

Estate of Florence Jurzenia v Mims

2014 NY Slip Op 30299(U)

January 24, 2014

Sup Ct, Suffolk County

Docket Number: 13490/2013

Judge: William B. Rebolini

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This opinion is uncorrected and not selected for official publication.

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Estate of Florence Jurzenia, Jean Jurzenia Burden,
as co-Executor of the Estate of Florence Jurzenia,
Edward Jurzenia, as co-Executor of the Estate of
Florence Jurzenia, Silver Sands Motel, Inc., Jean
Jurzenia Burden as Shareholder in Silver Sands
Motel, Inc., Edward Jurzenia as Shareholder in
Silver Sands Motel, Inc., Terry Keefe, as
Shareholder in Silver Sands Motel, Inc. and Walter
H. Burden, III, Edward Jurzenia, individually, and
Jean Jurzenia Burden, individually,

Plaintiffs,

-against-

Jerry M. Mims, Eric Friedlander, Long Island
Capital Management Corp., Somer Estrin, Esq.,
PM Advisory Group, Sol Lopiccolo, Anthony
Galeotafiore, AJG Capital Group Associates, Inc.,
Patricia Chessman, Deborah Loftain, Peter
Shembri, Gail Shembri, Patricia A. Judd, Richard
Olivo, Michael Harrison, Philip Solomon,
Rosemary Solomon, Angela Sivillo, Annemarie
Prokopiak, Annmarie Panagos, Susan Bonitch,
Patricia Warner, Jennifer R. Hain, Elizabeth R.
Reis, The Gross Family Holdings, LLC, The
Wheatley Harbor, LLC, Stanley Weisz and Stanley
Gross, Brightwaters Abstract, Ltd., Titleland
Abstract a/k/a Titleland Guarantee, Inc.,
Affirmative Land Services, Inc., Hamlet Title
Agency, Inc.,

Defendants.

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Attorneys [See Rider Attached]

Motion Sequence No.: 001; MD

Motion Date: 8/27/13

Submitted: 10/9/13

Motion Sequence No.: 002; MD

Motion Date: 10/7/13

Submitted: 10/23/13

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Upon the following papers numbered 1 to 44 read upon these two motions to dismiss the complaint: Notice of Motion and supporting papers, 1 - 6; 15 - 25; Answering Affidavits and supporting papers, 7 - 14; 26 - 36; Replying Affidavits and supporting papers, 37 - 40; 41 - 44; it is

ORDERED that this motion by defendants, Sal LoPiccolo, sued in this action as Sol LoPiccolo and P.M. Advisory Group for an order pursuant to CPLR 3211(a)(7) dismissing the complaint is denied; and it is further

ORDERED that the separate motion by defendants, Philip Solomon and Rosemary Solomon, for an order dismissing the complaint against them is denied; and it is further

ORDERED that movants shall serve their answer to the complaint within twenty (20) days from the date of this order.

Plaintiffs commenced this action by the filing of a summons and complaint on May 20, 2013, to recover damages and for other relief arising out of numerous allegedly fraudulent mortgage transactions. Central to their allegations are claims that defendants fraudulently profited from receipt of mortgage proceeds paid in connection with mortgages burdening plaintiffs' real properties. It is averred that defendants conspired with plaintiffs' former attorney, Jerry M. Mims, to profit from the transactions encumbering numerous properties in which plaintiffs have an interest.

Defendants LoPiccolo and P.M. Advisory Group (LoPiccolo) now move for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against them. A review of the complaint reveals that at the core of plaintiffs' allegations against movants are claims that they accepted funds from the mortgage proceeds without plaintiffs' authority or knowledge.

The defendants Solomon also move for an order dismissing the complaint against them on the ground that an award of summary judgment in their favor in a foreclosure action arising out of a 2009 mortgage given to them by Walter H. Burden III and Jean J. Burden constitutes *res judicata* and precludes the re-litigation of the claims in this action. While the Appellate Division, Second Department found in *Solomon v Burden*, 104 AD3d 839, 961 NYS2d 535 (2d Dept 2013), that plaintiffs had met their initial burden of establishing their *prima facie* entitlement to a judgment of foreclosure by producing the mortgage, the note and evidence of default and that defendants had failed to raise a triable issue of fact, the allegations of fraud against the defendants Solomon in this action involve more than just the 2009 mortgage on properties located at 1000 Cove Circle and 1090 Cove Circle, Greenport, New York. It is alleged in the complaint that the defendant Mims falsely represented to plaintiff Jean Jurzenia Burden (Burden) the nature of a transaction into which she entered with the Solomons in 2008, and that Burden was unaware that she was giving defendant Solomon a mortgage on her property located at 1400 Silvermere Road, Greenport, New York. It is also alleged that Burden suffers from ocular histioplasmiasis, a serious eye disease that affects her vision, and that she was unable to read the documents that she signed at the time. In addition, it is

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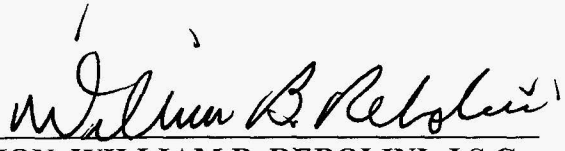
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alleged in the complaint that Burden was threatened and coerced through use of force into signing the 2008 mortgage. Furthermore, it is asserted that the mortgage funds totaling \$200,000.00 were disbursed to Mims, and that Burden ultimately received only \$23,217.06 from the 2008 mortgage. It is also claimed that Mims made arrangements with the defendant Solomon to enter into another mortgage transaction with Burden to encumber the Cove Circle properties. Burden claims, however, that it was not her intention to secure the mortgage with the property located at 1090 Cove Circle, and that she was assured by defendants Mims, Solomon and Estrin that the 2009 mortgage would not encumber that parcel. It is also claimed that the 2009 mortgage is void *ab initio* on the ground that it alleged was executed by Burden for Walter H. Burden III upon a forged power of attorney. Thus, the complaint in this action does not involve one isolated mortgage transaction in 2009 but, instead, describes a series of transactions that are alleged to have involved fraud by defendants.

While plaintiffs have set forth facts regarding the underlying mortgage transactions in sufficient detail to give notice to the defendants of the nature of the claims against them, plaintiffs also assert that facts essential to justify opposition may exist but cannot be stated presently (*see* CPLR 3211[d]). In particular, plaintiffs claim that they have been unable to obtain documentation to identify how the proceeds from the various mortgages on their properties were distributed. Furthermore, it is plaintiff Burden's claim that she was coerced by her attorney Mims, who has since been suspended from the practice of law (*see Matter of Mims*, 102 AD3d 238, 958 NYS2d 52 [2d Dept 2012]), to sign documents without having been given sufficient information to understand the underlying transactions. Under the particular circumstances of this case, dismissal of the claims against movants at this stage is inappropriate, as plaintiffs have set forth a reasonable basis to believe that with additional discovery they will be able to develop facts sufficient to establish the elements of their claims of fraud against the defendants (*see Lemle v Lemle*, 92 AD3d 494, 939 NYS2d 15 [1st Dept 2012]; *see also Giunta's Meat Farms, Inc. v Pina Constr. Corp.*, 89 AD3d 799, 932 NYS2d 523 [2d Dept 2011]).

Dated:

2/24/2014



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION NON-FINAL DISPOSITION

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