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| <b>Bautista v NMC NY Corp</b>  |
| 2013 NY Slip Op 31744(U)   |
| June 13, 2013  |
| Supreme Court, Queens County   |
| Docket Number: 18984/12  |
| Judge: Timothy J. Dufficy  |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. TIMOTHY J. DUFFICY  
Justice

IA Part 35

GLORIA BAUTISTA, x

Index  
Number: 18984/12

-against-

NMC NY CORP, COMMUNITY REALTY  
MANAGEMENT CORP., NICOLLO  
MANGIARACINA, LIBORIO GALANTE,  
LOUIS SCARANTINO, MAXIMUS TITLE  
LLC, FIRST AMERICAN TITLE INSURANCE  
COMPANY, FRANCINE DILEONARDO,  
JOSEPH GIORDANO, ANTOINETTA RUSSO,  
MARJORIE CENTRON,

Motion  
Date: March 28, 2013  
Mot. Cal. Nos.: 10, 11, 13  
Mot. Seq. Nos: 2, 4 and 5

x  
The following papers numbered 1 to 73 read on this motion by defendant First American Title Insurance Company (First American Title) pursuant to CPLR 3211(a)(1) and (7), and CPLR 3013 and 3016 to dismiss the complaint asserted against it; this motion by defendant Lobarorio Galante pursuant to CPLR 3211(a)(7), 3016(b) and 3013 to dismiss the complaint asserted against him, and for an award of costs, disbursements and attorneys' fees; this motion by defendant Maximus Title LLC (Maximus Title) pursuant to CPLR 3211(a)(7) and 3016(b) to dismiss the complaint asserted against it; and this cross motion by defendant Antoinetta Russo, Esq. s/h/a Antoinetta Russo pursuant to CPLR 3211(a)(7), 3016(b) and 3013 to dismiss the complaint asserted against her; this cross motion by defendant Marjorie Centrone, Esq., s/h/a Marjorie Centrone pursuant to CPLR 3211(a)(7), 3016(b) and 3013 to dismiss the complaint asserted against her; and this cross motion by defendant Galante pursuant to CPLR 3211(a)(7), 3016(b) and 3013 to dismiss the complaint asserted against him.

Papers  
Numbered

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Upon the foregoing papers it is ordered that the Motion Sequence Nos. 2, 4 and 5 on the motion calendar for March 28, 2013, with motion calendar numbers 10, 11 and 13, and the cross-motions are joined together for determination as follows:

Plaintiff, a Peruvian citizen and resident, alleges she is the true owner of the real property known as 89-15 Sutter Avenue, Ozone Park, New York (subject property), pursuant to a deed dated March 3, 2008. She allegedly purchased the property with proceeds she received from the September 11<sup>th</sup> Victim Compensation Fund<sup>1</sup> in connection with the death of her son, who was killed in the World Trade Center terrorist attacks. She alleges the subject property was fraudulently conveyed to defendants NMC and Community Realty without her authorization or knowledge by a forged deed dated August 23, 2012. According to plaintiff, she was in Peru on August 23, 2012, at the time of her purported acknowledgment of her signature on the deed by defendant Francine DiLeonardo, a notary public. Plaintiff further alleges that in connection with the fraudulent conveyance, defendants NMC and Community Realty gave a mortgage in the principal amount of \$200,000.00 on the subject property to defendant Louis Scarantino. Plaintiff claims that defendant Galante, the “owner” of Community Realty & Management Corp. s/h/a Community Realty Management Corp. (Community Realty), and defendant Mangiaracina, the “owner” of NMC, were partners in the fraudulent scheme to transfer title to her property to their corporations, and the other defendants acted in concert with defendants Galante and Mangiaracina to divest her of her property. Plaintiff alleges that after learning of the fraudulent conveyance, her attorney contacted defendants Mangiaracina, Maximus Title, Russo and Centrone, and was promised by “Nicollo Guaramancino<sup>2</sup>” that he would “return”

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1

Congress enacted, and the President signed into law, the Federal Air Stabilization Act, later amended by the Aviation Security Act. Title IV of the act establishes the September 11th Victim Compensation Fund, which provides to those killed or injured in the attacks the option of federal compensation in exchange for a waiver of their rights to file a civil action for damages resulting from the events of September 11 (*see* Federal Air Stabilization Act § 405[c][3][B][i]).

2

Plaintiff utilizes the name “Nicollo Guaramancino” throughout the complaint but makes no allegation that defendant Nicollo Mangiaracina is also known as Nicollo Guaramancino. Counsel for plaintiff states in her affirmation dated January 18, 2013 that it was defendant Nicollo Mangiaracina who advised her that he would “return” the property back to plaintiff.

the subject property. When plaintiff was not restored to her title, she commenced this action on October 19, 2012 asserting causes of action based upon fraud, civil conspiracy to commit fraud, and to quiet title to the property in her name pursuant to RPAPL article 15, all arising out of the fraudulent conveyance and mortgage transaction. She seeks to set aside the deed on the ground of forgery, cancel the mortgage, and recover compensatory and punitive damages.

At the outset, the court notes defendant Galante made duplicative motions in that he first cross moved, pursuant to notice of cross motion dated January 7, 2013, and thereafter separately moved pursuant to notice of motion dated January 17, 2013, for the same relief, i.e. to dismiss the complaint asserted against him pursuant to CPLR 3211(a)(7), 3016(b) and 3013. The Court shall consider such motion and cross motion together.

Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action (CPLR 3013). CPLR 3016 requires that a claim of fraud be asserted in detail, and conclusory allegations of fraud do not suffice to meet the statutory requirement (*see Scomello v Caronia*, 232 AD2d 625 [2d Dept 1996]; *Sforza v Health Ins. Plan of Greater N.Y.*, 210 AD2d 214 [2d Dept 1994]).

In considering a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “ ‘A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211 (a) (1) has the burden of submitting documentary evidence that “resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim” ’ ” (*Sullivan v State of New York*, 34 AD3d 443, 445 [2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d at 88”) (*Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]).

It is essential to the maintenance of an action to determine a claim to real property that the complaint state a claim by the defendant of “an estate or interest in the real property, adverse to that of the plaintiff” (RPAPL 1515[1][b]).

Plaintiff makes no allegation in her complaint of any claimed adverse estate or interest of defendants Galante, Maximus Title, First American, Russo and Centrone in the property (*see* RPAPL 1515[1][b]). Plaintiff, therefore, has failed to state a cause of action pursuant to RPAPL article 15 against those defendants (*see* CPLR 3211[a][7]; *see East 41st St. Assoc. v 18 E. 42nd St.*, 248 AD2d 112 [1<sup>st</sup> Dept 1998]; *Beisheim v People*, 255 AD 429 [4th Dept 1938]).

A cause of action alleging fraud requires the plaintiff to plead: (1) a material misrepresentation or omission of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages (*see Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Indymac Bank, F.S.B. v Vincoli*, \_\_\_ AD3d \_\_\_ [2d Dept 2013]; *Stein v Doukas*, 98 AD3d 1024, 1025 [2d Dept 2009]; *see Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706 [2d Dept 2009]; *Daly v Kochanowicz*, 67 AD3d 78, 89 [2d Dept 2009]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]). For a plaintiff to plead a cause of action for aiding and abetting fraud under New York law, a plaintiff must allege (1) the existence of a fraud; (2) the defendant’s actual knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud’s commission (*see Lenczycki v Shearson Lehman Hutton, Inc.*, 238 AD2d 248 [1st Dept 1997]; *Franco v English*, 210 AD2d 630, 633 [3d Dept 1994]; *see also Lerner v Fleet Bank, N.A.*, 459 F3d 273 [2d Cir NY 2006]).

Here, the causes of action for fraud asserted against defendants Galante, First American, Maximus Title, Centrone, and Russo fail to state a claim. Plaintiff makes no allegation that defendants Galante, First American, Maximus Title, Centrone or Russo had any communications with plaintiff prior to the transfer of the subject property (*see Glatzer v Scappatura*, 99 AD2d 505 [2d Dept 1984]; *see also National Westminster Bank USA v Weksel*, 124 AD2d 144 [1<sup>st</sup> Dept 1987]). Nor does plaintiff allege that the alleged forgery was made with the intent to induce her reliance on it (*see e.g. Ferdico v Zweig*, 82 AD3d 1151 [2d Dept 2011]). In addition, plaintiff makes no allegation that she is in contractual privity, or in any special relationship approaching privity, with defendants Galante, First

American, Maximus Title, Centrone or Russo which would have obligated them to conduct a background check or verify the social security number of the imposter/seller, or warn plaintiff of the alleged imposter's attempt to sell the property (*see Mateo v Senterfitt*, 82 AD3d 515 [1st Dept 2011]; *Burger v Singh*, 28 AD3d 695 [2d Dept 2006]; *see also Jebran v LaSalle Business Credit, LLC*, 33 AD3d 424 [1st Dept 2006]).

