

**WMC Mtge. Corp. v Vandermulen**

2007 NY Slip Op 31463(U)

May 29, 2007

Supreme Court, Suffolk County

Docket Number: 0000371/2005

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

COPY

SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

\_\_\_\_\_ X  
WMC MORTGAGE CORP.,  
  
Plaintiff,

MOTION DATE: 9-12-06; 10-24-06  
SUBMITTED: 1-17-07  
MOTION NO: 011-MD  
012-MD  
013-MD  
014-XMOT D

-against-

HENDRIKA VANDERMULEN, 234 SOUTH MAGEE  
CO., INC., DONALD MACPHERSON, CARRIE  
MACPHERSON, EUGENE JOHN SHEEHAN, JOHN  
EUGENE SHEEHAN,  
  
Defendants.  
\_\_\_\_\_ X

ESSEKS, HEFTER & ANGEL, LLP  
Attorneys for Plaintiff  
108 East Main Street  
Riverhead, New York 11901

IRWIN POPKIN, ESQ.  
Attorney for Defendants Hendrika  
Vandermulen and 234 South Magee Co., Inc.  
1138 William Floyd Parkway  
Shirley, New York 11967

PATRICIA WEISS, ESQ.  
Attorney for Defendants Donald Macpherson  
and Carrie Macpherson  
78 Main Street, #12  
Sag Harbor, New York 11963

DAVID A. KAMINSKY & ASSOCIATES, P.C.  
Attorneys for Defendant John Eugene Sheehan  
325 Broadway, Suite 504  
New York, New York 10007

Upon the following papers numbered 1 to 48 read on these motions to dismiss and cross-motion to amend ;  
Notice of Motion and supporting papers 1-9; 10-16; 37-41 ; Notice of Cross Motion and supporting papers 17-36 ; Answering  
Affidavits and supporting papers 42; 43; 44-46 ; Replying Affidavits and supporting papers 47; 48 ; it is,

**ORDERED** that the motions by the defendants Hendrika Vandermulen and 234  
South Magee Co., Inc.; Donald and Carrie MacPherson; and John Eugene Sheehan for an order  
dismissing the amended complaint insofar as it is asserted against them are denied; and it is further

**ORDERED** that the cross motion by the plaintiff for leave to serve supplemental  
summons and a second amended complaint is granted to the extent indicated below; and it is  
further

**ORDERED** that, on the court's own motion, the action is dismissed insofar as it is asserted the defendant Eugene John Sheehan.

The plaintiff is a wholesale lender that funds loans originated by mortgage brokers and purchases closed loans from correspondent lenders. The defendant Hendrika Vandermulen applied for a loan to purchase a parcel of real property located at 234 South Magee Street in Southampton, New York. The property, which is the subject of this action, was owned by the defendant Donald MacPherson, who transferred it to his wife, the defendant Carrie MacPherson, on August 30, 2000, for no consideration. Approximately one month later, Donald MacPherson sold the property to the defendant Hendrika Vandermulen for \$383,000. The plaintiff loaned Vandermulen 100% of the purchase price. Donald McPherson's mortgage on the property was satisfied with \$285,000 from the proceeds of the loan Vandermulen obtained from the plaintiff. Although a deed from Carrie and Donald MacPherson to Vandermulen was prepared, it was subsequently lost. Moreover, neither the deed nor the mortgage was ever recorded. Vandermulen's first payment to the plaintiff was due on November 1, 2000. She made one payment on December 31, 2000 and then defaulted.

On March 28, 2001, Vandermulen transferred her interest in the property to the defendant 234 South Magee Co., Inc., a corporation purportedly owned by her. However, 234 South Magee Co., Inc., was not incorporated until May 17, 2001. The deed was recorded on April 9, 2001.

The plaintiff sold Vandermulen's loan to Ingomar, LP, almost immediately after the closing. By a letter dated September 25, 2001, Ingomar advised the plaintiff that, because Vandermulen's loan did not have a recorded mortgage, the plaintiff was required to repurchase it. The repurchase was completed on July 31, 2002.

By letters dated February 12, 2003, the plaintiff's counsel advised the attorneys who represented Vandermulen and the MacPhersons in connection with the sale to Vandermulen that the mortgage and deed for that transaction were never recorded. Plaintiff's counsel requested to Vandermulen their assistance in resolving the matter, but they never responded.

On May 23, 2003, 234 South Magee Co., Inc., transferred its interest in the property to the defendant Eugene John Sheehan for \$450,000. However, Eugene John Sheehan had died on April 6, 2003. The deed was recorded on July 16, 2003. Also on May 23, 2003, Carrie MacPherson executed a deed transferring the property to Eugene John Sheehan for no consideration. That deed was also recorded on July 16, 2003. The defendant John Eugene Sheehan, as attorney-in-fact for the deceased Eugene John Sheehan, mortgaged the property and obtained a loan in the amount of \$337,500 from Homecomings Financial Network, Inc., to finance the purchase from 234 South Magee Co., Inc. That mortgage was recorded on June 27, 2003.

On September 1, 2003, Eugene John Sheehan transferred the property to John Eugene Sheehan for no consideration. The deed was signed by John Eugene Sheehan as attorney-in-fact for the deceased Eugene John Sheehan. It was recorded on October 24, 2003, and returned to Donald MacPherson.

By a letter dated November 17, 2003, the plaintiff's counsel advised the MacPhersons that the plaintiff's mortgage and the deed they gave to Vandermulen were lost prior to recordation and, thus, not recorded. The plaintiff's counsel asked the MacPhersons to execute a replacement deed, but they refused.

On June 1, 2004, John Eugene Sheehan transferred his interest in the property to 234 South Magee Co., Inc., for no consideration. The deed was recorded on November 17, 2004, and returned to Donald MacPherson.

In 2004, Fidelity National Title Insurance Company, which insured the plaintiff's and Vandermulen's interest in the property, commenced an action in Vandermulen's name to compel the MacPhersons to execute a replacement deed. By a letter dated July 30, 2004, Vandermulen directed Fidelity's counsel to discontinue the action.

The plaintiff commenced this action in January 2005 and subsequently amended the complaint as of right. The amended complaint asserts causes of action to foreclose the plaintiff's mortgage, for an equitable lien on the property, and to recover damages for fraud. All of the defendants except the deceased defendant, Eugene John Sheehan, move to dismiss the complaint on the grounds that the plaintiff lacks standing to sue, that necessary parties have not been joined, and that the plaintiff's fraud and equitable lien claims fail to state a cause of action. The plaintiff cross moves for leave to serve a supplemental summons and a second amended complaint.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez**, 84 NY2d 83; **Guggenheimer v Ginzburg**, 43 NY2d 268; **Rovello v Orofino Realty Co.**, 40 NY2d 633). Additionally, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*see*, **Leon v Martinez**, *supra*; **Guggenheimer v Ginzburg**, *supra*; **Rovello v Orofino Realty Co.**, *supra*).

The defendants contend that, because the plaintiff sold Vandermulen's loan to Ingomar, the plaintiff does not have standing to maintain this action. However, the plaintiff alleges that it repurchased the loan and that the repurchase was completed on July 31, 2002, well before the commencement of this action. Contrary to the defendants' contentions, the plaintiff's allegation that it repurchased is loan is sufficient to avoid dismissal. The plaintiff is not required to lay bare its proof at this stage of the litigation. Accepting the alleged facts as true and giving the plaintiff the benefit of every possible favorable inference, the court finds that the plaintiff has standing to maintain this action.

The defendants contend that the plaintiff's claim for an equitable lien is barred by the doctrines of laches and unclean hands. Laches and unclean hands are affirmative defenses that must be pleaded in the answer (*see*, CPLR 3018[b]; **Fade v Pugliani/Fade**, 8 AD3d 612, 614; **Kromer v Kromer** 177 AD2d 472, 483). They may not be raised by a motion to dismiss under

CPLR 3211 (*see*, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3018;20).

The defendants contend that the amended complaint fails to state a cause of action for fraud and fails to satisfy the particularity requirements of CPLR 3016(b). To state a legally cognizable claim of fraudulent misrepresentation, the plaintiff must allege that the defendant made a material misrepresentation of fact, that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff, that the plaintiff reasonably relied on the misrepresentation, and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation (*see*, **P.T. Bank Central Asia, N.Y. Branch v ABN AMRO Bank N.V.**, 301 AD2d 373, 376). In addition, in any action based on fraud, the circumstances constituting the wrong shall be stated in detail (*see*, CPLR 3016[b]).

The plaintiff alleges that the defendant Hendrika Vandermulen made the following material representations to the plaintiff, which she knew to be false, in order to induce the plaintiff to lend her \$383,000: (1) that she was applying for a mortgage in the sum of \$383,000 for the purchase of 234 South Magee Street, (2) that she would occupy the premises as her primary residence, (3) that the plaintiff would have a first priority mortgage lien on the property, (4) that she was employed by Resources International, Inc., at 80 Varick Street, New York, New York, and that she had the financial resources to qualify for the mortgage loan, and (5) that she was not related by family or affiliated through a business relationship with the sellers, Donald and Carrie MacPherson. The plaintiff alleges that it relied on Vandermulen's misrepresentations and, as a result, loaned her the \$383,000. The plaintiff further alleges that Vandermulen and the other defendants conspired to ensure that its mortgage was not recorded and that, as a result, it has been deprived of its first priority mortgage lien on 234 South Magee Street.

In addition, the plaintiff alleges that the mortgage agreement provides that Vandermulen will be in default: (1) if she fails to pay the principal and interest due under the note on time, (2) if she fails to occupy the premises and use it as her principal residence, (3) if she made false or inaccurate statements to the plaintiff regarding information important to determining her eligibility for the loan, (4) if she fails to defend her ownership of the property against any claims by others, and (5) if she sells or transfers the property without the plaintiff's prior written permission.

Insofar as the plaintiff alleges that Vandermulen failed to make payments on the loan, failed to occupy the property, failed to defend her ownership of the property, and transferred the property without the plaintiff's consent, the amended complaint states a cause of action for breach of contract. It is well settled that a cause of action for fraud may not be maintained when the only fraud charged relates to a breach of contract (*see*, **Alamo Contract Builders, Inc. v CTF Hotel Co.**, 242 AD2d 643; **McKernin v Fanny Farmer Candy Shops**, 176 AD2d 233). However, a cause of action for fraud may be maintained when the plaintiff pleads a breach of duty separate from, or in addition to a breach of the contract (*see*, **Non-Linear Trading Co. v Braddis Assocs.**, 243 AD2d 107, 118). When the plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to a breach-of-contract claim (*see*, **First Bank of the Americas v Motor Car Funding**, 257 AD2d 287, 291-292). Unlike a

misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and, therefore, involves a separate breach of duty (*see, Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956). Accordingly, insofar as the plaintiff alleges that Vandermulen made material representations regarding her employment, her financial resources, and her relationship to the MacPhersons, which she knew to be false, in order to induce the plaintiff to lend her \$383,000, the amended complaint states a cause of action for fraud against Vandermulen. Moreover, the court finds that the amended complaint clearly informs Vandermulen about the incident complained of and gives her notice of the allegations the plaintiff intends to prove (*see, CPLR 3016[b]; Mountain Lion Baseball v Gaiman*, 263 AD2d 636).

Regarding the remaining defendants (except Eugene John Sheehan), the plaintiff alleges that they conspired with Vandermulen to ensure that its mortgage was not recorded, thereby depriving the plaintiff of its first priority mortgage lien on the property. While an independent cause of action for civil conspiracy is not recognized in this State, a plaintiff may plead the existence of a conspiracy in order to connect the action of the individual defendants with an actionable, underlying tort and establish that those actions were part of a common scheme or plan (*see, Litras v Litras*, 254 AD2d 395, 396; *American Preferred Prescription v Health Mgmt.*, 252 AD2d 414, 416). Since the plaintiff has alleged an actionable underlying tort, i.e., fraud, the court finds that the plaintiff has stated a cause of action for civil conspiracy against all of the remaining defendants except Eugene John Sheehan.

Although the defendant Eugene John Sheehan is named as a party defendant in this action, he died before the action was commenced. Moreover, it appears that no representative of his estate has been appointed. A party cannot commence a legal action or proceeding against a dead person without naming the personal representative of the decedent's estate, nor can a party enter a personal judgment against a decedent (*see, Jordan v City of New York*, 23 AD3d 436, 437; *100 W. 72<sup>nd</sup> St. Assoc. v Murphy*, 144 Misc 2d 1036, 1040). Since no executor or administrator has been appointed for the estate of the defendant Eugene John Sheehan, the complaint is dismissed insofar as it is asserted against him (*see, Grosso v Estate of Ira L. Gershenson*, 33 AD3d 587). In any event, the court finds that the amended complaint fails to state a cause of action against either Eugene John Sheehan or his estate. The plaintiff alleges that the property was transferred to Eugene John Sheehan after his death and that it was subsequently mortgaged and transferred by John Eugene Sheehan as attorney-in-fact for the decedent. Since the death of a principal revokes the authority of the agent (*see, Wisdom v Wisdom*, 111 AD2d 13, 14-15; *Vartarian v Brady*, 184 Misc2d 333, 339-340), John Eugene Sheehan did not have any authority to act for the decedent.

The defendants contend that the amended complaint should be dismissed because the plaintiff has failed to join a plethora of purportedly necessary parties: Ingomar, Homecomings Financial Network, the attorney who represented the plaintiff at the closing, the title closer, the abstract company, Fidelity National Title Insurance Company, and the County Clerk. Except for Homecomings Financial Network, the defendants have failed to demonstrate that these third parties are needed if complete relief is to be accorded between the plaintiff and the defendants or that they will be inequitably affected by a judgment in this action absent their joinder (*see, CPLR 1001[a]; RPAPL 1311[3]; Spector v Toys "R" Us, Inc.*, 12 AD3d 358, 359). Accordingly, the court finds

that, except for Homecomings Financial Network, none of the aforementioned third parties is indispensable to this case in the sense that the action cannot fairly proceed without that party (*see, Dime Savings Bank of New York v Johneas*, 172 AD2d 1082, 1083).

The plaintiff cross moves to add as party defendants Homecomings Financial Network and the two attorneys who represented the defendants in connection with the transfers of the property. The court finds that Homecomings Financial Network is a necessary party to this action. However, the court is unpersuaded that the plaintiff has a cause of action against the attorneys. The facts that they represented the defendants and executed documents as attorneys-in-fact for their clients do not establish that they were part of the alleged scheme to defraud the plaintiff.

The plaintiff also cross moves to add a claim for punitive damages and to clarify the factual allegations in the amended complaint. It has long been held that punitive damages are ordinarily unavailable in fraud and deceit cases. However, it has been determined that they may be recoverable in instances where the fraud is aimed at the public generally, is gross, and involves high moral culpability (*see, Bobash, Inc. v Festinger*, 15 Misc 3d 1114[A], \*4, *citing Walker v Sheldon*, 10 NY2d 401, 405). The court finds that the complaint does not allege conduct of such an egregious nature directed at the plaintiff or a pattern of such conduct directed at the public in general sufficient to sustain a demand for punitive damages (*see, Grazioli v Encompass Ins. Co.*, \_\_\_\_\_ AD2d \_\_\_\_\_, 2007 NY Slip Op 04076, \*1 [2<sup>nd</sup> Dept, May 8, 2007]). Accordingly, the cross motion is granted solely to the extent of adding Homecomings Financial Network as a party defendant and clarifying the factual allegations in the amended complaint.

HON. ELIZABETH HAZLITT EMERSON

DATED: May 29, 2007

\_\_\_\_\_  
J. S.C.