

Gall v Colon-Sylvain

2012 NY Slip Op 33929(U)

July 10, 2012

Supreme Court, Nassau County

Docket Number: 6536/07

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

TRIAL/IAS, PART 1
NASSAU COUNTY

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

INDEX No. 6536/07

MOTION DATE: May 22, 2012

Motion Sequence # 017

-against-

FRANCES COLON-SYLVAIN, WELLS FARGO
N.A., JOSEPH GRANT, EMPIRE LAND
SERVICES CORP., ANTHONY MICHAEL
CAMISA, DAVID M. FISH and JJRG
ENTERPRISES INC.,

Defendants.

WELLS FARGO N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN,
JOSEPH GRANT and JJRG ENTERPRISES INC.,

Counterclaim-Defendants.

WELLS FARGO N.A.,

Third-Party Plaintiff,

-against-

JUDITH REARDON, ESQ.,

Third-Party Defendant.

The following papers read on this motion:

- Order to Show Cause..... X
- Affirmation/Affidavit in Opposition..... XX

Motion by plaintiff Elemer Gall for disclosure of the settlement agreement between defendant Wells Fargo N.A. and plaintiff's former attorney Judith Reardon is denied. Motion by plaintiff for an order restoring Ms. Reardon as his attorney is denied. Motion by plaintiff for the return of certain funds paid to Ms. Reardon as an attorney fee is denied. Motion by plaintiff for an award of counsel fees against defendant Wells Fargo is denied.

This action for fraud arises from a residential real estate transaction. In July 2003, plaintiff Elemer Gall and defendant Joseph Grant formed a corporation, defendant JJRG Enterprises, Inc., to acquire distressed properties and renovate them for resale. In February 2005, Gall contributed \$220,000 to the venture to purchase a property located at 75 Oakdale Boulevard in Farmingdale. The purchase price was \$392,000. Grant initially took title in his own name and took out a purchase money mortgage for the balance of the price, which Grant was to pay as his contribution to the venture. Grant subsequently transferred title to the property to JJRG and agreed to pay Gall \$155,000 because of "irregularities" with regard to the transaction. Grant undertook to perform the renovation of the property and began to occupy the premises while the renovation was taking place.

Gall alleges that Grant defaulted on the mortgage and did not notify him that a foreclosure action was commenced. On August 18, 2006 a judgment of foreclosure was entered against the property.

On November 1, 2006, JJRG entered into a contract, signed by Grant, to sell the property to defendant Frances Colon-Sylvain, who was Grant's girlfriend. The contract provided for a purchase price of \$450,000, with no down payment and a seller's concession of \$25,500. Colon-Sylvain obtained a purchase money mortgage from defendant Wells Fargo by representing that the property would be her primary residence. Gall alleges that he had no knowledge of the contract of sale until Grant informed him of the contract a few days before the closing.

Gall alleges that on December 20, 2006, he went to the office of an attorney, defendant Anthony Camisa, who subsequently represented both Conlon-Sylvain and Wells Fargo at the closing. Gall claims that his purpose in going to Camisa's office was to object

to the proposed sale. However, Gall claims that he was advised by Camisa that his signature on the deed would not be required, apparently because Grant had prevailed upon Gall to issue him a power of attorney.

The closing of the sale to Colon-Sylvain occurred on December 26, 2006 at Camisa's office. Gall claims that he reiterated his position that Grant was not authorized to execute a deed. However, Camisa and the title company representative accepted the deed and continued with the transaction. Gall alleges that he did not sign any documents at the closing. Defendant David Fish is the attorney who represented JJRG in connection with the transaction. As noted, Camisa represented both Conlon-Sylvain and Wells Fargo.

At the closing, Conlon-Sylvain issued a first mortgage to Wells Fargo in the amount \$351,000 and a second mortgage in the amount of \$99,500. Gall received a check for \$52,620, purportedly representing his share of the sale proceeds. However, Gall instructed Camisa to retain this money in escrow, apparently because he did not want to prejudice his right to challenge the transaction.

On April 16, 2007, Gall commenced the present action, asserting claims against Grant for breach of fiduciary duty, fraud, to impose a constructive trust on the property, and for an accounting. The fifth and sixth causes of action may be read as asserting claims against Fish and Camisa for aiding and abetting Grant's breach of fiduciary duty, on the theory that the attorneys provided substantial assistance to Grant with knowledge of his fiduciary duty to Gall. The latter causes of action may be read as asserting a claim against defendant Wells Fargo on the theory that it is vicariously liable for the actions of Camisa.

Defendant Wells Fargo counterclaimed against Gall for fraud based on his participation in the loan transaction. Colon-Sylvain defaulted on the mortgage, and Wells Fargo commenced an action to foreclose the mortgage in August 2007 (Index No. 14073-07). Wells Fargo alleges that Gall was aware that the property was being sold to Colon-Sylvain and knew that she had no intention of paying the loan or residing in the premises. Wells Fargo claims that Colon-Sylvain agreed to be the nominal borrower only because Gall and Grant did not have adequate credit to qualify for a refinancing.

Gall subsequently instructed Camisa to release the \$52,620 to Judith Reardon, the attorney representing Gall in the present action, in payment of counsel fees. Wells Fargo then served a third party complaint against Reardon, seeking to recover the funds as proceeds of a fraudulent loan transaction. The court granted Reardon's motion for leave to withdraw

as Gall's counsel, and Wells Fargo's third party claim against Reardon was settled.

By notice of motion dated December 21, 2011, defendant Wells Fargo moved to dismiss the complaint for want of prosecution pursuant to CPLR 3216 on the ground that plaintiff failed to timely file a note of issue. Plaintiff filed a note of issue on January 25, 2012, in response to defendant's motion.

By order dated March 5, 2012, the court denied defendant Wells Fargo's motion to dismiss for failure to prosecute. By order dated May 21, 2012, the court granted Wells Fargo leave to reargue. Upon reargument, the court granted defendant Wells Fargo's motion to dismiss for failure to prosecute. As plaintiff was without counsel when the note of issue was due, the court concluded that plaintiff had a reasonable excuse for failing to file the note of issue in a timely manner. Nevertheless, because Camisa, the bank's closing attorney, was an independent contractor, Wells Fargo could not be vicariously liable for Camisa's aiding and abetting Grant's breach of fiduciary duty (*Rosenberg v Equitable Life*, 79 NY2d 663, 668 [1992]). Thus, plaintiff had not set forth a meritorious claim against Wells Fargo. However, the court deemed the note of issue timely as to the other defendants.

Plaintiff Elemer Gall, appearing pro se, moves for disclosure of the settlement agreement between Wells Fargo and Judith Reardon. Plaintiff also requests an order "restoring" Ms. Reardon as his attorney. Plaintiff requests the return of the \$52,620 sales proceeds paid to Ms. Reardon as an attorney fee. Finally, plaintiff requests an award of counsel fees against defendant Wells Fargo, apparently in the amount paid to Ms. Reardon.

By purporting to assert a claim against Ms. Reardon for the return of counsel fees, plaintiff has made clear the Ms. Reardon has a conflict of interest and could not accept employment as plaintiff's attorney. Plaintiff's motion for an order restoring Ms. Reardon as his attorney is **denied**. Plaintiff's request for the return of the counsel fee which he paid to Ms. Reardon is **denied** with leave to commence a plenary action.

Plaintiff has not established that the settlement agreement between Wells Fargo and Reardon is in any way relevant to plaintiff's breach of fiduciary duty claim against Grant or his aiding and abetting claims against Fish and Camisa. Plaintiff's motion for discovery of the settlement agreement between Wells Fargo and Reardon is **denied**.

As defendant Wells Fargo's counterclaims against plaintiff are not frivolous,

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plaintiff's request for an award of counsel fees against Wells Fargo is denied.

Counsel are reminded of the pretrial conference scheduled for 9:30 am on July 12, 2012 (See Rule 31, 22 NYCRR § 202.70).

So ordered.

Dated JUL 10 2012

Stephen Bucaria
J.S.C.

ENTERED
JUL 12 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE