SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY** IAS PART 16
Justice

DLJ MORTGAGE CAPITAL, INC.,

Plaintiff,

- against -

DARLENE SMITH, et al.,

Defendants.

INDEX NO. 14098/2006

MOTION DATE June 19, 2007

MOTION CAL. NO. 9

The following papers numbered 1 to 10 read on this motion by the plaintiff for, inter alia, summary judgment, to strike the answer of the defendants Darlene Smith, Shawnette Beard and Tyree Smith and to appoint a referee to compute. The defendants Darlene Smith, Tyree Smith and Shawnette Beard cross-move for leave to amend the complaint to add third-party defendants and to interpose affirmative defenses and counterclaims.

	PAPERS NUMBERED
Notice of Motion/Affid(s)-Exhibits.....	1 - 4
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Affid(s) in Opp.-Exhibits.....	9 - 10

Upon the foregoing papers the motion and cross-motion are determined as follows:

In this mortgage foreclosure action, the plaintiff seeks, inter alia, an order appointing a referee to compute. The defendants Darlene Smith, Shawnette Beard and Tyree Smith cross-move to, inter alia, amend their answer to assert third-party claims and counter-claims.

To the extent that the defendants seek leave to assert new claims against persons and/or entities that are not parties to this action, that branch of the motion is denied. The appropriate method for asserting third-party claims is by filing and serving a third-party summons and complaint (See, CPLR §304, §305 and §1007).

As to the branch of the motion to for leave to amend the defendants' answer, leave to amend a pleading should be freely granted except in a case where the proposed amendment is palpably insufficient or patently devoid of merit or will prejudice or surprise the opposing party (See, CPLR §3025[b]; McCaskey, Davies & Associates, Inc. v NYCHHC,

59 NY2d 755; Belanowski v Trustees of Columbia Univ., 21 AD3d 340).

In this action, the defendants seek to assert, inter alia, claims and defenses against the plaintiff under Banking Law §6-l. The purpose of Banking Law § 6-l, which became effective on April 1st, 2003, is to prevent predatory lending practices. Predatory lenders typically offer high-interest rate loans, sometimes coupled with exorbitant closing fees, to borrowers who, because of shaky credit histories, are unable to secure prime interest rate loans.[1] Far too often, these lenders have targeted ethnic minority groups, the poor, the elderly and single parents who are often in less of a position to understand and investigate the implications of the loan agreements.[2] Further, these loans are often made without regard to whether the borrower can realistically repay the principal and often result in foreclosure and the loss of the borrower's home.

Predatory lenders typically target homeowners who have built up a substantial amount of equity and make offers to refinance or make improvements to their home. The agreements often charge an exorbitant interest rate, sometimes together with a host of fees, often without regard to the borrower's ability to repay the loan.[3] Then, in the event of a default, the lender will refinance the home tacking on more fees and stripping as much equity out of the home as possible until there is none left and the house is foreclosed on.[4] This process is sometimes known as equity-stripping.

One indication of the pervasiveness of this type of lending occurred on Oct. 11, 2002, "when Household International Inc., one of the largest lenders in the United States agreed to pay a record fine of $484 million to settle nationwide allegations of predatory lending practices."[5] This settlement reimbursed some 25,000 New York borrowers from whom closing costs were concealed, unnecessary insurance costs added, and loans refinanced at higher interest rates to the borrowers' detriment.[6]

NY Banking Law § 6-l seeks to prevent this sort of unscrupulous lending by prohibiting lenders from engaging in many of the activities associated with predatory lending when offering a "high-cost home loan."[7] To fall within the ambit of the statue, the loan in question may not exceed three hundred thousand dollars.[8] To constitute a high-

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[1] McKinney's Session Laws of NY, Book 2, 225th Session, Ch. 626 at 2098.
[2] See e.g., Nicholas Bagley, The Unwarranted Regulatory Preemption of Predatory Lending Laws, 79 NYULR 2274, 2278-79 (2004).
[3] This is known as "asset-based lending."
[4] See id. at 2279 ("Lenders stand to gain from predatory lending in one of three ways: They might (1) receive higher interest payments than they would otherwise receive in a competitive market; (2) foreclose on the value of the collateral; or (3) immediately sell the mortgage loan on the secondary mortgage market in exchange for cash.").
[5] Benjamin Weinstock and Joanne S. Agrippina, New Restrictions on Predatory Lending in High-Cost Home Loans, 228 N.Y.L.J. 4, (col. 4) (2002).
[6] Id. at 4.
[7] McKinney's Session Laws of NY, Book 2, 225th Session, Ch. 626 at 2098.
[8] Banking Law §6-l[1][e].

cost home loan, "one or more of the thresholds" within the statute must be met.[9] Generally, the two thresholds defined in the statue are based upon the annual percentage rate ("APR") of the loan and the total points and fees charged. The first threshold is breached where the APR of a "first lien mortgage loan" exceeds 8 percentage points ---9% "for a subordinate mortgage lien"--- over the yield on treasury securities that have comparable maturation periods.[10] The second threshold covers loans in which the total points and fees exceed five percent ---6% for FHA or VA guaranteed loans--- of a "total loan amount" of $50,000 or more.[11]

Once the loan has been identified as a "high-cost home loan" the law lays out several limitations on the practices of lenders. These limitations include the inability to accelerate the indebtedness other than through the borrower's default, prohibition of balloon payments within 15 years of the loan's origination, prohibition of negative amortization (interest-only payments that result in the principal increasing over time), prohibition of mandatory arbitration clauses, prohibition of "loan flipping,"[12] and prohibition of lending without due regard to the borrower's repayment ability (curtailing asset-based lending).[13] Especially significant to the law is the ability of a borrower to assert any predatory lending claims or defenses against an assignee of the mortgage[14]. This gives the law teeth by making larger financial institutions wary of buying sub-prime mortgages from mortgage brokers and other lenders whose practices are of questionable repute.[15] An intentional violation of any of the law's provisions results in the rescission of the loan agreement together with the potential of restitution to the buyer of all amounts paid under the agreement. This goes considerably further than New York's usury law, a violation of which only voids the loan and does not require the note-holder to disgorge past payments and interest.[16]

In the present case, the statute is initially applicable since the loan was for $207,600.00. It is also clear that the APR of the loan does not exceed the threshold established by the Banking law. However, the same definitive conclusion can not be reached on the papers presented with respect to the threshold limiting points and fees. Specifically, based upon the loan documentation submitted by the

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[9] Banking Law §6-l[1][d].
[10] Banking Law §6-l[1][g][i].
[11] Banking Law §6-l[1][g][ii]; Loans for less than $50,000.00 are considered high-cost where the total points and fees exceed the "greater of six percent of the total loan amount or fifteen hundred dollars".
[12] This is the practice of refinancing an existing loan that does not result in a net benefit to the borrower under all the circumstances.
[13] Banking Law §6-l[2].
[14] Banking Law §6-l[13].
[15] Joe Lamport, Predatory Lending Fuels Rise in Foreclosures (2007), http://www.gothamgazette.com/article/housing/20070426/10/2157. ("A chain of incentives in the lending industry drives predatory lending. Unscrupulous mortgage brokers chase homeowners and first-time homebuyers because banks will pay the brokers commissions. The banks, in turn, are motivated by the profits they can make by packaging the loans and selling them to Wall Street investors. The investors, of course, are interested in the rates of return on these investments.").
[16] General Obligations Law § 5-501, §5-511; Banking Law § 14-a, §108[6].

plaintiff in opposition to the cross-motion, this threshold may or may not have been breached depending upon which of the numerous fees and charges incurred by the defendants qualify as "points and fees" as defined by the statute.[17] Thus, as the plaintiff failed to establish that the proposed amendments patently lack merit, is legally insufficient or the existence of any prejudice, the amendment must be permitted (See, Lang v Dachs, 303 AD2d 645; Duffy v Wetzler, 260 AD2d 596).

Accordingly, the defendants Darlene Smith, Shawnette Beard and Tyree Smith are given leave to serve an amended answer in the form annexed to the moving papers within 20 days from the date of service of a copy of this order.

The plaintiff's motion for summary judgment is denied as the proposed counterclaims, if properly proven, could void the home loan agreement and vitiate the lender's "right to collect, receive or retain any principal, interest, or other charges whatsoever with respect to the loan".[18]

Dated: August 29, 2007

Peter J. Kelly, J.S.C.

[17] Banking Law §6-l[1][f].
[18] Banking Law §6-l[10].