INDEX NO.11864-2007

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 002 MG
Adj'd Date: 9-20-07
Return Date: 9-14-07

Present:
Hon. SANDRA L. SGROI

PEDRO GARCIA,
Plaintiff,

-against-

AMERIQUEST MORTGAGE COMPANY, NATIONAL REAL ESTATE INFORMATION, LEE S. JACOBOWITZ, ESQ. and DON PANUSH, ESQ.,
Defendant.

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP
Attorneys for Defendant Lee S. Jacobowitz, Esq.
Mid-Westchester Executive Park
Hawthorne, New York 103532

PHIL W. FELICE, ESQ.
Attorney for Plaintiff
333 Sunrise Highway
West Islip, New York 11795

LAWRENCE S. ROSEN, ESQ.
Attorney for Defendant Don Panush, Esq.
40 Wall Street, 32
Holtsville, New York 11742

MORISON COHEN, LLP
Attorneys for Defendant Ameriquest
90 Third Avenue
New York, New York 10022

CANELLIS & ADAMS, ESQS.
Attorney for Defendant National Real Estate Information
60 Sterling Road
Watchung, New Jersey 07069

Upon the following papers numbered 1 to 12 read on this Motion: Notice of Motion and supporting papers 1-4; Affidavit in opposition and supporting papers 7-10; Affirmation in Reply and supporting papers 18-19; Exhibits 5-6; 11-12; it is,

ORDERED that the motion of the Defendant, Lee S. Jacobowitz, Esq., for an order dismissing the action as against him only is granted.

It is alleged that on or about May 30, 2003, the Plaintiff, Pedro Garcia, refinanced his real property with the Defendant Ameriquest Mortgage Company and at the closing, the moving Defendant, Lee S. Jacobowitz, Esq., represented Ameriquest. Jacobowitz deposited proceeds of the closing in his IOLA account intending to satisfy the first mortgage. The Plaintiff states that the amount of money that Ameriquest disbursed to the escrow agent to satisfy the existing mortgage on the property was insufficient to satisfy that mortgage. The moving Defendant alleges that the Complaint asserts a cause of action in negligence against him and that since the transaction derives from the work of as an attorney, it sounds in legal malpractice. Jacobowitz's attorney further alleges that the sixth and seventh causes of action "presumably sounding in defamation, are time barred under the applicable statute of limitations and are insufficiently pleaded as a matter of law."

In opposition, the attorney for the Plaintiff states that the Complaint is not alleging a cause of action in either legal malpractice or defamation. Instead, he states that the Defendant breached his obligations as an escrow agent by releasing the monies in the escrow account to the holder of the first mortgage on Plaintiff's property, Provident Bank, when he knew that the funds in that account did not satisfy the loan with Provident. However, there is no written escrow agreement defining the obligations of Jacobowitz and therefore there is no agreement that would have prevented Jacobowitz from releasing the funds he held in the IOLA account to Provident Bank.

This is not a situation where any monies were converted or lost through the negligence of Jacobowitz. According to the Plaintiff, at the time of the refinance, Provident Bank had a mortgage on the property to secure a loan that was originally in the amount of $138,000.00. At the closing, Ameriquest Mortgage Company produced a "competitor payoff worksheet" (attached as Plaintiff's Exhibit "1") which was used as a payoff letter to close the refinance transaction. The payoff worksheet mistakenly indicated that the amount owed to Provident was $145,000.00, and the alleged amount actually owed was approximately $148,000.00. Jacobowitz took possession of only $145,000.00 from the proceeds and there is no allegation that any monies from the Ameriquest loan were improperly disbursed to any person pursuant to a written or oral agreement. It is alleged that Jacobowitz issued a check to Provident Bank shortly after the closing but Provident did not negotiate the check and returned it to Jacobowitz because it was not sufficient to satisfy the Provident loan and mortgage. Jacobowitz then deposited the monies back into his escrow account where they remained until they were disbursed by checks approximately one year later.

On any motion to dismiss for failure to state a cause of action, "all pleadings shall be liberally construed***" (***Taft v Shaffer Trucking***, 52 AD2d 255, 257, 383 N.Y.S.2d 744). The Court agrees with the attorney for the moving Defendant that no attorney-client relationship existed with the Plaintiff with respect to the real estate transaction at issue (see, ***Sucese v Kirsch***, 199 AD2d 718). In a legal malpractice action, the Plaintiff "must plead factual allegations, which, if proven at trial, would demonstrate that counsel had breached a duty owed to the client, that the breach was the proximate cause of the injuries and that actual damages were sustained." ***Dweck Law Firm, LLP v. Mann***, 283 A.D. 2d 292, 727 N.Y.S. 2d 58, 59). "Unsupported factual allegations, conclusory legal argument or allegations contradicted by documentation do not suffice" to allege a cause of action (supra; ***Geller v. Harris***, 258 A.D.2d 421, 685 N.Y.S.2d 734, 735).

According to New York Jurisprudence (*7 **N.Y. Jur. 2d Attorneys at Law § 146***):

> Upon delivery of an escrow to an attorney acting as escrow agent, the attorney becomes the fiduciary of both relevant parties and owes both the highest kind of loyalty,(citing ***Muscara v***

> ~~***Lamberti*** 133 AD2d 362, 519 NYS2d 265; ***Director Door Corp. v Marchese & Sallah, P. C.***~~ 127 AD2d 735, 511 NYS2d 930) but *before the escrow is delivered no such duty is owed to a party not a client, and no liability to a third party can be attributed to an attorney arising out of his knowledge that a client has failed to comply with an escrow agreement since the attorney's duty is to the client and not the third party*. (italics supplied by the Court).

Since no attorney client relationship existed between the Plaintiff and Jacobowitz and the attorney for the Plaintiff admits that the complaint does not sound in legal malpractice, the motion of the moving Defendant is granted to the extent that the claims in the Complaint could be construed as alleging a claim sounding in legal malpractice against Lee S. Jacobowitz, Esq.

The Court must now determine if the remaining claims in the Plaintiff's Complaint should be dismissed against Jacobowitz. Even though there was no attorney client relationship between Jacobowitz and Garcia, Jacobowitz did deposit monies from the closing into his attorney escrow account, thus establishing an escrow relationship with Garcia. The Court will now determine whether the cause of action alleging abuse of the escrow relationship should be dismissed. This issue was addressed by the Plaintiff in his opposition to the motion where the Plaintiff's attorney alleges "[o]nce Defendant, Lee S. Jacobowitz, accepted the return of said check, he owed Plaintiff, Pedro Garcia, a duty to maintain the escrow pending full payment to Provident Bank."

An escrow agent can be held liable for breach of the escrow agreement as well as for breach of fiduciary duty as an escrowee (see, ***Takayama v. Schaefer***, 240 A.D.2d 21, 669 N.Y.S.2d 656). This being said the escrow agent is not an insurer of the money or the results (see generally, ***Oppenheim v. Simon***, 57 A.D.2d 1006, 394 N.Y.S.2d 500).

Jacobowitz, as Plaintiff's escrow holder, was in a fiduciary relationship with the Plaintiff and, therefore, owed him the highest degree of loyalty (see, ***Director Door Corp. v Marchese & Sallah***, 127 AD2d 735, 736, 511 NYS2d 930; ***Solondz v. Barash***, 225 A.D.2d 996, 639 N.Y.S.2d 561). In ***Grinblat v Taubenblat***, 107 A.D.2d 735, 736, 484 N.Y.S.2d 96, the Court stated that "an escrow agent is charged with the duty not to deliver the escrow deposit to anyone except upon strict compliance with the conditions imposed and he is subject to damages for his failure to so act (***Farago v Burke***, 262 NY 229, 186 N.E. 683)."

Here, the Plaintiff's claim that a special relationship was created between the Plaintiff and the moving Defendant is supported by the fact that Jacobowitz took possession of the money for the purpose of satisfying the Provident loan. This is standard procedure in a refinancing transaction and if the correct amount to satisfy Provident Bank had been placed in escrow, there would have been no claims to be interposed against the Defendants. Although the correct amount to satisfy the Provident loan was not placed in escrow, it was not the obligation of Jacobowitz, *as the escrowee*, to compute the amount necessary to satisfy the loan.

The money deposited by Jacobowitz remained in the escrow account for over one year until 2004, when checks were issued to the Plaintiff, Provident Bank and another entity. Jacobowitz could not satisfy the loan in either 2003 or 2004 from the proceeds in his possession and there is no showing that the persons who received the monies were not entitled to those funds.

In this case, there is no written escrow agreement stating the responsibilities of the moving Defendant and therefore the only obligation that can be imposed upon Jacobowitz is the responsibility to forward any monies in his possession to Provident Bank, their agents or the Plaintiff Garcia. Under these facts, that is exactly what the Defendant Jacobowitz eventually did when the checks were issued in 2004 and thus there is no viable cause of action for violating a fiduciary relationship or for damaging the credit or reputation of Garcia(see generally, ***Dorsey Prods. Corp. v United States Rubber Co.***, 21 AD2d 866, *affd* 16 NY2d 925). The Plaintiff does not contend that Jacobowitz concealed the monies in the escrow account, that he made any specific misrepresentations or converted or diverted those monies or that he acted in any other manner that caused the Plaintiff to lose his right to any of the monies that were deposited in the escrow account. Instead, Plaintiff appears to be complaining that the failure of Ameriquest to ascertain the proper amount required to satisfy the Provident mortgage is the act that caused the damage to the Plaintiff.

General Business Law §778-a and ***22 N.Y.C.R.R. § 1200.46 (b)(1)*** set forth specific requirements for the handling and maintenance by an attorney of the funds of another person. There are no allegations that any requirements in these sections have been violated by Jacobowitz.

Under these circumstances, the motion of the Defendant Jacobowitz is granted.

Dated: 9/28/07

SANDRA L. SGROI, J. S. C.