

**Lombard v Yacoob**

2008 NY Slip Op 32180(U)

July 23, 2008

Supreme Court, Kings County

Docket Number: 0036016/2005

Judge: Sylvia O. Hinds-Radix

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At an IAS Term, Part 50 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 July, 2008.

P R E S E N T:

HON. SYLVIA O. HINDS-RADIX,  
Justice.

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LUCIENNE LOMBARD,  
Plaintiff,

Index No. 36016/05

- against -

FARHAAD YACOOB, et al.,  
Defendants.

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The following papers numbered 1 to 22 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1,2 6,7 11,12 17,18,19</u>
Opposing Affidavits (Affirmations) _____	<u>3,4 8,9 13,14 20,21</u>
Reply Affidavits (Affirmations) _____	<u>5 10 15,16 22</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, the motion by defendant Mortgage Electronic Registration Systems, Inc. (MERS) for an order, pursuant to CPLR 3211, dismissing the third amended complaint insofar as asserted against it, the motion by defendant First National Bank of Nevada (Nevada) for an order dismissing the complaint against it, the motion by defendants Chicago Title Insurance Company (Chicago Title) and Decision 2000 Real Estate Services, Inc. (Decision 2000) for an order dismissing the complaint against them and the motion by

defendant Benjamin Jacob Turner (Turner) for an order dismissing the complaint against him are consolidated for disposition herein and, upon consolidation:

1. the motion by MERS is granted;
2. the motion by Nevada is granted only to the extent of dismissing the twenty-third cause of action against it;
3. the motion by Chicago Title and Decision is denied as premature and
4. the motion by Turner is denied.

Prior to January 26, 2004, plaintiff was the owner of the premises at 499 East 29<sup>th</sup> Street in Brooklyn. According to the complaint herein, in December 2003, plaintiff was contacted by defendant Nadia Yacoob who represented that she was a mortgage broker who could help plaintiff re-finance her mortgage and avoid a threatened foreclosure. On January 26, 2004, plaintiff went to Nadia Yacoob's office for a "refinance closing." From there, plaintiff was driven to another address where she first met Turner, an attorney who was to represent plaintiff in her re-finance transaction. When plaintiff allegedly became suspicious about the proceedings, she "stopped the closing, took copies of some documents and left," assuming that the transaction would not be completed. After receiving a letter from an insurance company in May 2005, "she became aware that on January 26, 2004 she had conveyed the premises to defendant Farhaad Yacoob." Thereafter, plaintiff further learned that Farhaad Yacoob, as mortgagor, had entered into a mortgage with Berkshire Financial Group, Inc. (Berkshire), as mortgagee, in the amount of \$348,000. That mortgage was

subsequently assigned to Nevada and then re-assigned to Residential Funding Corporation. Notwithstanding the contents of the closing statement, plaintiff denies receipt of any of the net proceeds of the sale in the amount of \$117,949.37. Subsequently, Decision 2000 Real Estate Services, Inc. and Chicago Title Insurance Company “delivered the above described deed and the mortgage [involving Farhaad Yacoob] . . . for recording to the New York City Register.” On February 15, 2005, Farhaad Yacoob executed a mortgage in favor of defendant Finance America, LLC to secure a promissory note in the amount of \$450,000. MERS was named in the mortgage document as “a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.” The mortgage from Finance America, LLC was used to pay off the Berkshire mortgage. On July 30, 2005, MERS, as nominee for Finance America, LLC, assigned its mortgage to defendant HSBC Bank, USA, N.A., as Trustee for the Registered Holders of Ace Securities Corp. Home Equity Loan Trust, Series 2005-HE3, Asset Backed Pass-Through Certificates (HSBC).

In its motion, MERS points out that plaintiff’s most recent (third verified amended) complaint alleges only two causes of action against it. In her third and seventeenth causes of action, plaintiff seeks a judgment declaring that the Finance America, LLC mortgage and subsequent assignment to HSBC were void ab initio and that such transactions should be cancelled as of record. MERS argues that both causes of action are moot since it assigned its interests in the subject mortgage prior to commencement of this action. MERS points out

that there is no allegation that it engaged in any wrongdoing related to the Finance America, LLC mortgage transaction and that it was not in attendance at the subject closing.

In its motion, Nevada similarly notes that plaintiff has requested a judgment voiding a mortgage which at one time had been held by Nevada, but which was subsequently paid off and cancelled of record. Nevada asserts that its mortgage was assigned to Residential Funding Corporation and thereafter discharged and, therefore, plaintiff's third cause of action (for a declaratory judgment) should be dismissed. With respect to plaintiff's claim (in her twenty-third cause of action) that seeks to have Nevada "disgorge any and all moneys received pursuant to or as a result of that mortgage given by defendant Farhaad Yacoob . . . including but not limited to any monies received in payment of principal and/or interest due under said mortgage, loan origination fee, application fee . . .," Nevada characterizes the cause of action as "merely an attempt by the plaintiff to claim unjust enrichment under the guise of 'disgorgement'" and notes that plaintiff's claim for unjust enrichment was dismissed in this court's order, dated September 12, 2006, on the ground that Nevada and other defendants were not directly enriched at plaintiff's expense.

