SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 59

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CHRISTOPHER CARAVELLO and VICTORIA CARAVELLO,

Plaintiffs,

-against-

ONE MANAGEMENT GROUP, L.L.C., and PAUL SUKHOLINSKY and VADIM SOSKIL, NILO LEON and ELENA R. GELMAN,

Defendants.

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Index No. 10417/11
Motion Calendar No. 9
June 10, 2013

DECISION AND ORDER
Jack M. Battaglia
Justice, Supreme Court

Recitation in accordance with CPLR 2219 (a) of the papers considered on defendant Elena R. Gelman's motion for an order, pursuant to CPLR 3211(a)(5) and (7), and CPLR 3212, dismissing Plaintiff's Verified Complaint as against her:

- Notice of Motion
  Affirmation in Support
  Exhibits A-H
- Affirmation in Opposition to Defendant, Gelman's Motion for Summary Judgment
  Exhibits A-F
- Supplemental Affirmation in Opposition to Defendant, Gelman's Motion for Dismissal
- Reply Affirmation
  Exhibit A

According to the Verified Complaint, prior to February 8, 2008, plaintiffs Christopher Caravello and Victoria Caravello owned property located at 1945 62nd Street in Brooklyn, and Countrywide Home Loans held a mortgage on the property. Sometime prior to February 8, 2008, Plaintiffs "fell into financial straits" and could no longer make payments on their mortgage. Defendants Paul Sukholinsky and Vadim Soskil, on behalf of defendant One Management Group, L.L.C., approached Plaintiffs "with a way out of their predicament: a third person, the defendant, Nilo Leon, would apply for a mortgage", and buy the subject property and pay off Plaintiffs' mortgage, allowing Plaintiffs to continue to "remain in their home and when [Plaintiffs] got on their feet again financially, [they] would be able to buy [the property] back from the defendant, Nilo Leon." Plaintiffs agreed with the proposal, and in November 2007, they signed a contract of sale for the property. The contract provided for, among other things, a purchase price of $560,000, and set a closing date of December 31, 2007 or "upon reasonable notice by Purchaser at lender's office".

Plaintiffs allege that defendants Paul Sukholinsky and Vadim Soskil obtained an attorney, defendant Elena R. Gelman, Esq., to represent Plaintiffs at the closing. After the contract was signed, defendant Nilo Leon was able to obtain a mortgage from Indy Mac Bank FSB for $504,000.00.

On February 8, 2008, the closing was held, and Plaintiffs transferred the deed to defendant Nilo Leon. Of the mortgage proceeds of $504,000, the sum of $303,708.44 was paid to satisfy the remaining balance on Plaintiffs' mortgage; the sum of $10,295 was paid for state and city transfer taxes; the sum of $1000.00 was paid to defendant Gelman for legal fees; and there were payments for "title charges of $475.00, a fee to the title closer of $250.00, and an outstanding water bill of $151.17." The title company held $525.00 in escrow for any outstanding water charges and parking violations. Plaintiffs credited defendant Nilo Leon "with a seller's concession" of $16,800 for closing costs. Most significantly, the sum of $163,772.93 was paid to defendant One Management Group, L.L.C. for "management and consulting services".

A check in the amount of $80,500 drawn on Commerce Bank and made payable to the Plaintiffs "was never received by" Plaintiffs. According to the Verified Complaint, "[g]iven the purchase price of $560,000.00" and subtracting expenses, Plaintiffs "should have received $226,789.41, as and for the net proceeds of the sale of their home", and, instead, they received nothing.

The only defendant to have appeared in this action is defendant attorney Elena R. Gelman, the movant, who seeks an order, pursuant to CPLR 3211(a)(5), 3211(a)(7), and CPLR 3212, dismissing the Verified Complaint as against her. The Verified Complaint purports to allege three causes of action as against her: legal malpractice in the Fifth Cause of Action; fraud as part of the Sixth and Seventh Causes of Action; and violation of the "federal Real Estate Settlement Procedures Act and its attendant rules and regulations" as part of the Seventh Cause of Action.

Since the alleged legal malpractice occurred on the closing date of February 8, 2008, and Plaintiffs did not commence the action until May 6, 2011, Plaintiffs' Fifth Cause of Action alleging legal malpractice is time-barred. (*See* CPLR 214[6]; *Rupolo v Fish*, 87 AD3d 684, 685 [2d Dept 2011]; *Jones v Safi*, 58 AD3d 603, 603 [2d Dept 2009].)

Accordingly, the branch of defendant Gelman's motion seeking dismissal of Plaintiffs' Fifth Cause of Action, alleging legal malpractice as against her, on the ground that the cause of action is time-barred, is GRANTED. (*See* CPLR 3211[a][5].)

Plaintiffs' cause of action alleging violation of the federal Real Estate Settlement Procedures Act ("RESPA") is also time-barred. (*See* 12 USCA § 2614; *see also e.g. Fremont Investment & Loan v Edwardsen*, 20 Misc 3d 1114[A], 2008 NY Slip Op 51349, *2 [Sup Ct, Richmond County 2008].)

Accordingly, the branch of defendant Gelman's motion seeking dismissal of the part of Plaintiffs' Seventh Cause of Action, alleging violation of the "federal Real Estate Settlement Procedures Act and its attendant rules and regulations", on the ground that the cause of action is time-barred, is GRANTED. (*See* CPLR 3211[a][5].)

Defendant Gelman also contends that the causes of action alleging fraud must be dismissed on grounds that the allegations of fraud are not pled with sufficient particularity, do not state a cause of action for fraud, and that the allegations are duplicative of Plaintiffs' cause of action alleging legal malpractice.

As part of the Sixth Cause of Action, Plaintiffs repeat all prior allegations, and allege further that, among other things, defendants One Management Group L.L.C., Paul Sukholinsky, and Vadim Soskil "obtained the defendant, Elena R. Gelman, to represent the plaintiffs . . . as the attorney in connection" with the sale of their property; that all Defendants, including Gelman, "acted in concert to foster a level of trust between" them and Plaintiffs; that all Defendants were aware of Plaintiffs' financial condition and that Plaintiffs were "desperate"; and that Defendants, including Gelman, "acted in concert to deprive and defraud the plaintiffs . . . of the net proceeds of the sale of their home".

As part of Plaintiffs' Seventh Cause of Action, they repeat all prior allegations, and allege further that "[d]espite knowing that the defendant, Nilo Leon, did not tender the full sales price of $560,000 to the plaintiffs . . ., the defendant Elena R. Gelman, the attorney for the plaintiffs, nevertheless, directed and permitted the plaintiffs to sign the HUD-1 Settlement Statement where it is indicated that the full sales price was tendered".

"On a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be afforded a liberal construction", and "[t]he court must accept the facts alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Kempf v Magida*, 37 AD3d 763, 764 [2d Dept 2007].) "So liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he has stated one." (*Cayuga Partners, LLC v 150 Grand, LLC*, 305 AD2d 527, 527 [2d Dept 2003] [internal citations and quotation marks omitted].)

The court may use affidavits in considering a pleading motion to dismiss (*see* CPLR 3211[c]), but where a motion to dismiss is not converted to a summary judgment motion (*see id.*), "affidavits submitted by the defendant will seldom if ever warrant the relief [she] seeks unless . . . the affidavits establish conclusively that plaintiff has no cause of action" *(see Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976].) "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].)

"To sustain a cause of action alleging fraud, a party must show a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (*Cayuga Partners, LLC v 150 Grand, LLC*, 305 AD2d at 527.)

"To plead a cause of action to recover damages for aiding and abetting fraud, the complaint must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud." (*Winkler v Battery Trading, Inc.*, 89 AD3d 1016, 1017 [2d Dept 2011].) "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." (*Monaghan v Ford Motor Company*, 71 AD3d 848, 850 [2d Dept 2010].) "However, the mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." (*Id.*)

Where a cause of action is based on fraud, the "circumstances constituting the wrong shall be stated in detail." (*See* CPLR 3016[b]). "Bare allegations of fraud, which merely list the material elements of fraud without any supporting detail, are insufficient to satisfy the pleading requirements of CPLR 3016 (subd [b])." (*Gorman v Gorman*, 88 AD2d 677, 678 [3d Dept 1982].) Confusing and ambiguous allegations are insufficient. (*See Perla v Marine Midland Realty Corp.*, 61 AD2d 837, 837 [2d Dept 1978].) However, CPLR 3016[b] is satisfied "when the facts suffice to permit a reasonable inference of the alleged misconduct". (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [citing *Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486 (2008)].) "[I]n certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud." (*Pludeman v Northern Leasing Sys. Inc.*, 10 NY3d 486, 493 [2008]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559.)

Here, contrary to Defendant's contentions, the allegations sufficiently comply with CPLR 3016(b) in that they adequately inform her of the "complained-of" acts. (*See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d at 559.).

Also, contrary to Defendant's contentions, the allegations in the Verified Complaint sufficiently state a cause of action for fraud and aiding and abetting fraud. The allegation that Gelman was obtained by Defendants in order to represent Plaintiffs as their attorney at the closing; that Gelman allegedly did not object to or question the sum of $163,772.92 being taken from the proceeds of sale to be paid to defendant One Management Group, LLC as a "consulting fee"; that she concealed the $163,772.92 "consulting fee" on the HUD-1 statement, and the fact that Plaintiffs did not receive the check from the purchaser defendant Nilo Leon representing the balance of the proceeds on the sale, allow an inference that Gelman, who had a fiduciary duty to Plaintiffs (*see Greene v Greene*, 47 NY2d 447, 453 [1979]), gave "substantial assistance" to the fraud by concealing from Plaintiffs that they were being deprived of the proceeds of the sale (the sum of $226,789.41) by defendants One Management Group L.L.C., Paul Sukholinsky, Vadim

Soskil, and Nilo Leon. The alleged concealment of that information from Plaintiffs constitutes a material omission of fact that a fact finder could reasonably infer was made for the purpose of inducing Plaintiffs to enter into the transaction. Plaintiffs allege that they justifiably relied on the representations made to them regarding the sale of their property, and that they lost the sum of $226,789.41 as a result.

Indeed, what is described in the pleadings is commonly known as a "foreclosure rescue scheme". (*See generally Mathurin v Lost and Found Recovery,* 19 Misc 3d 756, 757 [Sup Ct, Kings County 2008], *mod* 65 AD3d 619 [2d Dept 2009]; *Bryan v Ramirez*, 20 Misc 3d 1138[A], 2008 NY Slip Op 51781[U], *2-3 [Sup Ct, Kings County 2008]; *Richards v Cesare*, 25 Misc 3d 1217[A], 2009 NY Slip Op 52164 [U], *3 [Sup Ct, New York County 2009] ["potted plant" attorney]; *see also generally* Real Property Law § 265-a[1][a] [Home Equity Theft Prevention Act]["The legislature finds and declares that homeowners who are in default on their mortgage or in foreclosure may be vulnerable to fraud, deception, and unfair dealing by home equity purchasers"].) Under certain circumstances, such schemes may constitute fraud. (*See e.g. Heaven v McGowan,* 40 AD3d 583 [2d Dept 2007];*Bryan v Ramirez*, 2008 NY Slip Op 51781[U] at *7-8.)

For example, in *Heaven v McGowan* (40 AD3d 583 [2d Dept 2007]), the plaintiffs, who were beneficiaries of a trust that owned real property valued at about $200,000, were faced with foreclosure and consulted with an attorney for the trust. Plaintiffs alleged that based upon the attorney's representations, they entered into an agreement with him which they believed "accomplished a refinance of their mortgage". (*See id.* at 584). "The documents that the plaintiffs signed, however, actually effected a sale of the property to the defendant New World Investment Trust . . . an entity created and owned by the attorney, for the sum of $92,000 and a leaseback by the plaintiffs at a monthly rent greater than their mortgage payments had been." (*Id.*) When the plaintiffs fell behind in their rent, New World and the attorney commenced a holdover proceeding against them. Thereafter, plaintiffs brought an action against the attorney alleging, among other things, fraud.

The Second Department found that the defendants established *prima facie* entitlement to summary judgment dismissal of the fraud cause of action by submitting a real estate contract and deed demonstrating that the plaintiffs were aware that their property was being sold, as opposed to having their mortgage refinanced. However, in opposition, the plaintiffs established a triable issue of fact by submitting an affidavit to the effect that they were told by the defendant, an attorney, that the transaction was a "refinance" of their mortgage. (*See id.* at 585.) The Second Department found that there were triable issues of fact as to whether the defendant's characterization of the transaction as a "refinance", as opposed to a "sale-leaseback", was a misrepresentation meant to "mislead and confuse the plaintiffs into entering into the transaction", and whether "the plaintiffs justifiably relied upon those misrepresentations". (*See id.; see also Bryan v Ramirez*, 2008 NY Slip Op 51781[U] at *2-3.)

Here, assuming the truth of Plaintiffs' allegations, Plaintiffs allege, among other things,

that Gelman and the other defendants, who were aware that Plaintiffs were facing foreclosure, meant to mislead and confuse them into selling their home to defendant Nilo Leon by concealing from Plaintiffs that Plaintiffs would not recover any of the proceeds of the sale.

Defendant Gelman fails to make any showing that the affidavit and exhibits attached to her motion "conclusively" establish that plaintiff has no cause of action (*see Rovello v Orofino Realty Co.*, 40 NY2d at 636), or that "a material fact as claimed by the pleader to be one is not a fact at all" or that there is no significant dispute regarding a material fact claimed by Plaintiffs (*Guggenheimer v Ginzburg*, 43 NY2d at 275.)

Defendants also contend that the fraud causes of action must be dismissed "because it arises from the same facts as the legal malpractice cause of action and does not allege distinct damages". (*See Daniels v Turco*, 84 AD3d 858, 859 [2d Dept 2011] [dismissing fraud causes of action as "duplicative" of legal malpractice cause of action even where legal malpractice action was dismissed as time-barred].) However, contrary to Defendants' contentions, while some of the complained-of acts may also constitute legal malpractice, they are not duplicative of the allegations with respect to fraud and aiding and abetting fraud, since the latter claims allege independent tortious conduct, including facts allowing for an inference that Gelman had entered into an agreement with the other Defendants, that the agreement between Gelman and the other Defendants was concealed from Plaintiffs, and that the purpose of the scheme was to deprive Plaintiffs of the equity in their home for the benefit of Defendants. (*See Vermont Mutual Ins. Co. v McCabe & Mack, LLP*, 105 AD3d 837, 840 [2d Dept 2013]["Where, as here, tortious conduct independent of the alleged malpractice is alleged, a motion to dismiss a cause of action as duplicative is properly denied"]; *Rupolo v Fish*, 87 AD3d at 685-86.)

Accordingly, the branches of defendant Gelman's motion, pursuant to CPLR 3211(a)(7) and CPLR 3016, to dismiss Plaintiffs' causes of action alleging fraud and aiding and abetting fraud, are DENIED.

Defendant Gelman fails to make any showing that she is entitled to an order, pursuant to CPLR 3212, granting her summary judgment dismissal of the Verified Complaint as against her. To the extent that she submits evidence in support of the motion, she fails to show how any of the evidence establishes *prima facie* entitlement to judgment as a matter of law. It is not for the Court to review voluminous exhibits in order to find evidence that supports a party's motion for summary judgment. In any event, the evidence attached to her motion, including her own affidavit, as well as Plaintiffs' interrogatories and deposition testimony, demonstrates the existence of multiple triable issues of fact regarding the facts and circumstances of the transaction at issue, the relationship between defendant Gelman with the other Defendants, the relationship between Gelman and Plaintiffs, the representations made to Plaintiffs by Defendants regarding the transaction, and whether the conduct of the Defendants constitute fraud or aiding and abetting fraud.

Accordingly, the branch of defendant Gelman's motion seeking an order, pursuant to

CPLR 3212, granting her summary judgment is DENIED.

In sum, the branches of defendant Gelman's motion for dismissal of Plaintiff's causes of action alleging legal malpractice and violation of the Real Estate Settlement Procedures Act ("RESPA") are granted, and the branches of her motion seeking dismissal of Plaintiff's causes of action alleging fraud and aiding and abetting fraud are denied. The branch of defendant Gelman's motion seeking summary judgment is denied.

July 2, 2013

Jack M. Battaglia
Justice, Supreme Court

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