

**Tellock v U.S. Bank Trust N.A.**

2024 NY Slip Op 31041(U)

March 25, 2024

Supreme Court, New York County

Docket Number: Index No. 157259/2023

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 157259/2023
DON M. TELLOCK 12/19/2023,
Plaintiff, MOTION DATE 12/19/2023
- v - MOTION SEQ. NO. 001 002

U.S. BANK TRUST NATIONAL ASSOCIATION, AS
TRUSTEE OF THE LB-IGLOO SERIES IV TRUST,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 47, 49, 50, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 51, 52, 53, 67

were read on this motion to/for INJUNCTION/RESTRAINING ORDER

In July 2023, plaintiff Don Tellock commenced this action against defendant US Bank Trust National Association (hereinafter, "US Bank" or "defendant"), as Trustee of the LB Igloo Series IV Trust. Plaintiff alleges that (1) he re-purchased his condominium in a 2020 foreclosure action, (2) due to the COVID-19 pandemic, defendant's predecessor in interest, Wells Fargo Bank N.A., announced that it was cancelling the sale (to which plaintiff agreed) but communicated that it would work to ensure plaintiff remained owner of the apartment in the future, and (3) Wells Fargo held a second foreclosure sale in 2022, at which it purchased the property as the highest bidder for substantially less than plaintiff had in 2020. In this action, plaintiff seeks a judgment declaring the 2022 foreclosure sale invalid since Wells Fargo fraudulently induced him into cancelling his previous 2020 purchase of the apartment. In motion sequence 001, defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (5) and the doctrine of res judicata, CPLR 3211 (a) (1) based on documentary evidence, and CPLR 3211 (a) (7) for failure to state a cause of action. Plaintiff opposes the motion in its entirety. In motion sequence 002, plaintiff moves by Order to Show Cause ("OSC") for a preliminary injunction and temporary restraining order enjoining defendant from bringing eviction and removal proceedings in a related Holdover Proceeding in the Civil Court of the City of New York. (US Bank Trust National v Don Marcus Tellock, Index No. LT-317619-23/NY [Civil Ct. NY County].) For the following reasons, US Bank's motion to dismiss is granted and plaintiff's OSC is denied.

## BACKGROUND

In 2007, plaintiff purchased the subject condominium through funds secured by a mortgage from Wachovia Bank. Wells Fargo, after it acquired Wachovia, commenced a foreclosure action on December 23, 2014. (*See Wells Fargo Bank v Tellock*, NYSCEF index no. 850387/2014 [Sup. Ct. NY County 2014].) By Decision and Order dated December 18, 2019, this court [Bluth, J.] granted Wells Fargo motion for a Judgment of Foreclosure and Sale. (NYSCEF doc. no. 14, judgment of foreclosure and sale.) The final judgment due to Wells Fargo was \$1,285,121.02. (NYSCEF doc. no. 55 at ¶ 6, Braithwaite affidavit; NYSCEF doc. 14 at 1.) On February 19, 2020, under the direction of Elaine Shay, Esq., the condo was publicly auctioned at a foreclosure sale. (*Id.* at ¶ 7.) Plaintiff participated in said auction and purchased the condo for \$1,610,000. (*Id.*) The closing was set for March 21, 2020. However, around this time, the COVID-19 pandemic shutdown large parts of New York City and its court system. Wells Fargo informed plaintiff that it could not finalize the sale by that date and would cancel the sale, refund plaintiff's \$161,000 deposit (10% of the closing price), and "work with plaintiff to ensure that [he] remained the owner of his property." (*Id.* at ¶¶ 9-10.) On November 25, 2020, plaintiff entered into a stipulation and "agreed to cancel the proposed sale, due to the delays caused by the ongoing COVID-19 pandemic" and that "[i]t is hereby stipulated and agreed, by and between the parties, that the Referee shall immediately return to Mr. Tellock the entire Deposit, immediately, and without delay." (NYSCEF doc. no. 59 at 1, stipulation, 11/25/2020.)

In July 2022, Wells Fargo planned another foreclosure sale of the condo but plaintiff filed an OSC to stop it from moving forward. After allegedly receiving additional promises to make efforts to allow him to retain the condo (NYSCEF doc. no. 55 at ¶ 16), plaintiff ultimately voluntarily withdrew the OSC by stipulation dated August 16, 2022. (NYSCEF doc. no. 61, stipulation, 8/16/2022.) On May 17, 2023, a second auction for the foreclosed property was held. Wells Fargo was the high bidder and purchased the property for \$1,201,000.00. (NYSCEF doc. no. 17 at 1, referee Elaine Shay's report of sale.) Thereafter, Wells Fargo assigned its bid to US Bank. (NYSCEF doc. no. 15 at 1, assignment of bid from Wells Fargo to US Bank.) Plaintiff commenced this declaratory judgment action on July 19, 2023, seeking a declaration "that the May 2023 auction was invalid and without effect." In addition, plaintiff has asserted causes of action for fraudulent inducement and deceptive business practice under New York General Business Law § 349. Lastly, on September 9, 2023, US Bank commenced a Holdover Proceeding against plaintiff in New York County Civil Court.

## DISCUSSION

### *Dismissal Under CPLR 3211 (a) (5)—Res Judicata*

The doctrine of *res judicata*, or claim preclusion, prevents parties from relitigating causes of action arising out of the same transaction or series of transactions that were either raised or could have been raised in a prior proceeding. (*See Rojas v Romanoff*, 186 AD3d 103, 108 [1st Dept 2020].) It applies even where the plaintiff asserts a new underlying theory for their claim and/or seeks a different remedy. (*O'Brien v Syracuse*, 54 NY2d 353, 357 [1981]; *Jacobson Dev. Group, LLC v Grossman*, 198 AD3d 956, 959 [2nd Dept 2021].) Here, US Bank contends that *res judicata* precludes plaintiff's claims since this court issued a final judgment of foreclosure

and sale in 2019 (*see* NYSCEF doc. no. 14) and plaintiff could have and should have brought these claims in that action. In support of its position, US Bank cites decisions that apply the doctrine to various types of collateral attacks on underlying foreclosure judgments. (*See Sakala v Bank of Melon* (172 AD3d 640, 641 [1st Dept 2019] [where plaintiff sought the return of property under theory of wrongful foreclosure]); *Ciraldo v JP Morgan Chase Bank N.A.* (140 AD3d 912, 913 [2d Dept 2016] [where plaintiff moved to quiet title after a judgment of foreclosure and sale]); *Mazzurco v Astoria Fed. Sav. and Loan Ass.* (157 AD3d 943, 944 [2d Dept 2018] [where plaintiff asserted fraud and unjust enrichment claim related to its motion to vacate the judgment of foreclosure].) US Bank’s position, however, ignores that the fact that plaintiff’s allegations relate not to his rights under his 2014 mortgage and the merits of the foreclosure action itself but, instead, to his rights under a series of subsequent transactions as part of Wells Fargo’s attempts to sell the condominium through foreclosure. In other words, unlike the cases cited above, the claims asserted herein cannot be considered collateral attacks on the 2019 foreclosure judgment and do not relate to the same transactions as the Foreclosure Action. Accordingly, defendant’s motion to dismiss on this ground is denied.

#### *CPLR 3211 (a) (7)—Failure to State a Cause of Action*

On a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), courts afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, and give the plaintiff the benefit of every possible favorable inference. (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015].) Nonetheless, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss.’ (*See Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014].) A court’s inquiry is limited to assessing the legal sufficiency of the plaintiff’s pleadings; accordingly, its only function is to determine whether, from facts alleged and inferences drawn therefrom, plaintiff has stated the elements of a cognizable cause of action. (*JF Capital Advisors*, 25 NY3d at 764; *Skill Games, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

#### Plaintiff’s Declaratory Judgment and Fraudulent Inducement Claim

While both parties acknowledge that the Court is empowered to render declaratory judgments in justiciable controversies like the one here, US Bank correctly observes that the Court may exercise its equitable powers to set aside a foreclosure sale only where there is evidence of fraud, mistake, exploitative overreaching, or collusion in the sale. (*US Bank N.A. v Martinez*, 162 AD3d 528, 528 [1st Dept 2018], citing *Guardian Loan Co. v Early*, 47 NY2d 515, 520-521 [1979] [“A court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve oppressive or unfair conduct”].) Here, plaintiff has failed to allege any misconduct for which the Court may set aside the 2023 foreclosure sale.

In seeking to set aside this sale, plaintiff’s action is primarily premised on Wells Fargo’s failure to “work with Plaintiff to ensure that Plaintiff remained the owner of his property” after having promised to do so. (NYSCEF doc. no. 1 at ¶¶14, 19, 21) In plaintiff’s words, he was “uniquely disadvantaged from participating in the sale because the court referee had never

returned his deposit, and that the bank had made no efforts to follow through with the agreement to allow him to remain the owner of the property.” (*Id.* at 19.)<sup>1</sup> “The 2023 Foreclosure Sale was, therefore, tainted by bad faith and acts of deception... These acts include misleading misrepresentations.” (NYSCEF doc. no. 54 at 5-6, memo of law in opp.)

To properly plead fraud (whether in the declaratory judgment or fraudulent inducement context), plaintiff must allege that Wells Fargo made a material misrepresentation of existing fact, did so with knowledge of its falsity, and with the intent of inducing plaintiff to rely on it. (*See Perotti v Becker, Glynn, Melamed & Muffy LLP*, 82 AD3d 495, 498 [1st Dept 2011].) Further, plaintiff must have justifiably relied upon the misrepresentations to his detriment. (*Id.*) Under CPLR 3016 (b), plaintiff must plead each element of the fraud with particularity. (CPLR 3016 [b] [“Where a cause of action or defense is based upon ... fraud ... the circumstances constituting the wrong shall be stated in detail.”]) With CPLR 3016’s heightened pleading standard in mind, the allegation that Wells Fargo would “work” with plaintiff in the future does not sufficiently support a fraud-based causes of action. In the Court’s view, without any supporting details as to what Wells Fargo promised or how it would effectuate this general assurances, plaintiff’s fraud allegations consist solely of the fact that Wells Fargo’s failed to take certain, though unspecified, steps toward helping plaintiff retain possession of the Condo while being under no independent legal obligation to do so. The failure to plead fraud with the requisite degree of specificity is all the more evident when considering that (1) the language used in complaint stops short of alleging Wells Fargo agreed to modify his loan or that it would provide a new mortgage (indeed, plaintiff suggests that Wells Fargo steadfastly refused to do so), and (2) the November 2020 stipulation that cancelled the sale makes no mention of any assurances that plaintiff would be allowed to remain owner of the condominium in the future. (*See* NYSCEF doc. no. 10 at 1.) Accordingly, without factual allegations of what, short of new loan terms, “working” with Wells Fargo means, the bare factual allegations asserted in plaintiff’s complaint do not permit even a “reasonable inference” of alleged misconduct under CPLR 3016. (*See Euryclia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].)

As to US Bank’s argument that it was a bona fide purchaser of the condo at the 2023 Foreclosure Sale and rightfully owns it irrespective of plaintiff’s causes of action, the Court is unpersuaded. While the Judgement of Foreclosure and Sale, the Assignment of Bid, and the Referee’s Report of Sale no doubt constitute documentary evidence as judicial records, these documents fail to conclusively establish that US Bank was without actual or constructive knowledge of the alleged fraudulent inducement that plaintiff claims. Accordingly, the Court finds dismissal warranted only upon the grounds that plaintiff’s failure to adequately plead its causes of actions for a declaratory judgment and fraudulent misrepresentations.

#### Deceptive Business Practices under General Business Law § 349

General Business Law § 349 (a) declares unlawful all “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state.”

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<sup>1</sup> To the extent that this quotation implies an actual agreement to allow plaintiff to retain possession of the property, plaintiff does not make any such arguments in its memorandum of law. Moreover, both the November 2023 stipulation that plaintiff entered and other portions of his complaint refute any notion he and Wells Fargo had an actual agreement in place.

(GBL § 349; *Karlin v IVF Am.*, 93 NY2d 282, 290 [1999].) § 349 specifically prohibits deceptive acts and practices that misrepresent the *nature and quality of products* and services. (*Himmelstein, McConnel, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 176 [2021] [emphasis added].) The requisite elements that plaintiff must plead are: (1) the defendant’s conduct was consumer-oriented; (2) the defendant’s act or practice was deceptive or misleading in a material way; and (3) the plaintiff suffered an injury as a result of the deception. (*Id.* at 177.) The “consumer-oriented” element precludes § 349 claims based on private contractual disputes unique to the parties. (*Id.*, citing *Oswego Laborers’ Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995].) Here, it is clear that the alleged deceptive representation—that Wells Fargo would work with plaintiff to keep his home—was made solely towards him, concerned specific property and a private contractual dispute, and was unconnected to other consumer-oriented conduct in selling the condo. (*See Disa Realty, Inc. v Rao*, 168 AD3d 107, 1039 [2d Dept 2019] [“In any event, the alleged misrepresentations complained of were specific to the subject property and, thus, do not constitute consumer-oriented conduct falling within the ambit of General Business Law § 349.”]) Accordingly, defendants are entitled to dismissal of this cause of action as well.

Lastly, since dismissal is warranted, plaintiff’s Order to Show Cause is denied.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that defendant US Bank Trust National Association’s motion to dismiss pursuant to CPLR 3211 (a) (7) is granted and plaintiff Don Tellock’s complaint is dismissed in its entirety; and it is further


ORDERED that plaintiff’s Order to Show Cause is denied; and it is further

ORDERED that counsel for defendant shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.

This constitutes the Decision and Order of the Court

3/25/2024

DATE

  
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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE