

Alter v Wells Fargo Bank NA

2012 NY Slip Op 33434(U)

August 14, 2012

Sup Ct, New York County

Docket Number: 602877/08

Judge: Charles E. Ramos

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CE Ram
Justice

PART 53

Index Number : 100225/2012
ALTER, STEPHANIE
vs.
WELLS FARGO BANK, N.A.
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with
accompanying memorandum decision and order.

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

Dated: 8/14/12

RD
_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X

STEPHANIE ALTER and STANLEY ALTER,

Plaintiffs,

Index No. 602877/08

- against -

WELLS FARGO BANK NA,

Defendant.

-----X

Charles Edward Ramos, J.S.C.:

In motion sequence 001, the defendant Wells Fargo Bank NA ("Wells Fargo") moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the plaintiffs Stephanie Alter and Stanley Alter's (collectively, the "Alters") complaint.

As alleged in the complaint, the plaintiff Stephanie Alter is the owner of a cooperative apartment located at 45 Sutton Place, New York, NY (the "Apartment"). Wells Fargo, is the holder of a mortgage provided to the Alters in connection with the acquisition of the Apartment (the "Mortgage").

In September 2011, the Alters sought to refinance the Mortgage to take advantage of reduced interest rates offered by Wells Fargo. They were advised by Wells Fargo that it would refinance the Mortgage at a fixed interest rate of 4.25% for a 30 year term (the "Loan"). Based on that representation, the Alters agreed to refinance the Mortgage with Wells Fargo.

On September 21, 2011, Wells Fargo confirmed by letter that the lock-in interest rate of the Loan would 4.25% and it would

expire on December 14, 2011. In addition, Wells Fargo issued a loan commitment letter (the "Commitment Letter") to the Alters in the amount of \$350,534 at an interest rate of 4.25% for a 30 year term.¹ Pursuant to the Commitment Letter, the Alters monthly payment would be reduced from \$2,366.15 to \$1,724.42 per month.

In furtherance of closing the Loan, the Alters proceeded to provide Wells Fargo with their credit reports, an appraisal of the Apartment, the loan application, and other documents requested by Wells Fargo at their own expense.

In early November 2011, the Alters were advised by Wells Fargo that it had lost Stephanie Alters' original cooperative stock certificates and her proprietary lease to the Apartment (the "Co-op Documents"). Thereafter, Wells Fargo allegedly represented that it would obtain replacements of the Lost Documents from the cooperative at its own expense, and that it would extend the lock-in interest rate due to the delay caused by replacing the Co-op Documents.

On December 1, 2011, Wells Fargo informed the Alters that it would not extend the lock-in interest rate, contrary to its original representations. On December 13, 2011, Wells Fargo further informed the Alters that it would extend the lock-in

¹ The complaint alleges that the Commitment Letter was issued on November 15, 2011, but the actual document is dated September 21, 2011 (compare McGrath Aff., Exhibit A, ¶ 8 and Exhibit C).

interest rate if the Alters agreed to pay \$435.17 for each 5 day period the lock-in interest rate was extended.

The Alters allege that as of December 13, 2011, Wells Fargo had received all the requested and required documentation, including the replacement Co-op Documents, necessary to close the Loan on December 14, 2011.

On December 14, 2011, the Loan failed to close despite all parties having the ability to do so, and the Alters were informed that the lock-in interest rate had expired and that it would no longer be honored by Wells Fargo.

On January 9, 2012, the Alters commenced this action asserting causes of action for breach of contract and fraudulent inducement and seeking over \$2 million in damages. Subsequently, Wells Fargo moved to dismiss the complaint.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[T]he court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint" (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept

2002])).

In their first cause of action for breach of contract, the Alters allege that Wells Fargo's failure to close the Loan was a breach of the Commitment Letter.

In opposition, Wells Fargo argues that the Alters never signed and returned the Commitment Letter as required, and consequently, no enforceable contract between the parties was ever created. Furthermore, even if this Court finds that there was an enforceable contract created by the Commitment Letter, its terms clearly provide that Wells Fargo reserved its right to charge a fee for extending the expiration date of lock-in interest rate.

It is undisputed that the Alters never executed and returned the Commitment Letter, which clearly provides as a condition to closing, that the "[b]orrower to sign and return one original of this Commitment Letter to acknowledge terms and conditions set forth herein" (McGrath Aff., Exhibit C, p. 14).

The Alters argue that the acknowledgment was returned to Wells Fargo, but provide no explanation for their failure to attach an executed Commitment Letter to their papers. The Alters instead argue that Wells Fargo's partial performance in processing the Loan created an enforceable contract.

Even assuming *arguendo* that an enforceable contract was formed by Wells Fargo's conduct, the Commitment Letter clearly

provides that Wells Fargo is "under no obligation to extend the expiration date of this Commitment" and that it "reserves the right to charge a fee for any such extension and may require loan documents to be updated, at your cost, prior to closing" (McGrath Aff., Exhibit C, p. 8).

Furthermore, the Alters argument that they were prepared to close the Loan on December 13, 2011 completely ignores the provision in the Commitment Letter that provides that the "[Loan] must close at least three (3) business days prior to the lock-in expiration date" (*id.* at p. 7). The lock-in interest rate expired on December 14, 2011. Therefore, pursuant to the Commitment Letter, the Loan was required to close no later than December 11, 2011.

The Alters do not allege that they were prepared to close the Loan on December 11, 2011, but argue that the failure to close was due to Wells Fargo's loss of the Co-op Documents in November 2011. However, the express terms of the Commitment Letter provide that the Alters were obligated to provide the Co-op Documents to Wells Fargo in any event (*id.* at 11). Furthermore, the Alters had an opportunity to extend the Commitment Letter expiration date, but decided against doing so.

Based on the Alters' failure to submit an executed Commitment Letter it is unclear to this Court if there was ever an enforceable contract between the parties, but even accepting

the allegations as true, the complaint still fails to allege a breach of the terms of the Commitment Letter by Wells Fargo. As a result, the first cause of action for breach of the Commitment Letter is dismissed.

The Alters' second cause of action for fraudulent inducement alleges that Wells Fargo never intended to close the Loan by December 14, 2011. Instead, Wells Fargo's issuance of the Commitment Letter and the lock-in interest rate letter was a deliberate scheme to delay the Alters from refinancing with another lender, and force them to continue to make monthly payments under the higher original interest rate.

The Alters allege that they were induced from seeking refinancing from other lenders by Wells Fargo's representations that the Loan would close by December 14, 2011. Furthermore, the Alters allege that Wells Fargo intentionally delayed the process in an attempt to extort additional funds from them by having them pay to extend the lock-in interest rate indefinitely.

The Alters' cause of action based on fraudulent inducement must allege Wells Fargo made a misrepresentation of fact with the intention to defraud or mislead the Alters, and that the Alters reasonably relied upon the misrepresentation to their detriment. (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

The Alters second cause of action is not pled with the

particularity required by CPLR 3016(b) for causes of action sounding in fraud.

Moreover, the Alters offer no factual support for their conclusory allegations that Wells Fargo never intended to refinance the Mortgage (Complaint, ¶ 22). Furthermore, the Alters do not allege that Wells Fargo prevented or otherwise prohibited the Alters from obtaining other refinancing offers from other lenders, but alleges merely that they "refrained from seeking refinancing from another mortgage lender" (*id.*, ¶ 23-4).

Thus, the Alters fail to adequately plead a cause of action for fraudulent inducement because they have not pled scienter or inducement with the requisite specificity. "Bare allegations of fraud without any allegation of details constituting the wrong are not sufficient to sustain such a cause of action" (*Cent. State Bank v Am. Appraisal Co.*, 33 AD2d 1009, 1010 [1st Dept 1970] *affd*, 28 NY2d 578 [1971]).

Finally, the Alters have failed to provide any authority that would support the imposition of punitive damages.


Accordingly, it is

ORDERED that Wells Fargo's motion to dismiss is granted in its entirety and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: August 14, 2012

ENTER:



J.S.C.