

Golden First Mtge. Corp. v Smith

2011 NY Slip Op 32485(U)

September 15, 2011

Supreme Court, Nassau County

Docket Number: 3426-11

Judge: Timothy S. Driscoll

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
GOLDEN FIRST MORTGAGE CORPORATION,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Plaintiff,

**Index No: 3426-11
Motion Seq. No. 1
Submission Date: 7/1/11**

-against-

**GERALD SMITH, CAPITAL ONE, N.A., "JOHN
DOE #1 through JOHN DOE #10 inclusive, the names
being fictitious, the true names of said defendants being
unknown to plaintiff, it being intended to designate
individuals who assisted in the scheme to defraud the
plaintiff,**

Defendants.

-----X

The following papers having been read on this motion:

- Notice of Motion.....X**
- Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Memorandum of Law in Opposition.....X**
- Affirmation in Further Support and Exhibits.....X**
- Reply Brief in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendant Capital One, N.A. ("Capital One") on April 8, 2011 and submitted on July 1, 2011. For the reasons set forth below, the Court grants the motion.

A. Relief Sought

Defendant Capital One moves for an Order, pursuant to CPLR §§ 3211(a)(5) and (7), dismissing Counts One, Three, Seven, Nine, Thirteen and Fourteen of the Verified Complaint ("Complaint").

Plaintiff Golden First Mortgage Corporation ("Plaintiff" or "Golden First") opposes Capital One's motion.

B. The Parties' History

The Complaint (Ex. E to Antoine Aff. in Supp.), filed March 4, 2011, alleges as follows:

From February of 2003 to February 2007, Gerald Smith ("Smith") was employed by Golden First as the manager of its branch located at 4735 White Plains Road, Bronx, New York ("Bronx Office"). During that same time frame, Smith was the President of Merit Home Funding ("Merit"), which had the same address as the Bronx Office.

Between January of 2006 and February of 2007, loans were brokered from the Bronx Office to other lenders. In exchange, Golden First received broker's fees ("Fees") consisting of points, origination fees and other fees. Smith reviewed loan applications submitted to Golden First during this time period. The Fees were paid to Golden First by checks made payable to that entity. According to the Complaint, during this time period, Smith improperly endorsed and deposited two hundred and sixteen (216) checks ("Checks") payable and belonging to Golden First, into the Merit account at North Fork ("Merit Account"). Although the Checks were payable to Golden First, North Fork¹ accepted the Checks and deposited them into the Merit Account.

Plaintiff alleges that a North Fork teller advised a North Fork vice president of this discrepancy and was advised to continue accepting and depositing the Checks into the Merit Account. North Fork never contacted Golden First about the Checks, and did not require Smith to provide any proof of authorization to deposit the Checks into the Merit Account. Defendants John Doe #1 through John Doe #10 allegedly assisted Smith in this scheme. Smith received over \$2 million in Checks, which he never forwarded to Golden First. Smith was prosecuted for his conduct, pled guilty to a crime and was sentenced to a period of incarceration.

The Complaint contains fourteen (14) causes of action: 1) common law conversion against Capital One, 2) common law conversion against Smith, 3) statutory conversion against Capital One, based on violations of Uniform Commercial Code ("UCC") §§ 3-419(3) and 3-420, 4) statutory conversion against Smith based on the same UCC provisions, 5) for monies had and received against Capital One, 6) for monies had and received against Smith, 7) against Capital One for breach of fiduciary duty, 8) against Smith for breach of fiduciary duty, 9) against Capital One for common law fraud, 10) against Smith for common law fraud, 11) against Smith for larceny by embezzlement, 12) against the John Doe Defendants for common law conversion and

¹ On or about March 10, 2008, Capital One acquired North Fork Bank ("North Fork"). Following that acquisition, the name of all North Fork branches was changed to Capital One.

common law fraud, 13) against Capital One under the theory of *respondeat superior*, and 14) against Capital One for a violation of UCC § 306.

