

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

	x	Index	
THOMAS E. MULLINS,		Number <u>29937</u>	2007
Plaintiff,		Motion	
- against -		Date <u>August 13,</u>	2008
NEW HAVEN FUNDING, LLC, et al.,		Motion	
Defendant.		Cal. Number <u>10</u>	
	x	Motion Seq. No. <u>1</u>	

The following papers numbered 1 to 12 read on this motion by defendant Fremont Investment & Loan (Fremont) to dismiss the complaint pursuant to CPLR 3211.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-5
Answering Affidavits - Exhibits	6-10
Reply Affidavits	11-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

It is alleged that plaintiff executed a note and mortgage with defendant Fremont on the premises known as 68-08 Avenue, Ridgewood, New York, with defendant New Haven Funding, LLC (New Haven) as broker. Plaintiff has since defaulted on the note and in this action has interposed claims against defendant Fremont for (1) "predatory lending;" (2) violating the Truth in Lending Act (TILA); (3) violating the Real Estate Settlement Procedures Act (RESPA); (4) violating General Business Law § 349; and (5) violating Banking Law § 598. In support of its motion to dismiss all these claims against it, defendant Fremont submitted a copy of the loan documents.

Plaintiff's second cause of action alleges that defendant Fremont engaged in predatory lending when it "suffered and

permitted the fraud by NEW HAVEN" and "did not inquire or care whether the plaintiff could repay the loan, relying instead upon the value of the property and the ability of FREMONT to foreclose upon the property to repay the loan."

A motion to dismiss under CPLR 3211 (a)(1) on the ground that the action is barred by documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mut. Life Ins. Co., 98 NY2d 314, 326 [2002]). Banking Law § 6-1, the predatory lending statute, applies to "high-cost home loans," and whether the loan at issue here qualifies as such requires comparing its principal to "the conforming loan size limit for a comparable dwelling as established from time to time by the federal national mortgage association" (Banking Law § 6-1[1][e][i]), and its annual percentage rate to "the yield on treasury securities having comparable periods of maturity" (Banking Law § 6-1[1][g][i]). Defendant Fremont has not submitted this information with its moving papers, and thus the court cannot now determine whether the loan was a "high-cost home loan."

Absent from the submissions is any evidence that defendant Fremont complied with Banking Law § 6-1(2)(k), if this was a "high-cost home loan," by making the loan to plaintiff with "due regard to repayment ability" or by establishing a rebuttable presumption that this requirement was met by "demonstrat[ing] that at the time the loan [was] consummated, the resident borrower or borrowers' total monthly debts, including amounts owed under the loan, [did] not exceed fifty percent of the resident borrower or borrowers' monthly gross income." In addition, the loan documentation shows \$30,347.96 in settlement charges, which totaled more than 3% of the \$367,500 principal amount, a violation of Banking Law § 6-1(2)(m) (see LaSalle Bank, N.A. v Shearon, 19 Misc 3d 433, 437-438 [2008]).

To the extent that defendant Fremont moves to dismiss the complaint for failure to state a cause of action, while plaintiff has not alleged specifically that the loan was a "high-cost home loan," a pleading "will be deemed to allege whatever may be implied from its statements by reasonable intendment" (Siegel, NY Prac § 265, at 447 [4th ed]) and "on a motion to dismiss the complaint for failure to state a cause of action, the court is required to view every allegation of the complaint as true and resolve all inferences in favor of the plaintiff regardless of whether the plaintiff will ultimately prevail on the merits" (Grand Realty Co. v White Plains, 125 AD2d 639 [1986]). A broad reading of plaintiff's complaint alleging "predatory lending" would support

the inference that the predatory lending statutes apply to the loan at issue (see id. at 640). Thus, it would be inappropriate to dismiss plaintiff's cause of action for predatory lending.

However, plaintiff's second cause of action does not sufficiently plead fraud against defendant Fremont. To plead a cause of action for fraud, plaintiff was required to allege that defendant Fremont made a representation concerning a material fact which was false, and known by defendant Fremont to be false at the time the representation was made; that defendant Fremont made the representation for the purpose of inducing plaintiff to rely on it; that plaintiff, in ignorance of its falsity, rightfully did so rely; and relied upon the representation to his injury (Maisano v Beckoff, 2 AD3d 412, 413 [2003]). Here, plaintiff makes no allegation that defendant Fremont itself made any misrepresentation regarding the loan terms. The loan documents disclosed the terms of the loan, and plaintiff makes no claim that defendant Fremont falsified the loan documents. In addition, plaintiff offers no evidence that New Haven, the mortgage broker, was an agent for defendant Fremont, or acted in concert with defendant Fremont to defraud plaintiff, and therefore has failed to demonstrate that any misrepresentation made by New Haven is attributable to defendant Fremont. Although plaintiff states, in an affidavit submitted in opposition to the motion, that defendant Fremont "was either negligent or grossly negligent in underwriting the loan or in the alternative, was a party to the fraud [sic]," such an allegation does not satisfy the requirement of pleading "the circumstances constituting the [fraud]... in detail" (CPLR 3016[b]). Thus, to the extent that the complaint asserts a claim against defendant Fremont for fraud, that claim must be dismissed.

Defendant Fremont contends that plaintiff's sixth cause of action, a claim under the Truth in Lending Act (TILA), is barred by the Act's statute of limitations. Plaintiff failed to respond to defendant Fremont's challenge to the timeliness of plaintiff's TILA claim, which was required to have been brought within one year of the "date of the occurrence of the violation" (15 USC § 1640[e]). "In cases involving 'closed-end credit' transactions such as mortgages, the 'occurrence of the violation' typically refers to the date on which a plaintiff enters into a loan agreement" (Barkley v Olympia Mtge. Co., 2007 US Dist LEXIS 61940, *55-56 [ED NY 2007]). Plaintiff signed his mortgage on June 24, 2005, and his loan was funded on June 29, 2005, yet he did not file his complaint until December 5, 2007, more than two and a half years later. Plaintiff's TILA claim thus is time barred, and the branch of defendant Fremont's motion to dismiss this claim is granted.

Plaintiff's seventh cause of action alleges that defendants violated the Real Estate Settlement Procedures Act (RESPA) with respect to plaintiff's loan transaction by giving or accepting kickbacks or other things of value to and from defendants, and by giving a portion, split, or percentage of charges made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed (12 USC § 2607[a]; 24 CFR § 3500.14[c]). This claim, however, must be dismissed because plaintiff failed to bring it within one year of the alleged violation (12 USC § 2614), as discussed above.

Plaintiff's eighth cause of action alleges that defendant Fremont violated the Deceptive Practices Act (General Business Law § 349) by (a) falsely advertising "foreclosure rescue" and credit repair services in the course of conducting business, trade, or commerce in the State of New York; (b) misrepresenting to plaintiff that defendant Fremont would help plaintiff keep his home, while intending to strip plaintiff of title and hundreds of thousands of dollars in equity; (c) misrepresenting to plaintiff the nature of the documents he was signing and the nature and details of the transaction; (d) failing to provided plaintiff with a "good faith estimate" of settlement costs three days after application for the loan, as required by federal law; (e) hiding the cost of credit of the mortgage by failing to deliver the federally required disclosure to plaintiff; and (f) misrepresenting numerous other critical and material aspects of the financing transactions.

However, to state a claim under General Business Law § 349 plaintiff must allege "a material deceptive act or practice directed to consumers that caused actual harm" (Marcus v AT&T Corp., 138 F3d 46, 63 [2d Cir 1998]). Here, it is not the misrepresentation of the loan terms which support plaintiff's cause of action for a violation of General Business Law § 349, but instead the alleged misrepresentations of the mortgage broker, defendant New Haven. Therefore, the claim under the Deceptive Practices Act must be dismissed as to defendant Fremont.

Plaintiff's ninth cause of action for violations of Banking Law § 598(3) and (5) must be dismissed because plaintiff does not allege that defendant Fremont breached a "contract or agreement to make a mortgage loan" (Banking Law § 598[3]), or was unlicensed or unregistered (Banking Law § 598[5]). In addition, plaintiff has failed to plead a cause of action against defendant Fremont for fraud (Glassman v Zoref, 291 AD2d 430, 431 [2002]).

Accordingly, the motion is granted to the extent that the causes of action against defendant Fremont for fraud and for violations of TILA, RESPA, General Business Law § 349, and Banking Law § 598 are dismissed. The motion is denied with respect to the cause of action for predatory lending.

Dated: November 10, 2008

J.S.C.