

Fremont Invest. & Loan v Edwardsen

2008 NY Slip Op 32319(U)

August 5, 2008

Supreme Court, Richmond County

Docket Number: 0101563/2007

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
FREMONT INVESTMENT & LOAN,

Plaintiff,

-against-

TP9
Present:
Hon. Anthony I. Giacobbe

SHARON EDWARDSSEN a/k/a SHARON A. EDWARDSON;
UNITED STATES OF AMERICA INTERNAL REVENUE
SERVICE; NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE; "JOHN DOE 1" to "JOHN DOE 25",
said names being fictitious, the parties intended being persons
or corporations having an interest in, or tenants or persons in
possession of, portions of the mortgaged premises described
in the complaint,

Decision and Order
Index No. 101563/07
Motion Nos. 005, 006

Defendants.

-----X
SHARON EDWARDSSEN,

Third-Party Plaintiff,

-against-

Index No. A101563/07

FREMONT INVESTMENT & LOAN, MERIDIAN ABSTRACT;
ARGENT MORTGAGE CO., SUMMIT INVESTMENTS LOAN
CORP. d/b/a E-ISLAND MORTGAGE, NASSER ALAMEDDIN,
MARC LAMASSA; JOSEPH CRAPANZANO; ANTHONY
BELLINI, CYNTHIA LAPERA, "JOHN DOE 26" and "JOHN
DOE 27",

Third-Party Defendants.

-----X

The following papers numbered 1 to 6 were used on these motions the 23rd day of May, 2008:

- Notice of Motion to Dismiss by Third-Party Defendants
Meridian Abstract and Anthony Bellini with supporting papers
(dated April 21, 2008) 1
- Notice of Motion to Dismiss Third-Party Complaint by Third-Party
Defendants Summit Investments Loan Corp. d/b/a E-Island Mortgage,
Nassar Alameddin, Marc LaMassa and Cynthia Lopera
with supporting papers (dated April 23, 2008) 2
- Brief in Opposition to Motion to Dismiss of Summit Investments Loan Corp.
d/b/a E-Island Mortgage, Nassar Alameddin, Marc LaMassa
and Cynthia Lopera by Third-Party Plaintiff Sharon Edwardsen with
supporting papers (dated May 16, 2008) 3

Brief in Opposition to Motion to Dismiss of Meridian Abstract and Anthony Bellini by Third-Party Plaintiff Sharon Edwardsen with supporting papers (dated May 16, 2008)	4
Reply Affidavit in Further Support of Motion to Dismiss Third-Party Complaint (dated May 22, 2008)	5
Reply Affirmation (dated May 22, 2008)	6

Upon the foregoing papers, the motions to dismiss (1) by third-party defendants Summit Investments Loan Corp. d/b/a E-Island Mortgage, Nassar Alameddin, Marc LaMassa and Cynthia Lapera (hereinafter, collectively “E-Island”) (No. 005) and (2) by third-party defendants Meridian Abstract and Anthony Bellini (No. 006) are granted to the extent indicated and are otherwise denied.

As is relevant, it is alleged by the third-party plaintiff, Sharon Edwardsen, that the third-party defendants collectively engaged in a predatory lending scheme wherein the third-party plaintiff (hereinafter the “defendant-borrower”) was subjected to multiple high cost refinancings of her mortgage. It is further claimed that the defendant-borrower was advised by the third-party defendants that in order to “improve her credit score, she had to refinance her credit card debt into mortgage debt” (Third-party complaint paras 34-37). The allegations which form the basis of the third-party action may be summarized as follows:

On February 17, 2006 the defendant-borrower secured a loan from third-party defendant Argent Mortgage Co. (hereinafter “Argent”) to refinance her indebtedness to Countrywide Home Loans (hereinafter “Countrywide”), and on or about June 28, 2006 she obtained another loan from plaintiff/third-party defendant Fremont Investment & Loan (hereinafter “Fremont”) to refinance the indebtedness to Argent. Each loan was secured by a mortgage on the defendant-borrower’s property at 137 Fingerboard Road on Staten Island. It is claimed that each of these refinancing agreements were processed by third-party defendant E-Island (Third-Party Complaint, paras 22, 45, 58, 61).¹ It

¹It is claimed that prior to obtaining the Argent loan, the E-Island third-party defendants processed the Countrywide loan to refinance defendant-borrower’s indebtedness to JP Morgan Chase, a non-party to this action.

is further alleged that third-party defendant Meridian Abstract was the title company involved in each transaction, and that Anthony Bellini was the closing agent (*id.* at 17-19, 59, 68, 75, 77).

The main action involves the foreclosure of the Fremont mortgage based on the defendant-borrower's alleged failure to make the required payments. Fremont commenced its foreclosure action on April 30, 2007, and issue was joined by the defendant-borrower on or about September 5, 2007.² The defendant-borrower's answer included counterclaims and a third-party complaint. The third-party complaint alleges, *inter alia*, violations of the Real Estate Settlement Procedures Act (hereinafter "RESPA"), General Business Law §349, the Credit Repair Organizations Act (hereinafter "CROA"), fraud and unjust enrichment.

In moving to dismiss the third-party complaint as against them, E-Island claims that the alleged RESPA violation is time-barred by the one year statute of limitations set forth in 12 USC §2614. More specifically, it is claimed that the statutory period on the alleged RESPA cause of action expired on June 28, 2007. It is uncontroverted that the third-party complaint was not filed until September 5, 2007.

Pursuant to 12 USC §2614, any action under RESPA (12 USC §2607 *et seq.*) prohibiting kickbacks and unearned fees "incident to or part of a real estate settlement service involving a federally related mortgage loan" must be brought in the United States district court or any other court of competent jurisdiction within one year from the date of the purported violation.

In the case at bar, the defendant-borrower contends that notwithstanding the statute of limitations, her RESPA claim under §2607 is still timely as a recoupment action with respect to the Fremont and Argent transactions, and that she is entitled thereunder to recover the fees and interest incorporated in the proceeds of those loans (Third-Party Plaintiff's Attorney's Brief, p. 6). Contrary to these contentions, however, while the recoupment defense is expressly permitted under the federal Truth-in-Lending Act (hereinafter "TILA"), and while the similarity in purpose behind TILA and

²A judgment of foreclosure and sale was granted and subsequently vacated pursuant to CPLR 5015(a)(1) in a prior Decision and Order of this Court dated February 26, 2008.

RESPA may suggest that recoupment is available under that statute as well (*see, Moll v. U.S. Life Title Insurance Co. Of New York*, 700 FSupp 1284, 1288 [SDNY 1988]), said defensive use of RESPA is per se inapplicable herein.³ Accordingly, E-Island is correct in claiming that the statute of limitations on the alleged RESPA violations under 12 USC §2607 has been exceeded in this case (*see, Johnson v. Scala*, 2007 WL 2852758 [SDNY]).

In the alternative, the defendant-borrower argues that the fraudulent acts attributed to E-Island operate to toll the statute of limitations on her RESPA claim. In this regard, it has been held that the federal doctrine of equitable tolling may supersede an expired statute of limitations where a plaintiff can establish that: (1) the defendant concealed from him or her the existence of the cause of action during the statutory period; (2) he or she commenced the action within the statutory period from the time that he or she became aware of the claim; and (3) his or her ignorance was not attributable to any lack of diligence (*see, McAnaney v. Astoria Financial Corp.*, 2007 WL 2702348 [EDNY]). Thus, in the case at bar, the defendant-borrower claims that E-Island (1) advised her that she “did not need a lawyer for these refinancings” (Third-Party Complaint, para 51), and (2) “refus[ed] to provide her with a Form HUD-1 settlement statement” (*id.* at paras 80-82). It is further claimed that these specific acts constitute fraudulent misconduct which caused defendant-borrower to remain unaware of the predatory nature of the refinancing scheme (Third-Party Plaintiff’s Attorney’s Brief, p. 8).

In the opinion of this Court, defendant-borrower’s assertion that she refrained from filing a

³Pursuant to 15 USC §1640(e), any action under TILA (15 USC §1601 *et seq.*) may be brought in the United States district court, or any other court of competent jurisdiction within one year from the date of an alleged violation. However, the cited subsection expressly provides that a person may nevertheless assert a violation thereof “in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law” (15 USC §1640[e]; *see, Delta Funding Corp. v. Murdaugh*, 6 AD3d 571 [2nd Dept. 2004], wherein it was held that a counterclaim under TILA was available to offset any damage award or deficiency judgment that might be recovered against the borrower by the *mortgagee*). Manifestly, E-Island is not the mortgagee in the case at bar, nor is it a plaintiff against whom an offset could be taken.

timely action due to the alleged fraudulent concealment by E-Island is unavailing, as a plaintiff must allege more than the defendant's mere failure to disclose in order to avail him or herself of the toll; concealment by silence alone is not enough (*see, Moll v. U.S. Life Title Insurance Co. Of New York, supra* at 1290-1291). In order to invoke the operative toll, a plaintiff must demonstrate some trick or contrivance on the part of a defendant that was intended to preclude suspicion and prevent discovery of the alleged injury (*id.* at 1291). Accordingly, a plaintiff must show “some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that is designed to mask the existence of a cause of action” (*ibid.* [citation omitted; emphasis in original]). Here, the allegations in the third-party complaint are inadequate to justify tolling the statute of limitations under RESPA (*id.* at 1291-1294). Accordingly, any cause of action against E-Island for violating RESPA is untimely and subject to dismissal.

In moving to dismiss the defendant-borrower's claim under General Business Law §349, E-Island maintains that the allegations involving inflating the borrower's income and the falsification of her occupation on the loan applications are insufficient to support a cause of action for deceptive practices. E-Island also claims that the defendant-borrower's execution of the relevant documents, including the loan applications plainly misstating her income and occupation, constitute documentary evidence that it was she who “falsified them by signing them,” and that no “consumer acting reasonably, could ever claim to have been misled by a blatant misstatement of *her own occupation or income*” (E-Island Defendants' Memorandum of Law, pp. 7-8; emphasis in original).

Pertinent to the foregoing, E-Island has provided this Court with a copy of the defendant borrower's Uniform Residential Loan Application for the Argent and Fremont loans (E-Island Defendants' Exhibits “B”, “C”), and the HUD-1A Settlement Statement pertaining to the Argent loan (E-Island Defendants' Exhibit “D”), each of which appears to have been executed by the defendant-borrower. While the latter concedes as much, she claims to have done so “without an opportunity to read the completed documents” (Third-Party Plaintiff's Attorney's Brief, p. 20), and maintains that she was not given a copy of the HUD-1A Settlement Statement for the Fremont loan.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed (*see, Gershon v. Goldberg*, 30 AD3d 372 [2nd Dept. 2006]), and the sole criterion is whether factual allegations are discernible therein which are sufficient, taken together, to manifest any cause of action cognizable at law. In such circumstances, 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 & Assoc., LLP.*, 34 AD3d 510 [2nd Dept. 2006]; *Glassman v. Zoref*, 291 AD2d 430 [2nd Dept. 2002]). However, when evidentiary material is considered on such a motion, the criterion becomes whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*see, Gershon v. Goldberg, supra* at 373).

General Business Law §349 prohibits deceptive acts or practices in the conduct of any business, trade or commerce, or in the furnishing of any service (General Business Law §349[a]; *see, Phifer v. Home Savers Consulting Corp.*, 2007 WL 295605 [EDNY]). To state a viable cause of action thereunder, a plaintiff must allege that: (1) the challenged act or practice was consumer-oriented; (2) it was misleading in a material way; and (3) plaintiff was injured as a result of the deceptive act (*see, Shovak v. Long Island Commercial Bank*, 50 AD3d 1118, 1119 [2nd Dept. 2008]). Notably, neither an intent to defraud nor justifiable reliance is an element of the statutory claim (*see, Stutman v. Chemical Bank*, 95 NY2d 24, 29 [2000]).

In this case, the third-party complaint alleges that E-Island falsified defendant-borrower's occupation and inflated her income on the loan application in order to create the appearance that she could afford the loan, and failed to disclose how the loan proceeds were to be disbursed (Third-Party Complaint paras 56, 59, 69-76, 80-82). As a result thereof, defendant-borrower claims to have paid excessive fees, interest and other charges, and is now threatened with the loss of her home. It is also alleged that such practices have had and will continue to have a severe negative impact on homeowners and potential homeowners throughout the state (*id.* at 84-85, 100-101). Accordingly, even if the defendant-borrower, as here, maintains that her signatures at the closing were made in

ignorance of the deceptive statements in the loan application and HUD documents, the third-party complaint can still be said to state a viable cause of action so long as the pleader alleges that those fraudulent statements caused her injury (*see, Phifer v. Home Savers Consulting Corp., supra*). A borrower's reliance on the fraudulent statements is not required. Consequently, this branch of E-Island's motion to dismiss must be denied.

E-Island has also moved to dismiss the General Business Law cause of action based on documentary evidence, *i.e.*, the loan applications and HUD document. A motion to dismiss a 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]; *cf., McMorrow v. Dime Savings Bank of Williamsburgh*, 48 AD3d 646 [2nd Dept. 2008]). Here, this burden has not been met. In fact, E-Island concedes that it is unable to locate one of the more relevant documents to its defense, *i.e.*, the HUD-1A statement pertinent to the Fremont transaction (E-Island Defendants' Memorandum of Law, p. 6).

Notwithstanding the sufficiency of the above cause of action as against E-Island, the defendant-borrower has failed to allege any specific misleading or deceptive acts on the part of either Meridian Abstract and its employee, Anthony Bellini. Accordingly, so much of their motion as to dismiss the General Business Law cause of action as against said third-party defendants is granted.

Turning to the allegations of fraud, in order to state a viable cause of action, a plaintiff must plead "a misrepresentation or a material omission of which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Shovak v. Long Island Commercial Bank, supra* at 1120 [citation omitted]). In order to avoid dismissal under CPLR 3211(a)(7), it is also required that each of these elements be supported by factual allegations sufficient to satisfy the "detail" requirement of CPLR 3016(b) (*see, Williams v. Upjohn Health Care Services, Inc.*, 119 AD2d 817 [2nd Dept. 1986]).

In this case, while the defendant-borrower alleges that her income and occupation were falsely stated on the loan applications, she cannot allege either justifiable reliance upon said misrepresentations or that this purported reliance was a cause of her injury. Neither can the defendant-borrower show that she actually and reasonably relied upon the alleged misrepresentations (*see, McMorrow v. Dime Savings Bank of Williamsburgh, supra* at 647-648; *cf., Ozelkan v. Tyree Brothers Environmental Services, Inc.*, 29 AD3d 877, 879 [2nd Dept. 2006]). Moreover, the alleged misrepresentation that refinancing the defendant-borrower's mortgage was necessary to improve her credit rating amounts to nothing more "than an opinion or prediction of something which [was] expected to occur in the future and cannot sustain a claim for fraud" (*see, Jobe v. Akowchek*, 259 AD2d 735, 736 [2nd Dept. 1999], *citing Karsanow v. Kuehlewein*, 232 AD2d 458 [2nd Dept. 1996]). "The general rule is that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct" (*see, Cerabono v. Price*, 7 AD3d 479, 480 [2nd Dept. 2004], *lv denied*, 4 NY3d 704 [2005]). Under these circumstances, the third-party complaint insufficiently alleges a cause of action for fraud against E-Island.⁴

Similarly, the allegations of fraud in the third-party complaint are deficient as against third-party defendants Meridian Abstract and Anthony Bellini. Notable in this regard is the absence of any specific allegation to support the claims, *e.g.*, of misrepresentation, as against these particular parties. The mere claim of a party's involvement in a purported fraudulent transaction cannot satisfy the pleading requirements of a cause of action for fraud (*see, CPLR 3016[b]; Old Republic National Title Insurance Co. v. Cardinal Abstract Corp.*, 14 AD3d 678, 680 [2nd Dept. 2005]; *Blaize-Sampeur v. McDowell*, 2006 WL 3903957 [EDNY]). Accordingly, the defendant borrower's claims of fraud are dismissed against all of the moving third-party defendants.

As for the allegations of the movants' involvement in a conspiracy to commit fraud, said cause of action must also be dismissed. Since the substantive claim of fraud has been found wanting,

⁴In contrast, General Business Law §349 contemplates actionable conduct which does not necessarily rise to the level of fraud, as the statute is based on broader concerns about consumer protection (*see, Gaidon v. Guardian Life Insurance Co. of America*, 96 NY2d 201, 209 [2001]).

the cause of action predicated upon the same parties' alleged conspiracy to commit that fraud should also be dismissed (*see, Linden v. Moskowitz*, 294 AD2d 114 [1st Dept. 2002], *lv denied*, 99 NY2d 505 [2003]). Likewise, the claims for conspiracy to violate the General Business Law against third-party defendants Meridian Abstract and Anthony Bellini must also be dismissed (*ibid.*). In fact, New York refuses to recognize civil conspiracy to commit a tort as an independent cause of action (*see, Ward v. City of New York*, 15 AD3d 392 [2nd Dept. 2005]).

However, while this Court has already determined that the claimed violation of General Business Law §349 as against E-Island has been adequately plead, it does not necessarily follow that the same is true of the alleged conspiracy to violate same. A claim of conspiracy may lie where an underlying tort has been adequately pleaded (*see, Baker v. R.T. Vanderbilt Co. Inc.*, 260 AD2d 750, 752-753 [3rd Dept. 1999]; *Gouldsbury v. Dan's Supreme Supermarket, Inc.*, 154 AD2d 509, 510 [2nd Dept.], *lv denied*, 75 NY2d 701 [1989]). In this context, a claim of civil conspiracy requires the pleader to allege an agreement between the conspirator and the wrongdoer and a wrongful act committed in furtherance of the tort (*see, Fierro v. Gallucci*, 2008 WL 2039545 [EDNY]). Nevertheless, in order to survive a motion to dismiss, conclusory allegations of conspiracy will not suffice; rather the complaint must allege specific times, facts and circumstances to connect the conduct of the separate tortfeasors (*ibid.*). Judged by this standard, the third-party complaint in this case is insufficient with regard to the claim for conspiracy to violate the General Business Law and, accordingly, this claim as against E-Island is dismissed (*see, Baker v. R.T. Vanderbilt Co. Inc.*, *supra* at 752-753).

Turning to the allegations of unjust enrichment, the third-party complaint alleges that by the use of material misrepresentations and fraud, the third-party defendants knowingly induced the defendant-borrower to enter into loans that she could not afford, and that, as a result, the third-party defendants were unjustly enriched and are liable to the defendant-borrower for restitution of any unjustly imposed fees and consequent interest (Third-Party Complaint paras 133-138). As this relates to third-party defendants Meridian Abstract and Anthony Bellini, it alleged that "\$3,040 of

the settlement charges went to Meridian Abstract,” and that the documents given to the defendant borrower “do not make clear what portion of that money was the cost of the title insurance and what portion was fees to Meridian and/or Anthony Bellini” (*id.* at 59).

To state a cause of action for unjust enrichment, a plaintiff must allege that: (1) defendant benefitted from the transaction; (2) the benefit was incurred at plaintiff’s expense; and (3) equity and good conscience require restitution (*see, Whitman Realty Group, Inc. v. Galano*, 41 AD3d 590 [2nd Dept. 2007]; *Mazzaro de Abreu v. Bank of America Corp.*, 525 FSupp2d 381, 397 [SDNY 2007]). As such, it is recognized that unjust enrichment constitutes an “amorphous” cause of action which exists within the penumbra of quasi or implied contract (*Mazzaro de Abreu v. Bank of America Corp.*, *supra* at 397). Where the above factors are present, the courts are empowered to infer the existence of an implied contract to prevent one party from unjustly enriching itself at another’s expense (*ibid.*). Here, the defendant-borrower has stated a facially sufficient claim of unjust enrichment as against third-party defendants Meridian Abstract and Anthony Bellini to withstand their motion to dismiss (*see, Onanuga v. Pfizer, Inc.*, 2004 WL 601689 [SDNY]). Whether or not the alleged facts are true is of no concern to the Court at this juncture, nor is it relevant to its decision on the motion to dismiss (*ibid.*).

Finally, E-Island has moved to dismiss the claims lodged against it under CROA, the federal Credit Repair Organizations Act, the express purposes of which are to: (1) ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services; and (2) protect the public from unfair or deceptive advertising and business practices by credit repair organizations (15 U.S.C. §1679[b]; *see, Cortese v. Edge Solutions, Inc.*, 2007 WL 2782750 [EDNY]). Here, E-Island asserts that their services are outside the scope of CROA’s definition of a “credit repair organization.”

Under CROA, “credit repair organizations” are those entities that sell, provide, perform or represent that such person can or will sell, provide or perform any service for the express or implied purpose of: (1) improving any consumer’s credit record, credit history, or credit rating; or (2)

providing advice or assistance to any consumer with regard to any activity or service previously described (15 U.S.C. §1679a[3]; *see, Cortese v. Edge Solutions, Inc., supra*). In this case, it is alleged in the third-party complaint, *inter alia*, that E-Island: (1) mailed a solicitation to the defendant-borrower which “offered to lower her mortgage payments and fix her credit” (Third-Party Complaint, para 29); and (2) advised the defendant-borrower that in order to “improve her credit score, she had to refinance her credit card debt into mortgage debt” (*id.* at 34-37, 107-113). Under these circumstances, it appears that a CROA cause of action against E-Island has been sufficiently stated. Notable in this regard is the fact that CROA does not require an entity to actually provide the services listed, but only to represent that it can or will provide such credit repair services (*see, Cortese v. Edge Solutions, Inc., supra*).

Accordingly, it is

ORDERED that the motion to dismiss by third-party defendants Summit Investments Loan Corp.d/b/a E-Island Mortgage, Nassar Alameddin, Marc LaMassa and Cynthia Lopera is granted, except as to the purported violations of General Business Law §349 and the Credit Repair Organizations Act; and it is further

ORDERED that the other causes of actions and any such cross claims against said third-party defendants are hereby severed and dismissed; and it is further

ORDERED that the balance of said motion (No.005) is denied; and it is further

ORDERED that the motion to dismiss by third-party defendants Meridian Abstract and Anthony Bellini is granted, except as to the claims for unjust enrichment, and it is further

ORDERED that the other causes of action and any such cross claims against said third-party defendants are hereby severed and dismissed; and it is further

ORDERED that the balance of their motion (No. 006) is denied; and it is further

ORDERED that the third-party action shall continue as to each of the remaining causes of action; and it is further

ORDERED that the Clerk enter judgment accordingly; and it is further

ORDERED that all parties shall appear for a preliminary conference at 10:00 am on September 12, 2008 in Trial Part 9.

ENTER,

J.S.C.

Dated: August 5, 2008