

**Meltzer v Omni Abstract Corp.**

2009 NY Slip Op 31327(U)

June 10, 2009

Supreme Court, New York County

Docket Number: 005734/08

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3  
NASSAU COUNTY

INDEX No. 005734/08

MOTION DATE: May 1, 2009  
Motion Sequence # 004, 006, 007

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HELENE J. MELTZER and  
BERNARD V. MELTZER, On behalf of  
themselves and all other persons similarly  
situated,

Plaintiffs,

-against-

OMNI ABSTRACT, CORP. d/b/a OMNI TITLE  
AGENCY,

Defendant.

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The following papers read on this motion:

Notice of Motion..... XXX  
Affidavit in Opposition..... XXX  
Reply Affirmation ..... XXX  
Memorandum of Law..... XXXXX

This motion (seq. No. 7), by the attorneys for the defendant, for an order pursuant to CPLR 3212 granting summary judgment in favor of the defendant against the plaintiff dismissing the second and third causes of action is **granted**; and motion (seq. No. 4) by the attorneys for the plaintiffs, for an order pursuant to CPLR § 902 certifying this action as a class action is **denied**; and motion (seq. No. 6), by the attorneys for the defendant, for an order pursuant to Disciplinary Rule 5-102(d) disqualifying the firm of Bernstein Nackman & Feinberg LLP from representing the plaintiffs in this action is **moot**.

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By short form order dated September 25, 2008 this court dismissed the first cause of action for allegedly violating General Business Law § 349. The second cause of action is for breach of contract. The third cause of action is for unjust enrichment.

Plaintiff Helen J. Meltzer, an attorney at law admitted to practice in the courts of the State of New York and plaintiff, Bernard V. Meltzer, entered into a contract of sale to sell their premises (24 Paul Court, North Babylon, N.Y.) to Gary E. Lewis and Josephine Tavera. A title policy was ordered by Peter Dunn, Esq., the attorney for the purchasers. The title policy was ordered from defendant Omni Abstract Corp. d/b/a Omni Title Agency (Omni). As is the custom and usage in the closing of real estate transactions, copies of the title report are sent to the sellers' and buyers' attorneys. Michael Weinreb (Weinreb) is an officer of defendant Omni. Weinreb, as a clearing officer for Omni, has the responsibility to review the title report and notify the sellers' and buyers' attorneys of any exceptions to title. The report showed various exceptions to title including three outstanding mortgages. Weinreb wrote to Meltzer on June 13, 2006 for a letter of indemnity to Commonwealth Title Company c/o Omni Title Agency for exceptions 8, 9 and 10.

8. Mortgage in Liber 10497 mp 317 assigned by Liber 10519 mp 8 assigned by Liber 10582 p 261 held by Irving Trust company to be satisfied (released or considered).
9. Mortgage dated 3/15/86 filed 5/7/86 as Document 324022 assigned by Document # 324023 held by Home Loan & Investment Association to be satisfied (released or considered).
10. Mortgage in Liber 21019 mp 426 held by MERS to be satisfied (released or considered).

The defendant Weinreb did not schedule a closing until and unless Meltzer first dealt with the outstanding three mortgages of record. From on or about June 13, 2006 to on or about July 17, 2006 discussions took place between Weinreb and Meltzer. By letter dated July 17, 2006 Meltzer wrote to Weinreb.

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My contract date is "on or about July 15, 2006" and my buyers are pressing to close as soon as possible. Any consideration you give me in connection with having the mortgage which showed up in your title report omitted would be greatly appreciated.

I am in the unfortunate position of representing myself and my husband and, therefore, being much too closely involved in this matter.

From the time that we refinanced with Liberty Mortgage, until the present time, we refinanced with Mortgage Line Financial and then, finally, with GMAC.

If I can be of any other assistance to you, please let me know as soon as possible. Thank you for your kind consideration. (emphasis added).

By letter dated August 7, 2006, Meltzer wrote to Omni (Weinreb):

Pursuant to your request, and to my many conversations with you as well as your brother, Michael, attached hereto please find Satisfactions of Mortgages in recordable form for both the \$53,000.00 mortgage of 1984 and the \$55,105.00 mortgage of 1986. The original Satisfactions will be brought to closing for recording.

I trust that this will put an end to the mortgage questions and I look forward to seeing you, or your representative at the closing on Tuesday, August 15, 2006.

Please allow me to take this opportunity to thank you for all of your patience and assistance in this matter. (emphasis added).

As is the normal custom and practice in the closing of real estate transactions Weinreb was then able to schedule a closing. At the closing Meltzer paid \$295 as recording fees to record the three outstanding mortgages listed in exceptions 8, 9 and 10. (\$95.00 for each satisfaction).

At the closing, Omni's representative contacted GMAC Mortgage Corp. to verify the amount of the outstanding balance in order to remove exception 10.

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Omni's representative at the closing took the responsibility for having a cashier's check in the sum of \$317,921.58 paid from the sale proceeds, and forwarded by Fed Ex to GMAC. The title closer also requested that a "satisfaction piece" be forwarded to Omni. At the closing Omni's representative collected \$95.00 from the plaintiffs to record the GMAC satisfaction. Weinreb asserts that once GMAC sent Omni the satisfaction of mortgage it would be recorded. The GMAC satisfaction was recorded on October 13, 2006. Weinreb contends that he knew GMAC charged to record the satisfaction, but to avoid the problems that plaintiffs had in the past with recorded satisfactions, it was agreed that if the plaintiffs got the unrecorded satisfaction from GMAC the plaintiff Helene Meltzer would send it to Omni to record. On the other hand, if she got proof that the satisfaction was recorded by GMAC she would advise Weinreb; and Omni would return the \$95.00. GMAC accepted the payoff check and recorded a satisfaction of mortgage. GMAC never sent a copy of the recorded satisfaction to Omni for recording. When plaintiffs learned that GMAC recorded the mortgage (after October, 2006) and they were entitled to a return of the fee of \$95.00 advanced at the closing, the plaintiffs chose to commence the within action (November 2007) rather than simply writing a letter to defendant requesting a refund of the \$95.00 recording fee.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. (*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). The defendant has made an adequate *prima facie* showing of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. (*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; see *Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app. dismissed*. 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app. denied*. 82 NY2d 660).

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In opposition to the motion, plaintiffs' assertion that the affidavit of Weinreb should not be accepted, since he was not a person present at the closing and does not have first hand knowledge of what transpired is misplaced. A mortgage lien, such as exceptions 8, 9 and 10, not provided for in the contract of sale would render the title unmarketable. The Court accepts that Weinreb had no personal knowledge of what took place at the closing regarding the payoff of the GMAC mortgage; and it would have been gross negligence for Weinreb to permit the closer to forward the mortgage payoff amount (\$317,921.58) to GMAC without making a contingency for receipt and recording of the satisfaction of mortgage. (See *New York Investors v Manhattan Beach Bathing Parks Corp.*, 229 AD3d 593, *aff'd*. 256 NY 162). Had Weinreb permitted the closer to close the deal without the contingency for a satisfaction piece being delivered, and had GMAC not carried through, Omni and the buyers who engaged Omni would be in a most precarious position. In fact, they would find themselves in the same position as the plaintiffs when the plaintiffs attempted to close without the proper satisfactions of mortgage for exceptions 8 and 9. This Court does not view plaintiff's payment of \$95.00 for the recording fee of the GMAC mortgage to be voluntary, but rather mandatory so that the defendant could insure marketable title at closing for the benefit of the buyers. Although summary judgment is a drastic remedy (*Andre v Pomeroy*, 35 NY2d 361, 364), nevertheless a "court must evaluate whether the alleged factual issues presented are genuine or substantiated." (See *Assing v United Rubber Supply Co., Inc.*, 126 AD2d 590). In further opposition to the motion for summary judgment, plaintiffs assert they never agreed they would notify Omni if GMAC recorded the satisfaction, nor did a representative of Omni ever state that it would return the recording fee (\$95.00) on receiving notification from the Meltzers. Meltzer also contends there was never any discussion with a representative of Omni regarding any obligation on her part with respect to recording the satisfaction of mortgage held by GMAC. For the purposes of this motion, the Court will assume that Meltzer's versions of what transpired at the closing are correct and that she had no understanding or agreement with Weinreb who was not at the closing but without whose consent it would not have gone forward. As a result there is no longer an issue of fact as to what Meltzer agreed to or did not agree to.

In further support of its motion for summary judgment, and not refuted by the plaintiffs, are the following facts: Robin E. Nackman, Esq., who represented attorney Meltzer at every aspect of the closing, is a member of the firm of Bernstein Nackman & Feinberg LLP and "has been involved in all aspects of class action litigation including antitrust and consumer fraud matters involving defendants such as Toyota Motors, USA, Bridgestone/Firestone Tires and Indy Mac Bank." Ms. Nackman was aware of the payoff

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letter from GMAC that included an entry showing GMAC charged \$61.50 for a recording fee for the satisfaction. Ms. Nackman also paid \$95.00 to Omni to record the satisfaction. According to Ms. Nackman's resumé, one of her firm's primary areas of practice is "class actions challenging title companies' practice of collecting fees for filing services that the firms did not perform" (Exhibit W, pg. 1, Motion for Summary Judgment). Defendant opines that "Ms. Nackman was probably in the best position to advise her clients with respect to title companies charging fees for services they would not perform" (Weinreb Affidavit in Support ¶ 29). Under the unique circumstances including the prior correspondence between attorney Meltzer and Weinreb, Ms. Nackman should have made her position clear at the closing. (Compare Gimbel Brothers, Inc. v Brooks Shopping Centers, Inc., 118 AD2d 532).

Plaintiffs have created feigned issues of fact. This Court will not go so far as to agree with defendants that the entire scenario was a "set up" to create a class action litigation where none exists.

As learned counsel for plaintiffs acknowledges, this court's inquiry should be focused on "the conduct of the defendant rather than that of the individual plaintiffs, making it particularly susceptible to common, generalized proof." (Schwab v Philip Morris USA Inc., 449 F.Supp.2d 992). This Court has examined the circumstances preceding the closing, and at the closing, in light of applicable New York law, as well as custom and usage in real estate closings in New York and finds no fraud, overreaching or wrongdoing on the part of the defendant in the context of the within real estate closing. There was no contractual relationship between the plaintiffs and the defendant. Omni was engaged by the buyers to insure marketable title after the closing. (See Friedman, Milton R. Contracts and Conveyances of Real Property, Sixth Edition, 1998, Vol. 1, §§ 3.1, 3.11; Vol. 2, §§ 6.2, 11.1, 11.2, 11.15).

Defendant's motion for summary judgment dismissing the complaint is **granted**; the defendant shall forward a check in the sum of \$95.00 payable to the order of the plaintiffs.

The determination to grant class action certification rests in the sound discretion of the trial court. (See Small v Lorillard Tobacco Co., 94 NY2d 43). What should have been a run-of-the-mill real estate closing has been turned into a vehicle to create a putative class action. Rather than engage in burdensome litigation in the first instance,

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attorneys Meltzer and Nackman could have at the very least sent a perfunctory letter to Omni immediately after October 2006, advising defendant that the mortgage had been recorded, and asking for a return of the \$95.00; then had the defendant refused to comply, commence litigation. The unique circumstances preceding the closing, and surrounding the closing, including, but not limited to counsel representing Attorney Meltzer at the closing, predominate over those questions of law or fact which might be common to the putative class. (See Zehnder v Ginsburg & Ginsburg, 254 AD2d 284; Karlin v IVF America, Inc., 239 AD2d 562).

Motion by the plaintiffs for class certification is **denied**.

Motion by the defendant to disqualify the firm of Bernstein Nackman & Feinberg LLP from representing the plaintiffs in this action is **moot**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated         JUN 10 2009        



*Stephen Bucaria*  
 XXX J.S.C.

**ENTERED**  
 JUN 11 2009  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE