SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

TP 9

GRACE VELEZ and THOMAS VELEZ,

Plaintiff(s),

HON. ANTHONY I. GIACOBBE

-against-

DECISION AND ORDER

Index No. 104008/08

Motion No. 006

MOSES CRAWFORD, RONALD WIGGINS, FORECLOSURE OPTIONS, INC., DON BALSAMO, JOSEPH WALD, WALD FINANCIAL SERVICES, INC., VICTOR OKEKE, SIGNATURE TITLE AGENCY AND LAND SERVICES, LLC, CHICAGO TITLE INSURANCE COMPANY, DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR NEW CENTURY HOME EQUITY LOAN TRUST, 2006-1, "JOHN DOE" and " JANE DOE" the last two names being fictitious, said parties being individuals, in any, having or claiming an interest in, or lien upon, the premises described herein, and XYZ-2 CORP., the last two name being fictitious, it being the intention of the Plaintiffs to designate any corporation having a legal interest in the premises described herein,

Defendant(s).

The following papers numbered 1-3 were fully submitted on the 16th day of March, 2012:

Notice of Motion to Dismiss by Defendant VICTOR OKEKE with supporting papers (dated February 7, 2012)	1
Plaintiffs' Request to Deny Motion to Dismiss (dated March 2, 2012)	2
Reply Affirmation by Defendant VICTOR OKEKE (dated March 14, 2012)	3

Upon the foregoing papers, the motion to dismiss the complaint as against him by defendant VICTOR OKEKE is granted in accordance herewith.

Plaintiffs commenced this action alleging, *inter alia*, multiple acts of fraud against the various defendants, including civil conspiracy to commit fraud and violations of General Business Law §349; General Obligations Law §501(1),(2); the Federal Truth-In-Lending Act (15 USC §§ 1691 et seq.); and the Real Estate Settlement Procedures Act. In addition, plaintiffs allege that the moving defendant, VICTOR OKEKE, was retained to act as their attorney with respect to the transaction at issue involving their home and committed legal malpractice in the course of his representation.

According to the verified complaint, plaintiffs GRACE and THOMAS VELEZ purchased 99 Union Avenue, Staten Island, New York, the subject of the current litigation, in 1983. However, by 2005, plaintiff THOMAS VELEZ had begun to receive pre-foreclosure letters from his mortgage company advising plaintiffs of their default. Thereafter, plaintiffs filed for bankruptcy in order to reorganize their household debt. Shortly after the filing of that petition, plaintiffs were solicited by defendant FORECLOSURE OPTIONS, INC. (hereinafter "FOI"), which advised them of a "test" program designed to help homeowners who had fallen behind on their monthly mortgage payments. In accordance therewith, plaintiffs were advised that they would be able to avoid foreclosure by adding an "investor" onto the title of their property in order to give them the income and credit necessary to obtain a new loan. The investor in question was defendant RONALD WIGGINS. Defendant MOSES CRAWFORD of FOI allegedly advised plaintiffs that the WIGGINS name would temporarily appear on the title to their property, but that once their credit score had been repaired, his name would be taken off the deed. Plaintiffs were further advised by CRAWFORD that they would henceforth send their monthly mortgage payments directly to defendant DON BALSAMO, an associate of CRAWFORD's, who would then forward them to the bank.

As is further alleged in the verified complaint, on March 15, 200[6], plaintiff THOMAS VELEZ appeared at the law offices of defendant VICTOR OKEKE for the closing with a Power of Attorney signed by his wife, was given various papers to sign, and, without any explanation, told to sign them. Unbeknownst to plaintiffs, this "closing" resulted in the actual sale of their property to defendant RONALD WIGGINS. No longer the owners of the property, it is alleged that the payments subsequently made by plaintiffs were never forwarded to any bank, as a result of which the property went into foreclosure. Defendant DEUTSCHE BANK apparently purchased the property at the foreclosure sale, and commenced eviction proceedings against plaintiffs.

In response, plaintiffs commenced the within action against all those who had participated in the alleged fraudulent transfer of their home to RONALD WIGGINS. It is alleged, *inter alia*, that each of the defendants who appeared at the closing made false and misleading representations to plaintiff THOMAS VELEZ (hereinafter "plaintiff"), and that the moving defendant, VICTOR OKEKE breached his fiduciary duty to act in plaintiffs' best interest by, *e.g.*, failing to disclose any conflict of interest which he may have had in the subject transaction. It is alleged this breach of fiduciary duty and counsel's purported failure to meet the minimum standard of competence required of any attorney which underlies plaintiffs' claim of legal malpractice. Based on the papers presently before the Court, it appears that plaintiff met the defendant attorney for the first and only time at the closing on March 15, 2006.

In the current application, attorney OKEKE moves to dismiss the complaint as against him with prejudice pursuant to CPLR 3013, 3016 and 3211(a)(7), on the ground that plaintiffs have failed to adequately plead the causes of action asserted against him for legal malpractice, fraud, fraudulent misrepresentation and punitive damages. OKEKE also argues that it is a blatant disregard for this

Court's discovery orders by plaintiffs as well as their allied failure to prosecute this action which is indicative of their inability to substantiate any of their purported claims against him.

More particularly, OKEKE alleges that the complaint fails to set forth any facts in support of the theory that he participated in or had anything whatsoever to do with the alleged scheme to defraud plaintiffs of their interest in the subject property. Moreover, OKEKE contends that plaintiffs knowingly deeded the subject premises to WIGGINS in order to avoid their financial obligations and in an attempt to defraud past, present and future creditors. He further maintains that the complaint fails to contain the detailed factual allegations required by CPLR 3016(b) in connection with their causes of action for fraud, misrepresentation and breach of trust. In this regard, OKEKE argues that plaintiffs have failed to differentiate the acts of fraud and/or fraudulent misrepresentation by and between any of the various defendants. Accordingly, the causes of action as against OKEKE are alleged to be without any factual basis and legally insufficient to state a cause of action against him.

Insofar as the claim for legal malpractice is concerned, OKEKE contends that not only have plaintiffs failed to plead their cause of action with the specificity required by statute, but that they have further fail to plead the required elements of a cause of action for legal malpractice against him. In addition, defendant maintains that plaintiff Thomas Velez is himself at fault for failing to read the papers presented to him at the closing before signing them. Accordingly, any claims of legal malpractice against OKEKE must be dismissed. For similar reasons, OKEKE argues that plaintiffs have failed to demonstrate the right to punitive damages with regard to any of OKEKE's actions at the closing. Finally, it is noted by the moving defendant that plaintiffs have resided in the subject premises rent and mortgage-free from March of 2006 until the foreclosure sale in 2008.

In their unsworn opposition, plaintiffs assert that OKEKE "represented our interest" at the subject closing, and that "**if** he was aware of any wrongdoings in this transaction, it was his

responsibility to inform us of such" (emphasis added). However, he did not. Neither did he comment during the closing on any of the documents being presented to plaintiff for signature – although defendant CRAWFORD allegedly did -- nor did OKEKE explain the legal effect of signing same.

It is beyond cavil that a pleading must be sufficiently particular to give the court and the parties notice of the transactions or occurrences intended to be proved at trial, as well as the material elements of each cause of action or defense (*see*, CPLR 3013). Even more demanding is the particularity required in causes of action sounding in fraud, which are expected to contain detailed allegations of (1) a misrepresentation or a material omission of fact, (2) which is false and known to be false, (3) for the purpose of inducing plaintiff to rely thereon, (4) justifiable reliance on the misrepresentation or material omission of the defendant, and (5) injury (*see, Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173 [2011]). Thus, a reliance that is both reasonable and justifiable are necessary elements of the cause of action (*see, McMorrow v. Dime Savings Bank of Williamsburg*, 48 AD3d 646 [2nd Dept. 2008]). Nevertheless, an exception has been recognized and the specificity requirement relaxed in those cases where it appears that the facts of the purported fraud or misrepresentation lie mostly or entirely within the exclusive knowledge of the moving defendants (*see*, *Pericon v. Ruck*, 56 AD3d 635 [2nd Dept. 2008]).

Finally, it is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must afford plaintiffs the benefit of every possible favorable inference , accept the facts alleged in the complaint as true, and determine only whether plaintiff's factual allegations fit within any cognizable legal theory (*see, Nonnon v. City of New York*, 9 NY3d 825 [2007]). This is so without regard to whether any of plaintiffs' allegations can be proved at trial (*see, EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). "[P]leadings must survive a motion

to dismiss so long as they give the court and the parties notice of what is intended to be proved and the material elements of each cause of action" (*see, Meese v. Miller*, 79 AD2d 237, 244 [4th Dept. 1981]).

Here, notwithstanding plaintiffs' contrary protestations, it is the opinion of this Court that the complaint fails to contain sufficient factual information regarding their claim of legal malpractice against OKEKE to withstand dismissal. In particular, the only factual allegations made specifically regarding OKEKE is that he is an attorney who plaintiff met for the first and only time at the closing; that he seemed to appear on plaintiffs' behalf; that he breached his fiduciary duty to them at the closing by allowing them to sign away their home; that his gross, wanton and negligent conduct fell well below the minimum standards required of an attorney; and that plaintiffs were damaged by his failure to provide them with competent legal counsel. However, no facts have been alleged, *e.g.*, any acts or statements attributable to OKEKE at the closing, which plaintiff relied upon in coming to the conclusion that he was there to represent them. No pre-existing attorney-client relationship has been alleged, nor is compensation claimed to have been paid (*see, e.g., EBC I. Inc. v. Goldman, Sachs & Co., supra*). Moreover, plaintiffs do not claim, and it does not appear, that the facts giving rise to plaintiffs' claim of legal malpractice against OKEKE is a matter which presently lies exclusively within the knowledge of the moving defendant. As a result, the failure to allege specific facts giving notice of the transactions or occurrences intended to be proved against OKEKE in support of the material elements of this cause of action renders the complaint legally insufficient. Hence, the cause of action for legal malpractice must be dismissed. However, the same does not appear as to the remaining causes of action against OKEKE, where the pertinent facts are likely within the defendants' exclusive knowledge. With this in mind, the motion to dismiss the balance of the complaint as against the moving defendant is denied without prejudice to renewal following the completion of discovery (CPLR 3211[d]; *Pericon v. Ruck, supra*].

As for plaintiffs' causes of action for "punitive damages", it is sufficient to note that no distinct cause of action for punitive damages is recognized in New York (*see, Glatter v. Chase Manhattan Bank*, 239 AD2d 68 [2nd Dept. 1998]).

Accordingly, it is

ORDERED that the motion to dismiss the complaint by defendant VICTOR OKEKE is granted to the extent that the cause of action for legal malpractice is severed and dismissed; and it is further

ORDERED that the balance of the motion is denied without prejudice to renewal following the completion of discovery; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

Dated: September 28, 2012 J.S.C.