In opposition to the motion of MERS, plaintiff asserts that MERS must be deemed an essential party to this action in order for the mortgage which it assigned to be declared null and void. Plaintiff faults MERS for failing to support its motion with an affidavit by someone with personal knowledge of the facts herein and points out that MERS' mortgage was recorded after she filed a notice of pendency in this action. Plaintiff also suggests that

she should be allowed to conduct discovery “to determine defendant MERS’ involvement in this matter.”

In reply, MERS maintains that, without the need for further discovery and based upon the documents submitted by MERS, it has demonstrated that the third amended complaint fails to state a cause of action against it. Whether or not MERS recorded its mortgage after plaintiff filed a notice of pendency, MERS argues that it has no present interest in the subject mortgage and that it did not participate in the originating transaction. MERS points out that it was Finance America, LLC that was the lending institution and that MERS was the mortgagee for recording purposes only. MERS further notes that plaintiff has a superior remedy through causes of action against the current mortgage holder.

In opposition to Nevada’s motion, plaintiff asserts that this is Nevada’s third attempt to dismiss the causes of action against it, one prior motion having resulted in a denial with leave to renew after discovery is complete and one which resulted in plaintiff being granted leave to serve her third amended complaint. Plaintiff also contends that Nevada is not a “good faith assignee” of the allegedly fraudulent mortgage that Berkshire gave to Farhaad Yacoob and that it “may well have had a direct and substantial involvement with the fraudulent transaction.” Plaintiff adds that, in seeking leave to serve a third amended complaint, the cause of action therein for disgorgement of profits was known to the court when such relief was granted.

In reply, Nevada points out that, while the prior order of February 15, 2007 denied dismissal motions with leave to renew upon the completion of discovery, nothing in the order barred Nevada from moving to dismiss any further amended complaints filed by plaintiff, such as her third amended complaint. Nevada further asserts that its argument that there does not exist any justiciable controversy between plaintiff and Nevada was not made in prior motions. Nevada adds that the merit of plaintiff's proposed third amended complaint was not established when plaintiff sought leave to serve a third amended complaint and that "no amount of discovery will change the fact that there clearly exists no justiciable controversy between plaintiff and [Nevada]."

Initially, the court notes that MERS has not previously sought dismissal of any of the prior complaints herein and, therefore, plaintiff's assertion that MERS is precluded from seeking such relief because it recorded the mortgage as nominee for Finance America, LLC, which previously moved for dismissal, is without merit. Moreover, to the extent that Nevada seeks dismissal of the disgorgement claim, such relief is not barred by the prior order permitting plaintiff to serve a third amended complaint since plaintiff was not necessarily required to establish the legal sufficiency or merits of the proposed pleading when she sought such amendment (see *Benyo v Sikorjak*, 50 AD3d 1074 [2008]). However, because the third cause of action of the third amended complaint is identical to that asserted by plaintiff in her second amended complaint and this court, in its order of February 15, 2007, denied Nevada's

request for dismissal of that cause of action with leave to renew after discovery is complete, to the extent that Nevada seeks such relief herein, its request is denied as premature\*.

In addressing a motion to dismiss the complaint in a declaratory judgment action (or, in this case, the third and seventeenth causes of action), the determinative question is not whether the plaintiff is entitled to a declaration in his or her favor, but whether the court's jurisdiction to render a declaratory judgment has been properly invoked (see *Hallock v State of New York*, 32 NY2d 599, 603 [1973]). The third and seventeenth causes of action for declaratory relief do not present a justiciable controversy with respect to MERS. Because it is uncontroverted that MERS assigned the subject mortgages prior to the commencement of this action, there can be no declaration of the respective rights of said defendant and plaintiff with respect to the property (see *NASA Auto Supplies, Inc. V 319 Main Street Corp.*, 133 AD2d 265, 267 [1987]). Since the court does not have subject matter jurisdiction to render a declaratory judgment as to the rights of the parties, the third and seventeenth causes of action fail to state claims for declaratory relief with respect to MERS. Accordingly, the motion by MERS is granted.

Plaintiff's twenty-third cause of action seeking a judgment directing Nevada, among others, to disgorge money received as a result of the original mortgage and subsequent assignments relates to money which was allegedly received in payment of principal and/or

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\*Although there may be some inconsistency in considering MERS' request and not that of Nevada, the difference is that MERS is not bound by the prior order since it was not a moving party.

interest under a mortgage herein, as well as loan origination fees and processing fees. Although stated as a disgorgement claim, the gravamen of the claim is actually for unjust enrichment (see *Bestolife Corp. V American Amicable Life*, 5 AD3d 211 [2004]). By order dated September 12, 2006, this court held that the allegations set forth in the complaint failed to state a cognizable claim to recover damages for unjust enrichment since the cause of action was only tangentially related to the allegedly fraudulent conveyance and there was (as to that claim) no enrichment at plaintiff's expense. Since plaintiff was not entitled to any principal, interest or fees on the mortgage given by Berkshire, the twenty-third cause of action is dismissed as it relates to Nevada.

Chicago Title provided title insurance for the subject premises when Farhaad Yacoob "purchased" the property. Decision 2000 was the title company's agent which acted as the title closer for the sale. Defendant Augusta Uwechue, an employee of Decision 2000, represented it at the closing. In their motion, Chicago Title and Decision 2000 point out that the complaint alleges only two causes of action against them: (1) fraud and collusion and (2) aiding and abetting fraud. They argue that, while the complaint may articulate a claim for fraud as to the individual defendants, including Augusta Uwechue, who allegedly misrepresented the nature of the transaction and the papers which plaintiff signed, it fails to allege any facts demonstrating that either Chicago Title or Decision 2000 authorized Augusta Uwechue to engage in a fraudulent transaction or that they had any knowledge of or participated in the alleged fraud. Since a principal is not liable for the tortious conduct of an

agent where the agent acted outside the scope of his or her authority and Augusta Uwechue's alleged misrepresentations to plaintiff that she was re-financing her mortgage, rather than selling her home, were not within the scope of her authority, Chicago Title and Decision 2000 contend that plaintiff's fraud claims against them — the nineteenth and twentieth causes of action — should be dismissed.

In opposition to Chicago's motion, plaintiff accuses said defendants of improperly attempting to reargue this court's prior order of February 15, 2007 which denied the dismissal motions of various defendants with leave to renew after discovery is complete. Plaintiff also charges Chicago Title and Decision 2000 with being the "primary catalysts" of the fraud perpetrated upon her because they "insured fraudulent title in the name of defendant Farhaad Yacoob . . . and caused the deed fraudulently transferring the subject property to be recorded." In reply, Chicago Title and Decision 2000 argue that plaintiff has not alleged any facts to demonstrate that Augusta Uwechue was authorized to engage in a fraudulent transaction or that they had any knowledge of the fraud. They also assert that the prior order did not bar it from moving to dismiss further complaints "on a different basis than the defendants' original motion to dismiss." As with Nevada, the previous challenge of Chicago Title and Decision 2000 to the sufficiency of the second amended complaint (which contained claims identical to the third amended complaint) was denied with leave to renew following discovery. If said defendants wish to obtain a determination as to the sufficiency of plaintiff's newly-refined fraud claims, they must wait until discovery is complete since

their challenge would otherwise be barred by the “single motion rule” (see *B.S.L. One Owners Corp. v Key Intern. Mfg., Inc.*, 225 AD2d 643 [1996]).

In his motion, Turner maintains that, contrary to plaintiff’s contentions, the documentary evidence establishes that she understood the terms of the transaction and was a willing participant who proceeded against his legal advice. According to Turner, after he reviewed the closing documents, he recommended to plaintiff that she not proceed with the closing. When plaintiff was allegedly unwilling to follow his advice, he requested that she acknowledge in writing that she was proceeding against his recommendation. Turner submits a copy of a statement signed by plaintiff to that effect on January 26, 2004, the closing date. Turner adds that plaintiff spoke English proficiently and understood the terms of the transaction. Given plaintiff’s voluntary decision to proceed with the closing, Turner argues that plaintiff’s claims against him should be dismissed.

In opposition to Turner’s motion, plaintiff maintains that she is “an immigrant from Haiti who could not read English” and, therefore, she “had no idea what she was signing.” Plaintiff notes that, according to the contract of sale dated December 12, 2003, Turner was to hold the contract deposition in escrow; however, according to Turner’s affidavit, he had no knowledge of the subject transaction until January 21, 1004. Plaintiff also questions Turner’s actions in submitting the allegedly fraudulent deed to the title closer for recording after plaintiff is alleged to have announced that she no longer wished to go through with the

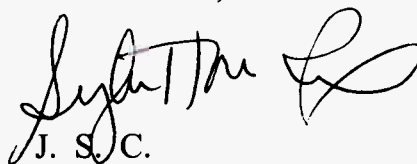
transaction and despite plaintiff having failed to receive any of the net proceeds of the sale, an amount in excess of \$117,000.

In reply, Turner relies upon the “well-established case law” to the effect that ignorance of the terms and conditions of a contract is no defense for a party who executed the contract.

On a motion to dismiss on the ground that a defense is founded upon documentary evidence, the movant must demonstrate that “the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim” (*Trade Source, Inc. v Westchester Wood Works, Inc.*, 290 AD2d 437, 438 [2007]). In this case, plaintiff’s averments regarding the net proceeds of the sale and the contract language identifying Turner as plaintiff’s attorney raise questions about the propriety of his representation, notwithstanding any written acknowledgment she may have signed, especially as plaintiff alleges that she left the closing prematurely, presumably with Turner still in attendance and still acting in her best interest. Accordingly, the motion by Turner is denied.

The foregoing constitutes the decision and order of this court.

E N T E R,



J. S. C.

**HON. SYLVIA O. HINDS-RADIX JSC**