

Scott v Fields

2010 NY Slip Op 32650(U)

September 14, 2010

Supreme Court, Nassau County

Docket Number: 5626/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

GRACE MARJORIE SCOTT,

Plaintiff(s),

Index No. 5626/09

-against-

**Motion Submitted: 6/15/10
Motion Sequence: 009**

**SHERRAN FIELDS, MOSES CRAWFORD, KECIA
J. WEAVER, ESQ., KECIA J. WEAVER, P.C.,
STELLA AZIE, ESQ., STELLA AZIE, P.C.,
SELECT DEVELOPMENT GROUP, LLC,
FORECLOSURE OPTIONS INC., C&C HOMES
INC., WALD FINANCIAL SERVICES, INC.,
JOSEPH WALD,**

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendant C&C Homes, Inc. ("C&C") moves this Court for an Order dismissing this action pursuant to CPLR §§ 3211(a) (1) and (a)(7) on the grounds that there is a defense based upon documentary evidence, and that the pleading fails to state a cause of action. Plaintiff opposes the requested relief and cross-moves this Court for a stay of any

adjudication of C&C's motion pending appeal of this Court's May 3, 2010 decision, pursuant to CPLR § 5519(c). C&C opposes plaintiff's request for a stay. Defendant Fields opposes plaintiff's motion for a stay.

The Court relies on the facts and surrounding circumstances pertaining to this action as they were fully set forth in this Court's decision dated May 3, 2010. In that earlier decision, rendered upon the motions of defendants Azie and Weaver, the Court dismissed all six causes of action against the Azie and Weaver defendants. Plaintiff filed a Notice of Appeal with the Appellate Division, Second Department on or about May 21, 2010.

The Court denies plaintiff's application for a stay of the proceedings, including a stay of the determination of C&C's motion pending appeal of this Court's May 3, 2010 Order.

The facts and circumstances of this case do not entitle plaintiff to an automatic stay pursuant to CPLR § 5519(a). This Court's Order dated May 3, 2010 does not direct the payment of a sum of money, the assignment or delivery of personal property, the execution of any instrument, or the conveyance of real property. It is in the Court's sound discretion whether or not to grant a stay under the present circumstances, based on the presumptive merits of the underlying issues (*CPLR § 5519 [c]*).

As more fully set forth below, and based on its earlier decision, this Court finds that the merits of plaintiff's claims set forth in her complaint are lacking in merit. Thus, the Court will not stay adjudication of C&C's motion pending appeal of this Court's earlier decision.

In reaching its earlier decision, the Court held that, with respect to the first cause of action alleging conversion, plaintiff's claim must be dismissed because such a claim will not lie where it is predicated upon the loss of real property, as is alleged here (*Garelick v. Carmel*, 141 A.D.2d 501, 529 N.Y.S.2d 126 (2d Dept., 1988); *Boll v. Town of Kenderhook*, 99 A.D.2d 898, 472 N.Y.S.2d 496 (3d Dept., 1984); *Roemer and Featherstonhaugh, P. C. v. Featherstonhaugh*, 267 A.D.2d 697, 699 N.Y.S.2d 603 [3d Dept., 1999]). As such, plaintiff's cause of action will not lie as to C&C either, and it should be dismissed pursuant to CPLR §3211(a)(7).¹

With respect to plaintiff's second cause of action sounding in civil conspiracy, the

¹C&C's motion brought pursuant to CPLR § 3211(a)(7) is timely made as a motion made pursuant to that subdivision "may be made at any subsequent time" (*CPLR § 3211[ef]*). Although C&C also purports to make its dismissal motion pursuant to CPLR § 3211(a)(1), it does not appear to have made any argument with respect to that subdivision. In any event, a motion brought pursuant to that subdivision is untimely as C&C has already interposed an answer.

Court recognizes that it is well settled that there is no independent tort of civil conspiracy recognized in New York. Such a claim may only be alleged to connect the actions of separate defendants with an actionable injury and to show that these acts flowed from a common scheme or plan (*Schlotthauer v. Sanders*, 153 A.D.2d 729, 545 N.Y.S.2d 196 (2d Dept., 1989); *SRW Associates v. Bellport Beach Property Owners*, 129 A.D.2d 328, 517 N.Y.S.2d 741 [2d Dept., 1987]). Plaintiff's conclusory complaint fails to make such a showing against C&C. Accordingly, the second cause of action is dismissed against C&C for failure to state a cause of action.

Plaintiff's third cause of action is for fraud. In order to allege a cause of action sounding in fraud the complaint must allege the following: the defendants made a material representation; the material representation was false; the defendants knew it was false and made it with the intention of deceiving the plaintiff; the plaintiff believed the representation to be true and justifiably acted in reliance thereon; and the plaintiff is damaged as a result thereof (*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 720 N.E.2d 892, 698 N.Y.S.2d 615 [1999]). CPLR §3016(b) requires that a cause of action sounding in fraud be pled with factual specificity, however, where it is alleged that the particular circumstances of the purported fraud are within the exclusive knowledge of the defendants, the requirements for specificity are relaxed (*Pericon v. Ruck*, 56 A.D.3d 635, 868 N.Y.S.2d 118 [2d Dept., 2008]).

The plaintiff's complaint alleges that "on November 25, 2005, and for some times prior," the defendants herein named "made certain material oral and/or written representations and statements regarding past and/or existing facts regarding the subject property which did not include matters of mere opinion" and that such representations were false and were used by the defendants to induce Ms. Scott into transferring 100% of her interest in the subject premises. The plaintiff fails to allege, either in the pleading, or in her opposition to the instant motion, exactly what misrepresentations were made to her by defendant, C&C (*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 (1999), *supra*; *Jacobs v. Haber*, 232 A.D.2d 372, 648 N.Y.S.2d 638 [2d Dept., 1996]). Even if the Court fully accords as true the plaintiff's allegations as recited in the complaint, if indeed defendant C&C made representations and or statements to the plaintiff, which were later found to be untrue, the plaintiff would now know what statements were untrue so as to generally describe them either in her complaint or an accompanying affidavit. The plaintiff having failed to so specify, the third cause of action sounding in fraud and as asserted against C&C is hereby dismissed.

The fourth cause of action asserted in the complaint is for breach of an implied contract wherein plaintiff contends that all of the defendants breached such contract by failing to re-convey to her the title to the subject property.

“The existence of a valid and enforceable contract governing a particular subject matter ordinarily precludes recovery in quasi contract for the events arising out of the same subject matter” (*Clark-Fitzpatrick Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). In the instant matter, there is in fact a “Residential Contract of Sale” governing the subject property forming the basis of the within dispute, which was executed on July 27, 2005.

In her opposition to the earlier dismissal motion made by the Azie and Weaver defendants, plaintiff acknowledged that she “did not read any agreement or document that [she] signed at the closing,” and she did not dispute that she signed the “Residential Contract of Sale,” which was executed four months prior to the closing and before she met any of the named defendants, with the exception of defendant Crawford. Additionally, the terms of the contract quite clearly and unambiguously state on the first page thereof, that the plaintiff, Grace Scott, as “Seller” was conveying the subject premises located at 418 Bayview Avenue, Inwood, New York, to defendant, Sherran Fields “together with all buildings thereon.”

In the context of the instant motion, plaintiff does not dispute any of her prior statements regarding her failure to read the contract of sale, or that she signed that contract.


An individual who signs a contract and is without any valid excuse for having failed to read the contents thereof, is “conclusively bound” by the terms therein contained (*Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 534 N.E.2d 824, 537 N.Y.S.2d 787 [1988]). Additionally, any agreement by and between Ms. Scott and Ms. Fields, which provided that the latter would reconvey back to Ms. Scott her 50% interest in the subject premises, would have to have been reduced to a writing in order to satisfy the statute of frauds (*General Obligations Law §5-703[2]*). Here, the plaintiff has failed to even allege the existence of such a writing, or to produce same as documentary evidence. Accordingly, the plaintiff’s fourth cause of action sounding in Implied Contract is dismissed against C&C.

With respect to the fifth and sixth causes of action asserted by plaintiff, the Court has previously determined that those claims were specifically alleged against the Weaver defendants, and that they sounded in breach of fiduciary duty and legal malpractice. In its earlier decision, the Court dismissed the fifth and sixth causes of action against both the Weaver and Azie defendants. In view of the fact that plaintiff has not alleged that C&C owed her a fiduciary duty, or that C&C represented her at the closing of the subject property, those claims cannot lie against C&C. Accordingly, the fifth and sixth causes of action are dismissed against C&C to the extent, if any, that they were even alleged against C&C.

Based upon the foregoing, the motion interposed by C&C pursuant to CPLR §3211 (a)(7) for an order dismissing the plaintiffs’ complaint is hereby granted.

The foregoing constitutes the Order of this Court.

Dated: September 14, 2010
Mineola, N.Y.


J. S. C.

ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**