

Rodgers v US Bank
2014 NY Slip Op 33388(U)
December 23, 2014
Supreme Court, Queens County
Docket Number: 701807/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

 MELINDA RODGERS and ROLAND ROSE,

Plaintiffs,

-against-

US BANK, AS TRUSTEE FOR CMALT
 2006-A4,

Defendant.

Index No. 701807/13

Motion

Date June 13, 2014

Motion

Cal. No. 70

Motion

Sequence No. 1

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Upon the foregoing papers it is ordered that this motion by defendant, US Bank, As Trustee for CMALT 2006-A4, pursuant to CPLR 3211(a) dismissing the Amended Complaint of plaintiffs', Melinda Rodgers and Roland Rose, prior to submission of an Answer is hereby decided as follows:

This underlying action is one involving a mortgage for a subject property. Plaintiffs assert three (3) causes of action in their Amended Complaint: fraud, unjust enrichment, and quiet title. Defendant now moves to dismiss the plaintiffs' Complaint

pursuant to CPLR 3211(a)(1), (5), and (7).

A. CPLR 3211(a)(1)

That branch of defendant's motion to dismiss plaintiffs' causes of action pursuant to CPLR 3211(a)(1) is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v. Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v. Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006][internal citations omitted]). "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v. John Doe 1*, 73 AD3d 78 [2d Dept 2010]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(internal citations omitted).

The documentary evidence submitted in the instant matter consists of: a Note, a Mortgage, a modified Note pursuant to the Home Affordable Modification Agreement for a reduced principal amount, and a Pooling & Servicing Agreement. This documentary evidence is insufficient to dispose of any of the causes of action. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v. Kaufman* 91 NY2d 425 [1998]; *Teitler v. Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, a Note, a Mortgage, and a modified Note pursuant to the Home Affordable Modification Agreement, and a Pooling & Servicing Agreement are insufficient to dispose of the causes of action. As plaintiffs maintain in their opposition papers, inter alia, that the Note produced by defendant in its motion papers is a fraudulent copy, factual issues remain. Accordingly, this branch of the motion is denied.

B. CPLR 3211 (a) (5)

That branch of defendant's motion to dismiss plaintiffs' cause of action sounding in unjust enrichment pursuant to CPLR 3211(a)(5) on the grounds that the action may not be maintained because of the expiration of the statute of limitations applicable to such claims is granted.

Defendant established a prima facie case that plaintiffs' second cause of action for unjust enrichment is time-barred. The statute of limitations for a claim of unjust enrichment is six (6) years pursuant to CPLR 213(1). The statute of limitations begins to run upon the occurrence of the wrongful act that causes the defendant to be unjustly enriched (*Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 AD2d 501 [2d Dept 1993]). As plaintiffs claim the date when the first wrong began was September 28, 2006, when the Note was improperly assigned to the Trust on the closing date of the Trust, and as this action was not commenced until May 20, 2013, more than six (6) years later, the cause of action for unjust enrichment is time-barred. While plaintiffs claim that the cause of action for unjust enrichment accrued when they first learned of the unjust enrichment, said argument is unavailing.

That branch of defendant's motion to dismiss plaintiffs' cause of action sounding in fraud pursuant to CPLR 3211(a)(5) on the grounds that the action may not be maintained because of the expiration of the statute of limitations applicable to such claims is denied.

Pursuant to CPLR 213(8), regarding the statute of limitations for fraud, "the time within which the action must be commenced shall be [fig 1] *the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom [fig 2] the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.*"

In the instant case, the cause of action for fraud is not time-barred as plaintiffs allege that they did not discover the fraud until April, 2013 when they discovered the improper assignment of the Note and Mortgage. As the action was commenced in May, 2013, such cause of action was not time-barred.

That branch of defendant's motion to dismiss plaintiffs' cause of action sounding in quiet title pursuant to CPLR 3211(a)(5) on the grounds that the action may not be maintained

because of the expiration of the statute of limitations applicable to such claims is denied as movant has failed to set forth any arguments in support of this branch of the motion.

C. CPLR 3211(a)(7)

That branch of defendant's motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against moving defendants for failure to state a cause of action is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v. Macy's East, Inc.*, 262 AD2d 607, 608; *Leon v. Martinez*, 84 NY2d 83). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (see, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v. County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (see, *Rovello v. Orofino Realty Co., Inc.*, *supra*; *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

To state a cause of action for fraud, plaintiff must demonstrate that defendant knowingly misrepresented a material fact, upon which plaintiff justifiably relied, resulting in an injury (*New York University v. Continental Ins. Co.*, 87 NY2d 308 [1995]). CPLR 3016(b) states that in an action for fraud, "the circumstances constituting the wrong shall be stated in detail". It is well settled that a claim for fraud must satisfy the specificity and particularity requirements of 3016(b) and allege the essential elements of a fraud claim, misrepresentation of a material fact, falsity, scienter and deception (see, *Barclay Arms, Inc. v. Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]; *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 NY2d 403 [1958]).

"In order to sustain a cause of action for fraudulent inducement, plaintiffs must show 'misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" (*Shea v. Hambros PLC*, 244 AD2d 39 [1st Dept 1998][internal citations omitted]). Such a claim, like any fraud cause of action, must set forth "the circumstances constituting the wrong . . . in detail" (CPLR 3016[b]; *Megarix Furs v. Gimbel Bros.*, 172 AD2d 209, 210) (Id.).

In the instant case, the allegations in the Amended Complaint are supported by specific facts (see, CPLR 3016; *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 AD2d 608 [2d Dept 2002]). The allegations regarding fraud in the inducement are sufficient to support a cognizable legal claim, as the necessary elements of the claim have been established via inter alia ¶¶50-64 of the Amended Complaint.

The Amended Complaint adequately states a cause of action for quiet title. To state a cause of action pursuant to article 15 of the RPAPL, the complaint must set forth facts showing the plaintiffs' estate or interest in the real property, and "the source from or means by which the plaintiff's estate or interest immediately accrued to the plaintiff" (RPAPL 1515[1][a]). It also must allege facts showing that the defendant "might claim an estate or interest in the real property, adverse to that of the plaintiff, and the particular nature of such estate or interest" (RPAPL 1515[1][b]).

In the instant complaint, plaintiffs allege the necessary elements to state a cause of action to quiet title via inter alia, ¶¶69-71 of the Complaint. Plaintiffs allege that their interest in the subject property accrued from their purchase of the Deed on August 2, 2006 from Dalton Murray in ¶5.

Accordingly, this branch of defendant's motion is denied.

Defendant may serve an Answer within twenty (20) days of service of a copy of this Order with Notice of Entry.

Defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211(a) motion (see, *Stukuls v. State of New York*, *supra*; *Jacobs v. Macy's East Inc.*, *supra*).

As the Court finds that the causes of action have been sufficiently pled to the extent set forth herein, the cross motion to amend the Amended Complaint if the court were to find that the Amended Complaint was not sufficiently pled, is rendered moot.

This constitutes the decision and order of the Court.

Dated: December 23, 2014

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Howard G. Lane, J.S.C.