

Estrada v Metropolitan Prop. Group, Inc.
2012 NY Slip Op 30803(U)
March 27, 2012
Supreme Court, New York County
Docket Number: 110123/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

BRIAN ESTRADA,

INDEX NO. 110123/11

Plaintiff,
-against-

METROPOLITAN PROPERTY GROUP, et al.,

Defendants.

FILED

MAR 30 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1, 4, 7, 9 + 10

Answering Affidavits- Exhibits _____

2, 5, 8

Replying Affidavits _____

3611

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated:

3/27/12

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

BRIAN ESTRADA,

INDEX NO.
110123/11

Plaintiff,

- against -

METROPOLITAN PROPERTY GROUP, INC.,
WELLS FARGO BANK, N.A. and VICTORIA
HUGHES,

DECISION/ORDER

Defendants.

DONNA M. MILLS, J:

Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

In this action for damages, plaintiff is seeking compensatory and punitive damages against Metropolitan Property Group, Inc., ("MPG"), Wells Fargo Bank, N.A. ("Wells Fargo") and Victoria Hughes ("Hughes"). All defendants move for an order pursuant to CPLR 3211(a)(1), (7), dismissing each of the claims in the complaint.

BACKGROUND

This case arises out of the purchase of a residential cooperative apartment unit under a contract of sale executed on October 11, 2005. It is undisputed that plaintiff responded to an advertisement placed by Metropolitan for the sale of the subject apartment. After seeing the apartment, plaintiff subsequently applied to Wells Fargo for a loan to finance the purchase of the subject apartment. Before the closing date, Wells Fargo ordered an appraisal to assess the value of the apartment. Hughes completed the appraisal, and submitted an appraisal report to Wells Fargo on or about February 23, 2006. Thereafter, plaintiff obtained a mortgage based in part upon the appraisal which indicated the size of the premises as 451 square feet, and valued it at exactly the price in the Contract of Sale, \$440,000.00. On or about March 16, 2006, Wells Fargo granted a loan to plaintiff in the original principal amount of \$352,000.00.

In 2009, Mr. Estrada sought to refinance his mortgage but was unable to do so based upon the fact that the appraisal conducted for the refinance indicated the size of the premises as 376 square feet and valued it at \$350,000.00. In 2010, Mr. Estrada commissioned a historical appraisal of the premises as of March 16, 2006. The appraiser who conducted the historical appraisal measured the size of the premises as 344 square feet and valued it at \$330,000.00, which was \$110,000.00 less than plaintiff had paid for it on March 16, 2006.

In the case at bar, the amended complaint contains ten causes of action. The first cause of action is for breach of fiduciary duty against Metropolitan. The second cause of action for fraud is against Metropolitan. The third cause of action is also against Metropolitan for engaging in deceptive business acts or practices. The fourth and fifth causes of action is brought against Wells Fargo for fraud. The sixth cause of action is against Wells Fargo for engaging in deceptive business acts or practices. The seventh cause of action is against Wells Fargo for negligence. The eighth cause of action is against Hughes for fraud. The ninth cause of action is against Hughes for breach of contract. The tenth cause of action is against Hughes for engaging in deceptive business acts or practices.

All defendants seek dismissal of the complaint on the grounds, inter alia, that the claims are either meritless or deficient, and on the ground that they have a complete defense founded upon documentary evidence.

APPLICABLE LAW & DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). This court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (Morone

v Morone, 50 NY2d 481, 484 [1980]). Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see Heaney v Purdy, 29 NY2d 157 [1971]). In assessing a motion under CPLR 3211 (a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Rovello v Orofina Realty Co., 40 NY2d 633, 635 [1976]), and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

The court shall examine each cause of action in the amended complaint in order to determine its merit. The first cause of action is brought against Metropolitan for breach of fiduciary duty. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 [2010]). A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b) (see Tsutsui v Barasch, 67 AD3d 896, 898 [2009]).

Here, for purposes of determining Metropolitan's motion, this Court accepts the plaintiff's allegations that Metropolitan owed him a fiduciary duty. Moreover, the affidavit of Metropolitan's representative, Eran Nesher, reveals that he represented to a third party that he was acting on behalf of plaintiff. Although Metropolitan argues that no such relationship existed between itself and plaintiff, the aforementioned letter and belies this contention. Plaintiff alleges the existence of a fiduciary relationship and misconduct by Metropolitan which led to the damages claimed in the complaint. So, based on these allegations, plaintiff has made out a valid cause of action for breach of fiduciary duty.

The second, fourth, fifth and eighth causes of action allege that the defendants

engaged in fraud. "The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury ." Daly v. Kochanowicz, 67 AD3d 78 [2d Dept 2009][internal citations omitted]). Defendants argue that plaintiff's fraud claims should be dismissed because plaintiff fails to allege any of the required elements. However, the amended complaint clearly alleges that the defendants misrepresented the size of the apartment that he purchased and thus misled him. Plaintiff appears to claim that defendants purposely misled him into believing that the apartment was a certain size in order to sell the property and to induce plaintiff to pay the inflated purchase price. It is not the role of this court to examine the plausibility of these claims at this stage, only to decide whether, assuming their truth, the allegations make out a cause of action (Leon v Martinez, 84 N.Y.2d 83, 87–88 [1994]). Consequently, for the purposes of the present motion, the Court will only rely on the facts alleged in plaintiff's complaint, and as such finds that plaintiff has alleged a valid cause of action for fraud.

The third, sixth and tenth causes of action allege that the defendants engaged in deceptive business acts or practices in violation of General Business Law § 349. All defendants argue that this cause of action is not timely pursuant to the statute of limitations. Defendants' contend that plaintiff's cause of action accrued at the latest in April 2006 when he closed on the purchase of the premises and is thus untimely.

General Business Law § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" General Business Law § 349(a)), and affords a right of action to "any person who has been injured by reason of any violation of this section" (General Business Law § 349(h)). Thus, accrual of a section 349(h) private right of action first occurs when plaintiff has been injured by a deceptive act or practice violating section 349 (see, Small v. Lorillard Tobacco Co., 94 N.Y.2d 43, 55 [2000]).

Plaintiff claims that he was injured on or about June 2009 when he was unable to obtain a refinance of the premises at more favorable terms because the payoff of the existing mortgage from Wells Fargo was based upon a purchase price which had been inflated as a result of misrepresentations as to the size of the premises. Taking plaintiff's arguments to its logical conclusion, therefore, if he would have attempted to refinance in the year 2030 and not in 2009, his cause of action for a violation of GBL 349 would still be viable.

This Court agrees with the defendants' position that plaintiff's claim under this statute began to run either in October, 2005 when he executed the Contract or, at the latest, in April 2006 when the sale closed. Accordingly, plaintiff was required to bring his GBL § 349 claim within three years of the date of injury, and since he did not commence this action until September 2, 2011, his GBL § 349 claim is untimely and must be dismissed pursuant to CPLR § 3211(a)(5).

The seventh cause of action is against Wells Fargo for negligence. In opposition to Wells Fargo's motion to dismiss, plaintiff does not address this branch of the motion. In light of the three year statute of limitations for negligence actions, this cause of action, even if it had merit, is time-barred.

The ninth cause of action is against Hughes for breach of contract. Plaintiff claims that the appraisal that was prepared by Hughes for Wells Fargo, makes him an intended beneficiary and created contractual privity between plaintiff and Hughes.

This Court rejects plaintiff's argument that he was an intended third-party beneficiary of Hughes' contract to provide an appraisal for the property for Wells Fargo. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate

the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 336 [1983]). There certainly was a valid and binding contract between Hughes and Wells Fargo for the appraisal services. However, contrary to plaintiff's assertion, Wells Fargo did not retain Hughes for plaintiff's benefit. As such, plaintiff has not alleged a valid cause of action for breach of contract against Hughes.

Accordingly it is

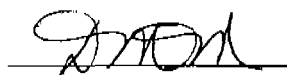
ORDERED that the defendants' motion to dismiss plaintiff's complaint is granted to the limited extent of dismissing the plaintiff's third, sixth seventh, ninth and tenth causes of action, and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre street, on May 11, 2012, at 10:00 AM.

Dated: 3/27/12

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

MAR 30 2012

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COUNTY CLERK'S OFFICE