

<p>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS</p> <p>-----X</p> <p>EMIGRANT MORTGAGE COMPANY, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>MARGARET F. MOSUNIC, et al.</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p> <p>MARGARET F. MOSUNIC,</p> <p style="text-align: center;">Third-Party Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>HOME CONSULTANTS, INC., CUSACK CONTRACTORS, JOHN CUSACK, and TOM DELANEY,</p> <p style="text-align: center;">Third-Party Defendants.</p> <p>-----X</p>	<p>Index No.: 21780/08</p> <p>AMENDED VERIFIED ANSWER WITH AFFIRMATIVE DEFENSES, COUNTERCLAIMS AND THIRD-PARTY COMPLAINT</p> <p><u>JURY TRIAL DEMANDED</u></p>

PLEASE TAKE NOTICE that Defendant Margaret F. Mosunic, by her attorneys, MFY Legal Services, Inc., The Law Offices of Kenneth Volandes, and Devon Filas, Esq., hereby interposes the following Amended Verified Answer to the Complaint herein:

1. Defendant/Third-Party Plaintiff Margaret F. Mosunic denies the allegations contained in paragraphs 4, 5, 9 and 10 of Plaintiff's complaint.

2. Defendant/Third-Party Plaintiff Margaret F. Mosunic lacks knowledge or information sufficient to form a belief with respect to the allegations contained in paragraphs 1, 2, 3, 6, 7, 8, 11, 12, 13, 14, and 15 of Plaintiff's complaint.

PARTIES

3. Plaintiff/Counterclaim Defendant Emigrant Mortgage Company, Inc. (Emigrant) is, upon information and belief, a domestic business corporation. Upon information and belief, Emigrant's business address is 7 Westchester Place, Elmsford, New York 10523.

4. Defendant/Third-Party Plaintiff Margaret Mosunic is a 60 year-old woman who is legally blind and who has resided in her home located at 2332 33rd Avenue, Astoria, New York 11106 for more than 40 years.

5. Third-Party Defendant, Home Consultants, Inc. (HCI) is, upon information and belief, a domestic business corporation licensed to do and doing business in the State of New York. Upon information and belief, HCI's business address is 38 Hancock Court, South Setauket, New York 11720.

6. Third-Party Defendant, Cusack Contractors is an unincorporated and unlicensed entity doing business in the State of New York. Upon information and belief, Cusack Contractors' business address is 25 Cliff Street, Yonkers, New York 10701.

7. Third-Party Defendant Tom Delaney is the mortgage broker employed at all pertinent times by HCI who arranged the mortgage loan transaction that is the subject of this foreclosure action. Upon information and belief, Tom Delaney lives in Suffolk County, New York.

8. Upon information and belief, Third-Party Defendant John Cusack is the owner of Cusack Contractors and lives at 25 Cliff Street, Yonkers, New York 10701.

FACTS COMMON TO ALL DEFENSES, COUNTERCLAIMS AND THIRD-PARTY CLAIMS

9. Margaret F. Mosunic lived with her parents at 2332 33rd Avenue in Queens for more than 40 years and inherited the subject property when her mother died in December 2003.

10. Ms. Mosunic is financially unsophisticated, did not graduate from high school, and holds only a general equivalency degree (GED).

11. Ms. Mosunic worked as a salesclerk at Woolworths from 1974 until 1984, when she was the victim of a brutal mugging.

12. As a result of this tragic experience, Ms. Mosunic is ***legally blind***.

13. Ms. Mosunic's only source of income is Social Security Disability Insurance (SSDI).

14. Ms. Mosunic received approximately \$738 per month from SSDI at the time she entered into the mortgage loan transaction in January 2008 that is the subject of plaintiff's foreclosure action.

Facts Pertinent To The Emigrant Mortgage Company, Inc. Loan Transaction

15. In October 2007 Ms. Mosunic was solicited for a mortgage loan by Tom Delaney, a mortgage broker employed at all pertinent times by HCI.

16. Mr. Delaney told Ms. Mosunic that HCI could arrange a mortgage loan for her that would allow her to hire a home improvement contractor to make certain repairs to the downstairs portion of her home (a rental apartment) and pay off delinquent real estate taxes.

