

**Allen v Rafi**

2010 NY Slip Op 30916(U)

April 8, 2010

Supreme Court, Nassau County

Docket Number: 9420/09

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**  
*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

GERDA ALLEN and SHEILA GRIFFITHS,  
  
Plaintiffs,

ORIGINAL RETURN DATE: 11/12/09  
SUBMISSION DATE: 02/09/10  
Index No. 9420/09

-against-

JOHN RAFI; FRANK DeGRASSE; RUBY  
TAYLOR; MILTON TAYLOR; FREMONT  
INVESTMENT AND LOAN; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC.; TCIF BAR, LLC; TCIF  
REO GCM, LLC; and GMAC  
MORTGAGE, LLC,

MOTION SEQUENCE #1

Defendants.

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Defendants, Mortgage Electronic Registration Systems, Inc.; TCIF Bar, LLC; TCIF REO GCM, LLC; and GMAC Mortgage, LLC (the "GMAC Defendants"), move for an order pursuant to CPLR 3211(a)(3), (5) and (7) dismissing plaintiffs' complaint against the GMAC Defendants. Plaintiffs oppose the motion.

Plaintiffs commenced this action to recover damages allegedly sustained by them as a result of an "Equity Theft Scheme," which occurred when premises known as 84 Franklin Avenue, Malverne, New York 11565 (the "Subject Property"), owned by plaintiff, Gerda Allen, was sold to defendant, John Rafi ("Rafi"), to avoid foreclosure by the mortgagee. Plaintiffs submit that they have resided in the Subject Property since 1997.

It is alleged that the mortgage sought to be foreclosed was satisfied at the closing on September 23, 2005, by payment of the sum of approximately \$417,000.00 from the proceeds of two mortgages made by Rafi to defendant, Fremont Investment and Loan, totaling \$550,000.00. Plaintiffs received the sum of \$11,000.00 and claim that the balance, to wit: \$122,000.00, is

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“Unpaid Consideration.” On July 6, 2006, Mortgage Electronic Registration Systems, Inc, as nominee for Fremont Investment and Loan assigned the mortgage to TCIF Bar, LLC (Movant’s Ex. B).

“The precise issue before this Court is whether plaintiffs have standing to commence the action in the first instance. . . . Whether a party ‘seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when [properly] challenged, must be considered at the outset of any litigation’ (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769). Lack of standing is a legal impediment to bringing an action” (*Gilman v. Abagnale*, 235 AD2d 989, 990 [3d Dept. 1997]). The issue of standing in the instant matter has been properly raised in a pre-answer motion.

The GMAC Defendants claim that plaintiff has no standing with respect to the eleventh cause of action to sue them for violations of the Real Estate Settlement Procedure Act (“RESPA”) and the Truth in Lending Act (“TILA”). It is submitted that plaintiffs were not extended credit by the GMAC Defendants and, therefore, were not entitled to receive disclosure or notice under TILA and also that a claim cannot be asserted under RESPA as plaintiffs are not borrowers.

Plaintiffs do not refute the GMAC Defendants’ contention that they lack standing to assert the RESPA and TILA claims under the eleventh cause of action. Accordingly, the GMAC Defendants’ motion to dismiss the eleventh cause of action against them based upon lack of standing is granted.

It is alleged in the ninth cause of action that defendants “unlawfully exercised dominion and control over the Plaintiffs’ property, being the Unpaid Consideration” which “actions constitute conversion” (Compl., Movant’s Ex. A, ¶¶ 90, 91). The GMAC Defendants assert that this cause of action is untimely. “CPLR 214(3) provides a three-year statute of limitations for actions for conversion, which ‘normally runs from the date the conversion allegedly took place’ (*Matter of Rausman*, 50 AD3d 909 [2d Dept. 2008]). The GMAC Defendants submit that the alleged conversion took place on September 23, 2005, the date of the closing. This action was commenced on May 14, 2009, more than three years after the alleged conversion took place.

Plaintiffs allege in the twelfth cause of action that they “suffered extreme emotional, psychological and mental distress, and anxiety” (Compl., Movant’s Ex. A, ¶106). Plaintiffs do not refute that a claim for negligent infliction of emotional distress is also governed by a three-year statute of limitations. Accordingly, the GMAC Defendants’ motion to dismiss the ninth and twelfth causes of action against them as time barred is granted.

The GMAC Defendants submit that the fifth (material misrepresentations), sixth (conspiracy to fraudulently induce) and seventh (bar claim pursuant to Art. 15 of the RPAPL) causes of action should be dismissed as against them because they fail to plead a fraud claim with the requisite particularity.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court will “accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). “It is well settled that no independent tort of civil conspiracy is recognized in this State (citations omitted). Rather, the cause of action rests upon an underlying wrong, here a cause of action sounding in fraud (citations omitted)” (*Ferguson v. Meridian Distribution Servs., Inc.*, 155 AD2d 642 [2d Dept. 1989]).

It is submitted by the GMAC Defendants that although the allegations in the complaint may be sufficient with regard to the co-defendants, they cannot be attributed to the GMAC defendants. Plaintiffs make no claim that the GMAC Defendants made any fraudulent misrepresentations to them.

The fifth and sixth causes of action, even read in a light most favorable to plaintiffs, fail to satisfy the specificity and particularity requirements of CPLR 3013 and 3016(b). There are no factual allegations from which it can be inferred that the GMAC Defendants engaged in any fraudulent conduct or made any misrepresentations to plaintiffs. Under such circumstances, plaintiffs have failed to state a cause of action against the GMAC Defendants based upon fraud.

With respect to the claim pursuant to RPAPL Article 15, the GMAC Defendants claim that TCIF Bar, LLC, as assignee, is a bona fide encumbrancer for value and entitled to protection under Real Property Law § 266. Plaintiffs’ argument that “[a]n assignee of a mortgage, although a *bona fide* holder, takes the same subject to all defenses existing between the original parties (citations omitted)” is unavailing. Here, plaintiffs were not parties to the mortgage, and plaintiff, Sheila Griffiths, acknowledges in her affidavit that she executed documents as attorney-in-fact for her mother, plaintiff Gerda Allen, whereby the Subject Property was transferred to Rafi.

Accordingly, the GMAC Defendants’ motion to dismiss the fifth, sixth and seventh causes of action against them based upon failure to state a cause of action is granted.

The GMAC Defendants submit that the remaining causes of action for punitive damages against the GMAC Defendants, the eighth and thirteenth causes of action, must also be dismissed as they fail to allege conduct by the GMAC Defendants that rose to the level of willful or wanton negligence.

“Punitive damages are only available in limited circumstances where it is necessary to deter conduct which may be characterized as ‘a fraud evincing a ‘high degree of moral turpitude’ or ‘such wanton dishonesty as to imply a criminal indifference to civil obligations’ directed ‘at the public generally’ (citations omitted)” (*Varveris v. Hermitage Ins. Co.*, 24 AD3d 537 [2d Dept. 2005]). Here, as in *Varveris*, plaintiffs have failed to support their allegations that the conduct of the GMAC Defendants was willful and malicious or that the GMAC Defendants acted with malice, fraud, gross negligence and/or oppression “so as to imply a criminal indifference to civil obligations directed at the public generally” (*Id.*).

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Accordingly, the GMAC Defendants' motion to dismiss the eighth and thirteenth causes of action against them based upon failure to state a cause of action is granted.

Based upon all of the foregoing, the fifth, sixth, seventh, eighth, ninth, eleventh, twelfth and thirteenth causes of action are hereby dismissed as against the GMAC Defendants, and the caption of the action is hereby amended to read as follows:

"GERDA ALLEN and SHEILA GRIFFITHS,

Plaintiffs,

-against-

JOHN RAFI; FRANK DeGRASSE; RUBY TAYLOR; MILTON TAYLOR and FREMONT INVESTMENT AND LOAN,

Defendants. "

Absent a demand for a Preliminary Conference or a motion for a default judgment, this matter is deemed disposed for record keeping purposes.

This decision constitutes the order of the court.

Dated: 4-8-10

HON THOMAS P. PHELAN  
*THOMAS P. PHELAN*  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**

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