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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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GRACE MARJORIE SCOTT,

Plaintiff(s),

-against-

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 AND C HOMES, INC., WALD FINANCIAL SERVICES, INC., JOSEPH WALD,

Defendant(s).

x

Index No. 5626/09

Motion Submitted: 2/7/11
Motion Sequence: 012, 013, 014, 015

The following papers read on this motion:

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

The plaintiff, by way of three separate applications, moves for the following relief: an order pursuant to CPLR §2221[d], vacating the decision/order, dated September 14, 2010, which granted the motion to dismiss the plaintiff's complaint interposed by defendant, C and C Homes, Inc. [Sequence #12]; for an order pursuant to CPLR §2221[d], granting leave to reargue it's motion dated, August 3, 2010, which sought renewal of a prior application, and

upon such reargument, for an order vacating this Court's decision dated, November 4, 2010, which denied the requested renewal [Sequence #14], and; for an order pursuant to CPLR §3211[b], dismissing the defenses asserted by defendant, Moses Crawford, as well as for an order granting a judgment by default against said defendant [Sequence #15].

Defendant, Moses Crawford, appearing pro se, moves pursuant to CPLR §§ 3211(a)(5) and (7), for an order dismissing the plaintiff's complaint as asserted against him (Sequence #13).

In determining the within applications, this Court premises it's decision upon the facts underlying the within action as they were fully set forth in this Court's decision, dated May 3, 2010. This Court initially addresses the plaintiff's application, which seeks an order vacating this Court's decision, dated September 14, 2010, which granted the application interposed by defendant, C & C Homes, Inc., and dismissed the plaintiff's claims as asserted against said defendant.

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision." (***Viola v. City of New York***, 13 A.D.3d 439, 786 N.Y.S.2d 556 (2d Dept., 2004); ***Carrillo v. PM Realty Group***, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept., 2005); ***McNeil v. Dixon***, 9 A.D.3d 481, 780 N.Y.S.2d 635 [2d Dept., 2004]). A motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated (***McGill v. Goldman***, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept., 1999); ***Woody's Lumber Co., Inc. v. Jayram Realty Corp.***, 30 A.D.3d 590, 817 N.Y.S.2d 391 (2d Dept., 2006); ***Gellert & Rodner v. Gem Community, Mgt. Inc.***, 20 A.D.3d 388, 797 N.Y.S.2d 316 [2d Dept., 2005]).

In support of the application, counsel appears to be arguing that when granting C & C's application, this Court misapprehended matters of fact in relation to statements made to the plaintiff by defendant Crawford. However, in the supporting affirmation, counsel does not direct the supporting arguments to the decision issued on September 14, 2010. Rather counsel reiterates the allegations contained in the complaint and makes particular references to an Order issued by this Court on May 3, 2010, which neither entertained an application by C and C Homes for an order dismissing the plaintiff's complaint, nor granted any such relief. While the Court is cognizant that a motion to reargue is to afford a party an opportunity to demonstrate that the Court overlooked the facts or law in deciding a prior application, "such a motion is made on the papers submitted on the original motion" (***Phillips v. Village of Oriskany***, 57 A.D.2d 110, 394 N.Y.S.2d 941 (4th Dept., 1977); ***James v. Nestor***, 120 A.D.2d 442, 502 N.Y.S.2d 27 [1st Dept 1986]).

In the instant matter, counsel for the plaintiff provides neither a copy of the decision dated, September 14, 2010, nor the supporting and opposing affirmations relevant to C and C's application. Alternatively, counsel provides a copy of a decision unrelated to C & C Homes, as well as exhibits in relation to previous applications involving defendants, Azie and Weaver, against whom the action has been dismissed. Accordingly, as counsel has failed to establish how this Court misapprehended the facts or law in relation to the decision issued on September 14, 2010, the application is hereby Denied.

The Court now addresses the plaintiff's application for an order vacating this Court's decision dated, November 4, 2010. Said decision denied the plaintiff's application for leave to renew a prior application, which requested leave to amend the complaint. In it's decision of November 4, 2010, this Court denied the plaintiff's motion to renew upon counsel's failure to proffer a justification as to why she did not present facts, which were clearly in her possession at the time the original amendment application was interposed. Such a justification is required by controlling case law and the failure of the moving party to provide same deprives the motion court of the discretion to grant a renewal application (***Worrell v. Parkway Estates, LLC.***, 43 A.D.3d 436, 840 N.Y.S.2d 817 (2d Dept., 2007); ***Sobin v. Tylutki***, 59 A.D.3d 701, 873 N.Y.S.2d 743 (2d Dept., 2009); ***Leone Properties, LLC v. Board of Assessors for the Town of Cornwall***, 916 N.Y.S.2d 149, 2011 WL 338013 [2d Dept., 2011]). Thus, while this Court hereby grants the plaintiff leave to reargue the application dated, August 3, 2010, upon reargument, this Court adheres to it's prior determination.

The defendant, Moses Crawford, moves pursuant to CPLR §§3211[a][5] and [7], for an order dismissing the plaintiff's causes of action as asserted against him, which include those sounding in conversion, conspiracy, fraud and deceit, as well as quasi contract.[1]

In order to state a cause of action sounding in conversion, the plaintiff is required to establish "legal ownership of a specific identifiable piece of property and [defendants] exercise of dominion over or interference with the property in defiance of plaintiff's rights" (***Gilman v. Abagnale***, 235 A.D.2d 989, 653 N.Y.S.2d 176 (3d Dept., 1997); quoting ***Ahles v. Aztec Enterprises, Inc.***, 120 A.D.2d 903, 502 N.Y.S.2d 821 [3d Dept., 1986]). However, a cause of action sounding in conversion will not lie where it is predicated upon the loss of real property (***Garelick v. Carmel***, 141 A.D.2d 501, 529 N.Y.S.2d 126 (2d Dept., 1988); ***Boll v. Town of Kinderhook***, 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]). Here, a review of the complaint reveals that the action in conversion is

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[1] By Order dated, November 4, 2010, this Court directed the defendant to file an answer in the underlying action on or before December 6, 2010. In accordance with CPLR §320(a), the defendant elected to interpose a pre-answer application.

predicated upon the plaintiff's loss of her fee simple interest in the subject premises. Accordingly, the cause of action sounding in conversion is hereby dismissed (***id.***).

It is well settled that there is no independent tort of civil conspiracy recognized in New York and such a claim "may only be alleged to connect the actions of separate defendants with an actionable injury and to show 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]). Accordingly, the cause of action sounding in conspiracy is dismissed (***id.***).

In order to allege a cause of action sounding in fraud, the complaint must allege the following: the defendant made a material representation; the material representation was false; the defendant 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]).

In support of the instant application, the defendant argues that the action is time barred warranting dismissal thereof. Specifically, the defendant posits that the allegations which underlie the fraud action are identical to those which underlie the conversion action, and as such the three year statute of limitations which governs the conversion claim should apply to the fraud action rendering same time barred. The defendant additionally argues that the plaintiff failed to set forth precisely what misrepresentations he made to her requiring dismissal of the within action.

"The six-year fraud Statute of Limitations * * * is only applicable when there would be no injury but for the fraud" (***New York Seven-Up Bottling Company, Inc. v. Dow Chemical Company***, 96 A.D.2d 1051, 96 A.D.2d 1051, 466 N.Y.S.2d 478 (2d Dept., 1983), *affd.* 61 N.Y.2d 828, 462 N.E.2d 150, 473 N.Y.S.2d 973 [1984]). However, "where the allegations of fraud are only incidental to another cause of action, the fraud Statute of Limitations cannot be invoked" (***id.***). The Court has reviewed the fraud allegations contained in the complaint, which are amplified by the plaintiff's affidavit (*see* ***Leon v. Martinez***, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994); ***Uzzle v. Nunzie Court Homeowners Ass'n, Inc.***, 70 A.D.3d 928, 895 N.Y.S.2d 203 [2d Dept., 2010]). Fully according the plaintiff's allegations as true and affording same every favorable inference, this Court finds that contrary to the defendant's assertions, the allegations of fraud are not merely incidental to the action sounding in conversion. As adduced from her affidavit, the plaintiff stated that at the closing defendant Crawford "explained that Defendant Sherran Fields [would] be added to the title of the subject property to allow a new loan mortgage to be taken in both [her] name and Defendant Sherran Field's name" but that she "would remain on the title to the subject property as the primary owner and Defendant Fields would be added as a co-

signer or secondary owner for a limited time." Thus, as the plaintiff has specifically identified statements made by defendant Crawford upon which she purportedly relied to her detriment, the defendant's application made pursuant to CPLR §§3211(a)(5) and (7), seeking dismissal of the action sounding in fraud, is hereby Denied.

Finally, with respect to the plaintiff's cause of action alleging implied contract, "[t]he 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 Is. R.R. Co.***,70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 [1987]). Here, the record clearly contains a "Residential Contract of Sale", which specifically governs the subject property upon which the within action is predicated. Additionally, while the plaintiff repeatedly stresses that there existed an agreement whereby Ms. Fields agreed to reconvey her purported 50% interest in the subject premises back to Ms. Scott, any such agreement would have required a writing reflecting the terms thereof so as to satisfy the statute of frauds (***General Obligations Law §5-703[2]***). Absent such a writing, the alleged agreement would be unenforceable (***id.***). In the instant matter, Ms. Scott has failed to either allege the existence of such a writing or to provide this Court with any evidence thereof. Therefore, the cause of action sounding in Implied Contract is dismissed as against defendant Crawford.

In consideration of the foregoing, that branch of the plaintiff's cross-application, which seeks an order dismissing all of the defendant's defenses as contained in his motion to dismiss is hereby Denied. With respect to that branch of the plaintiff's application which seeks a judgment by default against Crawford, said application is denied in accordance with CPLR §3211[f].

All applications not specifically addressed are denied.

The foregoing constitutes the Order of this Court.

Dated: March 9, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.