

**Dobroshi v Bank of Am., N.A.**

2008 NY Slip Op 32583(U)

September 19, 2008

Supreme Court, New York County

Docket Number: 0104034/2006

Judge: Richard F. Braun

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD F. BRAUN  
J. B. Gilce

PART 23

DOBROSHI, ZANA

INDEX NO. 104034/06

MOTION DATE 6/26/08

BANK OF AMERICA, N.A., et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion ~~to~~ for OTHER RELIEFS (limited discovery and extend time to move for cross certification) and cross motion to strike cross allegations of the complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Replying Affidavits

PAPERS NUMBERED
1
2,3
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>without prejudice</sup> to allow discovery is stayed by <sup>the branch of</sup> the subsequently made summary judgment motion (CMR 3214(b)), rd 5/4/08

*It is further ORDERED that the balance of the motion is granted to the extent of staying and extending the time for plaintiff to move for cross certification, and the cross motion is denied, and it is further*

*ORDERED that defendant, Bank of America, N.A., shall pay plaintiff \$50 motion costs, on the above motion, to abide the event.*

*This constitutes the decision and order of this Court. See separate Opinion.*

**FILED**

SEP 24 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Enter:

Dated: New York, New York, September 19, 2008

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 23**

----- X  
ZANA DOBROSHI, on behalf of herself  
and all others similarly situated,

Index No. 104034/06

Plaintiff,

**OPINION**

vs.

BANK OF AMERICA, N.A., DOES 1  
THROUGH 100,

Defendants.

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NEW YORK

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**RICHARD F. BRAUN, J.:**

In this proposed class action, plaintiff has sued defendants for a declaratory judgment, an injunction, restitution or disgorgement of monies, imposition of a constructive trust, an accounting and a pay-over of funds, and compensatory and punitive damages. Plaintiff asserts causes of action under General Business Law § 349, and for fraudulent misrepresentation, negligent misrepresentation, breach of duty to disclose, conversion, unjust enrichment, negligent training, and negligent supervision. Plaintiff moved to allow discovery, and, pending said discovery, stay and extend the time to move for class certification, pursuant to CPLR 902. The branch of the motion for discovery was denied without prejudice, by this court's May 4, 2008 decision and order. Defendant Bank of America, N.A. (defendant) cross-moved to strike the class allegations from plaintiff's complaint. Defendant subsequently separately moved for partial summary judgment dismissing all of plaintiff's causes of action, except the first, and the claims for punitive damages in the second and fifth causes of action. Plaintiff cross-moved to deny defendant's motion for partial summary judgment without prejudice. All four motions were denied on October 4, 2007 due to the failure of

either side to appear for oral argument in spite of the parties' stipulation adjourning the motion to that date, and then were restored by subsequent stipulation to this court's motion calendar.

A party moving for summary judgment must demonstrate his, her, or its entitlement thereto as a matter of law, pursuant to CPLR 3212 (b) (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 382 [2005]). To defeat summary judgment, the party opposing the motion must show that there is a material question(s) of fact that requires a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment can be awarded based on a CPLR 3211 (a) ground asserted as a defense in a defendant's answer (*Houston v Trans Union Credit Info. Co.*, 154 AD2d 312, 313 [1<sup>st</sup> Dept 1989]; see *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]).

Fraud and misrepresentation causes of action must be pleaded with particularity (CPLR 3016 [b]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1<sup>st</sup> Dept 1993]). The elements of a fraud claim are "a representation concerning a material fact, falsity of that representation, scienter, reliance, and damages (citation omitted)." (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98 [1<sup>st</sup> Dept 1997]; see *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1<sup>st</sup> Dept 2005].) Under the circumstances here, plaintiff has not adequately specified a cause of action for fraud, particularly because it is based on the subject estimate, which did not contain a false misrepresentation, and that plaintiff went forward with the closing. Plaintiff does not show, pursuant to CPLR 3212 (f), that summary judgment should not be afforded to defendant on the second cause of action (see *Federal Deposit Ins. Corp. v Schwartz*, 55 NY2d 702, 703-704 [1981]; *Auerbach v Bennett*, 47 NY2d 619, 636 [1979]; *Lewis v Safety Disposal Sys. of Pa., Inc.*, 12 AD3d 324, 325 [1<sup>st</sup> Dept 2004]). Thus, by this court's September 18, 2008 decision and order, summary judgment has been granted to defendant dismissing that cause of action.

"A claim for negligent misrepresentation can only stand where there is a special relationship

of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given (citations omitted).” (*Hudson Riv. Club v Consolidated Edison Co. of N.Y.*, 275 AD2d 218, 220 [1<sup>st</sup> dept 2000].) Again under the circumstances, plaintiff has not stated such a cause of action, and summary judgment has been awarded dismissing this claim.

The fourth cause of action also does not state a claim. No breach of such a duty occurred, and thus summary judgment also was granted dismissing that cause of action.

“Conversion is the ‘unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner’s rights’ (citations omitted).” (*State of New York v Seventh Regiment Fund*, 98 NY2d 249, 259 [2002].) Conversion concerns possession, not title. (*id.*) The First Department has stated that specifically identifiable monies can be converted (*Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883 [1<sup>st</sup> Dept 1982]). Here, the sum at issue was not converted by defendant because it never had possession thereof. Thus, summary judgment has been awarded dismissing the fifth cause of action.

The sixth cause of action is for unjust enrichment. Such a claim requires that plaintiff plead the conferring of a benefit upon the defendant who received such benefit without affording the plaintiff sufficient compensation (*Nakamura v Fujii*, 253 AD2d 387, 390 [1<sup>st</sup> Dept 1998]). Plaintiff did not plead any benefit that defendant received, and thus summary judgment was awarded to defendant dismissing that cause of action.

Claims for negligent training and supervision do not have to be pled with specificity (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 162 [2<sup>nd</sup> Dept 1997]). Plaintiff has adequately pled these causes of action. Furthermore, as the actions in training and supervising

defendant's employees and agents were within defendant's ken, not plaintiff's, the branch of the motion to award summary judgment dismissing those two causes of action has not been granted, pursuant to CPLR 3212 (f) (*Parkoff v General Tel. & Elecs. Corp.*, 53 NY2d 412, 417-418 [1981]; *Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338, 340 [1<sup>st</sup> Dept 1987]).

Plaintiff only claims punitive damages in the second and fifth causes of action. As summary judgment has been granted dismissing those causes of action, the punitive damages claims fall with those dismissals (*see Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]).

Plaintiff's cross motion to deny defendant's motion was unnecessary (*see Sullivan v 40 West 53rd Partnership*, NYLJ, Oct. 16, 2000, at 27, col 2 [Sup Ct, NY County]). Plaintiff could have just opposed the motion, which was decided by this court on its merits. Thus, the cross motion was denied by the court's April 26, 2008 decision and order.

Defendant's motion for partial summary judgment stayed discovery in this action (CPLR 3214 [b]; *Matter of Schneider v Rockefeller*, 31 NY2d 420, 435 [1972]). Thus, by this court's May 4, 2008 decision and order, the branch of the motion seeking discovery was denied without prejudice.

Plaintiff attempted to bring her motion by order to show cause, which this court declined to sign, because plaintiff did not submit an affirmation of good faith in support of the discovery branch of her motion, as required by 22 NYCRR 202.7 (a) (2) and (d) (*see Dunlop Dev. Corp. v Spitzer*, 26 AD3d 180, 182 [1<sup>st</sup> Dept 2006]; *Pandolf v American Intl. Group, Inc.*, 16 AD3d 315, 317 [1<sup>st</sup> Dept 2005]; *Nikpour v City of New York*, 179 Misc 2d 928, 930 [Sup Ct, NY County 1999]). In light of the deadline contained in CPLR 902, the better course of action would have been for this court to have signed the proposed order to show cause, and addressed the CPLR 902 branch of the motion

on the merits and denied the discovery part of the motion without prejudice. In any event, this court has the discretion to allow the extension sought, even though the deadline passed (CPLR 2004).

In light of the allegations made by plaintiff in the remaining causes of action and the information that is within defendant's knowledge, plaintiff should be given the opportunity to conduct discovery (*see Katz v NVF Co.*, 100 AD2d 470, 474 [1<sup>st</sup> Dept 1984]), and then move for class certification (*see Citipostal, Inc. v Unistar Leasing*, 283 AD2d 916, 920 [4<sup>th</sup> Dept 2001]; *Meraner v Albany Med. Ctr.*, 199 AD2d 740, 742 [1<sup>st</sup> Dept 1993]). Thus, plaintiff's motion has been granted by this court's separate decision and order of this date, to the extent of staying and extending plaintiff's time to move for class certification. A conference will be held before this court to set deadlines for the parties to conduct discovery, and then a deadline will be set for plaintiff to move for class certification.

Even where CPLR 3024 (b) does not apply, class action allegations can be stricken from a complaint (*MFT Inv. Co. v Diversified Data Servs. & Sciences*, 52 AD2d 761 [1<sup>st</sup> Dept 1976]). However, defendant has not shown that any of the class action allegations should be stricken under the circumstances here, and thus the cross motion has been denied. Pursuant to CPLR 8106 and 8202, plaintiff has been awarded \$50 costs against defendant Bank of America, N.A. on the cross motion, to abide the event.

Dated: New York, New York  
September 19, 2008

**FILED**

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RICHARD F. BRAUN, J.S.C.