

Gall v Colon-Sylvain
2012 NY Slip Op 33932(U)
May 21, 2012
Supreme Court, Nassau County
Docket Number: 6536/07
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

ELEMER GALL a/k/a CSABA GALL,

Plaintiff,

-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.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 6536/07

MOTION DATE: April 16, 2012
Motion Sequence # 016

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Support..... XX

Motion by defendant Wells Fargo N.A. for leave to reargue its motion to dismiss the complaint for failure to prosecute is **granted**. Upon reargument, defendant's motion to dismiss for failure to prosecute is **granted** only as to Wells Fargo. The note of issue is deemed timely as to the other defendants.

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, without his knowledge, Grant listed the property for sale with a real estate broker. Gall further 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 December 20, 2006, when Grant informed him that a closing had been scheduled for December 26, 2006.

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 at the meeting that his

signature on the deed would not be required, apparently because Gall had issued Grant 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, both the representative of the title company and Camisa 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 did not initially cash the check, apparently because he did not want to prejudice his rights to take legal action.

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 a fraudulent 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. By order dated July 29, 2011, the court denied plaintiff's motion for summary judgment dismissing Wells Fargo's counterclaims.

The matter was certified for trial on September 19, 2011. The certification order directed plaintiff to file a note of issue within 90 days, or by December 18, 2011. Plaintiff's attorney had previously been granted leave to withdraw, and Gall appeared pro se at the certification conference.

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. The court noted that plaintiff had not been served with a 90 day demand, other than by virtue of the certification order. Moreover, the note of issue was only five weeks late and much of the delay was attributed to Wells Fargo's pursuit of a third party claim against Judith Reardon, Esq., plaintiff's former attorney.

Defendant Wells Fargo moves for leave to reargue its motion to dismiss for failure to prosecute. Defendant argues that the certification order constitutes a valid 90 demand. Defendant argues that the court overlooked an affidavit of Gall dated May 17, 2010 in which he stated that he had conferred with "an experienced trial" who had suggested that he had no case against Wells Fargo. The affidavit was submitted by Gall in response to a prior motion for leave to withdraw by Judith Reardon. Finally, defendant argues that a case relied upon by the court, *Cadichon v Facelle*, 18 NY3d 230 [2011]), is distinguishable because it involved a case that was ministerially dismissed by the clerk's office.

CPLR 3216(a) provides that where a party unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Nevertheless, CPLR 3216(b) provides that no dismissal shall be directed unless plaintiff has been served with a written demand to file a note of issue within 90 days. Additionally, CPLR § 205(a) provides that where the dismissal is for neglect to prosecute to CPLR 3216, or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

Dismissal of a claim for neglect to prosecute involves "judicial involvement" (*Cadichon v Facelle*, 18 NY3d 230, 236 [2011]). "It should be the trial court, with notice to the parties, that should make the decision concerning the fate of the case, not the Clerk's Office (Id)."

In *Cadichon*, plaintiff's counsel was served with a demand to file a note of issue within 90 days, similar to the provision directing plaintiff to file a note of issue within 90

days contained in this court's certification order. *Cadichon* makes clear that where a plaintiff fails to file a note of issue within 90 days, an action should not be dismissed for failure to prosecute without a discretionary determination by the court. On such a motion, the court should consider both the merits of the claim and whether plaintiff has a reasonable excuse for failing to file the note of issue in a timely manner (*49-50 Assoc v Free-Tan Corp.*, 248 AD2d 128 [1st Dept 1998]).

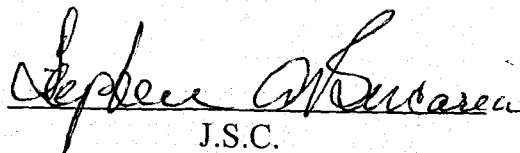
At the time the note of issue was due, plaintiff was without counsel because his attorney had been granted leave to withdraw because she had been named by Wells Fargo as a third party defendant in the action. The court concludes that plaintiff has a reasonable excuse for failing to file the note of issue in a timely manner.

The court will proceed to consider the merits of plaintiff's claim against Wells Fargo. As suggested above, plaintiff has stated a claim against Camisa, Wells Fargo's attorney, for aiding and abetting breach of fiduciary duty. Gall alleges that Camisa provided substantial assistance to Grant, by accepting the deed and proceeding with the real estate transaction, even though Camisa knew, or should have known, that Grant's action in executing the deed was unauthorized. Nevertheless, because Camisa, the bank's closing attorney, must be deemed an independent contractor, Wells Fargo cannot be vicariously liable for Camisa's aiding and abetting Grant's breach of fiduciary duty (*Rosenberg v Equitable Life*, 79 NY2d 663, 668 [1992]). The court concludes that plaintiff has not set forth a meritorious claim against Wells Fargo.

Defendant Wells Fargo's motion for leave to reargue its motion to dismiss the complaint for want of prosecution is **granted**. Upon reargument, defendant Wells Fargo's motion to dismiss for failure to prosecute is **granted**. The note of issue is deemed timely as to the other defendants. The time for parties who have not yet moved for summary judgment to move for that relief is extended to June 15, 2012. 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 MAY 21 2012


J.S.C.

ENTERED

MAY 23 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE