

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

AVA A. FRANK, x

Plaintiff,

- against -

NORTH AMERICAN FORECLOSURE
SOLUTIONS, et al.,

Defendants.

Index
Number 8430 2006

Motion
Date July 12, 2006

Motion
Cal. Number 20

x

The following papers numbered 1 to 15 read on this motion by plaintiff Ava A. Frank for an order consolidating this action with a holdover action commenced in Civil Court, Queens County, entitled Ying Ling Hwang v Ava A. Frank a/k/a Patricia Frank, John Doe and Jane Doe (Index Number 053709/2006), and enjoining the Civil Court action. Defendants cross-move for an order granting summary judgment dismissing the complaint and imposing sanctions against plaintiff's attorney for bringing a frivolous action; and, in the alternative, lifting the stay imposed in the Civil Court action; or directing plaintiff to post a bond in the sum of \$100,000.00, or an appropriate amount, in order to compensate defendant for the loss of use and occupancy in the event that the stay is not lifted.

	<u>Papers Numbered</u>
Order to Show Cause-Affirmation-Exhibits(A-D) ..	1-4
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Opposing Affirmation-Exhibits(A-J)	9-12
Reply Affidavit-Exhibits(O-Q)	13-15

Upon the foregoing papers it is ordered that this motion and the cross motion are decided as follows:

Plaintiff Ava Frank was the owner of improved real property located at 187-16 87th Road, Jamaica Estates, New York. This

property was the subject of a foreclosure action (Wells Fargo Bank Minnesota, et al. v Ava P. Frank, et al, Index Number 17775/2004) and a judgment of foreclosure and sale was granted on March 2, 2005 and entered on March 9, 2005. The judgment was for the sum of \$456,261.15, plus interest, costs of \$1,440.00, a Referee's fee of \$500.00 and legal fees of \$1,200.00. The property was to be advertised for an auction sale, pursuant to the terms of the judgment.

On May 11, 2005, Ms. Frank filed a Chapter 13 petition in the United States Bankruptcy Court, Eastern District of New York, which stayed the sale of the property. Upon filing for bankruptcy, Ms. Frank was required to make monthly payments of \$4,034.00 to the trustee until the bankruptcy was completed. Ms. Frank asserts that she was also required to pay her monthly mortgage payments of \$3,070.00 at this time. The bankruptcy proceeding was dismissed on July 18, 2005.

Ava Frank and Ying Ling Hwang entered into a contract of sale, dated June 1, 2005, which contained a use and occupancy agreement and a buy back agreement. The contract sets forth a purchase price of \$712,000.00, with a down payment of \$1,000.00, and provides that the purchase price would first be used to pay any encumbrances on the property. The contract includes a concession rider which states that the seller agrees to pay any and all closing costs, including New York State and City transfer taxes, title insurance premium, and other costs charged by the title company, and any and all costs charged by the bank, mortgage brokers, and any and all charges associated with the closing. The contract also has a Use and Occupancy Agreement which permitted Ms. Frank to remain in the property for one year from the date of the closing in exchange for the monthly payment of use and occupancy equal to the amount of the monthly bank mortgage payment, real estate taxes, and hazard insurance. This Use and Occupancy agreement required Ms. Frank to deposit in an account designated by Hwang an amount equal to six months of such payments, as a reserve for use and occupancy, and gave Mrs. Hwang free use of this account subject to the payment of 3% interest per annum by Hwang to Frank, payable when Frank either bought back the property or terminated the agreement. Ms. Frank was also required to pay all utility and carrying charges while she remained in occupancy. The closing was held on August 2, 2005.

Ms. Frank was also given the option of buying back the property during said one year period, at a purchase price of \$712,000.00. In the event that she bought back the property she would be responsible for all costs associated with the buy back including New York State and City transfer taxes, mortgage recording taxes, deed and mortgage and other recording fees, any

and all reasonable attorney's fees, and all fees in connection with the application of a mortgage, mortgage broker's commission, and title charges. In addition, she was required to pay a sum equal to 8% of the purchase price which was \$56,960.00, plus \$10,000.00 for the privilege of buying back the property with \$52,720.00 due at the closing of the sale from Frank to Hwang and \$14,240.00 due when Frank purchased the property from Hwang.

Mrs. Hwang obtained two mortgages from Washington Mutual Bank in the sums of \$569,600.00, and \$142,400.00, totaling \$712,000.00. At the closing, the sum of \$515,191.56 was paid to Option One Mortgage, thereby satisfying the foreclosure judgment and \$8,500.00 was paid to Gilberto, Guastaferrri & Nuccio, LLP. Ms. Frank asserts that \$10,000.00 was paid towards water bills and taxes, that she received \$40,000.00 and that Domingo Roldan received \$12,000.00, although a HUD statement prepared by Richard H. Lee, Esq. on behalf of Mrs. Hwang, and signed by Mrs. Hwang, reported that Roldan received \$48,289.06. It is noted that the copy of the check in the sum of \$12,000.00 payable to Roldan contains a hand written notation of "Buono Contracting." Buono Contracting Co., Inc. was a judgment creditor of Ms. Frank, who had obtained a default judgment in the sum of \$48,289.06. Although Ms. Frank asserts that she paid her creditors prior to the closing, it is apparent that some creditors were paid at the closing. Ms. Frank has not submitted any evidence as to whether Buono Contracting was paid in whole or part, prior to the closing. Payments were also made to Ying Ling Hwang in the sum of 1,072.00 and to Interstate Commercial Lending in the sums of \$34,784.52, 33,840.00 and 151.66. Payments were made to Leader Abstract in the sums of \$44,783.58, \$1,424.00 and \$356.00, and to Cecilia Awong in the sum of \$525.00, to Richard H. Lee, Esq. in the sums of \$350.00 and \$250.00, to Apex Mortgage Inc. in the sums of \$11,392.00 and 12,102.00, and to Tom Lai Appraisal in the sum of \$500.00. The affidavits and documentary evidence submitted fail to state what role these individuals and entities played in the transaction and which payments were made from the proceeds of the sale.

Ms. Frank executed a deed to the property in favor of Mrs. Hwang on August 2, 2005 and elected to remain in occupancy. Ms. Frank, a licensed pharmacist, was represented by counsel of her choice in both the foreclosure proceeding and the bankruptcy proceeding. The same counsel who represented her in the bankruptcy proceeding, also represented her in the sale of the subject property. Ms. Frank, however, claims that she did not communicate with her attorney with regard to the subject transaction until the closing, at which time he allegedly urged her to sign the papers, without offering her any advise.

The court notes that although the parties have submitted another contract of sale dated June 1, 2005 which contains a mortgage contingency clause, that contract was apparently abandoned by the parties. Ms. Frank has submitted a third contract of sale dated June 1, 2005 with a sale price of \$710,000.00. However, as it is undisputed that the sale price was \$712,000.00, this contract shall not be considered by the court.

In February 2006, Mrs. Hwang commenced a holdover proceeding against Ms. Frank in the Civil Court, Queens County, to recover possession of the real property and for use and occupancy in the sum of \$34,813.50. Ms. Frank commenced the within action on May 11, 2006, and seeks to recover damages for fraud, for breach of contract, for predatory lending practices, for conversion and for reformation of the deed.

Plaintiff Ava A. Frank's motion for an order enjoining the prosecution of the holdover action commenced in Civil Court, Queens County, entitled Ying Ling Hwang v Ava A. Frank a/k/a Patricia Frank, John Doe and Jane Doe (Index Number 053709/2006), and consolidating that action with the within action for the purpose of a joint trial is granted. The court finds that these actions involve common questions of law and fact as regards the terms of the use and occupancy agreement; whether Mrs. Hwang was entitled to divide the sums she received at the closing between the reserve account and the option payment in a manner that may have resulted in the under funding of the reserve account; the actual amount placed in reserve; and whether the reserve account was totally depleted during the first six months of Ms. Frank's occupancy. The court therefore finds that a joint trial as to these issues is appropriate. (CPLR 602[b].)

Defendants' cross motion for an order granting summary judgment dismissing the complaint is granted to the extent that the first cause of action for fraudulent inducement is dismissed. In order to sustain a claim for fraudulent inducement, the plaintiff must show "misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 [1996]; Channel Master Corp. v Aluminium Ltd. Sales, 4 NY2d 403 [1958]; Shea v Hambros PLC, 244 AD2d 39, 46 [1998]; Century 21 v Woolworth Co., 181 AD2d 620, 625 [1992]). Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong ... in detail" (CPLR 3016[b]; Megariss Furs v Gimbel Bros., 172 AD2d 209, 210 [1991]). Plaintiff, in her complaint, alleges that she was introduced to Mrs. Hwang by

Mr. Wallace and North American, that Mrs. Hwang is the spouse of Chi Yuan Hwang, the agent for the alleged broker Interstate Commercial Lending. It is also asserted that Wallace is an agent for Interstate Commercial Lending. Plaintiff alleges that Mr. Hwang and Interstate held themselves out as real estate brokers and mortgage brokers entitled to closing costs associated with the sale of the property, and that approximately \$126,000.00 of the sale proceeds was either unaccounted for or paid to the defendants. Plaintiff, however, does not allege that Mrs. Hwang held herself out as a broker entitled to recover brokerage fees, or that any such fees were paid to Mrs. Hwang. Moreover, plaintiff does not allege that at the time she entered into the subject contract she relied upon any misrepresentations regarding any of the defendants' alleged status as a real estate broker or mortgage broker. Therefore, to the extent that plaintiff claims that certain defendants falsely held themselves out as brokers and improperly retained proceeds from the sale of the premises as brokers' fees, this is insufficient to sustain a claim of fraudulent misrepresentation. To the extent that it is alleged that the sale price of \$712,000.00 was below market value, and that homes in this area sell for more than one million dollars, plaintiff was the seller of the property and, thus, could have independently ascertained its value. Plaintiff does not allege that the defendants misled her as to the value of the property. Therefore, as plaintiff does not allege any misrepresentation or omission of a material fact on the part of the defendants, and does not detail any of the allegedly fraudulent or deceptive conduct which allegedly induced her to enter into the subject contract, the first cause of action for fraudulent inducement is dismissed as to all defendants.

Defendants' request to dismiss plaintiff's second cause of action for breach of contract is denied. In view of Ms. Frank and Mrs. Hwang's conflicting affidavits, and in the absence of any affidavits from the co-defendants, the court is unable to determine whether a reserve account was properly established; whether plaintiff provided Mrs. Hwang with the sum of \$34,813.50, or some other amount for the reserve account; whether Mrs. Hwang was entitled to place a lesser amount in the reserve account and whether she properly utilized the sums in the reserve account. The court further finds that an issue of fact exists as to whether plaintiff received all of the sums that she was due at the closing.

Defendants' request to dismiss plaintiff's third cause of action for "predatory lending" based upon a "constructive mortgage" is granted. Plaintiff does not allege that the defendants violated any statutory lending provisions. Rather, her allegations are nothing more than a rehash of her fraud allegations. Plaintiff was

well aware of her own financial circumstances at the time she entered into these agreements. The fact that the monthly use and occupancy payments exceeded the prior mortgage payments, and may have exceeded the payments that were required while the bankruptcy proceeding was pending does not, in itself, constitute fraud or render the agreement unconscionable. In opposition to the defendants' cross motion, plaintiff has failed to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact which requires a trial of the action. Counsel's bare assertion that issues of fact exist is insufficient to defeat the motion for summary judgment (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Cordova v Vinueza, 20 AD3d 445, 445-446 [2005]; Sammarco v City of New York, 16 AD3d 657 [2005]; Harrington v City of New York, 6 AD3d 662 [2004]; Davi v Alhamidy, 207 AD2d 859, 860 [1994]; Partridge v Pinzino, 227 AD2d 460 [1996]). Furthermore, plaintiff's conclusory allegations of fraud and coercion are inadequate to raise an issue of fact as to whether defendants engaged in predatory lending practices or whether the subject agreement is unconscionable.

Defendants' request to dismiss the fourth cause of action for conversion is denied, as an issue of fact exists as to whether all sums due plaintiff were disbursed to her at the closing, whether the defendants improperly disbursed or retained a broker's fee, and whether all sums tendered by plaintiff to defendants were properly applied for use and occupancy.

Defendants' request to dismiss the fifth cause of action to reform the deed is granted, as plaintiff's assertion that she is an equitable owner of the property is not supported by the allegations or the evidence presented herein.

In view of the foregoing, plaintiff's motion to enjoin the prosecution of the Civil Court action and to combine that action with the within action, for the purpose of a joint trial, is granted. These actions shall retain their separate captions and shall have separate index numbers, separate requests for judicial intervention and separate notes of issue shall be filed for each action. Defendants' cross motion for summary judgment is granted to the extent that the first, third, and fifth causes of action are dismissed, and is denied in all other respects.

The caption of the actions to be jointly tried are:

AVA A. FRANK,

Plaintiff,

INDEX NO. 8430/06

-against-

NORTH AMERICAN FORECLOSURE SOLUTIONS,
JOSEPH WALLACE, YING LING HWANG,
INTERSTATE COMMERCIAL LENDING, INC.,
AND CHI YUAN HWANG,

Defendants.

AND

YING LING HWANG,

Plaintiff,

INDEX NO. TO BE ASSIGNED

-against-

AVA P. FRANK, a/k/a AVA PATRICIA FRANK,
JOHN DOE, and JANE DOE,

Defendants.

Upon the service of a copy of this order, together with notice of entry, the Clerk of the Civil Court, Queens County, shall transfer the file in the action entitled Ying Ling Hwang against Ava Frank, Index No. 53709/06, to this court.

A copy of this order together with notice of entry shall be served upon the Clerk of the Pre-Note Compliance Part and upon the Clerk in the Trial Term office at the time the notes of issue are filed.

Dated: July 31, 2006

J.S.C.