

Demperio v Solomon
2008 NY Slip Op 33388(U)
November 3, 2008
Supreme Court, Nassau County
Docket Number: 6275/07
Judge: F. Dana Winslow
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SWAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. F. DANA WINSLOW,
Justice

EMMA DEMPERIO,

TRIAL/IAS, PART 7
NASSAU COUNTY

Plaintiff,

MOTION DATE: 8/15/08
MOTION SEQ. NO: 002

-against-

MICHAEL D. SOLOMON and STAFFORD
CAPITAL, INC.,

INDEX NO.: 6275/07

Defendants.

The following papers having been read on the motion (numbered 1-3):

Notice of Motion.....	1
Affidavit in Opposition.....	2
Memorandum of Law.....	3

Relief Requested:

The defendant, Michael D. Solomon, moves pursuant to CPLR §3212 for an order dismissing the plaintiff's complaint. The application is hereby **DENIED** for the reasons set forth hereinafter (Sequence #001).

Factual and Procedural Background:

The underlying cause of action was commenced by the plaintiff, Emma Demperio, to recover damages incurred in defending a previously interposed action entitled Salvatore and Patricia Assenza v. Emma Demperio (see Affirmation in Support at Exh. D). On October 23, 2006, the parties in that action, executed a contract of sale, wherein the Assenzas agreed to purchase Ms. Demperio's home located at 3050 Johnson Place, Wantagh, New York, for the purchase price of \$525,000 (*id.* at Exh. B). Additionally, Mr. and Mrs. Assenza were obligated to provide a down payment in the sum of \$50,000 (*id.* at Exh. B). The obligation of

the buyers to ultimately consummate the sale was contingent upon the procurement of a mortgage commitment with 45 days of the contract (*id.* at Exh. B). Thereafter, on January 12, 2007, the Assenzas were denied a mortgage commitment by Flagstar Bank and consequently sought the return of their down payment, which request was refused precipitating the commencement of the prior action (*id.* at ¶¶5,6; *see also* Exh. C).

In September of 2007, the Assenzas moved for summary judgment on their complaint and Ms. Demperio, cross-moved for summary judgment with respect to a counter claim whereby she sought to retain the down payment as liquidated damages (*see* Affirmation in Opposition at Exh. L). By order dated September 13, 2007, the Honorable Thomas Adams denied the Assenza's application and granted that motion interposed by Ms. Demperio thereby permitting her to retain her down payment (*id.*).

The within action was subsequently commenced by Ms. Demperio to recover those fees necessarily incurred in the defense of the prior action, which she claims was devoid of legal merit and based largely upon false statements promulgated by defendant, Michael Solomon (*see* Affirmation in Support at Exh. D). A careful review of the instant Complaint reveals that the within action is predicated, *inter alia*, upon the allegation that the defendant, acting in collusion with the Assenzas, articulated a series of misrepresentations, which were deliberately designed to obtain a denial of mortgage, so as to permit the Assenzas to recoup their down payment (*id.*). In addition thereto, counsel for the plaintiff alleges that the defendant, in a blatant attempt to earn additional legal fees, falsely counseled the Assenzas that the contract of sale relative the Ms. Demperio's property "could be breached with impunity" which advice resulted in the

Assenzas retaining Mr. Solomon to acquire a different property and by hiring him to institute the earlier action to recoup the down payment (*id.*).

Defendant's Supporting Arguments:

In support of the within application, counsel for the defendant argues that the within application must be granted inasmuch as the plaintiff has failed to proffer admissible evidence to raise a triable issue of fact and does not possess a sufficient degree of personal knowledge to sustain the within action (*id.* at ¶¶13,19,20,21,33).

Annexed to the defendant supporting papers is the affidavit of Mr. Solomon wherein he avers that “he proceeded in good faith and zealously represented the interest” of his clients (*id.* at Exh. A). He further states that he was “never aware of any commitment issued by any lender” and that “the only document I ever received concerning whether the Assenzas would receive a mortgage was a denial from Flagstar Bank issued on January 12 , 2007”(*id.* at ¶7).

Plaintiff's Opposition Arguments:

In opposition to the within application, counsel for the defendant argues that the documents annexed hereto raise numerous questions of fact as to whether Mr. Solomon conspired with the Assenzas to deliberately obtain a cancellation of a previously issued mortgage commitment, the primary purpose of which was to defraud the plaintiff of her right to retain the \$50,000 down payment (*see* Memorandum of Law at pp. 3-12; *see also* Affirmation in Opposition at ¶3). Counsel further asserts that the evidence provided demonstrates that Mr. Solomon continued to misrepresent that his clients did not obtain a mortgage, when in fact they had procured a commitment, and that this misrepresentation was the basis of the prior action in which the Assenzas demanded return of their down payment

(*see* Memorandum of Law at p.4). Counsel argues that as a result, the plaintiff was damaged by being forced to employ the assistance of counsel in defending this frivolous prior action and incurring the legal fees attendant thereto (*id.*).

In support of this contention, counsel for the plaintiff relies upon the contract of sale and other various documents, as well as the deposition testimony of Anne Castro, who served in the capacity of mortgage broker for the Assenzas (*see* Affirmation in Opposition at ¶¶10,11,12).

Initially, counsel makes particular reference to the terms of the heretofore referenced contract of sale dated October 23, 2006, which required the Assenzas to procure a mortgage within 45 days (*id.* at ¶6; *see also* Exh. A). Counsel posits that notwithstanding this agreed upon time frame, Mr. Solomon failed to keep him apprised as to the status of the mortgage commitment and accordingly sent him a letter declaring that “time was of the essence” and setting a closing date of January 15, 2007 (*id.*; *see also* Exh. C). Counsel avers that the first response he received relative thereto was a letter dated January 10, 2007, wherein Mr. Solomon stated that his clients had “not yet received a written mortgage commitment” and were “not in a position to close title” (*id.* at Exh. D). Mr. Solomon further advised that “We are working diligently with our mortgage broker to secure our financing , but as of yet, we do not have a lender willing to issue a commitment. Inasmuch as my client has not received a commitment, your time of the essence closing is hereby rejected.” (*id.*).

Counsel argues that notwithstanding these assertions, by the time Mr. Solomon authored his letter on January 10, 2007, he was already aware that the Assenzas had abandoned their intention to purchase the plaintiff’s property and had in fact entered and signed an agreement on January 4, 2007 to purchase a

home located at 1389 Field Lane, Seaford, New York (*see* Affirmation in Opposition at ¶8; *see also* Exh. E). Of particular relevance to this point, the plaintiff has provided a letter dated January 8, 2007, that indicates that on said date Mr. Solomon was forwarded the sales contract relevant to the Seaford property, which was both fully executed by the Assenzas and sent back to the seller's attorney by Mr. Solomon on January 12, 2007 (*id.* at Exhs. F, I).

In addition to the foregoing, counsel for the plaintiff relies upon various portions of the deposition of Anne Castro, the Assenza's mortgage broker, who testified, *inter alia*, that in connection to the purchase of the plaintiff's property, Flagstar Bank issued to the Assenzas a mortgage commitment on January 9, 2007 and again on January 12, 2007 (*id.* at ¶10; *see also* Affirmation in Support at Exh. G, pp. 16,22). Counsel further refers to those portions of Ms. Castro's testimony, wherein she stated that the mortgage commitment issued by Flagstar was subsequently withdrawn on January 12, 2007 and that such withdrawal was particularly occasioned by Mr. Assenza informing her that he could not sell his home, which information she transmitted to Flagstar (*id.* at Exh. G at pp. 24,44). Plaintiff's counsel argues that this assertion by the Assenzas, that they could not sell their home as of January 12, 2007, is completely belied by the fact that they immediately applied for another mortgage for the purchase of the Seaford property on or about January 16, 2007, which was approved on January 23, 2007 (*id.* at pp. 31,33,34).

Standard for Summary Judgment

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*,

[* 6]

140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247; *Daliendo v Johnson*, 147 AD2d 312).

Liability of an Attorney to a Third Party

It is a well settled principle that "an attorney who does not represent a party may only be held liable to that party upon a showing of fraud or collusion or a malicious or tortious act" (*Krasne v Gedell*, 147 AD2d 616 [2d Dept 1989]; *Pancake v Franzoni*, 149 AD2d 575 [2d Dept 1989]; *Nicoleau v Brookhaven Memorial Hospital*, 181 Ad2d 815 [2d Dept 1992]). A cause of action which is predicated upon fraud does not demand the existence of privity between the parties

[* 7]
(*Metral v Horn*, 213 Ad2d 524 [2d Dept 1995]). However, where fraud is the legal basis upon which relief is sought, CPLR §3016[b] and the provisions therein embodied expressly demand that “the circumstances constituting the wrong shall be state in detail.”

The requisite elements of an action sounding in fraud are as follows: a misrepresentation or a material omission of fact; scienter or knowledge on the part of the defendant that such misrepresentation was false and which was made for the purpose of having the other party rely thereon; justifiable reliance; and injury resulting therefrom (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Orlando v Kukielka*, 40 AD3d 829 [2d Dept 2008]).

Decision

In the instant matter, the Court having reviewed the record as thus far developed finds that the plaintiff has raised triable issues of fact the existence of which precludes the granting of summary judgment and warrants a trial (*Zuckerman v City of New York*, 59 NY2d 557 [1980]). Specifically, the Court finds that the plaintiff has raised triable issues of fact with regard to both the timing and the underlying reasons surrounding the January 12, 2007 mortgage denial. The defendant’s contention that the plaintiff has failed to submit admissible evidence through which to raise a triable issue of fact is unavailing. While the opposing papers consist largely of an affirmation from plaintiff’s counsel, said affirmation is based upon counsel’s personal knowledge of the events therein recited and makes particular reference to depositions, as well as numerous probative documents, many of which were identified by the defendant during his examination before trial (*Zuckerman v City of New York*, 59 NY2d 557 [1980],*supra*).

Moreover, the plaintiff’s complaint is a fact-laden pleading, which identifies

with particularity, the relevant parties, dates, occurrences and documents, all of which are sufficient to set forth the necessary elements attendant to an action sounding in fraud (CPLR §3016[b]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996], *supra*; *Orlando v Kukielka*, 40 AD3d 829 [2d Dept 2008], *supra*; *see also Stern v Consumer Equities Associates*, 160 AD2d 993 [2d Dept 1990]).

Based upon the foregoing, the defendant's motion made pursuant to CPLR §3212 which seeks dismissal of the plaintiff's complaint is hereby **DENIED**.

All applications not specifically addressed herein are deemed **Denied**.

This constitutes the Order of the Court.

Dated: *November 3, 2008*

ENTER:

[Handwritten Signature]
J.S.C.

ENTERED
DEC 12 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE