

Ferrara v Amritt-Hall
2015 NY Slip Op 31228(U)
July 13, 2015
Supreme Court, Queens County
Docket Number: 22203/11
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

VINCENT J. FERRARA, x

Plaintiff,

-against-

STEPHANIE AMRITT-HALL, KEITH AMRITT,
GOTHAM BUILDERS OF NEW YORK, LTD,
MICHAEL ANDREW HALL AND JOHN DOE'S
#1-10 and JANE DOE'S # 1-10
the last two names being fictitious
and unknown to the plaintiff, the
persons intended being the tenants,
occupants, persons or corporations,
if any, having or claiming an interest
in or lien upon the premises described
in the complaint, known as 173-05
140th Ave., Springfield Gardens,
NY 11434,

Defendants.

Index

Number: 22203/11

Motion

Date: 3/2/15 & 3/9/15

Motion Seq.: No. 4 & 5

x

The following papers numbered 1 to 47 read on this motion by third-party defendant Howard I. Horn (Horn) to dismiss all claims against him pursuant to CPLR 3211(a)(7) or 3212; a cross motion by third-party defendant Lexington Capital Corporation (Lexington) to dismiss the third-party claims by defendant/third-party plaintiff Stephanie Amritt-Hall (Amritt-Hall) under CPLR 3211(a)(7) and (11) or, in the alternative, for an extension of time to file a summary judgment motion; a cross motion by defendant Gotham Builders of New York, Ltd. (Gotham Builders) to dismiss the cross-claim Amritt-Hall's cross-claim pursuant to CPLR 3211(a)(1) and (7) or, in the alternative, for an extension of time to file a summary judgment motion, and to dismiss the complaint pursuant to CPLR 3016(b); a cross motion by third-party defendant Jason Galasso (Galasso) to dismiss the third-party claims under CPLR 3211(a)(1) and (7) or, in the alternative, for an extension of time to file a summary judgment motion; and a separate motion by Horn to sever the third-party action or, in the alternative, staying the trial until summary judgment motions are decided and/or outstanding discovery is completed.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-8
Notices of Cross Motion - Affidavits - Exhibits...	9-21
Answering Affidavits - Exhibits.....	22-39
Reply Affidavits.....	40-47

Upon the foregoing papers it is ordered that these motions and cross motions are consolidated for purposes of disposition and are determined as follows:

FACTUAL HISTORY

Plaintiff, a private lender, commenced this action on or about September 23, 2011 to foreclose upon a loan for home repairs on a property inherited by Amritt-Hall and her brother, Keith Amritt, from their father, who passed away in 1993. Amritt-Hall, who has resided at the subject property her entire life, alleges that the loan was predatory and that she was a victim of a scam perpetrated by the other parties to this action. In July 2009, Galasso, an employee of Lexington and Gotham, allegedly solicited Amritt-Hall to contract for home repairs to be performed by Gotham by going door-to-door in her neighborhood and arranging for her to receive a loan to finance such repairs despite her poor credit history. Because Amritt-Hall's father had an outstanding mortgage on the subject property, he advised that she would have to satisfy that mortgage as part of the refinance and put the house in her name, which Galasso would take care of. Galasso advised her that if she used money from the loan to install a new bathroom, she would still receive \$7,000 in cash. After multiple meetings, in late November 2009 Galasso advised Amritt-Hall that he had found her a 15-year mortgage at a higher interest rate, but that she should not worry because he would help her refinance the loan.

Approximately one week later, Horn contacted Amritt-Hall via telephone and offered to represent her. He stated that he saw her file publicly listed and that he handled real estate matters such as the one she was contemplating. He said that fees for his representation would be paid from the loan proceeds at closing, where they would meet for the first time. Amritt-Hall subsequently asked Galasso if he had heard of Horn; Galasso said yes, and that she should hire him because he was a good lawyer and experienced in real estate matters.

Although Galasso originally applied for a loan from Lexington on Amritt-Hall's behalf, Lexington apparently denied such application. Rather, financing for the "hard money" loan

ultimately came from private lender Vincent J. Ferrara (Ferrara), and the subject closing occurred on February 19, 2010. The principal amount of the loan was \$150,000, with an interest rate of 14% on \$21,000 of the principal amount, full pre-payment of interest taken out of the loan proceeds at closing, and a large balloon payment at the end of one year. Amritt-Hall never received any required disclosures detailing the terms of the loan, such as the Truth in Lending Statement or any Home Ownership and Equity Protection Act disclosures.

Two days after the closing, workers arrived at Amritt-Hall's home to begin renovations, which she alleges were performed by Gotham in a substandard manner that Galasso never rectified when informed of the defects. Although Galasso assured her that the home repairs would be covered by the loan, and that she would receive \$7,000 in cash from the refinance, Gotham placed a mechanic's lien on the subject property for outstanding renovation expenses, and she never received any funds from a new loan, despite repeatedly asking about progress on the promised refinancing.

Amritt-Hall alleges that she entered the subject loan in reliance on Galasso and Horn's advice. Although she expressed her concerns that she could not afford the subject loan or home repairs many times, both Galasso and Horn repeatedly assured her that she would be able to refinance the loan within six months and obtain a traditional, more affordable loan with a 30-year term. Galasso and Horn never provided the assistance they had promised. Amritt-Hall tried to refinance on her own, but was unsuccessful given her poor credit history. She claims that she only agreed to the egregious terms of the subject loan because of repeated assurances from the other parties that she would be able to refinance the loan before the balloon payment became due.

DISCUSSION

As a preliminary matter, the court notes that movant Horn has submitted no affidavits or other evidence in support of his application for summary judgment dismissing the third-party complaint. Gotham, Lexington, and Galasso's contentions that they had no relationship with Ferrara, the individual who ultimately financed the loan to Amritt-Hall and/or that they did not act as brokers are unsupported and insufficient to dismiss the claim (see *Cauthers*, 41 AD3d 755; *Jeune*, 29 AD3d 635). Moreover, the documentary evidence that Lexington submitted to show that it denied her loan application is insufficient to demonstrate that it or Galasso is not liable for playing a role in the alleged scheme. As attorney affirmations alone are insufficient to satisfy a movant's initial burden, summary judgment is not appropriate (see

Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2007]; *Jeune v O.T. Trans Mix Corp.*, 29 AD3d 635 [2006]).

The court proceeds to consider the application for dismissal under CPLR 3211. "On a motion to dismiss pursuant to CPLR 3211, the . . . complaint is to be afforded a liberal construction. The facts as alleged in the . . . complaint are accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory" (*Goldfarb v Schwartz*, 26 AD3d 462, 463 [2006]); see also *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). If, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (see *511 West 232nd Owners Corp.*, 98 NY2d at 152; *Cooper v 620 Prop. Assoc.*, 242 AD2d 359, 360 [1997]). The court's function is to "accept . . . each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts" (*id.*, quoting *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]).

General Business Law § 349 Claims

Under General Business Law (GBL) § 349 (the Deceptive Practices Act), a plaintiff must allege that defendant has engaged in "consumer-oriented conduct" that is materially misleading and that plaintiff suffered injury as a result of such deceptive act or practice (see *Shaw v Club Mgrs. Assn. of Am., Inc.*, 84 AD3d 928, 929-930 [2011]; *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999]). Although the conduct need not be repetitive or recurring, it must have a broad impact on consumers at large (see *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]). "The single shot transaction, which is tailored to meet the purchaser's wishes and requirements, does not, without more, constitute consumer-oriented conduct for the purposes of this statute" (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 12 [2012] [internal quotation marks omitted]).

Here, Amritt-Hall's GBL § 349 cause of action is predicated upon allegations that movants and cross-movants were cohorts in a scheme involving a practice of soliciting business door-to-door, and that such actions directed at Amritt-Hall were "part of, and representative of, misleading activities targeted at homeowners."

Allegations of such advertising by Galasso on behalf of Lexington and/or Gotham, along with Horn's legal services, are sufficient to establish that movant and cross-movants offered their services to consumers, generally, and such advertising was not "unique" to Amritt-Hall's circumstances (see *Oswego Laborers' Local 214 Pension Fund*, 85 NY2d at 26; see also *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 53 [2001] [finding New York City consumer protection statute applicable where defendants "offered a 'package' of services" that included the sale of real estate and that was advertised in newspapers and through flyers handed out at subway stations]; *DeAngelis v Timberpeg East, Inc.*, 51 AD3d 1175, 1178 [2008]). Moreover, the claim is based on the allegation that Gotham, Horn, and Galasso misled her with false promises of refinancing assistance after the subject loan transaction, rather than merely whether Amritt-Hall could afford the loan (cf. *Silverman v Household Finance Realty Corp. of New York*, 979 F Supp 2d 313, 318 [EDNY 2013] [conduct not consumer-oriented]). Thus, Amritt-Hall's allegations are sufficient to plead violations of GBL § 349 (see *Monter v Massachusetts Mut. Life Ins. Co.*, 12 AD3d 6 [2004]; cf. *Flax v. Lincoln Nat. Life Ins. Co.*, 54 AD3d 992 [2008]).

Fraud and Conspiracy to Commit Fraud Claims

To state a cause of action for fraud, the following elements must be alleged, with sufficient particularity: representation of a material existing fact, falsity, scienter, deception and injury (see *Daly v Kochanowicz*, 67 AD3d 78, 89-91 [2009]). Additionally, although New York does not recognize civil conspiracy to commit a tort as an independent cause of action (see *Barns & Farms Realty, LLC v Novelli*, 82 AD3d 689, 691 [2011]), a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme (see *JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576, 580 [2014]; *Levin v Kitsis*, 82 AD3d 1051, 1052 [2011]).

Here, Amritt-Hall alleges that Gotham, Lexington, Galasso and Horn promised that she would be able to refinance shortly after the subject closing with their assistance, although they had no intention of helping her; that the transaction would be beneficial to her even though it was actually to her detriment; that they knew such representations were false, but made them so as to induce her into entering the transaction; that she relied on such misrepresentations and/or omissions in agreeing to the loan; and that she was injured because she reasonably relied on such misrepresentations. She further alleges that Galasso, on behalf of Lexington and Gotham, assured her that the transaction would be

sufficient to cover the home repair expenses, and that Horn prevented her from examining the loan documents by rushing her to sign them at closing and misrepresented how he learned of her need for legal representation while soliciting her. Assuming the truth of the allegations, as required on a motion to dismiss under CPLR 3211(a)(7), they are sufficient to support a cause of action for fraud (see *JP Morgan Chase Bank, N.A.*, 122 AD3d at 580; *House of Spices [India], Inc. v SMJ Servs., Inc.*, 103 AD3d 848, 850 [2013]). Furthermore, Amritt-Hall's allegations that Gotham, Lexington, Galasso, and Horn knowingly entered into an agreement to fraudulently induce her into entering the transaction based on their intentional misrepresentations and/or omissions are sufficient for a factfinder to infer that defendant and third-party defendants participated in the fraudulent scheme (see *DiMauro v United, LLC*, 122 AD3d 568 [2014]; *Nerey v Greenpoint Mtge. Funding, Inc.*, 116 AD3d 1014 [2014]). Contrary to Gotham's assertions, although it may be impossible at this juncture to specify the circumstances constituting the fraud insofar as knowledge of such details are within the knowledge of an adverse party, the elements necessary to support a claim of fraud and conspiracy to defraud were pleaded with sufficient particularity to infer participation in the fraudulent scheme and inform defendant of the alleged circumstances constituting the wrong (see *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]; *Marshall v Vilar*, 303 AD2d 466 [2003]).

Negligent Misrepresentation Claims

In order to state a claim for negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission]" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 959 [2011] [internal citation and quotation marks omitted]).

Affording Amritt-Hall the benefit of every possible favorable inference, she successfully alleges that Lexington, Gotham, and Galasso acted as brokers for the subject transaction and had a duty to impart correct financial information to her given their superior financial knowledge and expertise on which they persuaded Amritt-Hall to rely (see *RBE Northern Funding, Inc. v Stone Mountain Holdings, LLC*, 78 AD3d 807 [2010]; *Fresh Direct, LLC v Blue Martine Software, Inc.*, 7 AD3d 487 [2004]; see also *Smith v Ameriquest Mortg. Co.*, 25 Misc 3d 1230[A], 2006 NY Slip Op 52707[U], *3 [2006]). As against Horn, Amritt-Hall successfully alleges that he had a duty to use reasonable care and maintain loyalty to her as

his client, and that he negligently breached such duties by stating that the subject transaction was beneficial for her, that she would be able to refinance before the one-year loan term expired, and that a new loan would be provided, even though he knew or should have known that such statements were false, in order to induce her to enter into the loan. Such allegations are sufficient to support a claim for negligent misrepresentation against Horn (see *Health Acquisition Corp. v Program Risk Mgt., Inc.*, 105 AD3d 1001, 1003 [2013]).

New York State Banking Law § 590-b Claims Against Gotham, Lexington, and Galasso

Under New York State Banking Law § 590-b, mortgage brokers must "act in the borrower's interest" and "in good faith and with fair dealing." Amritt-Hall alleges that Gotham, Lexington, and Galasso, as brokers on her behalf, violated this statute by intentionally and willfully failing to act in her best interest, with reasonable skill, care, and diligence, to present a range of loan products, and to disclose the total compensation to be received for such services. Such allegations are sufficient to state a claim under the statute (see generally *Davis v CCF Capital Corp.*, 277 AD2d 342 [2000]).

Breach of Fiduciary Duty Claim against Horn

To state a cause of action for a breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (see *Baumann v Hanover Community Bank*, 100 AD3d 814 [2012]; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776 [2010]). Here, Amritt-Hall alleges that Horn was acting in his capacity as her attorney in the refinancing transaction, and that such fiduciary relationship continued beyond the subject closing due to his representations that he would obtain a traditional refinanced loan on her behalf at a more favorable rate and with a more favorable term. She further alleges that she was injured because Horn intentionally and willfully solicited her with false information, failed to represent her interests at closing, failed to ensure that she had the information necessary for making informed decisions, and misled her into believing that she would obtain a more favorable loan after the subject closing.

In moving to dismiss, Horn argues that Amritt-Hall has mislabeled what is essentially a legal malpractice claim instead as a breach of fiduciary duty claim involving fraud (with a six-year statute of limitations) in order to avoid the three-year statute of limitations for malpractice claims (CPLR 213, 214), which he avers

has expired. In determining whether the claim sounds in malpractice or arises from a fiduciary relationship, the court looks to the essence of the claim rather than the form in which it is pleaded (see *State v Cortelle Corp.*, 38 NY2d 83, 86 [1975]). A fiduciary relationship is defined as one "founded upon trust or confidence reposed by one person in the integrity and fidelity of another" (see *Penato v George*, 52 AD2d 939, 942 [1976]), the hallmark of which is an imbalance of power between the parties (see *Langford v Roman Catholic Diocese of Brooklyn*, 271 AD2d 494, 504 [2000]). Although the allegations herein are similar, this cause of action is sufficiently based on a violation of the trust Amritt-Hall placed in Horn to represent her in the loan transaction and secure refinancing thereafter, rather than some lack of skill or negligence in performing his duties (see generally *Malmsteen v Berdon, LLP*, 477 F Supp 2d 655, 661-662 [SDNY 2007]; cf. *Matter of R.M. Kliment & Frances Halsband, Architects [McKinsey & Co., Inc.]*, 3 NY3d 538, 542 [2004]). Moreover, the third-party action was timely commenced before the six-year statute of limitations for a breach of fiduciary duty claim based on fraud had expired (CPLR 213).

The court further notes that the breach of fiduciary duty claim is not duplicative of the fraud claim asserted against him (see *KS v ES*, 39 Misc 3d 1219[A], 2013 NY Slip Op 50664[U], *8 [2013]; cf. *Stein v McDowell*, 74 AD3d 1323, 1326 [2010]). Rather, the alleged fraud Horn perpetrated against his client was one way in which he violated the trust placed in him by virtue of the fiduciary nature of their relationship. As Amritt-Hall correctly notes, Horn's reliance on *Mecca v Shang* (258 AD2d 569 [1999]) is misplaced, as it merely stands for the proposition that a separate claim for fraud does not exist when it is duplicative of a legal malpractice claim because it is based on concealment or intentional failure to disclose the attorney's own lack of competence or legal expertise (see *id.*, citing *White of Lake George v Bell*, 251 AD2d 777 [1998]), which is not alleged here.

Unconscionability Claims

Finally, although Amritt-Hall concedes that unconscionability may only be asserted as a defense against the debt owed and does not constitute a cause of action on its own (see *Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 354 [2006]), the allegations set forth in her second counterclaim and cross-claim may be considered insofar as they amplify the remaining pleadings in the complaint.

Horn's Motion to Sever the Third-Party Action

Finally, since the making of these motions and cross motions, Horn's motion to sever has been rendered moot by the Honorable Justice Martin J. Schulman's order, dated June 22, 2015, which severed all third-party cross-claims and counterclaims from the main action.

The court has considered the parties' remaining contentions and deems them meritless.

Accordingly, Horn's motion and the cross-motions of Lexington, Gotham, and Galasso are granted to the extent of dismissing any cause of action sounding in unconscionability, but denied with respect to dismissal of the counterclaims and/or cross-claims based on GBL § 349, fraud, conspiracy to commit fraud, negligent misrepresentation, New York State Banking Law § 590-b, and breach of fiduciary duty. Horn's motion to sever is denied as moot.

Dated: July 13, 2015

J.S.C.