SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK **ORIGINAL**

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

KEIKO CRESCENTINI,

Plaintiff,

INDEX No. 601383/11

MOTION DATE: March 23, 2012
Motion Sequence # 001, 002, 003, 004, 005

-against-

SLATE HILL BIOMASS ENERGY, LLC, LORETTA OLIVA, ROBERT GIORDANO and LEONARD C. ALOI,

Defendants.

The following papers read on this motion:

Order to Show Cause..... XX
Notice of Motion..... XX
Cross-Motion..... X
Affirmation/Affidavit in Opposition..... XXXXX
Supplemental Affirmation in Support..... X
Reply Affirmation..... X
Memorandum of Law..... X

Motion by plaintiff for preliminary injunctive relief against defendants Slate Hill Biomass Energy, LLC ("Slate"), Loretta Oliva, and Robert Giordano as set forth in the Temporary Restraining Order ("TRO") dated December 9, 2011, is **denied**, on the conditions set forth below. The TRO is **continued** pending further order of the court.

Motion by plaintiff for an order directing that service of the summons and verified

complaint by made on defendant Giordano by publication pursuant to CPLR 315, or in the alternative, in a manner directed by the Court pursuant to CPLR 308(5), is **granted** in the alternative. Plaintiff is directed to submit a proposed order of publication pursuant to CPLR 308(5), and in accordance with CPLR 316, within 10 days of service or receipt of a copy of this order.

Motion by defendants Slate and Loretta Oliva for judgment dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7), and CPLR 3016(b), is **denied**.

Motion by defendants Slate and Oliva for an order vacating and dissolving the temporary restraining order dated December 9, 2011, is **denied** as **moot**.

Cross-motion by defendant Leonard Aloi for judgment dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7) , and CPLR 3016(b), is **denied**.

Background

Plaintiff is a 79 year-old woman, with no family or heirs, who began a friendship with defendant Oliva in March, 2009. Ms. Oliva is estimated to be thirty years younger than plaintiff. She assisted plaintiff with many personal and household tasks. Plaintiff describes this in the complaint as a "campaign to take over" her estate and "isolate" her "from all her remaining friends, her driver, bankers, accountants, and lawyers" (complaint, par 13).

On December 2, 2010, defendant Oliva created Slate. Oliva advised plaintiff that Slate was seeking funding of several million dollars for a waste to energy project ("the project"), and she introduced plaintiff to defendant Aloi. According to plaintiff, Oliva told her that Aloi, an attorney, would represent her for estate planning, and help her to give Oliva $1,500,000 to fund the project. The money would be secured by a mortgage on property upstate ("the Wawayanda property"), that was currently owned by defendant Oliva and her cousin, defendant Giordano. Plaintiff states that Oliva assured her the property was worth more than $1,500,000.

The closing took place on January 13, 2011. Defendants Oliva and Giordano deeded the Wawayanda property to Slate. Plaintiff paid the full amount of $1,500,000, and took back a mortgage securing the loan in that amount. Oliva executed the mortgage (Exhibit 2 to plaintiff's moving papers) and a promissory balloon note(Exhibit 4 to plaintiff's moving papers) as the managing member of Slate. No appraisal was sought for the Wawayanda

property prior to the closing, and no guaranty of the mortgage or note was obtained. The maturity date of the mortgage is January 11, 2016, while principal and interest of 8% per annum is due on the note on December 31, 2015.

The funds were wired to defendant Aloi's account, and disbursed pursuant to Oliva's instructions. According to the complaint, checks written at the closing resulted in payments of $639, 305.55 to Oliva or on her behalf, $613,305.45 to Giordano or on his behalf, and approximately $247,000 for miscellaneous expenses, leaving Slate with no funds available to conduct business (complaint, par. 24-35).

Plaintiff and Slate also entered into the Slate Biomass Project Agreement "the Project Agreement" (Exhibit 5 to the moving papers). Pursuant to this Project Agreement Slate would secure a loan or sell part of the property, at which time it would repay plaintiff the sum of $1,500,000. However Slate had no obligation to get the necessary approvals for the construction of the project and "in its sole discretion" could discontinue the application process at any time, "in which event Crescenti (sic) shall not be entitled to any payment" (Project Agreement, par. 2).

Plaintiff alleges that she had a falling out with Oliva in August, 2011, when Oliva suggested that she and plaintiff get married, so that Oliva could control plaintiff's estate. Plaintiff declined.