Capital One moves to dismiss counts One, Three, Seven, Nine, Thirteen and Fourteen which allege the following against Capital One: common law conversion, statutory conversion based on violations of UCC §§ 3-419(3) and 3-420, breach of fiduciary duty, common law fraud, liability under the theory of *respondeat superior*, and a violation of UCC § 3-306.

Counsel for Capital One affirms that Plaintiff first commenced an action (“Original Action”) against that entity and the other Defendants on July 27, 2010 by filing a complaint under Nassau County Index Number 14233/10 (Ex. A to Antoine Aff. in Supp.). Capital One removed the Original Action to the United States District Court for the Eastern District of New York on September 1, 2010, as reflected by the documents provided (*id.* at Ex. B). In the Federal Court action, Capital One produced to Golden First account statements and documents detailing all checks deposited in the Merit Account between February 2005 and February 2008. In December of 2010, Capital One moved for judgment on the pleadings (“Prior Motion”), and Golden First opposed the Prior Motion. The Prior Motion was not submitted for decision, as Capital One and Golden First filed a joint stipulation of dismissal without prejudice (“Stipulation”), which was so-ordered on February 10, 2011 (*id.* at Exs. C and D).

The Stipulation provides as follows:

The parties hereby stipulate and agree that Plaintiff’s Complaint and Defendant/Third Party Plaintiff’s Third-Party Complaint are hereby discontinued without prejudice and costs. Plaintiff shall have the right to re-file this action in State Court within thirty days of the Order of Discontinuance. Defendant/Third-Party Plaintiff reserves all of its rights as to its Third-Party Complaint, among other rights. Counsel for Defendant shall accept service of any re-filed Complaint on behalf of Defendant and shall serve its response to any re-filed Complaint within twenty days of service.

The parties stipulate and agree that any unexpired statute of limitations applicable to any claim in the originally-filed Complaint shall be tolled as of July 16, 2010—the date of the initial filing of this action in State Court—and that this tolling arrangement shall last for a period of thirty days from the Order of Discontinuance or until the re-filing of this action (which must occur within 30 days of the Order of Discontinuance), whichever is sooner. This tolling provision is of no effect whatsoever on any statute of limitations that expired before July 16, 2010, or that continued to run during the pendency of this federal action or the originally-filed state-court action. The parties reserve all other rights concerning statutes of limitations. The parties further agree that any possible claim for fees under either Federal Rule 41 or New York’s CPLR section 3217 is waived.

In opposition, counsel for Golden First affirms that, upon reviewing this file in April of 2010, he discovered a memorandum dated June 4, 2008 (Ex. 1 to Rosenberg Aff. in Opp.) prepared by prior counsel ("Prior Counsel") for Golden First. In that memorandum, Prior Counsel stated that he had conferred with the Nassau County District Attorney's Office ("D.A.") who advised Prior Counsel, *inter alia*, that 1) the D.A. had interviewed the teller ("Teller") through whom Smith negotiated most of the Checks, and the Teller stated that she knew that the Checks contained an incorrect endorsement but Smith had spoken to an Assistant Branch Manager who had instructed the Teller to negotiate the Checks; 2) the Assistant Manager involved in these transactions is no longer with Capital One/North Fork, or has been transferred to another branch; 3) the D.A.'s Office intends to locate that Manager and interview him; 4) the D.A. interviewed the Teller who "appeared creditable [sic];" 5) the Teller did not say that she had received any benefit for negotiating the Checks; and 6) the Teller told the D.A. that at some point in 2006, due to the number of Checks being deposited, a manger or another senior employee asked Smith for proof that he was an officer or owner in Golden First, which Smith never produced. Counsel for Golden First affirms that he contacted a representative of the D.A. to confirm the above information. In addition, as part of discovery in the Federal Action, Defendants provided evidence that North Fork had negotiated over 250 Checks payable to Golden First, endorsed those Checks in favor of Merit, and deposited them into the Merit Account.

C. The Parties' Positions

Capital One submits that 1) the statutory and common-law conversion claims (counts one and three) are time-barred, in light of the three (3) year statute of limitations and the fact that the date of the latest conversion was Smith's deposit into the Merit Account in February of 2007; 2) the claim for breach of fiduciary duty (count seven) is barred by the statute of limitations, as the three year statute of limitations is applicable to Plaintiff's action which seeks money damages; 3) the claim for fraud (count nine) is insufficient on the grounds that a) Plaintiff has failed to allege the necessary elements; b) it is barred by the three year statute of limitations which is applicable because the fraud claim is really an action for conversion; and c) it fails to allege the fraud with adequate particularity; 4) the claim based on *respondeat superior* (count thirteen) cannot proceed because Capital One's employees are not liable to Golden First and, therefore, there can be no vicarious liability on the part of Capital One as their employers; and

5) the claims for violations of UCC § 306 cannot be sustained because that provision, which addresses the rights of a non-holder in due course, does not create an independent cause of action.

In opposition, Golden First submits that 1) pursuant to CPLR § 3212(f), the Court should deny Defendant's motion to dismiss the first and third causes of action, sounding in conversion, and the fourteenth cause of action alleging a violation of UCC § 3-306, in light of the fact that discovery may provide Golden First with facts essential to opposing the instant motion, which facts are peculiarly within the knowledge of Capital One; 2) the ninth cause of action alleges the fraud with adequate particularity, and is not governed by the three (3) year statute of limitations, but rather is governed by a six (6) year statute of limitations, in light of information provided by the D.A. suggesting that North Fork employees were aware of Smith's improper conduct with respect to the Checks; 3) the seventh cause of action alleging breach of fiduciary duty is governed by the six (6) year statute of limitations, and Plaintiff has adequately alleged that North Fork/Capital One employees aided and abetted Smith in his criminal conduct; and 4) the thirteenth cause of action, alleging *respondeat superior*, is viable in light of the fact that Plaintiff has adequately pled a cause of action for fraud against the bank employees.

In reply, Capital One submits that 1) Golden First has failed to allege the essential elements of fraud; 2) the allegations in the Complaint on information and belief are improper because they do not provide the basis for that belief, and Golden First is improperly attempting to rely on Prior Counsel's memorandum, which is hearsay; and 3) the information required to allege an action for fraud is not peculiarly within Capital One's possession, as Golden First would be aware of misrepresentations made to it.

RULING OF THE COURT

A. Standards of Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept.

2002).

Pursuant to CPLR § 3211(a)(5), a party may move to dismiss a complaint on the ground that it is foreclosed by the applicable statute of limitations.

B. Relevant Causes of Action

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008). Where it is impossible to state the circumstances constituting the fraud in detail, CPLR § 3016(b) should not be so strictly interpreted as to prevent plaintiff from asserting an otherwise valid cause of action. *Id.* There is no requirement of unassailable proof at the pleading stage. Rather, the complaint must allege the basic facts to establish the elements of the cause of action. *Id.* at 492. CPLR § 3016(b) is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct. In certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud. *Id.* at 493. *See also Eurycleia Partners v Seward & Kissel*, 12 N.Y.3d 553 (2009).

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50.

The elements of a claim for breach of fiduciary duty are: 1) existence of a fiduciary relationship, 2) misconduct, and 3) damages directly caused by the wrongdoer's misconduct. *Fitzpatrick House III, LLC v. Neighborhood Youth & Family Services*, 55 A.D.3d 664 (2d Dept. 2008); *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007).

C. Statute of Limitations

For statute of limitations purposes, an action for conversion is subject to a three-year limitation period. *Vigilant Insurance Company of America v. Housing Authority of the City of El Paso, Texas*, 87 N.Y.2d 36, 44 (1995), citing CPLR § 214(3). Accrual runs from the date the conversion takes place. *Id.* In *Mohan v. Hollander*, 303 A.D.2d 473 (2d Dept. 2003), the Second Department held that, where the facts set forth in the complaint alleged causes of action to recover damages for conversion and legal malpractice which were barred by the applicable three-year statute of limitations, and the fraud claims were "merely incidental to the conversion and legal malpractice claims" and "the only purpose they serve is to circumvent the three-year statute of limitations," the trial court properly granted defendants' motions to dismiss the amended complaint. *Id.* at 274. *See also Jones v. Community Bank of Sullivan County*, 306 A.D.2d 679 (3d Dept. 2003) (trial court properly concluded that three-year statute of limitations applicable to conversion of funds by defendants, one of whom was plaintiff's former office manager, who forged plaintiff's signature on checks payable on his business accounts and deposited them into defendants' personal accounts).

An action based upon fraud shall be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. CPLR § 213(8). A cause of action accrues, for the purpose of measuring the period of limitations, when all of the facts necessary to the cause of action have occurred so that the party would be entitled to relief in court. *Poughkeepsie v. Espie*, 41 A.D.3d 701, 704 (2d Dept. 2007), *app. disp.*, 9 N.Y.3d 1003 (2007), quoting *Matter of Motor Veh. Acc. Indem. Corp. v. Aetna Cas.*, 89 N.Y.2d 214, 221 (1996). A cause of action alleging fraud accrues at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence. *Poughkeepsie*, 41 A.D.3d at 705 (town's cause of action for fraud accrued when it executed more expensive lease agreement that defendant, allegedly falsely, represented was necessary for unexpected renovations costs).

New York law does not provide any single limitations period for breach of fiduciary duty claims. *Kaufman v. Cohen*, 307 A.D.2d 113, 118 (1st Dept. 2003). Generally, the applicable statute of limitations for such claims depends upon the substantive remedy sought. Where the relief sought is equitable in nature, the six year period of CPLR § 213(1) applies. *Id.* Where a suit for breach of fiduciary duty seeks only money damages, the action is viewed as alleging injury to property and the court will apply CPLR § 214(4)'s three year statute of limitations. *Id.* Generally, a cause of action for breach of fiduciary duty accrues at the time of the breach. *Id.* at 121, n.3.

D. Application of these Principles to the Instant Action

The Court concludes that Plaintiff has failed to plead viable causes of action for fraud, as Plaintiff has not alleged any misrepresentation by Defendants on which Plaintiff relied to its detriment, or demonstrated how further discovery will reveal such a misrepresentation. Moreover, Plaintiff has provided no support for its assertion of an independent cause of action based on a violation of UCC § 3-306 which governs the rights of one who is not a holder in due course.

The gravamen of Plaintiff's action is that Smith converted Plaintiff's funds by depositing the Checks into the Merit Account. Thus, the three year statute of limitations is applicable to all claims other than fraud. Capital One has alleged, and Plaintiff does not dispute, that the latest improper deposit by Smith was in February of 2007. The documentation provided by Plaintiff in its opposition papers corroborates that claim. As the Original Complaint was filed on July 27, 2010, and the terms of the Stipulation provide that its tolling provision is of no effect on any statute of limitations that expired before July 16, 2010, Plaintiff's claims against Capital One with respect to the remaining causes of action that are the subject of its motion are time-barred. Thus, the Court grants Capital One's motion to dismiss Counts One, Three, Seven, Nine, Thirteen and Fourteen of the Verified Complaint. The Court notes that there remains a cause of action against Capital One for monies had and received, which was not the subject of the motion.

All matters not decided herein are hereby denied.

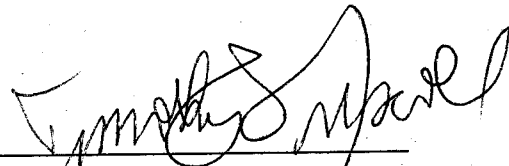
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on October 4, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 15, 2011



HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
SEP 19 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE