

Giordano v Giammarino
2008 NY Slip Op 30016(U)
January 8, 2008
Supreme Court, Richmond County
Docket Number: 0102961/2006
Judge: Anthony Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ROXANN GIORDANO,

Plaintiff,

-against-

ROSE MARIE GIAMMARINO and "John Doe No. 1"
through "John Doe No. 10", the last ten names being
fictitious and unknown to the plaintiffs, the persons
or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming
an interest in or lien upon the premises described in
the complaint known as 226 Greencroft Avenue,
Staten Island, New York.

Defendants.

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ROSE MARIE GIAMMARINO,

Third-Party Plaintiff,

-against-

SUMMIT INVESTMENTS LOAN CORPORATION
d/b/a B-Island Mortgage, Marc LaMassa, Joseph Crapanzano;
Nasser Alameddin, Monarch Mortgage Services,
Certified Abstract Corporation and Anthony M. Bellini.

Third-Party Defendants.

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TP-9
Present:
Hon. Anthony I. Giacobbe

Decision and Order

Index No. 102961/06
Motion No. 004

Index No. A102961/06

The following papers numbered 1 to 3 were submitted on this motion the 12th day of October, 2007:

Notice of Motion by Third-Party Defendant Bellini with supporting papers dated (July 19, 2007)	1
Third-Party Plaintiff's Response with supporting papers (dated September 28, 2007)	2
Reply Affirmation (dated October 11, 2007)	3

Upon the foregoing papers, the third-party defendant's motion to dismiss is granted to the
extent indicated, and otherwise is denied.

This action sounding in fraud, breach of fiduciary duty, violation of General Business Law

§ 349 (“Consumer Protection from Deceptive Acts and Practices”) and conspiracy arises out of a mortgage refinancing transaction wherein the third-party plaintiff claims to have been defrauded.

The third-party plaintiff, Rose Marie Giammarino, is a homeowner whose property at 226 Greencroft Avenue, Staten Island, New York, was scheduled to be sold in foreclosure on March 7, 2006. To the extent relevant, it is alleged that Mrs. Giammarino’s daughter, Elizabeth Giammarino, handled the negotiations on behalf of her mother, and in the furtherance thereof was granted a Durable General Power of Attorney to act as her mother’s attorney-in-fact for the purpose of closing on the mortgage commitment obtained from third-party defendant B-Island Mortgage. It is undisputed that the third-party plaintiff did not appear at the closing on March 3, 2006, which was attended in her stead by her daughter. Elizabeth Giammarino is not a party in this action. According to the third-party complaint, third-party defendant Anthony M. Bellini, Esq. (hereinafter “Bellini”) was appointed by B-Island Mortgage to represent Mrs. Giammarino at the closing. It is claimed in support of the third-party action that the closing costs, fees, loan duration and other relevant information had been misrepresented to Mrs. Giammarino.

In the main action, plaintiff Roxann Giordano, the present holder of the aforesaid mortgage, claims that defendant/third-party plaintiff Rose Marie Giammarino has failed to make the required payments, and is in default. A judgment of foreclosure and sale is requested. In response, Mrs. Giammarino commenced the third-party action against the mortgage broker, title company, mortgage closer, various employees of each, and her attorney, Bellini, asserting causes of action for: (1) the violation of General Business Law § 349; (2) fraud; (3) conspiracy (to violate General Business Law § 349 and commit fraud); and (4) breach of fiduciary duty.

In support of his motion to dismiss the third-party complaint pursuant to CPLR 3211(a)(1), attorney Bellini maintains that the factual allegations in the third-party complaint preclude the

maintenance of a cause of action against him for breach of fiduciary duty. In this regard, Bellini purports to rely upon the allegations that: (1) it was the daughter, Elizabeth Giammarino, who was acting as the third-party plaintiff's attorney-in-fact; (2) the third-party plaintiff did not attend the closing; and (3) attorney Bellini never spoke to the third-party plaintiff prior thereto. On the basis of this "documentary evidence," Bellini contends that any cause of action against him for breach of fiduciary duty could only run in favor of Mrs. Giammarino's daughter, Elizabeth.

CPLR 3211(a)(1) provides that a party may move for the dismissal of one or more causes of action asserted against it on the ground of a defense founded upon documentary evidence. To succeed on such a motion, however, the documentary evidence that forms the basis of the defense must be such that it resolves all of the factual issues as a matter of law, and conclusively disposes of plaintiff's claim (*see, Scadura v. Robillard*, 256 AD2d 567 [2nd Dept. 1998]). Thus, a motion to dismiss the complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, thereby conclusively establishing a defense to the action as a matter of law (*see, Ruby Falls, Inc. v. Ruby Falls Partners, LLC.*, 39 AD3d 619 [2nd Dept. 2007]). Here, the third-party defendant has not met this burden.

The allegation that the daughter was acting under a power of attorney as her mother's attorney-in-fact does not conclusively establish the absence of a fiduciary duty between the third-party plaintiff and counselor Bellini. Accordingly, this fact, standing alone, will not support dismissal.

Arguing in the alternative, Bellini maintains that the third-party cause of action for breach of fiduciary duty is factually insufficient to establish a fiduciary relationship between himself and Mrs. Giammarino. Accordingly, it is claimed that a cause of action has not been stated. The Court disagrees.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7), the sole criterion is whether from the complaint's four corner factual allegations are discernible which, taken together, manifest any cause of action cognizable at law. On such a motion, the court must accept the facts alleged in the complaint and the papers submitted in opposition to the motion as true, and accord plaintiff the benefit of every possible favorable inference (*see, Aranki v. Goldman & Associates, LLP.*, 34 AD3d 510 [2nd Dept. 2006]).

In the opinion of this Court, the third-party complaint in this case sufficiently alleges a cause of action for breach of fiduciary duty. The elements of such a cause of action are three: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages that were directly caused by the fiduciary's misconduct (*see, Kurtzman v. Bergstol*, 40 AD3d 588 [2nd Dept. 2007]).

It is well settled that an attorney-in-fact is essentially an alter ego of the principal, and as such is authorized to act with respect to any and all matters on behalf of the principal, except for those acts which, by their nature, public policy, or contract, require personal performance (*see, Zaubler v. Picone*, 100 AD2d 620 [2nd Dept. 1984]). Here, it is undisputed that the power of attorney executed by the third-party plaintiff designates her daughter as her attorney-in-fact for the purpose effectuating the mortgage refinancing. As alleged in the third-party complaint, the daughter is claimed to have participated in various discussions with the third-party defendants with respect to obtaining a mortgage on behalf of her mother, and appeared as the mother's attorney-in-fact at the closing. Moreover, it may reasonably be inferred that third-party defendant Bellini either knew or should have known that Elizabeth Giammarino was acting solely on her mother's behalf, as it was he who prepared and witnessed the execution of the subject power of attorney. Moreover, it is alleged that he was appointed by B-Island Mortgage to represent the mother. On this view of the case, sufficient facts have been pled to make out an attorney-client relationship between Mrs. Giammarino and

Bellini.

Estate of Keatinge v. Biddle (789 A2d 1271 [Me 2002]) does not represent controlling authority to the contrary. Unlike the holder of the power of attorney in that case, it is undisputed that Elizabeth Giammarino was not acting in furtherance of her own interests in attempting to refinance her mother's mortgage. Thus, the *Keatinge* case is distinguishable on its facts.

As for the allegations of misconduct, it is claimed in the third-party complaint that "Anthony Bellini did not alert Mrs. Giammarino regarding any of the inflated fees and charges in the loan, nor did he question how a woman living on social security could afford a \$350,000 mortgage at 12 percent interest, or even at a prime interest rate" (Third-party complaint, para 46). In addition, the complaint alleges that Bellini failed to "advise Mrs. Giammarino of the disadvantageous terms of the high-cost, high-rate, interest-only loan... and the large balloon payment" or to "advise Mrs. Giammarino of the high cost of [multiple] refinancing... and the fact that even at a reduced interest rate, the \$350,000 mortgage would never be affordable to her" (*id.*, at para 142-143).

Damages are articulated in paragraph 145, where it is claimed that as a result of his misconduct, Bellini is liable to the third-party plaintiff for "actual damages and [the] return of any and all commission paid" by her, directly or indirectly.

Under these circumstances, the third-party complaint sufficiently alleges a cause of action for breach of fiduciary duty against Bellini to preclude dismissal pursuant to CPLR 3211(a)(7). Accordingly, this branch of third-party defendant's motion to dismiss must be denied, as well.

Turning to the allegations of fraud, the third-party defendant's motion to dismiss is premised on the ground that said cause of action lacks the particularity required by CPLR 3016(b). The Court must agree.

CPLR 3016(b) provides, as relevant, that where a cause of action or defense is based upon allegations of misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence,

the circumstances constituting the wrong shall be stated in detail. Thus, in order to plead a prima facie case of fraud, plaintiff must allege the misrepresentation of a material existing fact, falsity, scienter, deception, and injury. In addition, each of these essential elements must be supported by factual allegations sufficient to satisfy the “detail” requirement of CPLR 3016 (*see, Williams v. Upjohn Health Care Services, Inc.*, 119 AD2d 817 [2nd Dept. 1986]).

In this case, the third-party complaint alleges (at para 118) that “plaintiff [Giordano] and third-party defendants fraudulently and knowingly induced Mrs. Giammarino to enter into an unconscionable mortgage loan by their misrepresentations and failures to provide material information.” In addition, it is alleged (at para 110[p]) that “appointing Anthony Bellini purportedly to represent Mrs. Giammarino at the closing and deducting \$1000 from the loan proceeds as payment to Mr. Bellini, when in fact Mr. Bellini regularly represented B-Island Mortgage... did not provide Mrs. Giammarino with any service of value.” Nevertheless, the third-party complaint fails to allege sufficient facts to support an inference that third-party defendant Bellini either intentionally or knowingly misrepresented material facts which induced the third-party plaintiff to enter into the subject mortgage (*see, F. Nathanson & Co. v. Marinello*, 192 AD2d 575 [2nd Dept. 1993]).¹ Under these circumstances, the lack of factual details renders the cause of action for fraud legally insufficient (*see, Meltzer v. Klein*, 29 AD2d 548 [2nd Dept. 1967]). Manifestly, it is not plaintiff’s characterization of the representations as being fraudulent which is controlling for the purposes of CPLR 3211(a)(7) to sustain a cause of action for fraud (*Meltzer v. Klein, supra* at 548). Finally, the third-party complaint with respect to the cause of action for fraud is further deficient in failing to specify any intent to defraud on the part of Bellini. Therefore, even considering the third-party complaint in the light most favorable to third-party plaintiff, it fails to allege a cause of action for

¹ The absence of “knowing misrepresentation” referred to above must be distinguished from the failure to offer advice alleged in the cause of action for breach of fiduciary duty.

fraud against the moving defendant with sufficient particularity to withstand dismissal under CPLR 3211(a)(7) (*see, Fink v. Citizens Mortgage Banking, Ltd.*, 148 AD2d 578 [2nd Dept. 1989]; *Glassman v. Catli*, 111 AD2d 744 [2nd Dept. 1985]). Accordingly, this branch of the third-party defendant's motion to dismiss must be granted.

In moving to dismiss the third-party plaintiff's statutory cause of action for failure to state a cause of action, Bellini argues that General Business Law § 349 is per se inapplicable inasmuch as the subject mortgage was a single, private loan rather than a consumer-oriented transaction aimed at the public at large. In addition, it is claimed that the allegations against Bellini do not amount to materially misleading or deceptive conduct.

In relevant part, the third-party complaint alleges (at para 109) that the third-party defendants, including Bellini, "conduct a business or furnish a service as those terms are defined in New York State General Business Law §349", and that it was in the course thereof that Bellini was appointed by a former client, B-Island Mortgage, to represent Mrs. Giammarino (*see, para 101[p]*).

In this instance, the Court must again agree that the allegations in the third-party complaint fail to state a cause of action against Bellini. At the outset, it appears from its legislative history that section 349 of the General Business Law was never intended to apply to an attorney's handling of a specific transaction for an individual client (*see, Nardella v. Braff*, 621 FSupp 1170, 1173 [SDNY 1985]). In any event, further justification for this result can be found by examining the three elements of a cause of action under General Business Law §349: (1) that the challenged act or practice was consumer-oriented; (2) that it was misleading in a material way; and (3) that plaintiff suffered injury as a result of the deceptive act (*see, Stutman v. Chemical Bank*, 95 NY2d 24 [2000]). Notably, however, neither an intent to defraud nor justifiable reliance is required to be proven (*id.*, at 29).

In this case, an argument can surely be made that the instant loan to refinance the third-party

plaintiff's residential mortgage was a consumer-oriented transaction within the scope of General Business Law §349 (see, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 NY2d 20 [1995]). In this regard, the material allegations of the third-party complaint bearing upon the issue include the claims (1) that the third-party defendants misrepresented to Mrs. Giammarino that "the principal amount of the loan would not exceed \$300,000 when it was in fact \$350,000" (para 110 subd [f]); (2) that the third-party defendants charged Mrs. Giammarino "an appraisal fee of \$550 from the loan proceeds when no appraisal was done" (*id.*, at subd [j]); and (3) that the third-party defendants failed "to apply \$10,500 of the... loan proceeds to prepay [the mortgage]" (*id.*, at subd [n]). However, the specific claims against the moving defendant are limited to the allegations that "Anthony Bellini did not alert Mrs. Giammarino regarding any of the inflated fees and charges in the loan, nor did he question how a woman living on social security could afford a \$350,000 mortgage at 12 percent interest, or even at a prime interest rate" (para 46), and that he failed to meet the duty (a) to "advise Mrs. Giammarino of the disadvantageous terms of the high-cost, high-rate, interest-only loan from Giordano, and the [resultant] large balloon payment," or (b) to "advise Mrs. Giammarino of the high cost of refinancing multiple times, and the fact that even at a reduced interest rate, the \$350,000 mortgage would never be affordable to her" (paras 142-143). While previously determined to be sufficient to state a cause of action against Bellini for breach of fiduciary duty, it is the opinion of this Court that said allegations are insufficient, even if proved, to constitute the materially misleading statements required by the General Business Law, as it is not a deceptive act or practice to proceed with an arms-length transaction without attempting to ascertain the extent of every consumer's appreciation of the ramifications of his or her decision, and whether that decision is in his or her overall best interest (see, *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, *supra* at 26). Accordingly, the motion to dismiss the statutory cause of action as against the moving third-party defendant must be granted.

Finally, the third-party complaint includes allegations of Bellini's involvement in a conspiracy to commit fraud and violate the General Business Law. Since both of these substantive claims have been found wanting, the cause of action predicated upon Bellini's alleged conspiracy to commit same must also be dismissed (*see, Linden v. Moskowitz*, 294 AD2d 114 [1st Dept. 2002], *lv denied*, 99 NY2d 505 [2003]). In any event, New York does not recognize civil conspiracy to commit a tort as an independent cause of action (*see, Ward, Jr. v. City of New York*, 15 AD3d 392 [2nd Dept. 2005]).

Accordingly, it is

ORDERED that the motion by third-party defendant Anthony Bellini to dismiss the third-party complaint as against him for failure to state a cause of action is granted with respect to the causes of action for (a) fraud, (b) violation of General Business Law § 349 and c) conspiracy to commit fraud and violate New York General Business Law § 349; and it is further

ORDERED that each of these causes of action against him are hereby severed and dismissed; and it is further

ORDERED that the balance of the motion is denied; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,

J.S.C.

Dated: January 8, 2008