

Salvaggio v American Express Bank, FSB
2011 NY Slip Op 34193(U)
October 31, 2011
Supreme Court, Queens County
Docket Number: 22636/2010
Judge: Sidney F. Strauss
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ORIGINAL

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA Part 11

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DONNA M. SALVAGGIO,

Plaintiff,

Index No.: 22636/2010

-against-

Motion Date: August 17, 2011

AMERICAN EXPRESS BANK, FSB,
ET. AL.,

Defendants.

Cal. Nos.: 49 & 50
Seq. Nos.: 1 & 2

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The following papers numbered 1 to 35 read on this motion by defendants PNC Bank National Association and PNC Financial Services Group, Inc. (jointly PNC) for summary judgment dismissing the amended complaint as against PNC on the ground that the claims are time-barred and fail to state a cause of action, and for sanctions; a separate motion by defendant Patrick Christopher for the same relief on his behalf; a cross motion by plaintiff for summary judgment in her favor, dismissal of the counterclaims asserted by defendant Christopher, and other related relief; and a cross motion by defendants American Express Bank, FSB and American Express Travel Related Services Company, Inc. (jointly AMEX) for leave to amend their answer to assert the affirmative defense of the statute of limitations and for costs.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-8
Notices of Cross Motion - Affidavits - Exhibits.....	9-10
Answering Affidavits - Exhibits.....	20-29
Reply Affidavits.....	30-35

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated for the purpose of disposition and are determined as follows:

This action arises out of plaintiff's purchase in 2005 of certain residential real property located in Howard Beach, New York. The contract of sale entered into on or about February 10, 2005, provided that the closing was conditioned upon the "delivery by Seller to Purchaser of a valid and subsisting Certificate of Occupancy or other required certificate of compliance, or evidence that

none was required, covering the building(s) and all of the other improvements located on the property authorizing their use as a two family dwelling as of the date of Closing.” To finance the purchase, plaintiff borrowed \$472,000 from AMEX and gave AMEX a mortgage on the property. The closing took place on March 24, 2005. Defendant Christopher, an attorney, represented plaintiff in connection with the purchase. On or about August 24, 2007, plaintiff gave a second mortgage on the premises to PNC to secure a loan in the amount of \$150,000. In this action, plaintiff alleges that as a result of defendants’ conduct she purchased and took title to the subject property without knowing that the premises lacked a certificate of occupancy. Asserting various theories of liability, plaintiff seeks to recover damages allegedly sustained as a result of her inability to sell or refinance the premises to avoid foreclosure, and for emotional distress.

The cause of action asserted against defendant Christopher for legal malpractice is governed by the three-year statute of limitations set forth in CPLR 214(6). A legal malpractice cause of action accrues, and the limitations period begins to run, when the alleged malpractice is committed, not when the client discovers it. (*See, Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]; *Tsafatinos v Lee David Auerbach, P.C.*, 80 AD3d 749 [2011].) Here, plaintiff’s claim against defendant Christopher accrued on March 24, 2005, the date of the closing, and this action was not commenced until September 7, 2010.

Plaintiff’s reliance on CPLR 203(g) to avoid the applicable malpractice statute of limitations is unavailing since, by its terms, CPLR 203(g) is applicable only in instances where the time within which an action must be commenced is computed from the time of discovery. Furthermore, plaintiff has failed to raise a triable issue of fact as to whether the continuous representation doctrine tolled the limitations period. (*See, Rakusin v Miano*, 84 AD3d 1051 [2011]; *Hasty Hills Stables, Inc. v Dorfman, Lynch, Knoebel & Conway, LLP*, 52 AD3d 566 [2008].) This doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim. (*See, McCoy v Feinman*, 99 NY2d 295, 306 [2002]; *Shumsky*, 96 NY2d at 168.) There is no proof of any continuing representation in connection with plaintiff’s purchase of the premises, nor of any contemplated need therefor. Even assuming that defendant Christopher’s representation of plaintiff continued until he provided her with a closing statement, the unsubstantiated hearsay assertion of plaintiff’s attorney in a reply affirmation that the closing statement was not provided to plaintiff until August 2009 is insufficient to meet plaintiff’s burden to show that her case falls within an exception to the statute of limitations. (CPLR 3212[b]; *see, Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP*, 75 AD3d 546 [2010]; *Alicanti v Bianco*, 2 AD3d 373 [2003]; *see generally, Morales v Coram Materials Corp.*, 51 AD3d 86, 96 [2008].) In any event, counsel’s assertion is belied by the closing statement annexed as an exhibit to plaintiff’s cross-moving papers, which has a cover letter dated March 26, 2005.

Accordingly, that branch of defendant Christopher’s motion that is for summary judgment dismissing the amended complaint against him as time-barred is granted. (CPLR 214[6]; *see, Daniels v Turco*, 84 AD3d 858 [2011]; *Rakusin*, 84 AD3d at 1052.) In all other respects, the motion is denied. The contentions regarding the sufficiency of the complaint are rendered academic. There is no basis to impose sanctions on plaintiff pursuant to CPLR 8303-a or the Uniform Rules for Trial

Courts [22 NYCRR] § 130-1.1. (See, *Tsafatinos v Lee David Auerbach, P.C.*, 80 AD3d at 750.) The part of plaintiff's cross motion that is to dismiss the counterclaims for sanctions interposed by Christopher is granted. (CPLR 3212[b].)

The causes of action against PNC sounding in negligence and violation of General Business Law § 349 are barred by the three-year statutes of limitations set forth in CPLR 214(2), (4) and (5). (See, *Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201 [2001]; *Tenenbaum v Gibbs*, 27 AD3d 722 [2006].) It is undisputed that the date of the loan from PNC to plaintiff was August 27, 2007, more than three years prior to the commencement of this action. Once again, contrary to plaintiff's contention, CPLR 203(g) is inapplicable since the time within which these causes of action must be commenced is not computed from actual or imputed discovery of facts.

The cause of action against PNC alleging false representations by PNC in connection with the closing on the purchase of the subject property is defeated by the undisputed fact that PNC did not make any loan to plaintiff to finance the purchase and was not a party to said closing. To the extent plaintiff attempts to transfer her allegations of misrepresentation to the second mortgage loan that was made by PNC more than two years after the purchase of the property, plaintiff has not sufficiently pleaded the material elements of a fraud cause of action. (See, *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *Tenenbaum*, 27 AD3d at 723.)

Accordingly, the part of PNC's motion that is for summary judgment dismissing the complaint as against it is granted for the above-stated reasons. The part of the motion that is for sanctions is denied. (See, *Tsafatinos v Lee David Auerbach, P.C.*, 80 AD3d at 750.)

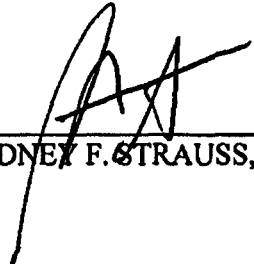
Based upon the above determinations, the parts of plaintiff's cross motion that seek summary judgment and the striking of answers against defendants PNC and Christopher are denied. The part of the cross motion addressed to defendant AMEX is also denied. Plaintiff has not submitted evidence in admissible form sufficient to demonstrate the absence of any material issues of fact and establish her right to judgment as a matter of law. (See, *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993].) Assuming that plaintiff is correct in arguing that AMEX can be charged with a duty of care to plaintiff based upon the customary business practice of a lender, plaintiff has not offered any proof of the general custom or practice in issue, or any proof that the title report and related searches available to AMEX were insufficient under those general practices. In addition, the copy of the mortgage commitment proffered contradicts plaintiff's assertion that the commitment issued by AMEX was conditioned upon plaintiff providing a certificate of occupancy. Furthermore, the expert evidence relied upon by plaintiff is not in admissible form and does not constitute competent evidence. (See, *Alvarez v American Intl. Realty Corp.*, 60 AD3d 793 [2009]; *Mazzola v City of New York*, 32 AD3d 906 [2006].)

The branch of the cross motion by AMEX that is for leave to amend its answer to assert the affirmative defense that the causes of action are barred by the statute of limitations is granted. The amended answer, in the form proposed, is deemed served. Plaintiff has not demonstrated any prejudice or surprise, and the proposed amendment is not palpably insufficient or devoid of merit.

Under these circumstances, leave to amend is freely granted. (CPLR 3025[b]; *see, Kruger v EMFT, LLC*, 87 AD3d 717 [2011]; *Frumento v On Rite Co., Inc.*, 66 AD3d 828 [2009].)

There is no basis to award AMEX costs upon this cross motion, and the part of the cross motion that seeks costs is denied. (CPLR 8106.)

Dated: October 31, 2011



SIDNEY F. STRAUSS, J.S.C.

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