

Jennings-Purnell v Donner

2016 NY Slip Op 31517(U)

August 10, 2016

Supreme Court, New York County

Docket Number: 110344/2006

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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Ann Jennings-Purnell, M.D.

Plaintiff,

110344/2006

-against-

Richard W. Donner

Defendants

-----X

KALISH, J.:

Upon the foregoing submitted papers, the Defendant's motion for summary judgment dismissing the Plaintiff's action is granted and the Plaintiff's cross-motion for summary judgment is denied as follows:

Background and Procedural History

The following recitation of facts includes only those facts directly relevant to the instant motion and cross-motion for summary judgment before the Court. Originally, the Plaintiff brought the underlying action against Eric C. Jennings, Benjamin M. Adams, Adams & Associates, P.C. and Richard W. Donner. The Plaintiff has since discontinued the action against Jennings without prejudice pursuant to a settlement agreement, and also discontinued the action against Adams and Adams & Associates, P.C. without prejudice. The only remaining Defendant in the underlying action is Richard W. Donner, who now moves for summary judgment.

The underlying action arises from the closing for a sale of a property located at 549 Manhattan Avenue (the "Property") that occurred on September 14, 2004. Plaintiff alleges that Adams is the principal of Adams & Associates, P.C. Plaintiff further alleges that the contract of sale for the Property she signed on September 14, 2004 violated a previous oral agreement between the former Defendant Jennings and herself. The Plaintiff alleges that Adams knew of said oral agreement and that the sale was the result of fraud/misconduct/false representations by the former Defendants Jennings, Adams and

Adams & Associates, P.C.

The Plaintiff alleges in sum and substance that as a result of Donner's notarial misconduct, the Defendant ended up paying more for the Property at the closing than she had previously agreed with Jennings, that she received only a partial ownership of the Property and that she incurred additional costs based upon the higher sales price she paid for the Property.

Prior to the instant motion, the Plaintiff discontinued her underlying action without prejudice as against the prior Defendant Jennings pursuant to a settlement agreement made effective June 10, 2009. The Plaintiff also discontinued the underlying action without prejudice against the prior Defendants Adams and Adams & Associates, P.C. pursuant to a Stipulation of Partial Discontinuance dated July 28, 2014. The Stipulation of Partial Discontinuance was based upon Adams' prior bankruptcy Discharge of Debtor Order issued by the United States Bankruptcy Court on June 4, 2012 under Case No. 11-24-120-rdd, venued in the United States Bankruptcy Court, Southern District of New York.

The Court notes that the Plaintiff's Amended Verified Complaint dated January 9, 2008 does not state the specific nature of her cause of action against the remaining Defendant Donner. However, a decision by the First Department has clarified that the Plaintiff's cause of action against Donner is for "notarial misconduct".

Donner previously made a motion to dismiss the Plaintiff's cause of action against him pursuant to CPLR §3211(a)(5) and (a)(7) on the bases that the statute of limitations had run and for failure to state a claim. By decision dated February 7, 2012, said motion was granted by the Honorable Justice Tingling sitting in the New York Supreme Court for New York County. The Plaintiff appealed said decision to the First Department, which overturned the prior decision on the grounds that "Plaintiff's amended complaint, as supplemented by her affidavit in opposition to the motion to dismiss, stated a claim against defendant for notarial misconduct" (Jennings-Purnell v Jennings, 107 AD3d 513, 514 (NY App Div 1st Dept 2013)). The First Department further indicated that "[i]n light of the foregoing determination, the appeal from the order denying plaintiff's motion to vacate a prior order striking her motion to interpose a

second amended complaint is moot” and “[f]urther, the proposed pleading sufficiently stated a claim for notarial misconduct. It also related back to the prior amended complaint for the purposes of the statute of ‘limitations’” (Jennings-Purnell v Jennings, 107 AD3d 513, 514 (NY App Div 1st Dept 2013)). The First Department specifically stated that “[w]hile the prior amended complaint did not mention notarial misconduct, it clearly gave notice to defendant of the transaction and occurrence in which the notarial misconduct took place” (Jennings-Purnell v Jennings, 107 AD3d 513, 514 (NY App Div 1st Dept 2013)).

There is no indication that the Plaintiff ever filed “the proposed pleading” reviewed by the First Department. As such, the Plaintiff’s allegation of notarial misconduct against Donner is based upon the Plaintiff Amended Verified Complaint dated January 9, 2008 read together with the Plaintiff’s affidavit in opposition to Donner’s prior motion to dismiss (see Embee Advice Establishment v. Holtzmann, Wise & Shepard, 191 AD2d 194 (NY App Div 1st Dept 1993)[“Modern pleading rules focus upon whether the pleader has a cause of action, not whether he has properly stated one, and in making that determination, accompanying affidavits may be referred to for the limited purpose of remedying any defects in the pleadings”]).¹

¹ Although the Court recognizes that the First Department determined that the Plaintiff’s Amended Verified Complaint dated January 9, 2008 read together with the Plaintiff’s affidavit in opposition to Donner’s prior motion to dismiss was sufficient to state a claim for notarial misconduct, it would have been better practice for the Plaintiff to have filed a second amended complaint in the form of the “proposed pleadings” which the First Department reviewed and found sufficient to state a claim for notarial misconduct. Had the Plaintiff done so, all of the Plaintiff’s allegations of facts would have been included in a single pleading going forward in the underlying action. However, as the First Department determined that the Plaintiff’s Amended Verified Complaint dated January 9, 2008 read together with the Plaintiff’s affidavit in opposition to Donner’s prior motion to dismiss was sufficient to state a claim for notarial misconduct, the Court must now read two separate documents together in order to ascertain the Plaintiff’s factual allegations against the Defendant Donner. The Court recognizes that the scope of a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7) is limited solely to the determination of whether or not the Plaintiff has a cause of action. However, the pleadings are the primary source for determining the factual allegations in any cause of action, and are necessary in order to determine motions for summary judgment as well as ultimately determining the outcome of an action should it proceed to trial. As such, it is better practice for plaintiffs’ attorneys to submit amended pleadings and/or bills of particulars when necessary to clarify their factual allegations, even where their original pleadings are sufficient to state a claim.

Analysis

Parties' contentions

In support of his motion for summary judgment pursuant to CPLR §3212, Donner argues in sum and substance that the Plaintiff's factual allegations failed to support a cause of action for notarial misconduct pursuant to New York Executive Law §135. Specifically, the Defendant argues that the documentary and testimonial evidence demonstrate that he fully and properly fulfilled his notarial duties at the September 14, 2004 closing by witnessing and verifying the identity of each person signing the documents on said date.

The Defendant's attorney argues in her affirmation that the Plaintiff admitted at her deposition that all of the signatures on the closing documents were genuine, and that her son Jennings' signatures and initials on the mortgage agreement were also genuine. Defendant further argues that he notarized all of the signatures at the September 14, 2004 closing, including the Plaintiff and Jennings' signatures, after he witnessed each person sign the document in his presence. Defendant further argues that prior to notarizing the closing documents at issue, he requested and received copies of the Plaintiff and Jennings' valid New York State driver's licenses, which were valid proof of each person's identification sufficient to fulfill the Defendant's notarial duties. The Defendant argues that he also reviewed Benjamin Adams' driver's license and was separately familiar with Mr. Adams' identity because Adams was Donner's employer. As such, the Defendant argues that he duly executed his duties as a notary at the September 14, 2004 closing.

The Defendant further claims that the Plaintiff's action against him for notarial misconduct should be dismissed since the Plaintiff cannot demonstrate through admissible evidence that any of her purported damages were caused by Mr. Donner's notarial acts. The Defendant argues that the Plaintiff's equitable claim in her amended complaint that the Plaintiff was damaged by her son Jennings' co-ownership of the Property has been moot ever since the Plaintiff's settlement agreement with Jennings, which resulted in the Plaintiff becoming the sole owner of the Property in August 2009.

The Defendant further argues that there is no documentary proof to establish that the Plaintiff incurred any out-of-pocket expenses at the September 14, 2004 closing. The Defendant further argues that although Plaintiff alleges in her interrogatory responses that she paid \$477,000.00 more for the Property at the closing than she had orally agreed to pay for the Property prior to the closing, the Plaintiff has failed to produce any documentary evidence supporting the purported origins of this alleged damage amount. The Defendant further argues that even assuming that the Plaintiff did have a prior oral agreement to purchase the Property for an amount \$477,000.00 less than the amount the Plaintiff ultimately paid for the Property at the closing, the Defendant had no involvement whatsoever with the alleged oral agreement. As such, the Defendant argues that the Plaintiff cannot link any alleged damages to the Defendant's performance of his notarial duties at the September 14, 2004 closing. Similarly, the Defendant argues that the Plaintiff's alleged damages due to excessive real estate taxes, mortgage interest, title insurance, and property and liability insurance are all based upon her unsupported claim that she ultimately paid more for the Property at the closing than she had previously agreed to pay. As such, Donner argues that there is no causal connection between his performance of his notarial duties at the September 14, 2004 closing and the Plaintiff's alleged damages stemming from her claim that she paid a higher purchase price at the closing than she had previously agreed (with the prior Defendant Jennings) to pay.

In opposition to the Defendant's motion and support of her cross-motion for summary judgment, the Plaintiff argues that New York Executive Law §135 does not delineate the types of situations where notarial misconduct can cause injuries. The Plaintiff further argues that her claim against Donner is based upon two points: (1) that she executed documents at the closing under false pretenses and under duress and (2) that Donner bore sufficient enough responsibility for facilitating the misconduct to be responsible for plaintiff's resulting damages. The Plaintiff argues that said damages include \$500,000.00 in out of pocket damages (presumably the difference in the amount she paid for the Property from the lesser amount she allegedly orally agreed with Jennings to pay for the Property prior to

the closing) and the “property taxes and insurance charges that are higher than they would have been had the price at the closing been \$500,000 lower than it was” (Plaintiff’s Memorandum of Law p. 9).

The Plaintiff specifically indicates in her opposition and cross-motion that although she believes that forgery may have occurred (in that the deed may have been later altered to name Jennings as a co-owner of the property or that she was intimidated into executing a marked-up deed without understanding the nature of the changes), said “forgery” is not one of her primary complaints against Donner in the underlying action. The Plaintiff specifically argues that said issue “is actually not critical on this [cross] motion” and that the settlement of the Plaintiff’s cause of action against Jennings “involved a quit-claim deed back to plaintiff of any interest that he might have acquired as a result of any scheme, no matter how effectuated” (Plaintiff’s Memorandum of Law in opposition to Defendant’s motion and in support of Plaintiff’s cross-motion for summary judgment pp. 8-9).

The Plaintiff argues that because Donner was an employee of Adams’ law firm, Donner was not an “independent notary” and as such the Plaintiff only bears an “ordinary burden of proof” to challenge the validity of the documents he notarized at the closing. The Plaintiff further argues in sum and substance that Donner knew that Adams was acting to defraud and deceive the Plaintiff at the closing (as the Plaintiff alleged against Adams prior to discontinuing the action against Adams). Specifically, the Plaintiff argues that at the closing, Adams signed a HUD-1 disclosure form and Donner co-signed the same form, on behalf of the firm of Adams and Associates, as Settlement Agent. The Plaintiff also argues that Donner notarized Adams’ signature as seller on the New York City real estate transfer tax form.

The Plaintiff further argues that Donner knew of the existence of a close relationship between Adams and Jennings when he saw Jennings at the closing, and that Donner could not have failed to observe the Plaintiff's compromised physical condition at the closing. The Plaintiff further argues that Donner's deposition testimony did not address "any of the circumstances claimed by plaintiff to constitute fraud and duress" and that "the court should evaluate this conspicuous omission as indicative of the existence of knowledge of fraud and duress" (Plaintiff's Memorandum of Law p. 16).

The Plaintiff argues that Donner bears responsibility for the success of the fraud and duress Adams perpetrated against her, since Donner had knowledge that Adams was acting to defraud and deceive the Plaintiff at the closing and helped to facilitate said fraud/deception in his role as a notary. Plaintiff argues that she is entitled to summary judgment against Donner on both the issues of liability and damages.

In reply and opposition to the Plaintiff's cross-motion, Donner reiterates the arguments presented in his moving papers. He further argues that the Plaintiff has not alleged any claim for fraud, duress, legal malpractice, or any other tort against Donner in the pleadings. Donner further argues that the Plaintiff's argument that Donner engaged in notarial misconduct is purely speculative and conclusory. Donner argues that the Plaintiff's argument that Donner should be held liable for the alleged independent fraudulent and/or negligent acts of the non-party Adams is purely speculative, merit-less and not supported by admissible evidence. Donner further argues that the Plaintiff's theory of liability against Donner (i.e. that Donner facilitated Adams' alleged fraud/deception through Donner's role as a notary at the closing) was presented for the first time in Plaintiff submitted papers for the cross-motion, and were not included in any of the Plaintiff's pleadings. The Defendant further reiterates his argument that the Plaintiff cannot establish that any of her alleged monetary damages were proximately caused by Donner's proper notarization of the closing documents.

The Defendant further argues that the Plaintiff's cross-motion for summary judgment should be denied as untimely pursuant to CPLR §3212, since the Plaintiff did not make her cross-motion until March 11, 2016, almost a month after the February 16, 2016 deadline ordered by the Court. The Defendant further argues that the Plaintiff had failed to present good cause for her delay in moving for summary judgment against the Defendant.

Oral Argument

On June 13, 2016, the Parties appeared before this Court for oral argument on the instant motion. The Defendant's counsel reiterated the argument that the Defendant fulfilled all of his duties as a notary at the September 14, 2004 closing by confirming the identities of the signatories and witnessing them signing the closing documents. As such, the Defendant argued that he fulfilled his duty as a notary. The Defendant further argued that the Plaintiff could not establish that the Defendant's alleged notarial misconduct was the proximate cause of any of her alleged damages.

Defendant's counsel further argued that there is no statutory requirement that a notary verify the accuracy or completeness of documents being notarized. Defendant's counsel further argued that the Plaintiff's claim against Donner in effect attempts to hold Donner liable for the alleged fraudulent acts taken by Adams at the closing. However, the Plaintiff did not allege any causes of action for fraud and/or duress directly against Donner in the pleadings. Defense counsel further argued that there is no statutory or legal basis for expanding the scope for a charge of notarial misconduct to hold Donner responsible for any and all torts allegedly committed by any individuals at the September 14, 2004 closing.

Defense counsel further reiterated his argument that the Plaintiff cannot establish that any of her alleged damages were proximately caused by Donner's alleged notarial misconduct. Specifically, Defense counsel argued that all of the Plaintiff's claimed "damages" arise from her claim that she paid approximately \$477,000 more for the Property at the closing than she had orally agreed to pay for the Property prior to the closing. However, Donner was not involved in any the alleged prior oral agreement

and did not become involved in the Plaintiff's purchase of the property until the September 14, 2004 closing. Therefore, the Plaintiff's claimed damages arising from the allegedly higher price (e.g. higher mortgage taxes, title insurance etc.) were in no way caused by Donner's role as the notary at the September 14, 2004 closing. Defense counsel further argued that the Plaintiff's cross-motion for summary judgment was untimely as the Plaintiff did not make her cross-motion within sixty days of the filing of the note of issue as ordered by the Court.

In opposition, Plaintiff's counsel argued at oral argument that Donner violated his notarial duty by ignoring the Plaintiff's compromised physical condition at the September 14, 2004 closing and allowing her to sign the closing papers. The Plaintiff further argued that Donner knew that Adams was engaged in fraud, that Adams was an "undisclosed seller" and that Adams was acting as the attorney for both the Plaintiff and Jennings. The Plaintiff's attorney argued in sum and substance that Donner's notarial duties included observing that the Plaintiff was not in a physical condition to participate in the closing and not allowing the closing to go forward based upon said observations.

The Plaintiff further argued that it should be inferred from Donner's lack of testimony as to the Plaintiff's physical condition, that Donner did actually observe that the Plaintiff was in a compromised physical state at the September 14, 2004 closing. The Plaintiff further argued that the alleged damages stem from Donner's notarial duties. Specifically, Plaintiff argued that by notarizing the closing documents at the closing, Donner helped to facilitate the fraud and duress that allegedly cause the Plaintiff to pay more for the Property than under her prior oral agreement with Jennings.

On the issue of the Plaintiff's untimely cross-motion for summary judgment, the Plaintiff's counsel acknowledge that he had made his cross-motion more than sixty days after filing of the note of issue, but asked that the Court in its discretion still determine the cross-motion on its merits.

Summary Judgment Standard

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (id.). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

The Court

The Court will determine both the Defendant’s motion and the Plaintiff’s cross-motion for summary judgment on their merits

In the instant action, the Plaintiff acknowledges that his cross-motion is untimely pursuant to the deadline set by the Court requiring all motions for summary judgment to be made within 60 days of the Plaintiff’s filing of a statement of readiness. Further, the Court finds that the Plaintiff has failed to present a satisfactory reason for said delay given that the underlying action was commenced approximately ten years ago and that the Plaintiff was the party that filed the statement of trial readiness. However, “a court may entertain an untimely cross motion for summary judgment if the court is deciding a timely motion for summary judgment made on nearly identical grounds” (Alexander v Gordon, 95 AD3d 1245 (NY App Div 2nd Dept 2012)). In the instant action, Donner has moved for summary judgment dismissing the Plaintiff’s action for notarial misconduct arguing in sum and substance that Donner fully performed his duty as a notary at the September 14, 2004 closing. The Plaintiff has also

cross-moved for summary judgment arguing in sum and substance that Donner violated his notarial duties by participating in the September 14, 2004 closing despite observing the Plaintiff's alleged impaired physical condition and given Donner's knowledge of Adams' fraudulent activity. As such, both the motion and cross-motion address Donner's involvement with the September 14, 2004 closing in his capacity as a notary. The Court further notes that the Defendant served reply papers in opposition to the Plaintiff's cross-motion, and both Parties subsequently appeared for oral argument on the motion and cross-motion.

Accordingly, the Court shall determine both the Defendant's motion for summary judgment and the Plaintiff's cross-motion for summary judgment based upon the merits of the submitted papers.

The Defendant Donner is entitled to summary judgment dismissing the Plaintiff's cause of action for notarial misconduct.

The tort of notarial misconduct is based upon an alleged violation of New York Executive Law § 135, which reads as follows:

§ 135. Powers and duties; in general; of notaries public who are attorneys at law

Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages and powers of attorney and other instruments in writing; to demand acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and to protest the same for non-acceptance or non-payment, as the case may require, and, for use in another jurisdiction, to exercise such other powers and duties as by the laws of nations and according to commercial usage, or by the laws of any other government or country may be exercised and performed by notaries public, provided that when exercising such powers he shall set forth the name of such other jurisdiction.

A notary public who is an attorney at law regularly admitted to practice in this state may, in his discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his client in respect of any matter, claim, action or proceeding.

For any misconduct by a notary public in the performance of any of his powers such notary public shall be liable to the parties injured for all damages sustained by them. A notary public shall not, directly or indirectly, demand or receive for the protest for the non-payment of any note, or for the non-acceptance or non-payment of any bill of exchange, check or draft and giving the requisite notices and certificates of such protest, including his notarial seal, if affixed thereto, any greater fee or reward than seventy-five cents for such protest, and ten cents for each notice, not exceeding five, on any bill or note. Every notary public having a seal shall, except as otherwise provided, and when requested, affix his seal to such protest free of expense.

Notarial misconduct can be for wilful, fraudulent or negligent actions of a notary. Further, New York Executive Law § 135 does not require a showing of detrimental reliance. “Rather, a plaintiff seeking to recover under that section need only show that the notary engaged in notarial misconduct and that such misconduct was a proximate cause of the plaintiff’s injury” (Chicago Tit. Ins. Co. v LaPierre, 104 AD3d 720, 720-721 (NY App Div 2d Dept 2013) citing Plemmenou v Anninos, 12 AD3d 657 (NY App Div 2d Dept 2004); Wells Fargo Bank, N.A. v Sherwood, 82 AD3d 758 (NY App Div 2d Dept 2011); Maloney v Stone, 195 AD2d 1065 (NY App Div 4th Dept 1993); Amodei v New York State Chiropractic Ass’n, 160 AD2d 279 (NY App Div 1st Dept 1990) affd 77 NY2d 891 (NY 1991)).

Initially, the Court notes that the Plaintiff’s Amended Verified Complaint does not state a cause of action against the Defendant Donner for fraud or duress. Further, the First Department specifically determined that the Plaintiff’s Amended Verified Complaint dated January 9, 2008 read together with the Plaintiff’s affidavit in opposition to Donner’s prior motion to dismiss were sufficient to make out a claim for notarial misconduct (Jennings-Purnell v Jennings, 107 A.D.3d 513, 514 (NY App Div 1st Dept 2013)). There is nothing in the First Department’s decision to indicate that the Plaintiff’s Amended Verified Complaint dated January 9, 2008 read together with the Plaintiff’s affidavit in opposition to Donner’s prior motion to dismiss was sufficient to make out any other claims against Donner, and the Plaintiff does not now claim that she is making a claim of fraud or duress against Donner.

As previously stated, based upon the First Department’s determination that “Plaintiff’s amended complaint, as supplemented by her affidavit in opposition to the motion to dismiss, stated a claim against defendant for notarial misconduct” (Jennings-Purnell v Jennings, 107 A.D.3d 513, 514 (NY App Div 1st Dept 2013)) and the Plaintiff’s failure to file additional pleadings in the underlying action, the Court must look to both the Plaintiff’s Amended Verified Complaint and her affidavit in opposition to the prior motion to dismiss in order to ascertain the nature of her claim against Donner for notarial misconduct.

The only allegations as to the Defendant Donner included in the Plaintiff's Amended Verified Complaint are as follows:

- on or about September 14, 2004, Donner was an associate of Adams and Associates P.C. (Plaintiff's Amended Verified Complaint para. 6);
- Donner is an attorney licensed to practice law in the State of New York (Plaintiff's Amended Verified Complaint para. 9);
- at all relevant times Donner does business within the City, County and State of New York (Plaintiff's Amended Verified Complaint para. 11);
- pursuant to the contract of sale, Donner is listed as the Plaintiff's attorney (Plaintiff's Amended Verified Complaint para. 29);
- the first time the Plaintiff met Donner was on the date of the closing, September 14, 2004 (Plaintiff's Amended Verified Complaint para. 30);
- the only individuals present at the closing were the Plaintiff, Jennings, Adams and Donner (Plaintiff's Amended Verified Complaint para. 62);
- Donner attended the closing as a Plaintiff's lender (Plaintiff's Amended Verified Complaint para. 63); and
- no consent was given for Donner or Adams and Associates P.C. to act in dual capacity on behalf of the lender and/or purchaser (Plaintiff's Amended Verified Complaint para. 64).

In addition, the Plaintiff made the following allegations as to Donner in her affidavit submitted in opposition to Donner's prior motion to dismiss her action pursuant to CPLR §3211 that was appealed before the First Department:

- "[t]he Amended Verified Complaint does not indicate that Mr. Donner represented me as an attorney or that he performed legal services on my behalf" (Plaintiff's affidavit in opposition to the prior motion to dismiss para. 3);
- "My sole and exclusive counsel in the transaction complained of was the co-Defendant, Benjamin Adams. Benjamin Adams prepared the Contract of Sale that listed Mr. Donner" (Plaintiff's affidavit in opposition to the prior motion to dismiss para. 4);
- "I have no knowledge of any legal involvement by Mr. Donner either with the preparation of the contract of sale, with the "negations" or arrangement made with the mortgage brokerage agency and with the title insurance agency or otherwise prior to the closing" (Plaintiff's affidavit in opposition to the prior motion to dismiss para. 6);

- “I added Mr. Adams’ incorporated law firm, Adams & Associates, P.C. (Since declared bankrupt) as a co-defendant in this litigation, since it is responsible for his actions as principal attorney, but I did not allege that Mr. Donner is liable as an associate of that firm working under Mr. Adams’ direction” (Plaintiff’s affidavit in opposition to the prior motion to dismiss para. 7);
- “[a]t the closing, Benjamin M. Adams was in exclusive control. Mr. Donner made no statements, and took no actions other than to notarize signatures” (Plaintiff’s affidavit in opposition to the prior motion to dismiss para. 8);
- “[i]n front of that statement [the closing statement], Mr. Donner is identified as having represented the lending institution, not me... Nothing in the closing statement supports the allegation of that document that Mr. Donner, or anyone else besides Mr. Adams, had represented the lender. I have never adopted Mr. Adams; characterization of Mr. Donner’s role as attorney for the lender” (Plaintiff’s affidavit in opposition to the prior motion to dismiss para. 9);
- “[t]he actual role of Mr. Donner at the closing and possibly afterwards, was to apply his signature and notary seal or stamp to the fraudulent deed, to false affidavits in the real estate returns and to other improperly prepared Closing documents. It is entirely appropriate that Mr Donner should bear legal responsibility for these actions.” (Plaintiff’s affidavit in opposition to the prior motion to dismiss para. 12); and
- “[m]y counsel has not had an opportunity to depose Mr. Donner. A deposition will become unnecessary if Mr. Donner should signify his agreement that he only acted as notary at the closing. If Mr. Donner does not agree with this description of the limited nature of his involvement, then the scope of his involvement may become a disputed factual issue that can only be determined at trial or on summary judgment” (Plaintiff’s affidavit in opposition to the prior motion to dismiss para. 13)

Read together, it is clear from the Plaintiff’s Amended Verified Complaint and affidavit in opposition to Donner’s prior motion to dismiss pursuant to CPLR §3211 that the Plaintiff’s notarial misconduct claim against Donner stems solely from his performance of his duties as a notary at the September 14, 2004 closing. The Plaintiff specifically indicates that Donner was not acting as her counsel at the closing. She also attested that she had “no knowledge of any legal involvement by Mr. Donner either with the preparation of the contract of sale, with the negotiators or arrangements made with the mortgage brokerage agency and with the title insurance agency or otherwise prior to the closing”. She further indicates that Donner made no statements, and took no actions at the closing other than to notarize signatures. Plaintiff does not allege that Donner had any involvement in the preparation of the fraudulent documents, nor does she allege any basis to show that Donner even knew of the alleged

prior oral agreement the Plaintiff had with Jennings. The Plaintiff states very clearly in her affidavit that Donner's role at the closing was to apply his signature and notary seal or stamp to the allegedly fraudulent closing documents.

Upon review of the submitted papers and having conducted oral argument on the motion and cross-motion, the Court finds that the Defendant has established prima facie that he is entitled to summary judgment dismissing the Plaintiff's action against him for notarial misconduct. Specifically, the Plaintiff has established prima facie that he fully performed his notarial duties at the September 14, 2004 closing by insuring the identities of the individuals signing the closing documents, witnessing said signatures and notarizing the signed documents accordingly. The Plaintiff does not allege that Adams in any way instructed Donner in the performance of his duties as notary at the September 14, 2004. Further, the Plaintiff does not allege that any of the signatures on any of the closing documents were forged.

The principle function of a New York notary is to verify the identity of a person signing a document so that the power of a notary may be relied upon to authenticate the document as being from an under-oath declarant. Actions brought for notarial misconduct are built around allegations that the Plaintiff sustained damages due to forged signatures that were treated as genuine due to a notary's failure to perform his/her duty correctly, such as notarizing signatures he/she did not witness and/or accepting unreliable proof of identification (See e.g. Blue Danube Prop. LLC v Mad52 LLC, 107 AD3d 561 (NY App Div 1st Dept 2013); Chicago Tit. Ins. Co. v LaPierre, 104 AD3d 720 (NY App Div 2d Dept 2013); Wells Fargo Bank, N.A. v Sherwood, 82 AD3d 758 (NY App Div 2d Dept 2011); Koch v Kyong Min, 2011 NY Slip Op 31951(U) (NY Sup Ct NY Cnty 2011); Edwards v Rockaway Stor., Inc., 30 Misc 3d 1215(A), 1215A (NY Sup Ct Queens Cnty 2008)).

In the instant action, the Plaintiff concedes that none of the signatures on any of the closing documents were forged, and further does not allege that Donner failed to witness said signatures and/or accepted improper proof of identification from the signatories. Further, Donner's verification of the signatures on the closing documents only verified the fact that the closing documents were properly executed, not the content of said closing documents (See Pittis v Abrams, 129 NYS2d 216, 217 (NY App Term 1st Dept 1954)). As such, the Court finds that Donner has established prima facie that he properly performed his notarial duties at the September 14, 2004 closing in compliance with New York Executive Law § 135.

Further, even assuming arguendo that the Defendant had failed to perform his notarial duties at the September 14, 2004 closing, the Defendant has also established prima facie that the Plaintiff failed to establish that any of her damages stemmed from Defendant's alleged failure. In the underlying action, the Plaintiff's damages all stem from her allegation that she entered into a prior oral agreement with Jennings, wherein she agreed to pay a lesser amount for the Property than she actually paid at the September 14, 2004 closing. However, the Plaintiff does not allege that Donner was present when she and Jennings reached said agreement, nor does the Plaintiff allege any basis for the Court to conclude that Donner was aware of said agreement on or before the closing.

Plaintiff's alleged damages stem from her allegations that the prior Defendants Jennings and Adams defrauded her. The Plaintiff's alleged damages do not stem from Donner acting as a notary at the closing. Plaintiff concedes that Adams prepared the contract of sale, arranged for the financing, arranged for the title insurance, that Adams was Plaintiff's sole and exclusive counsel and that Adams was in exclusive control of the closing. Plaintiff further indicated that Donner made no statements and took no actions at the September 14, 2004 closing other than notarizing the signatures. Further, the Plaintiff has not made any allegations of fraud or duress against Donner.

As such the Court finds that Donner has established prima facie that he is entitled to summary judgment dismissing the Plaintiff's action against him for notarial misconduct.

The Court further finds that the Plaintiff has failed to create an issue of fact in opposition to the motion. The Plaintiff's opposition to the Defendant's motion (and Plaintiff's own cross-motion for summary judgment) is based upon the arguments that Donner had knowledge of Adams' alleged fraud and that Donner should not have notarized the closing documents given the Plaintiff's physical state at the closing. However, the Plaintiff's argument that Donner had knowledge of Adams' alleged fraud is purely speculative and based entirely upon the fact that Donner was employed by Adams & Associates, P.C. The Plaintiff has presented no proof that Donner had any knowledge of the alleged fraud on or before the closing. Further, although the Plaintiff testified as to her physical state at the closing, there is no basis for the Court to conclude she had the appearance of being physically incapable of knowingly participating at the closing. Similarly, the fact that the closing took place at the Plaintiff's home in no way puts Donner on notice that the Plaintiff was mentally infirm or incapable of knowingly participating at the closing. There is nothing from the submitted papers to show that Donner had any notarial duty to stop the closing based upon the Plaintiff's action or the actions of any other individuals at the September 14, 2004 closing.

In addition, there is no duty under the law for a notary to read the documents that he is notarizing and/or advise any individuals as to their contents. Further, a notary does not automatically take on the role of an attorney for any of the parties to a closing due solely to the fact that said notary is also an attorney. In point of fact, the Plaintiff specifically acknowledges that Adams was her sole and exclusive counsel at the September 14, 2004 closing.

The Plaintiff argues in sum and substance that this Court should extend the scope of a notary's duty under New York Executive Law § 135 so that a notary can be held independently responsible for the full consequences of another individual's tort of fraud based solely upon the fact that the notary notarized the documents that were allegedly used to perpetrate the fraud and participated in the closing in his/her capacity as a notary. The Court notes that said argument was not included in the Plaintiff's pleadings and is being raised for the first time in the Plaintiff's submitted papers and oral argument approximately ten years after the commencement of the underlying action.

The Court further notes that the Plaintiff has failed to cite to a single case or statute imparting a duty upon a notary to insure the absence of fraud or duress from a closing, apart from his/her duty to witness and verify the authenticity of the signatures. This is not to say that a notary cannot be subject to a fraud claim based upon his/her knowing participation in a fraudulent scheme. In the underlying action the Plaintiff alleges that she was under duress when she signed the closing documents and that pushing her to sign the closing documents under duress was part of the fraud perpetrated upon her by Adams. However, fraud is a cause of action separate from notarial misconduct and much larger in scope. In the instant action, the Plaintiff has not alleged a claim of fraud against the Donner. Had the Plaintiff sought to hold Donner accountable for the fraud allegedly perpetrated by the prior Defendant Adams, the Plaintiff was free to make a claim of fraud against Donner in her pleadings. The Plaintiff having failed to do so, the Court will not now expand the scope of notarial misconduct so that it may essentially stand in the place of an action for fraud.

Accordingly and for the reasons so stated, this Court finds that the Defendant Richard W. Donner is entitled to summary judgment dismissing the Plaintiff's cause of action against him for notarial misconduct. Similarly and for the reasons so stated, the Court further finds that the Plaintiff is not entitled to summary judgment on her cross-motion.

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that the Defendant Richard W. Donner's motion for summary judgment is hereby granted and the Plaintiff's cause of action against him for notarial misconduct is hereby dismissed. It is further

ORDERED that the Plaintiff's cross-motion for summary judgment is denied

The foregoing constitutes the ORDER and DECISION of the Court.

Dated:

Aug 14, 2016

ENTER:

Robert D. Kalish, J.S.C.
HON. ROBERT D. KALISH
J.S.C.