

LSF6 Mercury Reo Invs., LLC v Crossland Appraisal Servs., Inc.
2012 NY Slip Op 33537(U)
November 28, 2012
Sup Ct, NY County
Docket Number: 152204/12
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JOAN M. KENNEY
J.S.C.

PRESENT:

PART 8

Index Number : 152204/2012
LSF6 MERCURY REO
vs
CROSSLAND APPRAISAL
Sequence Number : 001
DISMISS ACTION

INDEX NO. 152204/12MOTION DATE 8/8/12MOTION SEQ. NO. 1001

The following papers, numbered 1 to 13, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits + memo g l a u

No(s). 1-4

Answering Affidavits — Exhibits _____

No(s). 5-11

Replying Affidavits _____

No(s). 12, 13

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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

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

Dated: November 28, 2012


JOAN M. KENNEY
J.S.C.

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: IAS Part 8

-----X
LSF6 Mercury Reo Investments, LLC,
Plaintiff,

-against-

Crossland Appraisal Services, Inc.,
and Fernando Medina,

Defendants.
-----X

KENNEY, JOAN M., J.

DECISION AND ORDER

Index Number: 152204/12

Motion Seq. No.: 001

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers

Numbered

Notice of Motion, Affirmation, Exhibits, and Memo of Law

1-4

Opposition Affirmation, Exhibits, and Memo of Law

5-11

Reply Affirmation and Memo of Law

12-13

In this negligence action, defendants, Crossland Appraisal Services, Inc. (Crossland), and Fernando Medina, move for an Order, pursuant to CPLR § 3211(a)(1) and (7), dismissing the complaint.

Factual Background

On June 30, 2008, plaintiff purchased CIT Group, Inc.'s mortgage assets and all related rights, including causes of action against third-parties related to the mortgages. Plaintiff LSF6 Mercury Reo Investments LLC (Mercury) is the successor in interest to CIT Group, Inc., and all of the rights against defendants are now owned by plaintiff.

Defendant Crossland is a real estate appraisal services company. Defendant Medina is a real estate appraiser, licensed in the State of New York, who was employed by Crossland at all relevant times.

On February 15, 2006, Medina conducted a real estate appraisal on behalf of plaintiff's predecessor in interest for the property located at 70 Cabot Lane in Westbury, NY. Medina issued a

report to plaintiff, and defendants received payment for their services.

The appraisal was used to determine under what conditions, if at all, plaintiff would offer refinancing to the home owner of the subject property. Plaintiff's allege that Medina used negligent, improper, inaccurate, and fraudulent appraisal methods to conclude that the property was worth \$525,000.00. Based on a retroactive appraisal conducted on December 5, 2011, plaintiff claims that the fair market value of the property at the time of defendants' appraisal was only \$455,000.00. It is alleged that defendants inflated the market value of the property by comparing it to the highest valued properties in the area and not to those that were most reflective of its actual value.

Based on this alleged inaccurate appraisal, plaintiff agreed to issue a refinanced mortgage to the homeowner at the property. Thereafter, the mortgagor defaulted. The asset was "charged off" the plaintiff's books on October 30, 2009. A charge off reduces the value of the property on the plaintiff's general ledger while leaving the balance of the loan on the servicing system for the purpose of pursuing additional collection or recovery efforts. Plaintiffs claim that if the appraisal had been accurate: the principal would have been lower; other terms of the loan would have been different; or the loan would not have been issued at all, thus preventing their alleged losses due to the devaluation of the property.

Plaintiff now sues for: 1) negligence; 2) fraud; 3) negligent misrepresentation; 4) breach of contract; 5) breach of express warranty; 6) breach of implied warranty; 7) negligence per se; 8) unlawful, deceptive, and/or unfair trade practices; and 9) punitive damages.

Arguments

Defendants argue that: plaintiff's first and seventh causes of action for negligence and negligence per se must be dismissed because they are time barred pursuant to the statute of limitations and because plaintiff has not pleaded that the allegedly negligent appraisal was the proximate cause of any damages sustained by it; plaintiff's second cause of action for fraud must be dismissed because it is untimely pursuant to the statute of limitations and that the complaint fails to adequately allege that defendants knew the appraisal was false when it was provided to plaintiff's predecessor in interest; plaintiff's third cause of action for negligent misrepresentation must be dismissed because it is barred by the statute of limitations and because plaintiff was not damaged as a result of defendants' alleged misrepresentation; plaintiff's fourth cause of action for breach of contract must be dismissed because it is barred by the statute of limitations and because plaintiff fails to plead a cause of action for breach of contract; plaintiff's fifth and sixth causes of action for breach of express warranty and breach of implied warranty must be dismissed because they are barred by the statute of limitations, because plaintiff fails to state a cause of action for breach of express warranty, and plaintiff fails to state a cause of action for breach of implied warranty; plaintiff's eighth cause of action for unlawful, deceptive, and/or unfair trade practices must be dismissed because it is barred by the statute of limitations and because the complaint fails to allege conduct on the part of defendants that was consumer-oriented; that plaintiff's cause of action for punitive damages must be dismissed because New York does not recognize such as an independent cause of action; and that in the alternative, plaintiff's causes of action against defendants are all based upon the same allegations as the negligence cause of action, and accordingly, must be dismissed for being duplicative.

Plaintiff argues that: since real estate appraisers are not professionals within the ambit of CPLR 214(6), the appropriate statute of limitations varies according to each cause of action

asserted; their first and seventh causes of action for negligence and negligence per se are both timely, and the complaint sufficiently alleges that the negligent appraisal was the proximate cause of plaintiff's damages; their second cause of action for fraud is both timely and states a valid cause of action; their eighth cause of action for unlawful, deceptive, and/or unfair business practices under General Business Law § 349 is timely and states a valid cause of action; and they may maintain a valid claim for punitive damages.

Discussion

When deciding whether or not a complaint should be dismissed pursuant to CPLR 3211(a)(7), the complaint must be construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true, limiting the inquiry to whether or not the complaint states, in some recognizable form, any cause of action known to our law. (see, *World Wide Adjustment Bureau et al., v Edward S. Gordon Company, Inc., et al.*, 111 AD2d 98 [1st Dept. 1985]). In assessing the sufficiency of the complaint, this court must also consider the allegations made in both the complaint and the accompanying affidavit, submitted in opposition to the motion, as true and resolve all inferences which reasonably flow therefrom, in favor of the plaintiff. (*Joel v Weber*, 166 AD2d 130 [1st Dept. 1991]). A motion to dismiss is made pursuant to CPLR 3211(a)(7), which allows such a motion on the ground that the pleading fails to state a cause of action. The sufficiency of a pleading to state a cause of action generally depends upon whether or not there is substantial compliance with CPLR 3013, which requires that statements in a pleading be sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action. Further, every pleading question should be approached in the light of CPLR 3026 requiring that pleadings shall be liberally construed and that defects shall be ignored if a substantial right of a party is not prejudiced. Thus,

the burden is placed upon one who attacks a pleading for deficiencies in its allegations to show that he is prejudiced.

Pursuant to NY CPLR 214(4), an action to recover damages for an injury to property shall be commenced within three years. Regardless of whether or not real estate appraisers are “professionals” under the CPLR, the appraisal of the property took place on February 15, 2006, and this action was not commenced until April 25, 2012. Whatever negligence occurred, whether it be simple or professional, it occurred on the date of the appraisal. The April 25, 2012 commencement of this action is well outside the three year statute of limitations, thus, plaintiff’s negligence and negligence per se claims are dismissed.

NY CPLR 213(8) states that, in “an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.” Here, the alleged fraud accrued on February 15, 2006 with the original real estate appraisal. Per CPLR 213(8), plaintiff’s statute of limitations would be either February 15, 2012, or, two years from when they could have reasonably discovered the alleged fraud. Plaintiffs charged the property off after the homeowner default on October 30, 2009, and had the retroactive appraisal done on December 5, 2011. Those dates would give an October 30, 2011, and a December 5, 2013 statute of limitations date (respectively). At this juncture it is premature to discern whether plaintiff had sufficient facts to discover the alleged fraud at the point of the charge-off or whether it was only discoverable at the time of the retroactive appraisal. Accordingly, the fraud claim cannot be dismissed, at this juncture, on grounds that it is untimely.

The elements of a cause of action for fraud are a representation concerning a material fact,

falsity of that representation, scienter, reliance and damages. Plaintiff must show not only that they actually relied on the misrepresentations, but also that such reliance was reasonable. Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, they cannot claim justifiable reliance on a defendant's misrepresentations. (*Stuart Silver Associates, Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99, 665 N.Y.S.2d 415, 417 [1st Dept. 1997]). Here, plaintiff alleges in the complaint that defendants made the willful false representation of the value of the property, they relied on that representation in awarding the mortgage to the homeowner, and the value of the property was affected by the alleged false representation. Plaintiff has sufficiently pleaded a fraud claim.

General Business Law (GBL) 349(a) states that “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” Section 349(h) provides a private right of action to this statute, the statute of limitations for the cause of action arising under GBL 349 is three years. (CPLR 214(2)). “Accrual of a private right of action under business law statute providing that deceptive acts and practices in conduct of business is unlawful first occurs when plaintiff has been injured by a deceptive act or practice violating the section.” (*Gaidon v Guardian Life Ins. Co. of America*, 96 NY2d 201 [2001]). A “discovery rule [does] not apply to, and thus [cannot] extend, three-year limitations period on deceptive acts and practices claims against insurance agent and agency under General Business Law [349].” (*Wender v Gilberg Agency*, 276 AD2d 311 [1st Dept. 2000]). Since the alleged deceptive appraisal occurred on February 15, 2006, the statute of limitations would have ran by February 15, 2009. This action was commenced on April 25, 2012, well outside the statute of limitations. Plaintiff's GBL 349 claim is dismissed.

Plaintiff fails to rebut defendants' assertions that plaintiff's claims for negligent

misrepresentations, breach of contract, breach of express warranty, and breach of implied warranty should all be dismissed. Accordingly, all such claims are dismissed without opposition.

In New York, “a claim for punitive damages is not a separate cause of action.” (*Rivera v City of New York*, 40 AD3d 334 [1st Dept. 2007]). Plaintiff’s claim for punitive damages is therefore dismissed. Accordingly, it is hereby

ORDERED, that defendants’ motion, dismissing the action, is granted, on the claims of negligence; negligent misrepresentation; breach of contract; breach of express warranty; breach of implied warranty; negligence per se; unlawful, deceptive, and/or unfair trade practices; and punitive damages; and it is further

ORDERED, that defendants’ motion, dismissing the action on the claim of fraud, is denied; and it is further

ORDERED, that defendant serve and file an answer to the complaint herein, no later than December 28, 2012; and it is further

ORDERED, that the parties appear for a preliminary conference in Room 304, 71 Thomas St., New York, NY 10013, on January 31, 2013, at 9:30 a.m.

Dated: November 28, 2012

ENTER

A handwritten signature in black ink, appearing to read 'JMK', is written over a horizontal line.

Joan M. Kenney, J.S.C.