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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

FRANK DIZAZZO and VINCENZA DIZAZZO,

INDEX NO.: 000523/08

Plaintiff,

MOTION DATE:8-12-09
SUBMIT DATE:8-26-09
SEQ. NUMBER - 002

-against-

CAPITAL GAINS PLUS INC., a/k/a CAPITAL GAINS PLUS INC., STANISLAV SHVARTSMAN, a/k/a STANLEY SHVARTSMAN, HOME FUNDING GROUP, LLC, a/k/a HOME FUNDING GROUP, OLEG SHOLOMOV, STUART RINGE, ILONA MASHEYEV & ANGELA CAMPIONE

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 7-24-09.....1
Affirmation in Opposition, dated 8-7-09.....2
Affidavit (reply), dated 8-19-09.....3

This motion by the defendant Stuart Ringe pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as it is asserted against him is granted.

This is an action sounding in mortgage and real property fraud, in which the plaintiffs allege that they were defrauded into transferring ownership of their home to defendant Oleg

Sholomov. A related foreclosure action was begun against Sholomov and the plaintiffs herein by lender Washington Mutual Bank. That action continues after this Court relieved the Dizazzos of their default and permitted them to answer, upon consideration of the newly enacted Home Equity Theft Prevention Act.. *See, Washington Mut. Bank v Sholomov,* 20 Misc 3d 773 (Sup Ct Nassau County 2008).

On the present motion, defendant Stuart Ringe moves for summary judgment. Ringe was sued here because the plaintiffs alleged misconduct on his part as a notary. Specifically, they charge that he notarized signatures on certain key documents, including the forged signature of Frank Dizazzo on the contract of sale to Sholomov, which enabled the fraud allegedly perpetrated against them to proceed. Ringe contends he did not know the plaintiffs, played no role in the transfer of the home, and did not notarize any of the documents, even though his notary stamp undisputedly was used.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring

a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). In that regard, an attorney's affirmation that is not based upon personal knowledge is of no probative value or of evidentiary significance. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 (2005); *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455(2d Dept. 2006). Further, even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Stein v Security Mut. Ins. Co.*, 38 AD3d 977 (3d Dept. 2007); *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient defense to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town*

of Southhampton, 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

In reviewing the opposing proof, however, the Court need not ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987). Nor can a plaintiff stave off the motion by raising new theories of liability not previously pled. *Figueroa v Gallagher,* 20 AD3d 385 (2d Dept. 2005).

Applying these well-established standards to the case at bar, the Court finds that the movant has made a *prima facie* case for the relief requested. In his affidavit he states that prior to depositions in this case he had never met or heard of the plaintiffs. He denies notarizing any documents, and that his notary stamp was in a desk at a real estate office, surmising that someone who knew that the stamp was there had used it. In addition, he submits sections of plaintiffs' deposition transcripts. Frank Dizazzo acknowledged that the sole basis for suit against Ringe is that Dizazzo's signature was forged on a document and that Ringe's notary stamp was used when Dizazzo was not present. Vincenza Dizazzo testified to the same effect. She added that on May 22, 2007, she left the closing and had been taken to a real estate office by defendant Angela Campione where certain documents

apparently were being prepared or had been brought. There she met two men. One of them took a notary stamp out of a drawer and notarized a document. Ringe was not present when this occurred. She then returned to the location of the closing.

The foregoing is sufficient as *prima facie* proof that Ringe did not notarize any document, upon which the plaintiffs' case against him rests. *See, Eggleson v Trustees of General Electric Pension Trust,* 238 AD2d 871 (3d Dept. 1997). Although Ringe did not specifically plead forgery of his notarial signature in his answer, the Court will consider this evidence – indicating that any such signature over his notary stamp was not his, and thus is not a basis for liability – as plaintiffs claim no unfair surprise. *Ouziel v Baram,* 305 AD3d 564 (2d Dept. 2003). Accordingly, the burden shifts to the plaintiffs to demonstrate that issues of fact exist regarding Ringe's liability.

This they have failed to do. They submit the affirmation of their attorney, a portion of the affidavit of Vincenza Dizazzo (submitted on a separate motion to serve a supplemental summons and amended complaint, previously granted by this Court), the transcript of Ringe's testimony at a deposition, responses to a notice to admit, and other proof – including a copy of a deed from the Dizazzos to Sholomov bearing Ringe's notary stamp and a signature. However, at best this proof serves to place certain aspects of Ringe's prior statements at issue regarding his work history (including a business relationship with a Coldwell Banker real estate office), how many notary stamps he owned and whether one such stamp was present at that Coldwell Banker office.

Even viewing this proof in a manner most favorable to the plaintiffs, it does not act as a bar to summary judgment. None of it places in issue Ringe's fundamental assertions that

he was not present for the alleged fraudulent transaction, did not know the Dizazzos, and did not notarize any of the signatures. Indeed, a casual comparison of the notary's own signature found on the deed submitted by the plaintiffs and Ringe's signature on his affidavit and reply affidavit submitted on this motion reveals significant discrepancies. *See, Eggleson v Trustees of General Electric Pension Trust, supra,* at 871. Further, the plaintiffs present no handwriting expert, nor is there any indication that they even asked for an exemplar of Ringe's signature, which one might expect to be important to test Ringe's denial of his signature on any of the documents at issue. *See, Great Am. Ins. Co. v Giardino,* 71 AD2d 836 (4th Dept. 1979). There is also no affidavit from or other evidence regarding the role of Angela Campione, the only other party present at the time the documents were allegedly notarized in East Meadow the day of the closing. Accordingly, the Court finds that Ringe's key contentions that he was not at all involved in the events leading to the alleged fraud are uncontradicted.

Finally, the Court must reject the attempt of the plaintiffs to hold Ringe in this case by raising negligent conduct, as opposed to intentional action, on his part. Although a notary may be liable under a negligence theory if parties are injured by a negligent act (Executive Law § 135; *see, Marine Midland Bank v Stanton,* 147 Misc 2d 426 [Sup Ct Monroe County 1990]), the plaintiffs have advanced no authority, and the Court's own research has revealed none, where the mere failure to keep a notary stamp in a locked drawer or other secure location constitutes actionable negligence.

As in all negligence cases, there must be a duty to the plaintiffs and a breach of that duty, and a causal relationship between the breach and plaintiffs' damages. *See, e.g., Englehart v County of Orange,* 16 AD3d 369 (2d Dept. 2005). However, as noted above the testimony of Vincenza Dizazzo was that the stamp was taken from a drawer by a third party, not defendant Ringe, and the stamp was not simply lying on the desk top or some other easily seen location. There is no negligence on Ringe's part apparent, but rather only an unauthorized use of his stamp and signature. Under these circumstances, plaintiffs seek to hold Ringe liable for the unauthorized acts of a third party, who by using the stamp and signing as a notary would be committing the crime of forgery. *Strang v Westchester County Nat. Bank,* 235 NY 68, 71 (1923). Further, there is no hint in the record that any duty existed on Ringe's part to control the actions of whoever it was who used the stamp, which is a separate bar to liability. *See, Pulka v Edelman,* 40 NY2d 781, 783-784 (1976).

Therefore, even assuming that Ringe left his stamp in an unlocked drawer, there was no actionable negligence, either as "misconduct" under in the statute or under the common law. Plaintiffs' counsel statement that it is not known whether Ringe "*deliberately* left his stamp for others to use" (emphasis in original) is merely speculative, and is unsupported by any proof.

Accordingly, this motion should be granted.

The requests for sanctions are denied. Plaintiffs' request for an award of costs pursuant to CPLR 3123[c] is denied, as no cross motion was made.

Finally, as no party has addressed the counterclaims asserted by Ringe they are severed and continued.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 10, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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