

**Aurora Loan Servs. LLC v Lamattina &
Assoc., Inc.**

2007 NY Slip Op 32853(U)

September 13, 2007

Supreme Court, Richmond County

Docket Number: 0103092/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

**AURORA LOAN SERVICES LLC, a Delaware
Limited Liability Company,**

**Calendar No: 682-001
1165-002
1200-003**

Index No: 103092/06

Plaintiff,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

**LAMATTINA & ASSOCIATES, INC., JOSEPH
LAMATTINA, ESQ., JOSEPH W. LAFORTE,
JAMES LAFORTE, JR., TINA LAFORTE, JAMES
LAFORTE, TARA GIBSON, JAIME LYNN GULI,
FRANCIS ALFIERI, MICHAEL O'LEARY,
UNION AMERICA MORTGAGE, KEY LAND
SERVICES, INC., WASHINGTON TITLE
INSURANCE COMPANY, HORTENSE MARKS
and ILENE MARKS,**

Defendants.

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The following papers numbered 1 to 11 were submitted on these motions the 18th day of May, 2007.

Notice of Motion to Dismiss by Defendant Joseph LaMattina,
with Supporting Papers, Exhibits and Memorandum of Law
(dated February 27, 2007)..... 1

Affirmation in Opposition by Plaintiff,
with Exhibit
(dated March 9, 2007)..... 2

Reply Affirmation by Defendant Joseph LaMattina,
with Exhibits and Reply Memorandum of Law
(dated March 16, 2007)..... 3

Notice of Cross Motion to Dismiss by Defendants
Vincent Ancona and Union America Mortgage, Inc.,
with Supporting Papers, Exhibits
and Memorandum of Law
(dated April 10, 2007)..... 4

Affirmation in Opposition by Plaintiff,
with Exhibits and Memorandum of Law
(dated April 18, 2007)..... 5

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| Reply Affirmation to Cross Motion by Defendant Joseph LaMattina, with Exhibits and Memorandum of Law (dated April 19, 2007)..... | 6 |
| Affirmation in Opposition to Cross Motion by Plaintiff, with Exhibits and Memorandum of Law (dated April 20, 2007)..... | 7 |
| Notice of Motion for Summary Judgment by Defendant Washington Title Insurance Company, with Supporting Papers and Exhibits (dated April 19, 2007)..... | 8 |
| Affirmation in Opposition by Plaintiff to the Motion by Defendant Washington Title Insurance Company, with Exhibits and Memorandum of Law (dated May 18, 2007)..... | 9 |
| Reply Affirmation by Defendant Washington Title Insurance Company (dated May 23, 2007)..... | 10 |
| Reply Affirmation by Vincent Ancona and Union America Mortgage, Inc. (dated May 24, 2007)..... | 11 |

Upon the foregoing papers, the motions are denied in their entirety.

Defendant Joseph LaMattina, Esq. (hereafter “LaMattina”) moves by notice of motion for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff’s eighth cause of action on the ground that it fails to state a claim upon which relief can be granted. Co-defendants Vincent Ancona and Union Mortgage, Inc. (hereafter, collectively, “Ancona”) cross-move for dismissal of plaintiff’s tenth and eleventh causes of action pursuant to CPLR 3211(a)(1); (7) and for sanctions. Co-defendant Washington Title Insurance Company moves by notice of motion for summary judgment dismissing plaintiff’s ninth and twelfth causes of actions. Plaintiff Aurora Loan Services LLC (hereafter “Aurora”) opposes all three motions, and is joined in its opposition to the LaMattina motion by defendant Ancona.

Aurora, a wholly owned subsidiary of Lehman Brothers Bank, FSB, is a limited liability company which exists under the laws of the State of Delaware. Defendant LaMattina & Associates, Inc. (hereafter “L&A”) is a New York corporation of which defendant LaMattina is an officer, shareholder, agent and employee. As is relevant, Aurora alleges in its complaint that defendant Anacona, a mortgage broker, assisted co-defendants Hortense and Ilene Marks (hereafter “Marks”)

to refinance their mortgage on 769 Bartholdi Street, Bronx, New York (hereafter the “premises”) with Aurora. A mortgage in the amount of \$251,603.81 was, then, and is currently held by nonparty Skyline Mortgage Corp. (hereafter “Skyline”). Aurora claims that it agreed to provide the Marks with a first mortgage in the amount of \$305,000.00 as a result of Ancona’s referral. The relevant title work was referred to defendant Key Land Services, Inc. (hereafter “Key Land”), with settlement services to be provided by L&A. According to plaintiff, L&A was given written closing instructions by Key Land directing that the disbursement of any funds it received by wire from Aurora should be made only to designated beneficiaries. Insofar as it appears, Key Land is an agent of defendant Washington Title Insurance Company (hereafter “Washington”).

Aurora further claims that it was instructed by L&A to wire the mortgage proceeds directly into an account at Victory State Bank entitled “LaMattina & Associates, Inc., Joseph LaMattina Settlement Trust Account” (hereafter the “account”). In accordance with those instructions, it is alleged that on or about July 1, 2005, Aurora (or its agent) wired the sum of \$300,884.94 into the designated account for the purpose of funding the loan and satisfying the existing mortgage on the premises. At this point, L&A is claimed to have issued a check to Skyline to satisfy the existing mortgage, but it appears that this check was subsequently dishonored and the prior lien held by Skyline in the amount of \$251,603.81 remains unsatisfied. According to Aurora, instead of being used to satisfy Skyline’s mortgage, the funds wired to L&A were criminally transferred to the remaining individual defendants and/or Jaime Lynn Guli (a vice president of Key Land) or companies controlled by them, for less than fair consideration. As a result, Aurora claims to have been damaged by its relegation to the position of a junior lienor when the Marks subsequently defaulted on its mortgage. Aurora commenced this action by the filing and service of a summons and complaint on or about October 2, 2006.

CPLR 3211(a)(7)

When reviewing a motion to dismiss a complaint pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the Court “must accept as true the facts as alleged in the complaint and... accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414).

SUMMARY JUDGMENT

On a motion for summary judgment, the function of the court is issue-finding, not issue determination (*see Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331, *affd* 65 NY2d 732). Here, again, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion (*see Glennon v. Mayo*, 148 AD2d 580), however, in order to prevail, the moving party must first present *prima facie* evidence of its entitlement to judgment as a matter of law. Upon its failure to do so, the motion will be denied (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324). Once a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (*Zuckerman v. City of New York*, 49 NY2d 557,562). In this regard, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to raise a triable issue (*id.* at 562). Thus, summary judgment, which is a drastic remedy that operates to deprive a party of his or her day in court, is only appropriate where the movant’s initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (*see Rotuba Extruders v. Ceppos*, 46 NY2d 223; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500; *cf. Persaud v. Darbeau*, 13 AD3d 347).

Motion No. 682

In its eighth cause of action, Aurora alleges, *inter alia*, that both L&A and LaMattina received, *e.g.*, attorney’s fees from the July 2005 closing of its mortgage, thereby rendering each amendable to suit for alleged malpractice¹. In support of his motion to dismiss, defendant LaMattina claims that even after according plaintiff the benefit of every favorable inference, its eighth cause of action fails to state a viable claim against him personally, either in malpractice or negligence. In this regard, LaMattina asserts that the complaint fails to allege (1) that the settlement services were referred to him personally, rather than to L&A, (2) that he entered into any retainer agreement with Aurora as required by 22 NYCRR 1215.1, (3) that he agreed to perform specific legal services for plaintiff, (4) that he controlled L&A, (5) that a basis exists for piercing the corporate veil of L&A to hold him personally liable for its acts, (6) that “LaMattina & Associates, Inc.” was ever authorized to practice law,² and (7) that he had the means to control and/or knew of the purported wrongdoing of

¹ It is worthy of note at this juncture that a law firm doing business as a corporation in New York may only operate as a professional corporation or “P.C.” Hence, LaMattina and Associates, Inc. was not authorized to collect legal fees. On or about November 27, 2006, defendant LaMattina was suspended from the practice of law by Decision and Order of the Appellate Division, Second Judicial Department.

²According to LaMattina, his law practice was conducted solely under the name of “LaMattina & Associates, P.C.”.

the other named defendants.

In opposition, Aurora alleges that L&A held itself out as a law firm by opening an attorney's trust account at Victory Savings Bank, as well as purporting to act as settlement agent in real estate transactions. In addition, Aurora claims that the instructions it received to wire the loan proceeds directly into the account entitled "LaMattina & Associates, Inc., Joseph LaMattina Settlement Trust Account" bore a letterhead indicating that it was from the "Law Offices of LaMattina & Associates." In any event, it is undisputed that the check to Skyline was dishonored when the funds in the trust account were found to be insufficient to cover the check issued by L&A.³

Viewing the allegations in the complaint as true while according to plaintiff the benefit of every favorable inference, it is the opinion of this Court that the motion to dismiss plaintiff's eighth cause of action must be denied. Initially, the Court notes that discovery has yet to begin in earnest, and that the precise details of the relationship, if any, between LaMattina and the other defendants has yet to be fully explored (*cf.* CPLR 3211(d)). Moreover, it is uncontroverted that LaMattina (1) executed a signature card for the trust account with the word "attorney" inserted on the back under "Type of Business", and (2) received monthly stipends from L&A that appear to include fees for closings which he never attended. Under the totality of the circumstances as they presently appear, the specter of, *e.g.*, fraud and collusion, are sufficient to forestall the dismissal of plaintiff's claim of negligence and/or professional malpractice against defendant LaMattina at this early juncture (*cf. AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582, 595; *see also Ideal Steel Supply Corp. v. Fang*, 1 AD3d 562). Accordingly, Motion No 682 is denied.

Motion No. 1165

The standard for the dismissal of one or more causes of action based on a defense founded on documentary evidence (CPLR 3211[a][1]) is well settled. A dismissal is warranted only upon the submission of documentary evidence which conclusively establishes a defense to the complaint as a matter of law (*see Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 571; *Held v. Kaufman*, 91 NY2d 425, 430-431). In making this determination, it is familiar law that the intentions of the parties to any written agreement must be discerned from within its four corners, and the contract interpreted so as to give full meaning and effect to each of its material provisions (*see Excess Ins. Co. Ltd. v. Factory Mutual Ins. Co.*, 3 NY3d 577, 582; *Vermont Teddy Bear Co., Inc. v. 538 Madison*

³It appears that the LaMattina trust account at Victory Savings Bank was closed shortly after the closing, *i.e.*, on August 17, 2005, for insufficient funds.

Realty Corp., 1 NY3d 470, 475).

Here, Ancona contends in support of dismissal that the terms of its broker's agreement with Aurora limits its role to that of bringing borrowers such as the Marks to Aurora, which was to make its own decision as to whether or not to grant the loan. Ancona further contends that after Aurora decided to make the loan, the LaMattina defendants became its sole agents, leaving Ancona with no further duty to plaintiff. In this regard, Ancona maintains that the terms of its contract with Aurora (Ancona's Exhibit "C") conclusively establish its lack of a continuing duty to Aurora, and refers back to the subsequent conduct of the LaMattina defendants as proof of this intent.

In opposition, Aurora contends that Ancona's position is contrary to the terms of their broker's agreement, which purports to continue Ancona's obligation through the closing of the loan. In addition, Aurora contends that Ancona (1) breached the "Representations and Warranties" section of its broker's agreement, and (2) was negligent in referring the loan settlement services to L&A.

Here, again, it is the opinion of this Court, that Ancona has failed to demonstrate its right to the relief requested. While the Marks application appears sufficient on its face, it is alleged by Aurora and uncontroverted by Ancona that at the time when the latter referred the loan settlement services to L&A, Joseph LaMattina, James LaForte Jr. and Joseph LaForte were already under investigation as part of a federal lawsuit arising out of the alleged diversion of fiduciary funds into L&A's account at Victory Savings Bank, and were, in fact, represented by individual defendant Vincent J. Ancona, Esq.. Also, it was Mr. Ancona who personally signed the "Closing Information Form" submitted to Aurora naming L&A as the settling "attorney". This, coupled with the now-public information regarding L&A and the Victory account which prompted La Mattina's suspension from the practice of law⁴, are suggestive of the presence of fraud and collusion in the events which allegedly caused damage to Aurora. On these facts, this Court would be loath to rule that the terms of Ancona's broker's agreements constituted a complete defense to Aurora's allegations of, *e.g.*, material misrepresentation. Ancona has failed to demonstrate that plaintiff's tenth and eleventh causes of action are legally insufficient to state cognizable claims against it in negligence and breach of contract. Thus, Ancona's motion to dismiss pursuant to CPLR 3211 (a)(1);(7) must be denied. In view of the foregoing, Ancona's further request for sanctions has been rendered academic.

⁴See Matter of LaMattina, 2006 NY Slip Op 80602("U") (2d Dept).

Motion No. 1200

In support of its motion for summary judgment, Washington contends it is not liable for the acts of its insured, Lehman Brothers Bank (Aurora), or its designated settlement agent, L&A. In the alternative, Washington alleges that it is not responsible for the unauthorized acts of its title agent, Key Land and/or its vice president, Jamie Lynn Guli.

In opposition, Aurora alleges that Washington's motion is premature, as substantial discovery has not yet been conducted. Additionally, Aurora contends that triable issues of fact exist as to (1) the actual or apparent authority of Key Land, and (2) its right to coverage under Washington's title insurance policy.

It is beyond cavil that summary judgment need not be delayed until discovery is complete. Nevertheless, the law favors full disclosure before denying a party his or her day in court (*see Juseinoski v. New York Med Ctr. of Queens*, 29 AD3d 636), and this is especially true where facts essential to oppose the motion may lie exclusively within the knowledge and control of a moving parties (*cf. Arpi v. New York City Tr. Auth.*, __AD3d__, 2007 NY Slip Op 6095). Pertinently, the Nassau County District Attorney's Office has indicted many of the defendants named in this action, including Key Land's vice president, on criminal charges which include grand larceny, money laundering and conspiracy. Here, Washington is at least potentially liable for the acts committed by Ms. Guli on behalf of Key Land (*see Chubb & Son Inc. v. Consoli*, 283 AD2d 297), and is fully liable for its negligence, if any, *e.g.*, in hiring and/or supervision. Moreover, it has yet to be determined whether Lehman Brothers (Aurora) is entitled to be indemnified under the terms of Washington's title insurance policy. Under these circumstances, the summary dismissal of Aurora's ninth and twelfth causes of action would be premature.

Accordingly, it is hereby:

ORDERED that the motions and cross motion are denied in their entirety.

All parties shall appear in DCM Part 3 at 9:30 a.m. on **October 15, 2007** for a pre-trial conference.

E N T E R ,

Dated: September 13, 2007

Joseph J. Maltese
Justice of the Supreme Court