

People v Empire Prop. Solutions, LLC

2011 NY Slip Op 33040(U)

November 15, 2011

Supreme Court, Nassau County

Docket Number: 017767-09

Judge: Steven M. Jaeger

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

PEOPLE OF THE STATE OF NEW YORK by
ANDREW M. CUOMO, Attorney General of the
State of New York,

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 017767-09

Plaintiff,

MOTION SUBMISSION
DATE: 9-27-11

-against-

EMPIRE PROPERTY SOLUTIONS, LLC, et al.,

MOTION SEQUENCE
NOS. 2, 3, 4, 5

Defendants.

The following papers read on this motion:

- Notice of Motion, Affirmation, and Exhibit (Mot. Seq. 2) X
- Notice of Motion, Affirmation, and Exhibits (Mot. Seq. 3) X
- Notice of Motion, Affirmation, and Exhibit (Mot. Seq. 4) X
- Notice of Cross-Motion and Affirmation (Mot. Seq. 5) X
- Memorandum of Law In Support (Mot. Seq. 3) X
- Reply Affirmation to Cross-Motion to Dismiss (Mot. Seq. 5) X
- Memorandum of Law in Opposition to Plaintiff's Motion
and in support of Cross-Motion (Mot. Seq. 5 &1) X
- Reply Memorandum in Further Support of Motion
to Dismiss (Mot. Seq. 4) X
- Plaintiff's Memorandum of Law in Opposition and In
Support of Plaintiffs' Motion (Mot. Seq. 4) X
- Reply Affirmation to Motion to Dismiss (Mot. Seq. 4) X
- Affidavit in Opposition to Plaintiff's Motion and In Support
of Cross-Motion (Mot. Seq. 1) X
- Memorandum of Law in Support of Motion to Dismiss
(Mot. Seq. 4) X
- Memorandum of Law in Support to Dismiss (Mot. Seq. 2) X
- Memorandum of Law in Reply to Opposition and
Further Support of Motion (Mot. Seq. 2) X
- Plaintiff's Memorandum of Law in Opposition to
Motion to Dismiss (Mot. Seq. 2) X
- Plaintiff's Memorandum of Law in Opposition to
Motion to Dismiss (Mot. Seq. 3) X

Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss and Reply in Support of Plaintiffs' Motion (Mot. Seq. 5)	X
Defendants' Reply Memorandum of Law in Further Support of Motion to Dismiss (Mot. Seq. 3)	X
Affirmation in Opposition (Mot. Seq. 5)	X
Defendants' Reply Memorandum of Law in Further Support of Cross-Motion (Mot. Seq. 5 & 1)	X
Affidavit (Mot. Seq. 4)	X

Motion (seq. no 2) by the attorneys for the defendant Cory Covert (Covert) seeks an order dismissing the complaint against Covert pursuant to CPLR 3211(a)(7) on the grounds that each of the causes of action in the complaint fails to state a cause of action against him; dismissing the first, second, and sixth causes of action in the complaint against Covert pursuant to CPLR 3016(b) for failing to particularize the fraud and breach of fiduciary duty causes of action; and dismissing the third, sixth and eighth causes of action in the complaint against Covert pursuant to CPLR 3211(a)(5) because of the expiration of the statute of limitations. Motion (seq. no. 3) by the attorneys for the defendants Zornberg & Hirsch, Barry Zornberg, Nanci Hirsch and H&Z Abstract, Inc. seeks an order pursuant to CPLR 3211(a)(7), 3211(a)(5) and CPLR 3016 (b) dismissing the complaint against them are determined as hereinafter set forth. Motion (seq. no 4) by the attorneys for the defendant Select Portfolio Servicing, Inc., as Servicing Agent and Attorney-in Fact for U.S. Bank National Association as Trustee, for the

property located at 8 Terry Court, Glen Head, New York seeks an order pursuant to CPLR 3211 dismissing the action against Select. Cross-motion (seq. no. 5) by the attorneys for the defendants Deutsche Bank National Trust Company, as Trustee for HASCO 2007-NC1 (incorrectly sued herein as “Deutsche Bank National Trust Company,”), U.S. Bank National Association, as Trustee for Asset-Backed Pass-Through Certificates Series 2006-NC2 (incorrectly sued herein as “U.S. Bank National Association,”), and America’s Servicing Company for the properties located at 34 Jean Drive and 86 Eatondale Avenue seek an order pursuant to CPLR 1003, 3211(a)(5) and (7) dismissing the complaint as to these defendants and denying the application to declare null and void any transfer of title to real property and rescinding any agreements that arose out of the subject mortgage transactions are both denied without prejudice.

This action is against various individuals and entities for allegedly operating fraudulent foreclosure rescue programs that allegedly defrauded homeowners of the title to their homes by inducing them to enter into putative sale/lease-back agreements.

The plaintiff, the People of the State of New York, is now represented by Eric Schneiderman, Attorney General of the State of New York. The Court *sua sponte* directs the caption be modified to reflect this change.

Defendant Empire Property Solutions, LLC held itself out as a home foreclosure rescue specialist to consumers who were having difficulty paying their mortgages. Defendant John Rutigliano is the director and part owner of Empire. Defendant Kenneth Kiefer is also an owner of Empire. Defendants Rutigliano and Kiefer were the sole officers of Empire. Defendants Empire Property Solutions, Rutigliano and Kiefer will be referred to collectively as the Empire Defendants.

Defendant Zornberg & Hirsch is a law firm. Defendants Barry Zornberg and his wife Nanci Hirsch were general partners of Zornberg & Hirsch. Defendants Zornberg and Hirsch, Barry Zornberg and Nanci Hirsch shall be referred to as the Zornberg Defendants.

Defendant Cory Covert is an attorney licensed to practice in the state of New York. Defendant Bill Tsoumpelis is an attorney licensed to practice in the state of New York. The complaint also refers to the Zornberg Defendants, Cory Covert and Bill Tsoumpelis collectively as the "Attorney Defendants."

Defendant H&Z Abstract, Inc. is a title insurance company. Barry Zornberg and his wife Nanci Hirsch are owners and officers of H&Z Abstract, Inc. H&Z Abstract, Inc., Zornberg and Hirsch are also collectively referred in the complaint to as the H&Z Abstract Defendants.

Defendant Leonie Neufville d/b/a Zneufuille Mortgage (Neufville) was a mortgage broker allegedly registered with the New York State Superintendent of Banking.

The complaint sets forth the following allegations. The previously named defendants engaged in a foreclosure rescue scam to defraud homeowners of the title to and equity in their homes from about December 2005 until sometime in 2007 in a series of transactions that involved common players and common fraudulent practices. The Empire Defendants advertised and held themselves out as foreclosure rescue specialists and, repeatedly, set out to induce financially-distressed consumers to “sell” their homes based on false and misleading statements that they could “save” the homeowners’ properties from foreclosure. The homeowners were told that they could continue to live in their homes and pay the mortgage payments or “rent.” The Empire Defendants falsely represented that the homeowners would be able to save up enough money and re-build their credit, so that in about one year’s time they would then be financially able to repurchase their homes. (Verified Complaint ¶¶ 39-40). They were aided by the Zornberg Defendants who sought out Leonie Neufville, introduced her to the Empire Defendants, persuaded her to act as the mortgage broker, and helped set in motion the chain of events to perpetuate the fraud. (Verified Complaint ¶ 61). The

Zornberg Defendants arranged it so that their title company, H&Z Abstract, would be the title company in the series of real estate transactions. The Zornberg Defendants acted as attorneys for the lenders. (Verified Complaint ¶ 61). The Zornberg Defendants expanded their participation in the fraud by sometimes acting as attorneys for the buyers or attorneys for the sellers in the transactions. (Verified Complaint ¶ 62). Defendants Covert and Tsoumpelis also sometimes acted as the attorney for the seller, and sometimes acted as attorney for the purchaser.

Plaintiff alleges this was a concerted effort by participants in a scheme to defraud consumers that in fact did defraud consumers, depriving them of their homes and all the equity they had accrued. In addition, the plaintiff alleges the previously named defendants failed to disclose the substantial risks inherent in the transactions; failed to disclose or misrepresented the costs to the homeowners and total fees that the Empire Defendants and other defendants would receive; and misrepresented the homeowners' ability to meet the conditions necessary for the repurchase of their homes at the expiration of the "leases."

It is alleged that an integral aspect of the scheme involved the Empire Defendants applying for and procuring a mortgage on the property as mortgagor. The Empire Defendants failed to make the mortgage payments on the new loans as

promised to the homeowners, and failed to pay real estate taxes and other expenses. The homeowners ended up losing both their property and whatever equity they had accrued. Some were forced to abandon their homes; other's face eviction.

The allegations in the complaint are further amplified by the facts outlining the individual cases of fraud allegedly perpetrated by Empire on four of the consumers as detailed in the affirmation of Victoria L. Safran, in support of the Order to Show Cause (seq. no. 1) and the consumer affidavits that accompany the affirmation and also summarized in the affirmation of Ms. Safran. A copy of the affirmation of Ms. Safran and copies of the affidavits are marked as Exhibit B to the Notice of Motion (seq. no. 3) by the attorneys for the Zornberg Defendants.

Plaintiff has submitted copies of purported sale/lease-back agreements between Empire and Napolitano dated October 26, 2006 and between Empire and Conforti dated July 25, 2006. Each of the sale/lease-back agreements contain the following language.

“This lease agreement is completely independent of the purchase by Landlord of the subject premises on this date, and was only negotiated for the sole benefit of the Tenant.

TENANT HAS HAD A FULL OPPORTUNITY TO CONSULT WITH COUNSEL IN THIS MATTER, AND WAS IN FACT REPRESENTED BY CORY J. COVERT, ESQ., COUNSEL,

WHO, THROUGH OF COUNSEL AT THE TIME OF CLOSING FULLY DISCUSSED ALL AVAILABLE OPTIONS OTHER THAN THE SALE AND LEASE OF SAID PREMISES.

Tenant has read each and every word of this lease agreement and these disclosures and fully understands them.

Tenant has not been forced or in any way compelled to enter into this agreement by any party, nor have there been any promises made by anyone other than the terms in this agreement been made to the Tenant in consideration of this agreement.

Tenant was in fact advised to sell the subject premises through a realtor on the open market, but instead elected to move forward with this transaction.”

In further support of the allegations in the complaint, the plaintiff refers to seven (7) additional properties subject to foreclosure due to the alleged wrongful conduct of the defendants.

The first cause of action pursuant to Executive Law § 63(12) alleges fraud against the Empire Defendants, the Attorney Defendants, the H&Z Abstract Defendants and Neufville Mortgage. Executive Law § 63(12) prohibits repeated fraudulent acts or persistent fraud in the carrying on, conducting, or transaction of business.

The second cause of action pursuant to Executive Law § 63(12) alleges a violation of GBL § 349 Deceptive Practices against the Empire Defendants, the

Attorney Defendants, the H&Z Abstract Defendants and Neufville Mortgage.

GBL § 349 provides that it is unlawful to engage in deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in the State of New York.

The third cause of action alleges a violation of GBL § 349 Deceptive Practices against the Empire Defendants, the Attorney Defendants, the H&Z Abstract Defendants and Neufville Mortgage.

The fourth cause of action pursuant to Executive Law § 63(12) alleges violation of GBL § 350 False Advertising against the Empire Defendants. GBL § 350 makes it unlawful to engage in false advertising in the conduct of any business or trade or commerce in New York State. The plaintiff contends that the Empire Defendants' violations of GBL § 350 constituted repeated and persistent illegal conduct in violation of Executive Law § 63(12) by engaging in false advertising.

The fifth cause of action also alleges violation of GBL § 350 False Advertising against the Empire Defendants.

The sixth cause of action alleges violations of New York Executive Law § 63(12) Breach of Fiduciary Duty and Duty of Care against the Zornberg Defendants and Covert by repeatedly representing both the sellers and the lenders in the same transactions.

The seventh cause of action alleges violations of New York Executive Law § 63(12) and of Real Property Law § 440 *et seq.* against the Empire Defendants.

The eighth cause of action pursuant to Executive Law § 63(12) alleges common law conversion against the Empire Defendants, the Attorney Defendants and the H&Z Abstract Defendants. The plaintiff alleges the consumers in the sale/lease-back transactions have the right to possession of the mortgage proceeds at the closing which were misappropriated and converted by them for their own use without right or title.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court must accept as true, the facts “alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference,” determining only “whether the facts as alleged fit within any cognizable legal theory” (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414; *see, People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54; *Leon v Martinez*, 84 NY2d 83, 87-88; *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703. A motion to dismiss pursuant to CPLR 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, “the complaint states in some recognizable form any cause of action known to our law” (*Sheroff v Dreyfus Corp.*, 50 AD3d 877.

Notably, on a motion to dismiss, the plaintiff is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v Rye Country Store, Inc.*, 296 AD2d 455; *Paulsen v Paulsen*, 148 AD2d 685, 687, *Palmisano v Modernismo Publ.*, 98 Ad2d 953, 954; *Aurora Loan Services, LLC v Cambridge Home Capital, LLC*, 12 Misc3d 1152[A] (Supreme Court Nassau County 2006)), and “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*ECT 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19; *International Oil Field Supply Services Corp. v Fadeyi*, 35 AD3d 372).

“However, ‘allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration’ ” (*Morris v Morris*, 306 AD2d 449; *see, Maas v Cornell University*, 94 NY2d 87, 91-92, quoting *Gertler v Goodgold*, 107 AD2d 481, 485, *aff’d*, 66 NY2d 946; *see also, Godfrey v Spano*, 13 NY3d 358). “[A]ffidavits may be used freely to preserve inartfully pleased, but potentially meritorious, claims.” *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635. “In assessing a motion under CPLR 3211(a)(7) a court may freely consider affidavits submitted by the plaintiff to remedy and defects in the complaint,” and if the court does so, “the criterion is whether the proponent of the pleading has a cause of action, not whether he has

stated one” (Leon v Martinez, supra, at p. 88; see also, *Uzzle v Nunzie Court Homeowners Ass’n, Inc.*, 55 AD3d 723).

Executive Law § 63(12) empowers the Attorney General to seek injunctive relief, restitution and/or damages whenever any person or business engages in “repeated fraudulent or illegal acts or otherwise demonstrate(s) persistent fraud or illegality in the carrying on . . . or transaction of business.” Under the statute, fraud is defined as “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provision.” The definition of fraud under Executive Law § 63(12) is broadly construed so as to include acts which are misleading or dishonest irrespective of an intent to defraud. See *People v Apple Health & Sports Clubs*, 206 AD2d 266, 267; see also *people v General Electric Co.*, 302 AD2d 314, 315. The test of whether conduct is fraudulent under Executive Law § 63(12) is whether the particular act “has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud.” *People v General Electric Company, Inc.*, 302 AD2d 314.

General Business Law § 349 is a broad consumer protection statute which declares “deceptive acts or practices in the conduct of any business, trade or commerce” to be unlawful (see *Stutman v Chemical Bank*, 95 NY2d 24). “As a

threshold matter, in order to satisfy General Business Law § 349, plaintiffs' claims must be predicated on a deceptive act or practice that is 'consumer oriented' "

(*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 330, 344, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20,24-25).

Deceptive acts or practices may be considered "consumer oriented" when they have a broad impact on consumers at large (see *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25). In contrast, private contract disputes which are unique to the parties do not fall within the ambit of the statute (*id.* at 25).

First, Second and Third Causes of Action

The complaint adequately alleges that the consumers who were defrauded suffered injury as a result of the deceptive acts of the Zornberg Defendants, H&Z Abstract Defendants, and Covert. Construed liberally, the complaint adequately alleges conduct by Zornberg, H&Z Abstract and Covert that had "the capacity or tendency to deceive" or create an atmosphere conducive to fraud. Barry Zornberg and his wife, Nanci Hirsch are also the owners and officers of H&Z Abstract, Inc. The complaint alleges wrongdoing on behalf of the H&Z Abstract Defendants. The participation of a title company was essential in order to close the real estate transactions and consummate the alleged fraud on the consumers by deceiving the

consumers into believing they were legitimate deals. There are factual allegations in the complaint permitting the inference that the Zornberg Defendants knew or intended to aid the other defendants in the alleged commission of the fraudulent real estate scheme. *See Velazquez v Decaudin*, 49 AD3d 712, 716; *Compare, Robinson v Crawford*, 46 AD3d 252.

The attorneys for Covert's argument that Covert was not adequately apprised of the claims against him is misplaced. Even if the Court finds any insufficiencies in the pleadings, the Court "may freely consider the affidavits submitted by the plaintiff to remedy any defects in the complaint." *See Leon v Martinez, supra*. The affirmation submitted by the plaintiff's attorney identified properties that were alleged to be subject to the defendants' foreclosure rescue scam. Further, two of the consumers submitted affidavits that identify Covert as an attorney they met at closing. The complaint adequately alleges specific actions by the defendants that were misleading and deceptive in violation of Executive Law § 63(12) and GBL§ 349 . A cause of action for violation of GBL § 349 requires a finding of deceptive acts or practice. The cause of action for violation of Executive Law § 63(12) based on violations of GBL§ 349 requires a finding that defendants engaged in repeated or persistent deceptive acts and practices. An inference can be made that the complaint sets forth a viable cause of action based

on persistent acts rather than single isolated acts. The Attorney General can bring an action alleging violations of both statutes. *See, People v Applied Card Systems, Inc.*, 11 NY3d 105.

Therefore, the motions to dismiss the first, second, and third causes of action against the Zornberg Defendants, the Covert Defendant and H&Z Abstract Defendants are **denied**, except as set forth below as to the Statute of Limitations.

Statute of Limitations

As to the second and third causes of action, it appears settled that the State's claims based on violations of GBL §349 are governed by the three year statute of limitations. *Gaidon v. Guardian Life Ins. Co.*, 96 NY2d 201, 210 (2001); *Morelli v. Weider Nutrition Group, Inc.*, 275 AD2d 607 (2d Dept. 2000). Thus all claims that accrued prior to September 1, 2006 are time barred.

However, as to the first cause of action, the Court rejects the defendants' claim that enforcement proceedings brought by the Attorney General under Exec Law §63(12) are not governed by the six-year residual statute of limitations set forth in CPLR 213(1). The Court has already determined that the complaint sufficiently alleges both common law fraud (first cause of action) and violations of GBL §349 (second and third causes of action).

CPLR 214(2) prescribes a three-year statute of limitations for “an action to recover upon liability, penalty or forfeiture created or imposed by statute....”

However, this limitations period does not “automatically apply to all causes of action in which a statutory remedy is sought, but rather only where liability would not exist but for a statute”. (*Matter of Meyer*, 62 AD3d 133, 138 [1st Dept. 2009], quoting *Aetna Life & Cas. Co. v. Nelson*, 67 NY2d 169, 174 [1986]). Thus, the Court must “look to the essence of plaintiff’s claim and not to the form in which it is pleaded” (*State of New York v. Cortelle Corp.*, 38 NY2d 83, 86 [1975]).

Exec Law §63(12) allows the Attorney General to obtain injunctive relief, restitution and/or damages from any person who engages “in repeated fraudulent or illegal acts ... in the carrying on, conducting or transaction of business.” As used in this statute, the term “fraud” includes “any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions” (*id.*). Thus, Exec Law §63(12) applies to fraudulent conduct actionable at common law, as well as to conduct for which liability arises solely from statute. *People v. Liberty Mutual*, 15 Misc3d 1110(A) at *4 (Sup. Ct., NY Co. 2007).

Here plaintiff has plead both the elements of common law fraud and statutory violations which might not rise to the level of fraud and include “a far

greater range of claims that were never legally cognizable before [their enactment". *Gaidon, supra*. Thus, the six-year limitation period applies to the first cause of action since the conduct alleged is sufficient to constitute common-law fraud independent of the statutory violations. *State of New York v. Cortelle Corp.*, 38 NY2d 83 (1975); *see, Gaidon, supra; cf. State of New York v. Daciel Chem. Indus.*, 42 AD3d 301 [1st Dept. 2007]) (claims that do not allege all elements of fraud governed by three year statute); *see also, People v. Pharmacia Corp.*, 27 Misc3d 368, 373 (Sup. Ct. Albany Co. 2010); *People v. City Model and Talent*, 29 Misc3d 1205(A) (Sup. Ct. Suffolk Co. 2010).

Sixth Cause of Action

The sixth cause of action alleges breach of fiduciary duty in violation of Executive Law § 63(12). This cause of action alleges the same facts and law as the first cause of action for fraud in violation of Executive Law § 63(12). The claim of breach of fiduciary duty in violation of Executive Law § 63(12) warrants dismissal since it is duplicative of the plaintiff's second and third causes of action for fraud. There is nothing in plaintiff's allegations for breach of fiduciary duty which cannot be remedied by its request for relief involving the first to third causes of action. The sixth cause of action is duplicative and is **dismissed** against all named defendants.

Eighth Cause of Action

Plaintiff's complaint fails to state a claim for conversion. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property, belonging to someone else, interfering with that person's right of possession. The two 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.

Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 50. In the instant action, the plaintiff is the Attorney General of the State of New York. The Attorney General did not have a possessory right or interest in any property that is the subject of the foreclosure rescue transaction referred to in plaintiff's complaint. Thus, the first element of conversion has not been met. The eighth cause of action sounding in conversion is **dismissed** as to the moving defendants.

Necessary Parties

Select Portfolio Servicing, Inc. (SPS") as the servicing agent and attorney-in-fact for defendant U.S. Bank National Association, as Trustee for First Franklin Mortgage Loan Trust 2006-4-FF14, Mortgage Pass-Through Certificates, Series 2006-FF14 ("U.S. Bank") ("SPS and U.S. Bank Defendants") is named as a necessary defendant. The attorney for U.S. Bank and SPS in the affirmation in

support states that U.S. Bank is trustee for the First Franklin Mortgage Loan Trust 2006-4-FF14, Mortgage Pass-Through Certificates, Series 2006-FF14, which currently holds a note executed by Defendant John Rutigliano on June 29, 2006 (“Note”), in the principal sum of \$580,000 secured by a mortgage of the same date (“Mortgage”) giving a security interest in property located at 8 Terry Court, Glen Head, New York (“Property”). SPS is the servicing agent for U.S. Bank Mortgage. U.S. Bank and SPS are named as Necessary Party Defendants in this action.

Defendant Deutsche Bank National Trust Company, the Trustee for HASCO 2007-NC1 (“Deutsche Bank”), and defendant U.S. Bank National Association, the Trustee for Asset-Backed Pass-Through Certificate Series 2006-NC2 (“U.S. Bank”) and defendant American’s Servicing Co. (“ASC”) servicing agent for the property located at 34 Jean Drive and 86 Eatondale Ave. are also named as Necessary Party Defendants. None of the allegations by the plaintiff is against any of the named Necessary Party Defendants.

In support of the motion to dismiss the complaint as to the Necessary Party Defendants, the attorney submits an affidavit sworn to May 3, 2011 by Mary Ellen Burst, the Default Litigation Specialist of Wells Fargo Bank, N.A. successor by merger to Wells Fargo Home Mortgage, Inc. d/b/a America’s Servicing Company

(“ASC”). Ms. Burst’s affidavit is in support of defendants defendant Deutsche Bank National Trust Company, as Trustee for HASCO 2007-NC1 (“Deutsche Bank”), U.S. Bank National Association, as Trustee for Asset-Backed Pass-Through Certificate Series 2006-NC2 (“U.S. Bank”) and states that:

“ASC services two of the mortgage loans at issue in the above captioned action, specifically those that relate to properties located at 34 Jean Drive and 84 Eatondale Avenue. The trustee of the trust that owns the former is defendant U.S. Bank and as to the latter is Deutsche Bank. ASC does not own or hold a beneficial interest in the loans or mortgages at issue in this action.

As servicer of these loans, ASC collected and posted payments, maintained the escrow account, handled all aspects of customer service, and referred each loan for foreclosure when the mortgagees defaulted on their payments. Therefore, I, as Default Litigation Specialist for ASC, have reviewed the books and records maintained by ASC concerning this loan. The statements set forth herein are based upon my personal knowledge and my review of ASC’s records and files.

On or about July 11, 2006, defendant John Rutigliano (“Rutigliano”) obtained a mortgage loan from New Century Mortgage Corp. (“New Century”) for \$336,000 in principal, memorialized by a note (“Jean Drive Note”) and secured by a mortgage on the property located at 34 Jean Drive. (“Jean Drive Mortgage”). A true and correct copy of the Jean Drive Note and Mortgage is attached hereto as Exhibit 1 (emphasis added).

Subsequently, New Century assigned the Jean Drive Note and Mortgage to U.S. Bank, as evidenced by an Assignment of

Mortgage, dated September 22, 2008 (“Jean Drive Assignment”). A true and correct copy of the Jean Drive Assignment is attached hereto as Exhibit 2. The transfer of the Note from New Century to U.S. Bank is reflected in the Allonge, a true and correct copy of which is annexed to Exhibit 1.

U.S. Bank is the current holder of the Jean Drive Note and Jean Drive Mortgage.

Rutigliano failed to make the required loan payments that became due and payable in October 2007 and thereafter failed to cure his default. No payments have been made on the Jean Drive loan since September 2007, nor has Rutigliano paid taxes on the Jean Drive property, or insured the mortgaged property. ASC, acting for the trust holding the mortgage, has made those payments since the time of the default.

On or about December 22, 2006 defendant Kenneth Kiefer (“Kiefer”) obtained a mortgage loan from New Century for \$441,750 in principal, memorialized by a note (“Eatondale Note”) and secured by a mortgage on the property located at 86 Eatondale Avenue (“Eatondale Mortgage”). A true and correct copy of the Eatondale Note and Mortgage is attached hereto as Exhibit 3. The Note was indorsed in blank by New Century.

New Century assigned the Eatondale Note and Mortgage to Deutsche Bank, as evidenced by an Assignment of Mortgage, dated January 29, 2008 (“Eatondale Assignment”). Annexed hereto as Exhibit 4 is a true and correct copy of the Eatondale Assignment.

Deutsche Bank is the current holder of the Eatondale Note and Eatondale Mortgage.

A promissory note secured by a mortgage is a negotiable instrument. *See Mortgage Electronic Registration Systems Inc. v Coakley*, 41 AD3d 674.

A basic concept of contract law is that an assignee of a mortgage takes subject to all defenses and counterclaims that can be asserted against the assignor. *See, Hammelurger v Foursome Inn Corp.*, 54 NY2d 580, 586; *Crispino v Greenpoint Mortg. Corp.*, 304 AD2d 608, *State Street Bank & Trust Co. v Boayke*, 249 AD2d 535; *Caprara v Charles Ct. Assoc.*, 216 AD2d 722; *Granick v Mobach*, 13 AD2d 534.

New Century Mortgage Corporation was a subsidiary of New Century Financial Corporation. New Century Mortgage Corporation originated, purchased, sold and serviced mortgage loans secured primarily by first mortgage on single-family residences. As of January 1, 2007, New Century was the second biggest subprime mortgage lender in the United States. Subprime mortgage loans were riskier loans in that they were made to borrowers unable to qualify under traditional, more stringent criteria due to a limited or blemished credit history. Subprime borrowers were generally defined as individuals with limited income or having FICO credit scores between 500 and 620 on a scale that ranges from 300 to 850. Subprime mortgage loans have a much higher rate of default than prime mortgage loans and are priced based on the risk assumed by the lender.

On March 9, 2007, New Century Financial Corporation of which New Century Mortgage Corporation was a subsidiary, reported that it had failed to meet

certain minimum financial targets required by the warehouse lenders and disclosed that it was the subject of a federal criminal investigation. On March 20, 2007, New Century Financial Corporation said that it could no longer sell mortgage loans to Fannie Mae or act as the primary servicer of mortgage loans for the government sponsored enterprise. In a filing with the Securities and Exchange Commission, New Century Financial Corporation said that Fannie Mae terminated “for cause” a mortgage selling and servicing contract with it citing alleged breaches of that contract and others. New Century Financial Corporation said it received a notice of breach and termination on March 14, 2007.

On April 2, 2007, New Century Financial Corporation and its related entities filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court, District of Delaware located in Wilmington, Delaware. On March 26, 2008, an unsealed report by the bankruptcy court examiner outlined a number of “significant improper and imprudent practices related to its loan originations, operations, accounting and financial reporting process”. On or about August 1, 2008, New Century Financial Corporation went out of business pursuant to its Chapter 11 liquidation filing under bankruptcy. *See* http://en.wikipedia.org/wiki/New_Century viewed on October 31, 2011.

In commenting on the potential for lack of transparency with mortgage transactions involving MERS, former Chief Judge Judith Kaye of the court of Appeals, in a dissent in *MERS Corp., Inc. v Romaine*, 8 NY3d 90, 104, made the following prescient statement:

Although creating efficiencies for its members, there is little evidence that the MERS system provides equivalent benefits to home buyers and borrowers and, in fact, some evidence that it may create substantial disadvantages. While MERS necessarily opted for a system that tracks both the beneficial owner of the loan and the servicer of the loan, its 800 number and Web site allow a borrower to access information regarding only his or her loan services, not the underlying lender. The lack of disclosure may create substantial difficulty when a homeowner wishes to negotiate the terms of his or her mortgage or enforce a legal right against the mortgagee and is unable to learn the mortgagee's identity. Public records will no longer contain this information as, if it achieves the success it envisions, the MERS system will render the public record useless by masking beneficial ownership of mortgages and eliminating records of assignments altogether. Not only will this information deficit detract from the amount of public data accessible for research and monitoring of industry trends, but it may also function, perhaps unintentionally, to insulate a noteholder from liability, mask lender error and hide predatory lending practices (emphasis added).

In this era of allegations of predatory lending, subprime mortgages and short sales, the equity powers of the Court inherent in a mortgage foreclosure action are triggered. *See Note v Darien Const.*, 41 NY2d 1055. Once equity is invoked the Court's power is as broad as equity and justice requires. *See Norstar Bank v*

Morabito, 201 AD2d 545, 546.

In 1974 Congress passed the Real Estate Settlement Procedure Act (RESPA) after determining that reforms were needed to insure that Americans involved in real estate transaction would receive timely information on the nature and cost of the refinance process and would be protected from abusive practices. Now, over 35 years later, after numerous amendments to RESPA and New York State laws to protect the consumer, the failure to disclose the true cost of the mortgage is as rampant now as it was when Senator William Proxmire urged the passage of RESPA. In *Bank of New York v Allen Walden, et al.*, 194 Misc2d 461 (Nassau Supr. Ct., 2002), 751 NYS2d 341, 2002 NY Misc Lexis 1513 Justice Ralph Franco (retired), in one of the first cases in this Court to address the issue of predatory lending and/or subprime loans, stated that “. . . the legislative intent is crystal clear—protection of the public from sharp lending practices.”

It is incomprehensible that New Century did not have an underwriting department to ascertain the veracity of the transactions. It is a reasonable inference that the putative sale/lease-back deals were in reality mortgage refinances used to circumvent various state and federal statutes. A mortgagor would be entitled to a three day right of recession in a mortgage refinance transaction. The fact that there may be irregularities on the HUD-1 statements

raises issues as to whether the lender was in violation of the disclosure laws. *See* Truth in Lending Law (15 U.S.C. Sections 1601, et seq.).

Courts have found that the lender and mortgage broker may have such a relationship as to impute their joint action as being fraudulent. *See Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617; *compare Chemical Bank v Bowers*, 228 AD2d 407. In *Thomas v LaSalle Bank National Association et al.*, 79 AD3d 1015, 1017, the Appellate Division Second Department stated that:

Considering the complaint and all evidentiary material submitted, including the closing documents, the plaintiff has a cause of action for rescission of the subject mortgage transactions on a theory that the appellants are not *bona fide* encumbrancers for value. A mortgagee's interest in the property is protected unless it has notice of a previous fraud affecting the title of its grantor. "[A] mortgagee is under a duty to make an inquiry where it is aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue." "A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value" (internal citations omitted).

Here the documentary evidence establishes circumstances which would lead a reasonable, prudent lender to make inquiries concerning the transaction. Thus, under the first cause of action alleged in the complaint, the plaintiff has a cause of action against the appellants for rescission of the subject mortgages (internal citations omitted). *Compare Deutsche Bank Nat. Trust Co. v Gordon*, 84 AD3d 443 and *G.E. Capital Mortg. Services, Inc. v Holbrooks*, 245 AD2d 170.

In an action by mortgagors against a mortgagee and its assignee, it was undisputed

that the loan was advanced in connection with the construction and purchase of a single family home, that the home was uninhabitable at the time of closing, and the builder was convicted of fraud in federal court for crimes committed in the construction and sale of the plaintiff mortgagors' home, as well as other residences. Although a mortgagee generally has no duty to a mortgagor with respect to the structural soundness of a dwelling, the workmanship, on the issuance of a Certificate of Occupancy, the highly unusual circumstance established that an issue of fact existed as to the mortgagee's knowledge of the fraud. *Barnes v Countrywide Home Loans, Inc.*, N.Y.L.J., August 1, 2001, at 22, col. 3 (Sup. Ct., Suffolk County [Dunn, J.]).

New Century Mortgage filed for bankruptcy protection prior to the lender defendants procuring the assignment of mortgages.

An attorney for defendant Deutsche Bank National Trust Company submitted a one and one-half page reply affidavit stating that:

A true and correct copy of the cover page of the Pooling and Servicing Agreements ("PSAs") for 34 Jean Drive and 86 Eatondale Avenue loans, reflecting that "Wells Fargo Bank, NA" is servicer of the loans, are annexed collectively hereto as Exhibit I. A full copy of the PSAs are available online at http://www.sec.gov/Archives/edgar/data/1374759/000088237706003528/d569152ex4_1.htm. and http://www.sec.gov/Archives/edgar/data/1399479/0001144204070328-51/v078746_4-1.htm.

At the request of this Court the attorneys for Deutsche Bank National Trust Company, as Trustee for HASCO 2007-NC1 (“Deutsche Bank”) and U.S. Bank National Association, as Trustee for Asset-Backed Pass-Through Certificates Series 2006-NC2 (“U.S. Bank”) (together, “Defendants”) in the within captioned action, furnished the Court with copies of the Pooling & Servicing Agreements related to the mortgages held by Deutsche Bank and U.S. Bank, as trustees for the above-referenced trusts with respect to the properties at issue in this action. The Policy and Service Agreement dated May 1, 2007, is over 223 pages, and provides at pg. 49 that upon discovery that any of the mortgages are defective that make up the pool, the sponsor shall remove the:

Mortgage Loan from the Trust Fund and substitute in its place a Substitute Mortgage Loan, in the same manner and subject to the same conditions set forth in this Section 2.03 or (ii) repurchase such Mortgage Loan at the Repurchase Price; provided, however, that any such substitution pursuant to clause (i) above shall not be effected prior to the delivery to the Custodian of a Request for Release substantially in the form of Exhibit J, and the delivery of the Mortgage File to the Custodian for any such Substitute Mortgage Loan. It is understood and agreed that the obligations of the Sponsor under this Agreement to cure, repurchase or substitute any Mortgage Loan as to which a breach of a representation and warranty has occurred and is continuing, together with any related indemnification obligations of the Sponsor set forth in Section 2.03(b), shall constitute the sole remedies against the Sponsor available to the Certificateholders, the Depositor and any of its affiliates, or the Trustee on their behalf.

The Pooling and Servicing Agreements dated September 1, 2006 is almost 200 pages. The Court further notes that the Pooling and Servicing Agreements are dated May 1, 2007 and September 1, 2006, respectively, while assignments were not made until September 2008. The moving lender defendants are assignees of New Century and “stand in its shoes.”

The Pooling and Servicing Agreement dated September 1, 2006 requires the production of a title insurance policy pertaining to the mortgaged property (pg. 76). Section 2:05 of the Pooling Agreement Representations, Warranties and Covenants of the Servicer states that there are no actions or proceedings against, or investigations known to the Servicer before a court or administrative agency that might prohibit or materially and adversely affect the performance by the servicer of its obligations under or the validity or enforceability of the Agreement (p. 84). The Servicer had an obligation to furnish and “continue to fully furnish” accurate and complete information on its borrow credit files to named credit agencies in a timely manner (p. 84). The Pooling and Service Agreements provided protection to the assignees/trustees. When the servicer, the assignee and/or trustee acquired the subject mortgages they were aware of New Century’s precarious legal situation. New Century put the toxic mortgages into the stream of commerce. The “lender” defendants cannot use the Pooling and Servicing Agreements as a

defense without a judicial determination that the Agreements vitiate the time honored obligation of assignees that they take all liabilities associated with an assignment. *See, Hammelurger v Foursome Inn Corp.*, 54 NY2d 580, 586; *Crispino v Greenpoint Mortg. Corp.*, 304 AD2d 608, *State Street Bank & Trust Co. v Boayke*, 249 AD2d 535; *Caprara v Charles Ct. Assoc.*, 216 AD2d 722; *Granick v Mobach*, 13 AD2d 534. The attorney for the lenders have failed to demonstrate any basis in the law or the facts to permit the trustee assignees to walk away from their *obligations* as beneficiaries of the assignment and at the same time assert the *rights* pursuant to the assignment while precluding the consumers from asserting a viable cause of action for fraud and misrepresentation. *See JP Morgan Chase Bank v Munoz*, 85 AD3d 1124. At the very least, the lender defendants may be entitled to an equitable subrogation cause of action for the amount of money loaned on behalf of the consumers (*LaSalle Bank Nat'l. Assn. v Ally*, 39 AD3d 597). The sanctity of a contractual obligation is fundamental. *Pimpinello v Swift & Co.*, 253 NY 159; *Connelly v Blitzer Realty Inc. v Elwyn*, 111 AD2d 555. It would be inequitable for the consumers to have the Court rescind the respective mortgages and end up with a house that is free and clear of any liens. Justice should be a shield to protect those taken advantage of by

unscrupulous individuals, not a sword to unjustly enrich and reward the consumers with a windfall to which they are not entitled. *Norstar Bank v Morabito, supra*.

Moreover, this Court finds plaintiff's reliance on *State of New York by Abrams v Harris Home Design, Inc.*, 1989 WL 88690 (S.D.N.Y.) to be persuasive. In that case, as here, the Attorney General sought relief under Executive Law § 63(12). The complaint therein alleged that certain defendants had fraudulently induced consumers into entering into home improvement sales contracts. Before the case was removed to federal court, the plaintiffs had sought joinder under CPLR 1001(a) of assignee banks and FSLIC who had acquired the mortgages and notes executed in the underlying transactions. On a motion to dismiss brought by the assignees, the federal court held that joinder of the assignees as necessary parties pursuant to CPLR 10019(a) had been required, even though no cause of action was alleged against them. The court held that "plaintiff need not allege any wrongdoing in order to join" the banks and FSLIC as parties. "Since these defendants hold the consumers' mortgages as security for the obligations they purchased, any relief the Court may award plaintiff could be meaningless."

In addition, the Court reasoned that if the assignee banks and FSLIC foreclosed on the mortgages, the defrauded consumers would unduly go through excessive litigation. This, after all, would undermine the rationale behind CPLR

1001(a): “to avoid excessive and multiple litigation.” The Federal Court cited *Mahr, v NUF Ins. Society*, 127 NY452, *Rothenberg v Wolfman*, 16 Misc 2d 124 (Sup. Ct. 1958); *Estate of Anita Emons*, 93 Mis2d 615 (Sup. Ct. 1978).

Conclusions

The sixth and eighth causes of action are dismissed.

Under the second and third causes of action, all claims that accrued prior to September 1, 2006 are time barred.

Motions sequences no. 4 and no. 5 by the lender banks, assignees, trustees, servicing agents are denied.

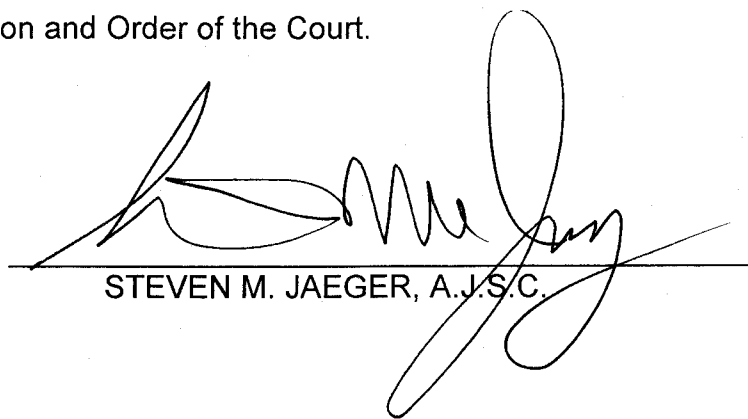
Any other relief not specifically granted herein is denied.

Parties shall have 20 days from today’s date to serve verified answers.

Counsel for all parties shall appear at the scheduled conference in Part 43 of the Nassau County Supreme Court on December 7, 2011, at 9:30 a.m. Counsel shall be prepared to enter into a scheduling order for discovery and further proceedings in this action. The attorneys for the plaintiff shall serve a copy of this order on the attorneys for the defendants.

This constitutes the Decision and Order of the Court.

Dated: November 15, 2011



STEVEN M. JAEGER, A.J.S.C.

ENTERED
NOV 17 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE