SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

X

JOUDETTE PETION and DELANGE PETION,

Plaintiffs,

Index No.: 010578/06
Motion Sequence...10, 11, 12, 14
Motion Date...02/03/10

-against

CLARA UWECHUE, MICHAEL JUMBO, DAVID M. GLICK, ESQ., MICHAEL TOPPIN, ESQ., CITY & GUILDS TITLE, AGENCY, INC., AND WMC MORTGAGE CORPORATION,

Defendants.

X

Papers Submitted:
Notice of Motion (#10).....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affidavits.....x
Notice of Motion (#11).....x
Affirmation in Opposition.....x
Notice of Cross-Motion (#12).....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Amended Notice of Cross-Motion (#14).....x
Affirmation in Opposition.....x
Affidavit in Opposition.....x
Affirmation in Opposition.....x
Affidavit in Reply.....x
Reply Affirmation.....x

Upon the foregoing papers, the Motion (Mot. Seq. No. 10) submitted by the

attorneys for the Defendant, WMC Mortgage Corporation ("WMC") seeking an order, pursuant to CPLR § 3212, granting summary judgment in favor of WMC dismissing the amended complaint and all cross-claims against it; the Motion (Mot. Seq. No. 11) submitted by the attorneys for the Defendant, Clara Uwechue, seeking an order, pursuant to CPLR § 3212, dismissing the amended complaint as to her; the Cross-motion (Mot. Seq. No. 12) submitted by the attorney for the Defendant, David Glick, Esq., seeking an order, pursuant to CPLR § 3212, dismissing the amended complaint and all cross-claims as to him; and the amended Notice of Cross-motion (Mot. Seq. No. 14) submitted by the attorney for the Defendant, Michael Toppin, Esq., seeking an order pursuant to CPLR § 3212 dismissing the amended complaint and all cross-claims as to him, are determined as hereinafter set forth.

In the within action, a day after a residential real estate closing, the attorney representing both the lending institution and the purchaser issued a stop payment order for the checks cut from the mortgage proceeds and used to fund the purchase price.

On June 5, 2006, the Plaintiffs, Joudete Petion ("Joudete") and Delange Petion ("Delange") executed and delivered a deed conveying the property located at 16 Winthrop Street, Hempstead, New York (the property) to the Defendant, Clara Uwechue ("Uwechue"). According to the complaint, the Defendant, Michael Jumbo ("Jumbo") was the fiancé of the Plaintiff, Joudete and the real estate broker who found the buyer for the property. The cause of action against the Defendant, Jumbo (first cause of action) alleges intentional misrepresentation and seeks damages in the amount of $500,000. There is no indication that

Jumbo was ever served, appeared or interposed an answer. The Defendant, David M. Glick ("Glick") was the attorney who represented the Plaintiffs in the underlying real estate transaction. The Defendant, Michael Toppin ("Toppin") was the attorney who represented the Defendant, Uwechue in the real estate transaction. Toppin also represented the Defendant, WMC at the closing. WMC was the lender who loaned the money to Uwechue to purchase the property. The Defendant, City of Guilds Title Agency ("City") was the title company engaged to insure title for Uwechue.

The cause of action against the Defendant, City (fifth cause of action) alleges that City took steps to record the deed to the property in violation of a prior court order. The Plaintiff seeks damages against City in an amount "less than $1,000,000." There is no indication that City was ever served, appeared or answered. This court has no jurisdiction over City.

In the cause of action against the Defendant, Uwechue (second cause of action), the Plaintiffs allege that a day after the closing Uwechue and her attorney put a stop payment order on checks from the mortgage proceeds given to the Plaintiff toward the purchase of the property and "that defendant Uwechue's failure to pay consideration for the purchase of the property was a material breach whereby the plaintiff had the right to rescind the contract." (¶ 56-57). The Plaintiffs also allege that Uwechue was responsible for the deed to the property to be recorded by the Defendant City in violation of a court order. The Defendant Uwechue interposed three counterclaims against the Plaintiffs. In her first

counterclaim, she alleges that at the closing the Plaintiffs executed a possession agreement that survived the closing of title and provided that the Defendant Uwechue would be entitled to compensation from the Plaintiffs for their possession of the property as of July 5, 2006 at a rate of $250.00 per day. Defendant Uwechue alleges that based on a $250.00 per day rate, the Plaintiffs are indebted to the Defendant in the sum of $296,750.00 computed from July 5, 2006 through October 4, 2009.

The second counterclaim alleges that the Plaintiffs represented they would satisfy the existing mortgage and all liens on the premises but failed to do so. The third counterclaim alleges that the Plaintiffs continue in wrongful possession of the property without the consent of the Defendant Uwechue. The Defendant Uwechue interposed two cross-claims against her former attorney, the Defendant Toppin. The first cross-claim sounds in legal malpractice as a result of his representation at the closing, i.e., failing to take the proper steps so that she purchased the property with clear title; and failing to insure the sellers would vacate in a timely fashion. The second cross-claim against Toppin alleges that Toppin did not exercise reasonable skill and diligence when, as WMC's attorney, he stopped payment on the checks that were to be used to pay the Plaintiffs' existing mortgage and the balance of the purchase price. Uwechue asserted a cross-claim against the Defendant, City. She alleges City failed to insure that the Plaintiffs prior lien was satisfied and refused to defend her in the within action. She claims entitlement to judgment from City for damages from City's alleged action and/or omissions in failing to insure good and marketable title.

Uwechue also asserted a cross-claim against the Defendant, WMC, alleging that she executed a note and mortgage at the closing on June 5, 2006, with WMC as the mortgagee, which mortgage was recorded and remains a lien against the property. She alleges the funds were never disbursed and are still in the possession of WMC or its agents.

In the cause of action (third cause of action) against the Defendant, Toppin, the Plaintiffs allege that Toppin's conduct in issuing a stop order payment deprived the Plaintiffs of the consideration due them from the sale of the property and constituted legal malpractice as to them. Toppin crossed-claimed against Co-Defendants Jumbo, Glick and City for indemnification.

The Plaintiffs' cause of action (fourth cause of action) against the Defendant Glick sounds in legal malpractice. Glick cross-claimed against Co-Defendants Jumbo, Uwechue, Toppin, City and WMC for indemnification. The Plaintiffs cause of action (sixth cause of action) against WMC alleges WMC, as principal, failed to control, direct and/or supervise its agent Toppin and "is liable to the plaintiffs for any losses caused by the intentional and/or reckless conduct of the bank attorney, defendant Topin [sic]." (¶ 82, 83). WMC cross-claimed against all co-defendants for indemnification.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Bhatti v Roche*, 140 A.D.2d 660. It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v Desmond*, 187 A.D.2d

797; *Gray v Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168. 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. *Brooks v Blue Cross of Northeastern New York, Inc.*, 190 A.D.2d 894.

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 N.Y.2d 1092. 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 N.Y.2d 851.

If a sufficient prima facie showing is made, however, the burden then shifts to the non-moving party. To defeat a motion fo 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 N.Y.2d 965; *Zuckerman v City of New York*, 49 N.Y.2d 557. 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 A.D.2d 513. Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defending party must do more than merely parrot the language of

the complaint 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; *Toth v Carver Street Associates*, 191 A.D.2d 631. If a party defends a motion by resort to CPLR § 3212(f), that is, the party has a defense sufficient 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 A.D.3d 519. Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southampton*, 29 A.D.3d 437.

The court must draw all reasonable inferences in favor of the nonmoving party. *Nichklas v Tedlen Realty Corp.*, 305 A.D.2d 385; *Rizzo v Lincoln Diner Corp.*, 215 A.D.2d 546. The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v Barrett*, 187 A.D.2d 553; *Barr v County of Albany*, 50 N.Y.2d 247, 254; *James v Albank*, 307 A.D.2d 1024; *Heller v Hicks Nurseries, Inc.*, 198 A.D.2d 330.

The Court need not, however, 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 A.D.2d 812; *Barclays Bank of N.Y. v Sokol*, 128 A.D.2d 492).

In support of its motion for summary judgment, WMC argues it owed no duty to the Plaintiffs, since they were the sellers in the transaction and the money was lent to the

Defendant, Uwechue, the borrower. In support of its motion to dismiss the cross-claim of Uwechue, WMC argues that Defendant Toppin did not act as an agent of WMC when he stopped payment on the checks after the closing. Further, WMC argues that Toppin had no express authority to stop payment on the checks that were distributed to the Plaintiff at the closing. Uwechue acknowledged that Toppin was WMC's agent "for the limited purpose of carrying out the closing instructions and for no other purpose. Lender (WMC) shall not be liable for any other acts of the settlement agent (Toppin) or any other party." See Closing Instructions at 6, Ex. A&B, WMC's reply affirmation. Toppin avers that "[t]he closing concluded without incident, as the Plaintiffs were paid in full and the proper closing documents were executed." WMC wired $440,428.72 to Toppin. WMC alleges Toppin did not consult with WMC regarding the stop payment request, nor did it authorize any stop order. WMC alleges it does not now have in its possession or control any money that it provided to the Defendant Toppin. (Taylor affidavit in support of WMC motion sworn to October 12, 2009).

"Essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Standard Funding Corp. v Lewitt*, 89 N.Y.2d 546, 551 [1997], quoting *Hallock v State of New York*, 64 N.Y.2d 224). (internal quotation marks omitted) See also *150 Beach 120th St. v Washington Brooklyn Limited Partnership,* 39 A.D.3d 722. WMC failed to make a prima facie showing of entitlement to

summary judgment. The Defendant Toppin acted as the attorney for the Defendant Uwechue, the borrower, as well as the closing agent for WMC, the lender. WMC has not established prima facie that Toppin lacked the apparent authority to issue a stop payment order on the checks. Without WMC, the underlying closing would not have taken place. The status of the mortgage documents that Uwechue executed at the closing is also a factor to consider in WMC's argument that its responsibility ended at the closing. Neither the seller nor the buyer have the proceeds of the loan in their possession. Both the Plaintiffs (complaint ¶ 44) and Uwechue (cross-claim ¶ 73) allege the WMC mortgage was recorded and remains a lien against the property despite the fact that the mortgage loan was never funded. The decision of Toppin, WMC's agent, to stop payment preserved the funds provided by WMC to Uwechue who he was also representing in the same transaction.

WMC's motion for summary judgment dismissing the complaint and all cross-claims is **DENIED**.

In support of her motion for summary judgment, the Defendant Uwechue refers to the fact that the Plaintiffs came to the closing without enough funds to pay off their existing mortgage. The Plaintiffs' attorney at the closing, the Defendant Glick, came to the closing without a pay-off letter from OCWEN Loan Servicing LLC ("OCWEN") which held the existing mortgage on the property. At the closing, Adewale Akingkoye ("Akingboye"), the title closer, telephoned for a pay-off figure. Based on the title closer's conversation with OCWEN, a pay-off check was issued in the sum of $333,568.34. The Plaintiffs signed a

"Mortgage Pay-Off Indemnity Agreement" requiring them to be responsible for any shortfall in the pay-off check. The day after the closing, it was determined the correct pay-off amount should have been $354,033.63. The $20,465.29 discrepancy was due to a pre-payment penalty that was omitted from the initial pay-off figure given to the closer. Apparently the Plaintiff was not aware of the pre-payment penalty prior to closing. Regardless, once the closing took place it was the Plaintiffs responsibility to make good for the $20,465.29. However, it was Uwechue, through her attorney, who stopped payment on the check. The Defendant, Toppin argues that the Defendant Glick instructed him to stop payment on the check. Glick denies requesting a stop order payment. There is no documentary evidence to support the Defendant Toppin's assertion regarding the stop payment order. Uwechue's attorney states that Glick gave a personal guarantee for any shortfall. (See Attorney's affirmation in support of Motion Seq. No. 11). However, there is no documentary evidence to support the assertion of a "personal guarantee from the plaintiffs' attorney." The Defendant Uwechue cannot expect to retain title to the property and receive a payment for Plaintiffs' occupancy after a stop payment order was issued. There are questions of fact as to whether Uwechue's attorney, when he stopped payment on the $333,568.38 check from his IOLA account subjected his client as well as himself to a cause of action for misrepresentation since that check represented the bulk of the consideration that Uwechue tendered to the Plaintiffs in exchange for the deed to the premises. Uwechue's motion for summary judgment is **DENIED**.

Uwechue also interposed a cross-claim against City . She alleges that "the title company accepted . . . employment and undertook to conduct various searches, resolve all open liens and encumbrances, and issue a title insurance policy on the property for which they were duly compensated" (¶ 53). It is further alleged that for valuable consideration, City issued a title insurance policy to the Defendant Uwechue and agreed to indemnify her as a result of any defects in or the marketability of the title. Uwechue is seeking damages for City's alleged negligent acts or omissions including legal fees for the defense and prosecution of this action. Not only does this Court not have jurisdiction over City, there is no proof before the Court that City ever issued a title insurance policy. Another inexplicable aspect of this action is why Uwechue's attorney did not bring a plenary declaratory judgment action directly against City to defend and indemnify her in the within action. See *Automobile Insurance Co. of Hartford v Cook,* 7 N.Y.3d 131. The Plaintiffs never moved out of the property. Yet with the exception of the counterclaims she is asserting in the within litigation, Uwechue never made any effort to have the Plaintiffs ejected or removed form the property. At her deposition, Uwechue testified that she did not wish to move into or take ownership of the property. Uwechue does not refute the Suffolk County Clerk's records that indicate several months after the subject closing on October 19, 2006, Uwechue bought another property at 3 Hirsch Avenue, Coram, New York.

In support of his motion for summary judgment, Glick states:

> 7. I can state with certainty based on my more than forty years of experience handling residential real estate closings that it is

> not unusual for a closing to go forward without a payoff letter. As long as the title closer is willing to proceed, as they invariably are due to the fact that a seller's agreement to indemnify the holder of the existing mortgage note for any shortfall in the mortgage payoff is a standard agreement included in nearly all residential real estate closings (indeed, such an indemnity agreement existed in the instant case), the absence of a payoff letter is no reason for any party to a transaction to abort the closing.
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> 8. At the June 5, 2006 closing, a representative of OCWEN told Akingboye over the telephone that the outstanding balance on the existing mortgage note was $333,568.38, and Toppin, who represented not only Uwechue, but represented Uwechue's mortgage lender, WMC Mortgage Corp. ("WMC"), as well , issued a check to OCWEN in that amount from his IOLA account. The closing proceeded and was ultimately concluded without incident. (Glick affirmation in support)

To establish a cause of action to recover damages for legal malpractice a plaintiff must prove "that the defendant-attorney failed to exercise that degree of care, skill and diligence commonly possessed by a member of the legal community," and "that the defendant-attorney's negligence was a proximate cause of damages." (See *DeNatale v Santangelo*, 65 A.D.3d 1006). To succeed on a motion for summary judgment, the defendant must establish that the plaintiffs are unable to prove at least one of the essential elements of the cause of action sounding in legal malpractice (see *Leone v Silver, LLP*, 62 A.D.3d 962; *Suydam v O'Neill,* 276 A.D.2d 549; *Ostriker v Taylor, Atkins & Ostrow*, 258 A.D.2d 572).

There is nothing in the law or facts to support the plaintiffs claim that Glick's actions at the closing constituted malpractice. It was the responsibility of the title closer to verify the payoff figures. The title company was hired by WMC's and Uwechue's

representative at the closing. Normally in the event of a shortfall in the payoff check, it would be the responsibility of the title company to pursue the seller based on the indemnification agreement signed by the plaintiff.

In opposition to Glick's motion, the Plaintiffs' attorney attempts to make much out of the fact that the sales price for the premises was increased from $390,000.00 to $440,000.00 at the request of Uwechue, who was able to secure a larger mortgage than she originally thought possible and who used a portion of the financing to cover repairs to the premises. The increase in the sales price did not result in any increase in the amount of the proceeds the Plaintiffs were due to receive. The Plaintiffs concede that the increased sale price did not decrease the amount they were due to receive, which remained the $390,000.00 figure less the amount required to pay off their outstanding mortgage and closing costs, as bargained for and agreed to when they signed the Contract of Sale. (See transcript of the Plaintiff Joudette Petion's deposition testimony, annexed to Glick's October 19, 2009 Notice of Cross-Motion, at pp. 140-143.)

The Plaintiffs assert that Glick was a stranger to them and foisted upon them by the Defendant Jumbo. However, Glick represented the Plaintiffs when they purchased the property for $299,980.00 two years earlier. Glick contends that the Plaintiffs were satisfied with the representation that Glick provided them in 2004, or they would not have permitted Glick to represent them when they entered the underlying contract to sell the property at a profit of 30% two years later.

Contrary to the allegations in the complaint, there is no documentary evidence to relate Glick's assertion that the Plaintiffs negotiated the sale of the property with Co-Defendant Uwechue prior to retaining Glick to represent them. The amendment to the contract price, together with the seller's concession and allowance for repairs, left the net sale price exactly as it was when the Plaintiff negotiated the sale price with Uwechue before retaining Glick. The Plaintiffs have failed to rebut Glick's prima facie showing that he did not commit legal malpractice during his representation of the Plaintiffs.

Accordingly, Defendant Glick's motion for summary judgment is **GRANTED**. The complaint and all cross-claims against Glick are **DISMISSED**.

The Plaintiffs' claims that Toppin's actions and/or inactions constitute "legal malpractice" as to the Plaintiffs are baseless and **DISMISSED** as a matter of law since there was no attorney-client relationship between the Plaintiffs and Toppin. See *Carmel v Lunney*, 70 N.Y.2d 169; *Rechberger v Scolaro, Shulman, Cohen, Fetter & Burstein, P.C.*, 45 A.D.3d 1453; *Goldfarb v Schwartz,* 26 A.D.3d 462.

The Plaintiffs allegations that Toppin failed to prevent the recording of the deed of the property in contempt of the court order "but aided and abetted in the said recording by turning a willful blind eye, all in contempt of the court order granting a preliminary injunction to the Plaintiff" is **DISMISSED**. The act of recording the deed was the responsibility of the title company. There is no documentary evidence that Toppin had anything to do with recording the deed.

As previously stated, there is not one iota of credible documentary evidence to substantiate Toppin's claim that Glick instructed Toppin to stop payment on the checks. Only Toppin had the authority to have stopped payment on the checks as they were written on his IOLA account. Toppin's stop payment order on the checks precipitated the chain of events that gave rise to the underlying causes of action including Uwechue's alleged breach of her contractual obligation to the Plaintiff. The balance of the relief requested by Toppin in his motion for summary judgment is **DENIED**.

WMC and Uwechue's motions for summary judgment dismissing the complaint and all cross-claims against them are **DENIED**.

Glick's motion for summary judgment dismissing the complaint and all cross-claims against him is **GRANTED**.

Except for the relief granted as previously discussed, the balance of Toppin's motion for summary judgment is **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 15, 2010

Hon. Randy Sue Marber, J.S.C.