

Raber v RJ Contr. Plus Inc.

2008 NY Slip Op 32633(U)

September 18, 2008

Supreme Court, Suffolk County

Docket Number: 0018351/2007

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Peter H. Mayer

ELIZABETH A. RABER

Plaintiff(s),

-against-

RJ CONTRACTING PLUS INC., RICHARD ALDEN JR., individually, AFFIRMATIVE LAND SERVICES, INC., LITTLE PRINCESS REALTY MELODY P. BETT and EMANUEL J. SCARPINATO

Defendant(s).

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ORIG. RETURN DATE: August 31, 2007
FINAL RETURN DATE: October 30, 2007
MTN. SEQ. #: 001-MG
MTN . SEQ. # 002-MG

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DEFT'S ATTORNEY for Emanuel I. Scarpinato :
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UNIONDALE, NY 11553

Upon the following papers numbered 1 to 22 read on this motion and cross motion to dismiss: Notice of Motion and supporting papers 1 - 2; Affirmation in Opposition and supporting papers 3 - 11; Reply Affirmation and supporting papers 12 - 17; Notice of Cross Motion 18 - 20; Affirmation in Opposition and supporting papers 21 - 22; it is,

ORDERED that this motion (001) by the defendant Affirmative Land Services, Inc. for an order dismissing the complaint as to it, pursuant to CPLR 3211(a)(7), is granted; and it is further

ORDERED that this cross motion (002) by the defendant Emanuel J. Scarpinato for an order dismissing the complaint as to it, pursuant to CPLR 3211(a)(7), is granted; and it is further

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ORDERED that the defendants Affirmative Land Services, Inc. and Emanuel J. Scarpinato are hereby severed from the caption and this action shall continue only as against the remaining named defendants; and it is further

ORDERED that the second cause of action for conversion is dismissed as to all defendants; and it is further

ORDERED that the moving and cross moving defendants are to serve a copy of this Order and Decision upon counsel for all parties in accordance with CPLR 2103(b)(1), (2) or (3) within 30 days of the date of entry with the Clerk of the Court and thereafter file the proofs of service with the Clerk of the Court; and it is further

ORDERED that the remaining parties are directed to appear for the preliminary conference already scheduled for September 19, 2008 at the Supreme Court, DCM Part, Room A362, One Court Street, Riverhead, New York at 10:00 a.m.

This action arises from the purported sale of real estate owned by the plaintiff Elizabeth A. Raber (hereinafter Raber) and another party (not a party to this action) as tenants-in-common to the defendant RJ Contracting Plus, Inc. (hereinafter RJC+). It is further alleged by Raber that RJC+ is "owned" by the defendant Richard Alden, Jr. (hereinafter Alden).

The other defendants are: Melody P. Bett (hereinafter the notary) - the individual who notarized the signatures of the sellers; Little Princess Realty - the employer of the notary; and, Emanuel J. Scarpinato (hereinafter Scarpinato) - the holder of the mortgage on the property.

The deed evidencing the underlying transaction contains the sellers' notarized signatures with a date of signing as June 15, 2006. The actual closing was held 6 days later on June 21, 2006 with the sellers not being present. At the closing, a representative of the defendant Affirmative Land Services, Inc. (hereinafter ALS) was present. ALS was allegedly retained by Alden and RJC+ to insure the mortgage on the sale of the subject property with the mortgage being held by Scarpinato. ALS, in addition to insuring the mortgage, filed the deed in question.

Raber now comes forward and claims that she never signed the deed and that the signature which is purportedly hers is a forgery. As a result she brings this action claiming fraudulent conveyance (first cause of action), conversion (second cause of action), fraud and conspiracy (third cause of action) and negligence (fourth cause of action).

The defendant ALS and Scarpinato move and cross-move, respectively, to dismiss the complaint as to them pursuant to CPLR 3211 (a)(1) and (7).

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In general, in considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court's role is limited to "determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint [citations omitted]" (*Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121, 741 NYS2d 9, 12 [1st Dept 2002], *lv denied* 99 NY2d 502, 752 NYS2d 589 [2002]). In addition, the pleading "is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory [citations omitted]" (*Id.*, at 120-121, 12).

In support of these motions, ALS and Scarpinato (who essentially adopts the arguments put forth by ALS) contend that the first (fraudulent conveyance) and second (conversion) causes of action should be dismissed as to them because the relief sought (to wit: adjudging, inter alia, the deed to be fraudulent and void and to adjudge the plaintiff as the lawful owner of a one half undivided share of the property) is not obtainable from ALS or Scarpinato since neither is or was a possessor of the property at issue (*see e.g. Richardson v Coy*, 28 AD2d 640, 280 NYS2d 623 [4th Dept 1967; *Cheyne v Ferro*, 56 Misc 2d 1010, 1012, 290 NYS2d 813, 815 [Sup Ct, Herkimer County 1968]).

As to the third cause of action (fraud and conspiracy), the contention is that there can be no civil conspiracy and that the necessary elements for fraud or the aiding and abetting of fraud are not pleaded.

As to the fourth cause of action (negligence with regard to the transaction), the movant and cross movant again contend that the necessary elements for such a claim have not been sufficiently pleaded.

In further support of this motion and cross motion, an affidavit is submitted by the president of ALS in which he states that he was retained by Scarpinato - not by Alden and RJC+ - to procure a mortgage insurance policy - not to procure title insurance (which the plaintiff concedes); that neither ALS nor a representative of ALS was present on the earlier date when the deed was purportedly signed by the sellers; and, that the deed later presented at the closing was proper on its face as it contained the respective signatures of the sellers and a proper notarization of said signatures. In other words, the signatures appeared to be valid and lawful and there was no other reason to doubt the validity of the execution of the deed.

In opposition, the plaintiff Raber argues that the motion and cross motion are premature since issue has not been joined as to the moving defendants and no discovery has been held. In addition, the plaintiff concedes that no conspiracy is being claimed (notwithstanding the wording in the complaint) but does claim the existence of an aiding and abetting claim based upon the allegedly forged deed and the facilitating of the transaction and filing by ALS and the facilitating by the holder of the mortgage Scarpinato. Indeed, the plaintiff argues that ALS should have known that the plaintiff's signature was forged since Raber was not present at the closing, was not represented at the closing and no identification was produced with regard to her signature at said closing.

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In further opposition to this motion and cross motion, the plaintiff submits her own affidavit in which she simply states that she was one of the joint owners as a tenant-in-common, that she was never party to such a transfer of ownership, that she did not sign the deed in question and that the signature which is purportedly hers is a forgery.

First cause of action (fraudulent conveyance):

The relief sought with regard to this cause of action does not have any effect or applicability to ALS or Scarpinato. In asking for the relief of voiding the deed and adjudging the plaintiff's one half interest in the property to be viable, the defending party must be a party to the deed and to the transaction in order to be affected by the granting of such relief. Since ALS and Scarpinato are not direct parties to the transaction and have no possessory interests in the property, it is clear that there can be no relief granted as against ALS and Scarpinato with regard to this cause of action (*cf Richardson v Coy*, 28 AD2d 640, 280 NYS2d 623 [4th Dept 1967; *Cheyne v Ferro*, 56 Misc 2d 1010, 1012, 290 NYS2d 813, 815 [Sup Ct, Herkimer County 1968]). Accordingly, this cause of action is dismissed as to ALS and Scarpinato.

Second cause of action (Conversion):

A cause of action sounding in conversion "does not lie where the property involved is real property [citation omitted]" (*Garelick v Carmel*, 141 AD2d 501, 502, 529 NYS2d 126, 128 [2d Dept 1988]). Accordingly, this cause of action must be dismissed as a matter of law. Since this cause of action is improper as a matter of law, it is not only dismissed as to the moving defendants but as to all defendants.

Third cause of action (Fraud and conspiracy):

In view of the plaintiff conceding that she is not actually claiming conspiracy but, instead, aiding and abetting the fraud, the conspiracy aspect will not be addressed. As to the fraud itself, a claim for fraud must allege a misrepresentation of a material fact, falsity, scienter and deception (*see Reidy v Albany County Dept. of Social Services*, 193 AD2d 992, 598 NYS2d 115 [3d Dept 1993]). In addition, a claim of fraud must be pleaded with sufficient detail to clearly inform the defendant as to the incident complained of (*see CPLR 3016[b]*) and as long as the facts alleged provide the basis for damages which can be properly inferred, the requirements of CPLR 3016(b) are satisfied (*see Black v Chittenden*, 69 NY2d 665, 668, 511 NYS2d 833, 835 [1986]).

Here, an analysis under CPLR 3016(b) is not necessary because the complaint insufficiently pleads the required elements for fraud as to ALS and Scarpinato. Accordingly, this cause of action must be dismissed for failure to state a cause of action as to the moving defendants.

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Specifically, at the very least, this cause of action fails for lack of a scienter allegation. While the complaint alleges that ALS should have known that the plaintiff's signature was a forgery, it does not support a claim that ALS actually knew it to be a forgery. In the absence of an allegation of actual knowledge, an allegation of "should have known" is insufficient to support a claim for fraud as a matter of law (*see A A Tube Testing Co. v Sohne*, 20 AD2d 639, 246 NYS2d 247 [2d Dept 1964]). Accordingly, this cause of action is dismissed as to ALS and Scarpinato.

Fourth cause of action (Negligence);

The elements required to plead negligence are that there be a duty owed to the plaintiff by the defendant, that the defendant breached the duty owed and that there was an injury proximately caused by said breach (*see Solomon v New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]).

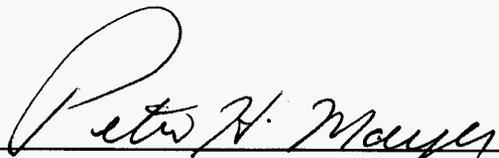
Here, it is acknowledged that ALS was insuring the mortgage on behalf of Scarpinato. Accordingly, ALS had no duty owed to the plaintiff. Scarpinato was holding the mortgage for RJC+ and, likewise, had no duty owed to the plaintiff. Indeed, the complaint does not allege any such duties being owed by ALS and Scarpinato to the plaintiff. Accordingly, this cause of action is dismissed as to ALS and Scarpinato for failure to state a cause of action.

With regard to the CPLR 3211(a)(1) contention that there is a defense based upon documentary evidence, while this issue is academic in view of the dismissal granted pursuant to CPLR 3211(a)(7), nevertheless, the court notes that the documents proffered in this regard do not conclusively resolve any fact issues in favor of the moving parties (*see AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 573 [2005]; *New York Schools Ins. Reciprocal v Gagliotti Assocs.*, 305 AD2d 563 [2d Dept 2003]) and, thus, would not form a basis for dismissal in and of itself.

In conclusion, the complaint is dismissed in its entirety as to ALS and Scarpinato and the second cause of action sounding in conversion is dismissed as a matter of law as to the remaining defendants as well.

This decision constitutes the order of the court.

Dated: 9-18-08


HON. PETER H. MAYER, J.S.C.