

Mauro v Countrywide Home Loans, Inc.

2011 NY Slip Op 32796(U)

October 17, 2011

Supreme Court, Nassau County

Docket Number: 000191/2011

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 7

MARIA MAURO,
Plaintiff,

INDEX NO.: 000191/2011
MOTION DATE: 8/4/2011
SEQUENCE NO.: 01, 02, 03

- against -

COUNTRYWIDE HOME LOANS, INC.,
VICTORIA S. KAPLAN, ESQ.,
PETER J. DAWSON and BMG
ADVISORY SERVICES, LTD.
Defendants.

The following documents were read on this Motion:

Motion Sequence 01 by Defendant Kaplan for Dismissal of Complaint	1.
Memorandum of Law in Support of Motion to Dismiss	2.
Affirmation of Kenneth J. Pagliughi, Esq. In Opposition	3.
Countrywide Memorandum of Law in Opposition to Motion	4.
Reply Affirmation of Scott E. Kossove, Esq. in Further Support of Motion ..	5.
Reply Memorandum of Law in Further Support of Kaplan Motion Sequence 01	6.
Motion Sequence 02 by Countrywide for summary judgment against Plaintiff	7.
Countrywide Memorandum of Law in Support of Motion for Summary Judgment	8.
Affirmation of Scott E. Kossove, Esq. in Partial Opposition to Motion	9.
Memorandum of Law on behalf of Defendant Kaplan in Partial Opposition	10.
Motion Sequence 03 Cross-motion by Plaintiff for S.J. against Countrywide	11.
Reply Memorandum of Law in Opposition to Cross-Motion for SJ by Plaintiff	12.
Reply Affirmation of Kenneth J. Pagliughi, Esq. to Opposition to Cross-motion	13.
Countrywide's Rule 19-a Statement of Material Facts	14.

PRELIMINARY STATEMENT

Defendant Victoria S. Kaplan, Esq. moves in Sequence 01 for summary judgment dismissing the complaint against her. In Motion Sequence 02 defendant Countrywide Home Loans, Inc. (“Countrywide”) also moves for summary judgment dismissing the complaint, Motion Sequence 03 is a cross-motion by plaintiff for summary judgment against Countrywide.

BACKGROUND

Plaintiff mortgaged two properties which she owned, receiving \$340,000 for property at 213 Fulton Street and \$175,000 against property at 168 Grant Street, both in Westbury, New York. In 2000 plaintiff began utilizing the services of TAXX Plus Services, Ltd., with which defendant Peter J. Dawson (“Dawson”) was affiliated. Dawson held himself out to plaintiff as having expertise in financial management, and encouraged her to refinance the two properties, which had no mortgages on them, for the purpose of investment. Both properties were titled in Simone Mauro Revocable Trust and Maria Mauro Revocable Trust.

Dawson arranged for the foregoing mortgages and scheduled the closings for May 30, 2006 at the offices of his company, BMG Advisory Services, Ltd. (“BMG”). Plaintiff alleges that she never received complete information regarding the loans, including a Good Faith Estimate of Fees, Truth in Lending Disclosure, Commitment Letter, Broker’s Agreement, or any other documents pertaining to the transaction.

Plaintiff attended the closings as directed, at which time Victoria S. Kaplan, Esq. (“Kaplan”) was the closing attorney for Countrywide, and Jodi Kaplan was the title closer for Venture Title. Plaintiff followed the directions of Dawson and Kaplan, and signed the various documents placed before her. She claims to have modest fluency in English, and that nothing was explained to her at the closing, including the proposed distribution of the proceeds of the loans.

Plaintiff alleges that Kaplan prepared deeds for the two properties from the Mauro

Trusts to her individually, so as to facilitate her obtaining the loan. According to the HUD-1 Settlement Statement for the Fulton Loan, the net proceeds, amounting to \$329,832.04, were to be distributed to the Borrower. Similarly the HUD-1 Settlement Statement for the Grant loan provided that the net proceeds of \$168,212.06 were to be distributed to her. Both loans were conventional 30-year mortgages. Despite the provisions of the HUD-1's, which she signed, none of the proceeds were given to her. Instead, the proceeds of both loans were delivered to Dawson, or to entities controlled by him, including BMG.

Several months after the closing, plaintiff obtained a copy of an IOLA check drawn on the Kaplan Account, payable to BMG Advisory Services, Ltd. The check was endorsed for deposit in a Citibank, NA account. Plaintiff denies authorizing this disbursement of the proceeds of the Fulton mortgage.

Defendants Countrywide and Kaplan assert that two children of plaintiff, as well as a third person, were present at the closings of the mortgage loans, and that plaintiff has acknowledged dependence upon one of them, Anna Marie, with respect to managing her finances. Plaintiff allegedly signed the Record of Checks Disbursed at Closing, (Exh. "G" to Motion Sequence 01), which noted a check in the amount of \$329,833.04 payable to BMG Advisory Services.

BMG initially made mortgage payments on both properties, and plaintiff had no information to the contrary, until November 2006, when a Countrywide representative called her, advising her of the defaults in payment. It was at this point that plaintiff undertook to obtain copies of the loan documents from Dawson.

At or about the same time, representatives of the Nassau County Police Department raided the offices of BMG and arrested Dawson, charging him with multiple counts of grand larceny. Plaintiff then filed her own complaint against Dawson with the police.

In connection with that investigation, Chuck Franssen interviewed plaintiff, and prepared a Declaration for use in a prior proceeding in the United States District Court for

the Eastern District of New York, in which he summarizes his interview of the plaintiff. He there states that Dawson convinced her to take out mortgages on both properties, and to have the checks payable to BMG so that Dawson could invest the money and make mortgage payments. (Exh. "9" to Attorney's Statement of Steven S. Rand, Motion Seq. 02).

Plaintiff cross-moves for summary judgment against Countrywide. With respect to the Rule 19-a Statement of Material Facts submitted by Countrywide, plaintiff disputes the impact of some of the statements. Counsel points out that defendant Kaplan recreated the Check Disbursement Record for the Grant Street property, and copied plaintiff's signature from the Fulton Street Disbursement Record. In fact, however, it is only the disbursements of the Fulton Street mortgage proceeds which plaintiff controverts. Plaintiff denies that she executed the Fulton Street Disbursement Record.

In the Counter Statement of Material Facts, plaintiff asserts that she is illiterate, is unable to read or write English. She also claims that when she did not receive a call from Dawson after the closings, she assumed that the loans had not gone through. Her son, Giuseppe Mauro, gave deposition testimony to the same effect. (Exh. "E" to Motion Sequence 03). Plaintiff denies speaking to Mr. Franssen; rather she went with her daughter who "did the talking". She asserts the same thing with respect to the Declaration of William J. Wallace, Exh. "8" to Rand Attorney Statement).

Countrywide's Rule 19-a Statement states that they have not instituted foreclosure proceedings, even though the mortgages are in default since November 2007. Plaintiff claims that Bank of America has sent a foreclosure notice to plaintiff, but it does not appear to be annexed as Exhibit "A" as claimed in the Counter-Statement.

In the cross-motion, plaintiff claims that the Court should only rely on depositions or other documents, but consider only the Notes and Mortgages, which set forth the parties contractual obligations, and the HUD-1 Form, which is the only document signed by both plaintiff and Countrywide. Plaintiff contends that Countrywide and Kaplan failed to

disburse the mortgage proceeds pursuant to the terms of the Note and Mortgage.

Plaintiff relies in substantial part upon the Closing Instructions issued by Countrywide to their closers, including Ms. Kaplan. (Exh. "H" to Motion Sequence 03). They provide in part that representatives are to adjoin the closing if they observe certain conditions, including evidence of coercion, undue influence, or incapacity. These conditions are contained at ¶ C15, and include situations in which the borrower or seller appears to be coerced, under undue influence, or incapable of reading and understanding the nature of the transaction. Under Subdivision E of the Instructions, ¶ E4 provides for no cash out. This is explained that the borrower must not receive any cash proceeds unless approved by the lender, and, if the lender approves a cash payment to the borrower, those loan proceeds must be delivered to the borrower only.

DISCUSSION

Plaintiff initially brought an action against defendants in this action and Mortgage Electronic Registration Systems, Inc. (MERS). The action was commenced in 2007 in Nassau County, and removed to United States District Court. After MERS was stipulated out of the action, the Court dismissed the federal claims alleging violation of the Truth in Lending Act, but declined to retain jurisdiction over the remaining state claims, and dismissed them without prejudice. (*Mauro v. Countrywide Home Loans, Inc.*, 727 F.Supp. 2d 145 [U.S.D.C., E.D.N.Y. 2010]). Plaintiff thereafter commenced this action by filing a Verified Complaint dated December 13, 2010, and verified on December 16, 2010.

The Complaint

Plaintiff alleges sixteen (16) causes of action as follows:

First: Breach of Contract against Countrywide with respect to the Fulton Street property, alleging that pursuant to the Fulton Street Note, Countrywide was to deliver the loan proceeds of \$340,000 to plaintiff, which they have failed to do;

Second: Breach of Contract against Countrywide with respect to the Grant Street property, alleging that pursuant to the Grant Street Note, Countrywide was to deliver the

loan proceeds of \$175,000 to plaintiff, which they have failed to do;

Third: Fraud against Countrywide with respect to the Fulton Street mortgage, in that Countrywide, through its agent, Kaplan, represented to plaintiff that the proceeds of the Fulton Street mortgage would be paid directly to her, but were paid to BMG without her consent;

Fourth: Fraud against Countrywide with respect to the Grant Street mortgage, in that Countrywide, through its agent, Kaplan, represented to plaintiff that the proceeds of the Fulton Street mortgage would be paid directly to her, but were paid to BMG without her consent;

Fifth: Plaintiff seeks to enjoin Countrywide and all its successors and assigns from seeking to recover from plaintiff funds advanced with respect to the Fulton Street and Grant Street mortgages;

Sixth: Declaratory relief that because of the failure of consideration for the Fulton Note and the Grant Note, plaintiff is entitled to a declaration that the notes are void and the mortgages securing the notes are vacated;

Seventh: Plaintiff seeks declaratory relief that because Countrywide is no longer the holder of the Fulton Note and Mortgage, or the Grant Note and Mortgage, plaintiff is entitled to a declaratory judgment voiding the notes and vacating the mortgages of record;

Eighth: Plaintiff alleges fraud against Victoria Kaplan in that knew, or should have known, that plaintiff could not speak or read English well enough to understand the nature, or legal effect of the transaction, that she falsely represented to plaintiff that the proceeds of the Fulton mortgage would be paid directly to her, when she knew that the representation was false, that plaintiff justifiably relied on the false representation, and that she was damaged by the fact that the proceeds were not paid to her, but in fact were paid to BMG without plaintiff's consent;

Ninth: Plaintiff alleges fraud against Victoria Kaplan in that knew, or should have known, that plaintiff could not speak or read English well enough to understand the nature,

or legal effect of the transaction, that she falsely represented to plaintiff that the proceeds of the Grant mortgage would be paid directly to her, when she knew that the representation was false, that plaintiff justifiably relied on the false representation, and that she was damaged by the fact that the proceeds were not paid to her, but in fact were paid to BMG without plaintiff's consent;

Tenth: Breach of Fiduciary Duty against Kaplan as to the Fulton Street mortgage in that Kaplan prepared a deed transferring title from Mauro Trusts to Mauro individually, for which she received a document preparation fee of \$150, thereby creating a fiduciary relationship between plaintiff and Kaplan. Plaintiff further asserts that as Countrywide's closing agent, Kaplan had a duty to determine that plaintiff spoke and read English well enough to understand the nature and legal effect of the transaction; assure that the Fulton loan proceeds were disbursed directly to plaintiff; assure that none of the parties to the transaction were engaged in the unauthorized practice of law; and make sure that none of the parties to the transaction were committing fraud. Kaplan breached her fiduciary duty by failing to explain to plaintiff the potential tax implications of transferring title out of the trust; failed to assure that plaintiff spoke English well enough to appreciate the nature and legal effect of the transaction; disbursing the funds to BMG without plaintiff's consent; proceeding when she knew that Dawson had misrepresented to plaintiff that he was an attorney; and that she knew or should have known that Dawson and BMG were committing fraud upon plaintiff by having the funds disbursed to them instead of the plaintiff; and, as a result plaintiff was injured as a consequence of the recording of a mortgage lien against the premises for which she received no consideration;

Eleventh: Breach of Fiduciary Duty against Kaplan as to the Grant Street mortgage in that Kaplan prepared a deed transferring title from Mauro Trusts to Mauro individually, for which she received a document preparation fee of \$150, thereby creating a fiduciary relationship between plaintiff and Kaplan. Plaintiff further asserts that as Countrywide's closing agent, Kaplan had a duty to determine that plaintiff spoke and read English well

enough to understand the nature and legal effect of the transaction; assure that the Fulton loan proceeds were disbursed directly to plaintiff; assure that none of the parties to the transaction were engaged in the unauthorized practice of law; and make sure that none of the parties to the transaction were committing fraud. Kaplan breached her fiduciary duty by failing to explain to plaintiff the potential tax implications of transferring title out of the trust; failed to assure that plaintiff spoke English well enough to appreciate the nature and legal effect of the transaction; disbursing the funds to BMG without plaintiff's consent; proceeding when she knew that Dawson had misrepresented to plaintiff that he was an attorney; and that she knew or should have known that Dawson and BMG were committing fraud upon plaintiff by having the funds disbursed to them instead of the plaintiff; and, as a result plaintiff was injured as a consequence of the recording of a mortgage lien against the premises for which she received no consideration;

Twelfth: Intentional Tort against Kaplan in that she intentionally permitted Dawson and BMG to convert and misappropriate the proceeds of the Fulton Street and Grant Street loans. The intentional conduct consisted of recreating loan documents, transferring title from the Mauro Trusts to plaintiff individually, and issuing checks for the loan proceeds from her IOLA account payable to BMG without the consent of plaintiff;

Thirteenth: Breach of Contract against Dawson and BMG in that they assumed duties and obligations to plaintiff with respect to providing professional, financial, investment mortgage brokerage and management advice to plaintiff, and that they breached their obligations, as a result of which plaintiff has suffered damages of \$340,000 on the Fulton Mortgage and \$175,000 on the Grant Mortgage;

Fourteenth: Misappropriation and Conversion against Dawson and BMG in that they misappropriated and converted the proceeds of both the Fulton and Grant mortgages;

Fifteenth: Fraud and misrepresentation against Dawson and BMG in that they represented to plaintiff that the mortgage proceeds would be paid to her, that the representations were false, that plaintiff justifiably relied upon the misrepresentations to

her detriment;

Sixteenth: Breach of fiduciary duty by Dawson and BMG, in that, as mortgage broker or agent for Countrywide, they owed a fiduciary duty to plaintiff to properly explain the terms of the transactions; to endure delivery of the proceeds of the Fulton and Grant mortgages to plaintiff, as stated in the HUD-1 statements; to obtain written authorization from plaintiff for delivery of the proceeds to them; preparing a correct HUD-1 Statement for each transaction, as required by RESPA; and delivering a complete and accurate set of closing documents to plaintiff. Defendants failed to perform these duties and damaged plaintiff.

Motion Sequence 01

Defendant Victoria Kaplan moves to dismiss the complaint against her pursuant to CPLR § 3211 (a)(1) and (c) which provide as follows:

Rule 3211. Motion to dismiss

(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 upon documentary evidence; or

* * *

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

By invoking both §§ 3211 (a)(1) and 3211 (c), counsel is adopting the recommendation of *Fontanetta v. John Doe 1*, 73 A.D. 3d 78 (2d Dept. 2010), in which the Court rejected the pre-answer motion pursuant to subdivision (a)(1), where the

documents included affidavits and deposition testimony, portions of the evidence the defendant would like to submit at trial, but which do not constitute the type of documents which finally determine all issues in the case. A motion pursuant to § 3211 (a)(1) will be granted only if the documentary evidence resolves all factual questions as a matter of law and fully disposes of the plaintiff's contentions. *Id.* at 83. Defendant is therefore, in reality, requesting that the Court treat the motion for summary judgment pursuant to §3212 before answering the complaint.

Plaintiff's allegations against Kaplan are contained in the Eighth and Ninth Causes of Action, alleging fraud on her part concerning the Fulton and Grant mortgages respectively; in the Tenth and Eleventh Causes of Action claiming breach of fiduciary duty on her part involving the Fulton and Grant mortgages respectively; and the Twelfth Cause of Action alleging intentional tort.

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." (*Quinn v. Krumland*, 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. (*Stillman v. Twentieth Century-Fox Corp.*, 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. (*Moskowitz v. Garlock*, 23 A.D.2d 94 [3d Dept. 1965]); (*Crowley's Milk Co. v. Klein*, 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v. Garfield*, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. (*Tortorello v. Carlin*, 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the

court must “ ‘ accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. (*Braddock v. Braddock*, 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez*, 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney’s affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

Eighth and Ninth Causes of Action - Fraud against Victoria Kaplan

To sustain a claim for fraud, plaintiff must allege (1) that a representation was made as a statement of material existing or preexisting fact; (2) that the fact was untrue; (3) that it was known by to be untrue by the party making it; (4) or, under certain circumstances, was recklessly or negligently made; that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; (5) that the other party did in fact justifiably relied on the representation; (6) and was thereby induced to act or refrain from acting; (7) resulting in their injury or damage.

Kaplan’s motion is premised on the claim that plaintiff cannot establish fraud, because the documentary evidence, including the disbursement report, and her testimony in a prior action, belie the claim that plaintiff was expecting to receive the proceeds of either or both of the mortgages. While it may be that these factual determinations will be decided in favor of Kaplan, they are, nevertheless, issues of fact.

Specifically, there are factual issues whether or not Kaplan made the representation that the funds were to be directed to plaintiff alone, whether or not it was made by her with intent to deceive, or to induce plaintiff to act upon the representation, and whether or not plaintiff completed the transaction in reliance on such representation, or based upon her own decision to invest her funds with Dawson’s company. Kaplan’s motion for summary

judgment dismissing the Eighth and Ninth Causes of Action is denied.

Tenth and Eleventh Causes of Action - Breach of Fiduciary Duty Against Victoria Kaplan

Kaplan was the attorney for Countrywide, serving as their representative at the closing of the mortgages on the Fulton and Grant mortgages. Plaintiff asserts that the preparation by Kaplan of deeds transferring title from the Mauro Trusts to plaintiff individually, thereby facilitating the issuance of mortgage loans to plaintiff, created a fiduciary relationship between them.

In order to establish a claim for breach of fiduciary duty, a Plaintiff is required to demonstrate (1) the existence of a fiduciary relationship; (2) misconduct by the Defendant; and (3) damages directly caused by such conduct. (*Kurtzman v. Bergstol*, 40 A.D.3d 588 [2d Dept. 2007]). The existence of a fiducial relationship is fact-specific. (*AG Capital Funding Partners, LP v. State Street Bank and Trust Co.*, 11 N.Y.3d 146 [2008]). An attorney is in a fiduciary relationship with his or her client. (*Graubard Mollen Dannett & Horowitz v. Moscovitz*, 86 N.Y.2d 112 [1995]). This relationship creates a high degree of undivided loyalty to his or her client. (*Kelly v. Greason*, 23 N.Y.2d 368 [1968]).

Defendant has not moved pursuant to CPLR § 3211 ()(7), failure to state a claim upon which relief can be granted. The documentary evidence upon which Kaplan relies does not conclusively resolve all factual issues in the action. Therefore, the motion devolves into one for summary judgment under § 3212. As previously stated, the existence of a fiduciary relationship is fact specific. While it appears unlikely that Kaplan, the attorney for the lender, entered into an attorney-client relationship with the borrower simply by drafting two deeds, it is not factually impossible. The motion to summarily dismiss the Tenth and Eleventh Causes of Action is denied.

Twelfth Cause of Action - Intentional Tort

The plaintiff claims an intentional tort in that Kaplan permitted Dawson and BMG to convert and misappropriate the proceeds of the Fulton and Grant Mortgages by recreating loan documents, transferring title from the Mauro Trusts to her individually, and

issuing checks from Countrywide to BMG without plaintiff's consent. This cause of action is governed by the one-year statute of limitations as contained in CPLR § 215 [3].

The actions complained of occurred at the closing on May 30, 2006. The Summons and Verified Complaint, Exh. "A" to Motion Sequence 01, was verified on December 16, 2010, well beyond the one-year term for initiating a claim for damages as a result of an intentional tort. The motion to dismiss the Twelfth Cause of Action is granted.

Countrywide's Cross-Claim for Malpractice

Defendant Kaplan also seeks dismissal of the cross-claims of Countrywide, as set forth in their Verified Answer. (Exh. "B" to Motion Seq. 01). ¶ 21 provides as follows:

21. During her representation of CHL, Kaplan allegedly acted carelessly, recklessly, failed to exercise reasonable care and/or was negligent in her legal representation of CHL; failed to properly advise CHL of the status of the Fulton Street and Grant Street closings; and/or she failed to properly represent the interests of CHL

In the Second Cross-claim, Countrywide alleges a breach of contract, in that Kaplan executed a written agreement with CHL which includes guidelines and conditions required by counsel in connection with the closings of CHL mortgage loans (the "Closing Instructions"), that CHL complied with its obligations of the Closing Instructions, but that Kaplan failed to act in accordance with the provisions of the Closing Instructions.

As with the allegations of the Complaint, the role of the Court is not to determine the merits of the cross-claim, but merely to determine whether or not the Court can conclude, as a matter of law, that there are no factual questions which preclude granting summary judgment.

Countrywide alleges professional negligence and breach of contract against Kaplan in the performance of her duties in the face of the Closing Instructions. Among them are requirements that the closing attorney assure that the borrower understands the import of the transaction, and precludes the dispersal of proceeds to the borrower, without the consent of the bank. When such consent has been obtained, distribution must be to the

borrower only. The allegations of the cross-claims adequately allege negligence and breach of contract, and there are factual issues which preclude the dismissal of the cross-claims on a motion for summary judgment. The factual issues are whether or not Countrywide consented to the payment of mortgage proceeds to plaintiff/ borrower, and whether, if the payment had been made directly to plaintiff, the end result would have not been different in that, as in other cases, borrowers simply endorsed the proceeds checks to Dawson or one of his controlled entities. (*See Hennesy, et al. v. Dawson, et al.*, 32 Misc.3d 1207(A) [Sup. Ct., Nassau County, Winslow, J 2011]). [Exh. 1 to Kaplan Reply Memorandum of Law, at p. 4]).

Countrywide's cross-claims seek indemnity in that, if they are found liable to plaintiff, it will be as a result of the active negligence or breach of contract between them and Kaplan. Kaplan's motion to dismiss the Countrywide cross-claims is denied.

Motion Sequence 02

Defendant Countrywide moves for summary judgment, pursuant to CPLR § 3212, dismissing plaintiff's complaint against it; or, in the alternative, granting summary judgment on their cross-claims against co-defendants Victoria S. Kaplan, Esq., Peter J. Dawson and BMG Advisory Services, Ltd.

Plaintiff's claims against Countrywide are contained in the First through Seventh Causes of Action. The First alleges breach of contract in that Countrywide was obligated under the terms of the Fulton Street Note to deliver the loan proceeds to the plaintiff. The Second Cause of Action makes the same claims with respect to the Grant Street mortgage proceeds. The Third and Fourth Causes of Action allege fraud against Countrywide with respect to the Fulton and Grant mortgages respectively, in that Countrywide, acting through its agent, Kaplan, represented to plaintiff that the mortgage proceeds were to be paid directly to her, when she knew that the misrepresentation was false.

The Fifth Cause of Action seek an injunction prohibiting Countrywide, its successors or assigns from seeking to recover the funds advanced in connection with the

Fulton and Grant mortgages. The Sixth and Seventh Causes of Action seek declaratory relief that the promissory notes are void and the mortgages are vacated with respect to the Fulton and Grant properties respectively.

Because there are material questions of fact with respect to the actions of defendant Kaplan, the alleged obligation of Countrywide to distribute mortgage proceeds directly to plaintiff, and whether or not plaintiff knowingly consented to the delivery of the proceeds to BMG, summary judgment dismissing the plaintiff's allegations against Countrywide are inappropriate. Countrywide's motion to dismiss the First and Second Causes of Action, alleging breach of contract, is denied.

For the reasons previously stated, there are also questions of fact as to whether or not Countrywide, through its agent Kaplan, represented to plaintiff that the proceeds of the mortgages would be delivered to her, that the representation was known to be false when made, and was made to induce plaintiff to execute the documents which resulted in the mortgage proceeds being delivered to BMG. These factual questions preclude the grant of summary judgment, and the Countrywide motion to dismiss the Third and Fourth Causes of Action is denied.

The Fifth Cause of Action seeks injunctive relief. "To establish entitlement to a preliminary injunction, a movant must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 6301, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.*, 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

"Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient". (*Walsh v. Design Concepts*, 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, "(e)conomic loss, which is compensable by money

damages, does not constitute irreparable harm". (*EdCia Corp. v. McCormack*, 44 A.D.3d 991, 994 (2d Dept. 2007)). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073).

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia*, 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348 [1st Dept. 2007]).

Because plaintiff cannot establish likelihood of success on the merits, and is seeking economic damages, injunctive relief is inappropriate. The Countrywide motion to dismiss the Fifth Cause of Action is granted.

The motion to dismiss the claims for Declaratory Relief in the Sixth and Seventh Causes of Action is granted. A mortgage may be declared void if obtained under false pretenses. (*Crispino v. Greenpoint Mortg. Corp.*, 304 A.D.2d 608 [2d Dept. 2003]). In *Crispino*, the Court affirmed the trial Court's setting aside a forged deed and mortgage which was then obtained under false pretenses. Plaintiff's husband, shortly before his death, acknowledged to plaintiff wife that he had forged her name to a deed placing

property in his name only, and then used the deed to obtain a mortgage. While plaintiff in this action claims that she did not intend to convey the proceeds of at least one of the mortgages to BMG, there is no doubt that she cooperated in the placement of the mortgages, and that they are a valid lien upon the property.

Summary Judgment on the Cross-Claims Against Defendant Kaplan

In their cross-claims, Countrywide denies liability to the plaintiff; but if they are determined to be liable, it is because of the negligence or breach of contract on the part of their agent, Kaplan, and they are entitled to judgment over against her.

These are pre-answer motions, and while there appears to have been discovery while the matter was pending in the United States District Court, it is certainly incomplete. In the record before the Court, it would appear that the instructions to Ms. Kaplan were that funds were to be distributed to the borrower only with the consent of Countrywide, and if the consent was obtained, then payments would be directed only to the borrower.

These ostensibly simple requirements leave open the question as to whether or not Countrywide authorized the "cash out" payment to the borrower, whether or not they were aware of and consented to payment directly to BMG in accordance with the alleged wishes of plaintiff, and whether or not, had the check been made payable to plaintiff, that she would have simply endorsed it to Dawson or BMG, leaving her in the same predicament in which she now finds herself.

Because of these material factual questions, the motion for summary judgment against defendant Kaplan is denied.

Summary Judgment on the Cross-Claim against Defendants Dawson and BMG

The Tenth Affirmative Defense and Cross-claim alleges that if Countrywide is found liable to the plaintiff, it will be because of the active, affirmative conduct and misconduct of defendants Dawson and BMG.

Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter

of law. (*Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y. 2d 1065 [1979]). There do not appear to be any factual issues with respect to the criminal wrongdoing of Dawson through his company, BMG. (See Plea Agreement of Peter J. Dawson, Exh. "D" to Motion Sequence 01). Countrywide's motion for summary judgment on its cross-claims for indemnification against defendants Dawson and BMG is granted.

Motion Sequence 03

Plaintiff moves for summary judgment against Countrywide. The claims against Countrywide are set forth in the First through Seventh Causes of Action, alleging breach of contract in the First and Second; Fraud in the Third and Forth; claim for injunctive relief in the Fifth; and declaratory relief in the Sixth and Seventh.

The motion as to the First and Second Causes of Action is denied because there are issues of material fact as to whether or not plaintiff approved the payment of the proceeds of the mortgages to Dawson or BMG. Similarly, the motion for summary judgment on the Third and Fourth Causes of Action, alleging fraud on the part of Kaplan is denied because of the questions of fact as to the representations made by Kaplan, the consent to the distribution of the mortgage funds to BMG, and whether, even if the funds had been directed to plaintiff, they would have been voluntarily transferred to Dawson and BMG in any event.

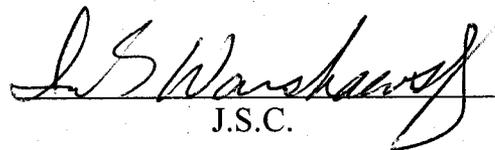
Plaintiff is not entitled to summary judgment of injunction against Countrywide or its agents or assigns from seeking to recover on the mortgages on Fulton and Grant Streets. On its face, Countrywide issued mortgages on the properties and plaintiff consented to the distribution of funds to BMG. Plaintiff has not established a likelihood of success on the merits of the allegations in its complaint. Injunctive relief against Countrywide's assignee, Bank of America, is inappropriate for that reason, as well as the fact that plaintiff is seeking monetary damages.

Plaintiff's motion for summary judgment on the Sixth and Seventh Causes of Action is also denied. Plaintiff seeks declaratory judgments that Countrywide is no longer

the holder of the Fulton or Grant Street promissory notes or mortgages; that the notes are void; and the mortgages should be vacated. The fact that Countrywide has assigned the mortgages and transferred the notes does not render the notes void or the mortgages subject to vacatur. The multiple factual issues with respect to the direction of the proceeds to BMG, with or without the consent of plaintiff preclude the grant of summary judgment on the Sixth and Seventh Causes of Action. In addition, there is no evidence that plaintiff did not wish to obtain the mortgages, only that she disputes the claim that she authorized delivery of the proceeds to BMG. There is no claim that the mortgages were procured with falsified documents or that the mortgages were "oppressive, unconscionable or against * * * [the defendant lender's] own mortgage loan criteria. (*Frawley v. Dawson*, 32 Misc.3d 1207(A) at 5). The plaintiff's cross-motion for summary judgment on the Sixth and Seventh Causes of Action is denied.

This constitutes the Decision and Order of the Court.

Dated: October 17, 2011


J.S.C.

ENTERED
OCT 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE