

<b>Suntrust Mtg., Inc. v Kingston</b>
2012 NY Slip Op 31118(U)
April 17, 2012
Supreme Court, New York County
Docket Number: 1110418/2010
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER  
*Justice*

PART IA PART 16

Suntrust Mortgage

INDEX NO. 110418-2010

MOTION DATE \_\_\_\_\_

Viola Kingstm

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*by third-party*  
*defendants New York City Department*  
*of Buildings and Chris Wolf to dismiss*  
*the third-party claims against them*  
*is granted in accordance with the*  
*accompanying memorandum decision.*

**FILED**

APR 24 2012

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: APR 17 2012

*Alice Schlesinger*

ALICE SCHLESINGER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

SUNTRUST MORTGAGE, INC.,  
Plaintiff,

Index No. 1110418/2010  
Motion Seq. No. 005

-against-

VIOLA KINGSTON, NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU, SILO OPPORTUNITY  
FUND 1, LLC, NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD, "JOHN DOE#1 through  
JOHN DOE #12" the last twelve names being fictitious  
and unknown to plaintiff, the persons or parties intended  
being the tenants, occupants or corporations, if any, having  
or claiming an interest in or lien upon the premises,  
described in the complaint,

Defendants.

-----X

VIOLA KINGSTON,  
Third-Party Plaintiff,

**FILED**

APR 24 2012

-against-

COUNTY CLERK'S OFFICE  
NEW YORK

HARLEM REALTY SERVICES, JAMES PEOPLES,  
NEW YORK BEST DEVELOPMENT, INC., C/O AYAZ  
AWAN Lic. No: 1098897, AYAZ AWAN, HIGHRISE  
DEVELOPMENT CONSTRUCTION Lic. No.: 600468  
f/k/a, NEW YORK BEST DEVELOPMENT INC.,  
SABBA SALEEMI, NEW YORK CITY DEPARTMENT  
OF BUILDINGS, CHRIS WOLF, K.T. SEUNG Lic. No:  
053953, OSCAR JACKSON Lic. No:011564, KNC  
ELECTRIC Lic. No: 003079

Third-Party Defendants.

-----X

SCHLESINGER, J:

At issue in this mortgage foreclosure proceeding is whether third-party plaintiff Viola  
Kingston was required to provide the Comptroller of the City of New York with notice pursuant to  
General Municipal Law §50-i prior to filing her third-party complaint against the New York City  
Department of Buildings (DOB) and Chris Wolf, a building inspector employed by DOB. Also at

issue is whether the third-party plaintiff's claims against the DOB should be dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause action.

### Background Facts

Defendant/third-party plaintiff Viola Kingston (Kingston) owns the properties located at 181 Lenox Avenue; 183 Lenox Avenue; and 161 West 120<sup>th</sup> Street, New York, New York. In 1982 Kingston purchased 161 West 120<sup>th</sup> Street, which has been her primary place of residence since 1983. Kingston purchased the property located at 181 Lenox Avenue in 1988 and in 1991 she purchased the property located at 183 Lenox Avenue.

As of 2006, Kingston's only mortgage was secured by 161 West 120<sup>th</sup> Street in the amount of \$325,000. Since the purchase of the properties, Kingston's husband assumed the management responsibilities of all of the properties; however, in the spring of 2006 he was diagnosed with a terminal illness and was unable to manage the properties. Kingston, who was sixty-two at the time, then assumed an active role in the management of the properties.

Kingston consulted with third-party defendant James Peoples (Peoples), a consultant/broker with Harlem Realty Services, regarding the renovation of her property at 181 Lenox Avenue. Peoples assisted Kingston in obtaining financing for the renovation of the building through a construction loan from the plaintiff Suntrust Mortgage, Inc. in the amount of \$1,700,000; Kingston executed the mortgage on July 27, 2006. Peoples then referred Kingston to third-party defendant New York Best Development, Inc. (NYB) to renovate 181 Lenox Avenue. With the assistance of Peoples, Kingston entered into a homeowner contractor agreement with NYB in the amount of \$1,295,000.

Despite the specified \$1,295,000 construction contract amount, NYB exhausted the entire \$1,700,000 construction loan amount. Third-party defendant Ayaz Awan (Awan), President of

NYB, requested an additional \$425,000 from Kingston beyond the contract amount to complete the renovation. Kingston claims that at the advice of Peoples, in order to pay Awan, she signed a note and security and mortgage agreement with Silo Mortgage Company (Silo) on March 11, 2008 for her property located at 161 West 120<sup>th</sup> Street in the amount of \$900,000. The renovation of 181 Lenox Avenue was completed in January 2008.

Kingston was unable to satisfy her mortgage obligations with Suntrust and Silo and claims that Peoples advised her to obtain a loan secured by the unencumbered property located at 183 Lenox Avenue. On July 31, 2008 Kingston signed a mortgage loan on her properties located at 161 West 120<sup>th</sup> Street and 183 Lenox Avenue with HVB Three LLC (HVB). Similarly, Kingston was unable to satisfy her loan obligations with HVB and as a result HVB instituted a foreclosure action against Kingston. Kingston entered into a settlement agreement with HVB on July 19, 2011 in which Kingston granted HVB a deed in lieu of foreclosure.

In 2010, Kingston learned that the property at 181 Lenox Avenue had significant New York City building code violations. Third-party defendant Chris Wolf (Wolf), a building inspector for the DOB had inspected and approved the work performed at 181 Lenox Avenue before that time.

Suntrust instituted a foreclosure action against Kingston on August 8, 2010. Kingston filed her Answer and Third-Party Complaint on November 17, 2010 seeking unspecified monetary relief.

Specifically in her claim against the City, Kingston alleged the following:

- DOB Inspector Chris Wolf conspired with Suntrust to rubber stamp the work at 181 Lenox Avenue, despite the apparent existence of violations;
- Wolf violated the Deceptive Practices Act by engaging in a practice which was misleading in a material way, unfair, deceptive, and contrary to public policy and generally recognized standards of business;

- Suntrust and Wolf conspired with Awan/NYB to fraudulently and falsely approve the inspection of 181 Lenox Avenue, thereby enabling payments to be disbursed for work that was not compliant with NYC building regulations and codes;
- DOB as Wolf's employer is vicariously liable for Wolf's acts.

On February 7, 2011 third-party defendants, New York City Department of Buildings and Wolf (hereinafter collectively referred to as the City) filed their Answer to the Third-Party Complaint. In their Answer, the City asserted the following pertinent Affirmative Defenses: failure to state a cause of action against the City third-party defendants and that plaintiff's claims arising under state law are barred for failure to comply with General Municipal Law §50-e and 50-i.

On April 13, 2011 the City moved to dismiss the Third-Party Complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action. On December 16, 2011 the Court denied the City's motion to dismiss without prejudice as it lacked, among other things, an adequate explanation of the facts, procedural history, and a copy of the complaint. On February 14, 2012 the City again moved to dismiss pursuant to CPLR §3211(a)(7) for failure to state a cause of action. Kingston did not file any opposition papers. That motion is the one now before the Court.

### Discussion

The City first argues that Kingston failed to file a notice of claim with the Comptroller of the City of New York pursuant to Gen. Mun. Law §50-i, which failure mandates dismissal as a matter of law. Gen. Mun. Law §50-i provides in pertinent part that:

No action or special proceeding shall be prosecuted or maintained against a city for personal injury or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city or of any officer, agent or employee thereof, unless, (a) a notice of claim shall have been made and served upon the city in

compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.

Kingston's allegations against the City based on fraudulent acts committed by Wolf are within the broad scope of Gen. Mun. Law §50-i. Pursuant to Gen. Mun. Law §50-i Kingston was not only required to serve the Comptroller of the City of New York with a notice of claim within ninety days prior to filing this action, but also to allege in her complaint that at least thirty days had elapsed since service of the notice of claim. However, Kingston did not file a notice of claim or serve the Comptroller of the City of New York with a notice of claim. Moreover, Kingston failed to allege in her complaint that she complied with the notice of claim requirement.

Failure to comply with a condition precedent of Gen. Mun. Law §50-i results in dismissal of the complaint as a matter of law. *Castro-Castillo v. City of New York*, 78 A.D.3d 406 (1<sup>st</sup> Dep't 2010). Therefore, Kingston's claims of fraud and civil conspiracy to commit fraud must fail.

The City next argues that even if no notice of claim was required, Kingston failed to state a cause of action under Gen. Bus. Law §349. Gen. Bus. Law §349(a) provides that: "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." Kingston must prove the following elements to establish a prima facie case under General Business Law §349(a): "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000). To satisfy the consumer-oriented prong Kingston must demonstrate that the City's act has a broader

impact on consumers at large. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y. 2d 20 (1995).

Kingston's complaint does not describe the nature of the deceptive act other than to allege that the City violated Gen. Bus. Law §349(a) because Mr. Wolf "rubber stamp" approved the work completed at 181 Lenox Avenue despite evidence to suggest that the property was in violation of New York City building codes. Moreover, even if the City did "rubber stamp" approve the work, there is nothing in the complaint to suggest that such approval had a broad impact upon the public at large; rather, the facts of the case are unique to Kingston in that she alleges that the third-party defendants took advantage of her lack of business experience to force various unconscionable loans upon her.

Furthermore, there are no facts in the complaint to satisfy the second element of Gen. Bus. Law §349(a) that the defendant's acts be misleading in a material way. Instead, the complaint alleges in conclusory fashion that Wolf's act of "rubber stamp" approving the renovation work violated the Deceptive Practices Act and as a result of Wolf's deceptive practices Kingston suffered serious injury. Therefore, the City's motion to dismiss this claim is granted.

The City also argues that Kingston's complaint should be dismissed as it does not state a cause of action for fraud. To establish a cause of action for fraud, Kingston must allege the following essential elements: "misrepresentation of a material existing fact, falsity, scienter, deception and injury." *New York University v. Continental Insurance Company, et al.* 87 N.Y.2d 308, 319 (1995).

The complaint is devoid of any factual allegations establishing the elements of fraud. With respect to the fraud cause of action against the City, Kingston only alleges that Wolf and Suntrust "rubber stamp[ed]" their approvals of the renovations despite evidence of possible building code

violations and that Wolf and NYB had a longstanding relationship. The fraud claim against the City is insufficient because Kingston failed to allege facts to support her conclusory statements. The complaint contains no allegations that Wolf misrepresented a material fact to Kingston and that Wolf knew that the representation was false and made it with the intent to deceive her. In the absence of any facts supporting a cause of action for fraud, Kingston has failed to state a cause of action pursuant to CPLR §3211(a)(7).

The City's final argument is that Kingston's cause of action for civil conspiracy to commit fraud should be dismissed as New York does not recognize an independent cause of action for conspiracy to commit a tort. The City is correct.

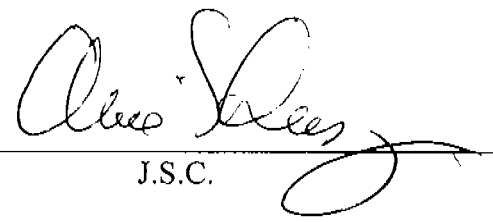
It is well established that New York does not recognize an independent cause of action for conspiracy to commit a civil tort. *Abacus Fed. Sav. Bank v. Carol John Mee Lim, et al.* 75 A.D. 3d 472, 474 (1<sup>st</sup> Dep't 2010). Conspiracy allegations are only permitted in connection with an otherwise actionable tort. *Alexander & Alexander, Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). In essence, to establish a claim of civil conspiracy, the plaintiff must demonstrate the elements of conspiracy as well as the elements of the primary tort. *Abacus Fed. Sav. Bank v. Carol John Mee Lim, et al. supra.* Here, Kingston merely alleges in her complaint that Wolf conspired with Awan and NYB to "fraudulently and falsely" approve the inspection of 181 Lenox Avenue. Kingston does not provide a factual basis to support her conclusory allegations or establish the elements of conspiracy. Furthermore, as discussed above, Kingston does not state a cause of action for fraud, the primary tort which Kingston alleges in connection with her conspiracy claim. Therefore, the City's motion to dismiss on this issue is granted.

Accordingly, it hereby

ORDERED that the motion by third-party defendants Department of Buildings and Chris

Wolf to dismiss the third-party complaint as against them is granted. The Clerk is directed to sever and dismiss those claim with prejudice, without costs or disbursements to either party.

Dated: **APR 17 2012**



A handwritten signature in cursive script, appearing to read "Alice Schlesinger", written over a horizontal line.

J.S.C.

**ALICE SCHLESINGER**

**FILED**  
APR 24 2012  
COUNTY CLERK'S OFFICE  
NEW YORK