GMAC Mortgage Corp. v. Monahan, No. 409-7-01 Rdcv (Cohen, J., Mar. 12, 2009)

STATE OF VERMONT
RUTLAND COUNTY

GMAC MORTGAGE CORPORATION,	)	**Rutland Superior Court**
	)	**Docket No. 409-7-01 Rdcv**
Plaintiff,	)	
	)	
v.	)	
	)	
WILLIAM S. MONAHAN,	)	
LISA S. MONAHAN, and	)	
OCCUPANTS RESIDING AT	)	
[address redacted], PITTSFORD, VERMONT,	)	
	)	
Defendants	)	

DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 8, 2008

This matter is before the Court on plaintiff GMAC Mortgage, LLC's Motion for Summary Judgment, filed on February 8, 2008. Defendants William S. Monahan and Lisa S. Monahan filed a Memorandum in Opposition to GMAC's Motion for Summary Judgment on June 20, 2008. A hearing was held on December 1, 2008.

Plaintiff GMAC Mortgage, LLC ("GMAC") is represented by Andre D. Bouffard, Esq. Defendants William S. Monahan and Lisa S. Monahan (the "Monahans") are represented by R. Joseph O'Rourke, Esq.

On January 21, 2009, the Court issued an Entry Order requesting further briefing on the issue of whether a plaintiff who initially has "unclean hands" may "cleanse" his hands by making the defendant whole at law. A deadline was set for February 6, 2009.

Plaintiff GMAC filed a Memorandum on February 9, 2009. Because the deadline of February 6, 2009, was a mandated furlough day, the Court will accept plaintiff's filing as timely. Defendant Monahans did not file a brief.

Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). In response to an appropriate motion, judgment must be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ... show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of material fact exists, the Court accepts as true allegations made in opposition to the motion for summary judgment, provided they are supported by evidentiary material. *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356. The nonmoving party then receives the benefit of all reasonable doubts and inferences arising from those facts. *Woolaver v. State*, 2003 VT 71, ¶ 2, 175 Vt. 397.

Background

On September 30, 1997, William Monahan and Lisa Monahan purchased a duplex residential property located at [address redacted] in the Town of Pittsford, County of Rutland, State of Vermont, with purchase money by GMAC.

The Monahans executed a Promissory Note (the "Note") in favor of GMAC in the amount of $87,168. The Note is secured by a Mortgage Deed, dated September 30, 1997 from the Monahans to GMAC. The Mortgage Deed was recorded on October 3, 2007, in Volume 101, Page 330 of the Land Records of the Town of Pittsford (the "Mortgage").

The Note calls for monthly payments commencing on the first day of November 1997.

One of the promises made by GMAC to induce the Monahans to sign the mortgage and note, and make the monthly payments was that GMAC would escrow payments and see to it that the property was insured against any damages caused by flood. As part of the loan closing, GMAC required the Monahans to sign documents requiring the Monahans to pay as part of their monthly payments to GMAC an amount to cover insurance on the property, including flood insurance.

The Monahans paid the monthly payments required by the Note from September 30, 1997 until December 17, 2000. On December 17, 2000 there was a flood at the Monahan's property in Pittsford, Vermont, which caused extensive damage to the basement. As a result of the flood, the Monahan's tenants moved out, and the building was vacant. Since December 17, 2000, defendants have not made any payments on the Note.

The Monahans promptly gave notice to GMAC of the flood and the resulting damage. GMAC, however, informed the Monahans that it had failed to remit the premiums due for flood insurance so that the Monahans' building was not covered by flood insurance. Thereafter, GMAC made several offers of settlement to the Monahans, all of which were rejected as inadequate.

On May 2, 2001, the Monahans brought suit against GMAC in Rutland Superior Court, *Monahan et al v. GMAC Mortgage Corp.*, No. 275-5-01 Rdcv, alleging breach of the escrow agreement and breach of the covenant of good faith and fair dealing, and seeking compensatory, consequential, and punitive damages.

On July 2, 2001, GMAC filed the current Complaint for Foreclosure against William Monahan and Lisa Monahan in this separate action. On October 31, 2001, GMAC and the Monahans entered into a Stipulation to Stay of Foreclosure, agreeing that the current foreclosure action, Docket No. 409-7-01 Rdcv, would be stayed until completion of all proceedings in the matter of *Monahan et al v. GMAC Mortgage Corp.*, No. 275-5-01 Rdcv.

The Monahans suit went forward against GMAC and a five-day trial was held in June 2003. The Court directed a verdict in the Monahans' favor on the count alleging breach of the escrow agreement. The jury found GMAC liable for breach of the implied covenant of good faith and fair dealing. The jury awarded $43,380 in compensatory and consequential damages, including $25,990 in lost rental income, as well as $45,000 in punitive damages.

On appeal, the Supreme Court upheld the jury's award of compensatory damages, but reversed the punitive damages, finding that the evidence was insufficient to satisfy the actual malice standard required. *Monahan v. GMAC Mortgage Corporation*, 2005 VT 110, ¶ 33, 179 Vt. 167. The Court did, however, find that GMAC went forward with the foreclosure action despite knowledge that the Monahan's lacked rental income due in part to GMAC's own breach of the escrow agreement, and despite knowledge that a foreclosure filing would have an adverse impact on the Monahans' credit rating, hurting their ability to secure future loans. *Id*. at ¶ 44. Furthermore, the Court found that the jury could have concluded that GMAC intended to use the foreclosure filing as leverage for settlement of the plaintiff's lawsuit. *Id*. at ¶ 45. The Court stated "[e]ven if we were

permitted to view GMAC's evidence in the light most favorable to it, we could not say that the inference of retaliatory foreclosure is unsupported." *Id.* at ¶ 47.

Plaintiff GMAC paid defendant Monahans in full the compensatory damages awarded by the jury after its verdict was affirmed on appeal, plus an additional amount for attorney's fees claimed by defendants. Since receiving their money judgment, the Monahans have yet to make any payment on the Note.

On February 8, 2008, plaintiff GMAC moved for Summary Judgment on the foreclosure action, pursuant to V.R.C.P. 56, arguing that (1) it is undisputed that defendant Monahans have breached the note and the mortgage through non-payment of the debt, (2) res judicata precludes defendants from opposing the foreclosure on the basis of claims that were adjudicated in the damages action, (3) even if res judicata does not apply, defendants have no valid equitable defense to foreclosure, (4) defendants' remaining defenses to foreclosure all fail as a matter of law.

Defendants filed their Memorandum in Opposition to GMAC's Motion for Summary Judgment, on June 20, 2008. Defendants argue that (1) the undisputed facts from the prior proceeding establish that the Monahans are excused from paying the mortgage and are not in breach, (2) res judicata does not bar the Monahans from defending foreclosure on equitable grounds asserted here, and which they established in fact before a jury, (3) the Monahans have valid equitable defenses to foreclosure based on their allegations of unjust conduct proved in the prior proceeding, (4) GMAC did not disclose the amount of the "introductory discount" in the time and manner required by 9 V.S.A. § 103(b).

Discussion

Under the terms of the Mortgage, "Lender may…require immediate payment in full of all sums secured by this Security Instrument if: Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment." Mortgage, Paragraph 9(a)(1).

"If Lender requires immediate payment in full under paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law." Mortgage, Paragraph 18.

It is undisputed that the Note calls for monthly payments commencing on the first day of November 1997, and that defendants paid the monthly payments required by the Note until December 17, 2000.

Furthermore, it is undisputed that plaintiff paid defendants in full the compensatory damages awarded by the jury after its verdict was affirmed on appeal, plus an additional amount for attorney's fees claimed by defendants. Since receiving their money judgment, defendants have not made any payment on the Note.

Even accepting as true allegations made in opposition to the motion for summary judgment, *Robertson v. Mylan Labs, Inc.*, 2004 VT 15, ¶ 15, and giving the benefit of all reasonable doubts and inferences arising from those facts to defendants, *Woolaver v. State*, 2003 VT 71, ¶ 2, there is no genuine issue of material fact as to whether defendants breached the Note. By the terms of the Note and the Mortgage, defendants have breached the Note as a matter of law.

Defendants invoke multiple defenses to the foreclosure action, including the doctrine of "unclean hands."

Foreclosure actions are equitable in nature and therefore it is proper for the court to weigh the equities of the situation. *Merchants Bank v. Lambert*, 151 Vt. 204, 206 (1989).

The doctrine of "unclean hands" is guided by the maxim that, "he who comes into equity must come with clean hands." *Starr Farm Beach Campowners Ass'n, Inc. v. Boylan*, 174 Vt. 503, 506 (2002) (citing *Precision Instrument Mfg. Co. v. Automotive Maint. Machinery Co.*, 324 U.S. 806, 814 (1945)). "Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim." *Id.*

The doctrine of "clean hands" is not to be applied mechanically, because to do so may create an inequitable result, as a party initially "dirty" may purge itself of the initial wrongdoing and thus preclude application of the "clean hands" doctrine. *Estate of Blanco*, 86 Cal. App. 3d 826, 834 (Cal. Ct. App. 1978). Thus, while plaintiff did not initially have "clean hands" when this foreclosure action was filed, the Court looks at the current situation among the parties – not the situation in 2001.

Since the jury verdict in defendants' suit against plaintiff, defendants were made "whole" by the payment of compensatory damages at law, restoring them to their initial position before being damaged by plaintiff's conduct. See *d'Arc Turcotte v. Estate of LaRose*, 153 Vt. 196, 199 (1989); see also *Shortle v. Central Vermont Public Service Corp.*, 137 Vt. 32, 34 (1979).

Despite plaintiff's payment of the money judgment in 2005, defendants have still not made any payment on the note. At this point, plaintiff has clean hands, while defendants do not. Thus, defendants may not invoke the "clean hands" defense.

The Court will now address, each of defendants' other defenses to foreclosure.

Defense No. 1, the argument that failure of plaintiff to assert their foreclosure action as a compulsory counterclaim in the Damages Action bars foreclosure, has already been rejected by this Court in denying defendants' Motion for Summary Judgment. *Entry Order Re: Defendant's Motion for Summary Judgment*, July 23, 2007.

Defense No. 2, "offset," fails as a matter of law because defendants do not claim any damages in the current action, therefore, there is nothing for them to "offset" against their mortgage debt.

Defenses Nos. 3-5, breach of the escrow agreement, breach of the covenant of good faith and fair dealing, and unfair debt collection practices, are encompassed by the claims made in the Damages Action by defendants, and have already been litigated.

Defenses Nos. 6-7 fail because defendants have not asserted any specific facts pertaining to either breach of contract/failure of consideration, or waiver and estoppel. Furthermore, if breach of contract concerns breach of the escrow agreement, that claim has already been litigated in the Damages Action brought by defendants.

Defense No. 8, no right/inequitable to satisfy any debt from this property under the circumstances, encompasses the same behavior already ruled upon above concerning "clean hands." It is not inequitable for plaintiff to satisfy the debt from this property under the circumstances, as defendants have already been made "whole" at law.

Defense No. 9, concerning lender's license and registration fails because defendants have proffered no evidence regarding this allegation.

Defense No. 10, misrepresentation/nondisclosure, fails for the same reason above; lack of any proffered evidence on the subject.

Defense No. 11 alleges that the Note is void to the extent the notice to co-signer does not comply with the bold-type requirements of 9 V.S.A. § 102. That statute requires a co-signer disclaimer notice, conspicuously placed, in a size equal to at least ten point bold type. The disclaimer on the Note satisfies this requirement, therefore, this defense fails.

Finally, Defense No. 12 alleges that the loan commitment letter dated September 30, 1997, does not contain a disclosure regarding the introductory discount, as required by 9 V.S.A. § 103(b). This statute requires the lender to disclose any introductory discount or similar reduction from the index or other measure fixing the rate or other terms of the loan at the time the commitment letter issues. 9 V.S.A. § 103(b). Any subsequent adjustment above the initial amount discounted, not disclosed at the time the loan commitment letter issues, shall have no legal force and effect. *Id.*

Although plaintiff argues that it did provide defendants with an adjustable rate mortgage loan disclosure prior to the commitment letter, this does not fulfill the requirement that this information be disclosed at the time the commitment letter was issued. This violation, however, does not affect the plaintiff's right to foreclose.

While this violation does not affect the right to foreclosure, it does affect the amount due and payable by defendants to redeem. The subsequent adjustment has no

legal force and effect according to 9 V.S.A. § 103(b). The defendants are entitled to have the rate of interest capped at 5.5%.

ORDER

Plaintiff's Motion for Summary Judgment, filed February 8, 2008, is GRANTED. The rate of interest on the Note is capped at 5.5%, pursuant to 9 V.S.A. § 103(b).

Dated at Rutland, Vermont this _____ day of _____, 2009.

_____
Hon. William Cohen
Superior Court Judge