

**Ponquogue Acquisitions, LLC v People's United  
Bank**

2013 NY Slip Op 32139(U)

August 28, 2013

Supreme Court, Suffolk County

Docket Number: 13-7296

Judge: Thomas Whelan

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mortgages was a consolidated mortgage that secured a building loan in the amount of \$2,900,000.00. The second mortgage secured a mortgage of the same date in the amount of \$1,000,000.00.

These two mortgages were the subject of a prior foreclosure action instituted by the defendant in this court in which a judgment of final foreclosure and sale issued on November 11, 2012. The defaults in answering of the defendant mortgagor and its guarantor were adjudicated on July 6, 2011, when the bank's motion for an order of reference upon default was granted. Although the obligor defendants in that action twice moved for a vacatur of such defaults, the applications were denied. Following its receipt of the November 11, 2012 judgment of foreclosure and sale, the bank scheduled a judicial sale of the property for March 14, 2013.

On March 13, 2013, the plaintiff commenced this action against the defendant. The plaintiff is a limited liability company that was formed in July of 2011 by one or more of the principals of the obligor defendants in the foreclosure action described above. The plaintiff was formed for the purpose of purchasing the notes in an effort to "take the loans out of any alleged default status" (*see* ¶ 10 of the plaintiff's complaint attached to the moving papers). In furtherance of such purposes, the plaintiff allegedly engaged the defendant in a contractual and/or fiduciary relationship.

In the complaint served herein, the plaintiff seeks money damages from the defendant under principles of contract law and quasi contract (unjust enrichment). In addition, the plaintiff seeks damages in tort for the defendant's purported breach of fiduciary duties and conversion and equitable relief in the form of a constructive trust. In its final cause of action, the plaintiff seeks "preliminary and permanent" injunctive relief staying the sale of the premises that were the subject of the prior commenced foreclosure action and enjoining the defendant's transfer of the mortgage notes to anyone but the plaintiff. All of the claims advanced in the complaint are premised upon claims that the defendant breached a purported November 9, 2011 agreement executed only by a nominee of the plaintiff, in which, the defendant was to sell to the plaintiff the two mortgage notes that were secured by the mortgages foreclosed in the prior foreclosure action. This purported agreement was allegedly the centerpiece of the plaintiff's objective to "take the loans out of any alleged default status" (*id.*). Allegations of the plaintiff's possession of either a present or antecedent legal interest in the mortgaged premises are not advanced in the complaint.

Simultaneously with the commencement of this action, the plaintiff moved (#001) for a preliminary injunction restraining the defendant and all others from proceeding with the scheduled judicial sale which took place as scheduled due to the absence of a stay or temporary restraining order precluding same (*see* Order dated May 30, 2013). The defendant opposed the motion on grounds of mootness, as the sale of the mortgaged premises proceeded as scheduled on March 14, 2013. In contesting the merits of the plaintiff's motion, defense counsel argued that the plaintiff was not entitled to preliminary injunctive relief, since, among other things, there was no consummated agreement signed by the defendant to sell the notes to the plaintiff.

Although, the plaintiff acknowledged that the factual landscape of its motion was altered by the March 14, 2013 judicial sale of mortgaged premises, it nevertheless continued to pursue the application

for preliminary injunctive relief since the mortgaged premises were purchased at the public sale by the defendant bank. Plaintiff's counsel argued that preliminary injunctive relief was not moot since the gravamen of the plaintiff's claims in this action was "its interest in purchasing the two (2) notes" and that such interest "had been hampered by the Defendant and that the Defendant has allowed the scheduling of a foreclosure sale of the underlying collateral that secures the two (2) notes in question" (*see* Order dated May 30, 2013, pages 2-3). The court, however, rejected these claims and denied the plaintiff's motion (#001) for preliminary injunctive relief in its March 30, 2013 order. The court found that the plaintiff failed to establish a likelihood of success as it did not establish the existence of any agreement on the part of the defendant to sell the mortgage notes to the plaintiff (*see id.*, at page 3).

By the instant motion (#002), the defendant seeks dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(1),(5) and (7). The motion is premised upon the following: 1) that the November 2011 draft agreement for the sale of the notes to the plaintiff, on which it relies to support its pleaded claims of breach and recovery under tort theories, was never executed by the defendant as required by the statute of frauds; 2) the draft agreement, or its terms, even if enforceable, terminated by its own terms when no closing took place by the time of essence date of November 15, 2011; 3) the plaintiff was never ready, willing or able to close on any date; and 4) the draft agreement, even if enforceable, precluded the remedy of specific performance (which is not demanded herein) and the recovery of consequential damages by the plaintiff. For the reasons stated below, the motion is granted to the extent detailed below.

To be successful, a motion to dismiss pursuant to CPLR 3211(a)(1) based on documentary evidence must be grounded upon a bona fide defense asserted by the moving party. Such a motion is properly granted only where the documentary evidence adduced utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (*see Choudhary v First Option Title Agency*, 107 AD3d 657, 967 NYS2d 86 [2d Dept 2013]; *Green v Gross and Levin, LLP*, 101 AD3d 1079, 2012 WL 6684704 [2d Dept 2012]). To succeed on such a motion, the movant must establish that the documentary evidence that forms the basis of the motion resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582, 590-591, 808 NYS2d 573 [2005]; *Bua v Purcell & Ingrao, P.C.* 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; *Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). To qualify as "documentary", the evidence relied upon must be unambiguous and undeniable in a manner like judicial records and documents reflecting out-of-court transactions such as mortgages, deeds and contracts. Documents compiled by parties, such as affidavits, notes, accounts, depositions, correspondence and the like, generally do not constitute documentary evidence within the ambit of CPLR 3211(a)(1) (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; *Fontanetta v Doe*, 73 AD3d 78, *supra*). If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2010]).

Here, the defendant relies upon the November 9, 2011 agreement that was not signed by it and the statute of frauds set forth in General Obligations § 5-703 to support its claims for dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(5). GOL § 5-703(2) provides that "[A] contract for the leasing for a longer period than one year, or for the sale of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing". "That an agreement to purchase a mortgage indebtedness falls within the statutory term of an interest in real property is clear, notwithstanding that a mortgage debt is considered personalty" (*Sleeth v Sampson*, 237 NY 69, 142 NE 355 [1923]; see *Ognenovski v Wegman*, 275 AD2d 1013, 713 NYS2d 594 [4th Dept 2000]; see also *Barretti v Detore*, 95 AD3d 803, 944 NYS2d 166 [2d Dept 2012]). The defendant, by its moving papers, established by production of the November 9, 2011 agreement that although the same provided for the signature of the defendant, as seller, and was executed by the plaintiff's nominee, the agreement was never executed by the defendant. Since such agreement was one for the purchase of the mortgage indebtedness via the purchase of the notes each secured by the separate mortgages, the agreement was not binding upon the defendant and no damages for its breach may be recovered by the plaintiff under theories of contract law. The plaintiff's discussion of the part performance doctrine is thus irrelevant since such doctrine is applicable only to claims for specific performance not to claims at law of the type asserted herein by the plaintiff (see *Zito v County of Suffolk*, 106 AD3d 814, 964 NYS2d 644 [2d Dept 2013]; *Sparks Assoc., LLC v North Hills Holding Co. II*, 94 AD3d 864, 941 NYS2d 695 [2d Dept 2012]). Since, however, the subject agreement, which was not signed by the defendant, is subject to the statute of frauds set forth in GOL § 5-703(2), the defendant established its entitlement to dismissal of the plaintiff's First cause of action sounding in breach of the November 9, 2011 agreement, pursuant to CPLR 3211(a)(1) and (a)(5).

The plaintiff's claim that discovery is necessary in order for it to state opposition to the defendant's motion is rejected as unmeritorious (see CPLR 3211[d]). The discovery characterized as necessary by the plaintiff relates to documentation allegedly under the control of the defendant or its agents. It allegedly bears upon the issue of whether the defendant intended to be bound by the agreement notwithstanding that it did not sign it (see ¶¶ 25-27 of the affirmation of plaintiff's counsel in opposition to defendant's motion). While the absence of a signed writing may not preclude a finding of the existence of enforceable contract where there is evidence of the parties' intent to be bound (see *Brighton Inv., Ltd. v Har-ZVI*, 88 AD3d 1220, 932 NYS2d 214 [3d Dept 2011]; *Geha v 55 Orchard St., LLC*, 29 AD3d 735, 815 NYS2d 253 [2d Dept 2006]), the issue of whether the parties intended to be bound is not relevant in cases, such as the instant one, wherein a statute of frauds such as GOL 5-703 imposes the requirement of a writing (see *Flores v Lower East Side Serv. Ctr., Inc.*, 4 NY3d 363, 795 NYS2d 491 [2005], "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of frauds (General Obligations Law § 5-701)—that imposes such a requirement; *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 960 NYS2d 455 [2d Dept 2013]; cf., *Zolin v Roslyn Synagogue*, 54AD2d 369, 545 NYS2d 846 [2d Dept 1989]). The only exception to the statutory requirement of a writing is in those cases wherein the doctrine of part performance is available to the claimant as noted in GOL § 5-703(4), which doctrine is not applicable to the claims interposed here (see *Zito v County of Suffolk*, 106 AD3d 814, *supra*; but see *Furman v Wells Fargo Home Mtge. Inc.*, 105 AD3d 807, 964 NYS2d 169 [2d Dept 2013]). The

plaintiff's demands for denial of the motion pursuant to CPLR 3211(f) and otherwise are thus rejected as unmeritorious.

Dismissal of the remaining causes of action set forth in the complaint is denied. The moving papers of the defendant failed to address any of these causes of action whereby the plaintiff seeks to recover money damages under theories of unjust enrichment, constructive trust, and tort by reason of the defendant's purported breach of fiduciary duties and conversion.

In view of the forgoing, the instant motion (#002) by the defendant to dismiss the plaintiff's complaint is granted only to the extent that the First cause of action is dismissed.

Dated: 8/28/13

  
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THOMAS F. WHELAN, J.S.C.