Scan

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOHN DiNOTO,

Justice

TRIAL/IAS PART 7
NASSAU COUNTY

ANDREA GLASSMAN,

Plaintiff(s),

INDEX NO. 27980/97

-against-

MOTION DATE: 4/7/00
MOTION SEQ. NO. 006

HAROLD ZOREF, A & D LEASING, INC.,
MERCURY CAPITAL CORPORATION,
JEFFREY MESHEL, MARC GLEITMAN,
MYLES CHEFETZ, MILTON MESHEL,

Defendant(s).

The following papers read on this motion to dismiss complaint.

Notice of Motion/Order to Show Cause.....1
Answering Affidavits.....2
Replying Affidavits.....
Briefs: Plaintiff's/Petitioner's.....3
Defendant's/Respondent's.....

The motion by the Defendants, Mercury Capital Corporation, Jeffrey Meshel and Marc Gleitman for an Order pursuant to CPLR 3211(a)(7) dismissing the complaint against them for failure to state a cause of action is granted only to the extent that the class action claims and those premised upon Banking Law §598(2) are dismissed.

To ward off foreclosure of her home in Merrick in 1993, the Plaintiff borrowed a $510,000.00 mortgage, purportedly from thirteen investors through a mortgage broker, the Defendant Mercury Capital Corporation. The one year mortgage's rate of interest was the legal maximum, 16%. Ultimately, this mortgage was defaulted upon and a foreclosure action against the Plaintiff is now pending. The first foreclosure action was dismissed due to the lenders' repeated failure to comply with this Court's discovery directives. The Plaintiff brought this action against her Attorney, some of the named mortgagees and the mortgage broker, the Defendant

Mercury Capital Corporation, as well as two of its officers, the Defendants Jeffrey Meshel and Marc Gleitman. The Defendants Mercury Capital Corporation and its officers seek dismissal of this action against them pursuant to CPLR 3211(a)(7).

The Plaintiff states in her complaint that none of the lenders were licensed; that the maximum legal interest rate was 16%; and, that a mortgage brokerage fee was collected. She alleges that as of the date of the mortgage closing on October 4, 1993, not all of the purported lenders' checks, some of which had been made payable to the Defendant Mercury Capital Corporation, had cleared. Thus, the Plaintiff alleges that either she was not actually lent $510,000.00 on the date of closing, thereby rendering the interest rate charged her usurious; or, she was secretly lent monies by the mortgage broker, Mercury Capital Corporation, thereby rendering the $59,750.00 mortgage brokerage fee paid to it actually points, and again rendering the interest rate charged her usurious. The Plaintiff characterizes this as fraud. The Plaintiff also charges the Movants with a violation of Banking Law §598(2) in giving her a mortgage without a mortgage banker's license. She charges the Movants with a violation of Banking Law §598(3) in receiving a mortgage broker's fee and with a violation of Banking Law §598(5) in receiving a brokers' fee which should have been characterized as points paid to the lender. The Plaintiff alleges that the Movants violated 15 USC §1640 by not providing her with adequate notices, i.e., recission rights and true and accurate disclosure statements.

The Plaintiff also alleges that the Defendants Mercury Capital Corporation, Marc Gleitman and Jeffrey Meshel themselves funded five or more residential mortgages without a banking or mortgage lender license. She seeks to act as class representative pursuant to CPLR 901 and 18 USC 1961 and 15 USC 1640(a), representing all borrowers who suffered from the Defendants' illegal conduct. Specifically, she seeks to recover mortgage broker fees allegedly improperly collected by the Defendants because it was the brokers' funds being lent. More specifically, she alleges that there were phantom nominee investors employed to enable these Defendants to charge mortgage broker fees and mortgage service fees. Alternatively, she alleges that the Defendants purportedly lent funds which were not actually available, i.e., illegally relying on a float, thus rendering the interest rate charge usurious.

When deciding a motion pursuant to CPLR 3211(a)(7), the Court must determine whether, accepting as true the factual allegations in the complaint, the Plaintiff can succeed on any reasonable view of the facts alleged. The Court is required to afford the Plaintiff the benefit of all favorable inferences. (Campaign for Fiscal Equity vs. State, 86 NY2d 307; see also, Tinter vs. Sack, 230 AD2d 681).

The Movant Defendants have established and indeed the Plaintiff does not dispute that the Defendant Mercury Capital received checks for $510,000.00 from the thirteen investors prior to the mortgage closing. The Plaintiff has alleged and in fact established that all of the purported third-party funds had not cleared the disbursing escrow agent's account on the date of her mortgage closing. Thus, the amount of the mortgage actually available upon closing as well as the true source of the funds is open to question.

"To state a cause of action for fraud, the allegations of which must be pleaded with particularity (see, e.g., Callahan vs. Miller, 194 AD2d 904, 905) that the Defendant made 'a representation of fact, which is either untrue and known to be untrue or recklessly made, and which is offered to deceive the other party and to induce them to act upon it, causing injury' (JoAnn Homes vs. Dworetz, 25 NY2d 117, 119..." (Flora vs. Kingsbridge Homes, 214 AD2d 834 [emphasis added]).

"[W]hen a transaction is challenged as usurious, courts traditionally look beyond the standard form of the transaction and attempt to ascertain its true nature (see, Kuklis vs. Treister, 83 AD2d 545, 547; see also, In re Garcia, 167 B.R. 341). In other words, '[a] transaction must be considered in its totality and judged by its real character, rather than by the name, color, or form which the parties have seen fit to give it' (Lester vs. Levick, 50 AD2d 860, 862-863 [Christ, J., dissenting], revd. On dissenting mem. Below, 41 NY2d 940, see, 72 NYJur2d, Interest and usury, §56, at 76.)" (Feinberg vs. Old Vestal Road Associates, 157 AD2d 1002, 1003-1004). The imposition of interest at a rate higher than 16 percent is considered usurious. General Obligations Law §5-501. Any note that imposes a usurious rate of interest is void by statute. General Obligations Law §5-511. "[U]surious loans are void ab initio. . ." (Tinter vs. Sack, supra; see also, Fareri vs. Rain's International Ltd., 187 AD2d 481), and "[w]hen 'any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt has been taken or received in violation' of the usury laws, 'the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled.'" (Seidel vs. 18 E. 17th St. Owners, supra, at p. 740)." (Pemper vs. Reifer, 264 AD2d 625, 626).

The fraud alleged here is essentially that the funds' were not actually available upon closing and if they were, their source was not third-party investors as represented by the Movants, but actually the Defendant mortgage broker, Mercury Capital Corporation, thus calling into question a host of issues, including the legality of the mortgage, the broker's fee and the interest rate. The Defendants may have violated various federal and/or state banking laws and regulations in the manner in which the mortgage was processed. Contrary to the Movant Defendants' contentions, not only may this afford the Plaintiff a viable defense in response to foreclosure action, but she also has causes of action to declare the mortgage void for usury as well as for damages. [See, Banking Law §598(3), (5)]. Since the Movant Defendants' role in this financial loan transaction is unclear, a claim founded upon usury exists. (Cohen vs. Eisenberg, 265 AD2d 365; Hicki vs. Choice Capital Corp., 264 AD2d 710; Rumburt vs. Reinhart, 216 AD2d 551; Pyrka vs. 38th St. Summit Corp., 173 AD2d 287; Farber vs. Republic Pension Services, Inc., 159 AD2d 677).

Sections 598(2) of the Banking Law provides that whoever violates Section 590(2)(a) and (b) of the Banking Law which requires that mortgage lenders be licensed or exempt is guilty of a class A misdemeanor. The Plaintiff does not have an independent cause of action based upon that statute.

The claims advanced herein are not amenable to class action resolution as they are focused entirely upon individualized factual situations. Common questions of law or fact do not predominate over the questions affecting individuals. (CPLR 901 [a][2]). The Defendants' motion

to dismiss the class action claims is accordingly granted. (See, Gordon vs. Ford Motor Company, 260 AD2d 164; Conrad vs. Hackett, 184 AD2d 995; Robertson vs. E. Smalis Painting Co., 134 AD2d 881; Evans vs. City of Johnstown, 97 AD2d 1, 3).

Dated: June 28, 2000

J.S.C.