MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. Fremont Investment & Loan

452 Mass. 733 (2008) · Decided December 9, 2008

SUMMARY

The Massachusetts Supreme Judicial Court reviewed a preliminary injunction restricting Fremont Investment & Loan's foreclosures on certain subprime residential mortgage loans. The court held that the Attorney General was likely to succeed on a claim that combining specified loan features constituted an unfair practice under Massachusetts General Laws chapter 93A, and that the conduct was not exempt under chapter 93A, § 3. The court affirmed the preliminary injunction as modified.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
WRITING FOR THE COURT	Botsford, J.
JURISDICTION	Massachusetts
DECIDED	December 9, 2008
DISPOSITION	affirmed
PROCEDURAL POSTURE	Fremont appealed from a preliminary injunction issued by the Superior Court in a consumer-protection enforcement action under G. L. c. 93A. After a single justice of the Appeals Court declined interlocutory relief and reported the matter, the Supreme Judicial Court granted direct appellate review.
STANDARD OF REVIEW	The grant or denial of a preliminary injunction is reviewed for abuse of discretion, including whether the judge applied proper legal standards and whether reasonable support existed for the evaluation of factual questions. When the order is based solely on documentary evidence, the appellate court may draw its own conclusions from the record.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Fremont Investment & Loan, Fremont General Corporation v. Commonwealth of Massachusetts, acting through the Attorney General

TOPICS

predatory lending · consumer protection · mortgages · foreclosure · writ of certiorari

PRACTICE AREAS

consumer protection | predatory lending | mortgages | foreclosure | appellate procedure

QUESTIONS PRESENTED

1. Whether the Superior Court improperly applied a new or retroactive standard of unfairness under G. L. c. 93A, § 2, to Fremont's mortgage loans.
2. Whether the Massachusetts Predatory Home Loan Practices Act, G. L. c. 183C, could be considered as an established statutory expression of public policy even though Fremont's loans were not high-cost home mortgage loans covered by that statute.
3. Whether G. L. c. 93A, § 3, exempted Fremont's lending practices because the individual loan features were permitted by applicable State or Federal laws and regulatory standards.
4. Whether the preliminary injunction promoted the public interest.
5. Whether the Superior Court properly granted and modified the preliminary injunction restricting foreclosure and requiring court approval for foreclosure of presumptively unfair loans.

HOLDINGS

1. The Commonwealth established a likelihood of success on its claim that originating subprime home mortgage loans combining the four identified characteristics—short introductory ARM periods, a substantial gap between the introductory and fully indexed rates, a debt-to-income ratio exceeding 50 percent when calculated at the fully indexed rate, and either 100 percent loan-to-value financing or specified prepayment penalties—was unfair under G. L. c. 93A, § 2.
2. Although Fremont's loans were not high-cost home mortgage loans governed by G. L. c. 183C, the Superior Court properly considered that statute as an established statutory expression of public policy that it is unfair to make a principal-residence mortgage loan when the lender does not reasonably believe the borrower can make the scheduled payments.
3. Fremont did not establish the c. 93A, § 3, exemption because it failed to show that any regulatory scheme affirmatively permitted the challenged combination of loan features.
4. The preliminary injunction promoted the public interest because it balanced borrowers' interests in avoiding foreclosure under presumptively unfair terms with Fremont's interest in recovering the value of loans and did not eliminate foreclosure or borrowers' repayment obligations.
5. The Superior Court did not abuse its discretion in granting and modifying the preliminary injunction.

KEY QUOTATIONS

> *"General Laws c. 93A, § 2 (a), makes unlawful any "unfair or deceptive acts or practices in the conduct of any trade or commerce.""* (at 742-743)

> *"A defendant's burden in claiming the exemption is "a difficult one to meet. To sustain it, a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the*

> *transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive""* (at 750)

> *"The injunction order crafted by the judge strikes a balance between the interests of borrowers who face foreclosure and loss of their homes under home loan mortgage terms that are at least presumptively unfair, on the one hand; and the interest of the lender in recovering the value of its loans to borrowers who received the benefit of those loaned funds and continue to have a contractual obligation to repay, on the other."* (at 752)

FACTUAL BACKGROUND

Between January 2004 and March 2007, Fremont originated approximately 14,578 mortgage loans to Massachusetts residents secured by owner-occupied homes, many of them subprime adjustable-rate mortgages. The loans commonly combined short introductory-rate periods, substantial payment increases at the fully indexed rate, underwriting based on the introductory payment rather than the fully indexed payment, and loan-to-value ratios approaching 100 percent or substantial and extended prepayment penalties. The Attorney General presented evidence that the combination made default and foreclosure predictable unless borrowers could refinance or housing values continued to rise. Fremont also entered into a consent agreement with the FDIC concerning unsafe and unsound mortgage-lending practices, although it admitted no wrongdoing.

PROCEDURAL HISTORY

The Attorney General sued Fremont over its origination and servicing of certain subprime residential mortgage loans. The Superior Court judge granted a preliminary injunction restricting foreclosure on loans possessing four identified characteristics and later modified the injunction to bind future assignees and servicers. Fremont sought interlocutory relief under G. L. c. 231, § 118, first par.; the Appeals Court single justice declined to reverse and reported the matter, and the Supreme Judicial Court granted direct appellate review.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

The case was remanded to the Superior Court for further proceedings, with the preliminary injunction remaining in effect as affirmed and modified.

CASES CITED

- Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 615-617 (1980)
- Commonwealth v. Mass. CRINC, 392 Mass. 79, 87-89 (1984)
- Kattar v. Demoulas, 433 Mass. 1, 12-13 (2000)
- Commonwealth v. DeCotis, 366 Mass. 234, 239-240, 244 n.8 (1974)
- Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 503 (1979)
- Kerlinsky v. Fidelity & Deposit Co., 690 F. Supp. 1112, 1119 (D. Mass. 1987), aff'd, 843 F.2d 1383 (1st Cir. 1988)

- PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975)
- Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 562-563 (2008)
- Fleming v. National Union Fire Ins. Co., 445 Mass. 381, 389-390 (2005)
- Bierig v. Everett Sq. Plaza Assocs., 34 Mass. App. Ct. 354, 367 n.14 (1993)
- Schubach v. Household Fin. Corp., 375 Mass. 133, 137 (1978)
- Penney v. First Nat’l Bank, 385 Mass. 715 (1982)
- Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 291, 299 (1980)
