

**199-02 Linden Blvd. Realty, LLC v LibertyPointe
Bank**

2010 NY Slip Op 31757(U)

June 29, 2010

Supreme Court, Queens County

Docket Number: 29499/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

199-02 LINDEN BLVD. REALTY, LLC and
JEROME GREENBAUM,
Plaintiffs,

-against-

LIBERTYPOINTE BANK,
Defendant.

Index No. 29499/09

Motion
Date March 9, 2010

Motion
Cal. No. 41

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that the branch of the defendant's motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against defendants for failure to state a cause of action is decided as follows:

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***." (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187

AD2d 560 [2d Dept 1992])). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc., supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159). In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory." (1455 *Washington Ave. Assocs. v. Rose & Kiernan, supra*, 770-771). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint." (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]).

The first cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The first cause of action in the complaint sounds in violation of New York's Deceptive Practices Act (also known as New York General Business Law § 349). In *Stutman v. Chemical Bank*, 95 NY2d 24 [2000], the Court held:

A plaintiff under Section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act (see, *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25; see also, *Gaidon v Guardian Life Ins. Co.*, 94 NY2d 330, 344; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55-56). Whether a representation or an omission, the deceptive practice must be "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra*, at 26).

As plaintiff's complaint alleges all of the elements for violation of the statute, plaintiff has stated a caused of action under New York General Business Law § 349 (see ¶36-39 of plaintiff's Complaint).

The second cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The second

cause of action in the complaint sounds in negligence. To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, *Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992].) However, absent a duty of care, there is no breach and no liability. (Id.; see also, *Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]). In the instant case, there is no allegation in the complaint of the existence of a duty. As such, there is a failure to allege the elements of a cause of action for negligence, and this cause of action is dismissed.

The third cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The third cause of action in the complaint sounds in fraudulent inducement. "In order to sustain a cause of action for fraudulent inducement, plaintiffs must show 'misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" (*Shea v. Hambros PLC*, 244 AD2d 39 [1st Dept 1998][internal citations omitted]). Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong . . . in detail" (CPLR 3016[b]; *Megarix Furs v. Gimbel Bros.*, 172 AD2d 209, 210) (Id.). In the instant case, the allegations in the complaint are conclusory and unsupported by specific facts (see, CPLR 3016; *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 AD2d 608 [2d Dept 2002]). The allegations regarding fraud in the inducement are insufficient to support a cognizable legal claim, as the necessary elements of the claim have not been established. Accordingly, the third cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed.

The fourth cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The fourth cause of action in the complaint sounds in violation of New York Banking Law § 6-1. At the outset, the Court notes that New York Banking Law § 6-1 applies to "Home loans." A "Home loan" is defined by the statute in subsection (1)(e) as a "loan, including an open-end credit plan, other than a reverse mortgage transaction or a loan made or fully or partially guaranteed by the state of New York mortgage agency, in which:

(i) The principal amount of the loan at origination does not exceed the conforming loan size limit . . . for a comparable dwelling as established from time to time by the federal national

mortgage association;

(ii) The borrower is a natural person;

(iii) The debt is incurred by the borrower primarily for personal, family, or household purposes;

(iv) The loan is secured by a mortgage or deed of trust on real estate improved by a one to four family dwelling, or by a condominium unit, or by any certificate of stock or other evidence of ownership in, and a proprietary lease from, a corporation, partnership or other entity formed for the purpose of cooperative ownership of real estate, in either case used or occupied or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling; and

(v) The property is located in this state."

Under this cause of action, it is necessary that the borrower be a natural person (see, New York Banking Law § 6-1(1)(e)(ii)). Additionally, pursuant to New York Banking Law § 6-1(1)(e)(iv): "The loan is secured by a mortgage or deed or trust on real estate . . . improved by a one to four family dwelling . . . used or occupied, or intended to be used or occupied, wholly or partly, as the home or residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling." In the instant case, plaintiff has failed to allege the aforementioned requirements, inter alia, that plaintiff is a "natural person" and that the mortgage secures premises improved by a "one to four family dwelling" which is occupied by plaintiff as a "principal dwelling".

The fifth cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The fifth cause of action in the complaint sounds in violation of New York's Licensed Mortgage Bankers Law (New York Banking Law §§ 589-599). The purpose of New York State's licensing mortgage bankers "is to protect New York consumers seeking a residential mortgage loan and to ensure that the mortgage lending industry is operating fairly and honestly . . . free from deceptive . . . practices." In the instant case, plaintiff has failed to allege that plaintiff is a "consumer" and failed to allege that the loan that is being sought is a "residential mortgage loan." Additionally, 590-1(a) states that a "Mortgage loan" shall mean "a loan to a natural person made primarily for personal, family, or household use, primarily secured by either a mortgage on residential real

property or certificates of stock or other evidence of ownership interests in, and proprietary leases from, corporations or partnerships formed for the purpose of cooperative ownership of residential property." Plaintiff has failed to allege that the loan is to a natural person made primarily for personal, family, or household use. As plaintiff has failed to allege the necessary elements of the cause of action, the cause of action is dismissed.

The sixth cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The sixth cause of action in the complaint sounds in violation of Truth-In-Lending Act (15 USCS 1601 et seq.). The statute applies to consumers. Pursuant to 15 USCS 1602(h), "the adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services, which are the subject of the transaction are primarily for personal, family, or household purposes." The statute also applies to dwellings. A "dwelling" is defined as "a residential structure or mobile home which contains one to four family housing units, or individual units or condominiums or cooperatives." Plaintiff has failed to allege that it is a consumer within the meaning of the statute, in that it is a natural person (see, 15 USCS 1602[h]). Additionally, plaintiff has failed to allege that the mortgage relates to a one to four family housing unit, condominium, or cooperative (see, 15 USCS 1602[v]). As plaintiff has failed to allege the necessary elements of the cause of action, the cause of action is dismissed.

The seventh cause of action in the complaint against defendant LibertyPointe Bank is hereby dismissed. The seventh cause of action in the complaint sounds in violation of the Fair Debt Collection Practices Act (15 USC 1692). This Act is only applicable to *consumer* debt. A "consumer" is defined by the Act as "any natural person obligated or allegedly obligated to pay any debt." As the plaintiff has failed to allege the elements of being a natural person, this cause of action is dismissed.

Accordingly, plaintiff's Complaint is dismissed as to all causes of action except for the first cause of action.

That branch of defendant's motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. A defense is founded on documentary evidence ***." In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248).

The only cause of action that has not been dismissed pursuant to CPLR 3211(a)(7) is the first cause of action, sounding in violation of New York's Deceptive Practices Act. The documentary evidence is insufficient to dispose of the first cause of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the Mortgage, the Note, the Appraisal Report by LibertyPointe Bank, and the Contract of Sale are insufficient to dispose of the first cause of action.

This constitutes the decision and order of the Court.

Dated: June 29, 2010

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Howard G. Lane, J.S.C.