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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

VENESSA SAMMY,
Plaintiff,

- against -

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, et ano.,
Defendants.

Index No. 24400 2008

Motion Date April 24, 2012

Motion Cal. No. 22

Motion Seq. No. 10

The following papers numbered 1 to 4 read on this motion by defendant Expedient Title, Inc. (Expedient Title), for an order permitting it to serve an amended answer.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1
Answering Affirmation - Exhibits.....	2
Reply Affirmation.....	3
Memorandum of Law.....	4

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff makes the following allegations: On or about March 16, 2007, she entered into a contract of sale with Astenie Sainvil for the purchase of premises known as 117-18 150th Avenue, South Ozone Park, New York. Plaintiff hired defendant First American Title Insurance Company of New York (First American) and Expedient Title to, inter alia, record certain closing documents, including the deed. After title closed on May 31, 2007, plaintiff

gave the deed and other mortgage instruments to the defendants for recording; however, the defendants did not record the documents until December 6, 2007. Prior to this recording, a deed conveying the premises from Astenie Sainvil into South Ozone Park Realty Holdings (South Ozone), dated September 28, 2007, was recorded on October 30, 2007.

Plaintiff further alleges: Expedient Title, as the agent of First American, took possession of the closing documents and the proceeds of the loans made by Countrywide Home Loans, Inc. After the closing, plaintiff and her husband began to make mortgage payments to Countrywide, but about four months after the closing, she learned that South Ozone had recorded a deed for the property. After making this discovery, plaintiff stopped paying the mortgage, and the lender began a foreclosure action against her in the New York State Supreme Court, County of Queens (*Countrywide Home Loans, Inc. v. Sammy, et al.*, Index No. 7693/08).

Plaintiff further alleges:

> " while defendants attempted a belated recording of my deed and related transfer documents, to date defendants have failed to pay off the existing mortgages of approximately Five Hundred and Nineteen Thousand [$519,000.00] Dollars, which amount was entrusted to the defendants at the Closing of May 31, 2007. Defendants are [sic: have] yet to proffer the reason why the [$519,000.00] was not used, as was required of them, to pay-off the existing mortgages" (emphasis in original).

Instead, the defendants made illegal and unauthorized transfers amounting to $50,030.00 from the funds entrusted to them and have failed to account for the balance of the funds.

On January 15, 2008, South Ozone began an action in the New York State Supreme Court, County of Queens, against plaintiff well as the mortgagee who purportedly has a mortgage lien on the premises in connection with the subject transaction (*South Ozone Park Realty Holdings Corp. v Sammy, et ano.*, Index No. 1214/08). The *South Ozone* action, brought pursuant to Real Property Actions and Proceedings Law Article 15, seeks a judgment to quiet title.

In the instant action, plaintiff asserts the following causes of action: (1) breach of contract for failure to promptly record her deed and the related closing documents; (2) negligence for failure to do same; (3) willful conduct; (4) breach of duty to defend in the *South Ozone* action; and (5) bad faith.

The defendant title companies have alleged in this action that plaintiff requested them to delay the recording of the documents and gave them a release for the delay to allow her time to negotiate a "short sale" with the bank, which was about to commence a foreclosure action against the premises.

Expedient Title now moves for an order permitting it to serve an amended answer asserting the new affirmative defense of *in pari delicto*. Expedient Title alleges that "during the course of discovery," it learned that plaintiff had submitted fraudulent documents to the lender in order to obtain the funds necessary to purchase her property. It also alleges that plaintiff acted merely as a "straw buyer" in a fraudulent scheme to obtain the mortgage. In order to obtain two loans from Countrywide – the first for $480,000 and the second for $90,000 – plaintiff allegedly misrepresented on her loan applications that: (1) she had $245,000 in liquid assets; and (2) she earned $12,000 per month from Tyler Development, Inc., which was not her actual employer. Moreover, within five days of the closing on the subject property, property, plaintiff allegedly purchased another property located at 130-11 109th Avenue, Queens, New York at a price of $580,000. Plaintiff allegedly obtained loans amounting to $541,000 from Citibank NA and Citimortgage, Inc., by again falsely representing that she had $245,000 in liquid assets and income of over $10,000 per month. Plaintiff did not make the mortgage payments due for the 109th Avenue property, and Citimortgage began an action in foreclosure.

Plaintiff contends that the false statements made in the loan applications are "forged" and " bogus." She alleges that Mike Raganauth, currently incarcerated for mortgage fraud, created the documents.

Plaintiff filed a note of issue in this case, but same was vacated in the Trial Scheduling Part on October 31, 2011 due to pending motions.

CPLR 3025 (b) provides that leave to amend a pleading "shall be freely given upon such terms as may be just" (*see Holchendler v We Transport, Inc*., 292 AD2d 568 [2002]; *St. Paul Fire & Marine Ins. Co. v Town of Hempstead*, 291 AD2d 488 [2002]; *Whitney-Carrington v New York Methodist Hosp*., 289 AD2d 326 [2001]). As a general rule, the amendment of a complaint will be permitted where there is no significant prejudice or surprise to the defendant (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957 [1983]; *Holchendler v We Transport, Inc., supra; Dal Youn Chung v Farberov*, 285 AD2d 524 [2001]). The court notes that plaintiff's attorney does not argue in his memorandum of law that his client will be prejudiced by delay if the amendment is permitted.

Instead, plaintiff's counsel argues that the proposed amendment is palpably without merit. In determining whether to permit a party to amend a pleading, the court must examine

the merits of the proposed amendment (*see Morgan v Prospect Park Associates Holdings, LP*, 251 AD2d 306 [1998]; *McKiernan v McKiernan*, 207 AD2d 825 [1994]). The proposed amendment will not be permitted where it is patently lacking in merit (*see McKiernan v McKiernan, supra*). Plaintiff's attorney argues that the proposed amendment is patently lacking in merit because the allegedly fraudulent loan documents relate to the 109th Avenue transaction, not the 150th Avenue transaction from which the instant action arose. However, Expedient Title's attorney affirms that "the bank documents referenced in our original motion are relative to the instant action, not the 130-11 109th Avenue property," and it appears that the exhibits contain loan documents and bank documents relevant to both properties. Thus, it appears that part of plaintiff's opposition to the instant motion is based on a misapprehension.

Plaintiff also controverts the allegations by Expedient Title that she committed fraud in procuring the loan for the 150th Avenue property, but the court's function on the instant motion is not to resolve the factual issues created by the parties' conflicting allegations concerning fraud. A court should not examine the merits or legal sufficiency of the proposed amendment beyond determining whether the amendment is palpably insufficient or patently devoid of merit on its face (*see Vista Properties, LLC v Rockland Ear, Nose & Throat Associates, P.C.* 60 AD3d 846 [2009]; *Rosicki, Rosicki and Associates, P.C. v Cochems*, 59 AD3d 512 [2009]).

In order to dispose of the instant motion, the court must return to the inquiry concerning whether the proposed affirmative defense is patently lacking in merit. "The doctrine of in pari delicto bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss" (*Rosenbach v Diversified Group, Inc*., 85 AD3d 569, 570 [2011]; *see Kirschner v KPMG LLP*, 15 NY3d 446 [2010]). The doctrine permits a court to refrain from resolving a dispute between two wrongdoers (*see Kirschner v KPMG LLP*, *supra*; *Rosenbach v Diversified Group, Inc., supra*). In order for the doctrine to be available to the defendant, "[t]he plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit" (*Pinter v Dahl,* 486 US 622, 635-636 [1988]; *see Ross v Bolton*, 904 F2d 819 [1990]). " *[I]n pari delicto* is only available when a party has 'violated the law in cooperation with the defendant' " (*U.S. v Philip Morris Inc*., 300 F.Supp.2d 61, 66 [2004], quoting *Pinter v Dahl*, *supra*, at 632). In the case at bar, the alleged fraud committed by plaintiff in applying for a mortgage loan is not the subject of the suit that she brought here (negligence and breach of contract in failing to timely record real estate documents and conversion of mortgage proceeds), and she did not commit a wrong (if any) in cooperation with Expedient Title. The parties allegedly acted separately in committing separate wrongs. "The defense of *in pari delicto* is intended for situations in which the victim is a participant in the misconduct giving rise to his claim . . . as in the classic case of the

highwayman who sued his partner for an accounting of the profits of the robbery they had committed together" (*Williams Electronics Games, Inc. v Garrity* 366 F3d 569, 574 [2004]). The parties here did not act together in committing the alleged wrongs.

Accordingly, the motion is denied.

Dated: July 9, 2012

J.S.C.