

Coleman v Wells Fargo & Co.
2013 NY Slip Op 34021(U)
March 12, 2013
Supreme Court, Westchester County
Docket Number: 61876-2012
Judge: Joan B. Lefkowitz
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SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.
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CONSTANCE COLEMAN and TANAI COLEMAN,

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Plaintiffs,

DECISION & ORDER

-against-

Index No: 61876-2012

WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., WELLS FARGO HOME MORTGAGE, INC., and ANN MARIE SCORZELLI,

Motion Return Date: December 7, 2012
Motion Seq. #1

Defendants.

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The following papers numbered 1 through 28 were read on the **E-filed** motion by defendants for an order dismissing the complaint pursuant to CPLR §§[a][1],[5] and [7].

Notice of Motion, Affirmation (Exhibits A-B).....	1-4
Memorandum of Law in Support.....	5
Affirmation in Opposition (Exhibits 1-20).....	6-26
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Upon reading the foregoing papers it is

ORDERED the motion is granted and the complaint is dismissed.

Plaintiffs sue alleging, among other things, that the defendants committed fraud in connection with a mortgage loan which closed on April 26, 2006.

In their complaint the plaintiffs, a mother and daughter, allege that they attended a seminar entitled *Financing for the Difficult Buyer* sponsored by defendants in November 2005. Shortly after the seminar the plaintiffs submitted an online mortgage application in which the plaintiff, CONSTANCE COLEMAN, stated her income for 2004 was \$56,334.61, and the plaintiff, TANAI COLEMAN, stated her year-to-date 2005 income was \$9,640.51. The defendants approved the mortgage loan and the plaintiffs purchased a home with proceeds of the loan. At the closing the plaintiffs claim they were asked to sign a second mortgage loan

application which falsely stated that CONSTANCE COLEMAN's income was \$88,800.00 per year, and that TANAI COLEMAN's income was \$74,400.00 per year. Less than eighteen months later the plaintiffs could no longer pay the monthly payments called for under the mortgage and they defaulted. In August 2012 the plaintiffs commenced this action asserting causes of action for fraud, negligent misrepresentation, violations of General Business Law §349 and §350, and violations of the federal RICO statute.

Prior to answering the complaint the defendants move for an order dismissing the complaint on the grounds that the action is barred by the statute of limitations, that the complaint fails to state a cause of action and that a defense founded on documentary evidence exists.

STATUTE OF LIMITATIONS

Fraud Causes of Action

"A cause of action based upon fraud must be commenced within six years from the time of the fraud or within two years from the time the fraud was discovered, or with reasonable diligence could have been discovered, whichever is longer. A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence" (*Oggioni v Oggioni*, 46 AD3d 646, 648 [2d Dept 2007] [citations and internal quotation marks omitted]).

Here, defendants established as a matter of law that the fraud causes of action are barred by the statute of limitations. The defendants demonstrated that the fraud alleged by plaintiffs occurred on April 26, 2006, when the plaintiffs claim that the defendants required them to sign a second loan application in which the defendants misrepresented plaintiffs' annual income. Under plaintiffs' theory, the causes of action for fraud and negligent misrepresentation accrued on April 26, 2006, when the plaintiffs could first seek to rescind the transaction based upon the claimed fraud of the defendants. However, the action was not commenced until August 2012, more than six years after the fraud claim arose. Accordingly, defendants established that the fraud causes of action are barred by the six-year statute of limitations.

Plaintiffs argue that defendants should be estopped from asserting the statute of limitations defense.

"Under the doctrine of equitable estoppel, a defendant may be precluded from invoking a statute of limitations defense where it is the defendant's affirmative wrongdoing which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Tampa v Delacruz*, 77 AD3d 910, 911 [2d Dept 2010] [citations and internal quotations omitted]). "A plaintiff seeking to apply the doctrine of equitable estoppel must establish that subsequent and specific actions by defendants somehow kept [them] from timely bringing suit. Equitable estoppel is appropriate where the plaintiff is prevented from filing an action within the applicable statute of limitations due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant" (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006] [citations and internal quotations omitted]). However, "[m]ere evidence of communications or settlement negotiations between [the parties] either before or after the expiration of the limitations period is not, without more, sufficient to establish grounds for waiver or estoppel (*Stubbs v Pirzada*, 55 AD3d 597, 598 [2d Dept 2008]).

Here, the plaintiffs failed to establish the applicability of equitable estoppel. Defendants' denial of wrongdoing does rise to the level of deception or fraud. In any event, the denial did not keep plaintiffs from timely commencing suit (*Putter, supra*), nor did it induce or mislead plaintiffs into commencing an untimely suit (*Jones v Safi*, 58 AD3d 603 [2d Dept 2009]; *Spirig v Evans*, 26 AD3d 425 [2d Dept 2006]).

The plaintiffs also claim that they could not have discovered the fraud until August 26, 2011. The claim is without merit. It is belied by the plaintiffs' affidavits submitted in opposition to the motion. The plaintiff, CONSTANCE COLEMAN, states in paragraph 15 of her affidavit (Exhibit 18), "I looked over the Wells Fargo loan application [the second application signed on April 26, 2006] and noticed two of the three assets listed were not mine, four of the seven liabilities listed were not mine, and the income noted was not mine." The plaintiff, TANAI COLEMAN, states in paragraph 9 of her affidavit (Exhibit 19), "I reviewed the Wells Fargo loan application and noticed no assets listed, three of the seven liabilities listed were not mine, and income noted was not mine." Thus, plaintiffs knew of the alleged misrepresentations on April 26, 2006, more than six

years before they commenced the action.

General Business Law Causes of Action

"General Business Law §349 prohibits deceptive business practices. The elements of such a cause of action are: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act" (*Andre Strishak & Assocs., P.C. v Hewlett Packard* 300 A.D.2d 608, 609 [2d Dept 2002]).

"General Business Law §350 prohibits false advertising. A plaintiff must demonstrate that the advertisement (1) had an impact on consumers at large, (2) was deceptive or misleading in a material way, and (3) resulted in injury" (*Andre Strishak & Assocs., supra* at 609).

The General Business Law causes of action are "governed by a three-year limitations period, which accrues when the plaintiff has been injured by a deceptive trade act or practice in violation the statute" (*Beller v. William Penn Life Ins. Co. of New York*, 8 A.D.3d 310, 314 [2d Dept 2004]).

Here, any injury the plaintiffs may claim arose on April 26, 2006, when they closed a loan based upon an application which they knew contained false information, or in August 2007 at the latest, when they were unable to pay the monthly payment due on the loan. Thus, the causes of action under the General Business Law are barred by the statute of limitations.

RICO Causes of Action

"The statute of limitations for civil RICO claims is four years. A RICO claim is deemed to have accrued when the plaintiff knew or should have known of his injury, regardless of when he or she discovered the underlying fraud" (*House of Spices (India), Inc., v SMJ Services, Inc.*, 2013 NY Slip Op 01236, 2013 WL 692725 [2d Dept 2013]).

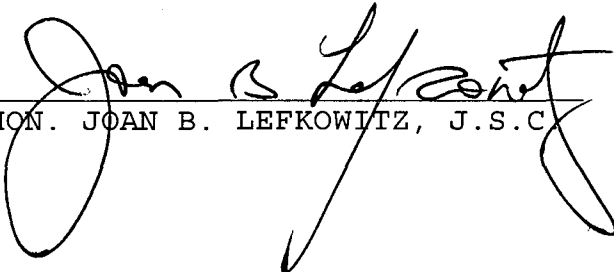
Here, plaintiffs should have known of their injury, if any, on April 26, 2006, the day they claim they were forced to sign a second mortgage application in which their incomes were falsely inflated and their assets falsely reported, or in August 2007 at the latest, when they were unable to pay the monthly payment. In either case the RICO causes of action accrued more than four

years before the plaintiffs commenced the action. Thus, the RICO causes of action are barred by the statute of limitations.

In view of the court's determination that the action is barred by the statute of limitations, it is not necessary to address the defendants' remaining contentions.

E N T E R,

Dated: White Plains, New York
March 12, 2013


HON. JOAN B. LEFKOWITZ, J.S.C.

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