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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 23rd day of November, 2007.

P R E S E N T:

HON. BERNADETTE BAYNE,
Justice.

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YVETTE MONROE and WALTER L. ALLEN,

Plaintiffs,

Index No. 23755/06

- against -

HOME REHAB AND DEVELOPMENT, INC., NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AMERICA'S SERVICING COMPANY, STEVEN J. BAUM, PC, DEE ABERS, ALL STAR ABSTRACT, LLC, MERAV RASHTY, ESQ., ASSAF DROR, ESQ., HABERMAN & GOLDENBERG, LLP, and PHYLLIS E. DUBROW, ESQ.,

DECISION AND ORDER

Defendants.

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The following papers numbered 1 to 9 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2, 3, 4, 5, 6
Opposing Affidavits (Affirmations)	7, 8
Reply Affidavits (Affirmations)	9

Upon the foregoing papers, defendants Phyllis E. DuBrow, Esq. (DUBROW), Merav Rashty, Esq. (RASHTY), Home Rehab and Development, Inc. (HOME REHAB), America's Servicing

Company (AMERICA'S) and Haberman & Goldenberg LLP (HABERMAN) move and Steven J. Baum, P.C. (BAUM) cross-moves, for an order, pursuant to CPLR 3211(a)(1), (7) and (8) and CPLR 3016(b), dismissing the verified complaint of plaintiffs Yvette Monroe (MONROE) and Walter L. Allen (ALLEN) on the grounds that, *inter alia*, the court lacks personal jurisdiction over the movants due to the improper service upon them of the summons and complaint; documentary evidence exists which conclusively establishes a defense to the instant action; and that said complaint fails to state a cause of action as against them.* The plaintiffs oppose the instant motions and cross motion on the ground that they have stated cognizable causes of action based upon the alleged misappropriation by defendants of sums due to the plaintiffs at the real estate closing which is the subject of the instant action.

Discussion

In their verified *pro se* complaint, the plaintiffs allege that the defendants collectively caused the plaintiffs "to lose out on monies in the amount of $405,000." They aver that such sums were misappropriated by the defendants during a real estate closing for property owned by the plaintiffs and located at 728 Monroe Street in Brooklyn, New York (the Monroe Street property). The plaintiffs claim that they sold the subject property to defendant HOME REHAB for the purchase price of $405,000 and that they received a "pay off" letter dated July 22, 2005 containing figures in

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* The court notes that the motions to dismiss of defendants Asaf Dror, Esq., Allstar Abstract LLC, Dee Abers and the New York City Department of Environmental Protection were previously granted by short form order dated February 13, 2007. Accordingly, the court will only consider the allegations asserted against the current defendant-movants in determining their respective motions to dismiss. In addition, to the extent that any of the defendants have requested that their motions or cross motion to dismiss be treated as motions for summary judgment upon notice to all parties, the court declines to do so and, instead, shall utilize the standard of review applicable to motions to dismiss with respect to the motions and cross motion before the court.

the amount of $237,638.00 with respect to the mortgage loan for the Monroe Street property. Plaintiffs further allege "...that each defendant was given monies and payments without due process as to the purpose of such payments and that . . . defendant HABERMAN . . . issued these checks without providing information to plaintiffs as to their involvement or service."

With respect to the moving defendants, the plaintiffs claim that the following defendants improperly received the following sums "with no due notice to plaintiff as to why such monies were issued to this particular defendant":

AMERICA'S - $237,260.00

BAUM - $934.00

DUBROW - $49,750.00

In addition, the plaintiffs claim that they were overcharged for a water bill in an amount exceeding $35,000, when such amount was allegedly credited to defendant HOME REHAB at the closing. Moreover, plaintiffs claim that they were obligated to pay additional water bill fees after the subject property was sold on June 24, 2005 and continued being billed for water usage related to the Monroe Street property until March 8, 2006. The plaintiffs claim that such water bills resulted in further payments by them of $4,522.73 and/or $5,041.91. Plaintiffs also claim that they were constrained to pay for a parking violation in the amount of $715.00 and "other violations" totaling $3,000.

The plaintiffs also assert other allegations of wrongdoing against the moving defendants. With respect to defendant DUBROW, the plaintiffs allege that she received an additional $4,000 for services that were not necessary, received monies for services which were never rendered during the closing and did not fully disclose "paperwork and documents" to the plaintiffs concerning the closing. The plaintiffs similarly claim that defendant RASHTY failed to inform them of

conversations she had with other attorneys and participants at the closing, and failed to update them with respect to issues that were discussed between the attorneys.

Based upon the foregoing allegations, plaintiffs seem to assert a cause of action sounding in fraud against all of the defendants and also state that the "defendants, either collectively or individually, . . . made efforts to incur extra monies for services that [were] either never conducted or performed . . . ."

Regarding defendant DUBROW's motion to dismiss, in her affidavit submitted in support of her motion, she argues that personal jurisdiction has not been obtained over her because the return post card for the service of the summons and complaint by certified mail was signed by the receptionist for her office suite who did not have authority to accept service on her behalf. In addition, defendant DUBROW states that she did not receive any follow-up service by mail as required by CPLR 308.

With respect to the substance of the complaint, defendant DUBROW contends that her role at the subject real estate closing was limited to that of Special Guardian for plaintiff ALLEN. She submits an order of this court signed by Judge Leventhal, dated June 15, 2005, which directed as follows:

> "[I]t is hereby
>
> ORDERED that PHYLISS DUBROW Esq. . . . is hereby appointed solely for the purpose of assisting Walter Allen in obtaining pension benefits, to oversee the closing of the property on Monroe Street and to insure the foreclosure action on the Hart Street property is resolved; and it is further
>
> ORDERED that the posting of a bond is hereby waived; and it is further

> ORDERED that this Order is to be deemed the commission; and it is further
>
> ORDERED that the Special Guardian is to advise this Court in writing when all matters have been completed so that she may be discharged; and it is further
>
> ORDERED that the special guardian has consented to waive any fees that may have been awarded in this matter."

Defendant DUBROW states that the "Hart Street property" referenced in the order is the primary residence of the plaintiffs located at 438 Hart Street in Brooklyn, New York for which a judgment of foreclosure and sale had already been issued and that the "Monroe Street property" - the subject of this action - had been purchased by the plaintiffs as an investment property. Defendant DUBROW was appointed as a Special Guardian after acting as a Court Evaluator in an Article 81 proceeding concerning the appointment of a guardian for plaintiff ALLEN. The Article 81 proceeding arose out of a divorce action commenced by plaintiff MONROE against plaintiff ALLEN on or about September 8, 2004. During the pendency of that action, the court (Sunshine, J.) issued an order appointing a guardian ad litem for plaintiff ALLEN and suggested that said guardian consider whether an Article 81 proceeding was appropriate. The foreclosure sale of the Hart Street property was stayed by the court pending resolution of the Article 81 issue. The guardian ad litem commenced such proceeding. As a result of the proceeding, the court (Leventhal, J.) determined that appointment of a guardian was not warranted and, instead, appointed defendant DUBROW as a limited "Special Guardian," as reflected in the aforementioned order.

Defendant DUBROW states that, as Special Guardian, she was charged with the responsibility of insuring that the outstanding mortgage payments owed by the plaintiffs for the Hart

Street property were paid with proceeds generated at the real estate closing for the Monroe Street property. She contacted the mortgagee for the Hart Street property, Countrywide Home Loans, and received a "reinstatement calculation" letter which stated that the amount due in order to reinstate the loan and bring the Hart Street property out of foreclosure was $45,216.26 as of June 29, 2006. Said letter also stated that payment of the sum had to be made by money order or certified funds.

Defendant DUBROW also states that she contacted an attorney, Precious C. Aneji, Esq., who had represented the plaintiffs in the early stages of the sale of the Monroe Street property and informed her that she would be representing the plaintiffs at the closing and sought all documents in her possession concerning the subject transaction. Subsequently, plaintiffs informed defendant DUBROW that they did not want her to represent them at the closing. Defendant DUBROW states that she contacted Justice Leventhal's clerk who advised that she should appear at the closing solely to collect the reinstatement funds and then forward the funds to Countrywide Home Loans.

Defendant DUBROW then sent a letter to Precious C. Aneji, Esq. which stated that defendant RASHTY would be representing the plaintiffs at the closing and stated the following:

> "As I have discussed with the plaintiffs as well as Ms. Rashty, my role [at the closing] will be only to ensure a payment from the proceeds to Countrywide Home Loans in order to reinstate the loan on the property at 438 Hart Street."

A copy of the letter was also sent to the plaintiffs.

On June 22, 2005, defendant DUBROW faxed a memorandum to defendant RASHTY informing her that she would need two certified checks, one for $45,216.26, as and for the reinstatement of the mortgage on the Hart Street property - and another check for $4,461.84, which equaled the amount of the next two mortgage payments.

The closing took place on June 24, 2006. As opposed to the two certified checks that defendant DUBROW requested, she received a check drawn on the IOLA account of the attorney for defendant HOME REHAB's lender in the total amount of $49,750.00 payable to "Phyliss E. DuBrow, as Attorney." Defendant DUBROW agreed to accept the check and exchange it for certified checks payable to Countrywide Home Loans.

Defendant DUBROW obtained two certified checks from Berkshire Bank in exchange for the IOLA check. She also had a check made payable to herself in the amount of $71.90 for out-of-pocket expenses that she incurred with respect to the closing, such as overnight mailings of necessary documents and transportation to the closing. She states that said check did not cover the total amount of her expenses, but that $71.90 was all that was left after the debt to Countrywide Home Loans was paid. The closing statement reflected that one of the plaintiffs' expenses was "Mortgage Payoff: Countrywide/$49,750 (escrow to Phyliss DuBrow)."

On July 5, 2005, defendant DUBROW submitted a sworn Interim Report to advise the court (Leventhal, J.) that she had accomplished reinstatement of the loan for the Hart Street property. The report stated, in relevant part, that:

> "I make this Affidavit as in interim report of my assignment to assist Walter Allen in obtaining pension benefits, to oversee the closing of the property on Monroe Street, and to insure that the foreclosure on the Hart Street property is resolved.
>
> With regard to the closing of the property on Monroe Street:
>
> a. I attended the closing of the sale of the property at 728 Monroe Street on June 24, 2004. Walter and Yvette Allen were represented at the closing by Merav Rasht[y], Esq. (Annexed hereto is a fax I received from Yvette Allen on June 13, 2005, stating that she and Mr. Allen did not wish me to represent them).

> b. From the proceeds of the sale, I was given two checks for payment to Countrywide Home Loans, the mortgagee which had been restrained from foreclosing its mortgage on 438 Hart Street. One check for $45,216.26 was the amount required to reinstate the loan on the property . A second check , for $4,461.00 covers the monthly payments through September 2005 so that the next payment is due October 1, 2005.
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> With regard to the foreclosure on the Hart Street property: I called Countrywide Home Loans on June 29, 2005 and was told that the loan was reinstated."

Defendant DUBROW states that on August 4, 2005, at a conference before Justice Leventhal, she made the same report orally, in the presence of the plaintiffs, and Justice Leventhal dismissed her as Special Guardian from the bench.

As a result of the foregoing, defendant DUBROW contends that she received no funds from the closing, other than the check for $71.60 for necessary expenditures, and was only present at the closing pursuant to a court order directing that she act as Special Guardian for the purpose of reinstating the loan on the Hart Street property. Accordingly, she maintains that because the complaint only alleges that she "received monies without notice . . . dollars for services that were unnecessary and monies for services never performed," it fails to state a cause of action against her and she has proffered documentary evidence that conclusively establishes a defense to the action.

Defendant BAUM submits an affidavit by Steven J. Baum, Esq. in support of its motion to dismiss wherein Mr. Baum states that defendant BAUM was retained by the mortgagee, Chase Manhattan Mortgage Corporation, to commence a foreclosure action against the plaintiffs with respect to the Monroe Street property. On or about June 21, 2005, defendant BAUM received a request from defendant RASHTY for a "pay off letter" with respect to the amount currently due pursuant to the mortgage on the Monroe Street property. Mr. Baum states that a pay off letter was

sent to defendant RASHTY as requested. Thereafter, on June 27, 2005, defendant BAUM received two checks in the amount of $235,260.00 and $934.00. Said funds were used to satisfy the mortgage on the Monroe Street property. On June 28, defendant BAUM issued a refund check to the plaintiffs in the amount of $730.93 to compensate them for overestimated disbursements.

Defendant BAUM argues that it was not a party to the closing and merely received funds on behalf of its client, the mortgagee for the Monroe Street property, which were then used to satisfy the mortgage on the property. Defendant BAUM also contends that the complaint does not state any specific acts of wrongdoing as against it, but merely alleges that defendant BAUM "improperly received $934.00 pursuant to the closing", ($730.93 of which defendant BAUM states was returned to the plaintiffs), "with no due notice to plaintiffs as to why such monies were issued", and otherwise alleges that defendant BAUM "does have personal involvement in this action to which defendant BAUM participated in causing plaintiffs . . financial loss."

Defendant BAUM also maintains that it was not properly served in this action. Mr. Baum states that on August 18, 2006, defendant BAUM received by first class mail a copy of the subject summons and complaint. He further states that the first class mailing failed to include two copies of a statement of service by mail and acknowledgment or receipt and a return envelope as prescribed by statute and, accordingly, defendant BAUM claims that it has not yet been properly served in this action.

In support of its motion to dismiss, defendant AMERICA'S submits an attorney affirmation which states that defendant AMERICA'S merely acted as the servicing company for Chase Manhattan Mortgage Corporation, the mortgagee for the Monroe Street property. Defendant AMERICA'S argues that the only allegation asserted against it is that it improperly received

$237,260.00 as a result of the subject real estate closing, and as said sum was properly used to satisfy the mortgage on the Monroe Street property, defendant AMERICA'S contends that the complaint fails to state a cause of action as against defendant AMERICA'S with respect to any alleged wrongdoing on its part related to the closing in question.

Defendant AMERICA'S also argues that it was not properly served pursuant to CPLR 312-(a) as the summons and complaint was served via regular mail and the "Proof of Service by Mail" utilized did not comport with the applicable statutory provision.

In support of its motion to dismiss, defendant HABERMAN submits the affidavit of Robert S. Goldenberg, a member of the firm, which states that defendant HABERMAN acted as counsel for Carnegie Capital LLC, a private lender which provided financing to defendant HOME REHAB for the purchase of the Monroe Street property. Mr. Goldenberg further states that the complaint does not allege that any tortious acts were committed by defendant HABERMAN or that defendant HABERMAN either had, or breached, any duties, contractual or otherwise, to the plaintiffs. Moreover, to the extent that checks were issued at the closing by defendant HABERMAN, such disbursement of monies was made pursuant to its obligations to its client, Carnegie Capital LLC, and in furtherance of defendant HOME REHAB's purchase of the subject property. Accordingly, defendant HABERMAN contends that the complaint fails to state a cause of action as against it.

In addition, defendant HABERMAN also maintains that it was never properly served in the action because it only received the summons and complaint via first class mail and, as such, accordingly, was never served pursuant to CPLR 311(a) and/or CPLR 310, as required. defendant HABERMAN states that it was not properly served pursuant to CPLR 312-a either.

In support of its motion to dismiss, defendant HOME REHAB submits an attorney's affirmation which states that on April 21, 2005 it entered into a contract with the plaintiffs for the purchase of the Monroe Street property. The total purchase price was $405,000 and defendant HOME REHAB tendered a down payment in the amount of $20,000. At the closing, defendant HOME REHAB was credited $56,000 with respect to the down payment and the satisfaction of liens on the property and the plaintiffs received the balance of $349,000. Defendant HOME REHAB argues that because the complaint fails to contain any specific allegations of wrongdoing against it, but rather only generally alleges that the defendants "in a collective enterprise" were responsible for financial loss to the plaintiffs, the complaint must be dismissed as against it for failing to state a cause of action.

In support of her motion to dismiss, defendant RASHTY submits an affirmation which states that in June 2005 she was contacted by plaintiff MONROE to represent her and plaintiff ALLEN at the closing for the Monroe Street property. Defendant RASHTY states that she received a copy of the subject contract of sale after she was retained by the plaintiffs, but that she did not participate in the negotiations related to the contract of sale and that the plaintiffs did not express any misgivings to her with respect to the sale. Defendant RASHTY acknowledges that she was aware that the plaintiffs had hired and fired two other attorneys who had previously provided representation to the plaintiffs related to the subject transaction.

Defendant RASHTY states that she attended the real estate closing and kept the plaintiffs fully informed of the transactions taking place at the closing, including the necessity of paying off the mortgage on the property and covering the title costs and other closing costs. As an experienced real estate practitioner, defendant RASHTY admits that she knew some of the other individuals who

attended the closing, but maintains that she did not have a business relationship with any other lawyer, title company or lender representative present at said closing. She further states that "although the plaintiffs desired to clear additional funds from the sale of their property, that was not possible due to their indebtedness and obligations on the property." Nevertheless, defendant RASHTY claims that the plaintiffs received $118,036.76 from the proceeds of the sale.

Defendant RASHTY argues that there are no specific acts of wrongdoing alleged against her and that even if there were, there are no allegations that such acts directly caused the plaintiffs financial harm. Defendant RASHTY claims that the allegations against her are either general in nature, referring to a "collective enterprise" between the defendants to cause financial loss to the plaintiffs, or relate solely to defendant RASHTY's alleged "failure to inform the plaintiffs of discussions that she had with the other attorneys and to update the plaintiffs with respect to such discussions." Defendant RASHTY argues that the complaint fails to state how such alleged failure on her part caused financial harm to the plaintiffs. Accordingly, defendant RASHTY contends that the complaint fails to state a claim as against her.

In their response to the aforesaid motions and cross motion to dismiss, plaintiffs submit two affidavits in opposition, both by plaintiff MONROE, wherein she primarily contends that the plaintiffs were overcharged $35,000 for allegedly outstanding water bills, with such amount being improperly credited to defendant HOME REHAB, due to defendant RASHTY's failure to provide adequate representation to them at the closing. Plaintiff MONROE states that no documentation was ever presented demonstrating the amount of the alleged water bill. In addition, plaintiff MONROE argues that the outstanding amount on their mortgage for the Monroe Street property was $180,000 and not the approximately $235,000 amount stated in both the closing statement and the pay off

letter, which plaintiff MONROE claims she only received a "print out" of, as opposed to an original of the same. Plaintiffs maintain that they purchased the Monroe Street property pursuant to a federal Housing and Urban Development (HUD) loan, but never received a statement pertaining to the aforementioned loan at the closing. The plaintiffs also state that a commission listed as $7,290.00 on a statement submitted by defendant HABERMAN in support of its motion to dismiss was improperly paid out in relation to the closing. Based on the foregoing, the plaintiffs contend that they have stated valid causes of action against the defendants for their alleged misappropriation of funds from the proceeds generated as a result of the closing.

Analysis

It is well settled that, "as a general rule, on a motion to dismiss a complaint for failure to state a cause of action under CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true", Gruen v. County of Suffolk, 187 AD2d 560, (1992). Additionally, "[t]he pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment", Components Direct, Inc. v. European American Bank and Trust Co., 175 AD2d 227, (1991). "If from the complaint's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail", Guggenheimer v. Ginzburg, 43 NY2d 268, (1977). "The criterion is whether the plaintiff has a cause of action and not whether he or she may ultimately be successful on the merits", One Acre, Inc. v. Town of Hempstead, 215 AD2d 359, (1995). Accordingly, the dismissal of a complaint pursuant to CPLR 3211(a) (7), "will be warranted only in those situations in which it is conclusively established that there is no cause of action", Town of North Hempstead v. Sea Crest Construction Corp., 119 AD2d 744, (1986). Similarly, a

dismissal motion, pursuant to CPLR 3211 (a) (1), "may be granted where documentary evidence submitted conclusively establishes a defense to the asserted action as a matter of law", Goldman v. Metropolitan Life Insurance Co., 5 NY3d 561, (2005), quoting Held v. Kaufman, 91 NY2d 425, (1998).

The statements supporting a cause of action, however, "must be sufficiently particular to give the court and parties notice of the transactions or occurrences to be proved and must support the material elements of the cause of action", Matter of Reden v. Nassau County Serv. Comm., 133 AD2d 694, (1987). Bare legal conclusions are not entitled to the general presumption that the facts pleaded are presumed to be true. See generally, Tal v. Malekan, 305 AD2d 281 (2003), *lv denied* 100 NY2d 513 (2003); Kantrowitz & Goldhamer, P.C. v. Geller, 265 AD2d 529, (1999); Sotomayor v. Kaufman, Malchman, Kirby & Squire, LLP, 252 AD2d 554, (1998); WFB Telecommunications v. NYNEX Corp., 188 AD2d 257, (1992), *lv denied* 81 NY2d 709 (1993).

"Under New York rules of procedure, conclusory averments of wrongdoing are insufficient to sustain a cause of action unless supported by allegations of ultimate facts", Vanscoy v. Namic USA Corp., 234 AD2d 680, (1996), quoting Muka v. Greene County, 101 AD2d 965 (1984), *lv denied* 64 NY2d 610 (1984). Accordingly, "the narrow question presented on review of a motion to dismiss is not whether a plaintiff should ultimately prevail in the action, but whether the complaint states cognizable causes of action, as vague and conclusory allegations will not suffice", Shariff v. Murray, 33 AD3d 688, (2006); *see also,* Soitanoff v. Gahona, 248 AD2d 525, (1998); Washington Ave. Assocs. v. Euclid Equipment, Inc., 229 AD2d 486, (1996). Moreover, factual claims which are flatly contradicted by the record are not presumed to be true. *See*, Parola, Gross & Marino, P.C. v. Susskind, 43 AD3d 1020, (2007); Palazzolo v. Herrick, Feinstein, LLP, 298 AD2d 372, 2002).

With respect to claims sounding in fraud, CPLR 3016(b) requires that "where a cause of action . . . is based upon misrepresentation or fraud . . ., the circumstances constituting the wrong shall be stated in detail." However, in DaPuzzo v. Reznick Fedder & Silverman, 14 AD3d 302, (2005), the Court ruled that "CPLR 3016 requires only that a claim of fraud be pleaded in sufficient detail to give adequate notice, particularly in situations where it may be impossible to state in detail the circumstances constituting the fraud, inasmuch as the surrounding circumstances are sometimes peculiarly within the knowledge of the party against whom the claim is being asserted". Nonetheless, CPLR 3016 does not sanction the use of vague and conclusory claims by plaintiffs with respect to an allegation of fraud; rather, even where some of the surrounding circumstances may be peculiarly within the defendants' knowledge, a plaintiff must still set forth his or her claim in sufficient detail to clearly inform a defendant with respect to the incidents complained of in the fraud action. *See generally,* P.T. Bank Central Asia v ABN AMRO Bank, N.V., 301 AD2d 373, (2003).

A complaint may also be subject to dismissal pursuant to CPLR 3211(a)(8) in cases where the defendant was improperly served and, accordingly, the court lacks personal jurisdiction over such defendant. As an alternative to service pursuant to CPLR 307, 308, 310, 311 or 312, a plaintiff may serve a defendant by mailing the summons and complaint to the defendant accompanied by two copies of a "Statement of Service by Mail" and an "Acknowledgment of Receipt." Both documents must substantially comply with the form and language prescribed by the statute. The failure to enclose forms that are in substantial compliance with CPLR 312-a(d) is a jurisdictional defect and renders the complaint subject to dismissal pursuant to CPLR 3211(a)(8). *See generally* Strong v Bi-Lo Wholesalers, 265 AD2d 745, (1999).

Here, defendants HABERMAN, AMERICA'S and BAUM are entitled to dismissal of the instant action as against them as they were not properly served with the summons and complaint in the instant action. The defendants state that they received service via first class mail, but did not receive copies of a proper "Statement of Service by Mail," "Acknowledgment of Receipt" or a pre-paid envelope for the return of the "Acknowledgment of Receipt" to plaintiffs, as is required by CPLR 312-a and were not properly served by any other method. Indeed, an affidavit of service has been submitted by defendant HABERMAN which evidences that all three parties were served with the summons and complaint by first class mail. However, such affidavit of service fails to state that copies of a "Statement of Service by Mail," an "Acknowledgment of Receipt," or pre-paid envelopes were included in such service. The plaintiffs have failed to proffer any proof that service of the summons and complaint was properly effected in compliance with any of the applicable statutes to counter the defendant's argument. *See generally,* Munoz v. Reyes, 40 AD3d 1059, (2007).

Although the court is aware that the plaintiffs are proceeding *pro se*, it is well settled that "a litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants", Roundtree v. Singh, 143 AD2d 995, (1988). Accordingly, it is not within the court's discretion to overlook such fundamental service flaws, but rather the court is constrained to dismiss the plaintiffs' complaint as against defendants HABERMAN, AMERICA'S and BAUM pursuant to CPLR 3211(a)(8) for want of personal jurisdiction over these defendants. This is true even though the defendants concede that they actually received the summons and complaint, as it is well established that "when the requirements of service of process have not been met, it is irrelevant that a defendant may have actually received the documents", County of Nassau v. Letosky, 34 AD3d 414, (2006).

Defendant DUBROW is also entitled to dismissal of the action as against her due to defective service of the summons and complaint. She states that she received the summons and complaint via certified mail and that the receptionist for her office suite, who was not authorized to accept service on her behalf, signed the return receipt card for the mailing. However, the mere service of a summons and complaint via certified mail, absent personal delivery to an authorized person or evidence that previous delivery attempts were unsuccessfully made and that as a result, the "nail and mail" service method is being utilized, do not suffice to fulfill the service requirements mandated by CPLR 308 or CPLR 312-a. Moreover, the plaintiffs, who bear "the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process", have failed to proffer any evidence in response to defendant DUBROW's defense that she was not properly served in the instant action and, accordingly, the complaint as against defendant DUBROW must also be dismissed. *See* Munoz v. Reyes, 40 AD3d 1059, (2007).

Even if the Court were to overlook the defects in service, the complaint as against defendants DUBROW, AMERICA'S, HOME REHAB BAUM and HABERMAN would still be subject to dismissal pursuant to CPLR 3211(a) (1) and (7). These defendants have proffered sufficient documentary evidence with respect to both the amount and use of certain funds generated at the subject real estate closing to establish conclusively their defense that no closing funds were misappropriated by them. Moreover, the claims levied by the plaintiffs against these defendants with respect to their alleged wrongdoing in connection with the closing merely consist of vague and conclusory averments of "swindling" or that the defendant's received receipt of funds to which they were not entitled, and are bereft of any detail, other than generalized allegations of wrongdoing, that would and could provide the requisite notice to the defendants of the factual substance of the

plaintiffs' claims with respect to the particular alleged malfeasance of each of the individual defendants.

In an effort to construe the complaint as liberally as possible, the Court concludes that the plaintiffs are attempting to claim fraud and, apparently, some derivation of a conversion claim against these defendants. The elements of such causes of action are well settled. "Conversion is the unauthorized dominion or control over specifically identified property which interferes with the owner's rights", Hoffman v. Unterberg, 9 AD3d 386, (2004). "Where, however, the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner.", Republic of Haiti v. Duvalier, 211 AD2d 379, (1995). A cause of action related to a conversion claim is one for "moneys had and received," which requires that a defendant received money from plaintiff, benefitted from such receipt, and under principles of good conscience should not be allowed to retain said money. *See*, The Insurance Co. of the State of Pennsylvania v. HSBC Bank USA, 37 AD3d 251, (2007). Such a claim is based upon considerations of right, justice and morality. *See* Parsa v. State, 64 NY2d 143, (1984).

With respect to a fraud cause of action, such a claim requires that a defendant knowingly made material representations that were false with the intent to deceive the plaintiff and that the plaintiff justifiably relied on such misrepresentations to his or her detriment. *See generally,* Cohen v. Houseconnect Realty Corp., 289 AD2d 277,(2001); Matter of Garvin, 210 AD2d 332, 333 [1994]). In addition, as previously discussed, each of the foregoing elements of a fraud cause of action must be supported by factual allegations and that said allegations must satisfy CPLR 3016 (b), which requires that such allegations "be stated in detail." Here, the general allegations of wrongdoing asserted by the plaintiffs fail to state a cause of action sounding in fraud, conversion or

moneys had and received and, given the vague nature of such claims, the court is constrained from finding that any other cognizable causes of action "can be implied from [the complaint's] statements by fair and reasonable intendment.", Components Direct, Inc. v. European American Bank and Trust Co., 175 AD2d 227, (1991). Accordingly, even if the court were to exercise jurisdiction over these defendants, it would nevertheless find that the claims asserted against them in the complaint are subject to dismissal pursuant to CPLR 3211(a)(1) and (7).

Defendant HOME REHAB is also entitled to dismissal of the complaint as against it. The complaint does not contain any specific allegations of wrongdoing as against defendant HOME REHAB. Indeed, the only claims asserted against defendant HOME REHAB it in the complaint are general, conclusory and apply to all of the defendants. The relevant allegations include "that each defendant . . . participated in fraud in order to take or swindle monies from plaintiff[s]" and "defendants, either collectively or individually, had made efforts to incur extra monies for [professional] services that [were] either never conducted or performed . . . ."

Such vague and conclusory allegations of wrongdoing are insufficient, even under the applicable liberal pleading standards, to have provided defendant HOME REHAB with sufficient "notice of the transactions or occurrences to be proved or to support the material elements of any cognizable causes of action.", Matter of Reden v. Nassau County Serv. Comm., 133 AD2d 694, (1987). This is especially true in a case where, as here, the plaintiffs assert claims sounding in fraud and are therefore bound by the particularity requirements of CPLR 3016. Although the aforementioned particularity requirements are relaxed in cases where certain specific details of the alleged fraud are peculiarly within the knowledge of the defendants, the plaintiffs are still obligated to set forth their claims in sufficient detail to provide adequate notice to a defendant with respect to

the incidents complained of in the fraud action. *See,* P.T. Bank Central Asia v ABN AMRO Bank, N.V., 301 AD2d 373, (2003). In this case, the only "incident" identified with respect to the general allegations of fraudulent conduct and wrongdoing is the defendant's mere presence at the subject closing and purchase of the Monroe Street property. However, no further details are provided, particularly with respect to the alleged misconduct or tortious acts of defendant HOME REHAB. As a result, the Court concludes that the plaintiffs have failed to state a cause of action with respect to plaintiffs have failed to state a cause of action with respect to defendant HOME REHAB, and as such, the complaint against them is dismissed.

The only complaint that is not subject to dismissal, is that as against defendant RASHTY. By accepting the allegations of the complaint as true, affording them a liberal construction and utilizing the affidavits in opposition by the plaintiffs to rectify any pleading defects, the court determines that the complaint adequately states a cause of action sounding in legal malpractice as against defendant RASHTY. *See,* Fresh Direct, LLC v. Blue Martini Software, Inc., 7 AD3d 487, (2004). With respect to defendant RASHTY, the gravamen of the complaint is that she departed from the exercise of that degree of care, skill and diligence commonly possessed by an attorney at a real estate closing by allowing a credit of $35,000 to be issued to defendant HOME REHAB for an allegedly unpaid water bill where no evidence existed that such amount was owed or constituted a lien on the Monroe Street property. *See generally,* Edwards v Haas, Greenstein, Samson, Cohen & Gerstein, P.C., 17 AD3d 517, (2005). Indeed, at the oral argument held on April 12, 2007 with respect to the instant motions and cross motion, plaintiff MONROE stated that the $35,000 credit for the water bill was the plaintiffs' "number one complaint." Plaintiffs claim that no bills were presented at the closing demonstrating that such sum was outstanding. The attorney for defendant

RASHTY stated at the oral argument that the $35,000 credit was a compromise agreed to by the plaintiffs in an effort to avoid having to place $60,000 in escrow until the actual bill could be determined. If the plaintiffs allegations are construed to be true, as they should be on a motion to dismiss, then the statement made on the record by defendant RASHTY's attorney, which was made without personal knowledge and was unsupported by any documentary evidence, is insufficient to demonstrate that "a material fact as claimed by the pleader to be one is not a fact at all" or that "no significant dispute exists regarding it.", Guggenheimer v. Ginzburg, 43 NY2d 268, (1977).

In addition, the contract of sale for the Monroe Street property states that the plaintiffs would be allowed to credit the purchaser at the closing for any outstanding water bills to the extent that official bills were presented at the closing evidencing such amount. The plaintiffs allege that no such bills were presented at the closing. Accordingly, bearing in mind that the criterion on a motion to dismiss is whether the plaintiffs have a cause of action and not whether they may ultimately be successful on the merits, and recognizing that the complaint "is deemed to allege whatever can be implied from its statements by fair and reasonable intendment" the court finds that the complaint and opposing affidavits taken together sufficiently state a cause of action for legal malpractice as against defendant RASHTY. *See,* One Acre, Inc. v. Town of Hempstead, 215 AD2d 359, (1995); Components Direct, Inc. v. European American Bank and Trust Co., 175 AD2d 227, (1991). The court also finds, however, that the legal malpractice claim asserted is the *only claim* not subject to dismissal as against defendant RASHTY. With respect to the vague and conclusory allegations as to conspiracy, fraud and direct misappropriation of funds asserted against her, the court finds that such allegations suffer deficiencies identical to those marring the claims already dismissed by the

court as to the other defendants and, as such, those claims must be dismissed as against defendant RASHTY as well.

Conclusion

Accordingly, it is

ORDERED, that the motions and cross motion to dismiss made by defendants DUBROW, AMERICA'S, BAUM, HABERMAN and HOME REHAB are hereby granted and the complaint is dismissed in its entirety as against those defendants, and it is further

ORDERED, that the motion to dismiss the complaint as against defendant RASHTY is granted to the extent that any and all claims made against her are dismissed, except for a cause of action sounding in legal malpractice.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne

HON. BERNADETTE BAYNE
J. S. C.

HON. BERNADETTE BAYNE