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NYC Condo Refinance Collapses Because There Was No "Meeting of the Minds"

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In *Trief v. Wells Fargo Bank, N.A.*, Index No. 105280/09, — N.Y.S.2d — (Sup Ct, NY County, Apr. 4, 2011) ("*Trief*"), the plaintiffs sought damages arising out of their attempt to refinance a mortgage loan with the defendant bank (the "Bank"), for breach of contract and violation of New York's Unfair and Deceptive Practices Act, N.Y. General Business Law ("NYGBL") § 349. Justice Charles Edward Ramos granted the Bank's motion for summary judgment on both counts. The parties actually proceeded to closing when plaintiff walked away from the refinancing of a luxury midtown condominium located at 15 West 53rd Street, New York, NY – seemingly over a $518.75 dispute.

The main lesson is that all parties, especially when communicating via more informal modes of communications like email, must clarify and confirm an "agreement on all essential terms" or else a valid contract will not be formed.

The facts – negotiation, informal communications, the exchange of standard loan forms, etc… – follow a seemingly common pattern. A mortgage consultant from the Bank filled out the refinance application on the Triefs' behalf by telephone and then sent an e-mail attaching a Good Faith Estimate of Settlement Charges (the "GFE"). The GFE proposed a 5.125% interest rate and a standard provision indicating that the "fees listed are estimated - the actual charges may be more or less." The cover email asked to "let me know if you would like me to lock you in for 60 days", which Mr. Trief responded "sure." After a small dispute about the rate, the Bank faxed a Conventional Commitment Letter (the "Letter") to the Triefs confirming the rate and other details. Despite language in the Letter that "You must sign and return this commitment letter within that period to

ensure receiving the terms specified", neither party signed the Letter. At the scheduled closing, the Triefs refused to proceed because the Bank sought to charge them a rate lock extension fee of $518.75, which the Triefs claim was never negotiated or agreed to.

The main issue was whether a contract was formed. The Court explained the classic rules that a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound. Kowalchuk v. Stroup, 61 A.D.3d 118, 121 (1st Dept 2009). Mutual assent means a "meeting of the minds" and must include agreement on all essential terms. *Id.* The Court held that there was not a meeting of the minds on all of the essential terms of a final contract for refinancing. The two key pieces of evidence – the email from the Bank asking to "let me know if you would like me to lock you in for 60 days" and the standard GFE language that terms were subject to change – were only seeking an acceptance to lock in the rate for a fixed period of time, rather than a final agreement to refinance. Further, the Real Estate Settlement Procedure Act ("RESPA") shows that the legislature did not intend for the GFE to bind a lender to a final loan agreement. *See* 24 CFR § 3500.7 [a], [g] (the "GFE is not a loan commitment. Nothing in this section shall be interpreted to require a loan originator to make a loan to a particular borrower.").

Finally, the Court also rejected the Triefs claim under NYGBL § 349. A claim for violation of GBL § 349 is based upon consumer-oriented conduct that is materially misleading, causing a plaintiff injury. The Court held that the Triefs failed to even identify consumer-oriented conduct on the part of the Bank because private contract disputes, unique to the parties, generally do not fall within the scope of the statute. The Triefs failed to demonstrate injury because they refused to close on the loan refinancing and did not pay any fees to the Bank.

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