

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. ORIN R. KITZES**  
**Justice**

**PART 17**

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**DAVID A. ARGUINZONI,**  
**Plaintiff,**

**-against-**

**Index No. 9617/07**  
**Motion Date: 9/26/07**  
**Motion Cal. No. 6,7, & 8**

**OCI MORTGAGE CORP., CULLEN**  
**and DYKMAN, LLP and CARMELLE**  
**ARGUIZONI,**

**Defendants.**

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The following papers numbered 1 to 15 read on this application and motion by defendants Carmelle Arguizoni and Cullen & Dykman for an order pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action and application by plaintiff for an award of damages based upon his claims in the complaint. For purposes of disposition, the motions under calendar numbers 6, 7, & 8 have been consolidated.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5-6
Affidavit in Opposition.....	7
Reply Affidavit.....	8-9
Notice of Motion-Affidavit-Exhibits.....	10-12
Notice of Motion-Affidavit-Exhibits.....	13-15

Upon the foregoing papers, it is ordered that the application and motion by defendants Carmelle Arguizoni and Cullen & Dykman for an order pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action is granted and the motion by plaintiff for an award of damages is denied, for the following reasons:

This action stems from a foreclosure action based upon a Fixed Rate Mortgage Note dated June 12, 1987 executed by the Arguizonis in favor of GreenPoint Savings Bank and on the action GreenPoint sought to foreclose on a Mortgage on the real property located at 91-07 215<sup>th</sup> Street, Queens Village, New York. Plaintiff alleges that his name should not have appeared on the foreclosure action since he was improperly induced to convey his interest in the Premises to Carmelle Arguizoni. Plaintiff does not allege that he was released from his obligations on the Note or that the foreclosure action was improper. Based upon being improperly named on the foreclosure action, plaintiff alleges to have suffered damage to his

credit rating that has caused him financial difficulties. He claims that defendants' defamation of him, abuse of process and otherwise tortious acts caused these damages. Defendants Carmelle Arguizoni and Cullen & Dykman now move to dismiss the complaint and plaintiff has opposed their request.

"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.)

Regarding the first cause of action, plaintiff claims an abuse of process based upon the judgment of foreclosure in the underlying action was vacated for failure to properly serve him. Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (Board of Educ. v Farmingdale Classroom Teachers Assn., 38 NY2d 397 [1975]). Herein, plaintiff has not alleged the gist of the action for abuse of process, which is the improper use of process after it is issued. Plaintiff does not contend that the summons was improperly used after it was issued but only that defendant acted improperly in bringing the action. Bringing an action that is subsequently dismissed by a court does not give rise to a cause of action for abuse of process (Curiano v Suozzi, 63 NY2d 113 [1984]; Syllman v Nissan, 18 AD3d 221 [2005]). Accordingly, the first cause of action is dismissed.

Plaintiff's second cause of action alleges that Carmelle Arguizoni defrauded him of

his interest in the subject property. 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, plaintiff has failed to allege that Carmelle Arguinzoni acted in such fraudulent manner. Moreover, plaintiff's claim was not pleaded with the particularity mandated by CPLR 3016(b).

To the extent that plaintiff has pleaded a defamation action, the complaint fails to state a cause of action for defamation. CPLR 3016(a) requires that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." In the instant case, the complaint merely alleges the plaintiff was improperly named in a foreclosure action. The court finds that these allegations fail to set forth the specific words that defendants allegedly used to defame plaintiff. Furthermore, "[w]hether particular words are defamatory presents a legal question to be resolved by the court in the first instance..." (Aronson v Wiersma, 65 NY2d 592, 593; Golub v Enquirer/Star Group, Inc., 89 NY2d 1074; Tracy v Newsday, Inc., 5 NY2d 134; Brach v Congregation Yetev Lev D'Satmar, Inc., 265 AD2d 360.) "The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction . . ." (Aronson v Wiersma, *supra*, 593; *see*, Brach v Congregation Yetev Lev D'Satmar, Inc., *supra*.) "Generally, a written statement may be defamatory 'if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community . . ." (Golub v Enquirer/Star Group, Inc., *supra*, 1076, quoting Mencher v Chesley, 297 NY 94, 100.) In the case at bar, the Court finds that the alleged defamatory words cannot be reasonably construed as being capable of causing plaintiff harm. Varela v Investors Insurance Holding Corp. 185 AD2d 309 (2d Dept 1992) Accordingly, the court finds as a matter of law that the alleged defamatory statements are not actionable.

Finally, to the extent that plaintiff has pleaded a prima facie tort, the complaint fails to state a cause of action for a prima facie tort. The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal (*see*, DeVecchio v Nelson, 300 AD2d 277; EECP Ctrs. of Am., Inc. v Vasomedical, Inc.,

265 AD2d 372). Here, the lack of any allegation of disinterested malevolence, necessary to support a cause of action for prima facie tort, warrants the dismissal of such cause of action (*see, EECF Ctrs. of Am., Inc. v Vasomedical, Inc., supra*).

Based on the above, the motion and application by defendants Carmelle Arguizoni and Cullen & Dykman to dismiss the complaint is granted and the complaint is dismissed in its entirety and plaintiff's motion for an award of damages based on the complaint is denied.

**Dated: September 27, 2007**

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**ORIN R. KITZES, J.S.C.**