

Cowell v Icon Props.

2008 NY Slip Op 33316(U)

December 9, 2008

Supreme Court, Suffolk County

Docket Number: 5809-2008

Judge: Melvyn Tanenbaum

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SHORT FORM ORDER

INDEX No. 5809-2008

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY**

PRESENT:

Hon. MELVYN TANENBAUM
Justice

MOTION #005, 006 - Mot D

R/D: 081508

S/D 101408

ROANN SMITH COWELL,

Plaintiff,

- against -

ICON PROPERTIES, ICON FUNDING, DESTINY
FUNDING CORPORATION, INFINITE REALTY
SOLUTIONS YPFS CORP., a/k/a INFINITE REALTY
SOLUTIONS, CREDIT COUNSELING UNLIMITED, INC.,
RACHEL FERNANDEZ, BARRY S. ZORNBERG and
CORY COVERT,

Defendants.

PLTF'S/PET'S ATTY:
ALLEN R. MORGANSTERN, ESQ.
355 POST AVENUE, STE 204
WESTBURY, N.Y. 11590

DEFT'S/RESP'S ATTY:
(Atty for Icon/Fernandez)
VALDAS C. DUOBA, ESQ.
2025 BRENTWOOD RD
BRENTWOOD, NY 11717

(Atty for Destiny Funding)
GOLD STEWART KRAVATZ & STONE
1025 OLD COUNTRY RD, STE 301S
WESTBURY, NY 11590

(Atty for Zornberg)
LEWIS JOHS AVALLONE AVILES
425 BROAD HOLLOW ROAD
MELVILLE, NY 11747

(Atty for Covert)
L'ABBATE & BALKAN, ESQS.
1001 FRANKLIN AVENUE -RM 300
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 30 read on this motion for an order pursuant to

_____ Notice of
Motion/Order to Show Cause and supporting papers 1-7; Notice of Cross Motion and supporting papers 8-11 Answering
Affidavits and supporting papers 12-16 Replying Affidavits and supporting papers _____ Other _____
_____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant CORY COVERT ("COVERT") and the motion by defendant BARRY S. ZORNBERG ("ZORNBERG") each seeking an order pursuant to CPLR Section 3211 (a)(1)&(7) and 3016(b) dismissing all causes of action asserted against them are determined as follows:

On or about October 21, 2006 Wells Fargo Bank, N.A. ("Wells Fargo") commenced a mortgage foreclosure proceeding seeking to foreclose upon residential premises owned by plaintiff ROANN SMITH COWELL ("COWELL"). "COWELL" had defaulted in making timely monthly mortgage payments and

owed the approximate sum of \$197,000.00 to Wells Fargo. Plaintiff claims that defendants RACHEL FERNANDEZ and MARGUERITE LANDROM ,as agents of all the named defendants, induced "COWELL" to refinance her home to prevent the foreclosure.

On November 2, 2006 plaintiff claims that she attended a closing at defendant "ZORNBERG's" law office to obtain a home equity loan to pay off the Wells Fargo mortgage so that she could continue living in her residence. Among the individuals present at the closing were defendants "FERNANDEZ" and "LANDROM", attorney/defendants "ZORNBERG" and "COVERT", and Kristen White. Plaintiff claims that "FERNANDEZ" and "LANDROM" introduced "COVERT" as her attorney for the transaction and that "ZORNBERG" supervised the entire transaction. Plaintiff claims that she signed all closing documents including a lease which allowed plaintiff to continue living in her home with the understanding that she was paying off the Wells Fargo mortgage but later discovered that she had been deceived into signing documents which conveyed title of her home to Kristen White for \$350,000.00. Plaintiff claims that she never received the approximate \$143,000.00 purchase price balance due from the sale from the defendants. Plaintiff's complaint sets forth five causes of action sounding in conversion, fraud, conspiracy to defraud, legal malpractice (against defendant "COVERT") and seeks an accounting for the sale proceeds.

Defendant "COVERT's" motion seeks an order dismissing all claims against the attorney claiming that no viable cause of action is stated against "COVERT". In support defendant "COVERT" submits three affidavits together with his attorney's affirmation and claims that no valid claim is asserted against him and therefore plaintiff's complaint must be dismissed. Defendant claims that he fully appraised his client "COWELL" of the details of the transaction and argues that plaintiff fully understood that she was selling her home to Kristen White and retaining an option to re-purchase it within one year. Defendant asserts that "COWELL" signed the deed, the HUD-1 disclosure statements, a check disbursement sheet and the lease which provided six detailed disclosure provisions each of which was initialed by plaintiff. Defendant maintains that he received a standard closing fee of \$1000.00. Defendant claims that plaintiff's amended complaint sets forth a different version of her understanding of what occurred at closing which substantially contradicts her original complaint. Defendant claims that in the original complaint plaintiff acknowledged selling her home with the option to re-purchase once her credit had been re-established. Defendant claims that in the amended complaint plaintiff has concocted a different story claiming that she was not aware that she was selling her home but was refinancing it to stay the foreclosure. It is defendant "COVERT's" contention that plaintiff's contradictory versions of the underlying transactions are incredible as a matter of law and therefore no valid claims based upon fraud or conspiracy to commit fraud have been stated against "COVERT". Defendant also claims that no malpractice claim exists since plaintiff denies having retained him as her attorney at the closing. Defendant also contends that no valid malpractice claim is stated since the evidence shows that entire transaction was explained to "COWELL" by her attorney and that she acknowledged "COVERT's" disclosures in writing. Defendant claims that no viable accounting cause of action exists since "COVERT" provided a check disbursement sheet accounting for disbursement of the proceeds which was acknowledged by plaintiff.

In support of his motion to dismiss defendant "ZORNBERG" submits three affidavits and claims that no viable claims are stated against him and plaintiff's complaint must therefore be dismissed. Defendant states that he acted as the settlement agent and the buyer's attorney during the closing and owed no fiduciary duty to the plaintiff who sold her home to his client. Defendant asserts that no valid claim for

conversion is stated since there are no specific allegations of wrongdoing which are attributable to him. Defendant maintains that plaintiffs fraud and conspiracy to commit fraud claims are not valid since there are no specific allegations of acts committed by "ZORNBERG" in the furtherance of fraud or a conspiracy to commit fraud. Defendant also claims that no grounds exist to compel an accounting since plaintiff never demanded one from him and since as the lender's settlement agent and the buyer's attorney "ZORNBERG" had no duty to provide an accounting to the seller. Defendant contends that the disbursement sheet together with copies of the checks were provided to the plaintiff and confirm how the proceeds of the closing were disbursed and that plaintiff signed and authorized the disbursements. Defendant also maintains that the affidavit submitted by his former client who purchased the premises at closing (Kristen White) does not set forth any specific claims that "ZORNBERG" personally defrauded, conspired to defraud or converted any of the proceeds of the mortgage for his own benefit. It is defendant "ZORNBERG's" position that were the Court to accept as true the claims set forth in the complaint and the claims set forth in plaintiff's opposition papers, no viable causes of action are stated against him for conversion, fraud, conspiracy to commit fraud or to compel an accounting and therefore the complaint must be dismissed against him.

In opposition to both motions plaintiff "COWELL" submits two affidavits together with an affidavit from the buyer at the closing, Kristen White, and an attorney's affirmation. Plaintiff claims that sufficient facts have been presented to support viable claims against both defendants. Plaintiff concedes that her original complaint contained an erroneous claim concerning her knowledge of when the sale of her home took place which she identified after reviewing the chronology of events with her attorneys. Plaintiff asserts that she then amended her complaint to correct the error since during the November 2, 2006 closing she was not aware that she was selling her home and understood that she was refinancing it to stay the pending foreclosure. Plaintiff claims that defendant "ZORNBERG", an attorney who was subsequently disbarred as a result of a felony conviction for one count of grand larceny in the second degree and one count of criminal possession of a forged instrument in the second degree, supervised the entire transaction retaining exclusive control of the \$350,000.00 mortgage funds from the purchaser's two lenders. Plaintiff claims that she never received the balance of the proceeds from the sale of her home after paying the foreclosing mortgage lender the sum of \$218,414.00. Plaintiff claims that her claim for conversion against defendant "ZORNBERG" is based upon the settlement agent's representative's failure to turn over the remaining funds from the closing.

Plaintiff contends that she never met defendant "COVERT" until the November 2, 2006 closing and that as her attorney, "COVERT" never informed her that she was selling her home or that she was entitled to the remaining proceeds in excess of \$130,000.00 from the home sale. Plaintiff asserts that the signed loan proceeds disbursement sheet submitted by the defendants in support of their motions was blank when she signed it since she would have known that the house was being sold had she been provided the sheet during the closing. Plaintiff claims that she never authorized the payments set forth on the sheet particularly payments of \$51,037.20 to "COVERT" from which the attorney disbursed payments to Kristen White and two unknown parties identified as "TDM" and "David Fernandez". Plaintiff claims that she is entitled to an accounting from the defendants and that valid causes of action for conversion and for an accounting are stated against defendants "ZORNBERG" and "COVERT".

Plaintiff claims that the complaint sets forth adequate details to support causes of action for fraud and conspiracy to defraud based upon both attorneys roles in facilitating the commission of fraud by the other named defendants. Plaintiff claims that both attorneys had a fiduciary duty to ensure that the seller received the balance of the loan proceeds from the sale of her house and argues that "ZORNBERG" and "COVERT's" actions aided and abetted the wrong perpetrated by the financing scheme. Plaintiff also claims that a valid cause of action for legal malpractice is stated against defendant "COVERT" based upon

plaintiff's claims that her attorney failed to adequately advise her about: 1) the terms of the sale of her home; 2) the meaning of the documents she was executing during the closing ; and 3) the disposition of the loan proceeds. It is plaintiff's position that no basis exists to dismiss any of the causes of action asserted against the moving defendants particularly since discovery proceedings have not yet been conducted.

To succeed on a motion pursuant to CPLR §3211(a)(1), the documentary evidence upon which defendant's motion is predicated must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claims (SIDDIQUI v. NATIONWIDE, 255 AD2d 30, 687 NYS2d 457 (3rd Dept., 1999); FERNANDEZ v. CIGNA, 188 AD2d 700, 590 NYS2d 925 (3rd Dept., 1992)).

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (STAKULS v. STATE, 42 NY 2d 272, 397 NYS 2d 740 (1977)). A pleading does not state a cause of action when it fails to allege wrongdoing by a defendant upon which relief can be granted (HEX BLDG. CORP. v. LEPECK CONSTRUCTION, 104 AD 2d 231, 482 NYS 2d 510 (2nd Dept., 1984)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR Sec. 3211(a)(7); MARONE v. MARONE, 50 NY 2d 481, 429 NYS 2d 592 (1980); KLONDIKE GOLD INC. v. RICHMOND ASSOCIATES, 103 AD 2d 821, 478 NYS 2d 55 (2nd Dept., 1984)).

The tort of conversion is established when one who owns and has the right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner. (REP. OF HAITI v. DUVALIER, 211 AD2d 379, 626 NYS2d 472 (1st Dept., 1995); SHMUELI v. CORCORAN GROUP, 9 Misc. 3rd 589, 802 NYS2d 871 (NY Cty, Sup Ct, 2005)). The tort of conversion applies only to specific chattel and centers exclusively on the physical theft of specific, identifiable, corporeal, tangible, personal property (9310 THIRD AVE. ASSOCIATES v. SCHAFFER FOOD SERV. CO., 210 AD2d 207, 620 NYS2d 255 (2d Dept., 1994); COMPREHENSIVE COMMUNITY DEV. CORP. v. LEBACH, 223 AD2d 399, 636 NYS2d 755 (1st Dept., 1996)).

Plaintiff's complaint states sufficient facts to assert valid causes of action for conversion against defendants "COVERT" and "ZORNBERG" based upon: 1) "COVERT's" alleged failure, as the buyer's lawyer, to ensure that his client/seller received the loan proceeds due her from the sale of her home or that such loan proceeds were fully accounted for in consideration for the sale, and 2) "ZORNBERG's" failure, as the settlement agent's representative who received the mortgage funds, to ensure that the seller received the funds to which she was entitled after payment of all reasonable and actual claims.

Plaintiff's second and third causes of action allege fraud and civil conspiracy. In order to sustain a valid cause of action for fraud a plaintiff must allege: 1) that the defendant(s) made material misrepresentations that were false; 2) that the defendant(s) knew the representations were false and made them with the intent to deceive the plaintiff; 2) that the plaintiff justifiably relied on the defendant(s) representations; and 4) that the plaintiff was injured as a result of the defendant(s) representations (Giurdanella v. Giurdanella, 226 AD2d 342 (2nd Dept., 1996); Shovak v. Long Island Commercial Bank, 50 AD2d 1118 (2nd Dept., 2008); Sellinger Enterprises, Inc. v. Cassuto, 50 AD3d 766 (2nd Dept., 2008); Williams v. Eason, 49 AD3d 866 (2nd Dept., 2008)). In order to sustain a valid cause of action for civil conspiracy a plaintiff must allege: 1) an agreement to participate in an unlawful act; 2) an injury caused by an unlawful overt act performed by one of the parties to the agreement; 3) which overt act was done pursuant to and in furtherance of the common scheme (Halberstam v. Welch, 705 F2d 472, 477(D.C. Cir., 1983)).

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While New York does not recognize civil conspiracy to commit a tort as an independent cause of action, such a claim stands or falls with the underlying fraud claim (Ward v. City of New York, 15 AD3d 392 (2nd Dept., 2005); Sokol et al. v. Addison, 293 AD2d 600, 742 NYS2d 311 (2nd Dept., 2002); Pappas v. Passias et al., 271 AD2d 420, 707 NYS2d 178 (2nd Dept., 2000)).

CPLR §3016 provides:

“(b) Fraud or mistake. Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

CPLR §3016 was not intended however to create more stringent pleading requirements than is required under CPLR§3013 (see FOLEY v. D’AGUSTINO, 21 AD2d 60, 248 NYS2d 121 (1st Dept., 1964)).

CPLR §3013 provides:

“Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, or occurrences, intended to be provided and the material elements of each cause of action or defense.”

The purpose of CPLR §3013 is to require “that the pleadings identify the transaction and indicate the theory of recovery with sufficient precision to enable the court to control the case and the opponent to prepare.” (FOLEY v. D’AGOSTINO, supra, citing 1957 First Preliminary Report to Legislature Advisory Committee’s Notes, pp 63)). Under CPLR §3013 the pleader must provide a factual basis for each claim or defense so that the total effect of the pleading provides a foundation for determining what transaction is involved and what legal theories are advanced (3 Weinstein-Korn-Miller, NY CIVIL PRACTICE, §3013.03); DIBBLE v. BOARD OF COOPERATIVE EDUCATIONAL SERVICES, 103 AD2d 1026, 478 NYS2d 412 (4th Dept., 1984)). A pleading consisting of mere conclusory allegations is legally insufficient (DUMAS v. FIORITO, 13 AD3d 332, 786 NYS2d 106 (2nd Dept., 2004)).

A reading of the complaint in the light most favorable to the plaintiff shows that the necessary elements of fraud and conspiracy to commit fraud are sufficiently stated to sustain each claim against the defendants. Defendants motions to dismiss these claims must therefore also be denied.

The elements of a legal malpractice claim are the existence of an attorney-client relationship, negligence on the part of the attorney or some other conduct in breach of that relationship, proof that the attorney’s conduct was the proximate cause of the injury to the plaintiff and proof that but for the alleged malpractice the plaintiff would have been successful in the underlying action (VOLPE v. CANFIELD, et al, 237 AD2d 282, 654 NYS 2d 160 (2d Dept., 1997)). Plaintiff’s complaint alleges sufficient facts to sustain a claim of legal malpractice against defendant “COVERT” based upon the attorney’s claimed failure to adequately advise his client about the ramifications of what occurred during the closing together with his alleged failure to ensure that the seller received the loan proceeds from the sale.

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (Adam v. Cutner & Rathkopf, 238 AD2d 234, 656 NYS2d 753 (1st Dept., 1997);

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Palazzo v. Palazzo, 121 AD2d 262, 503 NYS2d 381 (1st Dept., 1986)). An allegation of wrongdoing is not an indispensable element of a demand for an accounting where the complaint indicates a fiduciary relationship between the parties or some other special circumstance warranting equitable relief (Adam v. Cutner & Rathkopf, supra.; Morgulas v. Yudell Realty, 161 AD2d 211, 554 NYS2d 597 (Dept.,)). The fiduciary relationship necessary to obtain an accounting is created by the plaintiff entrusting to the defendant some money or property with respect to which the defendant is bound to reveal his dealings (Marvin v. Brooks, 49 Sickels 71, 94 NY 71 (1883); Stevens v. St. Joseph's Hospital, 52 AD2d 722, 381 NYS2d 927 (4th Dept., 1976)). Plaintiff's fifth cause of action sets forth sufficient facts to state a valid claim for an accounting based upon both defendants/attorneys fiduciary duties to: 1) account for the mortgage proceeds that defendant "ZORNBERG", as the lender's representative, received and was responsible to disburse to complete the sale of plaintiff's house, and 2) account for the remaining loan proceeds to which the seller was entitled based upon defendant "COVERT's" status as the attorney representing the seller at the closing. Accordingly it is

ORDERED that defendants motions each seeking an order pursuant to CPLR Sections 3211(a)(1)&(7) and 3016(b) are denied, and it is further

ORDERED that a preliminary conference shall be held on January 16, 2009 at 9:30 a.m. at the Supreme Court Trial Term Part XIII, 400 Carleton Avenue, Central Islip, New York to resolve all outstanding discovery issues. No appearance shall be required if the parties enter into a preliminary conference disclosure and discovery schedule and submit same to the Court prior to January 16, 2009. A copy of the form is attached to this order for the parties use and convenience. All discovery proceedings must be completed on or before July 16, 2009.

Dated: December 9, 2008

MELVYN TANENBAUM

J.S.C.