

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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**BEVERLY MORGAN, Individually, and KETURAH
HAMILTON, as AGENT OF BEVERLY MORGAN,
Plaintiff,**

**Index No.: 16977/07
Motion Date: 5/14/08
Motion Cal. No.: 42**

-against-

**H&Z ABSTRACT, INC. DONNA MORRIS, LEONI
NEUFVILLE, NEUFVILLE MORTGAGE, DONALD
DIMICILE PRECISION RESIDENTIAL APPRAISAL,
JULIUS SIMPSON, DENRICK COOPER,
BILL TSOUMPELIS, ET. AL.,**

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendant Denrick Cooper, for an order pursuant to CPLR 3211(a) (1) & (7), CPLR 3013, and 3016(b); and cross-motion by Plaintiffs.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Cross-Motion-Exhibits...	5-7
Reply Affirmation-Exhibits.....	8- 9

Upon the foregoing papers it is ordered that the motion by defendant Denrick Cooper, for an order pursuant to CPLR 3211(a) (1) & (7), CPLR 3013, and 3016(b) and cross-motion by Plaintiffs are decided as follows:

According to the complaint, on or about October 19, 2005, Plaintiff Beverly Morgan entered into a contract to purchase the real property located at 137-19 253rd Street, Rosedale Queens. Apparently, Defendants conspired and acted in a way that resulted in a sale of property to Plaintiff for property other than that which Plaintiff agreed to purchase. Plaintiffs brought this action setting fourth five causes of action.

The first cause of action sets out that Plaintiff Barbara Morgan employed Julius Simpson, an attorney, to handle this transaction and that the seller's attorney was defendant Denrick Cooper. Plaintiff made a down payment in the amount of \$18,000.00 for the property and this was made payable to Denrick Cooper. The second cause of action alleges that

Plaintiff hired Neufville Mortgage Company to process the loan and it employed Precision Residential Appraise to conduct a report. These two prevented the taking of photographs of the interior of the properties and this hid pertinent information from the Mortgage company regarding the need for work on the property and this was an act of bad faith. The third cause of action alleges that H&Z Inc., failed to conduct a proper title search of the property and this resulted in the Deeds not being recorded in Plaintiff's name. There is also a statement that "defendant does not legally own the property known as 137-15 253rd Street, Rosedale, New York, and that "Beverly Morgan, honestly and truthfully believed that she had acquired the properties formerly known as 142-03 Hook Creek Boulevard, Rosedale, New York; and now described as 137-19 253rd Street, Rosedale, New York, lot 8 of block 13627.

The fourth cause of action states, in relevant part, that defendant Donna Morris did attempt to fraudulently transfer, title to a property she did not lawfully owned (sic), to wit 137-15 253rd Street Rosedale, New York. That on that date the property was lawfully owned by Gloria U. Roland, and Donna Morris and her conspirators perpetrated a fraud against Plaintiff Beverly Morgan, causing the said Beverly Morgan to purchase a property, to which she Donna Morris, had no legal or equitable interest. That the defendant Beverly Morgan was misled, into believing, that she was signing documents pertinent to the purchase of 143-02 Hook Creek Boulevard, when in fact she was signing documents to purchase 137-15 253rd, Street, Rosedale, New York. The Preparation of the documents were carefully orchestrated, and deliberately planned by, . . . the seller Donna Morris, seller's attorney, Denrick Cooper and the bank's closings attorney, Bill Tsoupelis, to fraudulently induce the defendant Beverly Morgan into purchasing a property they all knew was not owned by the seller. . . That plaintiff attorney and the bank attorney negligently failed to review the title, and such failure was the sole, legal and proximate cause for the bank funding a loan against a property, which should with due diligence, have been denied. That Plaintiff Beverly Morgan has lost the benefit of her bargain, in that she has not been able to occupy or rent the properties, to realize at least an income to pay her mortgage. As a result of Defendant's action, Plaintiff was forced to commence this law suit against the Defendants and Plaintiff is entitled to an award of punitive damages and damages based on intentional infliction of emotional distress. Plaintiff also seeks an order transferring the Deeds to the two subject properties to her and that "all interest occurred on the loan, as a result of the defendants' actions are borne exclusively by said defendants. Plaintiff then apparently sums up the fourth cause of action with paragraph 41, which states, "That the entire transaction was a fraud from the outset; designed to fraudulent induce the defendant, Beverly Morgan into purchasing the properties, knowing full

well that the properties were not owned by the seller, unfinished, or could not be sold without the committal of fraud in the preparation of the loan documents appraisal report and the title report.”

The Fifth Cause of Action claims Defendant failed to act with due diligence in obtaining and reviewing the title and survey report. It then discusses the breach of duty and negligent representation by specific Defendants, none being Denrick Cooper. However, under the Fraud in the Inducement heading, Denrick Cooper is apparently referred to in the allegation that, “seller’s attorney knowingly prepared a contract of sale in the name of plaintiff, Beverly Morgan, . . . a property he knows was not owned at the time of preparation or would be owned any time in the future by the seller. The seller’s attorney, knowingly and willfully prepared a deed and other transfer documents, in the name of plaintiff Beverly Morgan, and for a property in which he knew the seller had no legal or equitable interest. . . . By reason of the foregoing, plaintiffs seek specific performance from the defendants conveying title, possession and all equitable rights to the properties currently located on lot 8 of block 13627, at 137-19 253 Street, Rosedale, New York.

The complaint concludes with “Plaintiff demands unspecified damages, against the defendants, requests judgment against (I) Defendant Donna Morris for specific performance to convey title and possession of the premises to the Plaintiff, (ii) granting Plaintiffs against the Defendants jointly and severally, the costs and disbursements of this action, including reasonable attorney’s fees. . . .”

Defendant Denrick Cooper, now moves for an order pursuant to CPLR 3211(a) (1) & (7), CPLR 3013, and 3016(b). He claims that the complaint fails to set forth a viable claim against him since it is unclear what the complaint alleges, and that he was not Plaintiff’s attorney and therefore owed Plaintiff no duty. Moreover, defendant Cooper claims the complaint fails to properly allege claims for fraud or fraud in the inducement. Finally, he claims there is documentary evidence that bars the complaint as against defendant Cooper. Plaintiff opposes this motion by way of an argument not suited for the instant motion, but rather one appropriate for a summary judgment motion.

The branch of the motion seeking dismissal of the complaint as against Defendant Cooper based upon its failure to plead any cognizable cause of action, pursuant to CPLR 3013 is granted, to the following extent:

CPLR 3013 states the following:

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or

series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

The Court agrees with defendant Cooper that the complaint lacks clarity and organization and in many instances identifies the Plaintiff as the defendant. However, a careful reading of the complaint would enable defendant Cooper to ascertain with sufficient particularity the claims against him and enable him to offer a defense. In this regard, the complaint alleges that Cooper participated in a fraud conspiracy regarding the sale of the subject premises to Plaintiff in that he prepared the contract of sale, knowing that his client, the Seller, Donna Morris, did not own the property. However, it is clear that the first cause of action fails to set forth any cognizable claim against defendant Cooper, since it is merely a factual recitation and does not set forth any cause of action. CPLR 3013.

The branch of the motion to dismiss the many allegations in the complaint that involve a fraud committed by defendant Cooper, pursuant to CPLR 3211 (a) (7) is granted. "It is well-settled 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; 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.) 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; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.)

Initially, Plaintiffs' causes of action asserted against Defendants purport to allege a conspiracy to commit the underlying torts but fail to assert any actions by said defendants to commit those torts. It is well settled that a mere conspiracy to commit a tort is never of itself

a cause of action (Alexander & Alexander, Inc. v Fritzen , 68 NY2d 968 [1986]; Dobies v Brefka, 263 AD2d 721 [1999]; Rivera v Greenberg, 243 AD2d 697 [1997]; Pravda v County of Saratoga, 224 AD2d 764 [1996]; Fisher v Bristol Myers, 224 AD2d 657 [1996]; Chiaramonte v Boxer, 122 AD2d 13 [1986]; Burns Jackson Miller Summit & Spitzer v Lindner, 88 AD2d 50 [1982]).

Regarding defendant Cooper, the complaint fails to allege the essential elements of a fraud cause of action and does not set forth in detail the circumstances constituting the alleged fraud. In order to state a cause of action for fraud, a plaintiff must allege a misrepresentation or material omission of fact which was false and known to be false by the defendant and made for the purpose of inducing the plaintiff to rely upon it, justifiable reliance of the plaintiff on the misrepresentation or material omission, and injury. Lama Holding Co. v Smith Barney, 88 N.Y.2d 413 (1996.)

Here, Plaintiffs have failed to allege defendant Cooper acted in such fraudulent manner. Plaintiffs's claims were not pleaded with the particularity mandated by CPLR 3016(b). Although Plaintiffs allege that Cooper prepared the sale contract knowing his client did not own the property, they fail to specify how this fact deceived them and deprived them of the benefit of the contract. *See*, Brown v Wolf Group, 23 AD3d 239 (1st Dept 2005.) This is especially so since it would have been very easy for Plaintiffs to either receive proof of ownership of the property or to have found out such information on their own. It must be emphasized that Cooper was not Plaintiffs' attorney and was thus under no obligation or duty to perform for her. Plaintiffs' failure to have obtained this information through her own attorney or her own acts renders these claims of reliance upon the fraudulent representation unreasonable. *See*, Valassis Communs. Inc. v Weimer, 304 AD2d 448 (1st Dept 2003.) In addition, no cause of action to recover damages for fraud arises when the only fraud alleged relates to a breach of contract. S.S.I.G. Realty v. Bologna Holding Corp., 213 A.D.2d 617 (2d Dept 1995.) It is clear that Plaintiffs have alleged no more than a breach of contract action. Plaintiffs' allegations are in essence that Defendants did not convey the property pursuant to the contract or failed to transfer it as promised, which is insufficient to state a claim for fraud. Bencivenga & Co. v Phye, 210 A.D.2d 22 (1st Dept 1994.) Thus, the Plaintiffs have failed to set forth a meritorious fraud claim as against defendant Cooper. Accordingly, the branch of the motion to dismiss any fraud claim against Cooper based upon CPLR 3211 (a) (7) is granted and such causes of actions are dismissed.

Similarly, defendant Cooper's request to dismiss any causes of action for fraudulent

inducement to enter into the sale contract, is granted. In order to sustain a cause of action to recover damages for fraud, a party must prove (1) that the defendant made a representation, (2) as to a material fact, (3) which is false, (4) and known to be false by the defendant, (5) that the representation was made for the purpose of inducing the other party to rely upon it, (6) that the other party rightfully did so rely, (7) in ignorance of its falsity, (8) to his injury. Plaintiff has failed to allege sufficient facts to support such claim against defendant Cooper. Accordingly, any causes of action against Cooper for fraudulent inducement are dismissed.

To state a cause of action to recover damages for the intentional infliction of emotional distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so "as to be regarded as atrocious and intolerable in a civilized society" (Freihofer v Hearst Corp., 65 NY2d 135, 143 [1985]; see Howell v New York Post Co., 81 NY2d 115 [1993]). Herein, the complaint fails to allege extreme or outrageous conduct necessary to support such a claim (see Leonard v Reinhardt, 20 AD3d 510 [2005]; Poliah v Westchester Country Club, 14 AD3d 601 [2004]; Doe v Archbishop Stepinac High School, 286 AD2d 478 [2001]; Leibowitz v Bank of Leumi, 152 AD2d 169 [1989]). The fourth cause of action, for intentional infliction of emotional distress, which was based on allegations that Defendant falsely prepared a contract for the Seller, alleges acts which do not meet the threshold of outrageousness needed to support such a claim (see Estate of Scheuer v City of New York, 10 AD3d 272 [2004]; Graupner v Roth, 293 AD2d 408 [2002]; Walentas v Johns, 257 AD2d 352).

To the extent that the complaint purports to set forth a separate cause of action for punitive damages, it is dismissed as against defendant Cooper. A demand for punitive damages does not amount to a separate cause of action for pleading purposes. Rather, punitive damages constitute an element of the single tort claim for damages. See, Fiesel v Nanuet Properties, 125 AD2d 292 (2d Dept. 1986.)

To the extent that the complaint purports to set forth a claim that Cooper was negligent toward Plaintiffs, such is dismissed. Cooper was the attorney for the Seller, defendant Morris and had no attorney client relationship with Plaintiffs. Without such relationship, Cooper owed Plaintiffs no duty and without a duty of care, there can be no breach and no liability for negligence. See, Shapiro v McNeill, 92 N.Y.2d 91 (1998); See also, Engelhart v County of Orange, 16 AD3d 369 (2d Dept 2005.)

Based upon the above, the branch of the motion to dismiss the complaint as against defendant Cooper, pursuant to CPLR 3211 (a) (7) is granted in its entirety and the complaint

is dismissed as against defendant Cooper.

Consequently, the Court has no need to address the branch of defendant Cooper's motion to dismiss any claims in complaint regarding the Deed being for the wrong property, pursuant to CPLR 3211 (a) (1). However were it to address this branch of the motion, it would be granted. CPLR 3211 (a) (1) provides that "(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.) Defendant has submitted documentary evidence that shows any initial error in the recording of the property on the Deed has been corrected. Plaintiffs have not submitted any evidence that suggests the Deed has not been corrected to indicate the correct Block number. *See, Prudential Wykagyl/Rittenberg Realty v. Calabria-Maher*, 1 A.D.3d 422 (2d Dept 2003.)

The cross-motion by Plaintiffs is denied based upon the dismissal of the complaint as set forth above. Moreover, the cross-motion was not filed in accordance with Court rules and there is no proof of proper service upon defendant Cooper.

Dated: May 19, 2008

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ORIN R. KITZES, J.S.C.