

Valasquez v Rosen

2007 NY Slip Op 31895(U)

June 20, 2007

Supreme Court, Suffolk County

Docket Number: 0021697/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr. _____

AURORA VELASQUEZ and LUIS A. TURCIOS

Plaintiff(s),

-against-

JONATHAN M. ROSEN and CHARLES SALVA
d/b/a CHARLES SALVA APPRAISALS.

Defendant(s).

ORIG. RETURN DATE: March 23, 2007
MTN. SEQ. #: 001-MotD

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Upon the following papers numbered 1 to 43 read on this motion for summary judgment: Notice of Motion and supporting papers 1 - 17; Affirmation in Support 18 - 20; Affirmation in opposition 21 - 39; Reply Affirmation and supporting papers 40 - 43; it is

ORDERED that this motion (001) by the defendant Jonathan M. Rosen is decided to the extent that that part of this motion which seeks summary judgment dismissing the three causes of action (first, second and fifth) as to the movant is granted; and, that part of this motion seeking the disqualification of the plaintiffs' attorney is denied as moot in view of the dismissal of these causes of action; and it is further

ORDERED that, pursuant to 22 NYCRR 202.8(f), the remaining parties are directed to appear for a preliminary conference on June 29, 2007 at the Supreme Court Annex, DCM Part, Room 203A, One Court Street, Riverhead, New York at 10:00 a.m.

This is an action brought by the purchasers of a home against Jonathan M. Rosen (hereinafter Rosen), the attorney who represented the lender, and Charles Salva d/b/a/ Charles Salva Appraisals (hereinafter Salva), the individual and his company who performed the appraisal of the subject home. This motion is brought by the defendant Rosen for summary judgment dismissing the three causes of action against him (the first, second and fifth causes of action) or, in the alternative, having the court disqualify the plaintiffs' attorney, Steven A. Sternlicht (hereinafter Sternlicht) from continuing to represent the plaintiffs in this action.

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In addition to this action, there is a related action, *Nationscredit Financial Services Corp. v Luis A. Turcios, Aurora Velasquez, et al.* (Index No. 12938/00). The *Nationscredit* case (originally brought in the name of Equicredit Corporation of N.Y. [hereinafter Equicredit])¹ and currently pending in the Supreme Court, Suffolk County, before the Honorable Melvyn Tanenbaum) is a foreclosure action with regard to the same residence and arising from the same closing as forms the basis for the instant action. In the *Nationscredit* case, Turcios and Velasquez (as defendants) served an answer with numerous counterclaims and cross claims which are repeated, in part, in their complaint in the instant case.

According to their complaint, Turcios and Velasquez have limited abilities to speak, write, read or understand English. Nevertheless, they applied for and received a so-called subprime loan from Equicredit in the amount of \$130,500.00 (30 years at 11.05% interest) to purchase the subject home from American Dream Homes, Inc. (hereinafter ADHI) which was being sold for \$145,000.00.

Turcios and Velasquez describe the home as “distressed property” which had been previously foreclosed on by Citibank and then sold to AHDI for \$94,000. This resale of the property occurred within 40 days of the purchase by AHDI but one of the copies of the title report had erroneous dates which indicated that AHDI had purchased the property over a year before this sale to Turcios and Velasquez.

Turcios and Velasquez further allege that the AHDI purchase date was intentionally altered by others so that Equicredit would not reject the loan application based upon its policy against approving loans in situations involving the “flipping” of property, that is; a resale less than a year from its prior sale.

It is not disputed that the defendant Rosen’s law firm represented the lender, Equicredit, at the closing between AHDI and the plaintiffs Turcios and Velasquez and that the plaintiffs had no attorney but these plaintiffs allege that Rosen’s firm was also representing their interests as part of its responsibilities in performing “mortgage services.” They further allege that Rosen, either personally or through his associate, committed fraud in participating in the closing and in his alleged involvement with the closing documents - particularly the title report - which led to the granting of the mortgage by Equicredit (first cause of action); that Rosen had a duty to them arising out of his alleged acting on their behalves and that he breached the resulting covenant of good faith and fair dealing owed to them (second cause of action); and, that Rosen’s actions with regard to this “subprime” loan were part of a deceptive business practice involving “predatory lending” and, thus, actionable under General Business Law §349(h).

In the pending *Nationscredit* case, a cross motion was brought seeking, in part, to disqualify Sternlicht as the attorney for Turcios and Velasquez. That branch of the cross motion was granted² pursuant to 22 NYCRR 1200.21(a) (DR 5-102[a]) on the basis that Sternlicht was the primary source of certain relevant information pertaining to factual issues in the action (e.g., regarding fraud, ratification, waiver) and, moreover, his testimony “may be prejudicial” in those regards to Turcios and Velasquez (*Nationscredit*

¹ Nationscredit is the successor by merger to Equicredit.

² Appeal pending.

Financial Services Corp. v Luis A. Turcios, Aurora Velasquez, et al., Sup Ct, Suffolk County, August 10, 2006, Tanenbaum, J., Index No. 12938/00, at page 9).

On a motion for summary judgment, the moving party has the burden of making a prima facie showing of entitlement to summary judgment as a matter of law and must offer sufficient evidence to show the absence of material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman v City of New York, supra*).

In support of that part of this motion which seeks summary judgment, Rosen submits an affirmation by counsel, his own personal affidavit and various exhibits including the transcript of his nonparty deposition on June 27, 2005 in the *Nationscredit* case. Rosen contends that the first cause of action, sounding in fraud, must be dismissed because the plaintiffs fail to provide clear and convincing support for their contentions that the closing was not done in a proper and honest manner, that Rosen was part of the application process and responsible for the fraudulent and erroneous documents which were submitted, that Rosen held himself out as representing their interests and that the plaintiffs justifiably relied upon Rosen's counsel and advice.

In addition, Rosen contends that, in any event, the subsequent actions by and on behalf of the plaintiffs evidence that they ratified the transaction and waived any objections to it. This is based upon Rosen's contention that Sternlicht negotiated, on behalf of the plaintiffs, agreements in which AHDI agreed after the closing, at its own expense, to make the residence habitable; in which Equicredit possibly waived the first four months of mortgage payments; and, in which a second mortgage was obtained from a different lender which waived the first several months of payments. These acts, according to Rosen, were consistent with the plaintiffs accepting the terms of the mortgage, benefitting from said mortgage and managing the payments.

As to the second cause of action, sounding in breach of a contractual duty to act in good faith and with fair dealing, Rosen contends that neither he nor his firm had any contract or agreement with the plaintiffs, did not represent the plaintiffs, did not make any representations to them that he represented them and, in fact, they were expressly told that he represented Equicredit and not them. Accordingly, Rosen argues that he had no contractual obligation to the plaintiffs and, thus, had no obligation of good faith or fair dealing to them.

And finally, with regard to the fifth cause of action, sounding in deceptive business practices under GBL §349(h), Rosen argues that the applicable three-year statute of limitations period (*see* CPLR 214[2]) had run since the subject closing had occurred on October 22, 1999, and this action was commenced almost six years later on September 2, 2005.

The court finds the arguments put forward by Rosen in support of summary judgment on the pertinent three causes of action to have satisfied his prima facie burden of showing his entitlement to

summary judgment. In short, Rosen has sufficiently shown that he made no false representations to the plaintiffs, was not responsible for the questionable title reports, indeed had no involvement with any loan approval proceedings or any dealing before the closing, had no contractual relationship with the plaintiffs which would give rise to a covenant of good faith and fair dealing and the General Business Law deceptive practices claim was not raised within the applicable statute of limitations period.

As to summary judgment, the burden now shifts to the plaintiffs to come forward with evidence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In opposition, the plaintiffs submit an affirmation by counsel (Sternlicht), an affidavit by the plaintiff Aurora Velasquez and numerous exhibits. The points and arguments in opposition to this motion are solely contained in Sternlicht's affirmation with the exception of Ms. Velasquez' affidavit which only addresses the issue of attorney disqualification and contains no statements whatsoever with regard to the summary judgment issues.

Significantly, Sternlicht was not the plaintiffs' attorney at the subject closing and has no personal knowledge of the facts regarding the actual closing such as what oral representations were made to the plaintiffs, what conversations were had regarding the transaction and the documents, and whether the plaintiffs availed themselves of the two persons in attendance who were bilingual.³

While the plaintiffs' counsel has personal knowledge as to subsequent events bearing on Rosen's affirmative defenses, he does not have personal knowledge (and the submitted documents on this motion are insufficient without additional testimony) as to the alleged fraud, breach and deceptive practices allegations.

In addition, as to the deceptive business practices allegations, Sternlicht contends that the plaintiffs were unaware of Rosen's actionable involvement in this "predatory lending scheme" until Rosen's deposition in the *Nationscredit* action on June 27, 2005. According to Sternlicht, Rosen's testimony contained inculpatory statements regarding this transaction which also evidenced his fraudulent concealment of his alleged illegal activities in the intervening period of time. Sternlicht thus argues that the statute of limitations period was tolled and did not accrue until the date of the deposition which was only about three months before this action was commenced.

A review of Rosen's deposition, however, fails to reveal any inculpatory statements as to any of the allegations in the pertinent causes of action (first, second and fifth) and, moreover, does not indicate or support any basis for the contention that he fraudulently concealed any alleged illegal or fraudulent activities.

³ According to the plaintiffs' verified complaint, a person from the seller's corporation as well as the realtor were present at the closing and both were bilingual in Spanish and English.

It is also noted that the essential allegations against Rosen in the instant complaint were also contained in the plaintiffs' answer in the *Nationscredit* case in 2000 which was five years before this action was commenced.

Under these facts and circumstances, there is no evidentiary support for the tolling of the fifth cause of action alleging deceptive business practices pursuant to GBL §349(h) and, therefor, this cause of action must be dismissed as being brought untimely.

In addition, Sternlicht's affirmation in opposition is without evidentiary value in opposing this application for summary judgment (*see Deronde Prods. v Steve Gen. Contr., Inc.*, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]; *Tsunis v Puglia*, 12 Misc 3d 1167A, 820 NYS2d 846 [Sup Ct, Suffolk County 2006]) and the plaintiffs, who have submitted no affidavits from themselves or anyone else with personal knowledge as to the summary judgment issues pertaining to the actual closing, therefore, have failed in their burden to establish material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Turning now to that part of Rosen's application seeking disqualification of the plaintiffs' counsel, although the court finds the similarities between the issues, allegations and defenses in the *Nationscredit* and this case to be indistinguishable in terms of the three causes of action alleged in this case against Rosen and his defenses to them, and that the reasoning expressed by Justice Tanenbaum in disqualifying Sternlicht in the *Nationscredit* case is equally applicable in this case, this issue is denied as moot in view of the dismissal herein of all the causes of action against Rosen.

The co-defendant Salva submits an affirmation from his attorney in support of Rosen's motion and asks the court to allow Salva to join in said motion. The plaintiffs ask the court to reject this application because it is not properly before the court.

The court agrees with the plaintiffs in this regard and rejects the request for relief improperly contained in the co-defendant's affirmation in support of the underlying motion. Such relief, under these circumstances, must be sought by way of a cross motion with the attending notice requirements and payment of fees (*see* CPLR 2211, 2215 and 8020[a]; *Hergerton v Hergerton*, 235 AD2d 395, 652 NYS2d 77 [2d Dept 1997]; *Thomas v Drifters, Inc.*, 219 AD2d 639, 631 NYS2d 419 [2d Dept 1995]). Moreover, the co-defendant Salva does not submit any affidavits from himself or anyone else with personal knowledge to support a motion on his behalf for summary judgment (*see Salas v Town of Lake Luzerne*, 265 AD2d 770, 696 NYS2d 314 [3d Dept 1999]).

Nor can the court search the record on its own in the absence of a motion or cross motion on behalf of the nonmoving party with regard to causes of action separate and apart from those subject to the application by the moving party⁴ (*see Bondanella v Rosenfeld*, 298 AD2d 941, 747 NYS2d 645 [4th Dept

⁴ The three causes of action at issue on this motion by Rosen are only alleged against him and are separate and distinct from the causes of action alleged against Salva.

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2002]; *Mercedes-Benz Credit Corp. v Dintino*, 198 AD2d 901, 604 NYS2d 451 [4th Dept 1993]).

In addition, and in any event, as to the co-defendant also seeking disqualification of the plaintiffs' counsel, Salva does not raise the same affirmative defenses which focus on the actions of attorney Sternlicht as raised by the defendant Rosen and, thus, makes no showing to support Sternlicht's disqualification as to the remaining causes of action against him.

This decision constitutes the order of the court.

Dated: June 20, 2007

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.