

Hayes v Assets Recover Ctr. Inv., LLC

2013 NY Slip Op 33466(U)

November 26, 2013

Supreme Court, New York County

Docket Number: 104217/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

SHARAY HAYES,
Plaintiff,
-against-

INDEX NO. 104217/11

MOTION SEQ. NO. 006

ASSETS RECOVERY CENTER INVESTMENTS, LLC., ASSETS RECOVERY CENTER, LLC., 1M, LLC., JOHN OLSEN, BARRY BRECHER, MARJORIE HOOG, and 242 WEST 136 STREET, LLC.,
Defendants.

FILED
NOV 29 2013

The following papers were read on this motion by the defendants for summary judgment pursuant to CPLR 3212.

COUNTY CLERK'S OFFICE
NEW YORK

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

PAPERS NUMBERED

Cross-Motion: Yes No

In this action, defendants Assets Recovery Center Investments, LLC (ARCI), Assets Recovery Center, LLC (ARC) and 1M, LLC (1M) move for summary judgment dismissing the complaint of plaintiff Sharay Hayes (Hayes). Hayes has responded in opposition to the motion.

BACKGROUND

Hayes commenced this action, alleging, among other things, mortgage fraud, breach of contract, violations of the Home Equity Theft Prevention Act (HETPA), and that defendants unlawfully acquired title to, and evicted him from, the premises that he formerly owned, located at 242 West 136th Street, New York, New York (subject premises). Hayes is seeking money damages, and to have the subject premises returned to him.

According to the complaint, Hayes purchased the subject premises on January 18, 2006, and on July 12, 2007, Hayes refinanced a first mortgage with UBS Bank (UBS). UBS

was the assignee of Hayes's prior loan. The New York City Department of Housing Preservation and Development (HPD) holds a second mortgage on the subject premises. This mortgage was subordinated to the UBS loan on July 21, 2007.

As set forth in the complaint, in or about January 2009, Hayes received telephone calls from ARCI explaining that UBS had assigned Hayes's mortgage to ARCI, and inquiring as to whether Hayes wanted to negotiate a loan modification, as his loan was in default. Hayes alleges that, at that time, he was unsure that UBS had actually assigned his loan to ARCI. As a result, on February 23, 2009 and March 17, 2009, in response to Hayes' requests pursuant to the "Real Estate Settlement Procedures Act" (RESPA), ARCI represented that it had obtained all rights, title, and interest to the loan through an assignment from UBS. ARCI sent Hayes a MERS print-out, to establish, for Hayes, the assignment of servicing rights from UBS to ARCI on February 6, 2009. The print-out does not clearly identify the property connected to those rights.

In the complaint, Hayes alleges the following causes of action: (1) fraud; (2) voiding the deed subsequent to Hayes's transfer of the deed to ARCI; (3) three causes of action under HETPA; (4) breach of contract; (5) piercing the corporate veil; and (6) conspiracy to commit fraud. Hayes alleges that in November of 2009, he met with Barry Brecher of ARCI, during which meeting Brecher begged Hayes to "give up" the subject property (Warmuth aff, exhibit U at 4), and claimed that if Hayes did not agree to a deed in lieu of a foreclosure, defendant would "destroy" Plaintiff's developing acting and TV career. . ." (Warmuth Aff., exhibit U at 4).

On January 6, 2010, Hayes and 1M, ARCI's designee, entered into a "deed in lieu of foreclosure" transaction. This was accomplished by an "agreement for deed and estoppel," signed by Hayes. According to this document, Hayes transferred the subject premises to 1M through a quitclaim deed, and 1M gave Hayes \$43,000, and a one-year lease to an apartment at the subject premises.

In his complaint, Hayes alleges that defendants misrepresented their ownership of the mortgage and, in fact, were not the owners of the loan on the subject property at the time Hayes transferred the deed in lieu of foreclosure. As stated above, with respect to this issue, the parties submitted: (1) a MERS printout, reflecting assignment of servicing rights by UBS to ARCI on February 6, 2009, which does not identify the property attached to those rights; (2) a "notice of assignment, sale or transfer or [sic] servicing rights" from ARCI to Hayes, stating that ARCI is the new servicer of his mortgage, effective January 30, 2009; and (3) a document entitled "Assignment of mortgage without covenant—Individual or Corporation," signed January 5, 2011, and filed with the City Register on February 11, 2011, which reflects the assignment of the mortgage for the subject premises by MERS, as nominee for UBS, to ARCI.

ARCI filed a complaint on April 14, 2010 to foreclose on the subject premises as against Hayes and 1M. 1M also filed a housing court action in 2010 in New York County Civil Court against Hayes' subtenant, Augustine Diji (Diji). In the Civil Court action, according to the present complaint, 1M misrepresented that there was no lease relating to the premises.

According to the present complaint, defendants "improperly filed the deed in lieu of foreclosure with the City Register . . ." (Warmuth Aff., exhibit U at 6). Hayes alleges that this improper filing did not make reference to the fact that the debt was forgiven, and did not include a provision for the payment of transfer taxes. Hayes further alleges that defendants did not pay the outstanding HPD lien on the premises and, instead, allowed HPD to continue to believe that Hayes owned the premises in order to take advantage of a reduction in the lien amount.

On September 22, 2010, Hayes served a notice of rescission deed pursuant to HETPA. According to that document, Hayes agreed to return the \$43,000 to ARCI and 1M in exchange for the deed.

On January 6, 2011, defendants Marjorie Hoog (Hoog) and 242 W 136 Street, LLC purchased the subject property. According to the complaint, many months prior to this

purchase, Hayes informed Hoog that he had cancelled his deed transfer. Hayes alleges that Hoog and the other defendants "pressured" Hayes into executing another deed in favor of defendant 242 W 136 Street, LLC and another in favor of 1M.

In this action, defendants ARCI, ARC and 1M interposed an answer, and now move for summary judgment on the grounds that: (1) all of Hayes' claims are barred by a written release; (2) the third, fourth and fifth causes of action are barred because HETPA does not apply to real estate investors; and (3) there is no cause of action for conspiracy.

Specifically, defendants argue that Hayes and ARCI signed a release on January 6, 2010, the same date as the quitclaim deed, in connection with the transfer of the deed in lieu of a foreclosure transaction, and that this release bars all claims set forth in this action. The release is annexed to defendants' motion. According to the release, signed by Hayes and ARCI, Hayes acknowledged execution of a deed transferring the ownership of the subject premises to 1M, ARCI's designee for that purpose. In this agreement, ARCI agreed to pay Hayes \$43,000, and authorized 1M to provide Hayes with a one-year lease for an apartment at the subject premises. Additionally in the release, ARCI agreed to release Hayes from all claims relating to the mortgage and the note. Hayes agreed to release ARCI, and its successors and agents, from any claims relating to the mortgage and the note, and agreed to hold ARCI "harmless from any and all claims relating to the Property" (Warmuth Aff., exhibit C at 2). ARCI agreed that it would not seek any monies from Hayes for any deficiency in the amount owed or that might be recovered through a foreclosure sale.

Defendants further argue that HETPA applies only to circumstances in which the owner of the property resides at the premises at the time of the sale, or immediately prior to the time of the sale, and that Hayes did not reside at the premises. Finally, defendants argue that there is no civil cause of action for conspiracy.

Defendants first argue that the claims alleged herein should be dismissed, because they are barred by the mutual release, executed by the parties on January 6, 2010. The mutual release, signed on the same date as the "agreement for deed and estoppel," states that each party, both Hayes and ARCI, and its successors and assigns, discharges the other from any claims relating to the mortgage and the note.

Plaintiff argues that because the mutual release was based upon ARCI's fraudulent misrepresentation that ARCI owned the loan at the time the mutual release was executed by the parties, it is not binding. To support its argument that defendants did not have ownership of the loan on the date of the agreement and the mutual release, January 6, 2010, Hayes submits a document dated January 5, 2011, entitled "Assignment of Mortgage without Covenant-Individual or Corporation." The document identifies MERS Inc, the nominee for UBS, as the assignor and ARCI as the assignee. In the document, it is stated that the mortgage made by Hayes on January 18, 2006 and on July 12, 2007 for the property 242 West 136th Street, New York, are assigned to ARCI. The document is executed by John Olsen, Assistant Secretary of ARCI.

In response, defendants offer the MERS printout that shows the February 6, 2009 transfer by UBS to ARCI of the servicing rights to a loan, but the document does not identify the location of the property related to the loan. Defendants also submit a January 28, 2009 "notice of assignment, sale or transfer of servicing rights," that was issued by ARCI to Hayes, and that states that the servicing of the mortgage loan has been assigned from UBS to ARCI, effective January 30, 2009. Another letter from ARCI to Hayes states that notice was provided by UBS on January 7, 2009, indicating that, effective January 30, 2009, ARCI was the new servicing agent for Hayes's loan payments.

Additionally, Hayes submits to the court a copy of the notice of rescission, dated September 16, 2010. The notice indicates four reasons for the rescission as follows:

"(1) failure to provide the right to cancel and the proper statutory Notice of Cancellation; (2) Failure to abide by the terms of the lease agreement provided to equity seller to [sic] equity purchaser. Improper attempts to void the lease; (3) Failure to abide by the terms of the agreement wherein grantee/equity purchaser did not pay the New York City and New York State transfer taxes thereby exposing grantor/equity seller to liability; and (4) misrepresentations regarding the terms of the transaction and inadequate consideration" (Warmuth aff, exhibit N).

Despite the mutual release, in a complaint filed three months after the release was signed, ARCI, as plaintiff, sought payment from defendants 1M and Hayes for the mortgage on the property 242 West 136th Street. In that complaint, ARCI alleges that defendants failed to make the payment of \$3,126.12, which became due on December 1, 2008, and every sum that became due each month thereafter. According to that complaint, in the event the monies were not paid ARCI would foreclose upon the subject property.

STANDARD

Summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Regardless of the sufficiency of the opposing papers, the "[f]ailure to make such showing requires denial of the motion" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

When determining a motion to dismiss the complaint based upon CPLR 3211(a), "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] [internal citation omitted]; see, *Sokoloff v Harriman*

Estates Dev. Corp., 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Wieder v Skala*, 80 NY2d 628, 631 [1992]).

DISCUSSION

Based upon the parties' submissions, there are factual questions concerning when MERS or UBS assigned the loan to ARCI and whether ARCI owned the loan on the date Hayes transferred the deed to ARCI. There are documents that indicate that the assignment took place before Hayes transferred the deed to ARCI. Yet, there are also documents that indicate the assignment took place after that time. Additionally, the defendants do not answer Hayes' attacks on the validity of the mutual release on the ground that defendants failed to comply with its terms. For example, the defendants do not explain whether they forgave the loan upon transfer of the deed, nor do they refute that ARCI commenced a foreclosure action three months after the transfer of deed in lieu of foreclosure transaction. As a consequence, there exist questions concerning the validity of the mutual release. Therefore, the Court denies defendants' motion for summary judgment on the ground of the release.

Defendants argue that HETPA does not apply because HETPA applies only to transactions in which the owner of the property resides at the premises at the time of the sale or immediately prior to the time of the sale. According to defendants, Hayes did not reside at the premises and, instead, he owned the subject property as an investor.

In support of this argument, defendants annex to their papers a copy of Hayes' loan application, in which Hayes states that it is to be an investment property, and they also include Hayes' 2008 registration for two Jeeps and a boat, which indicate his address as 230 W. 139th Street. Hayes' July 12, 2007 mortgage loan application indicates that Hayes did not intend to use the subject premises as his primary residence. Furthermore, defendants assert that Dijj was the true tenant at the subject premises, as Hayes' subtenant. In a September 23, 2010 affidavit, submitted in the Civil Court case, Dijj avers that he lived in the apartment at the

subject premises for over a year. Hayes does not deny he had a subtenant at the subject premises.

In opposition, Hayes argues that the subject property is covered under HETPA because "it is a four-family residence that, at one point in time, was occupied by the Plaintiff as his primary residence" (McCallion aff at 21). In his affidavit in opposition to defendants' motion, Hayes avers that "[a]t one time, I resided in the ground floor apartment and, later, in the parlor floor apartment. Since I frequently traveled, due to the nature of my employment, I sublet my residence at the Subject Property" (Hayes Aff. at 3). Hayes further avers that he "resided in the Subject Property on a full-time basis prior to the transfer of the deed to Defendant 1M" and that he was "collecting substantial rent from the Subject Property, which was enough to make the mortgage payments." He submits his driver's license, issued December 10, 2007, that shows his address as 242 West 136th Street.

Under HETPA, the government seeks to, among other things, "safeguard equity sellers against deceit and financial hardship; ... and to afford equity sellers a reasonable and meaningful opportunity to rescind sales to equity purchasers ..." (Real Property Law § 265-a[1][d]). Under RPL § 265-a[2][f], "[e]quity seller means a natural person who is a property owner or homeowner at the time of the equity sale." "Property owner" or "homeowner" are defined as "any or all record title owners of the residential real property in foreclosure or, where applicable, default at the time of the equity sale" (RPL § 265 [a][2][h]). Under the statute, "residence" and "real property" are defined as "residential real property consisting of one- to four-family dwelling units, one of which the equity seller occupies or occupied at a time immediately prior to the equity sale as his or her primary residence" (RPL § 265[a][2][k]).

Pursuant to the parties' submissions, Hayes has not established that he either resided at the subject premises as his primary residence at the time of the transfer of the deed to the subject premises, in January 2010, or that he used the subject premises as his primary

residence immediately prior to that transfer. His verified complaint and affidavit offer general statements that Hayes resided at the subject premises at "one time" or "prior" to the transfer of the deed. His 2007 driver's license likewise does not establish the residency required under the statute on the date of the transfer, or immediately before. Further, he admits to the subletting of the subject premises prior to, and at the time of, the transfer. Thus, Hayes has not offered any evidence that he is able to satisfy the residency requirements under HETPA. As a result, this Court dismisses all of Hayes' claims articulated pursuant to HETPA.

Finally, defendants argue that Hayes' cause of action for "conspiracy to commit fraud" must fail, because there is no civil cause of action for conspiracy alone. While it is correct that "New York does not recognize an independent cause of action for conspiracy to commit a civil tort" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [internal citations omitted]), "allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*id.*, quoting *Alexander & Alexander of N. Y. v Fritzen*, 68 NY2d 968, 969 [1986]).

"Therefore, under New York law, to establish a claim of civil conspiracy, the plaintiff 'must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury'" (*id.*, quoting *World Wrestling Fedn. Entertainment, Inc. v Bozell*, 142 F Supp 2d 514, 532 [SD NY 2001]).

Here, Hayes has alleged an underlying tort of fraud against the defendants, and has offered facts, with accompanying documents, to support his fraud claim and the allegations of conspiracy between the defendants. In his complaint, he alleges that at the time of the subject transaction, ARCI misrepresented that it was the assignee of his loan, and used 1M as its designee to receive Hayes' deed transfer. Thus, defendants' motion is denied with respect to dismissing this cause of action.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that defendants Assets Recovery Center Investments, LLC, Assets Recovery Center, LLC and 1M, LLC's motion for summary judgment dismissing the complaint is granted to the extent that the third, fourth and fifth causes of action are dismissed and is otherwise denied; and it is further;

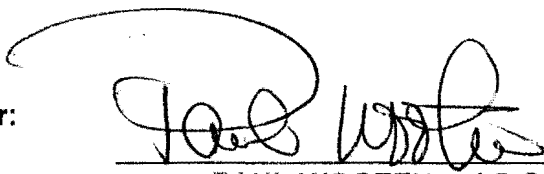
ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that counsel for defendants Assets Recovery Center Investments, LLC, Assets Recovery Center, LLC and 1M, LLC is directed to serve a copy of this Order with Notice of Entry upon all parties; and it is further,

ORDERED that the parties are directed to appear for a Status Conference on January 22, 2014 at 11:00 am at 60 Centre Street, Room 341, Part 7.

This constitutes the Decision and Order of the Court.

Dated: 11/26/13

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: : DO NOT POST REFERENCE

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