

**Gass v Jennifer C.E. Ajah & Assoc., P.C.**

2014 NY Slip Op 30318(U)

January 23, 2014

Supr Ct, Queens County

Docket Number: 13160/10

Judge: Janice A. Taylor

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

-----x

JAMES GASS & MARTHA GASS,  
Plaintiff(s),

Index No.:13160/10

Motion Date:7/01/13

- against -

Motion Cal. No.: 52

Motion Seq. No: 8

JENNIFER C.E. AJAH & ASSOCIATES, P.C.,

Defendant(s).

-----x

The following papers numbered 1 to 9 read on this motion by defendant for summary judgment and dismissal of all claims against it pursuant to CPLR § 3212.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1-4
Plaintiffs' Memorandum of Law in Opposition-Exhibits-Service.....	5-7
Defendant's Reply Memorandum of Law-Exhibit-Service...	8-9

Upon the foregoing papers it is **ORDERED** that the motion is determined as follows:

In or about January of 2001, the plaintiffs in this action executed a mortgage with Country-Wide Home Loans, Inc. d/b/a American Wholesale Lenders (Countrywide) in the principal sum of \$120,000.00. The mortgage was held on their residence located at 243-18 136<sup>th</sup> Avenue, Rosedale, New York. In or about December 2004, Countrywide informed plaintiffs that they were in default on their mortgage payments. A foreclosure proceeding was filed against them in January 2005 seeking the immediate sum of \$108,368.19.

Plaintiffs sought the advise of defendant Jennifer C.E. Ajah & Associates, P.C. In or about February 2005, plaintiffs met with Jennifer Ajah, a principle of defendant Jennifer C.E. Ajah & Associates, P.C. In that meeting plaintiffs maintain that they requested Ajah's assistance in defending against the foreclosure proceedings brought by Countrywide, but admitted that they also engaged defendant's services to find "... an alternate means to

save the property." (Defendant's Exhibit C, deposition James Gass, p. 38, lines 112-22).

Instead, according to plaintiffs, Jennifer Ajah made a series of material misrepresentations and omissions to induce them to execute a reverse mortgage with a third-party lending institution, namely Wells Fargo Bank, N.A. (Wells Fargo). In a complaint filed on May 24, 2010, and a subsequent supplemental summons and amended complaint filed on June 9, 2010, plaintiffs make claims including fraud (first cause of action); legal fraud (second cause of action); constructive fraud (third cause of action); fraudulent concealment by fiduciary (fourth cause of action); breach of fiduciary duty (fifth cause of action); and finally a claim for restitution of \$5,500.00 paid by plaintiffs to defendant, Jennifer C.E. Ajah & Associates, P.C., for representation that they claim they didn't receive (sixth cause of action).

In support of the first four claims plaintiffs allege:

a) that defendant, by Jennifer Ajah, intentionally misrepresented to them that a reverse mortgage was their only option to prevent foreclosure;

b) that defendant, by Jennifer Ajah, intentionally omitted the information that the principal and interest on the reverse mortgage would substantially deplete the plaintiffs' equity in their home;

c) that defendant, by Jennifer Ajah, intentionally omitted the information that the reverse mortgage would cost plaintiffs an additional \$65,848.52 in closing costs and fees;

d) that defendant, by Jennifer Ajah, intentionally omitted that plaintiffs would pay closing costs and fees from the proceeds of the reverse mortgage; and

e) that defendant, by Jennifer Ajah, omitted the information that Wells Fargo & Co. would compensate defendant for plaintiffs purchase of the reverse mortgage.

Plaintiff alleged further in support of the first, second and third causes of action that defendant, by Jennifer Ajah, intentionally represented to plaintiffs that it would represent plaintiffs in the foreclosure proceeding. On the fourth cause of action plaintiffs added the allegation that defendant, by Jennifer Ajah, intentionally omitted [sic] to inform plaintiffs of the option of defending against the foreclosure proceeding. Finally, plaintiffs allege in support of the fifth cause of action that defendant, by Jennifer Ajah, committed a breach of fiduciary duty by simultaneously representing plaintiffs in their foreclosure and

by receiving compensation from a third-party for the reverse mortgage executed by plaintiffs.

In support of its motion for summary judgment defendant supplied numerous exhibits including deposition testimony of plaintiff James Gass, defendant's, by Jennifer Ajah's deposition testimony, evidence that defendant filed a notice of appearance and answer in the foreclosure proceeding, the closing statement on the reverse mortgage, a letter advising plaintiffs to make an appointment to see a credit counselor and a reverse mortgage counselor, a HUD statement, and the letter providing Countrywide's counsel with a consent to discontinue form which Countrywide did execute.

Plaintiff James Gass' testimony reveals that he asked defendant to represent him and defend against the foreclosure proceedings brought by Countrywide, and (emphasis added) to explore alternative payment options to save their home. It is undisputed that plaintiffs signed the reverse mortgage agreement and attended the closing. Defendant denies receiving compensation from Wells Fargo for "steering" plaintiffs or anyone else to them to obtain a reverse mortgage and plaintiffs present no evidence to the contrary except James Gass' "suspicion."

Defendant presented evidence that Jennifer Ajah instructed plaintiffs to seek credit counseling and that such was required as part of the reverse mortgage process. Plaintiffs don't deny receiving this instruction from defendant, but claim they never received the counseling. The person who was to have provided the counseling pursuant to defendant's instructions was "too busy" and proclaimed he (plaintiff) didn't really need the instruction. Mr. Gass did not inform defendant of this circumstance. He provided defendant with a signed copy of the certificate attesting to his attendance at such counseling, instead.

When plaintiff James Gass initially met with defendant's principle, he told her of his efforts, on his own, to arrange a loan modification with Countrywide. He informed defendant that Countrywide declined to offer them any new payment options on the grounds that he had insufficient income. Plaintiff maintains that by the time he met with defendant his household income had increased, but he never informed defendant of this information because "... she didn't ask." (Defendant's Exhibit C, p. 71, lines 13-16). Plaintiff James Gass also admitted that he met with a representative from Wells Fargo Bank whose job was to explain the concept of the reverse mortgage. Plaintiff maintained that the Wells Fargo representative did not explain. Plaintiff also offered the certificate of credit counseling to him, knowing that the certificate was necessary to receive the reverse mortgage.

Plaintiffs allege that defendant intentionally omitted information that the costs of the reverse mortgage would be taken from the proceeds at the time of closing including the payoff of the Countrywide mortgage, the payoff of the *second mortgage* (emphasis added) from Beneficial (approximately \$42,000.00) as well as other costs. While the exact amounts may not have been provided to plaintiffs prior to the closing date, it is undisputed that this information was provided to them at the closing. (See Defendant's Exhibits N, O). Moreover, plaintiffs could not reasonably claim that they were unaware of the approximate sum owed to Countrywide and Beneficial prior to the closing date.

It is also undisputed that plaintiffs were not forced to execute the reverse mortgage agreement, attend the closing, or for that matter go forward with the closing. Plaintiffs do not dispute that they were given notice of their three day right of rescision, but failed to exercise it.

Plaintiffs continue to insist that they did not want a reverse mortgage, but when asked how he planned to pay under any other payment option plaintiff answered that was for the lawyer to figure out. He wanted to stop Countrywide from taking his house and he was nervous and afraid that he and his wife would be out on the street. (Defendant's Exhibit C, p. 50).

Defendant, by Jennifer Ajah, testified that she did explain plaintiffs options to them, but that it was her opinion, under the circumstances that the reverse mortgage was the only available option to plaintiffs that would allow them to stay in their home. She expressed this opinion to plaintiffs.

Before moving forward on the reverse mortgage defendant did file and serve a Notice of Appearance and Answer on behalf of plaintiffs in the foreclosure proceeding brought by Countrywide. (See Defendant's Exhibit L).

As, a result of having gone forward with the reverse mortgage, plaintiffs first and second mortgages were paid off and they remained in their home without further mortgage payments.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562)." (*Santanastasio v Doe*, 301 AD2d 511 [2003]).

It is also true that "... that burden can be satisfied by a tender of deposition testimony evidencing the plaintiff's inability to prove an element of his or her cause of action

against the defendant (*see, e.g., Sellars v Redondo*, 270 AD2d 407; *Strowman v Great Atl. Pac. Tea Co.*, 252 AD2d 384; *Wright v Rite-Aid of N.Y.*, 249 AD2d 931; *Bortle v Pron. Co.*, 203 AD2d 779, *lv denied* 84 NY2d 803).” (*Wiwigac v Snedaker*, 282 AD2d 801, 803 [2001]).

In the *Practice Commentaries*, by David D. Siegel, *McKinney’s*, CPLR § 3212:1, p. 10 the author cites *Wagner v Zeh* (45 Misc 2d 93, 256 NY2d 227 [1965]; *affd* 26 AD2d 729 [3d Dept 1966]) for the well established proposition that granting summary judgment is a drastic remedy that “... should not be granted where there is any doubt as to the existence of ... any material and triable issue(s) of fact.” (*Id.*) Siegel goes on to note that the court in *Wagner* also expresses the following: “... on the other hand, the court should not hesitate to give this remedy the full purpose for which it is intended. Given the statutory sanction, it is the duty of the court, not to test the sufficiency of the pleadings, but rather to go behind them to the very substance of the action and *distinguish matters of law from matters of fact, material issues from immaterial ones* (emphasis added).” (*Id.*, at 94).

Even viewing the evidence in a light most favorable to plaintiffs, as the court must in this summary judgment motion to dismiss (*Weiss v Garfield*, 21 AD2d 156 [1964]), plaintiffs have failed to overcome defendants *prima facie* entitlement to summary judgment as a matter of law.

As noted, there is a claimed “fraud” basis in each of plaintiffs first four causes alleged. There is simply no factual proof offered by plaintiffs that defendant made any false or misleading statements in her representation of plaintiffs, with an intention to induce plaintiffs to execute a reverse mortgage, or that they suffered any damages as a result.

Borrowing from the analysis of attorney malpractice claims the court notes that defendant offered plaintiffs the opinion that a reverse mortgage was their best option in saving their home. “Attorneys are free to act in a manner that is ‘reasonable and consistent with the law as it existed (emphasis added) at the time of the representation’ without exposing themselves to liability for malpractice (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]; *see Noone v Steiglitz*, 59 AD3d 505; 507 [2009]; *Iocovello v Weingrad and Weingrad*, 4 AD3d 208, 208 [2004]).” (*Bau v Purcell & Ingrao, P.C.*, 99 AD3d 843, 847 [2012].) Plaintiffs’ efforts to recharacterize, and reallege that defendant’s offering of an opinion, and plaintiffs acceptance and acts in furtherance of that opinion constituted actionably false misrepresentations simply falls short. Repeating the allegations will not meet the burden of a party opposing summary judgment. (*Marinelli v Shifrin*, 260 AD2d 227, 228 [1999]). Moreover, plaintiffs have failed to show that under the circumstances as presented the opinion offered

by defendant "that a reverse mortgage was the only option to plaintiffs to prevent foreclosure" was indeed false.

Defendant has demonstrated that plaintiffs were provided with, were in fact required and advised by defendant to attend counseling to provide them with, information they needed including how a reverse mortgage works. Defendant, by Jennifer Ajah, states that it explained the reverse mortgage concept to plaintiffs. Plaintiff, James Gass, admits that he never informed defendant that he didn't actually receive the counseling. Based on plaintiffs' own testimony plaintiffs cannot prove that defendant intended to omit or misrepresent material facts regarding the reverse mortgage. As already noted, plaintiffs acknowledge receiving that information at closing.

The most damning claim by plaintiffs was that defendant received compensation from Wells Fargo for "steering" them to accept a reverse mortgage. Defendant denies this allegation and, in response, plaintiff only states he believed she did. (Conclusions, expressions of hope or *unsubstantiated allegations* [emphasis added] are not enough to overcome a *prima facie* motion for summary judgment, *Corcoran Group v Morris*, 107 AD2d 622, 624 [1985]).

Plaintiffs' cause of action for breach of a fiduciary duty must likewise fail and be dismissed, where the claim is "... predicated on the same allegations and seek(s) the same relief ... as sought in the other cause(s) of action." (*Estate of Nevelson v Carro, Spanbrook, Kaster and Ciuffo*, 290 AD2d 399, 400 [2002]).

Finally, it is well-settled that a claim that defendant violated "... 22 NYCRR § 1215.1, in and of itself is not a ground for or disgorgement or refund of already paid attorneys fees." (*Markard v Markard*, 263 AD2d 470 [1999]).

Accordingly, it is **ORDERED** that defendant's motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the clerk of the court upon submission of an appropriate bill of costs; and it is further

**ORDERED** that the clerk is directed to enter judgment accordingly.

Dated: January 23, 2014

---

**JANICE A. TAYLOR, J.S.C.**