Wright v Bank of America, N.A.
2013 NY Slip Op 33074(U)
December 4, 2013
Sup Ct, New York County
Docket Number: 153533/12
Judge: Paul Wooten

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

JOHN WRIGHT and ANTOINETTE MARINO,
Plaintiffs,

-against-

BANK OF AMERICA, N.A., MERSCORP HOLDINGS, INC. and JOHN DOES 1-10, representing any other REMIC trusts, depositors, servicers, special servicers, master servicers, banks or other lenders claiming ownership of a promissory note dated December 23, 2008 in the principal amount of $313,858 and signed by John Wright and Antoinette Marino,
Defendants.

INDEX NO. 153533/12

MOTION SEQ. NO. 001

The following papers were read on this pre-answer motion by the defendants to dismiss the complaint and plaintiff's cross-motion to file a second amended the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ☐ No

This is an action brought by John Wright and Antoinette Marino (plaintiffs) on June 9, 2012, for declaratory judgement to determine whether any of the defendants is the owner and in possession of the promissory note executed by the plaintiffs in the principal amount of $313,858 dated December 23, 2008 (the "Note") which was assigned by its payee, directly or indirectly, to one or more underwriters and REMIC (securitization) trustees and servicers in New York, New York operating under New York law, for securitization. Because of the securitization process, including the possibility of unrelated assignments of, borrowing against and pledging of the Note by Wall Street financial institutions, it is not clear to the plaintiffs who is the owner of the Note. On July 3, 2012, plaintiffs filed an amended complaint.

Plaintiffs allege that the Note was assigned by their payee, directly or indirectly, to one or more underwriters and REMIC (securitization) trustees and servicers in New York County, New York, which operates pursuant to New York Law, for purposes of securitization. Plaintiffs allege that because of the securitization process, including the possibility of unrelated assignments of, borrowing against and pledging of the Note by Wall Street financial institutions, it is not clear to the plaintiffs who is the owner of the Note and whether plaintiffs should satisfy the Note with the defendants. The causes of action plead in plaintiffs' complaint are for the following relief: a declaratory judgment that the defendants do not own or possess the Note, for unjust enrichment, and related injunction (first); defendants have engaged in fraud and have collected monthly note payments under false pretenses (second); defendants violated New York General Business Law (GBL) § 349 (third); defendants have created a financial hardship for plaintiffs by manipulating securities and real estate markets causing frustration of plaintiffs' performance under the Note (fourth); defendants have breached the real estate contract ("Failing to Offer a Note in a Reduced Principal Amount at the Present Market Interest Rate") (fifth). In the sixth cause of action, claimed only as against Bank of America, N.A. (BOA), plaintiffs assert that BOA prejudiced the plaintiffs by an anticipatory breach of the Settlement Agreement between BOA and the 50 State Attorneys General in which BOA agreed to reduce the principal amount of the Note for the homeowners who qualified under the terms of the Settlement Agreement.

Plaintiffs further allege, *inter alia*, that: (1) the physical location of the Note is now in New York county, New York, grouped together with about 3,000 other similar notes and mortgages signed by homeowner-mortgagors from the 50 States of the United States (for a total sale price of about $1 billion); (2) that the aforementioned notes were sold and physically delivered to underwriters in New York County, New York, as the subject of a public offering of securities based on such package of approximately 3,000 notes and physically turned over to a

New York REMIC trust for holding by it in New York County, New York under a Pooling and Servicing Agreement, which states that it is governed and to be construed under New York Law; and (3) that witnesses to these facts are located in New York County, New York, and as such the proper venue for this action is New York County, not Suffolk County.

On August 14, 2012, defendants demanded pursuant to CPLR 511(a) and (b) that the trial venue be moved to Suffolk County, New York as required by CPLR 507, and on August 20, 2012 the plaintiffs submitted an affirmation in opposition to the demand. Before the Court is defendants BOA and Merscorp Holdings, Inc. (Merscorp), pre-answer motion to dismiss the amended complaint, pursuant to CPLR 3211(a)(7), filed on November 5, 2012. On December 10, 2012, plaintiffs opposed the motion and cross-moved for leave to file a second amended complaint. Defendants, on January 23, 2013, filed in opposition to the plaintiffs' cross-motion for leave to file a second amended complaint, and on January 28, 2013, plaintiffs filed a reply.

In a letter dated April 3, 2013, counsel for BOA and Merscorp notified the Court of a recent decision by Justice Donna Mills entered on March 26, 2013, in an action entitled *Chomicki v Bank of America, et al.*, New York County pending under Index No. 100481/2012, a copy of which was attached thereto. In her decision Justice Mills granted respective motions by defendants to dismiss and for summary judgment, thereby dismissing Chomicki's complaint which similarly challenged a hypothetical residential foreclosure. Counsel stated that the *Chomicki* action was instituted by the same plaintiff's counsel as the herein action, containing similar causes of action and raising virtually the same legal issues that are raised by plaintiffs in this action. Plaintiffs did not submit any opposition to the letter.

In support of their motion, BOA and Merscorp allege that this action must be dismissed because the plaintiffs fail to plead the existence of a justiciable controversy over ownership of the Note, since no foreclosure action has been filed against plaintiffs or the mortgaged property, nor does the complaint contain factual allegations specific to the plaintiffs and is a

general commentary on the mortgage industry. Specifically, they maintain that the first cause of action fails to state a cognizable claim because the allegations in the complaint are merely hypothetical and do not suggest there is currently any controversy among multiple parties claiming an interest in the Note, thus there is no dispute for this Court to resolve. As to the second cause of action, defendants argue that plaintiffs fail to allege any facts indicating that misrepresentations have been made by BOA or that they have been damaged or aggrieved by BOA's actions, and since there is no foreclosure action pending, defendants are under no obligation to demonstrate at this juncture that they own, service, or possess the Note. Defendants also argue that the third cause of action under GBL § 349 should be dismissed as this lawsuit involves a private contract and not an injury to the public. Defendants contend that the fourth cause of action alleging manipulation of securities and real estate markets should be dismissed because it is not a recognized claim in the State of New York. Moreover, defendants assert that the fifth cause of action should be dismissed because plaintiffs' claims have no basis under New York Law since BOA is under no legal obligation to modify the loan to which plaintiffs voluntarily agreed to be bound. Finally, defendants argue that the sixth cause of action should be dismissed since plaintiffs lack standing to enforce the Consent Judgment between the United States, 49 state attorney generals, and BOA.

In support of their cross-motion to serve and file a second Amended Complaint, plaintiffs maintain that the proposed second Amended Complaint makes changes to meet the pleading objections of the defendants in their motion to dismiss, including more specific allegations as to fraud, more specificity about the plaintiffs' damages in support of their complaint for declaratory relief, and allegations demonstrating an actual controversy, and that it should be granted. Plaintiffs' proposed second Amended Complaint asserts the following causes of action: (1) declaratory judgment that defendants are not in chain of title and not authorized to act by someone in chain of title; (2) recovery of monies paid by mistake to defendants (quantum

meruit, unjust enrichment, contract implied by law); (3) fraud; (4) wrongful failure [or breach of agreement] by New York REMIC Trustee to give plaintiffs a loan modification agreement at current market value and interest rate; (5) manipulating securities and real estate markets causing frustration of plaintiffs' performance under the Note; (6) reformation of the note.

In opposition to the motion to dismiss plaintiffs argue, *inter alia*, that they have alleged a justiciable controversy and that a declaratory judgment action is the appropriate way to enable the plaintiffs to know who owns the Note and with whom the plaintiffs should be dealing with for mortgage relief. Moreover, plaintiffs assert that the defendants' actions create consumer injury and are directed to the public at large such that GBL § 349 is applicable, they pleaded fraud with sufficient particularity, reformation of the note is appropriate based on the defendants' unclean hands which frustrated plaintiffs' performance under the Note and Mortgage, which is a defense in a foreclosure action, and that defendants had an obligation to negotiate an agreement in good faith, and failed to do so.

DISCUSSION

A. Plaintiffs' Cross-Motion for Leave to Amend

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . .[and] [l]eave shall be freely given upon such terms as may be just . . . ." (*see Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]; *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989]. The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum,* 301 AD2d at 475; *Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]; *Thompson*, 24 AD3d at 205; *see Ancrum*, 301 AD2d at 475; *Davis & Davis v Morson*, 286 AD2d

584, 585 [1st Dept 2001]).

The Court finds that plaintiffs' proposed Second Amended Complaint is without merit. Despite the inclusion of new allegations, and the withdrawal and replacement of causes of action, the proposed second Amended Complaint is still insufficient to solve the issue of the lack of controversy, nor cure the remaining deficiencies in the amended complaint. Thus, plaintiffs' cross-motion for leave to serve and file a second amended complaint, pursuant to CPLR 3025(b), is denied.

B. Defendants' Motions to Dismiss

CPLR 3211(a) provides that:

> "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
> [1] A defense is founded upon documentary evidence;
> [7] The pleading fails to state a cause of action"

When determining a CPLR 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]; *Wieder v Skala*, 80 NY2d 628 [1992]). To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268 [1997]; *Salles v Chase Manhattan Bank,* 300 AD2d 226 [1st Dept 2002]).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state

courts 'can be fairly gathered from all the averments'" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v D'Agostino,* 21 AD2d at 65, quoting *Kain v Larkin*, 141 NY 144, 151 [1894]). "[W]e look to the substance [of the pleading] rather than to the form (*id.* at 64). A 3211(a)(7) motion to dismiss "is solely directed to the inquiry of whether or not the pleading, considered as a whole, fails to state a cause of action. Looseness and verbosity must be overlooked on such a motion if any cause of action can be spelled out from the four corners of the pleading" (*id.* at 64-65 [internal citation omitted]).

The Court finds that in looking to the substance of the pleading rather than to its form (*see Foley v D'Agostino,* 21 AD2d at 64), and in viewing the amended complaint in the light most favorable to the plaintiffs and affording the plaintiffs the benefit of every possible inference (*see Leon v Martinez*, 84 NY2d at 87-88), the Court finds that the plaintiffs' claims cannot survive a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), as the amended complaint fails to raise cognizable legal theories upon which relief can be granted. Specifically, there is no foreclosure proceeding pending, and as such there is no controversy at issue to be determined. "Declaratory judgments are a means to establish the respective legal rights of the parties to a justiciable controversy" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]; *see* CPLR 3001). "Until there is a declared default [on either Notes] and the commencement of foreclosure proceedings, there is no justiciable controversy" (*Fairharven Props. v Garden City Plaza*, 119 AD2d 796, 796 [2d Dept 1986] ["The courts do not make mere hypothetical adjudications, where the is no presently justiciable controversy before the court, and where the existence of a 'controversy' is dependent upon the happening of future events. If foreclosure does occur, there will be time to litigate the priority of liens on the

property."]; *Prashker v United States Guarntee Co.*, 1 NY2d 584, 592 [1956]). Accordingly, the first cause of action for a declaratory judgment is dismissed.

In order to plead a claim for fraud, "the complaint must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely on it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*FNF Touring LLC v Transform America Corp.*, __AD3d__, 2013 NY Slip Op 07248 [1st Dept 2013], quoting *Mardarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotations omitted]). "A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b)" (FNF Touring LLC, 2013 NY Slip Op 07248 at *1, citing *Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 [2008]). The purpose behind the pleading requirement "is to inform a defendant with respect to the incidents complained of" (*Pludeman*, 10 NY3d at 491). Here, plaintiffs fail to allege the elements of fraud with sufficient particularity to withstand a motion to dismiss as, among other things, plaintiffs do not indicate any injury or damages as a result of defendants' conduct, thus the cause of action for fraud is dismissed.

In order to state a cause of action under GBL § 349, a plaintiff must allege that the defendant's conduct was: (1) consumer-oriented; (2) deceptive or misleading in a material way; and (3) that plaintiff suffered injury as a result thereof (*see Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]; *Small v Lorillard Tobacco Co.*, 94 NY2d 43, 55 [1999]; *Gomez-Jimenez v New York Law School*, 36 Misc3d 230 [Sup Ct, NY County 2012]). Moreover, "conclusory allegations about defendant's practices with other clients are insufficient" (*Golub v Tanenbaum-Harber Co. Inc.*, 88 AD3d 622, 623 [1st Dept 2011]).

The Court finds that plaintiffs fail to meet the threshold requirement to demonstrate that defendants' "acts or practices have a broader impact on consumers at large," and that this is not just a "private contract dispute[], unique to the parties . . . [which] would not fall within the ambit of the statute" (*Oswego*, 85 NY2d at 85). Accordingly, this cause of action is also dismissed.

Plaintiffs' fourth cause of action is entitled "Manipulating Securities and Real Estate Markets Causing Frustration of Plaintiff's Performance under the Note." Plaintiffs allege that:

> The Defendants participated with Fannie Mae, major banks and mortgage lenders to lend money to unqualified borrowers (i.e., "subprime loans") at substantially higher interest rates and risks than the average mortgage loan and immediately resell these high-risk subprime loans to investment banking firms (Amended Complaint ¶ 43).

Plaintiff further alleges that:

> Because many of the loans were bad and predatory, the securities market collapsed and the market value of real estate also collapsed, causing an economic crisis (i.e., a severe recession or a depression) in the United States and elsewhere in the world, and helped to create a financial hardship for the Plaintiffs and their family (*id.* at ¶ 45).

The aforesaid actions of the defendants, according to plaintiffs, amounts to a defense or at least a partial defense to any action brought by the defendants for non-payment of the two loans. Moreover, plaintiffs assert that they are entitled to a reformation of the Note including a reduction in principal on the Note and a reduction in interest on both loans. As stated by this Court earlier, there is no current foreclosure action regarding plaintiff's property, and the frustration of performance of the contract doctrine is inapplicable here. Similar to the plaintiff in *Chomicki,* plaintiffs allege that the loans were "bad and predatory" without any offer of proof to substantiate that assertion. Moreover, even accepting allegations as true, plaintiffs fail to prove how the aforementioned actions by defendants "helped to create a financial hardship" for them

and their family, such that they were unable to continue to make payments. For all of these reasons, this cause of action must be dismissed as it fails to state a cognizable cause of action.

Plaintiffs' fifth cause of action is labeled "Declaratory Judgment and Breach of Contract (Failing to Offer a Note in a Reduced Principal Amount at the Present Market Interest Rate)." In support of this cause of action, plaintiffs assert, *inter alia*, that:

> The Plaintiffs have a financial hardship resulting from the deteriorating economy, the decline in market and rental value of real estate generally and the Plaintiffs' real property specifically and related reduction in income, and for more than the past year has been unable to service the existing Note based on the outstanding principal amounts thereof (Complaint ¶ 53)
>
> . . .
>
> The Plaintiffs have the capacity to make monthly payments based on a Restructured Note (see ¶¶ 49-50 above), and as such she [sic] should have an option to do so (*id.* at ¶ 54)
>
> . . .
>
> the failure of the Defendants and the Lender to provide a right of first refusal or offer for the Plaintiff to retain ownership of her property under these terms is a predatory lending practice and a breach of industry custom and usage and the implied covenant of good faith and fair dealing to negotiate workout agreements in good faith with financially troubled borrowers, and is a defense to any action to enforce the Note (*id.* at ¶ 56).

Moreover, as a result of the aforementioned actions by defendants, plaintiffs allege they are entitled to a declaratory judgment, under CPLR 3001 and 3017, that "[t]he Defendants and Lender and any successors in interest have forfeited their rights under the Note to sell the property securing the Note by its/their failure to provide the Plaintiffs with the foregoing option to retain ownership of the property securing the Note" (*id.* at ¶ 66). The Court finds that this cause of action must also be dismissed for failing to state a cognizable cause of action under New York law. Plaintiffs' failure to make payments does not support a legal claim for a declaration that defendants have forfeited their rights to foreclose on the property, nor does it require the defendants to give plaintiff the option to make payments at a reformed rate. Specifically, recent case law has held that a mortgage lender is under no legal obligation to modify a loan (*see*

Carver Fed. Sav. Bank v Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., N.Y., Inc., 35 Misc3d 1228[A], 2012 NY Slip Op 50921[U], * 6 [Sup Ct, Suffolk County 2012] ["As this court recently held, there is no obligation on the part of a mortgage lender to renegotiate the terms of a mortgage loan, even in cases involving home loans that are secured by mortgages on family residences"]; *JP Morgan Chase Bank, N.A. v Ilardo*, 36 Misc3d 359, 378 [Sup Ct, Suffolk County 2012] ["a judicially imposed directive compelling the plaintiff to specifically perform a modification agreement, to which it had not assented and was not required to so assent by law, constitutes an unreasonable resort to equitable principles to override long-standing principles of contract law"]).

Lastly, with regards to plaintiffs' sixth cause of action asserted against only BOA for anticipatory breach of contract, plaintiffs have withdrawn this cause of action in opposition to defendants' motions, and thus the Court need not address the merits of this claim.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion for leave to serve and file a second amended complaint, pursuant to CPLR 3025(b), is denied; and it is further,

ORDERED that defendants Bank of America, N.A. and Merscorp Holdings, Inc.'s pre-answer motion to dismiss the amended complaint pursuant to CPLR 3211(a)(7) is granted, and the amended complaint is dismissed; and it is further,

ORDERED that within 30 days of Entry, counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon all the parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 12/4/13

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**