SCAN

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: 45**

LELA NILES,

INDEX NO.: 17920/09

Plaintiff,

MOTION DATE:11-4-09
SUBMIT DATE:12-17-09
SEQ. NUMBER - 002

-against-

RESIDENTIAL FUNDING COMPANY, LLC, RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, LITTON LOAN SERVICING, LP, FREMONT INVESTMENT & LOAN, CORAL MORTGAGE BANKERS, SOPHIA WELSH, ABEVERLY MIDDLETON, CONSTANTINE GIANNAKOS, P.C., JONETTE NILES, DEAN MAXWELL, CHRISTOPHER WELSH, LYDIA TROTMAN, DONNA DISANTI, ROBERT PERROTS, EXPRESS ABSTRACT, MALEN & ASSOCIATES,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 10-13-09.....1
Supplemental Affirmation in Support, dated 12-3-09.....2
Affirmation in Opposition, dated 12-7-09.....3
Affirmation in Reply, dated 12-9-09.....4

This motion pursuant to CPLR 3212[a]1], [7] by the defendant Fremont Reorganizing Corporation, f/k/a Fremont Investment & Loan, for an order dismissing the complaint insofar as asserted against it, is granted.

In July of 2006, the plaintiff Lela Niles conveyed her single-family, New Cassel residence to codefendant Beverly Middeleton, who obtained a mortgage to facilitate the purchase from codefendant Fremont Investment & Loan ["Fremont"]).

Prior to the closing, the plaintiff's home was encumbered by a pre-existing, "reverse" mortgage taken by her deceased father, with a principal balance of some $200,000.00, which mortgage was then allegedly in "danger of going into foreclosure" (A. Cmplt., ¶¶ 51-52).

Although the plaintiff attempted to secure new financing to replace the reverse mortgage, she allegedly experienced difficulties in finding a loan (Zelenitz Aff., ¶¶ 8-9; A. Cmplt., ¶¶ 59-60).

At this point, the plaintiff's daughter – codefendant Jonette Niles – allegedly approached her mother and introduced the plaintiff to codefendants Sophia Welsh, a mortgage broker, and codefendant Beverly Middleton (A. Cmplt., ¶¶ 64-74; Niles Aff., ¶¶ 16-17). The plaintiff contends, *inter alia*, that the foregoing defendants promised to assist her in obtaining a new mortgage which would stave off any foreclosure proceeding, thereby ensuring that she would retain title to the property (A. Cmplt., ¶¶ 54-60; Niles Aff., ¶¶ 10-11; Zelenitz Aff., ¶¶ 9-10).

The documents attached to parties' submissions establish that in September of 2006, Middleton made application for a proposed, $330,000.00 loan. The loan application which was presented to codefendant Fremont Investment & Loan ["Freemont"] on Middleton's behalf by Coral Mortgage Bankers Corp (Freemont Exh., "D"). Freemont

later processed Middelton's application and agreed to provide the requested funding, as evidenced by an "adjustable rate note" and accompanying first mortgage on the subject premises, both dated September 1, 2006 (Def's Exhs., "E," "F").

The contract closing took place on September 1, 2006, during which the plaintiff executed a bargain and sale deed finally conveying the property to Middelton (Def's Exh., "G"). Several months later in March of 2007, Freemont sold the Middleton loan to GMAC Residential Funding Corporation and released the servicing rights to Chase Manhattan Funding Corporation (Manfro Aff., ¶¶ 11-12).

According to the plaintiff, however, she was never told that she was actually conveying title to her property and, in fact, she never intended to do so. The defendants never informed the plaintiff that she would be conveying title to the property as part of the transaction. Moreover, when she questioned the defendants about the documents they allegedly asked to sign, they assured her that would "everything worked out to her benefit" (Niles Aff., ¶¶ 10-11).

Despite the conveyance, Niles apparently remained in possession of the property and continued to reside there until she was served with eviction/hold-over papers in early 2009. The eviction papers reveal, among other things, that Middleton had defaulted on the Fremont loan at some point in 2007; that a foreclosure action had been thereafter been commenced and concluded; and that by deed dated November 18, 2008, the property had been purchased at a foreclosure sale by third-party purchaser Residential Funding Real Estate Holding, LLC ["Residential"] – the entity which had commenced the above-referenced eviction proceeding (Pltff's Exh., "G").

The plaintiff contends that she never received notice of any foreclosure proceeding and that any mail delivered to her home and addressed to Middleton was returned (Niles [Aug 28, 09] Aff., ¶¶ 15-18).

Upon receipt of the holdover papers, the plaintiff retained counsel and obtained a stay of the eviction (Niles [Aug 28, 09] Aff., ¶ 16).

Thereafter, by summons and complaint dated September 2009, the plaintiff commenced the within action alleging, in sum, that the defendants fraudulently induced her to convey title to the property by misrepresenting the nature of the transaction as a mortgage refinance.

More particularly, and according to the plaintiff, the various named defendants – including Fremont as the originator of the mortgage – affirmatively targeted her as a vulnerable homeowner and then perpetrated a so-called predatory mortgage "foreclosure rescue" scheme, *i.e.,* a scam by which the defendants falsely represented they would acquire funding to prevent a foreclosure, but instead, fraudulently induced the plaintiff to convey title to an alleged "straw" buyer (A. Cmplt., ¶¶ 52-60; 64-74, 94, 137, 145, 162; Niles Aff.,¶¶ 7-9).

The plaintiff also generally asserts that funds paid out at the closing were not disbursed solely to the plaintiff but paid by the "defendants" in general to other, unspecified individuals whom the plaintiff "does not know" – sums which allegedly constituted unearned fees and improper commissions (A. Cmplt.,¶¶62, 69; Zelenitz Aff., ¶ 7).

Based on the foregoing factual assertions, the plaintiff has interposed nine causes of action seeking, *inter alia*, money damages as well as both injunctive and declaratory relief voiding and/or reforming the subject mortgage and deed under State and Federal law.

Specifically, the plaintiff has asserted: (1) State law claims grounded upon unjust enrichment, breach of fiduciary duty and violation of General Business Law § 349; (2) declaratory judgment claims to quiet title, reform and/or rescind the Middleton deed and cancel the mortgage under RPAPL § 1501, and RPL § 320; and (3) federal claims based on the "Truth in Lending Act" ["TILA"](15 U.S.C. §1601, *et., seq*); the Real Estate Settlement Procedures Act ["RESPA"](12 USC § 2601 *et., seq*); and the "Home Ownership and Equity Protection Act of 1994" ["HOEPA"](15 USC § 1639).

In sum, the plaintiff alleges that the subject transaction was in effect, a *de facto* loan and/or equitable mortgage, thereby implicating federal disclosure requirements and regulations aimed at predatory lending practices and protecting, *inter alia,* credit consumers and home purchasers (A. Cmplt.,¶¶ 13-149; 171-182).

Co-defendant Freemont now moves for an order dismissing the complaint insofar entirety as interposed against it pursuant to CPLR 3211[a][1], [7]. The motion should be granted.

To "prevail on a CPLR 3211(a)(1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's allegations". *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 NY3d 582, 591 (2005); *Leon v.*

Martinez, 84 NY2d 83, 87-88 (1994); *Daub v. Future Tech Enterprise, Inc.*, 65 AD3d 1004 (2d Dept. 2009).

Although on a motion pursuant to CPLR 3211(a)(7), the court will accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord them "the benefit of every possible favorable inference" (*Sokoloff v. Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001] *see, People ex rel. Cuomo v. Coventry First LLC*, 13 NY3d 108 [2009]; *Leon v. Martinez, supra*), bare legal conclusions, "inherently incredible" assertions and/or claims "flatly contradicted by documentary evidence" are not entitled to favorable consideration and "should be dismissed". *Daub v. Future Tech Enterprise, Inc., supra, quoting from, Well v. Yeshiva Rambam*, 300 AD2d 580, 581 (2d Dept. 2002); *see also, Godfrey v. Spano*, 13 NY3d 358 (2009); *Maas v. Cornell Univ.*, 94 NY2d 87, 91-92 (1999); *Kaisman v. Hernandez*, 61 AD3d 565, 566 (1st Dept. 2009); *Morris v. Morris,* 306 AD2d 449, 451(2d Dept. 2003); *see also, Jacobs v. Haber*, 232 AD2d 372 (2d Dept. 1996); *Warner v. Levinson*, 188 AD2d 268 (1st Dept. 1992).

Preliminarily, it bears noting that the plaintiff's counsel has misconstrued the procedural import of the Fremont's application by: (1) erroneously characterizing Fremont's motion as one for summary judgment; and (2) then basing his opposition almost exclusively on the nonsubstantive contention that Fremont's motion is premature since discovery has not yet been completed (Zelenitz Opp. Aff.,¶¶ 2, 7-9; 14-15)(*see,* CPLR 3212[f]).

Turning to the first cause of action, the temporary and permanent injunctive relief sought therein is exclusively aimed at preserving the plaintiff's current, possessory status at the property and does not implicate or involve Fremont. Indeed, the operative allegations neither refer to any fraudulent scheme nor even mention Fremont as an involved actor, property owner, or wrongdoer against whom the injunctive relief sought would have any particular bearing or import (A. Cmplt., ¶¶ 88-97).

As to the second and third causes of action, which seek relief: (1) deeming the deed to be an equitable mortgage (RPL § 320); and/or (2) canceling the mortgage and the Middleton deed pursuant to RPAPL § 1501, Fremont contends without dispute that it long ago conveyed the mortgage and servicing rights to a third party, and that it is therefore not a proper party to either claim. The Court agrees.

In general, "[p]redecessors in title who claim no interest in the property are neither necessary nor proper parties to an action to quiet title". *McGahey v. Topping*, 255 AD2d 562, 563 (2d Dept. 1998); *Brothers v. Wall*, 84 AD2d 923, 925 (4th Dept. 1981) *see generally*, *Soscia v. Soscia*, 35 AD3d 841, 843 (2d Dept. 2006); *Ramunno v. Skydeck Corp.*, 30 AD3d 1074, 1075 (4th Dept. 2006).

Here, the plaintiff's claim, as currently pleaded, apparently seeks to reform or cancel a deed and/or a mortgage in which the movant Fremont no longer maintains any ownership or possessory interest. Under these circumstances, and in the absence of any opposition from the plaintiff, the Court agrees that the plaintiff's second and third causes of action to quiet title and/or cancel or reform the subject mortgage and deed should be dismissed as insofar as interposed against Fremont.

The plaintiff's fourth through ninth causes of action sound in breach of fiduciary duty, violation of General Business Law § 349, unjust enrichment, and also set forth claims based on stated federal statutes, including TILA, RESPA and HOEPA.

As to the fourth (fiduciary duty) cause of action, the Court of Appeals has recently observed that "'[a] fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation' ". *People ex rel. Cuomo v. Coventry First LLC*, 13 NY3d 108 (2009) *quoting from, EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 11 NY3d 146, 158 (2008); *Northeast General Corp. v. Wellington Advertising, Inc.*, 82 NY2d 158, 162 (1993);*Chasanoff v. Perlberg*, 19 AD3d 635, 636 (2d Dept. 2005).

However, an "agreement premised ... upon a conventional business relationship and establishing at arms length" the contractual relation does not create a fiduciary relationship and cannot be transformed into one "by mere allegation". *Surge Licensing, Inc. v. Copyright Promotions Ltd.*, 258 AD2d 257, 258 (1st Dept. 1999); *see, Friedman v. Anderson*, 23 AD3d 163, 166 (1st Dept. 2005); *Oursler v. Women's Interart Center, Inc.*, 170 AD2d 407, 408 (1st Dept. 1991)). Nor in general, will a fiduciary duty arise out of a contractual, arm's length debtor and creditor legal relationship between a borrower and a bank. *See, e.g., Fab Industries, Inc. v. BNY Financial Corp.*, 252 AD2d 367 (1st Dept. 1998); *see also, Harris v. Adejumo*, 36 AD3d 855, 856 (2d Dept. 2007); *Burger v. Singh*, 28 AD3d 695, 697 (2d Dept. 2006).

Here, the amended complaint contains only vaguely framed allegations relating to

the fiduciary duty claim, *i.e.,* claims which: (1) refer to the "defendants" collectively; and (2) and which then generically allege that each defendant owed the plaintiff a duty of care (A. Cmplt., ¶¶ 127-129). There are no allegations which particularize the misrepresentations or acts of wrongdoing or fraud supposedly committed by Fremont – with whom the plaintiff had no contractual relationship.

Nor does the complaint describe in any meaningful fashion, why the relationship between the plaintiff and Fremont in particular, would – or should – give rise to an enhanced, fiduciary-type obligation which the plaintiff claims existed. *See generally, Sentlowitz v. Cardinal Development, LLC*, 63 AD3d 1137, 1138-139 (2d Dept. 2009); *Rattenni v. Cerreta*, 285 AD2d 636, 637 (2d Dept. 2001). In fact, the amended complaint is uniformly cryptic with respect to identifying the particular acts of misconduct and fraud allegedly committed by – and attributable to – Fremont in furtherance of the allegedly scheme.

It is settled that "[w]here a plaintiff asserts a cause of action to recover damages for breach of fiduciary duty, 'the circumstances constituting the wrong shall be stated in detail'". *Daly v. Kochanowicz*, 67 AD3d 78, 884 (2d Dept. 2009) NYS2d 144, 153-155; 3016[b]; *Black Car & Livery Ins., Inc. v. H & W Brokerage, Inc.*, 28 AD3d 595, 596 (2d dept. 2006); *Moss v. Moche,* 160 AD2d 785 (2d Dept. 1990); *see also, Godfrey v. Spano, supra*, 13 NY3d 358 (2009). Similarly, "[a] claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009), "may not rely on sweeping references to acts by all or some of the defendants * * *' " (*Henry v. City of New York*, ___ F.Supp2d___, 2007

WL 1062519 at 5 [E.D.N.Y. 2007], *quoting from, Center Cadillac, Inc. v. Bank Leumi Trust Co.*, 808 F.Supp. 213, 230 [S.D.N.Y. 1992], *aff'd*, 99 F3d 401 [2nd Cir.1995]; *see also, Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84 AD2d 736 (1st Dept. 1981).

As to the seventh cause of action, although General Business Law § 349 generally prohibits "[d]eceptive acts and practices in the conduct of any business, trade or commerce" having "a broader impact on consumers at large" (*see generally, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20, 24 (1995); *Sentlowitz v. Cardinal Development, LLC, supra,* 63 AD3d at 1138-1139 (2d Dept. 2009); *Ballas v. Virgin Media, Inc* ., 60 AD3d 712 (2d Dept. 2009), the Court agrees that the amended complaint never identifies the specific, deceptive acts and practices allegedly committed by Fremont. *See generally, Vandermulen v. Fidelity Nat. Title Ins. Co.,* 63 AD3d 1044 (2d Dept. 2009); *Ho Jo Contracting Co., Inc. v. Schultz Ford, Inc.*, 148 AD2d 582, 584 (2d Dept. 1989).

Rather, the plaintiff's allegations relating to the foreclosure scheme are primarily based upon misstatements and misconduct committed by the various co-defendants who first approached the plaintiff and initially induced her to become involved in the disputed sale transaction, *i.e.,* Sophia Walsh, Middleton, and her own daughter – Jonette Niles (*see e.g.*, Niles [Aug 28, 2009] Aff., ¶¶ 8-10).

Further, the cryptic accusations made by counsel relative to the allegedly suspect disbursements made at the closing have been advanced without any elaboration as to precisely what wrongdoing the plaintiff is actually claiming or what specific wrongdoing Fremont committed, *i.e.*, counsel's oblique statement that Fremont's attorney disbursed

funds to unknown persons at closing whom the plaintiff did "not know" (A. Cmplt.,¶¶ 66, 69; Zelenitz Aff., ¶ 7).

Similarly, as to eighth (unjust enrichment/restitution) cause of action, it is settled that in general "a plaintiff must demonstrate that services were performed for the defendant resulting in its unjust enrichment" and it "is not enough that the defendant received a benefit from the activities of the plaintiff". *Kagan v K-Tel Entertainment,* 172 AD2d 375, 376 ((1st Dept. 1991); *Kapral's Tire Serv. v Aztek Tread Corp.*, 124 AD2d 1011, 1013 (4th Dept. 1986); *Bello v. New England Financial*, ___Misc3d___, 2004 WL 1305515 (Supreme Court, Nassau County 2004). Indeed,"'[t]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'". *Sperry v. Crompton Corp.*, 8 NY3d 204, 215 (2007), *quoting from*, *Paramount Film Distrib. Corp. v. State of New York*, 30 NY2d 415, 421 (1972).

Here, and apart from vaguely asserting that the "defendants," in a collective sense, unlawfully received unidentified money and benefits from the plaintiff not legally due and owing (A. Cmplt.,¶¶ 164-170), the complaint never articulates exactly what services the plaintiff allegedly performed, or how Fremont – in particular – misappropriated whatever funds the plaintiff is claiming Fremont wrongfully retained. *See*, *Bello v. New England Financial, supra*, 2004 WL 1305515 at 6-7 [Supreme Court, Nassau County 2004]).

Lastly, while the plaintiff has also advanced claims predicated upon Truth in Lending Act" ["TILA"](15 U.S.C. §1601, *et., seq*); the Real Estate Settlement Procedures

Act ["RESPA"](12 USC § 2601 *et., seq*); and the "Home Ownership and Equity Protection Act of 1994" ["HOEPA"](15 USC § 1639)(fifth, sixth and ninth causes of action), she has not addressed or responded to any of Fremont's dismissal arguments and claims relating to these specific causes of action.

Under these circumstances, and inasmuch as the plaintiff has failed to interpose any substantive objection or opposition to Fremont's arguments and claims, that branch of Fremont's motion which is to dismiss the fifth, sixth and ninth causes of action, should be granted. *See generally, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544 (1975); *SportsChannel Associates v. Sterling Mets, L.P.*, 25 AD3d 314, 315 (1st Dept. 2006).

Accordingly, it is,

ORDERED that the motion pursuant to CPLR 3212[a][1], [7] by the defendant Fremont Reorganizing Corporation, f/k/a Fremont Investment & Loan, for an order dismissing the complaint insofar as asserted against it, is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 15, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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