Proceedings Herein

This action was commenced in December, 2011. Plaintiff alleges claims against Slate, Oliva, Giordano and Aloi for equitable rescission of the mortgage and fraud. She also alleges claims against Aloi, individually, for breach of fiduciary duty and legal malpractice. Plaintiff obtained a temporary restraining order against Slate, Oliva and Giordano, dated December 13, 2011.

Plaintiff seeks preliminary injunctive relief against Slate, Oliva, and Giordano, in an attempt to prevent dissipation of the $1,500,000. Slate and Oliva move for judgment dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7), and CPLR 3016(b). Although Aloi served an answer with eighteen affirmative defenses and a counterclaim, he also makes a cross-motion for dismissal on the same grounds as Slate and Oliva. Giordano apparently has not been served, and for this reason, plaintiff seeks an order directing service

on Giordano by publication. Slate and Oliva seek an order pursuant to CPLR 6314, vacating the temporary restraining order herein against Oliva, on the grounds that it is onerous and punitive.

Before considering the injunctive relief at issue, the Court first turns to the dismissal motions pursuant to CPLR 3211(a)(1) and (a)(7), and CPLR 3016 (b).

CPLR 3211 Standard

On a motion to dismiss pursuant to CLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (***Samiento v World Yacht Inc.***, 10 NY3d 70, 79 [2008]; ***Arnav Industries, Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP***, 96 NY2d 300, 303 [2001]). On a 3211 motion the court may consider affidavits to remedy pleading problems (***Sargiss v Magarelli***, 12 NY3d 527, 530 [2009]).

Where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal pursuant to CPLR 3211(a)(1) is warranted (***Snyder v Voris, Martini & Moore, LLC***, 52 AD3d 811 [2nd Dept 2008]; ***M Fund Inc. v Carter***, 31 AD3d 620 [2nd Dept 2006]; ***Berardino v Ochlan***, 2 AD3d 556 [2nd Dept 2003]). The document must utterly refute the plaintiff's factual allegations, thereby establishing a defense as a matter of law (see ***Goshen v Mutual Life Ins. Co. of New York***, 98 NY2d 314, 326 [2002]).

The criterion on a motion pursuant to CPLR 3211(a)(7) is whether the pleader has a cause of action (***Leon v Martinez***, 84 NY2d 83, 88 [1994]).

CPLR 3016(b) Dismissal Standard

CPLR 3016(b) requires that where a cause of action is based upon fraud, "the circumstances constituting the wrong shall be stated in detail." A pleading alleging fraud must set forth basic facts to establish the elements of a fraud claim. CPLR 3016(b) is satisfied where the facts alleged are sufficient to permit a reasonable inference of the alleged misconduct (***Pludeman v Northern Leasing Sys., Inc***, 10 NY3d 486, 491-492 [2008]).

The Motion and Cross-Motion to Dismiss

At the outset, the Court notes that defendant Aloi's answer was served on February 10, 2012, and his cross-motion for dismissal was served on March 15, 2012. Under these circumstances defendant Aloi's cross-motion to dismiss the complaint is untimely, because it was not made before service of his responsive pleading was required (***Bowes v Healy***, 40 AD3d 566 [2nd Dept 2007]; ***Diaz v DiGiulio***, 29 AD3d 623 [2nd Dept 2006]). In addition, the Court notes that the exhibits identified by defendant Aloi were not attached to his affidavit, and the cross-moving papers do not address the claims against him for breach of fiduciary duty and legal malpractice. Indeed, it is unclear on which document defendant Aloi relies for his request for dismissal based upon documentary evidence. For all of these reasons, defendant Aloi's cross-motion to dismiss the complaint is summarily **denied**.

Plaintiff claims that timeliness is also an issue for the dismissal motion by defendants Slate and Oliva. Plaintiff's attorney argues that a 60-day extension of time to answer granted in court on December 13, 2011, expired on February 11, 2012, and the motion papers are dated February 13, 2011. However counsel for defendants disputes the due date, and points out that in any event, papers due on Saturday, February 11, 2012 would be timely if served on Monday, February 13, 2012 (McKinneys' General Construction Law 25-a(1)). Under these circumstances the motion by defendants Slate and Oliva is not untimely.

To properly plead a cause of action to recover damages for fraud, the plaintiff must allege a representation of material fact, falsity, scienter, reliance and injury (***Scott v Fields***, 92 AD3d 666 [2nd Dept 2012]). Plaintiff's complaint herein contains the following relevant allegations:

(1) Oliva convinced plaintiff to loan Oliva and/or Slate $1,500,000 for a project to make energy and or recycle waste on premises Oliva owns with defendant Giordano (complaint, pars 7 and 17);

(2) Oliva represented to plaintiff that the subject premises were worth in excess of $1,500,000 (complaint par 18);

(3) upon information and belief the premises is not valued at more than $435,000 (complaint par 17);

(4) Slate, by Oliva, executed a project agreement which fails to obligate Slate to perform any construction whatsoever on the premises (complaint, par. 22);

(5) at the closing, $1,500,000 were disbursed pursuant to Oliva's instructions, leaving Slate no funds to conduct business (complaint, par 35);

(6) Oliva's friend, defendant Aloi, represented plaintiff in the transaction, in which he never obtained an appraisal of the premises, nor obtained any guaranty to secure repayment (complaint, pars.14, 26 and 27); and

(7) plaintiff seeks damages in the sum of $1,500,000, plus interest (complaint, Wherefore clause, par (b)).

In addition, the complaint contains allegations that permit a reasonable inference of scienter, and justifiable reliance, such as plaintiff's age, her new-found friendship with Oliva, and her dependence upon Oliva. Overall, the Court finds that the second cause of action for fraud contains the requisite specificity, when the pleading is read as a whole. The allegations in the complaint suffice to allege a cause of action for fraud against Slate, Oliva, and Aloi for the purposes of CPLR 3016(b) and CPLR 3211(a)(7).

Defendants Slate and Oliva challenge the first cause of action for equitable rescission pursuant to CPLR 3211(a)(1). They argue that the note and the mortgage between plaintiff and Slate act as a complete defense. They insist there has been no violation of the note and the mortgage, and plaintiff admits this.

As plaintiff points out, the mortgage and the note do not call for any action until the time of repayment, which is years down the road. In any event, equitable rescission is not to compensate for a wrong, but to undo the wrong and put the parties in the *status quo* (***In re Teller's Estate***, 277 AD 937 [4th Dept 1950]). To grant rescission is to declare the contract void from its inception and to put or restore the parties to the *status quo* (***Schwartz v National Computer Corp.***, 42 AD2d 123, 125 [1st Dept 1973]).

Considering the complaint and all evidentiary materials submitted, including the GGEC Letter of Intent (Exhibit 1 to plaintiff's moving papers), in the light most favorable to plaintiff, the complaint does state a cause of action for rescission of the subject mortgage because plaintiff essentially alleges that the mortgage is a sham that was used to defraud her of $1,500,000 (complaint par 41). Defendants' argue that the remedy of rescission is

unavailable because the underlying allegations of fraud in the first cause of action are inadequate; this argument must be rejected. The complaint, read as a whole, contains adequate allegations of fraud as set forth above. Based on the foregoing, the motion by defendants Slate and Oliva for judgment dismissing the complaint pursuant to CPLR 3211(a)(1) and (a)(7), and CPLR 3016(b), is **denied** in its entirety.

The Standard for Preliminary Injunctive Relief

To be entitled to a preliminary injunction, a movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) a balancing of equities in the movant's favor (see ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862 [1990]; ***Doe v Axelrod***, 73 NY2d 748, 750 [1988]: *91-54* ***Gold Road, LLC v Cross-Deegan Realty Corp.***, 93 AD3d 649 [2nd Dept 2012]). Although the purpose of a preliminary injunction is to preserve the *status quo* pending a trial, the remedy is considered a drastic one, which should be used sparingly (***Trump on the Ocean LLC v Ash***, 81 AD3d 713, 715 [2nd Dept], lv app dsmd 17 NY3d 875 [2011]).

Economic loss, which is compensable by money damages, does not constitute irreparable injury (***306 Rutledge, LLC v City of New York***, 90 AD3d 1026, 1028 [2nd Dept 2011]; ***Rowland v Dushin***, 82 AD3d 738, 739 [2nd Dept 2011]; ***Trump on the Ocean LLC*** at 716; ***EdCia Corp. v McCormack***, 44 AD3d 991, 993 [2nd Dept 2007]). A preliminary injunction may not be obtained to preserve assets as security for a potential money judgment (***Fatima v Twenty Seven-Twenty Four Realty Corp.***, 65 AD3d 1079 [2nd Dept 2009]; ***Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assn, Inc.***, 21 AD3d 777, 778 [1st Dept 2005]),

Plaintiff's Motion for a Preliminary Injunction

Plaintiff has shown that $1,500,000 was disbursed at the closing to, or on behalf of, defendants Giordano and Oliva. Plaintiff's appraiser, Mr. Palumbo, has disclosed his finding that an application for a variance for the project was removed from the agenda of the Town of Wawayanda Planning Department on two occasions, and has not been resubmitted. In short, plaintiff has shown that no progress has been made with respect to the construction of the project for which she made the loan of $1,500,000. Moreover Slate has no obligation to take any action at all to move forward with the project. Mr. Palumbo also provides some evidence that Slate's property is worth less than 1/3 of the loan amount. On this record, plaintiff has shown a likelihood of success on the merits on her claims for equitable

rescission of the mortgage and fraud. In this Court's opinion, a balancing of the equities tips in plaintiff's favor.

The issue presented is whether plaintiff has shown irreparable injury, when the remedy she seeks is return of the monies she loaned to Slate. Plaintiff's concern, that the monies will be long gone by the time of judgment, is the concern of many litigants. It does not justify granting the extraordinary remedy of a preliminary injunction (***Fatima***).

However, it appears that plaintiff may be entitled to an order of attachment on the ground that defendant Oliva assigned, disposed of, or secreted property with the intent to frustrate enforcement of a judgment rescinding plaintiff's mortgage (CPLR § 6201[3]). On such a motion for an order of attachment, the court may issue a temporary restraining order, prohibiting a garnishee, including defendant Oliva, from transferring specific assets (CPLR § 6210). As a matter of equity, the court may impose reasonable restrictions upon defendant as a condition of denying plaintiff's application for a preliminary injunction.

Because plaintiff loaned $1.5 million, and it appears that the value of the property on which plaintiff has a mortgage is $435,000, it appears that plaintiff has been defrauded of $1,065,000. Accordingly, plaintiff's motion for a preliminary injunction is **denied**, on condition that defendant Oliva offers plaintiff additional security in the amount of $1,065,000. The additional security may take the form of a bond from a reputable surety, mortgages on defendant Oliva's other properties, or a combination thereof. The temporary restraining order issued by the court on December 9, 2011, and subsequently modified by the court to allow defendants each to expend up to $35,000 of their personal funds, is continued pending approval by the court of the additional security to be provided by the defendants. No undertaking of the plaintiff shall be required as a condition of the temporary restraining order.

The Motion for Service by Publication

Plaintiff has been unsuccessful in her attempts to serve process upon defendant Giordano. Plaintiff's process server was told by defendant Oliva that Giordano's address, as set forth on the documents that are the subject of this action, is a business address where he does not reside. Furthermore, the property at that address is listed for sale by Ms. Oliva. The process server further states that he conducted "an extensive search in the computer/internet database," but that he has not located Robert Giordano because his name is extremely common. For this reason, plaintiff seeks leave to serve defendant Giordano by publication.

Service by publication should be a last resort because it is "the method of notice least calculated to bring to a potential defendant's attention the pendency of judicial proceedings"(***Contimortgage Corp v Isler***, 48 AD3d 732, 734 [2nd Dept 2008], quoting ***Boddie v Connecticut***, 401 US 371 [1971]; Siegel, *New York Practice*, §107, at 201-202 [5th ed.]).

Service by publication pursuant to CPLR 315, is permissible by court order in an action described in CPLR 314, namely, *in rem* actions (***Contimortgage*** at 734). This is not an *in rem* action. Nevertheless, service by publication may be permissible by court order pursuant to CPLR 308(5) where the movant has shown that service is impracticable under 308(1), (2), and (4). This impracticability standard does not require the movant to show that service has been attempted pursuant to CPLR 308 (1), (2) and (4) (***In re Kaila***, 64 AD3d 647 [2nd Dept 2009]; ***Contimortgage***).

As it appears that plaintiff is unable to attempt service pursuant to CPLR 308(1), (2), and (4), because she is aware of no other address for Mr. Giordano, impracticability has been shown. The Court authorizes service by publication in the Poughkeepsie Journal and Long Island Newsday. Plaintiff is directed to submit a proposed order of service by publication, in accordance with CPLR 316, within 10 days of service or receipt of a copy of this order.

Dated MAY 21 2012

J.S.C.

ENTERED
MAY 24 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE