Avila v Ocwen Loan Servicing, LLC
2012 NY Slip Op 33466(U)
May 31, 2012
Sup Ct, Bronx County
Docket Number: 308569/11
Judge: Mary Ann Brigantti-Hughes
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6-18-12

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

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ARMANDO AVILA,

Plaintiff,

-against-

DECISION / ORDER
Index No. 308569/11

OCWEN LOAN SERVICING, LLC., DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR REGISTERED HOLDER SAXON ASSET, SMI MORTGAGE, VICTORY NATIONAL ABSTRACT, DAVID BARNETT, JOHN DOE and JANE DOE number 1 through 10, said names being fictitious parties intended being persons or corporations or agents forging signature,

Defendants.

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The following papers numbered 1 to 8 read on the below motion noticed on November 23, 2011 and duly submitted on the Part IA15 Motion calendar of **March 20, 2012**:

Papers Submitted	Numbered
Def.'s Notice of Motion, Memo of Law, Exhibits	1,2,3
Pl.'s Cross-Motion, Affirmation, Exhibits	4,5,6
Def.'s Reply and Opposition, Exhibits	7,8

Upon the foregoing papers, defendants Deutche Bank National Trust Co. as Trustee for Registered Holder Saxon Asset ("Deutche Bank") and Ocwen Loan Services, LLC ("Ocwen")(collectively the "Bank") move to dismiss the complaint of the plaintiff Armando Avila ("Plaintiff") pursuant to CPLR 3211(a)(1) and (7), and CPLR 3016(b) and/or CPLR 3013. Plaintiff opposes and cross-moves for an Order to consolidate this matter with a related foreclosure matter, pursuant to CPLR 602.

I. Background

According to the Verified Complaint, Plaintiff owns the property located at 455 White Plains Road, Bronx, NY (the "Property"). On or about October 8, 2004, he borrowed $301,000

from non-party Option One Mortgage Corp., which loan was secured by a mortgage on the Property.

Plaintiff alleges that on or about March 7, 2006, certain unknown individuals engineered a refinancing of this loan with defendant SMI without Plaintiff's authorization. Defendant Victory National Abstract is alleged to have been the title agent at the closing of this loan refinancing which provided title insurance through an unidentified insurer and which purportedly confirmed the identity of the borrowing individual. Those participants are identified as "John Doe" defendants. Following the closing of the loan refinancing, the mortgage loan was assigned to defendant Deutche Bank, with defendant Ocwen Loan Servicing, LLC acting as the servicer on the loan.

In connection with this purportedly unauthorized refinancing, Plaintiff asserts that the amount of the refinanced loan was increased to $380,000, with the excess proceeds allegedly being distributed to all of the Defendants, including the Bank, who was not assigned the loan until after the closing.

On or about May 10, 2010, Deutche bank brought a foreclosure action seeking to foreclose upon the refinanced loan due to non-payment (the "Foreclosure action"). According to that complaint, the mortgage went into default when the August 1, 2008 payment was missed, nearly 2 ½ years after the allegedly unauthorized refinancing. Plaintiff did not answer the Foreclosure Action, and this Court granted the plaintiff in that matter summary judgment and an Order of Reference on or about April 20, 2011.

According to the instant verified complaint, Plaintiff alleges that all of the monthly statements for this mortgage were received by defendant David Barnett, whom Plaintiff hired to act as Plaintiff's agent in collecting the rents on the Property and paying the original loan. Plaintiff alleges that he only learned of the refinanced mortgage in June, 2010, four years after the closing, when Plaintiff hired a real estate broker to sell the Property.

Plaintiff asserts that the defendants Barnett, SMI, Victory and the unnamed John Doe defendants had conspired to effectuate the purportedly fraudulent refinancing of the original Option One loan and to thereafter engineer the foreclosure of the loan four years later.

As a First Cause of Action, Plaintiff seeks damages against all defendants for conspiracy

to defraud Plaintiff.

As a Second Cause of Action, Plaintiff seeks damages against all of the Defendants for "forgery", but only names defendants SMI, Barnett, Vanguard, and John Does 1-4 as those parties who allegedly made any fraudulent misrepresentations.

As a Third Cause of Action, Plaintiff seeks to enjoin the Bank from proceeding with the foreclosure of the refinanced mortgage.

As a Fourth Cause of Action, Plaintiff seeks an accounting of the Bank's books and records as they relate to the refinanced loan so that a determination can be made as to the amount owing on the loan.

As a Fifth Cause of action, Plaintiff asserts that the amount of arrears on the loan is incorrect and seeks a declaration that Deutche Bank may not proceed with the foreclosure, and the amount owed is in dispute.

Plaintiff opposes the motion and has cross-moved to consolidate this action with the Foreclosure action (Index No. 380980/2009).

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action. *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 (1st Dept. 2002). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. *See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 (1st Dept. 1990); *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 (1st Dept. 1997)(on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* §3026). The court must "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 into any cognizable legal theory". *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any

cause of action cognizable at law. *McGill v. Parker*, 179 A.D.2d 98 (1st Dept. 1992). Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence. *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 (1st Dept. 2005). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Id.*, citing *Leon v. Martinez., supra.* Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint. *Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 (2nd Dept. 2001). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7). *Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 (1st Dept. 1983).

III. Analysis

(1) Defendant Bank's Motion to Dismiss

In this matter, Plaintiff's first cause of action, "Conspiracy to Defraud by False Representation," paragraphs 24-30, does not allege that defendant Deutche Bank or Ocwen engaged in any fraudulent activity. Rather, this cause of action contains allegations solely against defendants "Barnett, Vanguard, SMI, John Doe 1, John Doe 2, John Doe 3, and John Doe 4".

To maintain a cause of action for fraud, "a plaintiff must assert the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury" (*Braddock v. Braddock*, 60 AD3d 84, 86 [1st Dept 2009]; see *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 348 [1999]). Additionally, a plaintiff alleging fraud must state "the circumstances constituting the wrong ... in detail" (CPLR 3016[b]). At a minimum, that requires plaintiff to identify the time,

place, manner and content of the alleged misrepresentations with respect to each of the defendants. *Eastman Kodak Co. v. Roopak Enters.*, 202 A.D.2d 220 (1st Dept.1994).

Here, Plaintiff has not made such sufficient allegations of fraud against the moving defendants. Moreover, it is well established that New York does not recognize an independent cause of action for conspiracy to commit fraud. *Alexander & Alexander v. Fritzen*, 68 N.Y.2d 968 (1986).

Plaintiff's second cause of action against Defendants for "Forgery" does not allege that Deutche Bank or Ocwen made any fraudulent misrepresentations. Again, at paragraphs 31-37, the Complaint only asserts that "on or about March 7, 2006, defendants falsely and fraudulently represented that one of the defendant was plaintiff." The Complaint goes on to allege "When defendants SMI, Barrett [sic], Vanguard , John Doe "1", John Doe "2", John Doe "3" and John Doe "4" made these representations defendant knew them to be false and these representations were made by defendants with the intent to defraud and deceive plaintiff." There are simply no allegations of wrongdoing on the party of Deutche Bank or Ocwen.

Plaintiff's third cause of action seeks to enjoin the foreclosure of the refinanced mortgage loan. Plaintiff, however, did not answer the complaint filed in the Foreclosure Action. This Court granted Plaintiff summary judgment in the Foreclosure Action and issued an Order of Reference. Plaintiff never sought vacatur of the default judgment or Order of Reference in the Foreclosure matter. Therefore, Plaintiff cannot now relitigate affirmative defenses or claims in a new action when it was given the opportunity to litigate in a prior proceeding, but failed to do so. *Sterling Doubleday Enters. v. Marro*, 238 A.D.2d 502 (2nd Dept. 1997). Under this same line of reasoning, Plaintiff's fifth cause of action must be dismissed. Plaintiff contends in paragraphs 47-48 that "the arrears amount that defendant Deutche Bank contends in the Summons and Complaint to be in default is incorrect" and therefore Plaintiff is not in default. Since Plaintiff failed to litigate this issue in the Foreclosure action, he cannot do so in this separate action.

The fourth cause of action seeks an accounting from the Bank with respect to the subject loan of which Deutche Bank is an assignee and Ocwen is the loan servicer. The complaint demands at paragraph 46 that "Defendant Ocwen and Detuche make available its books and records as they relate to the Plaintiff's loan so that Plaintiff may have a certified public

accountant and/or a similarly qualified representative, audit the books and records. To be entitled to an equitable accounting, the demanding party must allege the existence of a fiduciary and confidential relationship between themselves and the defendant. *PVM Oil Futures v. Banque Paribas*, 161 A.D.2d 220 (1st Dept. 1990)(internal citations omitted). Here, Plaintiff does not allege and such fiduciary relationship between themselves and the Bank. Accordingly, this cause of action must be dismissed.

Plaintiff's assertion in opposition that the motion is "premature" is meritless, given that the motion seeks dismissal due to insufficient pleadings in accordance with CPLR 3211(a). Moreover, Plaintiff only opposes with an affirmation of counsel, which states in conclusory fashion that Plaintiff has sufficiently stated a cause of action. While the affirmation states that it includes an affidavit from Plaintiff, no such document is provided in the papers.

(2) Plaintiff's Cross-Motion to Consolidate

Plaintiff has cross-moved for an Order consolidating this action with the Foreclosure action (Index No. 380980/2010) . Generally, there is a preference for consolidation in the interests of judicial economy and ease of decision making where there are common questions of law and fact. *Progressive Ins. Co. v. Vasquez*, 10 A.D.3d 518 (1st Dept. 2004). Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent the injustice which would result from divergent decisions based on the same facts. *Chinatown Apartments, Inc. v. New York City Transit Auth.*, 100 A.D.2d 824 (1st Dept. 1984). Consolidation should not be ordered, however, if to do so would "prejudice a substantial right" *Amcan Holdings, Inc. v. Torys, LLP*, 32 A.D.3d 337 (1st Dept. 2006).

Plaintiff's motion to consolidate must be denied, since Plaintiff defaulted on the Bank's claims in the Foreclosure Action and took no steps to vacate the default. The general rule is that actions will not be consolidated where issue has not been joined in one of the actions. *Luks v. New York Life Ins. Co.*, 213 A.D. 623 (1st Dept. 1925). Since Plaintiff did not join issue in the Foreclosure action, there is no issue to consolidate with this Action.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that defendant Deutche Bank and Ocwen's motion is granted, and it is further,

ORDERED, that Plaintiff's complaint as to defendants Deutche Bank and Ocwen is dismissed with prejudice, and it is further,

ORDERED, that Plaintiff's cross-motion to consolidate is denied.

This constitutes the Decision and Order of this Court.

Dated: May 31, 2012

Hon. Mary Ann Brigantti-Hughes, J.S.C.