

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Schiff v. Sokolow

48 A.D.3d 541, 852 N.Y.S.2d 210 (2d Dep't 2008) · Decided February 13, 2008

SUMMARY

The court affirmed an order granting the plaintiff summary judgment declaring her right under General Obligations Law § 5-501(3)(b) to prepay an owner-occupied residential mortgage without penalty. The court also affirmed dismissal of the defendants’ attorney-fee counterclaim and remitted the matter for entry of an appropriate declaratory judgment.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Second Department
WRITING FOR THE COURT	Per Curiam; Ritter, J.P.; Miller, J.; Dillon, J.; Angiolillo, J.
JURISDICTION	New York
DECIDED	February 13, 2008
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants appealed from an order granting plaintiff summary judgment on the first and second causes of action and granting summary judgment dismissing defendants' counterclaim.
STANDARD OF REVIEW	The court reviewed whether plaintiff made a prima facie showing of entitlement to judgment as a matter of law and whether defendants raised a triable issue of fact in opposition.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Sokolow v. Schiff

TOPICS

- real estate
- mortgages
- statutory interpretation
- summary judgment
- declaratory judgment

PRACTICE AREAS

- real estate
- mortgages
- civil procedure
- remedies

QUESTIONS PRESENTED

1. Whether the mortgage secured a loan or forbearance subject to General Obligations Law § 5-501 (3) (b).
2. Whether plaintiff established that the statutory requirements for penalty-free prepayment were satisfied.
3. Whether defendants raised a triable issue of fact defeating plaintiff's motion for summary judgment.
4. Whether defendants' counterclaim for attorney's fees should be dismissed.
5. Whether the matter required remand for entry of an appropriate declaratory judgment.

HOLDINGS

1. The mortgage secured a loan or forbearance within the meaning of General Obligations Law § 5-501 (3) (b).
2. Plaintiff established prima facie that the loan carried interest exceeding six percent per annum, was secured primarily by an interest in owner-occupied real property improved by a one- to six-family residence, and was sought to be prepaid more than one year after it was made; therefore, she was entitled to prepay without penalty.
3. The counterclaim seeking an attorney's fee was properly dismissed on summary judgment.
4. Because the action was in part for declaratory relief, the matter had to be remitted for entry of an appropriate declaratory judgment.

FACTUAL BACKGROUND

Plaintiff and her late husband gave defendants a mortgage securing a loan. Plaintiff sought to prepay the mortgage without penalty. The mortgage carried an interest rate exceeding six percent per year, was secured primarily by an interest in real property improved by an owner-occupied one- to six-family residence, and plaintiff sought prepayment more than one year after the loan was made.

PROCEDURAL HISTORY

Plaintiff brought an action seeking a declaration that she could prepay, without penalty, a mortgage held by defendants and an injunction compelling defendants to permit prepayment. The Supreme Court, Queens County, granted plaintiff summary judgment on those causes of action and dismissed defendants' counterclaim for attorney's fees. The Appellate Division affirmed and remitted the matter for entry of an appropriate declaratory judgment.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

Remit the matter to the Supreme Court, Queens County, for entry of an appropriate declaratory judgment.

CASES CITED

- *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)
- *Mandelino v. Fribourg*, 23 N.Y.2d 145 (1968)
- *Skidelsky v. Merendino*, 133 A.D.2d 149 (2d Dep't 1987)
- *Barone v. Frie*, 99 A.D.2d 129 (2d Dep't 1984)
- *Jacreg Realty Corp. v. Barnes*, 284 A.D.2d 280 (2d Dep't 2001)
- *Lanza v. Wagner*, 11 N.Y.2d 317, 334 (1962), appeal dismissed, 371 U.S. 74 (1962), cert. denied, 371 U.S. 901 (1962)

OPINION

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PER CURIAM.

*542In an action, inter alia, for a judgment declaring that the plaintiff has a right under General Obligations Law § 5-501 (3) (b) to prepay without penalty a mortgage held by the defendants, the defendants appeal from an order of the Supreme Court, Queens County (Kelly, J.), dated October 20, 2006, which, among other things, granted the plaintiffs motion for summary judgment on the first and second causes of action, and for summary judgment dismissing the defendants' counterclaim. Ordered that the order is affirmed, with costs, and the matter is remitted to the Supreme Court, Queens County, for the entry of an appropriate declaratory judgment. Insofar as relevant to this appeal, in the first cause of action of her complaint, the plaintiff sought a declaration that she has the right to prepay without penalty a mortgage that she, along with her late husband, gave to the defendants. In the second cause of action, the plaintiff sought an injunction compelling the defendants to allow her to do so. The plaintiff made a prima facie showing of entitlement to judgment as a matter of law on the subject causes of action. She demonstrated, prima facie, that the subject mortgage secured a "loan or forbearance" within the meaning of General Obligations Law § 5-501 (3) (b) (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; cf. *Mandelino v Fribourg*, 23 NY2d 145 [1968]; *Skidelsky v Merendino*, 133 AD2d 149 [1987]; *Barone v Frie*, 99 AD2d 129 [1984]). Furthermore, she demonstrated, prima facie, that the other statutory requisites were met, namely that the subject loan carried an interest rate in excess of six per cent per annum, that the loan was secured primarily by an interest in real property improved by a one- to six-family residence that was owner occupied, and that she sought to prepay the loan more than one year after the loan was made (see General Obligations Law § 5-501 [3] [b]). In opposition, the defendants failed to raise a triable issue of fact. Furthermore, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law entitling her to dismissal of the defendants' counterclaim, which sought a judgment awarding them an attorney's fee (see *Jacreg Realty Corp. v Barnes*, 284 AD2d 280 [2001]). Once again, in opposition thereto, the defendants failed to raise a triable issue of fact. *543Accordingly, the Supreme Court correctly granted the plaintiffs motion for summary judgment on the first and second causes of action, and for summary judgment dismissing the defendants' counterclaim. The defendants' remaining

contentions are without merit. Since this is, in part, a declaratory judgment action, we remit the matter to the Supreme Court, Queens County, for entry of an appropriate declaratory judgment (see *Lanza v Wagner*, 11 NY2d 317, 334 [1962], appeal dismissed 371 US 74 [1962], cert denied 371 US 901 [1962]). Ritter, J.P., Miller, Dillon and Angiolillo, JJ., concur.

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