Commonwealth Of Massachusetts

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 07-02160

ROBERT P. DINAPOLI and	)
MARY ANN DINAPOLI	)
Plaintiff	)
v.	)
	)
HOMECOMINGS FINANCIAL, LLC f/k/a	)
HOMECOMINGS FINANCIAL, INC.	)
Defendant	)

PLAINTIFFS ROBERT AND MARYANN DINAPOLI'S MEMORANDUM OF LAW IN SUPPORT OF THEIR OPPOSITION TO THE DEFENDANT HOMECOMINGS FINANCIAL, LLC's MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION TO AMEND COMPLAINT

BACKGROUND

This is a breach of contract action arising from an interest rate discrepancy concerning a mortgage and promissory note. On May 30, 2006 the plaintiffs Robert P. DiNapoli and Mary Ann DiNapoli (hereinafter "the DiNapolis") engaged in preparations to refinance 798 Worcester, Avenue in Wellesley with the defendant Homecomings Financial, LLC f/k/a Homecomings Financial, Inc. (hereinafter "Homecomings") Homecomings furnished the DiNapolis with a Loan Rate Lock Commitment letter which contained an interest rate of 6.875% and prepared a Document Order Form which also reflected the 6.875% rate. (*See* Exhibit "1" attached to the Affidavit of Raymond J. Paczkowski)

Satisfied with the interest rate contained in the preliminary loan documents, the loan closed shortly thereafter on June 5, 2006. At the time of the closing, the promissory note

presented to the DiNapolis contained a considerably higher interest rate of 7.676%.[1] Plaintiffs contend that this was brought to the attention of Homecomings closing attorney's representative, Sarah Sweeney (hereinafter "Sweeney"), at the closing table, a fact which is in dispute as Sweeney has testified that she made not such statements. Based on Sweeney's alleged representations, the DiNapoli's executed, among other documents which con the promissory note. (*See* Exhibit "1" attached to the Affidavit of Raymond J. Paczkowski)

The first five payments on the mortgage (August 1, 2006, September 1, 2006, October 1, 2006, November 1, 2006 and December 1, 2006) were made on time, without incident, and in accordance with the monthly billing statements that were sent by Homecomings citing the 6.875% rate. (*See* Exhibit 3 attached to the Affidavit of Raymond J. Paczkowski)

On December 1, 2006 the DiNapolis received a letter from Homecomings stating that the mortgage had been transferred and that the interest rate was changed to 6.875% to 7.676% per his note. (*See* Exhibit 2 attached to the Affidavit of Raymond J. Paczkowski) Homecomings did not inform the DiNapolis in the December 1, 2006 letter that the rate change was to be retroactive, which would result a deficit in the DiNapolis' escrow account, as well as loan account arrearages which would ultimately affect his excellent credit score. (*See* Exhibit "3" *Supra* and Exhibit "5" excerpt from the Deposition of Robert DiNapoli and documentation from Brownstone Mortgage showing negated credit standing attached to the Affidavit of Raymond J. Paczkowski) The DiNapolis were forced to make a "catch up" payment of $3,017.00 in January of 2007 or risk foreclosure. The monthly payment thereafter increased as a result of the interest rate change.

[1] Inexplicably, Homecomings did not prepare the loan documents in accordance with the instructions on its own document order form.

Robert DiNapoli's business has suffered due to his inability to finance building projects which is due in part, to the defendant's adverse credit reporting. (*See* Exhibit "5" excerpt from the Deposition of Robert DiNapoli attached to the Affidavit of Raymond J. Paczkowski) On June 10, 2009 Homecomings sent a letter to the DiNapolis stating that the right to collect payments under the loan was going to be transferred to GMAC effective July 1, 2009. (*See* Exhibit "7" letter from Homecomings to the DiNapoli's dated June 10, 2009 attached to the Affidavit of Raymond J. Paczkowski)

On August 10, 2009 plaintiff filed a Motion for a Preliminary Injunction and to Amend the Complaint to implead 3rd party GMAC, as they are now the holders of the subject promissory note. The court *inter alia*, denied the motion to amend because the plaintiff's complaint seeks only monetary damages and not reformation or rescission of underlying obligation. As such, a 3rd party holder cannot be impleaded without the complaint having Counts seeking these remedies. Accordingly, the plaintiff now seeks to Amend the complaint to add the appropriate counts and to implead GMAC.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to allow for the prompt disposition of controversies on their merits without a trial, when there is no genuine dispute as to the salient facts. Cassesso v. Commissioner of Correction, 390 Mass. 419 (1984) "Summary Judgment shall be rendered "…if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. " Community National Bank v. Dawes, 369 Mass. 550 (1976).

The test that the court should apply in determining if Summary Judgment should be granted in favor of the moving party is whether "upon any reasonable view of the evidence there found a combination of facts from which a rational inference may be drawn in favor of the

moving party". Foley v. Kilbrick, 12 Mass.App.Ct. 382 (1981); Alholm v. Wareham, 371 Mass. 402, 404 (1973)

It has been well-established in Massachusetts that Summary Judgment should not be granted if the opposing party has demonstrated that a genuine issue of material fact exists, though he has introduced no evidence. Smith v. Massimiano 414 Mass. 81, 86-87 (1993)

ARGUMENT

I. Homecomings is Not Entitled to Judgment as a Matter of Law Because the Plaintiffs' Claim is not Barred by the Parol evidence Rule

Homecomings argues that the promissory note and other documents which the plaintiffs signed were unambiguous and constituted a completely integrated agreement. Homecomings contends that because the DiNapolis' promissory note and rider each set forth an interest rate of 7.676%, that the DiNapolis read these documents and read them freely and voluntarily, the parol evidence rule precludes them from introducing oral testimony to contradict the "clear contractual language[2]" contained in the note. While the parol evidence rule holds that the terms of a completely integrated written contract may not be varied, contradicted, or added to by the introduction of antecedent or contemporaneous statements, the defendant's argument fails because i) Whether the parol evidence rule applies is a preliminary question of fact for the judge to determine, as such, the summary judgment standard cannot be satisfied by the moving party; ii) Events prior and subsequent to the execution of the promissory note unequivocally indicate mistake, illegality and/or fraud. In any case, the parol evidence rule cannot be used to bar the introduction of antecedent or contemporaneous statements; and iii) Because the parties' conduct subsequent to the execution of the promissory note constituted a subsequent agreement, the parol evidence rule does not apply.

[2] The only "language" in dispute is the interest rate.

i. Whether the Parol evidence Rule Applies is a Preliminary Question of Fact for the Judge to Determine, as such, the Summary Judgment Standard cannot be Satisfied by the Moving Party.

It is well-settled that the purpose of Summary Judgment is to allow for the prompt disposition of controversies on their merits without a trial, when there is no genuine dispute as to the salient facts. Cassesso v. Commissioner of Correction, 390 Mass. 419 (1984) "Summary Judgment shall be rendered "…if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. " Community National Bank v. Dawes, 369 Mass. 550 (1976). Plaintiffs argue that the parol evidence rule is inapplicable in this case due to a subsequent agreement by the parties, however, in the alternative, if it is, that is a finding of fact for the judge to determine because the intent of the parties is what is required to establish the existence of integration. Massachusetts follows the rule that the extent of integration on understandings in a formal agreement is an issue of fact for decision of the trial judge, entirely preliminary to any application of the parol evidence rule. Antonellis v. Northgate Construction Corp., 362 Mass 847, 291 NE2d 626 (1973). Paul J. Liacos, former Massachusetts Supreme Court Justice, explains in The Handbook of Massachusetts Evidence (5th Edition, 1981):

> "…The parol evidence rule is essentially a rule of integration, See Wigmore §§2400-2401, 2404, 2425 (Chad rev 1981), The question on whether there has been such an integration is essentially a question of the intent of the parties Antonellis v. Northgate Construction Corp., 362 Mass 847, 291 NE2d 626 (1973). Whether there was such an intent – i.e., whether the parol evidence rule applies – is a preliminary question of fact for the judge to determine, Carlo Bianchi & CO. v. Builder's Equipment & Supplies Co., 347 Mass 636, 643, 199 NE2d 519, 524 (1964); Charles A. Wright, Inc. v. F.F& D. Rich Co., 354 F2d 710 (1st Circuit), cert denied, 384 US 960 reh denied, 385 US 890 (1966); Wigmore §2430 (Chad rev 1981). See also proposed Mass Rule of Evidence 104; Federal Rule of Evidence 104. In determing the preliminary question of intent, the judge will be guided by the rule that, in the absence of fraud or mistake, where the parties have put their agreement in a writing there is a conclusive legal presumption that h e writing if unambiguous, expresses the whole intent of the parties. Nelson v. Hamlin, 258 Mass 331,

340, 155 NE2d 761 (1977). See also Smith v. Vose & Sons Piano Co., 194 Mass 193, 199, 80 NE527, 528 (1907)"[3]

Homecomings Motion for Summary Judgment *presumes* that the parol evidence applies. This is not for Homecomings to decide, as set forth *supra*, it is a determination which should be left solely to the court. On that ground alone, Summary Judgment should be denied. The plaintiffs argue that the undisputed execution of the Rate Lock Commitment Letter under the 6.875% rate coupled with the first five months of payments made by plaintiff and accepted by Homecomings at the 6.875% which was contained in the Rate Lock Commitment Letter and the contemporaneous oral statements made at the closing table, negate the element of intent to be bound under the terms of the promissory note.[4] The writing, plaintiffs contend, therefore, cannot be integrated, rendering the parol evidence rule inapplicable.

ii.. Events Prior And Subsequent To The Execution Of The Promissory Note Unequivocally Indicate Mistake, Illegality And/Or Fraud. In Any Or All Of These Cases, The Parol Evidence Rule Cannot Be Used To Bar The Introduction Of Antecedent Or Contemporaneous Statements.

Parol evidence is admissible to explain ambiguous language in a written contract and to prove fraud, duress, mistake and the like. Restatement, 2d, Contracts §2149(d), Harris v. Delco Products Inc. , 305 Mass. 362, 71 N.E.2d 219 (1947); Downey v. Levinson, 247 Mass. 358, 142 N.E. 85 (1924); Ryan v. Gilbert, 320 Mass. 682, 71 N.E.2d 219 (1947). Homecomings argues that the present case is similar to DiPietro v. Sipex Corp., 2005 69 Mass.App.Ct. 29, 865 N.E.2d 1190 because the DiNapoli's have testified that the understood the ramifications of signing the note and that they understood it was a legal document that detailed the terms of their obligation to repay their loan and knew that it contained an interest rate of 7.676%. DiPietro should not control for several important reasons. In DiPietro, the defendant in counterclaim was a former

[3] Pp. 385-386
[4] insofar as the interest rate is concerned.

employee who signed a promissory note and later attempted to disclaim the obligation on the grounds that he was fraudulently induced into signing the note by way of oral representations. The DiNapoi's are not and have never attempted to disclaim the underlying obligation on the note. In fact, the DiNapoli's continued to make payments on the loan despite Homecomings rate adjustment 6 months into the loan term. Furthermore, the facts in the present case clearly indicate that the rate contained in the note was either erroneous, or placed there intentionally with promises to correct it left unfulfilled. For these reasons, the facts of this case, taken as a whole, do not mirror DiPietro.

iii. Because The Parties' Conduct Subsequent To The Execution Of The Promissory Note Constituted A Subsequent Agreement, The Parol Evidence Rule Does Not Apply

Even if the agreement were fully integrated, nothing can be intergrated or merged that has not yet taken place. The parol evidence rule only forbids proof of promises that were made before or at the same time as the agreement that the promises would alter. Liacos, *Supra* pp. 388 It therefore stands to reason that an agreement may always be altered by a subsequent agreement, even if that agreement is oral. Severance & Sons v. Angley, 332 Mass 432, 439, 125 NE2d 415, 420 (1955); Frick Co. v. New England Insulation Co., 347 Mass 461, 468, 198 NE2d 433, 437 (1964) There is not principle that a written agreement may not be altered orally. And even if the written agreement is one within certain sections of the Statute of Frauds, oral alteration is possible in Massachusetts. Liacos, *Supra* pp. 388 citing Cummings v. Arnold, 44 Mass (3Metc) 486 (1842). Cf. Lampasona v. Capriotti, 296 Mass 94, 4 ME 621 (1936).

Section 4(A) of the promissory note which the DiNapoli's signed stated as follows:

(A) Change Dates

The initial fixed interest rate I will pay will change to an adjustable interest rate on the *first day of July, 2011* (emphasis added) and the adjustable interest rate I will pay will may change every 12th month thereafter. The date on which my initial fixed rate changes to an adjustable interest rate, and each date on which my adjustable interest rate could change is called the "change date."

It is undisputed that the plaintiffs made the first five months worth of payments under a rate which was not contained in the promissory note. It is also undisputed that Homecomings cashed the plaintiffs' payment checks thereby unequivocally accepting the tendered payment under a rate which was not contained in what Homecoming purports is a *fully intergrated* (emphasis added) agreement.[5] In fact, the account statements which were sent to the plaintiffs, and under which payments were remitted, clearly stated the rate of 6.875%. (*See* Promissory Note attached as Exhibit "1" to the Affidavit of Raymond J. Paczkowski) The actions of the parties, (i.e. the tender and acceptance of these payments in accordance with a written document (i.e. the monthly account statements) can only demonstrate the existence of a subsequent agreement in the form of an implied-in-fact contract.[6] As such, the terms of the promissory note, as they relate to the stated interest rated, were effectively modified by agreement of the parties.

II. In the Alternative, Homecomings is not Entitled to Summary Judgment Because Plaintiffs' Reliance on the on the Contemporaneous Statements was Reasonable as a Matter of Law

Homecomings claims that the DiNapolis had no reasonable grounds to rely on the oral statements made by the lender's paralegal at the time of the closing because it was unreasonable

[5] Conceding, for argument's sake that the note is fully intergrated, Homecoming's is essentially arguing that is that is unacceptable for the DiNapoli's to challenge the rate contained in ¶2 of the note, but it is justified in ignoring and acting contrary to the provisions contained in ¶4(A) at whim in its first argument.

[6] An implied-in-fact contract results from the non-verbal conduct of the parties. *See* Restatement, 2d, Contracts, §4 and Comment (a). Massachusetts recognizes implied-in-fact contracts based on the conduct of the parties. *See* Friendly Fruit, Inc. v. Sodhexo, Inc., 529 F. Supp. 2d 158, 164 (D. Mass. 2007), LiDonni, Inc. v. Hart, 355 Mass. 580, 246 N.E.2d 446 (1969) and

as a matter of law to rely on prior oral representations that are specifically contradicted by the terms of a written contract.[7] Homecomings argues that because the DiNapolis never changed the rate contained in the loan documents, never made any follow up phone calls immediately subsequent to the closing and signed the documents freely and voluntarily, acknowledging that the note contained the 7.676% rate, they are estopped from asserting reliance on the oral statements made at the time of closing. Fair and impartial consideration of the circumstances leading up to the execution of the note in addition to the six months subsequent thereto make the argument a virtual nullity. It is undisputed that the rate contained in the rate lock commitment letter is what drew the plaintiffs to the closing letter. It is also undisputed that an order was placed for closing documents that contained that rate. It is further undisputed that the plaintiffs made five months worth of payments in accordance with the rate contained in these documents. Clearly, the only reasonable inference to be made based on the undisputed facts of this case is that Homecomings made a mistake and is now attempting to take advantage of that error to the detriment of the plaintiff borrowers. Given the present foreclosure crisis and economic climate, combined with the fact that Homecomings made no attempt to reconcile the situation with the plaintiffs prior to the instigation of this lawsuit, make the defendants actions particularly egregious.

III. Plaintiffs' Should be Permitted to Amend to Complaint to Allow for Reinstatement of Original Interest Rate Per the Rate Lock Commitment Letter.

Mass. R. Civ. P. 15(a) provides that leave to amend pleadings shall be freely given when justice so requires. Massachusetts enjoys a long standing liberal policy of allowing amendments to pleadings. *See* e.g. Bengar v. Clark Equipment Co., 401 Mass. 554,556 (1988). A motion to

[7] Citing Zimmerman v. Kent , 31 Mass App. Ct. 72, 77 (1991) and Marram v. Kobrick Offshore Fund, Ltd., 442 Mass 43, 59 (2004)

amend should be allowed unless there is a good reason to deny it. Haves v. New England Millwork Distributors, Inc., 602 F. 2d 15, 19 (1979).

In the present case, counts for rescission and reformation were erroneously not included in the original complaint. In July, the court correctly found that GMAC, as the subsequent holder of the DiNapoli's note could be impleaded because of the plaintiffs' complaint did not request reformation or rescission of the contract, only pecuniary damages. The plaintiffs now request that the court allow them to add counts for rescission and reformation, and reconsider their prior motion to implead GMAC as a third party defendant. Moreover, the counts for rescission and reformation are necessary to complete the plaintiffs' forgoing opposition to the defendant's motion for summary judgment. (*See* proposed Second Amended Complaint attached hereto as Exhibit "1")

CONCLUSION

For the foregoing reasons, the forgoing reason, Homecomings claim for summary judgment fails as a matter of law and, accordingly, the DiNapoli's respectfully request that this Honorable Court deny the defendant's motion and grant the plaintiff's cross-motion to amend the complaint.

Respectfully Submitted,
Robert P. DiNapoli and
Mary Ann DiNapoli
By their Attorney,

_____

Raymond J. Paczkowski, Esq.
The Law Offices of Raymond J. Paczkowski
1830 Main Street
Tewksbury, MA 01876
978/ 851-4000
978/851-9300
BBO No. 386980

CERTIFICATE OF SERVICE

I, Raymond J. Paczkowski, Esq., Counsel for Robert P. DiNapoli hereby certifies that on this day, I served a true and correct copy of aforesaid documents upon counsel for the defendant:

Joseph P. Calendrelli, Esq.
Prince, Lobel, Glovsky & Tye
100 Cambridge Street, Suite 2200
Boston, MA 02114

Dated: October 31, 2009

_____
Raymond J. Paczkowski, Esq.