

360 W. 11th LLC v AGG Credit Co. II, LLC

2009 NY Slip Op 31883(U)

August 20, 2009

Supreme Court, New York County

Docket Number: 600141/07

Judge: Eileen Bransten

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.

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

PRESENT: MON. EILEEN BRANSTEN

PART 3

Justice

Index Number : 600141/2007
 360 WEST 11TH LLC
 VS.
 ACG CREDIT COMPANY
 SEQUENCE NUMBER : 005
 AMEND SUPPLEMENT PLEADINGS

INDEX NO. 600141/07
 MOTION DATE 3/18/09
 MOTION SEQ. NO. 005
 MOTION CAL. NO. _____

this motion to/for leave to amend

PAPERS NUMBERED

1
2
3

counter claim

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

FILED
 AUG 21 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

RECEIVED
 AUG 21 2009
 JAS. McLEOD COUNTY CLERK OFFICE
 NYS SUPREME COURT - CIVIL

WLL

Dated: 8-20-09

Eileen Bransten
MON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

-----X
360 WEST 11TH STREET LLC and
360 DEVELOPMENT CORP.,

Plaintiffs,

-against-

ACG CREDIT COMPANY II, LLC,
Defendant.

Index No.: 600141/07
Motion Date: 3/18/09
Motion Sequence No.: 005

-----X
ACG CREDIT COMPANY II, LLC,
Counterclaim Plaintiff,

-against-

360 WEST 11TH STREET LLC and
360 DEVELOPMENT CORP.,
Counterclaim Defendants.

-----X
ACG FINANCE COMPANY, LLC, as successor in interest to
ACG CREDIT COMPANY II, LLC
Third-Party Plaintiff,

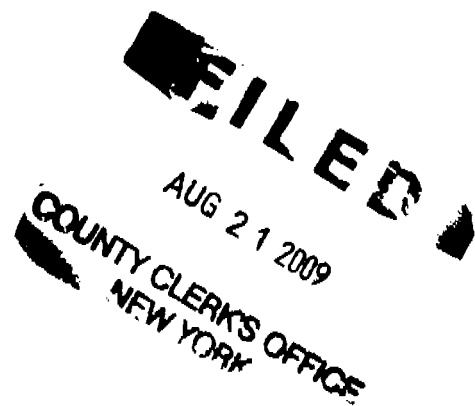
-against-

JULIAN SCHNABEL,
Third-Party Defendant.

-----X

PRESENT: EILEEN BRANSTEN, J:¹

Defendant, counterclaim-plaintiff, and third-party plaintiff ACG Finance Company, LLC, as successor in interest to ACG Credit Company II, LLC, (“ACG”) moves pursuant to CPLR 3025(b) for leave to serve an amended answer that includes a new counterclaim alleging fraud. Plaintiffs and counterclaim defendants 360 West 11th Street LLC and 360



¹ The court thanks Rebecca Mitchell for her valuable assistance with this Decision and Order.

Development Corp. (“360”) and third-party defendant Julian Schnabel (collectively, “Plaintiffs”), oppose the motion.

BACKGROUND

On February 10, 2006, Plaintiffs and ACG entered into a loan agreement whereby ACG loaned Plaintiffs \$8,000,000 and “took a first priority mortgage on property located at 360 West 11th Street [“Property”]” (Defendant’s Memo in Support [“Def. Mem”] at 1). The loan agreement stated that the “[b]orrower shall use the proceeds of the Loan to . . . refinance or repay and discharge any existing loans related to the Property,” (West Affirmation [“West Aff”], Exhibit A₂² at 14, §2.1.4). The loan agreement also provided for “permitted encumbrances,” which were defined as, among other things,

“(b) all Liens, encumbrances and other matters disclosed in the Title Insurance Policy . . . and (d) such other title and survey exceptions as Lender has approved or may approve in writing in Lender’s reasonable discretion, which Permitted Encumbrances in the aggregate do not materially adversely affect the value or use of the Property or Borrower’s ability to repay the Loan”

(*id.* at 10).

At the end of 2006, ACG declared two defaults under the loan (March 12, 2009 Transcript [“March Tr”] at 25; *see also* Def. Mem at 1). Plaintiffs, in the meantime, were

² The West Affirmation includes two exhibits marked with the letter A. For clarity, the court will refer to the first exhibit as A₁ and the second exhibit as A₂.

seeking a loan for construction at the Property and obtained financing from Commerce Bank (March Tr at 23).

360 then “[o]n or about January 16, 2007, . . . commenced this action by Order to Show Cause seeking, among other things, a temporary restraining order and preliminary injunction directing ACG to provide 360 with (i) a payoff letter on the Loan, and (ii) an assignment of ACG’s first priority mortgage so that 360 could refinance the Loan with Commerce Bank” (Def. Mem at 2).

This court (Moskowitz, J.) granted “a temporary restraining order (i) directing ACG to immediately provide plaintiffs with a payoff letter stating the amount owed to ACG under the Loan with plaintiffs; (ii) directing ACG to provide plaintiffs’ new lender, Commerce Bank, with an assignment of its mortgage, thereby releasing its lien on the Property and allowing the refinancing to move forward; and (iii) requiring ACG to accept the amount of monies claimed to be owed to it, as provided in its payoff letter, less any penalties sought therein by ACG as a result of plaintiffs’ alleged and disputed defaults under the Loan Agreement” (Plaintiffs’ Memo in Opposition [“Opp”] at 4). ACG responded and “asserted six counterclaims against 360 for breach of the Loan Agreement” (Def. Mem at 2).

ACG maintains that, at the time the Loan Agreement was signed, only one permitted encumbrance was disclosed in the Title Insurance Policy in the amount of \$786,000 (Def. Mem at 1). ACG claims that in addition to the \$786,000 mortgage, Plaintiffs also had a \$1.1

million home equity mortgage that was not disclosed or paid off at the closing of the loan (*id.*). Plaintiffs counter that the loan was disclosed (March Tr at 29).

In March 2007, ACG moved for summary judgment on its counterclaims (Def. Mem at 2). The motion was denied (*id.* at 7).

ACG now claims that through discovery from Telesis--the company involved with the development process at the Property--it uncovered misconduct by 360 regarding the \$1.1 million home equity mortgage (*id.* at 4). It seeks leave to amend its counterclaims to assert that 360 committed fraud and misrepresentation arising from its intentional failure to disclose the encumbrance or pay it off at closing (*id.* at 7-8).

In support of its motion, ACG submits the affirmation of its attorney Mathew B. West with twelve exhibits. The exhibits include discovery response e-mail correspondence between 360 and Telesis regarding the \$1.1 million home equity mortgage, documents from HSBC granting the \$1.1 million home equity mortgage on the Property in March 2003, documents from the Office of the City Register recording the \$1.1 million home equity mortgage in June 2006, e-mail correspondence from Telesis' general counsel regarding final payment from 360 to Telesis under a settlement agreement upon the signing of an affidavit from Telesis' president, a bank statement showing an incoming wire transfer to Telesis from 360 the day that the affidavit was signed, as well as an edited and final draft of the affidavit

from the president of Telesis. Plaintiffs oppose the motion, urging that an affirmation by an attorney without personal knowledge of the facts is insufficient (Opp at 7).

Plaintiffs oppose the motion and request that “scandalous material” be stricken from ACG’s proposed amended counterclaim.

ANALYSIS

CPLR 3025(b) provides that a party may amend a “pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances” (CPLR 3025 [b]). “The party opposing the motion to amend . . . must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient” (*Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). In the absence of prejudice or unfair surprise, leave to amend is to be granted freely (*id.* at 372).

At the outset, Plaintiffs do not demonstrate that they would be prejudiced in the slightest by the amendment. In fact, the parties have been permitted extra time to conduct additional discovery.

ACG's moving papers, moreover, are sufficient to support its proposed counterclaim. The discovery responses and other materials attached to Mr. West's affirmation sufficiently demonstrate the merits for the purposes of simply amending the answer (*Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 [1st Dept 2009]; *see also Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 616 [1st Dept 2009] [that "supporting proof was placed before the court by way of an attorney's affidavit annexing . . . deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant(s') right to summary judgment"].

Plaintiffs also argue that ACG's allegations lack the requisite particularity.

To maintain a cause of action for fraud, a party "must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages. Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings" (*Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993] [internal citations omitted]; *see also Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

"It is almost impossible to state in detail the circumstances constituting a fraud where those circumstances are peculiarly within the knowledge of the party against whom the defense is being asserted" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]).

“The language of CPLR 3016(b) merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice. . . . The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is, of course, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof” (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97–98 [1st Dept 2003] [internal citations omitted]).

ACG maintains that 360 learned in December 2005 that the \$1.1 million home equity mortgage would not show on the Title Insurance policy due to a recording error (Def. Mem at 3). It further alleges that 360 made the decision “not to identify the \$1.1 Million Home Equity Mortgage as a Permitted Encumbrance or pay it off at Closing” (*id.*) and that “[t]hese misrepresentations and omissions by 360 substantially influenced ACG’s decision to enter into the Loan Agreement. ACG never would have provided the Loan had it known that 360’s representations were false or that 360 had omitted to state material facts with respect to the Property” (West Aff, Exhibit A₁ at 17, ¶ 110). ACG also alleges damages “in the form of the Loan and the deteriorated loss protection in the Loan Agreement . . . that will be proven at trial” (*id.* at 18, ¶ 112).

Several of the exhibits ACG attaches to its affirmation contain e-mails between 360’s counsel and executives at Telesis. In the first attached e-mail, 360’s attorney states that “the mortgage is apparently not recorded and not showing up as record,” but that despite this fact, 360 “will need to pay the outstanding balance with the proceeds of the loan” (*id.*, Exhibit B;

see also id., Exhibit A₁ at 13, ¶ 91). A later e-mail between 360’s senior executive and Telesis then states that

“ACG does not require that mortgage to be paid off if it’s not on 360 W11. David pointed [sic] that we could not pay it for the time being and have the benefit of that money for use on the project . . . The HSBC interest is something like 5.5% while the ACG rate is approx. 11%. We needn’t correct HSBC’s error – they’ll figure it out themselves perhaps”

(*id.*, Exhibit D; *see also id.*, Exhibit A₁ at 14, ¶ 93).

ACG’s allegations coupled with these e-mails give Plaintiffs notice as to the substance of ACG’s proposed additional counterclaim while providing evidentiary support for many of the allegations contained therein.

Plaintiffs’ argument that ACG’s “pleading fails to allege that ACG sustained any injury whatsoever as a result of the making of this loan” (Opp at 12) is unavailing. ACG’s proposed amended counterclaim sets forth that

“ACG has suffered harm in the form of the Loan and the deteriorated loss protection in the Loan Agreement, damages that will be proven at trial. Moreover, 360’s continuing scheme and misrepresentations to ACG (and to the Court) have caused and will continue to cause ACG damages in expenses, costs and legal fees”

(West Aff, Exhibit A₁ at 18, ¶ 112). ACG also alleges that it is “entitled to recover punitive damages” (*id.* at ¶ 113). These allegations are sufficient for purposes of stating a fraud claim

(*see Isman v Loring*, 130 AD 845, 849 [1st Dept 1909]).³

³ Plaintiffs do not oppose the motion to amend on the ground that the proposed fraud counterclaim is duplicative of the breach of contract counterclaim.

ACG's motion to amend is therefore granted and Plaintiffs can conduct discovery related to the counterclaim.

Finally, Plaintiffs argue that "numerous paragraphs of, and exhibits to, ACG's Proposed Pleading contain scandalous matter that is both prejudicial and not necessary to the assertion of the fraud claim ACG attempts to advance therein" (Opp at 15). Plaintiffs state that "these scurrilous allegations are intended to be prejudicial to both plaintiffs and Telesis, and, if not stricken, may be used to prejudice the jury should these pleadings be allowed to be submitted in any trial of this action" (*id.*). Plaintiffs do not make this request by motion or cross-motion, but rather indicate that "[t]he Court has the power under CPLR Section 3024(b) to 'strike any scandalous or prejudicial matter unnecessarily inserted in a pleading'" (*id.* at 16).

CPLR 3024(b) sets forth that "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading" (CPLR 3024 [b] [emphasis added]). "In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" and "[g]enerally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024 (b)" (*Soumayah v Minnelli*, 41 AD3d 390, 392, 393 [1st Dept 2007]).

Though ACG's allegations may not constitute an "ideal pleading," the allegations are related to the elements of a fraud claim—that Plaintiffs misrepresented a material fact, knew that they were misrepresenting that fact, and sought to conceal it. Because Plaintiffs have not moved or cross-moved for the requested relief, and, in any event, at this stage it does not appear that the matter should be stricken, Plaintiffs' request is denied.

Accordingly, it is

ORDERED that ACG's motion for leave to amend the answer is GRANTED, and the amended pleading annexed to the moving papers as Exhibit A₁ shall be deemed served *nunc pro tunc* upon service of a copy of this Decision and Order with notice of entry thereof.

This constitutes the Decision and Order of the Court.

Dated: New York, New York

August 20, 2009

ENTER:



Hon. Eileen Bransten

FILED
AUG 21 2009
COUNTY CLERK'S OFFICE
NEW YORK