

7296-7304 Realty Corp. v Guastamaccia

2011 NY Slip Op 34202(U)

October 19, 2011

Supreme Court, Richmond County

Docket Number: 100705/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

Index No.:100705/08
Motion No.: 010, 011

**7296-7304 REALTY CORP. and
NICHOLAS ANTONELLI,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**STEVEN GUASTAMACCIA,
CATHERINE GUASTAMACCIA,
VITO LENTINI,
ANNETTE LENTINI,
COUNTRYWIDE HOME LOANS,
HCI MORTGAGE a/k/a HOME CONSULTANTS, INC.,
EAM LAND SERVICES, INC.,
LOUIS CANNIZZARO,
STEVEN DECKER, ESQ., and
DECKER, DECKER, DITO & INTERNICOLA, LLP,**

RICHMOND COUNTY CLERK
2011 OCT 24 P 5:08
DIVISION OF LAW & EQUITY

Defendants

The following items were considered in the review of the following motion and cross motion for reargument.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law in Support of Motion	2
Notice of Cross-Motion and Affidavits Annexed	3
Memorandum of Law in Support of Cross-Motion	4
Reply Memorandum of Law	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion and Cross-Motion is as follows:

The defendant, EAM Land Services, Inc., ("EAM") move and the plaintiffs cross-move to reargue the decision and order of this court dated May 10, 2011 which dismissed the plaintiffs' cause of action for negligent misrepresentation. EAM argues that the court erred in not simultaneously dismissing the plaintiffs' negligence claim when it dismissed the plaintiffs' claim for negligent misrepresentation. Contrariwise, the plaintiffs' seek reargument arguing that

this court erred in dismissing their claim for negligent misrepresentation. Upon reconsideration EAM's motion is granted, and the plaintiffs' cross-motion is denied.

Facts

EAM originally moved to dismiss the plaintiffs' complaint pursuant to CPLR § 3211(a)(7) arguing that the complaint fails to state a cause of action. Alternatively, EAM requested that the court treat this motion to dismiss as one for summary judgment. The court's original decision indicated that it would consider EAM's motion as one to dismiss, rather than for summary judgment. However, the court erred when in the first decretal paragraph it ordered that EAM's motion for summary judgment was granted in the cause of action for negligent misrepresentation. Additionally, the May 10, 2011 decision granted the plaintiffs' cross-motion to serve and file an amended complaint. The amended complaint annexed to the plaintiffs' cross-motion stated in pertinent part:

38. That EAM, in connection with the transfers of the Two Properties, prepared title reports for the Two Properties.

39. That the title reports stated that Plaintiff corporation was the insured and thus, Plaintiff had privity with EAM.

40. That the requirements in EAM's title reports were intentionally overlooked, recklessly overlooked and/or ignored by EAM, HCI and Countrywide to further the fraudulent Mortgages and transfers.

41. That the requirements for closings contained in EAM's title reports were intentionally overlooked, recklessly overlooked and/or ignored by EAM, HCI and Countrywide to further the fraudulent Mortgage transfers.

42. That Defendant EAM represented it had performed an accurate and diligent title examination and provided an accurate title report and performed proper clearance procedures but failed to do so.

43. That the fraudulent actions were known, recklessly or negligently disregarded by EAM, which provided substantial aid in achieving the fraudulent transfers of the properties.

44. In addition to the allegations set forth above and in the complaint(s) against EAM, EAM committed the following wrongful conduct:

- i. EAM overlooked or ignored its stated requirements to be provided with copies of prior contracts for "no consideration" deeds;
- ii. Failed to obtain valid certificates of incorporation;
- iii. Failed to verify validity of certificate of incorporation if received;
- iv. Failed to obtain valid corporate resolutions;
- v. Failed to obtain any evidence of authorization by the corporation;
- vi. Failed to obtain any evidence that the signatories had authority to sign documents;
- vii. Improperly and falsely prepared the transfer tax forms and filed same with the county clerk;
- viii. Failed to obtain any corporate documentation regarding the transactions;
- ix. Failed to determine whether transactions were purchases or refinances;
- x. Failed to verify the owner of the property;
- xi. Failed to verify owners of the corporation;
- xii. Produced title reports in the corporate name while the loan and deed went to individuals;
- xiii. Failed to obtain proper corporate acknowledgments;
- xiv. Failed to verify payoff of existing mortgage;
- xv. Failed to obtain affidavits disclosing prior conveyances as per title report;

xvi. Failed to obtain documents required in title reports before closing;

xvii. Indicated that 7302 Amboy was previously sold by the corporation yet proceed title for the property without verification;

xviii. Failed to address or clear the recorded notice of lending;

xix. Conspired with Kapsalis, Guerra and the Guastamaccia and Lentini defendants to defraud Plaintiffs of their property and aided and abetted said fraud;

xx. Failed to follow reasonable industry title closing standards;

xxi. Breached its duties to Plaintiffs.

On its face, the May 10, 2011 decision ordered summary judgment granted when considering a motion dismiss without ever indicating that it would treat the pending motion as one for summary judgment, rather than one for dismissal. Furthermore, it is clear that the May 10, 2011 decision failed to address the plaintiffs' cause of action for negligence. Therefore, reargument of this decision is appropriate.

Discussion

Motions to reargue pursuant to *CPLR* § 2221 are addressed to the discretion of the court. A motion to reargue is properly granted upon a showing that the court overlooked or misapprehended the facts and /or the law or mistakenly arrived at its earlier decision. Even in situations in which the criteria for granting a reconsideration motion are not technically met, the court retains flexibility to grant such a motion when it is deemed appropriate.¹ In this case given the conflicting standards of review between a motion to dismiss pursuant to *CPLR* § 3211(a)(7),

¹ *Loris v. S & W Realty Corp.*, 16 AD3d 729, [3d Dep't 2005]. See also, *Pinto v. Pinto*, 120 AD2d 337, [1st Dep't 1986].

and a motion for summary judgment pursuant to CPLR § 3212 this court grants reargument.

It is the finding of this court that discovery is still open and ongoing and therefore it was inappropriate to convert EAM's motion to summary judgment and grant the same with respect to the plaintiffs' claim for negligent misrepresentation.

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the pleading and submissions in opposition to the motion, and accord the plaintiff every possible inference.² In this case the causes of action for negligence and negligent misrepresentation must both be dismissed.

The Court of Appeals in *Sykes v. RFD Third Avenue 1 Associates, LLC* held that "... an action for negligent misrepresentation must be dismissed where the complaint does not allege that the misrepresentations were made with knowledge that plaintiffs would rely on them."³ Here, the second amended complaint fails to allege reliance on the part of the plaintiffs. Therefore, the plaintiffs' claims sounding in negligence and negligent misrepresentation must be dismissed.

Accordingly after allowing the reargument of the plaintiffs and EAM and having reconsidered this court's decision and order of May 10, 2011, it is hereby:

ORDERED, that the May 10, 2011 decision is amended to dismiss the plaintiffs' seventh cause of action sounding in negligence; and plaintiffs' eighth cause of action sounding in negligent misrepresentation as against EAM Land Services, Inc.; and it is further

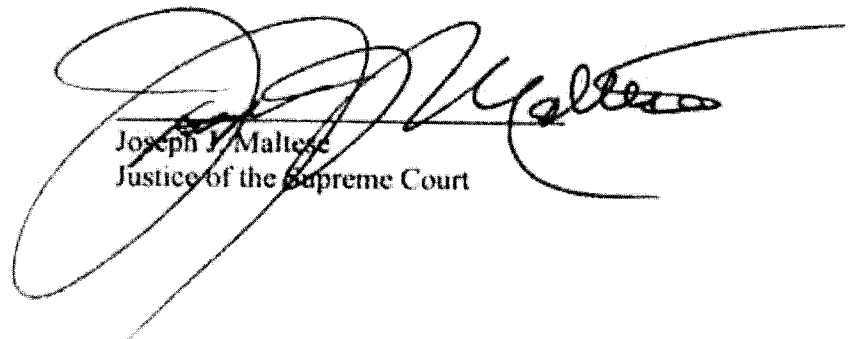
² See, *Kevin Spence & Sons, Inc. v. Boar's Head Provisions, Co.*, 5 AD3d 352, [2d Dept 2004].

³ 15 NY3d 370, 372 [2010].

ORDERED, that the remaining parties shall return to DCM Part 3, 130 Stuyvesant Place,
3rd Floor, on **December 7, 2011 at 9:30 a.m.**

ENTER,

DATED: October 19, 2011



Joseph J. Maltese
Justice of the Supreme Court

GRANTED
OCT 24 2011
Joseph J. Maltese