

Decided on February 3, 2009

Supreme Court, Kings County

**The Bank of New York AS TRUSTEE FOR THE
CERTIFICATEHOLDERS CWABS, INC. ASSET- BACKED
CERTIFICATES, SERIES 2006-22, Plaintiff,**

against

Cremston Myers, et. al., Defendants.

18236/08

Eun J. Torres, Esq. of Eschen Frenkel Weisman & Gordon, LLP represented plaintiff.

Arthur M. Schack, J.

In this mortgage foreclosure action for the premises located at 345 Dewitt Avenue, Brooklyn, New York (Block 3874, Lot 57, County of Kings) plaintiff THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-22 [BNY], moves for: summary judgment, pursuant to CPLR Rule 3212, striking the answer of defendant CREMSTON MYERS [MYERS]; and, upon the default of all other defendants, an order of reference to compute the amount due to plaintiff. Plaintiff's motion is denied without prejudice, with leave to renew the instant motion, within sixty (60) days of this decision and order, with submission of: an affidavit by Keri Selman, Assistant Vice President of plaintiff BNY, detailing her employment history for the past three years and explaining why a conflict of interest does not exist where she acted as the assignor of the instant mortgage and note to BNY and served as an officer of assignee BNY; an affidavit from an officer of the original mortgagor, HOMEBRIDGE MORTGAGE BANKERS CORP. [HOMEBRIDGE], explaining whether HOMEBRIDGE was aware of Ms. Selman's conflict of interest, and if Ms. Selman, in her

dual roles as Assistant Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. [MERS], the nominee for HOMEBRIDGE, and as Assistant Vice President of BNY, fully disclosed to HOMEBRIDGE the implications of [*2] her simultaneous representation of MERS and BNY and the advantages and risks involved; and, an affidavit or affirmation identifying whether the instant mortgage loan, pursuant to L 2008, ch 472, § 3-a is a subprime home loan as defined in Real Property and Actions Proceedings Law § 1304 or is a high-cost home loan as defined in Banking Law § 6-1.

Background

Defendant MYERS executed the instant mortgage and note on June 24, 2006 and borrowed \$391,000.00 from HOMEBRIDGE. MERS, as nominee for HOMEBRIDGE, recorded the instant mortgage and note on August 7, 2006, in the Office of the City Register of the City of New York, City Register File Number (CRFN) 2006000445168. Then, MERS, as nominee for HOMEBRIDGE, assigned the instant mortgage and note to plaintiff BNY, on June 20, 2008. The assignment was recorded on July 28, 2008, in the Office of the City Register of the City of New York, CRFN 2008000297075. Plaintiff commenced the instant action, five days subsequent to the assignment, by filing the summons, complaint and notice of pendency with the Office of the Kings County Clerk on June 25, 2008.

The June 20, 2008 assignment from MERS, as nominee for HOMEBRIDGE, to BNY, was executed by "Keri Selman, Assistant Vice President" of MERS for the assignor. Five days later, Ms. Selman, as Assistant Vice President of BNY, executed plaintiff's affidavit of facts in support of the instant motion. Ms. Selman is a milliner's delight by virtue of the number of hats she wears. In my November 19, 2007 decision and order (*BANK OF NEW YORK A TRUSTEE FOR THE NOTEHOLDERS OF CWABS, INC. ASSET-BACKED NOTES, SERIES 2006-SD2 v SANDRA OROSCO NUNEZ, et. al.* [Index No., 32052/07]), I observed that:

Plaintiff's application is the third application for an order of reference received by me in the past several days that contain an affidavit from Keri Selman. In the instant action, she alleges to be an Assistant Vice President of the Bank of New York. On November 16, 2007, I denied an application for an order of reference (*BANK OF NEW YORK A TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-8 v JOSE NUNEZ, et. al.*, Index No. 10457), in which Keri Selman, in her affidavit of merit claims to be "Vice President of COUNTRYWIDE HOME LOANS,

Attorney in fact for BANK OF NEW YORK." The Court is concerned that Ms. Selman might be engaged in a subterfuge, wearing various corporate hats. Before granting an application for an order of reference, the Court requires an affidavit from Ms. Selman describing her employment history for the past three years.

This Court has not yet received any affidavit from Ms. Selman describing her employment history, whether it is with MERS, BNY, COUNTRYWIDE HOME LOANS, or any other entity.

Further, the Court needs to address the conflict of interest in the June 20, 2008 assignment by Ms. Selman to her alleged employer, BNY. MERS, as nominee for HOMEBRIDGE, had a duty to its principal, HOMEBRIDGE, to protect HOMEBRIDGE's interest in the assignment to BNY. Did MERS take advantage of HOMEBRIDGE, and assign the mortgage for below market value? Was HOMEBRIDGE aware of the dual representation by the conflicted Ms. Selman, and, if so, did HOMEBRIDGE consent?

Discussion

The proponent of a summary judgment motion must make a *prima facie* showing [*3]

of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985] [Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.](#), 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]).

CPLR 3212 (b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law "that there is no defense to the cause of action or that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). Summary judgment shall be granted only when there are no

issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. (*Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

In the instant action there are issues of material fact with respect to the conflict of interest between assignor MERS, as nominee for HOMEBRIDGE, and assignee BNY. The Court of Appeals in [*MERSCORP, Inc. v Romaine* \(8 NY3d 90 \[2006\]\)](#) explained how MERS acts as the agent of mortgagors, holding at 96:

In 1993, the MERS system was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages. Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages. *Members contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.* [Emphasis added]

Plaintiff's counsel admits, in its Memorandum of Law submitted with the instant motion, that "MERS's relationship with its member lenders is that of agent with the lender-principal. This is a fiduciary relationship, which results from the manifestation of consent by one person to another allowing the other act on his behalf, subject to his control and consent. The principal is the one for whom action is to be taken, and the agent is the one who acts." It has been held that the agent, who has a fiduciary relationship with the principal, "is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." (*Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146 [2d Dept 1992]). "Agents are bound at all times to exercise the utmost good faith toward their principals. They must act in accordance with the highest and truest principles of morality." (*Elco Shoe Mfrs. v Sisk*, 260 NY 100, 103 [1932]). (See *Sokoloff v Harriman Estates Development Corp.*, 96 NY 409 [2001]); *Wechsler v Bowman*, 285 NY 284 [1941]; *Lamdin v Broadway Surface Advertising Corp.*, 272 NY 133 [1936]). An agent "is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties. Not only must the . . . agent account to his principal for secret profits, but he also forfeits his right to compensation for services rendered by him if he proves disloyal." (*Lamdin*, at 136).

The incestuous relationship between HOMEBRIDGE's agent, MERS, and BNY, as [*4]evidenced by Ms. Selman's June 20, 2008 assignment and June 25, 2008 affidavit as BNY's Assistant Vice President, forces the Court to determine if MERS, as nominee for HOMEBRIDGE, acted with "the utmost good faith and loyalty in the performance of [its] . . . duties" toward HOMEBRIDGE, when MERS assigned the MYERS mortgage and note to BNY. Did BNY purchase the MYERS loan for market value or did Ms. Selman, as Assistant Vice President of both MERS and BNY, take advantage of HOMEBRIDGE for the benefit of BNY? The Court, not knowing the financial details of the June 20, 2008 assignment is unable to make that determination. Further, if MERS, as nominee for HOMEBRIDGE, violated its duty of loyalty to HOMEBRIDGE, then it is not entitled to any compensation from its principal, HOMEBRIDGE. If an agent acts "adversely to his employer in any part of the transaction or omits to disclose any interest which would naturally influence his employer's conduct in dealing with the subject of employment, it is such a fraud upon his employer as [the agent] forfeits any right to compensation for his services. (*Murray v Beard*, 102 NY 505 [1886])." (*Beatty v Guggenheim Exploration Co.*, 223 NY 294, 304 [1918]). "The faithless agent rule thus is founded upon the agent's duty of loyalty to the principal." (*G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 101 [2d Dept 2007]). Therefore, if plaintiff BNY renews its motion for summary judgment and an order of reference, it must include an affidavit from an officer of HOMEBRIDGE explaining how MERS acted in good faith and loyalty to its principal, HOMEBRIDGE, when Ms. Selman assigned the instant mortgage and note on June 20, 2008 to BNY.

Conclusion

Accordingly, it is

ORDERED, that the motion of plaintiff THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-22 for: summary judgment, pursuant to CPLR Rule 3212; striking the answer of defendant CREMSTON MYERS; and, upon the default of all other defendants, an order of reference for the premises located at 345 Dewitt Avenue, Brooklyn, New York (Block 3874, Lot 57, County of Kings), is denied without prejudice; and it is further

ORDERED, that leave is granted to plaintiff THE BANK OF NEW YORK AS

TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-22, to renew its motion for: summary judgment, pursuant to CPLR Rule 3212; striking the answer of defendant CREMSTON MYERS; and, upon the default of all other defendants, an order of reference for the premises located at 345 Dewitt Avenue, Brooklyn, New York (Block 3874, Lot 57, County of Kings), within sixty (60) days of this decision and order, provided that plaintiff, THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-22, submits to the Court: an affidavit from Keri Selman, explaining her employment history for the past three years and why Ms. Selman didn't have a conflict of interest as the assignor of the instant mortgage and note from MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for HOMEBRIDGE MORTGAGE BANKERS CORP., to plaintiff THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWABS, INC. ASSET-BACKED CERTIFICATES, SERIES 2006-22; an affidavit from an officer of the original mortgagor, HOMEBRIDGE MORTGAGE BANKERS CORP., explaining whether [*5]HOMEBRIDGE MORTGAGE BANKERS CORP. was aware of Ms. Selman's conflict of interest, and if Ms. Selman, in her dual roles, as Assistant Vice President of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., the nominee for HOMEBRIDGE, and as Assistant Vice President of THE BANK OF NEW YORK, fully disclosed to HOMEBRIDGE MORTGAGE BANKERS CORP. the implications of her simultaneous representation and the advantages and risks involved; and, an affidavit or affirmation identifying whether the instant mortgage loan, pursuant to L 2008, ch 472, § 3-a is a subprime home loan as defined in Real Property and Actions Proceedings Law § 1304 or is a high-cost home loan as defined in Banking Law § 6-1.

This constitutes the Decision and Order of the Court.

ENTER

Hon. Arthur M. Schack

J. S. C.