

**Rivera v USA Bldrs. & Dev. Corp.**

2008 NY Slip Op 33360(U)

December 12, 2008

Supreme Court, New York County

Docket Number: 602493/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.C.  
*Justice*

PART 1

Index Number : 602493/2007  
RIVERA, MARIA  
vs  
USA BUILDERS & DEVELOPMENT  
Sequence Number : 002  
DISMISS ACTION

INDEX NO. 602493/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits → Exhibits

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in  
accordance with the attached decision and  
order.

**FILED**  
DEC 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: DEC 12 2008

MARTIN SHULMAN  
J.S.C. *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 1

-----X  
Maria Rivera and Wilson Mendez,

Plaintiff,

-against-

USA Builders & Development Corp., et al.

Defendants.  
-----X

Index No. 602493/07

**Decision and Order**

**FILED**  
DEC 16 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**Shulman, J.:**

This action arises from plaintiffs' purchase of certain real property located in Bronx County, New York. The amended complaint names thirteen defendants and alleges causes of action for breach of contract, fraud and misappropriation, breach of fiduciary duties, breach of warranties, misrepresentation and unjust enrichment. The amended complaint also seeks an accounting and injunctive relief.

In motion sequence 002, defendant Impac Funding Corporation ("Impac")<sup>2</sup> moves pursuant to CPLR 3211(a)(7) to dismiss the complaint and any cross-claims against it for failure to state a cause of action. In motion sequences 003 and 004, defendants Behnam Kahen ("Kahen"), USA Builders & Developers Corp. ("USA"), Sanders Trade & Properties, Ltd. ("Sanders") and Bianca Nunez ("Nunez") move to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]) and based

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<sup>1</sup> By prior decision and order dated February 25, 2008 this court dismissed the action as to defendant Bathgate Partners, LLC.

<sup>2</sup> The complaint also names Impac as "Impac Funding Corp (d/b/a Impac Lending Group)".

upon documentary evidence (CPLR 3211[a][1]).<sup>3</sup> Plaintiffs have submitted opposition only to Impac's motion, and stipulations of adjournment in the motion files indicate that plaintiffs were contemplating discontinuing the entire action.<sup>4</sup> All three motion sequences are consolidated for disposition. For the reasons set forth below, the motions to dismiss are granted.

The underlying transactions involve the conveyance of two properties from defendant USA to plaintiff Maria Rivera ("Rivera") and one property from USA to plaintiff Wilson Mendez ("Mendez"). Rivera obtained financing from Impac with respect to one of the properties. Kahen is the attorney who represented USA in all three transactions. As to the remaining moving defendants, the amended complaint alleges that: 1) Sanders and Nunez ordered title reports in connection with the closing of all three properties; 2) Sanders applied for zoning permits for each property; and 3) Sanders and Nunez maintain the same address as USA and therefore USA and/or Sanders and/or Nunez may be one and the same.

After closing, plaintiffs claim they learned the buildings were poorly constructed and required extensive repairs due to water leaks. Further, the buildings' tenants refused to pay rent because the buildings lacked certificates of occupancy. Plaintiffs contend that defendants knew these conditions existed and failed to disclose this information to plaintiffs.

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<sup>3</sup> USA, Sanders and Nunez also seek to recover their attorneys' fees and expenses incurred in this action, as well as sanctions against plaintiffs for frivolous conduct.

<sup>4</sup> By decision and order dated October 27, 2008 in motion sequence 005, this court denied plaintiffs' attorney's motion to withdraw as counsel on procedural grounds.

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211(a)[7]), a court must take all allegations of the complaint as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff. *Caron v. Hargro Fabrics*, 91 N.Y.2d 362 (1998); *Marini v. D'Atolio*, 162 A.D.2d 391 (1<sup>st</sup> Dept., 1990). The court must assume that the complaint's allegations are true and must deem the complaint to allege whatever can be reasonably inferred therefrom however imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 A.D.2d 105 (1<sup>st</sup> Dept., 1985); *see also, McGill v. Parker*, 179 A.D.2d 98 (1<sup>st</sup> Dept., 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co.*, 91 A.D.2d 173 (1<sup>st</sup> Dept., 1983). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 is available only where the dispute pertains to law, not facts. *Abrams v. Richmond County S.P.C.C.*, 125 Misc. 2d 530 (Sup. Ct., Rich. Co., 1984).

Further, under CPLR 3211(a)(1) a defendant has the burden of demonstrating that the documentary evidence conclusively resolves all factual issues and that plaintiff's claims fail as a matter of law. *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 (1<sup>st</sup> Dept., 2002). The criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one. *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

Here, it is patently obvious that plaintiffs cannot maintain their causes of action against defendants Impac, Kahen, Sanders and Nunez as a matter of law. Impac, as lender, and Kahen, as the seller's attorney, clearly were not in privity with plaintiffs, nor did they make any warranties or representations to plaintiffs or owe any fiduciary duties

to plaintiffs regarding the properties. Similarly, Sanders and Nunez merely ordered title reports and/or obtained building permits. Moreover, plaintiffs, while represented by counsel, opted to close knowing that no certificate of occupancy was in effect. Plaintiffs here are improperly attempting to recover damages from every person and/or entity having even a slight connection to the closings.

Of the moving defendants, only USA, the seller of the properties, was in privity with plaintiffs and made affirmative representations regarding the condition of the properties. Nonetheless, plaintiffs do not oppose USA's motion to dismiss and it is therefore granted.

Accordingly, it is

ORDERED that Impac's motion (sequence 002) and Kahen's motion (sequence 3) are granted in their entirety, and the complaint is dismissed with costs and disbursements to defendants Impac and Kahen, including costs upon motion pursuant to CPLR §8106, as taxed by the Clerk of the Court; and it is further

ORDERED that the portion of USA's, Sanders' and Nunez's motion (sequence 004) seeking dismissal of the complaint is granted and the complaint is dismissed with costs and disbursements to defendants USA, Sanders and Nunez, including costs upon motion pursuant to CPLR §8106, as taxed by the Clerk of the Court, and the remaining portions of the motion are denied; and it is further

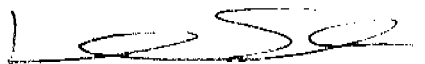
ORDERED that the action is severed and continued as to the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Counsel for plaintiffs and the remaining defendants are directed to appear for a preliminary conference at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York on January 20, 2009 at 9:30 a.m. Plaintiffs counsel is directed to notify the remaining defendants of the foregoing conference date.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the moving defendants and plaintiffs.

DATED: New York, New York  
December 12, 2008



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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
DEC 16 2008  
COUNTY CLERKS OFFICE  
NEW YORK