

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22  
Justice

-----	Index No. 22064/08
FLOYD G. PATTERSON and NEVILLE G. PATTERSON,	Motion
Plaintiffs,	Date November 18, 2008
-against-	Motion
THE MORTGAGE ZONE, et al.,	Cal. No. 30
Defendants.	Motion
-----	Sequence No. 1

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Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiffs Floyd G. Patterson and Neville G. Patterson commence this action seeking to recover damages and to void a mortgage because of an alleged fraud perpetrated by defendants Mortgage Zone and First Franklin Financial Corp. ("First Franklin") and because of the alleged negligence of First Franklin. Plaintiffs allege in the verified complaint that defendants fraudulently induced plaintiff to enter into a mortgage transaction through misrepresentations of plaintiff's income, failed to disclose actual information regarding the loan, and failed to exercise due diligence to ascertain plaintiff's actual income. Additionally, the complaint further alleges that a misrepresentation was made on Neville G. Patterson's loan application when the loan application stated his income as being \$9,700 per month, which plaintiffs contend is approximately four times his actual monthly income. Plaintiffs further allege that defendants failed to disclose that the mortgage would be adjustable that defendant Mortgage Zone was an agent of defendant First Franklin, and that First Franklin was complicit in the

alleged scheme to defraud plaintiffs. Also, plaintiffs claim that First Franklin did not exercise due diligence to ascertain plaintiff Floyd G. Patterson's actual income.

Defendant First Franklin now moves pursuant to CPLR 3211(a)(1) and (a)(7) for an order dismissing the complaint. First Franklin contends that the indisputable documentary evidence in the form of the Note, the Mortgage and other related documents executed by the plaintiff is grounds for dismissal. First Franklin additionally argues that plaintiffs have failed to state a cause of action for either negligence or fraud. Defendant First Franklin further argues that it owed no duty to plaintiffs to verify the financial information that Floyd G. Patterson supplied himself on the loan application. Also, First Franklin argues that allegations of fraud have not been sufficiently pled against it, and no fraud can be imputed upon it as an agent because as a matter of New York Law Mortgage Zone is not an agent of First Franklin.

#### **I. CPLR 3211(a)(1)**

That branch of defendant First Franklin's motion to dismiss plaintiffs' cause of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence \*\*\*." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim \*\*\*." (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248.)

To the extent the motion is based upon all of plaintiffs' causes of action which are grounded in fraud, and negligence, this documentary evidence is insufficient to dispose of these causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the information in the Mortgage and Note is insufficient to resolve the issue of whether or not there was the presence of fraud in the underlying Mortgage application process, or whether First Franklin was negligent in performing an alleged duty to

verify plaintiff's income.

## II. CPLR 3211(a)(7)

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendant First Franklin for failure to state a cause of action is granted for the following reasons:

It is beyond cavil that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference \*\*\*." (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see *Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see *Rovello v Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 *Washington Ave. Assocs. v Rose & Kiernan*, *supra*, 770-771).

It is well settled that "[t]o establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury" (*Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518 [2d Dept 2006]). In addition, a cause of action based upon fraud must be pleaded in detail (see CPLR 3016). Also, a plaintiff's cause of action sounding in fraud must be alleged with sufficient particularity to comply with CPLR 3016(b) (see

*Glaser v Glaser*, 127 AD2d 741 [2d Dept 1987]). Further, to establish a prima facie case of actual fraud, a plaintiff must present proof that (1) the defendant made material representations that were false, (2) the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) the plaintiff justifiably relied on the defendant's representations, and (4) the plaintiff was injured as a result of the defendant's representations (see *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]).

Applying these principles to the instant action, plaintiff undisputedly signed a loan agreement in which he stated that his income was \$9,700 per month. Plaintiff now contends that First Franklin acted negligently in failing to ascertain the falsity of the statement provided by the plaintiff himself. It cannot be said that First Franklin "can be liable for the fraud which was, at the very least, made possible by the actions of plaintiff[]." (*Stuart v Tomasino*, 148 AD2d 370 [1st Dept 1989]). Furthermore, "under the circumstances herein [First Franklin] owed no duty to plaintiffs..." (*Stuart v Tomasino*, 148 AD2d 370 [1st Dept 1989]). Without establishing a duty on behalf of defendant First Franklin, plaintiffs' negligence claim, as a matter of law, must fail.

With respect to plaintiffs' fraud claim, to the extent that plaintiffs allege that First Franklin "aided and abetted fraud" or was the agent of defendant Mortgage Zone, plaintiffs have failed to allege the necessary factual allegations that First Franklin was aware of a fraud and intended to aid in the commission of the fraud (see *Agostini v Sobol*, 304 AD2d 395 [1st Dept 2003]). Plaintiffs have failed to plead with detail and sufficient particularity a cause of action for fraud (see *Glaser v Glaser*, 127 AD2d 741 [2d Dept 1987]; *Gill v Caribbean Home Remodeling Co.*, 73 AD2d 609 [2d Dept 1979]; CPLR 3016[b]). Plaintiffs have not plead with respect to defendant First Franklin that the defendant made material representations that were false; that it knew the representations were false and made them with the intent to deceive the plaintiff; and that the plaintiffs justifiably relied on First Franklin's representations (see *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2d Dept 2001]). As such plaintiffs have failed to allege a proper claim for fraud as against defendant First Franklin.

Further, plaintiffs have not alleged sufficient facts to demonstrate the possibility of a principal-agent relationship

between defendants Mortgage Zone and First Franklin (see *Maurillo v Park Slope U-Haul*, 194 AD2d 142 [2d Dept 1993]).

Accordingly, as plaintiffs have failed to establish a prima facie case for negligence, and have failed to plead their fraud claim with sufficient particularity as required by the CPLR 3016, plaintiffs' claims are dismissed and defendant's motion to dismiss the complaint of plaintiffs' against defendant First Franklin Financial Corp. is granted.

This constitutes the decision and order of the Court.

Dated: February 27, 2009

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**Howard G. Lane, J.S.C.**