17. Ms. Mosnuic informed Mr. Delaney that she was only interested in obtaining a mortgage loan for a maximum of \$40,000, given her limited SSDI income and potential rental income from the downstairs portion of the home.
18. Mr. Delaney agreed that HCI would arrange a mortgage loan for Ms. Mosunic for no more than \$40,000.
19. Prior to the closing of the loan, Ms. Mosunic provided Mr. Delaney with proof of her monthly income of approximately \$738 per month.
20. Prior to the loan closing, neither Mr. Delaney nor any representative of HCI or Emigrant provided Ms. Mosunic with any proposed loan documents or with required federal disclosures or notices, nor was she even informed that Emigrant would be the lender.
21. Prior to the loan closing, neither Mr. Delaney nor any representative from HCI or Emigrant informed Ms. Mosunic what either the principal balance of the loan or monthly payment amount would be.
22. On or about January 8, 2008 Mr. Delaney advised Ms. Mosunic that the loan closing would take place on or about January 9, 2008.
23. Because Ms. Mosunic is legally blind and unable to review loan documents herself, she asked Mr. Delaney if she could bring a close friend to the closing of the loan to review the loan documents for her.
24. Mr. Delaney refused Ms. Mosunic's request.
25. Upon information and belief, Mr. Delaney, a closing agent representing Emigrant, a notary and Ms. Mosunic were present at the loan closing.
26. During the loan closing, Ms. Mosunic was presented with a stack of documents that she could not read because she is legally blind.

27. During the loan closing, Mr. Delaney and Emigrant's closing agent put intense pressure on Ms. Mosunic to sign loan documents with terms she was unaware of because she is legally blind.
28. After Ms. Mosunic was rushed through the closing process and had signed all the loan documents, Mr. Delaney informed her that the monthly payment under the mortgage loan would be more than \$2,200, the principal balance of the loan was \$300,000 rather than \$40,000, and that Emigrant would retain \$150,000 in an escrow holdback account, a portion of which was to be paid to Cusack Contractors.
29. After Ms. Mosunic became aware of the terms of the transaction, she informed Mr. Delaney and Emigrant's closing agent that she did not wish to go forward with the mortgage loan transaction.
30. Emigrant did not provide to Ms. Mosunic a Notice of Right to Cancel the mortgage loan transaction at the loan closing, in violation of the Truth in Lending Act.
31. Had Ms. Mosunic received the Notice of Right to Cancel, she would have exercised her right to rescind the loan immediately after the closing.
32. On April 9, 2009, Ms. Mosunic, through counsel, sent a letter to counsel for Emigrant notifying it that she was rescinding the loan.
33. As of this date, Emigrant has failed to respond to the rescission letter. Instead, Emigrant has continued to pursue this foreclosure action.

Facts Pertinent To The Cusack Contractor Home Improvement Work

34. In addition to arranging the predatory, unaffordable loan with Emigrant, Mr. Delaney also arranged for Cusack Contractors and John Cusack to perform the home improvement work to Ms. Mosunic's home.

35. The referenced home improvement work was necessary because, without it, Ms. Mosunic could not rent out the downstairs unit of her house to obtain rental income, without which she could not repay the loan.
36. John Cusack is, upon information and belief, the owner and operator of Cusack Contractors (hereinafter collectively referred to as “Cusack”).
37. After Cusack inspected Ms. Mosunic’s home, Cusack informed her that the total cost would not exceed \$79,000 and agreed to complete the work within five weeks.
38. Cusack did not provide Ms. Mosunic with a written contract.
39. In February 2008, Cusack began the “repairs” to the premises but never completed those repairs.
40. Cusack demanded that Ms. Mosunic remit full payment prior to completion of the work. In response to Cusack’s demand for full payment for work that had not been completed and for which there was no written contract, Ms. Mosunic paid Cusack approximately \$79,000.
41. Cusack’s work on the property was deficient in the following respects:
- a. Cusack failed to complete the electrical work in the downstairs portion of the home, as promised, and left live wires hanging from the ceiling and electrical sockets;
 - b. Cusack failed to replace all of the windows, as promised;
 - c. Cusack did not install new appliances in the downstairs portion of the home, as promised;
 - d. Cusack failed to remove the existing roof on the home and replace it with a new roof, as promised;
 - e. Cusack failed to install the new boiler properly;
 - f. Cusack painted over the smoke detector; and

- g. Cusack left debris covering the downstairs.
42. Cusack also damaged Ms. Mosunic's property as follows:
- a. Cusack removed from the premises and has never returned a Chevrolet Camaro automobile;
- b. Cusack removed and failed to replace the door between the garage and the basement;
- c. Cusack extracted heating oil, for which Ms. Mosunic had paid, from the new boiler; and
- d. Cusack damaged the garage door, which is no longer in working order.
43. As a result of Cusack's misrepresentations, deceptive conduct, and shoddy repair work, Ms. Mosunic has a mortgage loan that has been rendered even more unaffordable, a home she cannot live in, and a downstairs apartment that she cannot rent to a tenant.
44. Additionally, Ms. Mosunic cannot hire another home improvement contractor to repair the deficiencies left by Cusack due to her limited SSDI income.

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

45. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 44 as though fully set forth herein.
46. As and for her first affirmative defense, Defendant/Third-Party Plaintiff alleges that Plaintiff's complaint fails to state a cause of action upon which relief can be granted. Accordingly, the complaint must be dismissed pursuant to CPLR Rule 3211(a)(7).

SECOND AFFIRMATIVE DEFENSE AND FIRST COUNTERCLAIM
(Truth in Lending Act, 15 U.S.C. § 1601, et seq.)

(Failure to Provide Disclosures)

47. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 46 as though fully set forth herein.

48. Ms. Mosunic is a consumer within the meaning of the Truth in Lending Act (“TILA”). 15 U.S.C. § 1602(h).

49. At all relevant times, Emigrant, in the ordinary course of business: (a) has and does regularly extend, or offer to extend, consumer credit payable by written agreement in more than four installments or for which a finance charge is or may be required; and (b) has and does originate two or more mortgage loans in any twelve month period, on which a security interest in the borrowers’ homes is taken. Accordingly, Emigrant is a “creditor” within the meaning of TILA, 15 U.S.C. § 1602(f), and Regulation Z, 12 C.F.R. § 226, which implements TILA.

50. The credit extended to Ms. Mosunic by Emigrant is for personal, family, or household purposes. 15 U.S.C. § 1602(h).

51. Emigrant failed to deliver all of the “material disclosures” required by TILA to Ms. Mosunic in connection with the January 9, 2008 mortgage loan transaction.

52. In the course of this consumer credit transaction, Emigrant violated 15 U.S.C. § 1635(a) and Regulation Z § 226.23(b) by failing to deliver to Ms. Mosunic two copies of a Notice of Right to Cancel that should have:

- a. identified the transaction;
- b. clearly and conspicuously disclosed the security interest in the borrower’s principal dwelling;
- c. clearly and conspicuously disclosed the borrower’s right to rescind the transaction;

d. clearly and conspicuously disclosed how to exercise the right to rescind the transaction with a form for that purpose, designating the address of the creditor's place of business;

e. clearly and conspicuously disclosed the effects of rescission; and

f. clearly and conspicuously disclosed the date the rescission period expired.

53. The credit transaction was secured by real estate where the Plaintiff resided, and is a dwelling within the meaning of 15 U.S.C. § 1640(a)(2)(A)(iii).

54. As a result of the aforesaid violations of TILA and Regulation Z, Emigrant is liable to Ms. Mosunic for:

a. actual damages in an amount to be determined at trial;

b. statutory damages as provided by 15 U.S.C. § 1640; and

c. costs, disbursements and attorney's fees.

**FOURTH AFFIRMATIVE DEFENSE, THIRD COUNTERCLAIM, AND FIRST
THIRD-PARTY CLAIM**
(The Home Ownership and Equity Protection Act, 15 U.S.C. § 1639)

55. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 63 as though fully set forth herein.

56. The Home Ownership and Equity Protection Act ("HOEPA"), 15 U.S.C. § 1639, is an amendment to TILA and offers further protections for high rate mortgages, as defined by 15 U.S.C. § 1602(aa)(1)(B)(i) and Regulation Z § 226.32.

57. The above-mentioned consumer credit transaction was a high rate mortgage within the meaning of HOEPA, 15 U.S.C. § 1602(aa)(1)(B)(i), in that the annual percentage rate at consummation of the transaction exceeded by more than 8 percentage points the yield on

Treasury securities having comparable period of maturity on the 15th day of the month immediately preceding the month in which Emigrant received Ms. Mosunic's credit application.

58. The annual percentage rate at consummation of the transaction exceeded the applicable yield on Treasury securities by more than 8 percentage points because, given Ms. Mosunic's limited SSDI income of approximately \$738 per month at the time she entered the loan transaction and the monthly payment of more than \$2,200 that was due under the loan terms, Emigrant knew or should have known that Ms. Mosunic would default under the terms of the loan and the 18% default interest rate would be imposed. Thus, Ms. Mosunic alleges that the effective interest rate of the loan was the default interest rate of 18%, rather than the initial interest rate of 8.125% referred to in the loan documents.

59. Because the transaction described herein met the HOEPA definition of a high rate mortgage, the transaction was subject to additional disclosure requirements that must be provided three days in advance of the consummation of the transaction. 15 U.S.C. § 1639(b).

60. Emigrant did not furnish the required HOEPA disclosures to Ms. Mosunic three days prior to the closing of the loan transaction in violation of 15 U.S.C. § 1639(a) and (b), entitling Ms. Mosunic to actual and statutory damages under 15 U.S.C. § 1640(a) and extending her right to rescind the transaction until up to three years after its consummation.

61. The loan extended by Emigrant to Ms. Mosunic included abusive terms prohibited by HOEPA, including but not limited to incorporating a term that increases the interest rate to 18% in the event of default, in violation of 15 U.S.C. § 1639(d) and Regulation Z § 226.32(d)(4).

62. Emigrant's inclusion of the abusive term set forth in Paragraph 69 above violates 15 U.S.C. § 1639(d) and Regulation Z § 226.32(d)(4), entitling Ms. Mosunic to actual and

statutory damages under 15 U.S.C. § 1640(a) and extending her right to rescind the transaction until up to three years after its consummation.

THIRD AFFIRMATIVE DEFENSE AND SECOND COUNTERCLAIM
(Truth in Lending Act, 15 U.S.C. § 1601, et seq.)
(Failure to Honor Rescission Notice)

63. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 54 as though fully set forth herein.

64. This consumer credit transaction was subject to Ms. Mosunic's right of rescission. 15 U.S.C. § 1635 and Regulation Z § 226.23.

65. Emigrant failed to deliver all material disclosures required by the Truth in Lending Act and Regulation Z, including but not limited to a Notice of Right to Cancel as required under 15 U.S.C. § 1635(a) and Regulation Z § 226.23(b).

66. Ms. Mosunic has a continuing right to rescind the transaction until the third business day after receiving all material disclosures, up to three years after consummation of the transaction, pursuant to 15 U.S.C. § 1635(a) and Regulation Z § 226.23(a)(3).

67. On April 9, 2009, Ms. Mosunic rescinded the transaction, through counsel, by sending a notice of rescission to Richard F. Komosinski, Esq., Knuckles, Komosinski, Scutieri & Elliot, LLP, counsel for Emigrant.

68. More than 20 calendar days have passed since Emigrant's attorneys received Ms. Mosunic's notice of rescission.

69. Emigrant has failed to take any action necessary or appropriate to reflect the termination of any security interest created by the transaction, as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d)(2).

70. Emigrant has failed to return to Ms. Mosunic any money or property given by her to anyone, including Emigrant, as required by 15 U.S.C. § 1635(b) and Regulation Z § 226.23(d) (2).

71. As a result of these violations of the Truth in Lending Act and Regulation Z, Emigrant is liable to Ms. Mosunic for:

- a. rescission of the transaction pursuant to 15 U.S.C. § 1635(b);
- b. termination of any security interest in Ms. Mosunic’s property created by the transaction pursuant to 15 U.S.C. § 1635;
- c. return of any money or property given by Ms. Mosunic to anyone, including Emigrant, in connection with this transaction, under 15 U.S.C. § 1635(b);
- d. statutory damages for Emigrant’s failure to respond properly to Ms. Mosunic’s rescission notice pursuant to 15 U.S.C. § 1640(a)(2)(A).
- e. actual damages in an amount to be determined at trial pursuant to 15 U.S.C. § 1640; and
- f. costs, disbursements and attorney’s fees.

**FOURTH AFFIRMATIVE DEFENSE, THIRD COUNTERCLAIM, AND FIRST
THIRD-PARTY CLAIM
(New York General Business Law § 349 (“Deceptive Practices Act”))**

72. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 63 as though fully set forth herein.

73. Plaintiff/Counterclaim Defendant Emigrant and Third-Party Defendants HCI, Tom Delaney and Cusack “conducted a business” and/or “furnished a service” as those terms are defined in NY General Business Law § 349 (the “Deceptive Practices Act”).

74. Plaintiff/Counterclaim Defendant Emigrant and Third-Party Defendants HCI and Tom Delaney violated the Deceptive Practices Act by engaging in practices that were misleading in a material way, unfair, deceptive, and contrary to public policy and generally recognized standards of business, including but not limited to:

- a. extending credit to Ms. Mosunic and inducing Ms. Mosunic into a loan that was entirely unaffordable by any industry standards, thus putting her at clear and obvious risk of losing her long-time home;
- b. extending credit to Ms. Mosunic and inducing Ms. Mosunic into a loan based on her collateral, rather than on her ability to repay;
- c. exploiting Ms. Mosunic's physical disability (legal blindness), age, lack of education, and lack of understanding of financial matters to induce her into an unaffordable loan that has put her at clear and obvious risk of losing her long-time home;
- d. authorizing, paying, and receiving excessive broker's fees, both disclosed and undisclosed;
- e. engaging in high pressure and deceptive sales tactics to induce Ms. Mosunic to enter into a detrimental loan that has put her at clear and obvious risk of losing her home;
- f. failing to deliver to Ms. Mosunic two copies of a Notice of Right to Cancel, in violation of TILA; and
- g. failing to honor Ms. Mosunic's notice of rescission, in violation of TILA.

75. Third-Party Defendants Cusack violated the deceptive practices act by engaging in practices that were misleading in a material way, unfair, deceptive, and contrary to public policy and generally recognized standards of business, including but not limited to:

- a. charging Ms. Mosunic far in excess of the actual value of the home improvement work to be performed;
- b. inducing Ms. Mosunic into a costly mortgage loan and putting her at risk of losing her home for home improvement work that was never even begun, performed extremely shoddily, and that, in fact, damaged her home.
- c. misrepresenting to Ms. Mosunic that Cusack would perform work that it never in fact intended to perform; and
- d. violating NY General Business Law § 771-a by receiving payment in connection with the financing of a home improvement contract without having obtained an agreement in writing from Ms. Mosunic.

76. Ms. Mosunic suffered serious injury as the proximate result of the deceptive practices committed by Emigrant and Third-Party Defendants.

77. Emigrant and Third-Party Defendants' business practices have had and may continue to have a broad impact on consumers throughout New York State.

78. As a result of the aforesaid violations of the Deceptive Practices Act, this Court should enjoin Emigrant from enforcing the mortgage loan pursuant to NY General Business Law § 349(h).

79. In addition, Emigrant and Third-Party Defendants are liable to Ms. Mosunic for

- a. actual damages; and
- b. costs, disbursements, and attorney's fees.

**FIFTH AFFIRMATIVE DEFENSE, FOURTH COUNTERCLAIM AND SECOND
THIRD PARTY CLAIM
(Fraud)**

80. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 71 as though fully set forth herein.

81. Emigrant, HCI, Tom Delaney, and Cusack fraudulently, intentionally, and knowingly induced Ms. Mosunic to enter into the subject mortgage loan transaction and/or home improvement transaction by misrepresenting and/or failing to provide material information described in the above paragraphs.

82. Ms. Mosunic suffered serious injury as the proximate result of her reliance on Emigrant and Third-Party Defendants' intentional misrepresentations and failures to disclose.

83. As a result of the aforesaid fraud, the mortgage loan transaction should be declared void, the security interest created under the transaction should be terminated and all monies paid to Cusack for home improvement work should be returned to Ms. Mosunic.

84. In addition, Emigrant and Third-Party Defendants are liable to Ms. Mosunic for:

- a. actual damages; and
- b. punitive damages.

**SIXTH AFFIRMATIVE DEFENSE, FIFTH COUNTERCLAIM, AND THIRD
THIRD-PARTY CLAIM
(Civil Conspiracy to Commit Fraud)**

85. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 76 as though fully set forth herein.

86. Plaintiff/Counterclaim Defendant Emigrant and Third-Party Defendants HCI, Tom Delaney and Cusack knowingly entered into an agreement to fraudulently induce Ms. Mosunic to enter into the subject mortgage loan and home improvement transactions.

87. Plaintiff/Counterclaim Defendant Emigrant and Third-Party Defendants HCI, Tom Delaney and Cusack intentionally, knowingly, and willfully participated in this scheme by

committing overt acts and making misrepresentations and/or failing to provide material information, in furtherance of the agreement, including but not limited to those representations set forth in the above paragraphs.

88. Through their unlawful conduct constituting a civil conspiracy to defraud a legally blind, vulnerable, low-income, uneducated and elderly homeowner, Plaintiff Emigrant and Third-Party Defendants acted in a malicious, willful, wanton, and oppressive fashion, in reckless disregard of Ms. Mosunic's rights.

89. Ms. Mosunic suffered serious injury as the proximate result of her reliance on the material misrepresentations and omissions of Emigrant and Third-Party Defendants.

90. As a result of the aforesaid conspiracy to commit fraud, the mortgage loan transaction should be declared void, the security interest created under the transaction should be terminated, and all monies paid to Cusack for home improvement work should be returned to Ms. Mosunic.

91. In addition, Emigrant, HCI, Tom Delaney and Cusack are liable to Ms. Mosunic for:

- a. actual damages; and
- b. punitive damages.

**SEVENTH AFFIRMATIVE DEFENSE, SIXTH COUNTERCLAIM, AND
FOURTH THIRD-PARTY CLAIM
(Unconscionability)**

92. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 83 as though fully set forth herein.

93. Prior to and during the time of the loan transaction, there existed a disparity in bargaining power between Ms. Mosunic, on the one hand, and Emigrant, HCI, and Tom Delaney

on the other. Ms. Mosunic is an unsophisticated, *legally blind*, low-income consumer with very little education. Plaintiff/Counterclaim Defendant Emigrant and Third-Party Defendants HCI and Tom Delaney are sophisticated entities with experience in the mortgage banking industry, who sought to profit directly from this disparity in bargaining power.

94. Emigrant, HCI and Tom Delaney intentionally misled Ms. Mosunic into signing an unaffordable mortgage loan from which she received little or no tangible net benefit, and which has put her in jeopardy of losing her home.

95. Emigrant, HCI and Tom Delaney intentionally did not disclose to Ms. Mosunic material information regarding the nature and detail of the mortgage loan transaction, thereby depriving her of information that might have reduced the disparity in bargaining power between the parties.

96. Said unconscionability renders void and unenforceable the mortgage loan transaction entered into between Emigrant and Ms. Mosunic.

FIFTH THIRD-PARTY CLAIM
(Home Improvement Contractor Act)

97. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 88 as though fully set forth herein.

98. Cusack Contractors and John Cusack are home-improvement contractors as defined in NY General Business Law § 770, the New York Home Improvement Contractor Act.

99. Cusack fraudulently induced Ms. Mosunic to enter into a home-improvement transaction by falsely representing the cost and type of work to be performed, in violation of NY General Business Law § 772.

100. Cusack also received payment in connection with the financing of a home improvement contract without having obtained an agreement in writing from Ms. Mosunic, in violation of NY General Business Law § 771-a.

101. Based on the foregoing, Cusack Contractors and John Cusack are liable to Ms. Mosunic for:

- a. actual damages;
- b. statutory damages; and
- c. costs, disbursements, and attorney's fees.

SIXTH THIRD-PARTY CLAIM
(Breach of Contract)

102. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 93 as though fully set forth herein.

103. Cusack entered into an oral contract with Ms. Mosunic whereby Ms. Mosunic agreed to pay approximately \$79,000 to Cusack and, in consideration thereof, Cusack agreed to make certain repairs to Ms. Mosunic's home.

104. Cusack failed to perform the conditions of the contract although Ms. Mosunic has demanded performance.

105. As a consequence of Cusack's failure to perform the conditions of the contract, Ms. Mosunic has sustained substantial damages, including but not limited to monies paid to

Cusack for repair work that was not performed, physical damage to Ms. Mosunic's home, and loss of income.

106. As a result of Cusack's breach of contract, Cusack Contractors and John Cusack are liable to Ms. Mosunic for:

- a. actual damages; and
- b. costs, disbursements, and attorney's fees.

SEVENTH THIRD-PARTY CLAIM
(Unjust Enrichment, in the Alternative)

107. Ms. Mosunic reasserts and re-alleges the allegations contained in paragraphs 1 through 98 as though fully set forth herein.

108. In the alternative to the allegations contained in paragraphs 94 through 98, because of the wrongful activities described in paragraphs 34 through 93, including collecting approximately \$79,000 for home improvement work that was not performed and/or performed extremely shoddily, Cusack earned illegal profits and has been unjustly enriched at the expense of Ms. Mosunic.

109. As a result of Cusack's retention of fees not earned belonging to Ms. Mosunic, Cusack must account for such unjust enrichment and disgorge all unlawfully held monies and profits.

110. By reason of the foregoing, Ms. Mosunic has suffered substantial damages, including but not limited to monies paid to Cusack for repair work that was not performed and/or performed extremely shoddily, physical damage to Ms. Mosunic's home, and loss of income.

PRAYER FOR RELIEF

WHEREFORE, in light of the foregoing, Defendant/Third-Party Plaintiff Margaret F. Mosunic respectfully requests that this Court:

- a. rescind the underlying mortgage loan transaction and terminate any security interest in Defendant/Third-Party Plaintiff's property created pursuant to the transaction and declare that Ms. Mosunic is not liable for any finance charges or other charges imposed by Emigrant;
- b. declare that the security interest in Ms. Mosunic's property created under the transaction is void and issue an order requiring Emigrant to release such security interest;
- c. issue an order requiring the return of any money or property given by Ms. Mosunic to Emigrant, in connection with the transaction;
- d. issue an order that, because Emigrant failed to act in response to Ms. Mosunic's notice of rescission, Ms. Mosunic has no duty to tender the loan proceeds to Emigrant, but in the alternative, if tender is required, a determination of the amount of the tender obligation in light of all of Ms. Mosunic's claims, and an order requiring Emigrant to accept tender on reasonable terms and over a reasonable period of time;
- e. enjoin enforcement of the mortgage loan and declare the mortgage loan unenforceable;
- f. award actual damages in an amount to be determined at trial;
- g. award statutory damages;
- h. award punitive damages in an amount to be determined at trial;
- i. award attorney's fees;
- j. award reasonable costs of this action;

- k. enjoin Plaintiff and Third-Party Defendants from engaging in deceptive acts and practices that affect consumers in New York State under NY General Business Law § 349(h);
- l. void any agreements or transactions entered into with Cusack for home improvements to the subject property and return any money paid to Cusack in connection with said agreements or transactions to Ms. Mosunic; and
- m. award such other and further relief as this Court deems just and proper.

DATED: August 13, 2009
New York, NY

Respectfully submitted,

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