Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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JEAN HOWARD and LORENZO CROWE,

Plaintiffs,

-against-

SHERYL HYDE, CHRISTOPHER SMITH, DAVID GOMEZ, REGENCY FINANCIAL SERVICES & INVESTMENTS, INC., COUNTRYWIDE HOME LOANS, INC., and RICHARD EDWARDS,

Defendants.

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Index No: 15953/07
Motion Date: 9/19/07
Motion Cal. No: 14
Motion Seq. No: 1

The following papers numbered 1 to 18 read on this motion by plaintiff for an order enjoining defendants from transferring, selling, renting or otherwise encumbering the property located at 166-22 Hendrickson Place, Jamaica, New York, 11433, Section 45, Black 10170, Lot 141; and upon this cross-motion by defendant Countrywide for an order dismissing the complaint.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits.....	1 - 9
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Upon the foregoing papers, it is hereby ordered that the motion and cross-motion be disposed of as follows:

This is an action sounding in breach of contract and fraud arising from the transfer of property known as 166-22 Hendrickson Place, Jamaica, New York, 11433, Section 45, Black 10170, Lot 141, from plaintiffs to defendants. Plaintiffs, who have owned the property since 2002, allege that they held a fee simple interest in the property until they began having financial difficulties in 2005. As such, plaintiff Howard contends that she was introduced to defendant Richard Edwards, an employee and/or owner of defendant Regency Financial, by defendant Hyde, whom plaintiff alleges she has known for nine years, and was allegedly advised by defendants that they would need

to immediately refinance to avoid foreclosure of the property. On June 29, 2005, the property was deeded to defendant Hyde, notwithstanding the fact that plaintiffs contend that they were not suppose to be removed from the deed. On the same date, defendant Hyde placed two mortgages on the property totaling $375,000.00 with defendant Countrywide Home Loans, Inc. Plaintiffs retained possession and were to continue to pay the carrying costs of the property for one year upon which defendant Hyde allegedly was to revert her interest in the property back to plaintiffs. On January 23, 2007, defendant Hyde deeded the property to defendant Smith, who placed two mortgages on the property totaling $515,000.00 with defendant Countrywide Home Loans, Inc. Plaintiff Howard contends that as she was faced with eviction by defendant Smith, she thereafter, as the "Previous Owner," entered into an Agreement on February 8, 2007, with defendant Smith and his business partner, defendant David Gomez, as the "Current Owners," which provided as follows:

> 1. Previous owner of premises known as 166-22 Hendrickson Place, Jamaica, NY, will enter into a long term Residential Lease Agreement whereby Jean Howard agrees to pay Christopher Smith in the amount of $3000.00 a month for a period of 4 months commencing from April 1, 2007 and continuing to August 1, 2007.
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> 2. Current owners will agree to provide for payments for the heat and electricity and other bill payments outside the mortgage (so long as the bill amount remains reasonable).
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> 3. Upon the time of August 1, 2007, current owners agree to amend the deed to include previous owner. The reformed deed will include Jean Howard as a tenant in common.
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> 4. Within the year of the execution of this agreement, previous owner will make arrangements to raise her credit score and refinance the mortgage with a mortgage solely in her name. At the refinance, all parties agree to amend the deed to include her as sole owner of the premises. Current owner to receive $20,000.00 from the refinance, if available.

On the same day, plaintiff Howard and defendant Smith entered into a lease agreement for a term of one year commencing February 8, 2007, whereby the monthly rental payments were set at $3000.00 beginning on April 1, 2007. The agreement also reflected that she already paid rental and security deposits in the amount of $4000.00.

It is upon the foregoing that plaintiffs move for an order enjoining defendants from transferring, selling, renting or otherwise encumbering the property located at 166-22 Hendrickson Place, Jamaica, New York, 11433, Section 45, Black 10170, Lot 141. Defendant Countrywide cross-moves for an order dismissing the complaint, pursuant to CPLR § 3211(a)(7), for failure to state a

cause of action. As resolution of the cross-motion would be dispositive on the motion for injunctive relief, the Court will address the cross-motion for summary judgment and dismissal first.

On a cross-motion to dismiss, pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction, the facts as alleged in the complaint are accepted as true and the plaintiff is afforded the benefit of every possible favorable inference. See, Nonnon v. City of New York, 9 N.Y.3d 825 (2007); Zumpano v. Quinn, 6 N.Y.3d 666 (2006); Leon v. Martinez, 84 N.Y.2d 83 (1994); Kempf v. Magida, 37 A.D.3d 763 (2nd Dept. 2007); Gallagher. Kucker & Bruh, 34 A.D.3d 419 (2nd Dept 2006); Santos v. City of New York, 269 A.D.2d 585 (2nd Dept.2000); Jacobs v. Macy's East, Inc., 262 A.D.2d 607 (2nd Dept.1999); Doria v. Masucci, 230 A.D.2d 764 (2nd Dept.1996). In assessing such a motion, a court properly may freely consider affidavits submitted by the plaintiff for the limited purpose of ascertaining whether they may remedy defects in the complaint or they establish conclusively that plaintiff has no cause of action. See, Rovello v. Orofino Realty Co., Inc., 40 N.Y.2d 633 (1976). Such "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." Id., 40 N.Y.2d at 636; see, Cron v. Hargro Fabrics, Inc., 91 N.Y.2d 362 (1998). "When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." Gershon v. Goldberg, 30 A.D.3d 372, 817 N.Y.S.2d 322, 323 (2nd Dept. 2006); see, Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330 (1999); Operative Cake Corp. v. Nassour, 21 A.D.3d 1020 (2nd Dept. 2005).

"Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence." AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co., 5 N.Y.3d 582, 591 (2005). The determination to be made is whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). However, bare legal conclusions as well as factual claims that are flatly contradicted by the record are not presumed to be true on a motion to dismiss for failure to state a cause of action, and are not entitled to any such consideration." Mayer v. Sanders, 264 A.D.2d 827, 828 (2nd Dept. 1999); see, Morone v. Morone, 50 N.Y.2d 481 (1980). Moreover, where, the plaintiff's submissions conclusively establish that there is no cause of action, the cause of action should be dismissed." Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 636 (1976).

Here, there is only one claim asserted as against defendant Countrywide which states that this defendant holds two mortgages on the premises, and plaintiff seeks an order "rescinding such mortgages from the subject property." In viewing the instant complaint in its most favorable light, this Court finds that there are no potentially viable claims asserted therein as against defendant Countrywide. Consequently, the cross-motion to dismiss the complaint upon the ground that it fails to state a cause of action, pursuant to CPLR § 3211(a)(7), is granted, and the complaint hereby is dismissed as to defendant Countrywide Home Loan, Inc.

With respect to plaintiffs' motion for injunctive relief, the purpose of a preliminary injunction is to preserve the status quo of an action pending trial. As such, the granting of the preliminary injunction is a drastic remedy which is to be used sparingly, and such remedy will not be granted

"unless a clear right thereto is established." Doe v. Poe; 189 A.D.2d 132 (2nd Dept.1993). To prevail on a motion for preliminary injunction, the movant has the burden of demonstrating by clear and convincing evidence: (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of a preliminary injunction; and (3) that a balancing of equities favors movant's position. See, Ocean Club v Incorporated Vil. of Atlantic Beach , 6 A.D.3d 593 (2nd Dept. 2004); Price Paper and Twine Co. v. Miller, 182 A.D.2d 748 (2nd Dept.1992); Aetna Ins. Co. v Capasso, 75 N.Y.2d 860, 862 (1990). Accordingly, as the criteria for an injunction have been met, the motion for injunctive relief, which is unopposed by the remaining defendants, is granted.[1]

"Although the fixing of the amount of an undertaking when granting a motion for a preliminary injunction is a matter within the sound discretion of the court [see, Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557 (2nd Dept. 1998); see, Clover St. Assocs. v. Nilsson, 244 A.D.2d 312, 313, 665 N.Y.S.2d 537 (2nd Dept. 1997)], the language of CPLR 6312(b) is "clear and unequivocal," and it requires the party seeking the injunction to give an undertaking [see, Carter v. Konstantatos, 156 A.D.2d 632, 633, 549 N.Y.S.2d 131 (1996); Walter Karl, Inc. v. Wood, 137 A.D.2d 22, 29, 528 N.Y.S.2d 94 (2nd Dept. 1988); Burmax Co. v. B & S Indus., 135 A.D.2d 599, 601, 522 N.Y.S.2d 177(2nd Dept. 1987)]." Schwartz v. Gruber, 261 A.D.2d 526, 527 (2nd Dept. 1999); see, Livas v. Mitzner, 303 A.D.2d 381 (2nd Dept. 2003). The standard to be applied in fixing the undertaking is an amount that is rationally related to the damages the nonmoving party might suffer if the court later determines that the relief should not have been granted. See, Lelekakis v. Kamamis, 303 A.D.2d 380 (2nd Dept. 2003); Schwartz v. Gruber , 261 A.D.2d 526 (2nd Dept. 1999); Carter v. Konstantatos, 156 A.D.2d 632 (2nd Dept. 1996); Bennigan's of New York, Inc. v. Great Neck Plaza, L.P., 223 A.D.2d 615 (2nd Dept. 1996). As a general rule, however, the amount is fixed by the court after a hearing held for such purpose. See, Cohn v. White Oak Coop. Hous. Corp., 243 A.D.2d 440 (2nd Dept. 1997); Peron Rest. v. Young & Rubicam, Inc., 179 A.D.2d 469 (1st Dept. 1992); Times Sq. Stores Corp. v. Bernice Realty Co., 107 A.D.2d 677 (2nd Dept. 1985).

Accordingly, the motion is granted to the extent that defendants Christopher Smith, David Gomez, Regency Financial Services & Investments, Inc. and Richard Edwards hereby are enjoined from filing any deed, transferring, selling, renting or otherwise encumbering in any way the property located at 166-22 Hendrickson Place, Jamaica, New York, 11433, Section 45, Black 10170, Lot 141 and the parties are directed to appear before this court in Part 19, courtroom 63, on December 17, 2007, at 10:00 A.M., for a hearing to determine the amount of the undertaking. Copies of this order are being sent to all parties by mail.

Dated: November 13, 2007

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J.S.C.

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[1] By order of this Court dated November 5, 2007, plaintiffs' motion for an order directing a default judgment be entered against defendants Christopher Smith, David Gomez, Regency Financial, and Richard Edwards, was granted without opposition to the extent that a default judgment was granted against defendants Christopher Smith and David Gomez and an Inquest shall be held at the time of the trial of this action. By stipulation dated September 5, 2007, the motion was withdrawn as against defendants Regency Financial and Richard Edwards.