Defendant First American also offers a copy of the agreement dated July 7, 2005 between it and defendant Maximus Title to show Maximus Title was contractually limited to solicitation, production, countersigning and issuance of title insurance policies underwritten by First American concerning real property in New York. Any purported fraudulent acts of defendant Maximus Title cannot be imputed to defendant First American, because such alleged wrongful acts would have exceeded the scope of Maximus Title's agency under that agreement (*see CPLR 3211[a][1]*); *Nechadim Corp. v C.J.P. Abstract, LLC*, 67 AD3d 656 [2d Dept 2009]). Furthermore, to the extent plaintiff asserts defendant Maximus Title is liable for damages for notarial misconduct allegedly committed by defendant DiLeonardo, Executive Law § 135 applies only to notaries, and DiLeonardo was not an employee of Maximus Title but rather an independent contractor. Plaintiff makes no allegation that Maximus Title instructed DiLeonardo in the performance of her duties as a notary.

To the extent defendants Galante, First American, Maximus Title, Centrone and Russo failed to realize that the person who appeared at the closing purporting to be the seller was actually an imposter does not give rise to a claim by plaintiff for damages for negligence (*see Burger*, 28 AD3d at 698; *Beckford v Northeastern Mtge. Inv. Corp.*, 262 AD2d 436 [2d Dept 1999]; *Money Store/Empire State*, 151 AD2d 256).

The complaint herein is deficient for it contains no allegations of fact from which it can be inferred that there existed an agreement or understanding between defendant First American, Maximus Title, Centrone, and Russo and defendants Galante or Mangiaracina to cooperate in a fraudulent scheme. Nor does plaintiff allege that defendants Galante, First American, Maximus Title, Centrone and Russo knew the seller was an imposter. Moreover, New York does not recognize civil conspiracy to commit a tort, including fraud, as an independent cause of action (*see Kestenbaum v Suroff*, 268 AD2d 560 [2d Dept 2000]). Accordingly, a claim alleging conspiracy to commit a tort stands or falls with the underlying

fraud claim (*see id.*). Since plaintiff has failed to plead a valid cause of action against defendants Galante, First American, Maximus Title, Centrone and for fraud, the causes of action asserted against defendants Galante, First American, Maximus Title, Centrone and Russo for conspiracy to commit fraud must fall.

Furthermore, with respect to defendants Russo and Centrone, New York law does not recognize liability on the part of an attorney to a nonclient third party as a result of the attorney's action in representing a client absent fraud or collusion or a malicious or tortious act (*see Singer v Whitman & Ransom*, 83 AD2d 862, 863 [2d Dept 1981]). Again, the complaint fails to state a cause of action for fraud or conspiracy to commit fraud against defendants Russo and Centrone, and plaintiff has failed to allege any other malicious or tortious act committed by defendant Russo or Centrone.

In most instances, “[a]mple protection against imposters is afforded property owners by the refusal of the law to recognize conveyances made by imposters” (*Money Store/Empire State, Inc. v Lenke*, 151 AD2d 256 [1<sup>st</sup> Dept 1989]) (*see Crispino v Greenpoint Mtge. Corp.*, 2 AD3d 478 [2d Dept 2003]). Such conveyances include mortgages based upon forged deeds (*see Crispino v Greenpoint Mtge. Corp.*, 304 AD2d 608, 608–609 [2d Dept 2003]; *Northgate Elec. Profit Sharing Plan v Hayes*, 210 AD2d 384 [2d Dept 1994]).

Under these circumstances and insofar as plaintiff has made no cross motion for leave to amend the complaint, the motions by defendants First American, Galante and Maximus Title, and the cross motions by defendant Russo, Centrone and Galante are granted to the extent of dismissing the complaint asserted against them.

**Dated: June 13, 2013**

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**TIMOTHY J. DUFFICY, J.S.C.**