

Sander v Chase

2014 NY Slip Op 30993(U)

April 14, 2014

Supreme Court, New York County

Docket Number: 653486/12

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

PRESENT: MANUEL J. MENDEZ PART 13
Justice

MARIE SANDER, Plaintiff, INDEX NO. 653486/12
-Against- MOTION DATE 03-12-2014
CHASE, Defendant. MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion for a settlement conference and cross-motion for summary judgment and to dismiss for failure to state a cause of action.

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1-2
Answering Affidavits — Exhibits _____ | 3-4
Replying Affidavits _____ | 5

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion for a settlement conference is denied. The cross motion for summary judgment and to dismiss for failure to state a cause of action is granted, the complaint is dismissed.

Plaintiff brings this action against the defendant asserting four causes of action. The summons and complaint was filed on October 4, 2012. There is no affidavit of service to prove when the same was served on the defendant. On January 3, 2013 defendant filed an Answer to the summons and complaint. Plaintiff now moves for an order scheduling a settlement conference, defendant cross-moves for summary judgment for failure to state a cause of action and to strike the complaint for plaintiff's failure to provide discovery.

This action is not a foreclosure action, but was commenced by plaintiff alleging, although without specificity or particularity, fraud, conspiracy, malicious prosecution and abuse of process.

The relevant facts arise from a mortgage executed by plaintiff in 2002 with Greenpoint Mortgage Funding Inc., against real property situated at 56 Touissant Avenue, Yonkers, N.Y. 10710 to secure a loan in the amount of \$262,500. Subsequently in 2004 plaintiff executed a second mortgage against the same property, securing a loan in the amount of \$83,536.00. On the same day the two loans were consolidated to form a single mortgage in the amount of \$340,000. Fannie Mae acquired the mortgages and is the current investor of the loan. Chase Home Finance, LLC became the servicer of the loan in 2005. Plaintiff has defaulted in payment on the loan.

On May 1, 2011 JP Morgan Chase Bank, N.A. (Hereinafter "Chase"), became the successor by merger to Chase Home Finance, LLC. On July 19, 2012 Chase mailed plaintiff a ninety(90) day pre-foreclosure notice and an Acceleration Warning/Notice of

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Intent to Foreclose on July 24, 2012. Plaintiff then commenced this action.

Despite being served with discovery requests plaintiff has failed to respond. There is no foreclosure action pending in this or any other county. Plaintiff now moves for a settlement conference. Defendant Cross-moves for summary judgment , to dismiss the complaint for failure to state a cause of action and to strike the complaint for plaintiff's failure to comply with discovery demands.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

In order to recover for fraud, plaintiff must show a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury. These elements of fraud must be pleaded in detail and the damages incurred by reason of the fraudulent conduct must be actual pecuniary loss (CPLR § 3016(b); Pope v. Saget, 29 A.D. 3d 437, 817 N.Y.S. 2d 1 [1st. Dept. 2006]).

"To prevail on a claim for fraud a plaintiff must show that it actually relied on the purported misrepresentation and that his reliance was reasonable and justifiable. A party cannot claim reliance on a misrepresentation when he or she could have discovered the truth with due diligence (KNK Enters., Inc., v. Harriman Enterprises, Inc., 33 A.D. 3d 872, 824 N.Y.S. 2d 307 [2nd. Dept. 2006]).

Plaintiff fails to plead the elements of fraud in detail as such that portion of the complaint is dismissed.

To prove a violation of GBL § 349 a plaintiff must demonstrate the following three elements: (1) the challenged act or practice was consumer-oriented, (2) It was misleading or deceptive in a material way, and (3) the plaintiff suffered injury as a result of the deceptive act. The challenged act may be a representation or an omission, must be conduct directed towards consumers, and must be conduct that is likely to mislead a reasonable consumer acting under reasonable circumstances (Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20 [1995]). Section 349 does not reach private contract disputes unique to the parties and, to apply, the act must include conduct that will impact the public at large.

To the extent its complaint alleges a violation of GBL §349 it fails to state a cause of action as it does not apply to a dispute unique to plaintiff and defendant, as such that portion of the complaint is dismissed.

The commencement of a Civil Action alone does not give raise for a cause of action for malicious prosecution (*Hornstein v. Wolf*, 109 A.D.2d 129, [2nd. Dept. 1985]). To demonstrate malicious prosecution plaintiff must set forth (the commencement of a civil action, (2) that the civil action was terminated in favor of the plaintiff, (3) the party lacked probable cause to commence the civil action, (4) that the action was commenced with malice and (5) damages.

Similarly an abuse of process claim requires a party to demonstrate : (1) regularly issued process compelling the performance or forbearance of some prescribed act, (2) the person activating the process must have been motivated to do harm without economic or social excuse or justification and (3) the person activating the process must be seeking some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of process.

Plaintiff has failed to plead malicious prosecution or abuse of process. As chase alleges that it is the Servicer of Plaintiff's mortgage and that she is in default since 2005, it is entitled to commence a foreclosure action, as permitted under the terms of the loan document, to mail default and/or acceleration notices and warnings. The commencement of one foreclosure action against the plaintiff is not malicious prosecution or abuse of process.

"Although an independent cause of action for Civil conspiracy is not recognized in New York State, a plaintiff may plead the existence of a conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those actions were part of a common scheme. The plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt act in furtherance of the agreement. A bare conclusory allegation of conspiracy is usually insufficient."(*Faulkner v. City of Yonkers*, 105 A.D.3d 899, 963 N.Y.S.2d 340 [2nd. Dept. 2013]).

Plaintiff's complaint contains a bare conclusory allegation of conspiracy and is insufficient.

Chase has come forth with admissible evidence to show its entitlement to judgment as a matter of law (see Affidavit of Brandie S. Watkins with exhibits showing mortgages and consolidation of loans). Plaintiff has failed to rebut Chase Prima Facie case of entitlement to judgment as a matter of law and has failed to raise an issue of fact.

Plaintiff's complaint fails to state a cause of action. Under CPLR §3217(a)(7) a court may dismiss a complaint for failure to state a cause of action. The court's role on this motion is to determine when a cause of action is stated within the four corners of the complaint (*Frank v. Daimler Chrysler Corp.*, 292 A.D. 2d [1st. Dept. 2012]); *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y. 2d 409 [2001] a court must search the complaint for a cognizable legal theory). Although on a motion to dismiss plaintiff allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss (*Godfrey v. Spano*, 892 N.Y.S. 2d 272 [2009]). Plaintiff's complaint is lacking in factual specificity and fails to state a cause of action.

Defendant chase having made a prima facie case of entitlement to judgment as a matter of law and plaintiff's complaint failing to state a cause of action, this court declines to consider defendant's motion to strike for plaintiff's failure to provide discovery.

Accordingly, it is ORDERED, that the motion for a settlement conference is denied, and it is further

ORDERED that the cross-motion for summary judgment and to dismiss for failure of the complaint to state a cause of action is granted, and it is further

ORDERED that the complaint is dismissed.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: April 14, 2014


Manuel J. Mendez
J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE