

**Richards v Cesare**

2011 NY Slip Op 30207(U)

January 19, 2011

Sup Ct, New York County

Docket Number: 113943/08

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden  
Justice

PART 11

Index Number : 113943/2008

RICHARDS, TANYA

vs.

CESARE, LAWRENCE

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 8/5/10

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in ~~accordance~~ accordance with the annexed Memorandum Decision & Order.

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

**FILED**

JAN 31 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: January 19, 2011

*[Signature]*

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 11

----- X  
TANYA RICHARDS a/k/a TANJA RICHARDS and  
TERRENCE SMITH,

Plaintiffs,

INDEX NO.  
113943/08

-against-

LAWRENCE CESARE a/k/a LARRY CESARE,  
CONCEPT REALTY & HOLDING CORP., ALLISON  
B. CRAIN, ALISON B. CRAIN, P.C., FIRST LINCOLN  
MORTGAGE CORP., JACKIE'S REALTY AND HOME  
DEVELOPMENT CORP., JACQUELINE SINGOTIKO,  
STEVEN SINGO'TIKO, WASHINGTON MUTUAL BANK,  
and JOHN DOE, being a fictitious name of an individual

Defendants.

**FILED**

JAN 31 2011

NEW YORK  
COUNTY CLERK'S OFFICE

----- X  
**JOAN A. MADDEN, J.:**

Defendants Allison B. Crain and Allison B. Crain, P.C. (together "the Crain defendants")  
move for an order dismissing the second, third and fourth cross-claims asserted against them by  
defendant J.P Morgan Chase, N.A., as successor-in-interest to defendant Washington Mutual  
Bank ("Washington Mutual"). Washington Mutual opposes the motion, which is granted in part  
and denied in part.

Background

This action seeks to recover damages in connection with a "foreclosure rescue scheme"  
in which the victims were plaintiff Tanya Richards ("Richards") and her brother plaintiff  
Terrence Smith ("Smith"). Plaintiffs, who are African-American, were the equitable and legal  
owners respectively of a three-story brownstone located at 216 West 137<sup>th</sup> Street in Harlem (the  
"Property"), which was their childhood home (*id.*, p 2 and ¶ 12). Due to the failure of their

tenants to make rental payments, Richards' serious illness, and the fact that one of the rental units in the Property became vacant, plaintiffs fell behind in their mortgage payments and faced foreclosure (*id.*, ¶¶ 15, 18). At that point they became susceptible to a "foreclosure rescue scheme" which they describe as follows:

The scheme, which frequently targets minority and low-income homeowners, begins when a so-called foreclosure rescue "specialist" locates a susceptible homeowner who is behind in her mortgage payments and whose home may be in foreclosure, and makes promises to "save" her home, lower her monthly payments and repay her outstanding debt only to trick the homeowner into unwittingly signing away her deed to a third party, the "straw buyer." The foreclosure specialist then arranges for the straw buyer to re-mortgage the property at an amount that typically far exceeds the homeowner's original mortgage, keeping most of the cash proceeds for himself and his associates. Thus, the homeowner, for little or no consideration, is stripped of her deed, the equity in what was once her home, and is eventually evicted from the home itself

(*id.*, pp 1-2). The "foreclosure rescue specialist" who allegedly victimized plaintiffs is defendant Steven Singotiko ("Singotiko") (*id.*, p 2).

According to the first amended verified complaint ("the complaint"), the Crain defendants represented plaintiffs in the sale of the Property to the defendant Lawrence Cesare ("Cesare"), who is alleged to have been the "straw buyer." The complaint alleges that on or about July 6, 2007, Washington Mutual provided a mortgage to Cesare to purchase the property from plaintiffs.

The complaint asserts 16 causes of action, including claims against Washington Mutual some which seek relief in the form of cancelling the mortgage and declaring it null and void.<sup>1</sup> It

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<sup>1</sup> Specifically, the first cause of action seeks a declaration pursuant to New York Real Property Law ("RPL") § 320, that a July 6, 2007 deed from Terrence Smith to Cesare constitutes an equitable mortgage and that Washington Mutual's mortgage be declared null, void and cancelled; the sixth cause of action pursuant to RPL § 265-a seeks a judgment rescinding the deed to Cesare and treble damages; the fifteenth cause of action, pursuant Article 15 of the Real

also asserts various claims against the Crain defendants seeking damages for, *inter alia*, conversion, breach of fiduciary duty and professional malpractice.<sup>2</sup>

On November 11, 2009, plaintiffs and the Crain defendants entered into a settlement agreement in which the Crain defendants settled the claims against them for a sum of money, and in consideration for that agreement plaintiffs released the Crain defendants from all liability. A stipulation of discontinuance with prejudice was filed on or about December 10, 2009.

On or about May 12, 2010, Washington Mutual filed an Amended Answer, Counterclaim and Cross Claims (hereinafter "Amended Answer"). At issue on this motion are the second, third and fourth cross-claims as asserted against the Crain defendants.<sup>3</sup> The second cross-claim alleges that "in the event judgment is entered in this matter in favor of Plaintiffs canceling and vacating the July 6, 2007, mortgage in the original principal balance of \$1,000,000 made and executed by Lawrence Cesare, Washington Mutual will suffer damages [and that] in the event Washington Mutual suffers damages, such damages will be the result of the culpable conduct or negligence of [all the co-defendants]..." (Amended Answer ¶¶ 109-110).

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Property Actions and Proceedings Law, seeks a judicial determination and a dismissal of any claims on the Property adverse to plaintiffs; and the sixteenth cause of action seeks a declaratory judgment that Richards continues to hold an undivided one-half interest in the property. The complaint alleges asserts a cause of action against Washington Mutual seeking damages for its negligence in failing to investigate whether the transaction was fraudulent.

<sup>2</sup>By decision and order dated September 30, 2009, this court granted the Crain defendants' motion to dismiss with respect to claims asserting a violation of the Racketeer Influenced and Corrupt Practices Act ("RICO"), a violation of General Business Law § 349, civil conspiracy to commit fraud, and aiding and abetting fraud.

<sup>3</sup>By Stipulation dated January 25, 2010, Washington Mutual agreed to dismiss the first cross claim against the Crain defendants.

The third cross-claim, which is for fraud, alleges, *inter alia*, that “in the event judgment is entered in this matter in favor of Plaintiffs canceling and vacating the July 6, 2007 mortgage in the original principal balance of \$1,000,000 made and executed by Lawrence Cesare, Washington Mutual will suffer damages, [and that such damages] will be the result of the culpable conduct of [the Crain defendants] arising out of their participation in a mortgage fraud scheme” (Id., ¶ 111, 112). It is further alleged that “Washington Mutual would not have loaned \$1,000,000 if it were aware of the alleged scheme [and that] ... Washington Mutual suffered damages by reason of the cancellation of its mortgage, [and the Crain defendants are] liable to Washington Mutual...” (Id., ¶ 117, 119).

The fourth cross-claim, for negligent misrepresentation, alleges that “in the event judgment is entered in this matter in favor of Plaintiffs canceling and vacating the July 6, 2007 mortgage in the original principal balance of \$1,000,000 made and executed by Lawrence Cesare, Washington Mutual will suffer damages [and that ] such damages will be the result of the negligent conduct of the Crain defendants arising out of [their] failure to provide representation to plaintiffs in accordance with a reasonable attorney under the circumstances” (Id. at ¶¶ 120, 121). It is further alleged that the Crain defendants were “aware that Washington Mutual reasonably relied upon [Alison Crain’s] representation as attorney for Plaintiffs, as sellers, that they knowingly entered into the sale of the subject premises...[and that] [t]here is sufficient closeness to the relationship between Washington Mutual and [the Crain defendants] as to create privity between them” (Id. at ¶¶ 123, 124). It is also alleged that “in the event Washington Mutual suffers damages by reason of the cancellation of the \$1,000,000 mortgage, then in that event such damages will be the result of [the Crain defendants’] negligence.” (Id. at ¶ 125).

The Crain defendants now move to dismiss the cross claims against them, arguing that the claims are barred by § 15-108(b) of the General Obligations Law, which precludes the assertion of a contribution claim against a settling tortfeasor by another tortfeasor. The Crain defendants argue that the cross-claims constitute claims for contribution as they are contingent upon Plaintiffs obtaining a judgment against Washington Mutual cancelling the mortgage and premised upon the Crain defendants having breached their duty owe to plaintiffs. The Crain defendants alternatively argue that the fraud cross-claim should be dismissed for failure to plead fraud with particularity.

Washington Mutual opposes the motion, arguing that General Obligations Law § 15-108 does not apply to their cross-claims, which allege culpable acts by the Crain defendants, provide an independent basis for relief, and therefore do not constitute claims for contribution. In support of its position, Washington Mutual notes that the cross-claims seek damages it may incur if the mortgage is cancelled and not contribution for damages for sums in may owe to plaintiffs. In addition, Washington Mutual argues that since plaintiffs' first and fifteenth causes of action seek declaratory relief and sixth cause of action is for rescission, they are not tort claims and therefore fall outside the scope of General Obligations Law § 15-108.

With respect to the third cross-claim for fraud, Washington Mutual argues that the Crain defendants may be held liable to it based on its status as counsel to plaintiffs and their participation in the fraud scheme and that the cross claim is pleaded with sufficient particularity to satisfy CPLR 3016(b). Alternatively, Washington Mutual asserts that discovery is needed to determine the circumstances of the fraud which are within the Crain defendants' knowledge.

In reply, the Crain defendants argue that contrary to Washington Mutual's position, the

cross-claims do not assert a direct claim against them, but only seek relief in the event that plaintiffs succeed on their claims seeking to cancel Washington Mutual's mortgage based on Washington Mutual's own wrongful conduct which caused injury to plaintiffs. Moreover, the Crain defendants argue that General Obligation Law § 15-108 applies to claims sounding in fraud, statutory violations and negligence, as long as the plaintiff seeks to recover from the tortfeasors for the same injury even if based on different theories of liability.

The Crain defendants also argue that the third cross-claim must be dismissed as Washington Mutual fails to allege any of the essential elements of a fraud claim, including that the Crain defendants made any false statement on which Washington Mutual relied, and that any false statements made by the Crain defendants would be within the knowledge of Washington Mutual.

#### Discussion

General Obligations Law § 15-108(b) provides that “[a] release given in good faith by the injured person to one tortfeasor as provided in subdivision (a)<sup>4</sup> relieves [the settling tortfeasor] from liability to any other person for contribution as provided in article fourteen of the civil

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<sup>4</sup>General Obligations Law § 15-108(a) provides that:

When a release or covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury or wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated in the release or covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasors equitable share under article 14 of the civil practice law and rules, which ever is greater.

practice law and rules.” Under this provision, a party who settles with a plaintiff cannot be sued for contribution by any other tortfeasor liable for plaintiff’s injuries.<sup>5</sup> Westchester County v. Welton Beckett Associates, 102 AD2d 34, 40-41 (2d Dept 1984).

At issue here is whether the cross claims asserted by Washington Mutual against the Crain defendants can be characterized as contribution claims and are thus barred by General Obligations Law § 15-108(b). “A contribution claim may be interposed when two or more parties are alleged to be liable for damages for the same injury.” Comi v. Breslin & Breslin, 257 AD2d 754, 755 (3d Dept 1999); see also CPLR 1401<sup>6</sup>. “Contribution is available whether or not the culpable parties are allegedly liable for the injury under the same or different theories...and the remedy may be invoked against concurrent successive, independent, alternative and even intentional tortfeasors.” Raquet v. Braun, 90 NY2d 177, 183 (1997)(internal quotations and citations omitted). “The ‘critical requirement’ for apportionment by contribution under CPLR article 14 is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought.’ ” Id., at 184, quoting, Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 71 NY2d 599, 603 (1997).

Under these principles, the cross-claims at issue are not for contribution since they do not

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<sup>5</sup>In addition, under § 15-108(c), the released tortfeasor may not seek contribution from the others.

<sup>6</sup>CPLR 1401 provides that:

Except as provided under sections 15-108 and 18-201 of the general obligations law...two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or judgment has been rendered against the person from whom contribution is sought.

seek damages from the Crain defendants for their role in causing injuries to plaintiffs. While the complaint alleges that Washington Mutual and the Crain defendants are each liable to them for the injury suffered by plaintiffs as a result of the foreclosure rescue scheme, the cross-claims do not seek damages from the Crain defendants for contributing to plaintiffs' injury. Instead, the cross-claims seek damages for losses that Washington Mutual may suffer if plaintiffs are successful in cancelling its mortgage. Accordingly, the cross-claims are not for contribution, and General Obligations Law § 15-108(b) does not bar their assertion.

The remaining issue concerns whether the third cross-claim, for fraud, is pleaded with sufficient particularity. The third cross-claim alleges that the Crain defendants' are liable to Washington Mutual based on their participation in the mortgage fraud scheme in connection with their representation of plaintiffs and inducing Smith to execute transfer documents divesting him of title to the Property. It is alleged that the Crain defendants participated the scheme "[b]y failing to provide disinterested advice to plaintiffs...and by failing to require the other defendants to make allegedly legally required disclosures [to plaintiffs]... [and] by breaching [their] duties to [plaintiffs] by permitting them to proceed with the allegedly fraudulent transaction, failing to ascertain for [plaintiffs] information about their alleged underlying interests, failing to provide [plaintiffs] with impartial advice, by submitting an alleged fraudulent HUD-1 and allegedly failing to account for funds exchanged at closing" (Amended Answer ¶¶ 113 A.& B). It is further alleged that "[t]he transfer of title from Mr. Smith to Cesare was a necessary component to induce Washington Mutual into making a \$1,000,000 loan to Cesare as such loan would only be made to a person in lawful title of [the Property]" (*Id.*, ¶ 114). It is further alleged that "[t]he aforementioned acts by [the Crain defendants] were committed in furtherance of the fraudulent

scheme to secure the required transfer of title and execution of subject deed from Mr. Smith”...[and that] Washington Mutual would not have loan the \$1,000,000 if it were of the alleged scheme to commit fraud”(Id., ¶ 115, 117).

To plead a viable cause of action for fraud, it must be alleged that the defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing reliance, justifiable reliance on the alleged misrepresentation or omission by the victim of the fraud, and injury. Lama Holding Company v Smith Barney Inc., 88 NY2d 413, 421 (1996). “A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b).” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d 553, 559 (2009). CPLR 3016 (b) requires that claims for fraud set forth “the circumstances constituting the wrong...in detail.” Thus, “[a]lthough there is certainly no requirement of unassailable proof at the pleading stage, the complaint must allege basic facts to establish the elements of the cause of action.” Euryclei Partners, L.P. v. Seward & Kissel, L.P., 12 NY3d at 559.

The third cross-claim fails to contain any factual allegations asserting that Crain made any fraudulent misrepresentations or material omissions, or that Washington Mutual justifiably relied on such misrepresentations or omissions when loaning the money to Cesare.<sup>7</sup> Moreover, to the extent the allegations in cross-claim purport to allege a claim for conspiracy to commit fraud there must be allegations of fact from which it can be inferred that the Crain defendants entered into an agreement or understanding with the other defendants (against which particular acts of

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<sup>7</sup>As noted above, in its decision and order dated September 30, 2009, the court found that the complaint contain insufficient allegations to state a cause of action for fraud against the Crain defendants.

fraud were alleged) to cooperate in any fraudulent scheme. Abrahami v UPC Construction Co., Inc., 176 AD2d 180 (1st Dept 1991). Here, neither the cross-claim nor the complaint contain such allegations. Thus, while, as argued by Washington Mutual, an attorney may be held liable to a third party if she has committed fraud (Kahn v. Crames, 92 AD2d 634 [3d Dept 1983]), this principle is irrelevant here since there are insufficient allegations of fraud on which to base such a claim.

Finally, as Washington Mutual would have knowledge of any fraudulent misrepresentations or omissions made to it by the Crain defendants and whether it relied on such misrepresentations or omissions, it cannot be said the further discovery is needed to plead the essential elements of the cross-claim for fraud.

#### Conclusion

In view of the above, it is

ORDERED that the motion by defendants Allison B. Crain and Allison B. Crain, P.C. to dismiss the second, third and fourth cross-claims asserted against them by defendant Washington Mutual Bank is granted to the extent of dismissing the third cross-claim which is hereby dismissed; and it is further

ORDERED that the parties shall appear for a status conference on February 10, 2011, at 9:45 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: January 19, 2011

J.S.C.

**FILED**  
JAN 31 2011  
NEW YORK  
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