

MEMORANDUM DECISION

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES
Justice

PART 17

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EMIGRANT MORTGAGE COMPANY, INC.,

Plaintiff,

-against-

Index No. 10931/08
Motion Date: 1/7/08
Motion Cal. No. 29

ALVIN GAUSE, LORNA GAUSE, a/k/a LORNA M. GAUSE, HILLSIDE MANOR REHABILITATION, NEW YORK CITY HIGHWAY DEPARTMENT, and “JOHN DOE” AND “MARY DOE”, the last two names being fictitious and intended to be the persons or corporations in possession of the mortgaged premises herein under foreclosure and described in the Complaint as tenants or occupants thereof, their true names being unknown to Plaintiff,

DATED January 10, 2009

Defendants.
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This motion by plaintiff for orders pursuant to CPLR §3211(b), striking the verified answer of the defendants, Alvin Gause and Lorna Gause, a/k/a Lorna M. Gause (“Gauses”), pursuant to CPLR §3212, granting Emigrant summary judgment against the said defendants for the relief demanded in Emigrant’s Verified Complaint and deleting defendants “John Doe” and “Mary Doe” as party defendants, and amending the caption to state that: (I) defendant Hillside Manor Rehabilitation is also known as Hillside Care Center, LLC d/b/a Hillside Manor Nursing Center, and (ii) adding “Michael “Smith” last name being fictitious and unknown to Plaintiff,” as defendants is granted in its entirety.

This is an action by plaintiff to foreclose on its Mortgage against certain real property located at 241-05 148th Drive, Rosedale, New York (hereinafter, “subject premises”). According to the complaint, on or about May 8, 2007, defendant Lorna M. Gause, made, executed and delivered to Emigrant her mortgage loan note (hereinafter, “Note”) dated that day, in which she promised to pay to the order of Emigrant, the principal sum of \$200,000.00, with interest thereon at the rate set forth in the Note until the Note is paid in full. As collateral security for the payment of the Note, Lorna M. Gause, individually and as attorney-in-fact for defendant Alvin Gause, as mortgagors, on the same day, executed, acknowledged and delivered to Emigrant, as

mortgagee, their mortgage dated May 2, 2007, in the original principal sum of \$200,000.00 (the "Mortgage") encumbering the Mortgaged Premises. The Mortgage was duly recorded in the Office of the City Register of the City of New York for the County of Queens on June 5, 2007 under CRFN Number 200700288504. The Note provides, among other things, that the rate of interest provided in the Note is owed both before and after any default thereon, that after default, interest on the Note will be increased to eighteen (18%) percent per annum until the indebtedness pursuant to the Note is satisfied in full or all defaults are cured, that if Emigrant has not received the full amount of the monthly payments or other charges within fifteen calendar days after the date they are due, Gause will pay a late charge of two (2%) percent of the overdue payment of principal and interest, and that in the event of default in the payment of the Note or any part thereof, or of any taxes, assessments, ground rents, hazard insurance, mortgage insurance and/or other charges that might become due, Emigrant is empowered to foreclose and sell the Premises according to law, and that in case of such sale the Mortgaged Premises might be sold as one parcel. Emigrant has not assigned the Note and/or Mortgage to any other person and this Mortgage is a subprime or high-cost loan as defined pursuant to Section 1304 of Real Property Actions and Proceedings and Section 6-m(1)© of the Banking Law of the State of New York. Plaintiff claims that the Gauses' defaulted in making their monthly mortgage payments to Emigrant pursuant to the Note and Mortgage, by failing to make the installment payment due on January 1, 2008. Plaintiffs have now made the instant motion and defendant has opposed the motion.

The court shall first address plaintiff's motion for summary judgment. It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

In support of its motion, plaintiff has submitted, *inter alia*, an affidavit of James A. Raborn, the Vice President of plaintiff Emigrant Mortgage Company, Inc. (hereinafter, "Emigrant"), the Broker Direct Agreement" between Emigrant and ANM Funding, a copy of the loan disbursement authorization signed by Lorna Gause, copies of the checks cut from the loan proceeds, the Truth-In-Lending Disclosure Statement, the Good Faith Estimate, and the HUD-1

Statement, and the Gauses' Answer. This evidence shows that, the Gauses have defaulted on the mortgage loan and that Emigrant is not liable or responsible for any misrepresentations that may have been made by ANM Funding and/or Mike "Smith" to the Gauses concerning any aspect of the mortgage loan. In their Answer, the Gauses state that they entered into the loan transaction with EMIGRANT in reliance upon the representations of SMITH. On March 12, 2007, the Gauses received a "Counseling Letter" from Emigrant advising them that it may be in their best interest to obtain credit counseling. Furthermore, at the closing held on May 8, 2007, Lorna Gause signed Emigrant's "Resource Letter" in which Emigrant disclosed that the initial monthly loan payments would be approximately \$2,280.00 per month, and that in order for them to make their monthly loan payments they would need "regular and dependable income" in the sum of \$59,980.00 per year. Lorna Gause represented to Emigrant that they had regular and dependable income which gave them the ability to make the \$2,280.00 monthly payment. The Gauses' indicated that this income was not less than \$59,980.00. A similar letter was received by the Gauses at the time the loan was approved and they indicated that they had read and understood the contents of the letters and they knew Emigrant was relying on this confirmation of their ability to repay the loan. In addition to executing the Resource Letter, Lorna Gause also executed an "Affidavit of Good Faith," wherein the Gauses represented to Emigrant that the proposed loan was for "consolidating debts," and they "recognize that the Bank [Emigrant] considers the representations contained herein to be a material aspect of the underlying loan transaction. Lorna Gause also executed a "High Equity Loan Certificate" wherein Emigrant disclosed to the Gauses that it may elect not to independently verify the income statements contained in the Gauses' loan application, and the Gauses, once again, represented to Emigrant that they now had and expect "in the future to have sufficient income... to meet the payment obligation on the loan for which Application [Gause] has applied" to Emigrant," and they have "consulted with an attorney, financial advisor or financial consultant, as Applicant deemed appropriate."

Based on this evidence, the plaintiff has established that there was a mortgage default by the Gauses and the Mortgage was neither predatory or fraudulent. In fact, Emigrant has established that the Gauses defrauded Emigrant by knowingly, intentionally and deliberately making false representations to Emigrant that they had the income to pay the mortgage every month, Emigrant relied on these representations, and Emigrant had the right to rely on the Gauses' representations. Plaintiff has also established that Lorna Gause received \$20,120.38 at the closing for their own personal use, as well as having their mortgage with GMAC in the sum of \$134,725.14 paid in full, a Federal Tax Lien for \$3,40.60 being paid in full, a State Tax Lien for \$261.73 being paid in full, ECB violations in the sum of \$9,000.00 being paid in full, a Judgment against the Gauses in the sum of \$1,400.00 being paid in full, and a Parking Violations

Bureau judgment in the sum of \$1,100.00 being paid in full. Accordingly, plaintiff has established its prima facie entitlement to judgment as a matter of law. Consequently, the burden shifts to any opposing parties to establish an issue of fact.

Defendants Gause oppose the branch of the motion seeking summary judgment on the grounds that there was fraud in the inducement of the loan. They have submitted their affidavit wherein they claim that the loan application and other papers signed by the defendant at closing were signed together as part of a large package at which those attending closings would realize the individual does not have an opportunity to read or understand. Thus, clearly the plaintiff could not have relied upon any application signed by the plaintiff in making the loan.

They also state that their income was so deficient that compared to the amount of the monthly mortgage payment that it is of itself an indication of fraud. According to the Gauses, this raises a question of fact which must be addressed at a hearing of the evidence. Lorna Gause also indicates that she did not know that she applied for a stated loan. She furnished all of her income information at the request of the mortgage broker and believed that the loan was being made based upon her financial information and her ability to pay. Defendants Gause claims this establishes their counterclaim of fraud and, consequently, the plaintiff's motion must be denied.

The elements of fraudulent misrepresentation are: (1) the plaintiffs made a material false representation, (2) the plaintiffs intended to defraud the defendants thereby, (3) the defendants reasonably relied upon the representation, and (4) the defendants suffered damage as a result of their reliance. Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b) Black v. Chittenden, 69 N.Y.2d 665 (1986.) Ladino v. Bank of Am.,52 A.D.3d 571 (2d Dept 2008.) Swersky v Dreyer and Traub, 219 A.D.2d 321 (1st Dept 1996.) Defendants Gauses' have not sufficiently demonstrated the presence of these elements. Defendants' have not established that ANM Funding acted as agent for Emigrant and it is clear that their fraud claims are primarily directed at ANM's actions. In fact, ANM Fundaing was acting as defendant's agent in this transaction. Emigrant's providing documents to defendant at closing does not give rise to a fraud since all of the mandatory disclosures were provided at the closing. This is especially so since defendants do not deny receiving the three day right of rescission from Emigrant and they chose to not exercise this right. Furthermore, defendants received all of the money agreed to as well as had their various obligation paid for by Emigrant. Any money not paid out was in accordance with the escrow agreement, signed by defendants. Significantly, defendants do not deny that they signed the Resource Letter, which as shown above, renders her fraud claims insignificant. Nor do they deny signing any of the documents discussed above, which contradict most of her instant claims. Finally, they have

not raised any issue that they relied on Emigrant’s alleged misrepresentations. Accordingly, the Gauses have failed to raise any issue of fact regarding the Mortgage being fraudulently induced and the branch of the plaintiff’s motion seeking summary judgment against the Gauses for the relief demanded in the complaint is granted. J.A.O. Acquisition Corp. v. Stavitsky, 18 A.D.3d 389 (1st Dept 2005.) *See also*, Ladino v. Bank of Am.,52 A.D.3d 571 (2d Dept 2008.) Cohen v House Connect Realty Corp., 289 AD2d 277 (2d Dept 2001.)

Based on the above, the branch of the motion seeking to have defendant’s Answer stricken is granted. Additionally, the branch of the motion deleting defendants "John Doe" and “Mary Doe” as party defendants, and amending the caption to state that: (I) defendant Hillside Manor Rehabilitation is also known as Hillside Care Center, LLC d/b/a Hillside Manor Nursing Center, and (ii) adding “Michael “Smith” last name being fictitious and unknown to Plaintiff is granted. The submitted Judgment and Order shall contain a provision for the appointment of a referee.

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ORIN R. KITZES, J.S.C.