

2012 WL 12095697 (N.J.Super.L.) (Trial Pleading)
Superior Court of New Jersey, Law Division,
Chancery Division.
Essex County

Rose MIANO,

v.

EMIGRANT MORTGAGE COMPANY INC et. al.

No. ESXL269612.
September 24, 2012.

Second Amended Complaint

Mandelbaum, Salsburg, Lazris & Discenza, P.C., 155 Prospect Avenue, West Orange, New Jersey 07052, (973) 736-4600, (973) 736-4670, for plaintiff, Rose Miano.

Civil Action

Rose Miano, residing at 15 San Antonio Avenue ?? 07110 hereby alleges:

Parties

1. Plaintiff Rose Miano ("Rose"), an 82 year old widow, resides at 15 San Antonio Avenue, Nutley, NJ 07110 (the "Property").
2. Defendant John Miano ("John"), Rose's son, resides at the Property with Rose. John acted as a co-signer for the mortgage at issue in this matter. Ownership in the Property was transferred to John and Rose as tenants in common by Rose on July 22, 2008.
3. Defendant Emigrant Mortgage Company, Inc. ("Emigrant"), a New York State Corporation, located at 7 Westchester Plaza, Elmsford, New York, 10523, acted as the lender in this matter.
4. Defendant Direct Mortgage, LLC ("Direct"), located at 811 Clifton Avenue, Clifton, New Jersey, 07103, acted as the mortgage broker in this matter and directed Rose to Defendant Emigrant. Upon information and belief, Direct is an agent of Emigrant.
5. Defendant Andrew Walheim, Esq. ("Walheim") is a licensed attorney in the State of New Jersey, affiliated with the Law Office of Erik C. Peterson, LLC, located at 6 Darts Mill Road, Suite 1B, Flemington, NJ 08822, and who performed the real estate closing described in paragraphs 21 to 28. Walheim represented to Rose that he was attorney for the lender at the closing and prepared a deed transferring an interest in the Property to John. Rose believed that Walheim also represented her interests.
6. Defendant PEP Title Agency, LLC ("PEP Title"), located at 6 Darts Mill Road, Suite 1A, Flemington, New Jersey, 08822, acted as the title insurance broker in this matter.
7. Defendant Sherm Abdul (AKA Alex Sherm) ("Sherm") was an employee of Direct and Rose's point of contact at Direct. At all times, he acted as a representative of Direct and an agent of Emigrant.

8. Defendant US Food Service, a judgment creditor of John, is a nominal defendant in this action as it may or may not have an interest in the outcome of this litigation.

9. Defendant 9 North Inc., a judgment creditor of John, is a nominal defendant in this action as it may or may not have an interest in the outcome of this litigation.

10. Defendant First Select Inc., a judgment creditor of John, is a nominal defendant in this action as it may or may not have an interest in the outcome of this litigation.

11. Upon information and belief, fictitiously named Defendants, John Does 1 through 4, are individuals who were present at the mortgage closing. Plaintiff will amend this Complaint to state the true names of these fictitiously named Defendants when ascertained.

Allegations Common to All Counts

12. The Property, a single family residence, was conveyed to Rose and her husband, Peter Miano, as tenants by the entireties by deed dated December 2, 1963, recorded December 4, 1963. This has been Rose's sole residence for the past forty eight (48) years.

13. Peter Miano died on May 31, 1968 and thereafter, Rose became the sole owner of the Property.

14. Thereafter, Rose married Alfonse A. Porpora. During which marriage, the Property was transferred. Ultimately, they divorced and Rose retained an undivided fee simple interest in the Property.

15. Currently, Rose and John reside at the Property together. Rose, who is 82 years old and worked until she was 73, now relies on Social Security. At all relevant times, Rose's sole source of income has been Social Security. As of December 2009, Rose received \$1455.00 per month after medical insurance premiums were deducted.

16. John is permanently disabled. At all relevant times, John's sole source of income has been his social security benefits, which is in the amount of \$705.25 per month.

17. In the summer of 2008, Rose saw a Direct Mortgage advertisement, which indicated that even those with bad credit could obtain a mortgage. Hoping to get help to pay off her credit card debts, Rose went to Direct to obtain information on getting a mortgage. Rose filled out an application, but was told by Sherm that she did not qualify because her credit score and/or her income were too low. He told her that she needed to get a co-signor and after some discussion, Sherm told that her that John should cosign the loan. He also told Rose that she would need to transfer an interest in the Property to John so that Rose and John would own the Property together.

18. As of July 2008, there was a first mortgage on the Property in the amount of \$15,941.00 and monthly mortgage payments of \$302.00 (which did not include property taxes, which are approximately \$8,000 per year or \$667 per month).

19. Direct, through its employee, Sherm, directed Rose to Emigrant. Sherm continued to act as Rose's representative with Emigrant and as an agent of Emigrant.

20. Rose was told that Emigrant agreed to make the loan to Rose provided that John co-sign and provided that he would be a co-owner of the Property. She was advised that John's credit card debt also had to be paid off, which was approximately \$62,000.00.

21. Walheim represented Emigrant at the closing and prepared the deed transferring an interest in the Property to John.

22. On July 22, 2008, Rose signed the deed transferring an interest in the Property to John. Now Rose and John own the property as tenants in common.

23. On the same day, Rose and John executed a mortgage with the Emigrant in the amount of \$135,000.00. The mortgage was recorded on August 19, 2008 ("Emigrant Mortgage" or "the Mortgage").

24. The Mortgage closing was conducted at Rose's home in Nutley, New Jersey. The following parties were present: Rose, John, Sherm, Walheim, and several other men, whose names Rose can no longer recall.

25. Rose was not represented by her own lawyer at the closing and at no point, did anyone recommend that Rose should have a lawyer. Rose believed that Walheim was there to protect her interests and she relied on this.

26. Of the \$135,000.00 Emigrant loaned, Rose received \$115,258.23, which was used to pay off property taxes and creditors of both Rose and John. This included payment to a first mortgage lender, Wachovia, in the amount of approximately \$15,941.00. Approximately \$62,000.00 was used to pay off John's creditors which included the following payments:

a. \$34,286.13 to Americredit

b. \$14,017.40 to National Recreational Properties

c. \$7,383.00 to HSBC/Yamaha

d. \$5,186.00 to Worlds Foremost

e. \$1,077.00 to Capital One

f. \$50.00 to Capital One

27. The Emigrant Mortgage has an Adjustable Rate Rider, which had an initial interest rate of 8.875% for the first twelve (12) months with a monthly loan payment of \$1,074 per month. The monthly payment does not include taxes, which are approximately \$2,000.00 per quarter or \$667.00 per month.

28. Rose was assured by Sherm and other representatives (John Does 1-4) that she would be able to afford the monthly payment and she relied upon those assurances.

29. In early September 2008, when Rose received her first monthly invoice in the amount of \$1074.00, she immediately called Sherm at Direct and informed him that she could not afford the monthly payment. Sherm told her that there was nothing that Direct could do and she would have to contact Emigrant.

30. Immediately thereafter, Rose telephoned Emigrant and requested that it reduce her monthly payments. The Emigrant representative told her that she could fill out modification paperwork, but there was nothing that could be done immediately because it was too soon modify.

31. Rose, desperate to get a mortgage that she could afford, completed Emigrant's modification paperwork. She contacted Emigrant on several occasions throughout September 2008 to check on the status of her request for modification. Each time she was told the application was pending.

32. After not hearing from Emigrant about the loan modification, on September 25, 2008, Rose and John filled out an application to refinance the mortgage with Americaps **Financial**, Inc., but the application was denied because of judgments that were recorded against John (heretofore unknown to Rose).

33. When Rose added John to the deed and until she received notification from Americaps that she was denied refinancing, she had no knowledge of the judgments against him.

34. Upon being told that John had judgments against him, Rose contacted Defendant PEP Title. Copies of the judgments, totaling \$83,557.73, were faxed by Defendant PEP Title to Rose on December 12, 2008. The fax included the following judgments:

a. On December 6, 1999, Judgment was docketed against John in favor of US Food Service in Monmouth County Superior Court in the amount of \$3,675.91 plus costs.

b. On December 7, 2001, Judgment was entered against John in favor of 9 North Inc. in Mercer Superior Court in the amount of \$74,292.00 plus costs.

c. On February 23, 2001, Judgment was entered against John in favor of First Select Inc. in Camden Superior Court in the amount of \$5,589.82 plus costs and interest.

35. Because Rose was refused refinancing, on March 30, 2009, she drafted a letter to Emigrant requesting a fixed rate mortgage based on her inability to afford the monthly mortgage payment.

36. On March 31, 2009, Emigrant requested that Rose send **financial** documents so that her hardship could be reviewed.

37. On April 9, 2009, Rose submitted to Emigrant a hardship letter detailing her monthly expenses.

38. On September 28, 2009, the Emigrant Mortgage was modified. Under the loan modification agreement, the effective interest rate of the loan was 6% for a period of five (5) years and the monthly payment was \$814.09 beginning October 1, 2009.

Rose is a Victim of Predatory Lending

39. While predatory lending is a general concept not subject to precise definition, it has been described as: “a mismatch between the needs and capacity of the borrower ... In essence, the loan does not fit the borrower, either because the borrower's underlying needs for the loan are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan.” *Assoc. Home Equity Servs., Inc. v. Troup*, 343 N.J. Super. 254, 267 (App. Div. 2001) (quoting Daniel S. Ehrenberg, *If the Loan Don't Fit, Don't Take It: Applying the Suitability Doctrine to the Mortgage Industry to Eliminate Predatory Lending*, 10 J. Affordable Housing & Community Dev. L. 117, 119-20 (Winter 2001)).

40. Predatory lending includes “the practice of making loans containing interest rates, fees or closing costs that are higher than they should be in light of the borrower's credit and net income, or containing other **exploitative** terms that the borrower does not comprehend.” *Henry v. Lehman Commercial Paper, Inc.* 471 F.3d 977, 984 (9th Cir.2006); see also Debra Pogrud Stark, *Unmasking the Predatory Loan in Sheep's Clothing: A Legislative Proposal*, 21 Harv. BlackLetter L.J. 129, 134 (2005) (stating that “predatory lending is the situation where a mortgage broker or mortgage lender engages in fraudulent, deceptive or sharp practices to induce borrowers (often the **elderly** or minorities) to enter into ‘bad’ loans,” which would include loans that are overpriced, loans where there is no net economic benefit to the borrower, loans where the borrower cannot afford the payment so the lender is relying on the borrower's equity for payment, and loans with other **exploitative** terms not understood by the borrower).

41. The defendants have engaged in predatory lending. Rose, as an **elderly** woman, was targeted and taken advantage of by the defendants. Rose believed that the defendants were going to help her pay off her debts by assisting her in getting an affordable mortgage that would meet her goals and she trusted their representations that she would be able to afford the monthly mortgage payments. Instead, Rose has a mortgage that she cannot afford and one she never should have qualified for. Additionally, she was required to deed an interest in her home to her son who, unbeknownst to her, had substantial amount of judgments against him, which have now attached to the Property.

42. The Emigrant Mortgage, which had a monthly payment of \$1074.00 and an adjustable interest rate of 8.875%, did not meet Rose's needs. It was not only unlikely, but impossible, that Rose would be able to afford \$1074.00 per month on a fixed income of \$1455.00. The monthly mortgage payments and property taxes (which are approximately \$8000.00 a year or \$667.00 per month) exceed Rose's monthly income, and this is before she pays for food, electricity, water, and her prescription medicine.

43. Had Rose been granted an appropriate mortgage covering only her debt at a reasonable interest rate, she could have afforded the monthly payments.

44. Even after the loan modification, which has an effective interest rate of 6% for a period of five (5) years and the monthly payment was \$814.09, Rose is still unable to afford this as the monthly payments and property taxes still exceed her monthly fixed income. The loan modification is nothing more than an extension of Emigrant's first predatory loan and was done in furtherance of the fraud committed in connection with the Emigrant Mortgage. Both the terms and conditions of the modification are predatory in that they do not meet Rose's needs. Significantly, the modification is only for five (5) years, and therefore the predatory terms of the first Emigrant Mortgage goes back into effect. Rose, who is on a fixed income and unable to work because of her age and health, had no possibility of being in a better **financial** situation when the modification period ends.

45. Without enough money to meet her basic daily living expenses, Rose has had to resort to the kindness of family members and friends to survive each month and various assistance programs.

46. In addition to the terms of the loan being so disadvantageous, Rose was also forced into transferring over an equity interest to John despite the fact that he had three recorded judgments against him at the time of the mortgage was executed and the deed was signed.

Rose's need for Emergent Relief

47. Rose is 82 years old and in poor health. She suffers from both a heart and lung condition. Since 2002, Rose has had a pacemaker and undergone several heart surgeries related her heart condition. She also suffers from emphysema and uses a nebulizer daily.

48. In order to make monthly mortgage payments, pay property taxes, and pay for basic necessities, Rose's friends and relatives have loaned and/or given her money to cover her monthly expenses.

49. In October 2010, Rose applied, and qualified, for food stamps.

50. Rose also receives assistance with her utilities through HEAP (Home Energy Assistance Program) and assistance with the cost of her medication through PAAD (Pharmaceutical Assistance for the Aged and Disabled) and Silverscript.

51. In order to continue to meet her monthly expenses, Rose will need to use the equity in her home for daily living expenses. She will either have to obtain a reverse mortgage, refinance, or prepare the house for sale as she can no longer continue to rely on the generosity of her friends and family for survival.

FIRST COUNT

[Consumer Fraud Act, *N.J.S.A. 56:8-2* against all Defendants, except John and nominal defendants]

52. Plaintiff repeats and incorporates herein paragraphs 1 to 51 of this Complaint as though fully set forth.

53. Defendants employed unconscionable commercial practices, engaged in fraud and deception, false pretense, made false promises and misrepresentation, and/or knowing, concealment, or omission of material facts in violation of the Consumer Fraud Act, *N.T.S.A. 56:8-1 et seq.* including, but not limited to, the following conduct:

- a. Informing Rose that she would be able to afford her monthly payment based on her fixed income from Social Security; and
- b. Failing to disclose to Rose that her son, John, had judgments against him.

54. The representation that Rose could afford a monthly payment of \$1074.00 when her monthly income from Social Security was \$1455.00 was untrue, deceptive and false.

55. Defendants knew or should have known that Rose would rely on the false representation(s).

56. Rose, in fact, reasonably relied on the false representation(s) made by Defendants.

57. The omission that John had judgments against him in the amount of \$83,557.73 was material because had Rose known of the judgments at the time she executed the Emigrant Mortgage, she never would have executed the mortgage and deed giving John an interest in the property since she then could not sell or refinance the property without paying John's debts.

58. Defendants' violation of *N.T.S.A. 56:8-1 et seq.* caused Rose to suffer ascertainable loss, including but not limited to:

- a. Loss of equity in her home;
- b. Attorney's fees associated with preparing a new deed and bringing this cause of action;
- c. Excessive interest payments; and
- d. Responsibility of paying John's judgments.

WHEREFORE, Plaintiff demands judgment against Defendants for:

- a. stay the enforcement of mortgage;
- b. treble damages;
- c. attorneys' fees and costs of suit;
- d. a refund of "all moneys" acquired by means of an unlawful practice under the Consumer Fraud Act pursuant to *N.T.S.A. 56:8-19*;
- e. declaring the parties' transaction to be void as procured by fraud;
- f. a rescission of the deed and mortgage;

- g. disgorgement of John's interest in the Property; and
- h. any other relief the Court deems just and equitable.

SECOND COUNT

[Common Law Fraud/Fraudulent Misrepresentations against all Defendants, except John and nominal defendants]

59. Plaintiff repeats and incorporates herein paragraphs 1 to 58 of this Complaint as though fully set forth.
60. Defendants made misrepresentations and knowingly omitted material facts to Rose including, but not limited to, the following conduct:
- a. Informing Rose that she would be able to afford her monthly payment based on her fixed income from Social Security; and
 - b. Failing to disclose to Rose that her son, John, had judgments against him.
61. The representation that Rose could afford a monthly payment of \$1074.00 when her monthly income from Social Security was \$1455.00 was untrue, deceptive and false.
62. Defendants knew or should have known that Rose would rely on the misrepresentation(s).
63. Rose, in fact, reasonably relied on the misrepresentation(s) made by Defendants.
64. The omission that John had judgments against him in the amount of \$83,557.73 was material because had Rose known of the judgments at the time she executed the Emigrant Mortgage, she never would have executed the mortgage and deed giving John an interest in the property.
65. Rose reasonably relied upon these knowing misrepresentations and omissions in deciding to go forward with the mortgage and transfer of property interest.
66. Rose suffered damages as a result of Defendants' conduct, including but not limited to:
- a. Loss of equity in her home;
 - b. Attorney's fees associated with preparing a new deed and bringing this cause of action;
 - c. Excessive interest payments; and
 - d. Responsibility paying John's judgments.

WHEREFORE, Plaintiff demands judgment against Defendants for:

- a. actual, consequential and punitive damages resulting from the Defendants' misrepresentations;
- b. declaring the parties' transaction to be void as procured by fraud;
- c. stay the enforcement of mortgage;

- d. a rescission of the deed and mortgage;
- e. disgorgement of John's interest in the Property;
- f. costs of suit; and
- g. any other relief the Court deems just and equitable.

THIRD COUNT

[Negligent Misrepresentations against all Defendants, except John and nominal defendants]

67. Plaintiff repeats and incorporates herein paragraphs 1 to 66 of this Complaint as though fully set forth.

68. Defendants made misrepresentations and negligently omitted material facts to Rose including, but not limited to, the following conduct:

- a. Informing Rose that she would be able to afford her monthly payment based on her fixed income from Social Security; and
- b. Failing to disclose to Rose that her son, John, had judgments against him.

69. The representation that Rose could afford a monthly payment of \$1074.00 when her monthly income from Social Security was \$1455.00 was untrue, deceptive and false.

70. Defendants knew or should have known that Rose would rely on the misrepresentation(s).

71. Rose, in fact, reasonably relied on the misrepresentation(s) made by Defendants.

72. The omission that John had judgments against him in the amount of \$83,557.73 was material because had Rose known of the judgments at the time she executed the Emigrant Mortgage, she never would have executed the mortgage and deed giving John an interest in the property.

73. Rose reasonably relied upon these negligent omissions in deciding to go forward with the mortgage and transfer of property interest.

74. Rose suffered damages as a result of Defendants' conduct, including but not limited to:

- a. Loss of equity in her home;
- b. Attorney's fees associated with preparing a new deed and bringing this cause of action;
- c. Excessive interest payments; and
- d. Responsibility paying John's judgments.

WHEREFORE, Plaintiff demands judgment against Defendants for:

- a. actual, consequential and punitive damages resulting from the Defendants' misrepresentations;

- b. declaring the parties' transaction to be void as procured by fraud;
- c. stay the enforcement of mortgage;
- d. a rescission of the deed and mortgage;
- e. disgorgement of John's interest in the Property;
- f. costs of suit; and
- g. any other relief the Court deems just and equitable.

FOURTH COUNT

[Breach of Fiduciary Duty against all Defendants, except John and nominal defendants]

75. Plaintiff repeats and incorporates herein paragraphs 1 to 74 of this Complaint as though fully set forth.

76. Defendants caused Rose to place trust and confidence in them and rely on the defendants' advice on matters relating to the mortgage.

77. Defendants thus assumed a fiduciary relationship when they told Rose that John should be put on the mortgage and when Rose was told that she would be able to afford the monthly mortgage payments.

78. Defendants' breached their fiduciary relationship with Rose, including but not limited to, failing to exercise due care in advising her that monthly payments were affordable and by having her transfer equity in her home over to John when there were outstanding judgments against him.

79. Rose was injured by the Defendants' breach of fiduciary duty.

WHEREFORE, the Plaintiff demands judgment against the Defendants for:

- a. actual, consequential and punitive damages resulting from the Defendants' breach;
- b. declaring the parties' transaction to be void as procured by fraud;
- c. stay the enforcement of mortgage;
- d. a rescission of the deed and mortgage;
- e. disgorgement of John's interest in the Property;
- f. costs of suit; and
- g. any other relief the Court deems just and equitable.

FIFTH COUNT

[Attorney Malpractice Against Defendant Andrew Walheim, Esq]

80. Plaintiff repeats and incorporates herein paragraphs 1 to 79 of this Complaint as though fully set forth.

81. Upon information and belief, that Andrew Walheim is a member of the bar and acting in the capacity of an attorney for the state of New Jersey.

82. Walheim acted as an attorney for Emigrant during the closing.

83. Rose believed that he was acting as her attorney or at minimum, he was there to protect her interests and rights pursuant to her conversations with him. She relied on the statements made by him.

84. At the closing, Walheim's failed to disclose to Rose that there were judgments against her son even though the judgments were recorded prior to the mortgage closing date.

85. Walheim drafted a deed wherein Rose turned over equity interest in her home to Defendant. Rose would not have signed the deed transferring equity had she known that John had judgments against him.

86. Rose signed the closing documents because she relied on Walheim's implicit and explicit misrepresentations that her interests were protected.

87. Rose suffered a loss as a result of Walheim's breach of the standard of care.

WHEREFORE, the Plaintiff demands judgment against the Defendants for:

- a. actual, consequential and punitive damages resulting from the Defendants' misrepresentations;
- b. declaring the parties' transaction to be void as procured by fraud;
- c. stay the enforcement of mortgage;
- d. a rescission of the deed and mortgage;
- e. disgorgement of John's interest in the Property;
- f. costs of suit; and
- g. any other relief the Court deems just and equitable.

SIXTH COUNT

[Rescission of deed and rescission and/or reform of Emigrant Mortgage]

88. Plaintiff repeats and incorporates herein paragraphs 1 to 87 of this Complaint as though fully set forth.

89. There is no adequate legal remedy.

90. Rose is free of any inequitable conduct.

91. The deed, which transferred an interest in the Property to John, was procured by fraud and misrepresentation.

92. The Emigrant Mortgage and the loan modification, executed by Rose, were procured by fraud and misrepresentation.

WHEREFORE, the Plaintiff demands judgment against the Defendants for:

a. a rescission of the deed; and

b. any other relief the Court deems just and equitable.

SEVENTH COUNT

[Declaration that Nominal Defendants Have No Interest in the Property]

93. Plaintiff repeats and incorporates herein paragraphs 1 to 92 of this Complaint as though fully set forth.

94. A judgment search revealed defendant US Food Service, named as a nominal defendant in this action, is a judgment creditor of John.

95. A judgment search revealed defendant 9 North Inc., named as a nominal defendant in this action, is a judgment creditor of John.

96. A judgment search revealed defendant First Select Inc., named as a nominal defendant in this action, is a judgment creditor of John.

97. Since the deed transferring interest in the Property to John was procured by fraud, the deed should be voided and any of John's judgments should be deemed not to have attached as a lien to the Property.

WHEREFORE, the Plaintiff demands judgment against US Food Service, 9 North Inc., and First Select Inc. for:

a. a declaration that these defendants have no interest in the Property;

b. judgment deemed not to have attached;

c. not be entitled to perfect any lien;

d. Property not subject to judgment lien of John's creditors; and

e. any other relief the Court deems just and equitable.

Dated: September 21, 2012

MANDELBAUM, SALSBURG,

LAZRIS & DISCENZA, P.C.

Attorneys for Plaintiff

By: <<signature>>

Charles S. Lorber, Esq.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:5-4, Charles S. Lorber, Esq. is hereby designated as trial counsel on behalf of Plaintiff in the above matter.

DEMAND FOR TRIAL BY JURY

The Plaintiff hereby demands trial by jury as to all issues triable by jury.

NOTICE TO ATTORNEY GENERAL OF ACTION

A copy of this Complaint shall be mailed to the Attorney General of the State of New Jersey within ten days after filing with the Court pursuant to [N.J.S.A. 56:8-20](#).

CERTIFICATION PURSUANT TO R. 4:5-1

Pursuant to R. 4:5-1, the undersigned hereby certifies to the best of my knowledge and as advised by Plaintiff, that: (a) the matter in controversy is not the subject of any other litigation; (b) no other action or arbitration proceeding is contemplated, and (c) there are no other parties known who should be joined into this action.

Dated: September 21, 2012

MANDELBAUM, SALSBURG,

LAZRIS & DISCENZA, P.C.

Attorneys for Plaintiff

By: <<signature>>

Charles S. Lorber, Esq.