

**23 E. 39th St. Devs. LLC v JPMorgan Chase Bank**

2010 NY Slip Op 32126(U)

July 30, 2010

Sup Ct, NY County

Docket Number: 603703/09

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 603703/2009  
23 EAST 39TH STREET DEVELOPERS  
vs  
JP MORGAN CHASE BANK N.A.  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. 603703/09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_  
Motion to/for DISMISS

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1/1A  
2  
3

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>75</sup>

**FILED**  
AUG 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

Dated: 7-30-10

  
\_\_\_\_\_  
J.S.C.

**MARCY S. FRIEDMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_  
23 EAST 39<sup>TH</sup> STREET DEVELOPERS LLC,  
FARZANEH YEROUSHALMI, and BEHROUZ  
BENYAMINPOUR,

Index No.:603703/09

*Plaintiffs,*

- against -

DECISION/ORDER

JPMORGAN CHASE BANK, NATIONAL  
ASSOCIATION, as successor to WASHINGTON  
MUTUAL BANK, ALLEN GUTTERMAN, 23  
EAST 39<sup>TH</sup> STREET MANAGEMENT CORP.,  
JOSEPH J. BLAKE & ASSOCIATES, INC.,  
MARIE RIOS, "JOHN DOE," "ROBERT DOE"  
and "JANF DOE NO. 1 to 50," the last being  
fictitious names,

*Defendants.*

**FILED**  
AUG 03 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
x

This action arises out of plaintiffs' purchase of a \$10.4 million townhouse located at 23 East 39<sup>th</sup> Street in Manhattan. Plaintiffs sue for rescission of the purchase and mortgage agreements based on fraud and misrepresentation of the value of the property. By separate motions, JPMorgan Chase Bank, National Association, as successor to Washington Mutual Bank ("Chase") and Joseph J. Blake & Associates ("J.J. Blake") move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint based on documentary evidence and for failure to state a cause of action.<sup>1</sup>

\_\_\_\_\_  
<sup>1</sup>Although Chase moved to dismiss plaintiffs' original complaint (Chase's Motion, Ex. A), in its supplemental reply, Chase addresses the allegations in plaintiffs' amended complaint (Supp. Aff. of

The relevant facts are as follows: Plaintiffs purchased the townhouse pursuant to a five-year “lease back” agreement in which the sellers of the property agreed to rent the space from plaintiffs for \$700,000 annually with an option to terminate after one year. Although the \$7.25 million mortgage on the property was issued by Washington Mutual Bank (“Wamu”), Chase acquired the mortgage from the FDIC after the FDIC took over Wamu in late 2008. J.J. Blake prepared an appraisal of the property for Wamu. Within a few months after plaintiffs closed title, the sellers ceased paying rent to plaintiffs. Plaintiffs then defaulted on the mortgage and Chase commenced an action to foreclose on the property entitled JPMorgan Chase Bank, N.A. v 23 E. 39<sup>th</sup> St. Devs. LLC, et. al., (Sup Ct, New York County, Index No. 104639/09). By order in the foreclosure action dated February 11, 2010, this court granted Chase’s motion for summary judgment to foreclose, issued an order of reference to compute, and appointed a receiver to manage the property.

It is well settled that on a motion to dismiss addressed to the face of the pleading, “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs 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]. See 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1<sup>st</sup> Dept 2003].

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Joseph Muccia, ¶ 3). Accordingly, the court will consider Chase’s motion as to plaintiffs’ amended complaint. (See Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35, 38 [1<sup>st</sup> Dept 1998].)

[\* 4]

See also Water St. Leaschold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1<sup>st</sup> Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

In order to plead a claim for fraud, plaintiff must allege “a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages.” (Megarix Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, 213 [1<sup>st</sup> Dept 1991] [emphasis omitted].) Moreover, “each element must be pleaded with particularity” and “the circumstances constituting the wrong shall be stated in detail.” (LaSalle Nat. Bank v Ernst & Young L.L.P., 285 AD2d 101, 109 [1<sup>st</sup> Dept 2001] [internal citation omitted]; CPLR 3016[b].) A cause of action seeking rescission based on fraud must be plead “with the specificity required by CPLR 3016(b)” (Accurate Copy Serv. of Am. v Fisk Bldg. Assocs. L.L.C., 72 AD3d 456 [1<sup>st</sup> Dept 2010]), and “is to be invoked only when there is lacking complete and adequate remedy at law.” (Rudman v Cowels Communications, Inc., 30 NY2d 1, 13 [1972].)

Plaintiffs’ sole cause of action against Chase is to rescind the mortgage, mortgage note, and guarantee “[d]ue to the inflated appraised value and/or the 5-year lease.” (Ps.’ Amended Compl., Fourth Cause of Action, ¶ 61 [Ex. 3 to Supp. Aff. of Joseph Muccia].) However, plaintiffs fail to allege with any particularity that Chase engaged in any fraudulent acts that would provide a basis for rescission of the mortgage. Further, plaintiffs do not claim that, when Wamu issued the mortgage to them, Wamu (as opposed to the seller) made misrepresentations on which

they relied that would constitute a fraud. Even if plaintiffs adequately plead a cause of action that would permit them to rescind the mortgage agreement, the specific language of the Purchase and Assumption Agreement between the FDIC and Chase states that Chase specifically does not assume “any liability associated with borrower claims for payment of or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower . . . , related in any way to any loan or commitment to lend made by [Wamu] prior to failure . . . , or otherwise arising in connection with [Wamu’s] lending or loan purchase activities.” (Muccia Aff., Ex. 11, ¶ 2.5.) Thus, pursuant to the express terms of the Purchase and Assumption Agreement, any potential liability by Wamu to plaintiffs was not transferred to Chase. (See Cassese v Washington Mut., Inc., 2008 WL 7022845, \*3 [ED NY 2008].) Accordingly, plaintiffs’ fourth cause of action will be dismissed.

Plaintiffs’ sole cause of action against J.J. Blake appears to allege fraudulent misrepresentation. Specifically, plaintiffs claim that JJBlake “inflated the value of the property so WAMU will underwrite the Mortgage,” “exaggerated the square footage of the Property,” and “knew that there was no 5-year lease with one-year option to renew.” (Ps.’ Amended Compl., Fifth Cause of Action, ¶¶ 38a, 38f, 38g.) Plaintiffs fail, however, to allege any facts demonstrating that they relied on any of the alleged misrepresentations in the appraisal when they purchased the property. Moreover, J.J. Blake conclusively shows, based on the affidavit of plaintiff Behrouz Benyaminpour, that plaintiffs did not receive the appraisal until after they closed on the property. (Aff. of Jonathan Bruno, Ex. H., ¶ 26.) Contrary to plaintiffs’ apparent suggestion, this large-scale commercial transaction does not implicate a consumer fraud. Plaintiffs’ fifth cause of action against J.J. Blake will accordingly be dismissed.

In light of plaintiffs’ complete failure to set forth any misrepresentations to them by Chase

or J.J. Blake, or otherwise to adequately plead causes of action against Chase and J.J. Blake, plaintiffs' claimed need for discovery is not a basis for denying the instant motions.

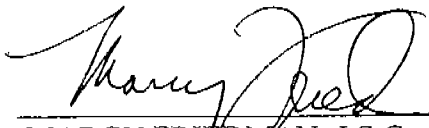
It is hereby ORDERED that the motions of JPMorgan Chase Bank, National Association, as successor to Washington Mutual Bank, and Joseph J. Blake & Associates to dismiss the complaint is granted to the extent of dismissing the complaint as against them; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that the remaining parties are directed to appear in Part 57 (60 Centre Street, Room 335) for a preliminary conference on Thursday, September 30, 2010, at 11:00 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 30, 2010

  
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MARCY FRIEDMAN, J.S.C.

**FILED**  
AUG 3 2010  
NEW YORK  
COUNTY CLERK'S OFFICE