

**Baron v Mason**

2008 NY Slip Op 33247(U)

November 25, 2008

Supreme Court, Nassau County

Docket Number: 2869/08

Judge: Kenneth A. Davis

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. KENNETH A. DAVIS,

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

STACY BARON and JOHN GANGEMI,

Plaintiff,

SUBMISSION DATE: 9/9/08  
INDEX No.: 2869/08

-against-

MADELYNN R. MASON, MASON & APRIL, LLC  
and ACME VENTURES, INC., d/b/a  
R.P. FUNDING,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

- Notice of Motion/ Order to Show Cause..... X
- Answering Papers..... X
- Reply.....
- Briefs: Plaintiff's/Petitioner's..... XX
- Defendant's/Respondent's..... X

Motion by defendants for an order pursuant to CPLR 3211(a)(5)(7) and (10) dismissing the complaint is determined as hereinafter provided.

Plaintiffs commenced this action seeking to recover damages for, *inter alia*, breach of fiduciary duty, unjust enrichment, fraud, and usury.

The following facts are undisputed:

On or about November of 2002, plaintiffs signed a promissory note in favor of defendant Mason in consideration of \$25,000.00. About three months later, on or about February 13, 2003, an additional \$125,000.00 was advanced to plaintiffs. At that time, plaintiff Baron executed a note and a mortgage in favor of defendant R.P. Funding. The note and mortgage were in the amount of \$150,000.00 reflecting both the previous \$25,000.00 unsecured loan as well as the additional \$125,000.00 loan. The source of the \$150,000.00 note and mortgage was as follows: \$80,000 from Marcia and Michael Katz (plaintiff Baron's mother and step-father), \$70,000.00 from defendant Madelynn Mason (plaintiff Baron's step-

mother), of which \$25,000.00 came from November 2002 and \$45,000.00 loaned from February of 2003.

Subsequently, a judgment was entered in favor of the Katzes against plaintiffs for \$80,000.00 with interest.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(7) and (10).

At the outset, this Court notes that the first and fourth causes of action set forth in the complaint have been rendered moot.

In deciding a motion to dismiss directed as to the sufficiency of the pleadings [CPLR 3211(a)(7)], a court must accept their allegations as true, according them the benefit of every favorable inference to determine whether they come within the ambit of any cognizable legal theory (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; *Arnov Industries, Inc. Retirement Trust v Brown*, 96 NY2d 303; [2001] *Parsippany Const. Co., Inc. v Clark Patterson Associates, P.C.*, 41 AD3d 805, 806 [2<sup>nd</sup> Dept. 2007]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in reaching a decision under this provision (*EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]), although bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion (*Riback v Margulis*, 43 AD3d 1023 [2<sup>nd</sup> Dept. 2007]). If the plaintiff can succeed on any reasonable view of the allegations, the cause of action may not be dismissed.

This court will first address the branch of the motion which seeks dismissal pursuant to CPLR 3211(a)(10).

CPLR 3211(a)(10) provides that "the court should not proceed in the absence of a person who should be a party."

CPLR 1001 states, in relevant part, that:

"(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."

Defendants assert that the Katzes are necessary parties to the second and third causes of action in that they would be inequitably affected by a judgment issued with respect to the mortgage and mortgage note involved in this action.

Plaintiffs, on the other hand, contend that the "necessary

party" argument is totally devoid of merit as the Katzes do not hold any mortgage or mortgage note—they have a money judgment, period. Plaintiffs, therefore, claim that no possible outcome of the action could have any effect on the Katzes' rights as judgment creditors.

Dismissal of this action on the ground that the Katzes have not been joined as necessary parties is unwarranted here. The Katzes are not indispensable to the case "in the sense that action could not fairly proceed without them, and their presence was not required to afford complete relief between the parties" (*NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540 [2<sup>nd</sup> Dept. 2005]; CPLR 1001[a]).

Breach of Fiduciary Duty  
(Second Cause of Action)

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge; but an arms-length business relationship does not give rise to a fiduciary obligation." (citations omitted) (*WIT Holding Corp. v Klein*, 282 AD2d 527 [2<sup>nd</sup> Dept. 2001]). In support of her claim that R.P. Funding breached its fiduciary duty to it, plaintiff Stacey alleges that Mason's breaches are attributable to R.P. Funding.

Plaintiff has not established the existence of an attorney-client relationship which requires that there must be an explicit undertaking to perform a specified task (*see Volpe v Canfield*, 237 AD2d 282 [2<sup>nd</sup> Dept. 1997], *lv to app den.* 90 NY2d 802 [1997]). "A plaintiff's unilateral belief does not confer upon him the status of client" (*Volpe v Canfield, supra*; *see Jane St. Co. v Rosenberg & Estis, P.C.*, 192 AD2d 451 [1<sup>st</sup> Dept. 1993], 82 NY2d 654 [1993]):

In the complaint, plaintiff asserts that "in executing the note and mortgage, Stacey reasonably relied on Mason's and Mason and April's advice and counsel relative to the presentation of the note and mortgage because of defendant's position as an attorney and her step-mother" ( ¶ 16, complaint).

Simply because Mason is an attorney does not mean that she was acting in such capacity and scope.

Under these circumstances, where the parties are involved in an arms-length business transaction, plaintiff's allegations do not give rise to a fiduciary relationship with R.P. Funding (*Id*; *see Wiener v Lazard Freres & Co.*, 24 AD2d 114 [1<sup>st</sup> Dept. 1998]).

Unjust Enrichment  
(Third Cause of Action)

"To prevail on a claim of unjust enrichment, [a] plaintiff must show that (1) defendant was enriched (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit . . . defendant to retain what is sought to be recovered' " (*Clark v Daby*, 300 AD2d 732 [3<sup>rd</sup> Dept. 2002], lv to app den. 100 NY2d 503 [2003] quoting *Lake Minnewaska Mtn. Houses v Rekis*, 259 AD2d 797, 798 [3<sup>rd</sup> Dept. 1999] quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 521 [1972], cert den. 414 U.S. 829 [1973]). Further, it is the plaintiff's burden to "demonstrate that services were performed for the defendant resulting in [the latter's] unjust enrichment" (*Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1<sup>st</sup> Dept. 1991]), and the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment (*see id*; *see also Wiener v Lazard Freres & Co.*, *supra*). "Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent" (*Clark v Daby*, *Id.* quoting *Paramount Film Distrib. Corp. v State of New York*, *supra* at 421 [citation omitted]).

In support of her claim for unjust enrichment, plaintiff Stacey alleges that "[b]y virtue of the fact that \$80,000 of the funds advanced by R.P. Funding \* \* \* did not come from R.P. Funding, but rather from the Katzes, and by virtue of the \$80,000 judgment obtained by the Katzes, R.P. Funding has been unjustly enriched \* \* \* by the continued maintenance of a lien on Stacey's property in an amount which includes the \$80,000 Katz advance . . ."

Such allegations do not properly plead a cause of action for unjust enrichment.

#### Fraud

(Fifth Cause of Action)

The essential elements of a cause of action for fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purposes of inducing the other party to rely on it, justifiable reliance of that party on the misrepresentation or material omission and injury (*Fredriksen v Fredriksen*, 30 AD3d 370, 372 [2<sup>nd</sup> Dept. 2006]). Each of these elements must be supported by factual allegations containing details constituting the wrong sufficient to satisfy the statute requiring particularity in pleading fraud, i.e., the specific circumstances constituting the fraud (CPLR 3016[b]; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277, 278 [2<sup>nd</sup> Dept. 2001]).

[\* 5 ]  
In support of her claim for fraud against Mason, plaintiff asserts, *inter alia*, that "Mason failed to disclose the conflicts of interest inherent in her, and her firm, representing defendant R.P. Funding at the closing and in her simultaneously advising plaintiff prior to and during the execution of the documents."

Taking plaintiff's allegations as true and according her the benefit of every possible inference (see *Leon v Martinez*, 84 NY2d 83 [1994]), we find that they state a legally cognizable cause of action for fraud.

Usury

(Sixth Cause of Action)

General Obligations Law § 5-501 deems a loan usurious if it exceeds 16% per annum (*Borowski v Fallerder*, 296 AD2d 301 [1<sup>st</sup> Dept. 2002]). "Usurious loans are void as a matter of law; the borrower is relieved of all further obligations to pay both the principal and interest" (*Id*; General Obligations Law § 5-511[2]).

Plaintiff argues that the loan is usurious because the note provides for repayment of 3.3 times the true principal sum of \$45,000 or at an interest rate of thirty-three percent. There is nothing in the record, however, to support her claim that such a rate was ever changed (see *Soler v Klimova*, 5 AD3d 294 [1<sup>st</sup> Dept. 2004]). Indeed, the interest rate on the subject note and mortgage held by R.P. Funding is ten (10) percent. Dismissal on this ground is, therefore, unwarranted.

Cancellation of Mortgage

(Seventh Cause of Action)

In the seventh cause of action, plaintiffs seek to cancel the \$25,000 note of November, 2002, on the grounds that Mason purportedly consolidated said loan into the \$150,000 loan. Plaintiff has not alleged sufficient facts to support a viable cause of action.

In view of the foregoing, the motion is granted to the extent that the second, third, sixth and seventh causes of action are dismissed.

This decision constitutes the order of the court.

Dated: \_\_\_\_\_

NOV 25 2008

**ENTERED**

DEC 01 2008

  
KENNETH A. DAVIS  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

J.S.C.