

<b>McLean v Prime Title Search, LLC</b>
2013 NY Slip Op 33342(U)
April 1, 2013
Sup Ct, Queens County
Docket Number: 25859/11
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

-----x  
EUTON MCLEAN and YVETTE MCLEAN,

Plaintiffs,

-against-

PRIME TITLE SEARCH, LLC, GENERAL TITLE  
INSURANCE COMPANY, FIRST AMERICA TITLE  
INSURANCE COMPANY, HSBC, ADMIRAL  
ABSTRACT LLC and HSBC MORTGAGE  
CORPORATION (USA),

Defendants.  
-----x

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Motion Date:  
March 6, 2013

Cal. No.: 88  
Seq. No.: 5

The following papers numbered 1 to 43 read on this motion by defendants, HSBC BANK USA, N.A., i.s.a HSBC, and HSBC Mortgage Corporation (USA), to dismiss plaintiffs' Second Amended Complaint pursuant to CPLR §3211(a) (1) and §3211(a) (7) and cross-motion by Plaintiff for leave to serve and file a third amended complaint.

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Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

Defendants HSBC BANK USA, N.A., i.s.a HSBC, and HSBC Mortgage Corporation (USA) ("HSBC") move to dismiss plaintiffs' Second Amended Complaint (Ex. A), pursuant to CPLR §3211(a)(1) and (7), on the grounds of a defense based upon documentary evidence and for failure of plaintiffs to state a cause of action. The instant complaint seeks, inter alia, "to remove of record the two (2) underlying Leduc mortgages", "reasonable counsel fees", and "punitive damages" arising from a foreclosure proceeding brought against plaintiffs' property, arising from plaintiffs' default on two mortgages held by defendants HSBC.

On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (see, Leon v. Martinez, 84 N.Y.2d 83 [1994]) and the plaintiff is to be accorded the benefit of every possible inference (see, Cueto v. Hamilton Plaza Co., Inc., 67 A.D.3d 722 [2 Dept. 2009]). Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (see, Gaidon v. Guardian Life Ins. Co. Of America, 94 N.Y.2d 330 [1999]). The Court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, Hoag v. Chancellor, Inc., 246 A.D.2d 224 [1 Dept. 1998]).

A motion made pursuant to CPLR §3211(a)(1) warrants dismissal only if the documentary evidence submitted utterly refutes, and conclusively establishes a defense to, the asserted claims as a matter of law (see, Goshen v. Mutual Life Ins. Co., 98 N.Y.2d 314 [2002]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (see, Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793 [2 Dept. 2011]). With respect to the branch of the Second Amended Complaint (Ex. A) which seeks to remove of record the two underlying Leduc mortgage liens, defendants HSBC have submitted "documentary" evidence in the form of a Satisfaction of Mortgage, dated November 14, 2011 and recorded in the Office of the City Register on December 1, 2011 (Ex. 4), pertaining to the subject Leduc mortgages. Plaintiffs have failed to refute such evidence. As such, defendants HSBC have conclusively established such defense to the asserted claim as a matter of law, and the branch of the instant motion seeking to dismiss the cause of action versus defendants HSBC relating to the Leduc mortgages is hereby granted.

The branch of the instant motion seeking to dismiss the attorney's fees claim in plaintiffs' Second Amended Complaint

versus defendants HSBC for failure to state a cause of action pursuant to CPLR §3211(a)(7) is hereby granted. Attorney's fees are generally considered incidents of litigation and may not be collected unless authorized by court rule, statute or agreement between the parties (see, Hooper Assocs. V. AGS Computers, 74 N.Y.2d 487 [1989]; Matter of A. G. Ship Maintenance Corp. V. Lezak, 69 N.Y.2d 1 [1986]). Plaintiffs have failed to demonstrate either a court rule, statute or an agreement between the parties that would permit a claim for attorney's fees herein. Further, the subject mortgage (Ex. 2, ¶22) clearly and unambiguously permits only defendants HSBC to recover attorney's fees upon default by the mortgagor, and makes no provision for mortgagor to recover attorney's fees.

The branch of the motion by defendants HSBC seeking to dismiss, against them, the claim for punitive damages as contained in plaintiffs' Second Amended Complaint, pursuant to CPLR §3211(a)(7) for failure to state a cause of action, is hereby granted. New York State law does not recognize a separate cause of action for punitive damages (see, Rocanova v. Equitable Life Assur. Soc. of U.S., 86 N.Y.2d 603 [1994]; Ehrlich v. Incorporated Village of Sea Cliff, 95 A.D.3d 1068 [2 Dept. 2012]; Rimany v. Town of Dover, 72 A.D.3d 918 [2 Dept. 2010]).

The Court has considered plaintiff's remaining contentions and arguments, and finds them to be without merit.

As such, plaintiffs' Second Amended Complaint is hereby dismissed as against defendants HSBC.

Plaintiff's cross-motion seeking leave to file a third amended complaint is denied. While amendment of pleadings is generally liberally granted, absent a showing of prejudice or surprise to the opposing party (see, CPLR §3205[b] and §305[c]; Cherebin v. Empress Ambulance Service, Inc., 43 A.D.3d 364 [1 Dept. 2007]), the court is not required to permit amendments which would be futile and result in needless litigation (see, Norte & Co. v. New York and Harlem R. Co., 222 A.D.2d 357 [1 Dept. 1995]; Staines v. Nassau Queens Med. Group, 176 A.D.2d 718 [2 Dept. 1991]). On a motion to amend, the court should not examine the merits or legal sufficiency of the proposed amendment unless it is "clearly and patently insufficient on its face" (Fisher v. Ken Carter Inds., Inc., 127 A.D.2d 817, 818 [2 Dept. 1987]; see, Lucido v. Mancuso, 49 A.D.3d 220 [2 Dept. 2008]; Polizzi v. Profaci, 5 A.D.3d 456 [2 Dept. 2004]), or unless a "substantial question is raised as to the sufficiency or meritoriousness of (the) proposed pleading" (Sharapata v. Town of Islip, 82 A.D.2d 350, 362 [2 Dept. 1981] see, Staines v. Nassau

Queens Med. Group, supra).

Plaintiffs have failed to demonstrate a fiduciary relationship with defendants HSBC in this matter (see, Call v. Ellenville Nat'l. Bank, 5 A.D.3d 521 [2 Dept. 2004]) or that defendants HSBC owed plaintiffs any duty to modify the subject purchase money mortgages herein by virtue of the terms of such mortgages. If the lack of merit of the proposed amendment is clear and free from doubt, as it is based upon the evidence submitted in this matter, leave to amend should be denied as a matter of law (see, Lang v. Dachs, 303 A.D.2d 645 [2 Dept. 2003]).

Accordingly, the motion by defendants HSBC seeking to dismiss plaintiffs' complaint against them pursuant to CPLR §3211(a)(1) and (7), for failure of plaintiffs to state a cause of action and upon a defense founded upon documentary evidence, is hereby granted. Plaintiff's cross-motion for leave to serve a third amended complaint is hereby denied.

This Constitutes the Decision and Order of the Court.

Dated: April , 2013

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Denis J. Butler, J.S.C.