

Sands v 1st Republic Mtge. Bankers, Inc.

2014 NY Slip Op 31081(U)

March 11, 2014

Sup Ct, Bronx County

Docket Number: 308452/11

Judge: Sharon A.M. Aarons

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

SWANNA SANDS,
Plaintiff,
-against-

Index No. 308452/11
Present: Hon. Sharon A. M. Aarons
DECISION and ORDER

1ST REPUBLIC MORTGAGE BANKERS, INC.,
CITIMORTGAGE , INC.,HSBC BANK, USA,
KAI WILLIAM CHEN, ESQ., JESSICA
TERRANOVA, BERMAN, HENOCH, PETERSON & PEDDY,
P.C., THE SEAPORT TITLE AGENCY LTD., SARA Z.
BORISKIN, LENDERS ABSTRACT & SETTLEMENT,
FESTIVE HOMES, LTD., U.S. HOUSING AND URBAN
DEVELOPMENT SECRETARY, JOHN REIMER, and
JOHN/JANE DOES,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

| Papers | Numbered |
|--|----------------|
| Notice of Motion and Affidavits Annexed | 1, 1A |
| Affidavit in Opposition | 2, 3, 4 |

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed | 5 |

Upon the foregoing papers, the foregoing motions are consolidated for disposition and decided as follows:

Plaintiff pro se moves pursuant to CPLR 5015 (a) (3), (5) to vacate the prior orders of this court, “especially its last order of 10/23/2102.” By separate motion (enumerated as 1A above), plaintiff pro se moves “that this court turn over to the movant the entire contents of the bond and undertaking of the man, John Barone, acting and d/b/a Judge John Barone, for irreparably damaging the affiant.” Defendants The Seaport Title Agency Ltd. (“Seaport”) and the U.S. Housing and Urban Development Secretary (“HUD”) submit written opposition.

By separate motion (enumerated as 5 above), defendant HUD moves to dismiss the complaint against it pursuant to CPLR 3211 (a) (2) and (7). Plaintiff appeared at the call of the calendar on January 6, 2014, and orally opposed the motion, but failed to submit written opposition.

Plaintiff's motions are denied, and defendant HUD's motion is granted.

This action concerns property owned by the plaintiff located at 1808 Undercliff Avenue in Bronx County, on which she obtained a mortgage from defendant 1st Republic Mortgage Bankers, Inc., which was later assigned to Citimortgage, Inc.¹ By summons and complaint dated September 12, 2011, plaintiff pro se seeks to quiet title to the property, alleging that she "was induced to create an unsolicited self-financing credit instrument (mortgage note)," that the defendant banks have no standing to assert an interest in the premises because the gold assets of the People of the United States were confiscated, and that the assignment of the mortgage was a "sham." As to HUD, the complaint merely states that HUD has a claim against the property, and demands that it pay restitution for participating in acts of "trespassory deception."

On a prior motion, in a decision and order dated October 23, 2012, the Hon. John Barone of this Court granted the motion of defendants Jessica Terranova, Sara Z. Borsikin, Berman, Henoeh, Peterson & Peddy, P.C., and Seaport dismissing the complaint pursuant to CPLR 3211. The request by HUD made at that time for judgment dismissing the complaint pursuant to CPLR 3211 was not considered as not supported by a notice of motion or cross-motion. In view of the present allegations that Justice Barone is "an advocate for the plaintiffs," and has acted "in a manner violative of the Federal Constitution," he has recused himself from this action. (Order dated December 9, 2013.)

In support of her motions, plaintiff submits only the prior decision of Justice Barone dated

¹A related foreclosure action concerning the same real property is pending in this Court. *Citimortgage Inc. v. Swanna Sands*, Index No. 380667/2009. The foreclosure complaint alleges that HUD holds a subordinate mortgage on the property. The most recent order in that action provides that the plaintiff may proceed to foreclosure. Order of the Hon. Robert E. Torres, dated May 10, 2011.

October 23, 2012. The supporting affidavits by plaintiff consist entirely of accusations that Justice Barone acted unlawfully, or that he acted arbitrarily and capriciously in depriving her of discovery and a jury trial, without advancing any cognizable argument to vacate the prior order.

In opposition, defendant Seaport submits a copy of Justice Barone's order dated October 23, 2012, served with notice of entry on November 8, 2012, as well as a decision in *2720 Realty Co. v. Williams* (N.Y.L.J. 1202570222814, at *1, L&T 077392/12 [Civil Court, Kings County 2012]), dealing with self-declared "sovereign citizens." Defendant maintains that no basis has been advanced to vacate Justice Barone's prior order.

In opposition, and in support of its separate motion for dismissal, defendant HUD submits a copy of the summons and the verified complaint in this action. Defendant HUD asserts that there is no factual allegation on plaintiff's part to support any allegation that HUD induced the plaintiff to execute a mortgage, or acted in any manner to assist the other defendants to falsely assign that mortgage, or in any way perpetrated a fraud. In addition, HUD asserts that as the plaintiff failed to allege the interest of the United States in her complaint, she failed to comply with 28 U.S.C. 2410 (b) ("The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States...."), which HUD asserts deprives this Court of subject matter jurisdiction. HUD accordingly seeks dismissal based on failure to state a cause of action, and lack of subject matter jurisdiction.

With respect to the motions by the plaintiff, no basis has been stated to vacate Justice Barone's prior order under CPLR 5015 (a) (3) (fraud, misrepresentation, or other misconduct of an adverse party) or (a) (5) (reversal, modification or vacatur of a prior judgment or order upon which it is based). CPLR 5015 (a) (3) deals with fraud by an adverse party, which has not been alleged here. CPLR 5015 (a) (5) deals with situations where one order has to be reversed or modified because it is based on a prior order which itself was reversed, modified or vacated – again, a situation not present here. If the plaintiff is asserting that Justice Barone engaged in fraud or misconduct, there is no evidence in support of it, nor

any circumstance which would suggest even an appearance of impropriety.

To the extent that the motion may be viewed as one seeking reargument, it is clear that the prior order was correctly decided. Plaintiff has not shown that she has a viable cause of action against any of the defendants as to whom dismissal was granted.

With respect to defendant HUD's motion to dismiss,"[o]n a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Breytman v. Olinville Realty, LLC*, 54 A.D.3d 703, 703-704, 864 N.Y.S.2d 70, 71 [2d Dept. 2008]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 A.D.3d 34, 38, 827 N.Y.S.2d 231, 234 [2d Dept. 2006]). Giving the plaintiff every favorable inference, she has simply not asserted any facts which would suggest that has any cause of action against HUD. It is thus not necessary to decide whether the failure to allege the interest of the United States divests the Court of subject matter jurisdiction.

Accordingly, plaintiff's motions are denied.

Defendant HUD's motion is granted, and the complaint is dismissed as to defendant U.S. Housing and Urban Development Secretary. It is hereby

ORDERED that defendant U.S. Housing and Urban Development Secretary, serve a copy of this order on all parties who have appeared herein.

Dated: March 11, 2014


SHARON A.M. AARONS. J.S.C.