

**Mauro v Countrywide Home Loans, Inc.**

2012 NY Slip Op 33679(U)

July 5, 2012

Supreme Court, Nassau County

Docket Number: 191-11

Judge: Vito M. Destefano

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SUPREME COURT - STATE OF NEW YORK

Present:

**HON. VITO M. DESTEFANO,**

Justice

TRIAL/IAS, PART 15  
NASSAU COUNTY

**MARIA MAURO,**

**Decision and Order**

**Plaintiff,**

**MOTION SUBMITTED:**

**April 12, 2012**

**-against-**

**MOTION SEQUENCE:04, 05**

**INDEX NO. 191-11**

**COUNTRYWIDE HOME LOANS, INC.,  
VICTORIA S. KAPLAN, ESQ., PETER  
J. DAWSON AND BMG ADVISORY  
SERVICES, LTD.,**

**Defendants.**

**The following papers and the attachments and exhibits thereto have been read on this motion:**

Notice of Motion (Victoria Kaplan)	1
Memorandum of Law in Support of Motion	2
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Defendants Victoria S. Kaplan, Esq. ("Kaplan") and Countrywide Home Loans, Inc. ("Countrywide") separately move pursuant to CPLR 2221(d) to reargue prior motions for dismissal, which were resolved by order of this court (Warshawsky, J.) dated October 17, 2011.

For the reasons that follow, the motions are granted.

### **Factual and Procedural Background**

The Plaintiff, Maria Mauro (“Mauro”), owned two properties in Westbury, New York, located at 213 Fulton Street (“Fulton Street property”) and 168 Grant Street (“Grant Street property”): The properties were titled in the name of the Simone Mauro Revocable Trust and Maria Mauro Revocable Trust (“Mauro Trusts”) (Ex. “A” to Kaplan Motion at ¶16).

On May 30, 2006, Mauro, at the recommendation of Defendant Peter Dawson (“Dawson”), her financial advisor, mortgaged both properties with the intention of investing the proceeds. Present at the closing were Mauro, Dawson, Anna Maria Mauro and Giuseppe Mauro (Mauro’s daughter and son) and Kaplan, the closing attorney for Countrywide, the lender on both loans. In order to facilitate the loan, Kaplan prepared two deeds from the Mauro Trusts to Mauro personally. At the conclusion of the closing, the loan proceeds from both properties were dispersed to Defendant BMG Advisory Services, Inc. (“BMG”), a company owned or controlled by Dawson (Ex. “A” to Motion at ¶ 35).

In November 2006, six months after the closing, Dawson was arrested and charged with, *inter alia*, multiple counts of grand larceny. In February 2007, Mauro commenced an action in Supreme Court Nassau County, which was subsequently removed to the Federal Court. Mauro’s only federal claim was violation of the Truth in Lending Act (“TILA”). The Federal Court dismissed Mauro’s TILA claim “because it [was] uncontroverted that [Mauro] obtained the Grant Street and Fulton Street mortgages in order to give the proceeds directly to Dawson for investment purposes” (Ex. “10” to Countrywide Motion). The Federal Court declined to exercise supplemental jurisdiction over Mauro’s remaining state law claims.

#### *The Instant Action*

Mauro thereafter commenced the instant action against Countrywide, Kaplan, Dawson and BMG asserting causes of action, *inter alia*, for breach of contract against Countrywide, breach of fiduciary duty against Kaplan, and fraud against both Countrywide and Kaplan.

More specifically, the breach of contract causes of action asserted against Countrywide are based on Countrywide’s failure to deliver the loan proceeds directly to Mauro. The breach of fiduciary duty claim asserted against Kaplan is based on an alleged fiduciary relationship arising from Kaplan’s preparation of the deeds transferring title from the Mauro Trusts to Mauro

individually.<sup>1</sup>

With respect to fraud, Mauro asserts that Kaplan knew, or should have known, that Mauro could not speak or read English well enough to understand the nature or legal effect of the transaction, that Kaplan falsely represented that the loan proceeds would be paid directly to Mauro, knowing that such a representation was false, and that Mauro relied upon that representation. Fraud is asserted against Countrywide, based on the actions of its agent, Kaplan, who purportedly represented to Mauro that the proceeds of the loans for both properties would be paid directly to Mauro when, in fact, they were paid to BMG without Mauro's consent.

*The Underlying Motions*

1. Kaplan Motion

Kaplan moved for an order pursuant to CPLR 3211(a)(1) and 3211(c) dismissing the complaint, insofar as asserted against her. In support of her motion, Kaplan argued that Mauro could not establish fraud with respect to either of the properties because documentary evidence belies the claim that Mauro was expecting to receive the loan proceeds from both of the properties that were mortgaged. The court denied this branch of Kaplan's motion, holding that there were "factual issues whether or not Kaplan made the representation that the funds were to be directed to [Mauro] alone, whether or not it was made by her with intent to deceive, or to induce [Mauro] to act upon the representation, and whether or not [Mauro] completed the transaction in reliance on such representation, or based upon her own decision to invest her funds with Dawson's company" (Order of Justice Warshawsky dated October 17, 2011 at pp 11-12).

With respect to that branch of Kaplan's motion seeking dismissal of the causes of action asserting breach of fiduciary duty, Kaplan argued, *inter alia*, that as the attorney for Countrywide, she was not in privity with Mauro, and thus there was no fiduciary relationship between Mauro and her. Kaplan also argued, assuming *arguendo* the existence of a duty, that there was no wrongdoing on her part insofar as Mauro authorized Kaplan to issue the loan proceeds directly to BMG. Treating the motion as one for summary judgment pursuant to CPLR 3211(c), Justice Warshawsky held that the "existence of a fiduciary relationship is fact specific" and that while "it appears unlikely that Kaplan, an attorney for the lender, entered into an attorney-client relationship with the borrower simply by drafting two deeds, it is not factually

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<sup>1</sup> Mauro claims that Kaplan's preparation of the deeds transferring title from the Mauro Trusts to Mauro individually facilitated the issuance of the loans and created a fiduciary relationship between them. Mauro paid a fee of \$150 for Kaplan's preparation of the deeds.

impossible” (Order dated October 17, 2011 at p 12).

## 2. Countrywide Motion

In the underlying motion, Countrywide moved for summary judgment, *inter alia*, dismissing the claims asserted against it. The court granted Countrywide’s motion in part but denied the motion with respect to the first through fourth causes of action (asserting claims for breach of contract and fraud with respect to both properties). The court declined to dismiss the breach of contract causes of action because “there are issues of material fact as to whether or not plaintiff approved the payment of the proceeds of the mortgages to Dawson or BMG”. In denying Countrywide’s motion for dismissal of the fraud claims, the court stated that there were “questions of fact as to the representations made by Kaplan, the consent to the distribution of the mortgage funds to BMG, and whether, even if the funds had been directed to plaintiff, they would have been voluntarily transferred to Dawson and BMG in any event” (Order dated October 17, 2011 at p 18).<sup>2</sup>

### The Court’s Determination

#### *Fraud as against Kaplan*

The eighth and ninth causes of action asserting fraud against Kaplan must be dismissed. The essence of Mauro’s fraud claims is that Kaplan falsely represented that the loan proceeds from both properties were to be paid directly to Mauro and that Mauro relied upon that representation.

With regard to the Grant Street property, Kaplan established, *prima facie*, that any reliance upon a purported misrepresentation was unreasonable as a matter of law. There is ample evidence in the record that Mauro knew the Grant Street loan proceeds from the closing were to be distributed to Dawson for investment purposes and that she intended the loan proceeds to go to Dawson. Mauro testified at her deposition that she “understood that the loan proceeds were in fact, deposited with Peter Dawson”, that it was her “intention to get the loan proceeds into Peter Dawson’s hands so he could invest them for [Mauro]” and that Mauro “figured he needed the money for his investment” (Ex. “F” to Ex. “B” to Kaplan Motion at pp 42-43, 71-72, 79).

Moreover, assuming that Kaplan purportedly represented that Mauro was to receive the loan proceeds at the conclusion of the closing, Mauro admits that she left the closing without the

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<sup>2</sup> According to the complaint, the fraud claims asserted against Countrywide are based upon the actions of its agent, Kaplan.

loan proceeds. The law is well-settled that reliance on a misrepresentation is unreasonable, as a matter of law, when the truth of the representation is known at the time the representation is made (*Breen v Law Office of Bruce A. Barket, P.C.*, 52 AD3d 635 [2d Dept 2008]; *Gouldsbury v Dan's Supreme Supermarket, Inc.*, 154 AD2d 509 [2d Dept 1989]). In this regard, it was unreasonable for Mauro to rely on the representation that the loan proceeds were going directly to her when at the same time she left the closing without the loan proceeds.

Similarly, with regard to the loan proceeds from the Fulton Street property, Mauro signed, *inter alia*, a "Record of Checks Dispersed at Closing" ("Record of Checks Dispersed") which indicated that the loan proceeds from the Fulton Street loan in the amount of \$329,832.04 were to be distributed directly to BMG. As noted above, even assuming Kaplan represented that Mauro would receive the Fulton Street loan proceeds at the closing, Mauro's reliance on this representation was unreasonable, as a matter of law, given that Mauro signed a document acknowledging that the loan proceeds would be dispersed to BMG.

In opposition, Mauro argues that she wanted to receive the loan proceeds herself so that she could "have access to cash and then decide later if and how to invest the loan proceeds" (Affirmation in Opposition at ¶ 12). Mauro also argues that because she did not receive the loan proceeds at the closing, or soon after, that she thought the loans had been cancelled.<sup>3</sup>

Neither of these arguments, however, render Mauro's reliance on Kaplan's purported misrepresentation reasonable. As mentioned, the fact that Mauro was purportedly told that she would receive the loan proceeds, yet never did, at the closing or ever, negates the reasonableness of Mauro's reliance, regardless of Mauro's intentions or assumptions.

The court also rejects Mauro's contention that her signature on the Record of Checks Dispersed does not evidence her intent to have the Fulton Street loan proceeds issued directly to BMG. The Record of Checks Dispersed "is of no import", according to Mauro because: 1) the HUD-1 for the loan indicates that the loan proceeds would be issued to Mauro, as the borrower; and 2) Mauro is "illiterate and should not be bound by her signature on the loan documents" (Affirmation in Opposition at ¶¶ 16-23). However, that the HUD-1 reflects Mauro's status as borrower and that the proceeds belong to her is not inconsistent with, nor does it undermine, the fact that Mauro was entitled to direct that the loan proceeds be dispersed to Dawson.

In addition, Mauro's contention that she should not be bound by her signature on the

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<sup>3</sup> The court notes the inconsistency in Mauro's argument that she thought the loans had been cancelled in light of her deposition testimony wherein she testified that "[w]hen we got a mortgage for the house at 168 Grant Street", that she was aware that Dawson was paying the mortgage for the Grant Street property (Ex. "F" to "B" to Kaplan Motion at pp 23, 41-42).

Record of Checks Disbursed because she was illiterate is without merit. “A party is under an obligation to read a document before he or she signs it and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents” (*Cash v Titan Financial Services, Inc.*, 58 AD3d 785 [2d Dept 2009]). Notwithstanding that Mauro was purportedly illiterate insofar as English is not her first language, there is no allegation that the contents of the Record of Checks Disbursed were misread or misrepresented to Mauro, a necessary element to void the Record of Checks Disbursed (*Pimpinello v Swift Co.*, 253 NY 159 [1930]). To the contrary, it is undisputed that Mauro’s son and daughter were both present at the closing. Mauro’s son and daughter were fluent in English; Mauro relied upon her daughter to manage her finances and her daughter “may have helped [her] read documents that were actually shown to [her] at the closing.”

#### *Fraud as against Countrywide*

The third and fourth causes of action allege that Countrywide engaged in fraud in that “Countrywide, through its agent Kaplan represented to [Mauro] that the proceeds” of the loans taken out against both properties “would be paid directly to [Mauro]”, that such representation was false as the loan proceeds were paid “directly to BMG, Dawson’s company . . . without [Mauro’s] authorization”, and that Mauro reasonably relied upon the representation (Ex. “A” to Kaplan Motion at ¶¶ 50-71).

In view of this court’s determination that the fraud allegations asserted against Kaplan should be dismissed, dismissal of the fraud claims insofar as asserted against Countrywide must also be dismissed given that Countrywide’s liability is predicated upon the actions of its agent, Kaplan. It is axiomatic that, in the absence of agent liability, no liability can attach to the principal.

#### *Breach of Fiduciary Duty as against Kaplan*

Kaplan also seeks reargument of that branch of her underlying motion which sought dismissal of the breach of fiduciary duty causes of action asserted in the complaint. In support of her contention, Kaplan argues that no fiduciary relationship existed between herself and Mauro because Kaplan was the attorney for Countrywide and she was not in privity with Mauro.

The *sine qua non* for a claim of breach of fiduciary duty is the existence of a fiduciary relationship. Where there is no fiduciary relationship, there is no fiduciary duty owed (*U.S. Fire Insurance Co. v Raia*, 94 AD3d 749 [2d Dept 2012]; *Daly v Kochanowicz*, 67 AD3d 78 [2d Dept 2009]). The determination of whether a fiduciary relationship exists is both a matter of law and often fact-specific (*Industrial Risk Insurers v. Ernst*, 224 A.D.2d 389 [2d Dept 1996] [citations omitted] [{"w}hether a duty exists presents a question of law to be determined by the court based

upon the facts and circumstances of each case”)).

It is well settled that the closing attorney for the lender does not owe any duty to a borrower for services arising out of the attorney’s contractual obligations to the lender and thus, Kaplan, as closing attorney for Countrywide, did not owe a duty to Mauro as the borrower (*see Chemical Bank v Bowers*, 228 AD2d 407 [2d Dept 1996] [“attorney representing the mortgagee did not owe any duty to the [mortgager] at the closing”]; *Nathan v J & I Enterprises, Ltd.*, 212 AD2d 677 [2d Dept 1995] [citations omitted] [“legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower”]; *see also Tawil v Wasser*, 21 AD3d 948 [2d Dept 2005]<sup>4</sup>).

Mauro also contends that Countrywide’s closing instructions created a special relationship between herself and Kaplan and that as “Countrywide’s closing attorney, Kaplan was required to follow certain closing restrictions . . . in order to protect” Mauro (Affirmation in Opposition at ¶ 34). However, any benefit received by Mauro as a result of Kaplan’s conduct was merely incidental to Kaplan’s performance of the contractual duties owed to Countrywide and did not give rise to a fiduciary relationship (*see e.g., State of California Pub. Employees’ Ret. Sys. v Shearman & Sterling*, 95 NY2d 427 [2000]; *Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc.*, 66 NY2d 38 [1985]).

The court concludes, as a matter of law, that there was no fiduciary duty between Kaplan and Mauro and therefore, the tenth and eleventh causes of action should be dismissed.

#### *Breach of Contract against Countrywide*

The first and second causes of action in the complaint assert that Countrywide is liable for breach of contract because, pursuant to the terms of the notes with regard to both properties, Countrywide was to provide Mauro with loan proceeds but that “[Mauro] has not received any of the loan proceeds” under either of the notes “nor did she authorize any third-party to receive the loan proceeds on her behalf” (Ex. “A” to Motion at ¶¶ 38-49).

The breach of contract causes of action asserted against Countrywide are dismissed in

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<sup>4</sup> In *Tawil v Wasser* (21 AD3d 948 [2d Dept 2005]), the plaintiff asserted that the defendant attorney was “acting as an ‘attorney in fact,’” alleging that the attorney “represented to [the plaintiff] that he would facilitate the transfer of the subject property on behalf of the parties” (*Tawil v Wasser*, Index No. 17903/03 [Johnson, J.] [Sup Ct Kings County Mar 26, 2004]). However, the Second Department affirmed the Supreme Court’s holding that plaintiff’s allegations failed to raise a triable issue of fact and that the attorney had established, as a matter of law, the he owed no duty to the plaintiff.

light of this court's finding that Mauro authorized the disbursement of loan proceeds to Dawson.<sup>5</sup> That the notes on the loans for both properties state that Mauro, in return for the loans that she has received, promise to pay a sum certain, is not inconsistent with, nor does it undermine, the fact that Mauro directed that the loan proceeds be dispersed to Dawson at the time of closing.

Based on the foregoing, it is hereby ordered that the motions of Defendants Kaplan and Countrywide seeking reargument pursuant to CPLR 2221 are granted and, upon reargument: the branches of their underlying motions seeking dismissal of the causes of action, insofar as asserted against them, are granted; and the branch of Kaplan's motion seeking dismissal of Countrywide's crossclaims asserted against her are granted.

This constitutes the decision and order of the court.

Dated: July 5, 2012

  
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Hon. Vito M. DeStefano, J.S.C.

**ENTERED**  
JUL 12 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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<sup>5</sup> See discussion at pp 4-6 , *supra*. The court also notes the language in the underlying order wherein Judge Warshawsky indicated that "it is only the disbursements of the Fulton Street mortgage proceeds which plaintiff controverts" (Order at p 4).