

Gall v Colon-Sylvain
2011 NY Slip Op 34289(U)
May 18, 2011
Supreme Court, Nassau County
Docket Number: 6536/07
Judge: Stephen A. Bucaria
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

INDEX No. 6536/07

MOTION DATE: April 5, 2011
Motion Sequence # 011, 012

-against-

FRANCES COLON-SYLVAIN, WELLS FARGO
N.A., JOSEPH GRANT, EMPIRE LAND
SERVICES CORP., ANTHONY MICHAEL
CAMISA, DAVID M. FISH and JJRG
ENTERPRISES INC.,

Defendants.

WELLS FARGO N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN,
JOSEPH GRANT and JJRG ENTERPRISES INC.,

Counterclaim-Defendants.

WELLS FARGO N.A.,

Third-Party Plaintiff,

-against-

JUDITH REARDON, ESQ.,

Third-Party Defendant.

– The following papers read on this motion:

Order to Show Cause.....	X
Cross-Motion.....	X
Affidavit in Opposition.....	X
Reply Affirmation.....	XX

Motion by defendant Wells Fargo for an order to set a date for the examination of third party defendant Judith Reardon, Esq. is **granted** to the extent indicated below. Cross-motion by third party defendant Judith Reardon for a protective order is **denied**.

This is an action for breach of fiduciary duty. Plaintiff Elemer Gall and defendant Joseph Grant formed a corporation, JJRG Services, Inc, to acquire distressed properties and renovate them for resale. In February 2005, Grant purchased a property located at 75 Oakdale Boulevard in Farmingdale, with \$140,000 contributed by Gall. Grant took out a mortgage on the property, the payment of which was to be his contribution to the venture, and then transferred title to JJRG. However, Gall proceeded to occupy the premises rather than performing the agreed upon renovation. Gall also defaulted on the mortgage, and on August 18, 2006 a judgment of foreclosure was entered.

On November 1, 2006, JJRG entered into a contract to sell the property to defendant Frances Colon-Sylvain, who is Grant's girlfriend. The contract was signed by Joseph Grant on behalf of the corporation. Colon-Sylvain, representing that the property would be her primary residence, obtained a purchase money mortgage from defendant Wells Fargo. The title was insured by defendant Empire Land Services Corp.

The closing occurred on December 26, 2006. While Grant acted for him by a power of attorney, Gall was nonetheless present at the closing. Defendant Anthony Camisa is an attorney who represented both Conlon-Sylvain and Wells Fargo in connection with the transaction. Defendant David Fish is the attorney who represented JJRG. At the closing, Gall received a check for \$52,620, representing his interest in the property. However, this check was not cashed by Gall, apparently because he thought that he was entitled to more of the proceeds of the sale.

On April 16, 2007, Gall commenced the present action, asserting claims against Grant for breach of fiduciary duty, fraud, and conversion in connection with the real estate transaction. Additionally, plaintiff asserts claims for fraud against Empire Land Services and Wells Fargo. Third party defendant Judith Reardon, Esq. is the attorney who originally represented plaintiff in the action. Wells Fargo counterclaims against plaintiff for fraud based upon his participation in the loan transaction. Wells Fargo alleges that Colon-Sylvain had no intention of residing in the premises or paying the debt but she agreed to be the nominal borrower because Gall and Grant did not have adequate credit to qualify for the loan transaction.

In August 2007, Wells Fargo commenced an action against Colon-Sylvain and Gall to foreclose the mortgage (Index No 14073-07). On March 30, 2009, Judith Reardon instructed Camisa to reissue the \$52,620 check to her as attorney. Reardon asserts that she deposited the check into her attorney's escrow account, but by May 15, 2009 all of the funds were applied to plaintiff's legal fees and expenses. On December 10, 2010, Wells Fargo served a third party complaint on Reardon, seeking to impose a constructive trust on the loan proceeds and asserting a claim for unjust enrichment.

Pursuant to an order to show cause dated February 22, 2011, Gall/Reardon moved for various relief, including summary judgment dismissing Wells Fargo's counterclaims against plaintiff and summary judgment dismissing Wells Fargo's third party claims against Reardon. In the order to show cause, the court granted permission to Reardon for leave to withdraw as Gall's attorney on the grounds that her interests were "directly adverse" to plaintiff's interests. By order to show cause dated March 14, 2011, third party plaintiff Wells Fargo moves pursuant to CPLR 3107 for an order scheduling an examination before trial of Reardon on less than 20 days notice. At the time the order to show cause was signed, Reardon's motion for summary judgment dismissing the third party complaint was returnable April 29, 2011. However, that motion was subsequently adjourned to May 16, 2011.

Third party defendant Judith Reardon cross moves pursuant to CPLR § 3103 for a protective order striking Wells Fargo's notice of deposition. Reardon argues that the information sought by Wells Fargo is protected by the attorney client privilege. The court notes that Gall, who is now pro se in this matter, has neither waived nor invoked the attorney client privilege and has not submitted opposition to Wells Fargo's motion. Moreover, Reardon herself has submitted several affidavits concerning her involvement in the case, including her receipt and disbursement of the escrow proceeds (See in particular affidavit of Judith Reardon dated February 17, 2011, ex C to Reardon's affidavit in opposition to the present motion).

The attorney-client privilege, codified in CPLR 4503, is an evidentiary privilege that protects against disclosure of confidential communications in specified proceedings (Madden v Creative Services, 84 NY2d 738, 745 [1995]). Like all privileges, it is a limitation on the truth-seeking process and is to be strictly construed (Id). The proponent of the privilege bears the burden of establishing that the information sought is immune from disclosure (People v Greenberg, 50 AD3d 195, 200 [1st Dept 2008]). The fee arrangements between attorney and client do not ordinarily constitute a confidential communication (Priest v Hennessy, 51 NY2d 62, 69 [1980]). A lawyer may reveal confidential information to the extent that the lawyer reasonably believes necessary to defend the lawyer against an accusation of wrongful conduct (Rule 1.6(b)(5) of the Professional Conduct Rules).

Reardon has not established that the facts surrounding the re-issuance of the \$52,620 check, her deposit of the check into her attorney escrow account, and her subsequent

Withdrawal of the funds are protected by the attorney client privilege. Moreover, Reardon should be permitted to testify as to her representation of Gall to the extent necessary to defend herself against Wells Fargo's accusation that she had reason to know that the \$52,620 was proceeds of a fraudulent mortgage transaction.

Accordingly, third party defendant Judith Reardon's motion for a protective order striking Wells Fargo's notice of examination before trial is **denied**. Third party plaintiff Wells Fargo's motion to set a date for the deposition is **granted** to the extent that third party defendant Judith Reardon shall appear for a deposition at the courthouse on June 1, 2011 at 9:30 am. The deposition shall continue day to day until completed and may not be adjourned without the prior approval of the court. The denial of Reardon's motion for a protective order is without prejudice to her right to assert the attorney client privilege as to communications with Gall concerning events prior to the Wells Fargo mortgage application.

So ordered.

Dated MAY 18 2011

Stephen A. Bucaria
 J.S.C.

ENTERED
 MAY 23 2011
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE