

**Gambale v Gaio Garage Indus., Inc.**

2014 NY Slip Op 31520(U)

June 6, 2014

Sup Ct, Suffolk County

Docket Number: 4520-13

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 5/9/14  
SUBMIT DATE: 5/23/14  
Mot. Seq. # 001 - MG  
CDISP: YES

-----X	:	
MICHELE GAMBALE, as Administratrix of the	:	MAZZEI & BLAIR, ESQS.
Estate of PATRICK THOMPSON, Deceased and	:	Attys. For Plaintiffs
MICHELE GAMBALE, individually,	:	9-B Montauk Hwy.
	:	Blue Point, NY 11715
Plaintiffs,	:	
	:	BRADFORD J. MARTIN, ESQ.
-against-	:	Attys. For Defendants
	:	434 New York Ave.
GAIO GARAGE INDUSTRIES, INC.,	:	Huntington, NY 11743
BUFFOLINO HOLDINGS, LLC and ANGELO	:	
BUFFOLINO,	:	
	:	
Defendants.	:	
-----X	:	

Upon the following papers numbered 1 to 9 read on this motion for summary judgment  
\_\_\_\_\_ ; Order To Show Cause/Notice of Motion and supporting papers: 1 - 4 ; Notice of Cross Motion and  
supporting papers \_\_\_\_\_ ; Answering papers 5-7 ; Reply papers 8-9 ; Other \_\_\_\_\_ ;  
(and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by the defendants for summary judgment dismissing the  
complaint served in this action to recover monies due under the terms of two separate notes and  
mortgages is considered under CPLR 3212 and 3211(a)(1) and is granted.

The plaintiff commenced this action to recover monies allegedly due under the terms of two  
separate notes that were executed by the defendants in May of 2001 in connection with the purchase  
of real property for \$800,000.00 and the garage business operated therefrom from the plaintiff's  
deceased father in the amount of \$200,000.00. The corporate defendants are alleged to have  
guaranteed payment of the separate notes executed by the Buffolino defendants. In addition, the notes  
were allegedly secured by separate purchase money mortgages on the subject real property. The  
complaint charges the defendants with liability for their failures to pay amounts due under the terms  
of each note and with a "fraudulent withholding" of the monies due to the plaintiff's decedent.

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By the instant motion (#001), the defendants seek summary judgment dismissing the plaintiff's complaint. The motion is premised upon the defendants' production of a written satisfaction of the \$200,000.00 mortgage duly subscribed to by the plaintiff's decedent on May 25, 2004 that was recorded in the office of the County Clerk on September 22, 2004. The defendants further rely upon a written satisfaction of the \$800,000.00 mortgage that was duly subscribed by the plaintiff's decedent on November 12, 2009, and recorded in the office of the County Clerk on December 18, 2009. Finally, the defendants rely upon a November 12, 2009 general release executed by the plaintiff's decedent in which he and his executors, administrators, successors and assigns released the Buffolino defendants from all claims for recovery of the \$800,00.00 mortgage debt.

The plaintiff opposes the motion on both procedural and substantive grounds. The plaintiff first claims that the defendants' failure to attach the pleadings served herein warrants the denial of this motion. Second, the plaintiff asserts that issues of fact regarding the payment of all amounts due are evident in the record. Such evidence includes the plaintiff's production of a writing entitled Certificate of Mortgage Reduction dated February of 2008 in which the plaintiff's decedent acknowledged receipt of a \$150,000.00 payment towards the \$800,00.00 mortgage note and the absence of proof of the defendants' payment of remaining amounts due as modified by this writing. The third and final ground advanced to support a denial of the motion is premised upon the plaintiff's claim that facts essential to justify opposition are unavailable to the plaintiff by reason of the defendants' failure to disclose documents.

For the reasons stated below, the defendants' demands for summary judgment dismissing the plaintiff's complaint are granted.

A motion for summary judgment may be predicated upon a ground enumerated in CPLR 3211(a) including subparagraph 1 thereof which is dependent upon documentary proof (*see III-38 Mgt. Corp. v Benitez*, 107 AD3d 862, 968 NYS2d 131 [2d Dept 2013]). To succeed on such a motion, the movant must establish that the documentary evidence that forms the basis of the motion resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2012]; *Choudhary v First Option Title Agency*, 107 AD3d 657, 967 NYS2d 86 [2d Dept 2013]; *Bua v Purcell & Ingrao, P.C.*, 99 AD3d 843, 952 NYS2d 592 [2d Dept 2012]; *Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable in a manner like judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Documents compiled by the parties such as affidavits, notes, accounts, depositions, correspondence and the like generally do not constitute documentary evidence within the ambit of CPLR 3211(a)(1) (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]; *Fontanetta v Doe*, 73 AD3d 78, *supra*).

Proof of payment of a debt represented by a promissory note, secured or not, is a defense to claims for recovery of sums due under the terms of the note which sound in contract, implied or quasi contract, or unjust enrichment (*see FGB Realty Advisors v Parisi*, 265 AD2d 297, 298, 696 NYS2d 207 [2d Dept 1999]). Unsubstantiated allegations that documents evidencing the full payment of a note or its release or satisfaction are not reliable and suggestions that the underlying transaction may have been tainted by fraudulent acts are insufficient to defeat a motion for summary judgment that is

based upon the defense of payment (*see Hellas Fos, Inc. v Russo*, 84 AD3d 1166, 924 NYS2d 447 [2d Dept 2011]).

A cause of action alleging fraud must be pleaded with the requisite particularity required by CPLR 3016(b). “[T]he purpose underlying [CPLR 3016(b)] is to inform a defendant of the complained-of incidents” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 883 NYS2d 147 [2009]). General allegations that a defendant entered into a contract with the intent not to perform are insufficient to support a fraud claim (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318, 639 NYS2d 283 [1995]; *Dune Deck Owners Corp. v Liggett*, 85 AD3d 1093, 927 NYS2d 125 [2d Dept 2011]). This result is derived from the general rule that fraud cannot be predicated upon statements that are promissory in nature at the time they are made and which relate to future actions or conduct (*see Cerabono v Price*, 7 AD3d 479, 775 NYS2d 585 [2d Dept 2004]; *Brown v Lockwood*, 76 AD2d 721, 731, 432 NYS2d 186 [2d Dept 1980]). In addition, claims of fraud which are merely duplicative of breach of contract claims are not actionable (*see Refreshment Mgt. Serv., Corp. v Complete*, 89 AD3d 913, 933 NYS2d 312, [2d Dept 2011]). “[A] cause of action will be found to sound in tort rather than in contract *only* when the legal relations binding the parties are created by the utterance of a falsehood, with fraudulent intent and reliance thereon, and the cause of action is entirely independent of contractual relations between the parties” (*Lee v Matarrese*, 17 AD3d 539, 793 NYS2d 457 [2d Dept 2005], quoting *Hoydal v City of New York*, 154 AD2d 345, 346, 545 NYS2d 823 [2d Dept 1989]).

Here, the defendants established, by due proof in admissible form, their possession of the legal defense of payment as evidenced by the two duly recorded satisfactions of mortgages executed by the plaintiff’s decedent, each of which are binding upon the plaintiff in her capacity as Administrator of the estate of deceased father. The court further finds that the defendants’ moving papers included a prima facie showing, albeit minimally, that the plaintiff’s Fifth and Sixth causes of action wherein the defendants are charged with having “fraudulently withheld payment of the purchase price” of both the company stock and the real property from the plaintiff’s decedent are lacking in merit due to legal insufficiency as no false statements nor breach of any duty independent of the parties contracts were alleged in the complaint.

It was thus incumbent for the plaintiff to submit, by due proof in admissible form, documentation that genuine questions of fact exist which preclude the granting of the summary judgment requested by the defendants (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 525 NYS2d 793 [1988]). Review of the opposing papers submitted by the plaintiff reveals that no such questions of fact were raised.

Rejected as unmeritorious is the plaintiff’s claim that the defendants’ motion is fatally defective since the supporting papers did not include a copy of the complaint served and filed herein by the plaintiff. However, this technical defect was cured by the subsequent paper submissions of the plaintiff and thus, there is no basis for a denial of the motion on the first ground advanced by the plaintiff in her opposing papers (*see Carey v Five Bros., Inc.*, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]; *Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 952 NYS2d 879 [1st Dept 2012]; *Welch v Hauck*, 18 AD3d 1096, 1098, 795 NYS2d 789 [3d Dept. 2005]).

Also rejected is the plaintiff's claim that the absence of proof of payment of the amounts due under the \$800,000.00 mortgage note warrants the denial of the defendants' motion. In essence, the plaintiff's claim distills into one that challenges the truth of the matters set forth in the duly acknowledged and recorded satisfaction of mortgages and the release of the \$800,000.00 mortgage which was neither acknowledged nor recorded, upon which the defendants rely to support their demands for summary judgment. However, facts recited in a duly acknowledge, recorded instrument, such as a mortgage satisfaction piece, are not subject to challenge except wherein it is alleged that the satisfaction piece was issued by mistake and no bona fide purchaser or encumbrancer detrimentally relied upon the erroneously issued satisfaction piece (*see Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 984, 935 NYS2d 651 [2d Dept 2011]; *DLJ Mtge. Capital, Inc. v Windsor*, 78 AD3d 645, 647, 910 NYS2d 160 [2d Dept 2010]; *New York Community Bank v Vermonty*, 68 AD3d 1074, 892 NYS2d 137 [2d Dept 2009]; *Citibank, N.A. v Kenney*, 17 AD3d 305, 308, 793 NYS2d 84 [2d Dept 2005]), or where fraudulent conduct such as forgery or false pretenses purportedly led to the execution of the satisfaction piece (*see Goldstein v Gold*, 106 AD2d 100, 101, 483 NYS2d 375 [2d Dept 1984], *affd.*, 66 NY2d 624, 495 NYS2d 32 [1985]; *Desser v Schatz*, 182 AD2d 478, 581 NYS2d 796 [1st Dept 1990]). Where the asserted challenge sounds in the forgery of a recordable instrument such as a deed, mortgage or satisfaction piece, a certificate of acknowledgment attached to it raises the presumption of due execution, "which presumption ... can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed" (*ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801, 939 NYS2d 70 [2d Dept 2012], *quoting Son Fong Lum v Antonelli*, 102 AD2d 258, 260, 261, 476 NYS2d 921 [2d Dept 1984], *affd.* 64 NY2d 1158, 490 NYS2d 733 [1985]; *Osborne v Zornberg*, 16 AD3d 643, 792 NYS2d 183 [2d Dept 2005]; *Washington Mut. Home Loans, Inc. v Rueda*, 12 AD3d 438, 783 NYS2d 828 [2d Dept 2004]).

Here, the plaintiff advances no claims of mistake, forgery or fraudulent inducement by false pretenses or otherwise against the two separate mortgage satisfaction pieces that were executed by her decedent some five years apart, both of which were acknowledged and recorded in the office of the Suffolk County Clerk. Nor is there any proof in admissible form that the satisfaction pieces are invalid due to mistake or fraud on the part of the defendants. Instead, the plaintiff merely asserts a claim of an entitlement to proof of payment beyond that which is recited in the two duly acknowledged satisfactions of mortgages that were recorded subsequent to their execution by the plaintiff's decedent. This claim is premised upon her deceased father's penchant for secreting assets, an alleged conspiracy to defeat claims for recovery of support and/or hidden marital assets by a former spouse of the decedent and the plaintiff's inability to locate checks or other evidence of payment of all amounts due. However, these predicate allegations which are unsubstantiated and conjectural, are insufficient to raise questions of fact regarding the defendants' defense of payment (*see Hellas Fos, Inc. v Russo*, 84 AD3d 1166, *supra*).

The court thus finds that the plaintiff failed to defeat the defendants' prima facie showing of their entitlement to summary judgment dismissing the plaintiff's claims for recovery of amounts due under theories of contract, implied contract or unjust enrichment. Additionally, the court finds that the opposing papers of the plaintiff did not rebut the defendants' prima facie showing of their entitlement to an award of summary judgment dismissing the plaintiff's Fifth and Sixth causes of action sounding in fraud.

Left for consideration is the plaintiff's claim that the defendants' motion is premature due to the absence of discovery which may reveal facts essential to justify opposition to the instant motion as contemplated by CPLR 3212(f). That rule provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (*Martinez v Kreychmar*, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; see *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the movant must show that his or her "ignorance was unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue of fact" (*Zheng v Evans*, 63 AD3d 791, 881 NYS2d 461 [2d Dept 2009]), as the "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered' by further discovery is an insufficient basis for denying the motion" (*Woodard v Thomas*, 77 AD3d 738 at 740, 913 NYS2d 103 [2d Dept 2010], quoting *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760, 825 NYS2d 516; see *Friedlander Org., LLC v Ayorinde*, 94 AD3d 693, 943 NYS2d 538 [2d Dept 2012]).

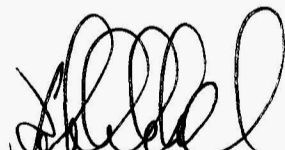
Upon its review of the plaintiff's opposing papers, the court finds that the plaintiff failed to demonstrate that additional discovery may lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the plaintiff (see CPLR 3212[f]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; *McFadyen Consulting Group, Inc. v Puritan's Pride*, 87 AD3d 620, 928 NYS2d 87 [2d Dept 2011]; *Urstadt Biddle Prop., Inc. v Excelsior Realty*, 65 AD3d 1135, *supra*). Instead, it appears that the plaintiff is merely asserting hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery.

To the extent that the defendants' motion may be construed as one seeking summary judgment on its defensive claim for an award of sanctions and/or costs including attorney's fees due to purported frivolous conduct on the part of the plaintiff and/or her counsel, it is denied. The court finds that none of the conduct on the part of the plaintiff about which the defendants complain constitutes frivolous conduct as that term is defined in 22 NYCRR Part 130-1. The court further finds that the defendants' claim for such award is not cognizable under CPLR 8303 as recited by the defendants in their moving papers or under CPLR 8303-a.

In view of the foregoing, those portions of the instant motion (#001) by the defendants for summary judgment dismissing the plaintiff's complaint is granted. All remaining demands for relief are denied.

DATED: \_\_\_\_\_

6/6/14

  
\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.