

Vescova v Private Capital Group, LLC

2012 NY Slip Op 30798(U)

March 15, 2012

Sup Ct, Nassau County

Docket Number: 13350/10

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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MIRRAY VESCOVA,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 13350/10
Motion Seq. No.: 02**

PRIVATE CAPITAL GROUP, LLC t/a PCG PRIVATE
CAPITAL GROUP, LLC and ROUNDPOINT
MORTGAGE SERVICING CORPORATION,

Defendants.

DECISION AND ORDER

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Papers Read on this Motion:

Defendants' Notice of Motion	02
Plaintiff's Affirmation in Opposition	xx
Defendants' Reply Affirmation	xx
Defendants' Reply Affidavit	xx

Defendants, Private Capital Group, LLC t/a PCG Private Capital Group ("PCG"), LLC and Roundpoint Mortgage Servicing Corporation ("Roundpoint") move this Court for an Order, pursuant to CPLR §§ 3211 and 3212, dismissing the Complaint of the plaintiff, Mirray Vescova. The instant motion arises out an underlying mortgage foreclosure action and the ensuing short sale, settling the action.

FACTS

In March, 2004, plaintiff borrowed the sum of \$665,000 from GreenPoint Mortgage Funding, Inc. Plaintiff conveyed a security interest in the commercial real property, located at 382-384 West Josh St., in Hicksville, NY, for repayment of the Note by a Mortgage duly recorded in the Office of the Clerk of the County of Nassau, in April, 2004. The Note and Mortgage were transferred and/or

assigned to Copperfield Investments, LLC c/o PCG, and Roundpoint was its servicer and agent.

It is undisputed that the plaintiff defaulted under the terms of the Note and Mortgage and that the lenders commenced foreclosure proceedings in this Court in August, 2008. During the pendency of the action, the plaintiff tendered the sum of \$1,104,371.22, by way of a short sale, although the total amount of indebtedness loan was \$1,142,337.60. The lender, however, accepted the tendered amount as full satisfaction, and discharged the lien against the premises and discontinued the foreclosure action.

According to the plaintiff, the payoff letter indicated the amount of \$45,000 for “forced placed insurance”. Plaintiff, however, contends that she had paid for and maintained the requisite insurance during the time period that the defendants were billing her for such insurance. In addition, the “forced placed” insurance premiums were at much higher rates than the rates she paid for her own insurance.

According to the defendants, the \$45,000 charge was adjusted against the amount for premiums paid by the plaintiff; however, plaintiff still owes about \$15,833.06 for insurance premiums paid by the defendants.

Plaintiff claims that the foreclosure settlement included an oral agreement that the defendants reimburse her for the insurance assessed against her, upon her producing proof of insurance. When she presented the insurance policies to the defendants, they refused to comply with the terms of their agreement.

In August, 2010, plaintiff commenced the underlying action against the defendants in this Court, on the basis of violations of the New York State General Business Law, and breach of contract. She is seeking punitive and treble damages, in addition to a reimbursement in the amount of \$45,333.98.

ARGUMENTS.

Plaintiff argues that the parties entered into an oral agreement to settle the amount owed on the mortgage, and the defendants waived any claimed shortfall when it pressured her to enter into a short sale where she would sell the property at a loss. She claims that the defendant promised her a refund if she could demonstrate that she paid the insurance, and that the defendants wrongfully maintained a “forced placed insurance” policy on the property . Additionally, because discovery has not been completed and because of the parties’ conflicting evidence, the granting of defendants’ motion for summary judgment is premature.

In support of her opposition, plaintiff submits a copy of her property insurance policy for the time periods in dispute, March 9, 2006 - through March 9, 2007, May 14, 2008 through May 14, 2009, and May 14, 2009 through May 14, 2010, and an affidavit from her husband, Vincent Vescova.

Defendants argue that a covenant contained within the subject mortgage permits them to place insurance on the subject property in the event of the mortgagor’s/plaintiff’s default on the Mortgage and Note. Even if the “forced placed insurance” was maintained by the defendant during the time period that plaintiff maintained and paid for her own insurance for the subject property, the amount assessed was adjusted, and a shortfall in the amount of about \$15,000 still exists.

Defendants submit the Note, Mortgage, Clerk of the County of Nassau’s documentation evincing a recording of the Note and Mortgage, the pleadings, and a customer account activity statement, as supporting evidence.

DISCUSSION

Summary judgment is a drastic remedy that will only be awarded where there is no triable issue of fact (see *Barclay v Denckla*, 182 AD2d 658 [2d Dept 1992]). The party seeking summary judgment

must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see *Friends of Animals v Associated Fur Manufacturer's, Inc.*, 46 NY2d 1065, [1979]). The failure to do so requires denial of the motion, regardless of the insufficiency of the opposing papers (see *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

When the movant has made a *prima facie* case, the burden of going forward shifts to the party opposing summary judgment to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

As to plaintiff's argument that that summary judgment is premature because discovery is not complete, summary judgment will generally be denied where a party has not had sufficient opportunity for disclosure (see *Korson v Preferred Mut. Ins. Co.*, 39 AD3d 483 [2d Dept 2007]). However, the party seeking to defeat a motion for summary judgment must establish that the discovery sought may raise an issue of fact. The mere hope that evidence may exist will not defeat a motion a for summary judgment (see *Simpson v City of New York Transit Authority*, 44 AD3d 930 [2d Dept 2007]). In addition, conclusory or unsubstantiated assertions that further discovery is necessary will not defeat a motion for summary judgment (see *Lambert v Bracco*, 18 AD3d 619 [2d Dept 2005]).

Here, although there is no dispute that a short sale of the subject premises had taken place, the record is devoid of evidence indicating that such sale was a full settlement of the issues--there is no Stipulation of Discontinuance or releases by either party in the record. In addition, defendants' evidence

does not clearly set forth the dates of plaintiff's default and the time period when it insured the premises with the "forced placed insurance". Although there is an amount assessed, there are no documents to support that amount was actually paid by the defendants or any supporting invoices setting forth the actual cost of the insurance, nor is there any clarity in how the plaintiff's reimbursement was actually applied to the payoff amount. It appears that an additional amount for forced placed insurance was assessed against the plaintiff from the time period of January 14, 2009 through April 29, 2009, but the pay off does not clearly set forth that amount.

It is also noted that defendants do not refute or deny plaintiff's claim of an oral agreement to reimburse her for fees upon her presenting the proof of insurance. Instead, the defendants continue to stress the point that plaintiff has an outstanding deficiency of about \$37,000. Again, without documentary evidence evincing full settlement of the real estate action and the ensuing ancillary issues, it would be improvident of this Court to grant the defendants' motion without the additional and pertinent documentary evidence.

As to granting the motion under CPLR §3211¹ regarding defendants' motion to dismiss the complaint, pursuant to CPLR§3211(a)(7), when a motion is based on a failure to state a cause of action, the complaint's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted. Said another way, the Court's scope of review is narrow and it is limited to ascertaining whether the pleading states any cognizable cause of action (see *Hogan v New York State Office of Mental Health*, 115 AD2d 638 [2d Dept 1985]).

In determining a motion to dismiss pursuant to CPLR §3211 (a) (7), "the sole criterion is

¹It is noted that the moving defendants do not cite to any particular subsection of this statute for the relief it is seeking from this Court.

whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail” (see *Heffez v L & G General Const., Inc.*, 56 AD3d 526 [2d Dept 2008]). Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v Pennysaver Corp.*, 98 AD2d 570 [2d Dept 1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628[2d Dept 1981]).

The only other applicable subsection of CPLR §3211 under which the defendants can seek relief is CPLR §3211 (a) (1). Generally, a motion to dismiss pursuant to this section of the statute, will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (see *Fontanetta v Doe*, 73 AD3d [2d Dept 2010], quoting Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3211:10 at 22). In sum, the analysis is two-pronged; the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

For evidence to be considered as documentary, it must be unambiguous, authentic, and undeniable. The term “documentary evidence” as referred to in CPLR §3211(a)(1) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes “[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based” (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20, *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]).

On such a motion, if the documentary evidence submitted by the defendant refutes the

plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law, the motion may be granted (see *Logatto v City of New York*, 51 AD3d 984 [2 Dept 2008]). Here, the evidence submitted by the defendants may be documentary, but it fails to clearly refute the plaintiff's claims.


Accordingly, the defendants' motion is **denied**. It is hereby

ORDERED, that this matter shall be set down for a conference before the undersigned on April 11, 2012, for the purposes of setting a discovery schedule.

This constitutes the Decision and Order of the Court.

DATED: March 15, 2012
Mineola, N.Y. 11501

ENTER:



HON. MICHELE M. WOODARD
J.S.C.

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ENTERED
MAR 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE