

Macaluso v Hoatson

2009 NY Slip Op 30169(U)

January 20, 2009

Supreme Court, New York County

Docket Number: 108562/08

Judge: Joan A. Madden

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

PRESENT: Joel A. Medda
Justice

PART 11

Index Number : 108562/2008
MACALUSO, MARYANNE
vs
HOATSON, ROBERT
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 9-25-08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for dismiss
+ cross-motion

PAPERS NUMBERED

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *+ cross motion* be decided *in accordance with the attached Memorandum Decision + Order.*

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 20, 2009

[Signature]
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: I.A.S. PART 11

-----X
MARYANNE MACALUSO,

Plaintiff,

Index No. 108562/08

-against-

ROBERT HOATSON, MORTGAGEIT, INC.,
and MARC A. ZIROGIANNIS, MARC A.
ZIROGIANNIS ESQ., P.C. and RICHARD I.
GOLIO,

Defendants.

-----X
JOAN MADDEN, J.:

Defendant Mortgageit Inc. (MIT) moves, and defendant Robert Hoatson ("Hoatson"), who is pro se, cross moves, pursuant to CPLR 3211 (a) (7) for an order dismissing the complaint for failure to state a cause of action and based on documentary evidence. Plaintiff opposes the motion and cross motion. For the reasons set forth below, the motion is granted and the cross motion is denied.

Background

The following facts are based on the allegations in the complaint and the documentary evidence submitted to the court.

In this action, plaintiff alleges that defendants engaged in a scheme to defraud her out of certain real property located at 10 Springdale Road, Somers, New York ("The Property"). The complaint alleges that Hoatson, a priest and counselor for plaintiff who assisted her with her financial affairs, defrauded plaintiff out of the Property, by persuading plaintiff to sell the Property to him to avoid foreclosure. Hoatson represented to plaintiff that he would hold the Property for her, pay her bills and thereby rid her of any of her creditors. He also told plaintiff

that he would help her “get back on her feet” and then reconvey the Property back to her.

The sale agreement executed on May 15, 2005, contained a contingency clause requiring Hoatson to secure financing by June 30, 2005. Hoatson secured part of this financing by obtaining a \$210,000 loan from MIT to purchase the Property as an investment property. In the loan application with MIT, Hoatson represented that he would pay the remainder of the purchase price in cash at the time of the sale.

It appears from the complaint, however, that the balance of the proceeds was obtained through “a balloon payment note in the amount of \$225,000, with no interest, and due in 15 years” from Hoatson to the plaintiff, and that the note was obtained from MIT’s agent, defendant Marc A. Ziropgiannis, Esq.

MIT subsequently approved Hoatson for the loan after reviewing his credit report and other documentation. On June 24, 2005, Hoatson closed on the Hoatson Loan and executed an adjustable rate note and Mortgage. On that same day Hoatson also executed several other documents including a HUD-1 Settlement Statement. On July 29, 2005, MIT assigned the loan to GMAC Mortgage, LLC.

It is alleged that following the closing, plaintiff received no monies and no copies of the closing documents. It is further alleged that thereafter Hoatson paid some, but not all of, plaintiff’s bills, and that the exact number and amount of these bills was not clear to plaintiff as Hoatson did not provide her copies of the bills. The complaint also alleges that plaintiff never received a complete accounting of what happened to the money borrowed against the Property, and that Hoatson “has inconsistently claimed that the funds were used to help the homeless, were spent on acts of mercy, and that he had the money and it was being used to finance the debt on

the Property” (Complaint ¶ 14).

When plaintiff realized that her bills had not been paid and began to question what happened to the mortgage proceeds and when the Property would be returned to her, Hoatson allegedly “became more distant and gave inconsistent answers” (id. ¶ 15). Then, in July 2006, an attorney for Hoatson contacted plaintiff to inform her that Hoatson was planning on selling the Property. On August 24, 2006, plaintiff received a letter from a different attorney informing her that the Property had been placed on the market and Hoatson had accepted an offer and that plaintiff should remove her personal property from the Property. Upon the sale of the Property the loan from MIT (which had been assigned to GMAC) was paid in full.

It is alleged that plaintiff received some of the proceeds of the sale of the Property, but not the Property’s full value or the amount in the note from Hoatson to the Plaintiff. It is also alleged that Hoatson used the proceeds of the loan for his own benefit and failed to pay plaintiff for the value of the Property from the financing of the sale.

The complaint alleges that but for the representations of Hoatson she would have never transferred ownership of the Property to him and that she relied upon the promises and representations of Hoatson based on the confidential relationship between them.

The complaint alleges that “Hoatson obtained the loan by making representations to [MIT] which [MIT] knew or should have known to be false [and that] upon information and belief a representative or employee of [MIT] prepared a fraudulent contract on behalf of Hoatson and used same to issue the loan given to Hoatson and otherwise aided Hoatson and acted in concert with Hoatson to defraud Plaintiff out of [the Property] and to cause injury to her” (Complaint ¶ 22).

The complaint further alleges that Hoatson conspired with MIT and the other defendants to defraud plaintiff out her property without consideration.

MIT now moves, pursuant to CPLR 3211 (a) (7), for dismissal of the complaint, arguing that it does not meet the pleading requirements for fraud or a conspiracy to defraud. In support of its motion, MIT submits the affidavit of its Vice President for Lending Operations and the underlying loan and closing documents.

In opposition, plaintiff argues that it should have an opportunity to obtain discovery so that it can amplify the allegations against MIT, and asserts that MIT owed plaintiff “a minimum duty of fair dealing” to ensure that plaintiff received the benefit of the transaction. Plaintiff notes that the HUD 1 Settlement Statement prepared by MIT’s counsel indicates that plaintiff received \$305,000 even though she never received any monies,¹ and that the Statement also fails to show that a note from Hoatson to plaintiff was used to pay \$225,000 of the purchase price.

Hoatson cross moves to dismiss the complaint against him and in support of the cross motion submits his affidavit denying the allegations in the complaint and asserting that he purchased and sold the Property for the sole benefit of the plaintiff who was in financial trouble. Specifically, Hoatson asserts that at the closing, after paying off the prior mortgage, back taxes and fees, he was provided with \$120,000 out of the \$210,000 mortgage and that all of the money was used to meet the financial obligations of the house, such as mortgage payments, taxes and utilities and the rest went to pay the bills for plaintiff’s apartment. Hoatson also states that he offered to transfer the Property back to plaintiff before he sold it in 2007 but she refused his

¹The court notes that the settlement statement indicates, however, that \$100,000 of the loan proceeds were used to pay off the prior mortgage on the Property.

offer. He also states that he only sold the Property after the money ran out from the mortgage. In support of his statements, Hoatson attaches various documents, including an accounting of how the moneys obtained from the mortgage on the Property was spent and documents relating to Hoatson's sale of the Property in 2007 .

In opposition to the cross motion, plaintiff submits an affidavit refuting Hoatson's version of events, and asserts that, at best, Hoatson has raised factual questions that cannot be resolved on this motion.

Discussion

On a motion pursuant to CPLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint. Guggenheimer v Ginzburg, 43 NY2d 268 (1977). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Id.; Morone v Morone, 50 NY2d 481 (1980).

At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New

York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. Affidavits and other evidence submitted by plaintiff may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims. Rovello v Orofino Realty Co., Inc., 40 NY2d 633 (1976).

To plead a viable cause of action for fraud, plaintiff must allege that defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendants when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). Additionally, CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what their respective roles were in the incidents complained of Sec P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373, 376 (1st Dept 2003).

Here, the complaint does not allege that MIT made any fraudulent misrepresentations to plaintiff or otherwise intended to deceive her or include allegations of fact from which it could be inferred that MIT had entered into any understanding with Hoatson or the other defendants to cooperate in any fraudulent scheme. Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991). Instead, the complaint merely alleges that MIT should have known that Hoatson's loan application was fraudulent, and that by loaning money to Hoatson it injured plaintiff. Moreover, plaintiff's conclusory allegation that the loan agreement with Hoatson constituted a fraudulent contract is inadequate to give rise to an inference that MIT participated in a conspiracy to defraud in the absence of allegations that there was an understanding between MIT and the other defendants to cooperative in a fraudulent scheme. Id.; see also LeFebvre v. New York Life

* 8]
Ins. and Annuity Corp., 214 AD2d 911, 912 (3d Dept 1995)(holding that conspiracy to defraud claim cannot stand against defendant who did not commit every element of the fraud in the absence of “specific factual allegations that could support an inference that defendants knowingly agreed to cooperative in a fraudulent scheme, or shared a perfidious purpose with [such defendant]”).

Additionally, plaintiff’s assertion in reply that MIT breached a duty of fair dealing to plaintiff is insufficient to remedy the defective fraud claim, and since there is no contractual relationship between plaintiff and MIT, plaintiff cannot assert a claim against MIT based on a breach of the covenant of good faith and fair dealing. See generally, 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002).

Thus, as the complaint does not set forth with particularity each of the elements of a fraud claim against MIT, it must be dismissed as to MIT. See Bramex Associates, Inc. v CBI Agencies, Ltd., 149 AD2d 383 (1st Dept 1989); P.T. Bank Central Asia v ABN AMRO Bank N.V., 301 AD2d 373.

In contrast, the complaint sufficiently alleges a fraud claim against Hoatson based on allegations that he made fraudulent representations to plaintiff that he would purchase the Property from for her sole benefit and use the money to pay of her debts, that these representations was false, and that, based on the nature of her relationship with Hoatson plaintiff justifiably relied on these representations to her detriment. Moreover, while Hoatson denies the allegations in the complaint, his statements are insufficient to warrant dismissal of the action at this juncture, since no discovery has been taken and plaintiff contradicts Hoatson’s statements in her affidavit.

In addition, although the documentary evidence submitted by Hoatson appears to support his version of the events, dismissal based on such evidence is warranted “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” See Acquista v. New York Life Ins. Co., 285 AD2d at 76 quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. Here, as the documentary evidence relied on by Hoatson does not resolve the disputed material facts at issue in this action, the cross motion to dismiss must be denied.

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by defendant Mortgageit Inc is granted, and the complaint against it is dismissed; and it is further

ORDERED that the cross motion to dismiss by defendant Robert Hoatson is denied; and it is further

ORDERED that the action shall continue as against the remaining defendants;

ORDERED that defendant Robert Hoatson and any other defendant who has not yet answered shall serve an answer to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on March 5, 2009 at 9:30 am.

A copy of this decision and order is being mailed by my chambers to the parties and/or their counsel.

Dated: January 29, 2009

FILED

JAN 29 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

J.S.C.