

**Golding v Nationscredit Fin. Servs. Corp.**

2012 NY Slip Op 31593(U)

April 17, 2012

Supreme Court, Queens County

Docket Number: 14418/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

NEVILLE GOLDING, Index No.: 14418/2011  
Plaintiff, Motion Date: 03/01/12  
- against - Motion No.: 9

NATIONSCREDIT FINANCIAL SERVICES Motion Seq.: 2  
CORPORATION, as successor-by-merger to  
EQUICREDIT of NY, HOUSEHOLD FINANCE  
REALTY CORPORATION, CITIBANK, JASON  
SIMMS, DANIEL CHAN, MARK LINDENMANN,  
STUART SCHOENFELD,

Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by  
defendant STUART SCHOENFELD for an order pursuant to CPLR  
3211(a) (5) and 3211(a) (7) dismissing the complaint on the grounds  
of statute of limitations and failure to state a cause of action:

Papers Numbered

Notice of Motion-Affidavits-Exhibits-Memo of Law.....1 - 5  
Affirmation in Opposition.....6 - 8  
Reply affirmation.....9 - 13

This complaint arises from an alleged fraud that plaintiff  
contends occurred when he was induced to act as a co-borrower for  
a mortgage refinanced by his friend Maudline Smith in March 1998.  
The plaintiff's action was commenced by the filing of a summons  
and complaint on June 16, 2011.

Plaintiff seeks rescission of the Equicredit of NY,  
Ameriquest Mortgage Company, Household Finance Corporation, HSBC  
and Citibank Loans as well as compensatory and punitive damages  
on the basis of fraud, civil conspiracy to commit fraud,  
negligent misrepresentation and promissory estoppel. Pursuant to

the complaint, defendant Stuart Schoenfeld was the attorney assigned to the mortgage transaction and received an attorney's fee from Ameriquest. The complaint states that in 1998, Smith had a mortgage loan secured by her residence with HFC. Plaintiff asserts that defendant Simms, an employee of Ameriquest, contacted Smith and induced her to refinance her existing mortgage which would include an additional \$10,000 to pay off existing debts. He allegedly told her that a co-signer would be required because she was not actively working. Smith allegedly asked plaintiff Golding to co-sign the refinance loan and he agreed.

Thereafter, Simms is alleged to have inserted false information on the loan application. The complaint states that the effect of characterizing Golding as a co-borrower required Smith to transfer one percent ownership interest in her home to plaintiff. It is also alleged that Simms informed Smith that she would not need her own attorney. The closing took place on March 11, 1998. Smith and plaintiff allege that during the closing, Chan had Smith sign a Quitclaim deed, which unknowingly transferred a 1% interest in her home to the plaintiff.

On March 14, 1998, Smith sent back the Notice of Right to Cancel the loan intending to cancel the transaction. However, according to the complaint, she was induced by Simms not to cancel the loan. The complaint states that Smith unknowingly obligated herself to a note and mortgage in the amount of \$20,000 with a balloon payment of \$18,301.95 due in ten years. Golding states that if he was made aware of the terms of the refinance agreement he would not have agreed to obligate himself for such a loan.

Plaintiff's first cause of action against defendant Schoenfeld alleges fraud based upon the defendant's intentionally and knowingly making false and misleading statements to induce plaintiff to enter into the loan transactions. The second cause of action against Schoenfeld alleges civil conspiracy to commit fraud.

Schoenfeld now moves to dismiss the complaint pursuant to CPLR 3211(a)(5) CPLR (a)(7) on the ground that the complaint fails to state a cause of action and on the ground that the plaintiff's action for fraud is barred by the six year statute of limitations.

In opposition, plaintiff claims that Schoenfeld prepared the deed transferring ownership in Smith's home, and was the attorney assigned to the mortgage transaction. Plaintiff's counsel also

contends, with respect to the statute of limitations defense, that there is a continuing wrong, as plaintiff continues to be damaged by the fraudulent mortgage transaction and continues to suffer adverse credit, tax problems and mortgage payments. Counsel states that the statute of limitations is not a bar to the proceeding as claims accrued anew each time defendant collected income and profits (citing Barasch v Estate of Sperlin, 271 AD2d 558 [2d Dept. 2000]).

On a motion to dismiss, pursuant to CPLR 3211(a)(7), a court must accept as true the allegations of the complaint and give the plaintiff every favorable inference to determine if the allegations fit within a cognizable legal theory (see Leon v Martinez, 84 NY2d 83 [1994]; Konidaris v Aeneas Capital Mgt., LP, 8 AD3d 244 [2d Dept. 2004]). To plead a cause of action for fraud, a plaintiff must plead a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, as well as justifiable reliance of the other party on the misrepresentation or material omission and injury caused as a result of that reliance (see Northeast Steel Prods., Inc. v John Little Designs, Inc., 80 AD3d 585 [2d Dept. 2011]; Hense v Baxter, 79 AD3d 814 [2d Dept. 2010]; Introna v Huntington Learning Centers, Inc., 78 AD3d 896 [2d Dept. 2010]).

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and defendant's reply thereto, this Court finds that the plaintiff has failed to state a cause of action for fraud against defendant Schoenfeld. The plaintiff did not plead any factual allegations or identify any fraudulent conduct that can be attributed to Schoenfeld. Bare allegations of fraud without any specific allegation that this defendant made a material representation is insufficient to sustain the cause of action (see CPLR 3016(b); Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc., 28 AD3d 595 [2d Dept. 2006]; Kline v Taukpoint Realty Corp., 302 AD2d 433 [2d Dept. 2003]). The misrepresentations which are alleged in the complaint all relate to purported conduct attributed to defendants Simms, Chan and Lindenmann. The complaint does not allege that Schoenfeld ever met with, spoke to or otherwise contacted plaintiff or Smith during the loan application process. The sole assertion in the complaint that defendant Schoenfeld was the attorney assigned to the mortgage transaction and received an attorneys fee from Ameriquest, is insufficient to sustain a cause of action for fraud. Therefore, as the plaintiff has not pled any statement by Schoenfeld that was fraudulent, the action for fraud against the defendant Schoenfeld must be dismissed (see CPLR 3016[b]; Moore v Liberty Power Corp., LLC, 72 AD3d 660 [2010]).

The cause of action for conspiracy to commit fraud is likewise dismissed as same is not recognized as an independent cause of action in this state and stands or falls with the underlying tort (see Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC, 82 AD3d 1035 [2d Dept.2011]; Salvatore v Kumar, 45 AD3d 560 [2d Dept. 2006]; Ward v City of New York, 15 AD3d 392 [2d Dept. 2005]).

Moreover, this Court finds that the cause of action for fraud is barred by the six year statute of limitations. A cause of action alleging fraud must be commenced within six years after the date on which the cause of action accrued or within two years after the time the plaintiff could with reasonable diligence have discovered the fraud (see CPLR 213 [8]; Sandpebble Bldrs., Inc. v Mansir, 90 AD3d 888 [2d Dept. 2011]; Prand Corp. v County of Suffolk, 62 AD3d 681 [2d Dept. 2009]; Espie v Murphy, 35 AD3d 346 [2d Dept. 2006]). When the fraud at issue induces a party to enter into an agreement the cause of action accrues upon the parties signing the agreement (see Espie, supra; Fandy Corp. v. Lung-Fong Chen, 262 AD2d 352 [2d Dept. 1999]). Here, the action was commenced 13 years after the mortgage and note were entered into and is thus time-barred inasmuch as the action was not commenced within six years of the date on which the cause of action accrued or within two years after the time the plaintiff could with reasonable diligence have discovered the fraud. Contrary to the plaintiff's contention, the continuing wrong doctrine does not apply to toll the statute of limitations. Any wrong accrued at the time of the time of the closing on the mortgage not at the time of payment of each installment (see Pike v New York Life Ins. Co., 72 AD3d 1043 [2d Dept. 2010]).

Accordingly, for the above stated reasons it is hereby

ORDERED, defendant STUART SCHOENFELD's motion to dismiss is granted and the complaint is dismissed against defendant STUART SCHOENFELD, and it is further,

ORDERED, that any and all cross-claims against defendant STUART SCHOENFELD are dismissed, and it is further,

ORDERED, that the Clerk is authorized to enter judgment accordingly.

Dated: April 17, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD,**  
**J.S.C.**