

**Gall v Colon-Sylvain**

2014 NY Slip Op 33924(U)

November 5, 2014

Supreme Court, Nassau County

Docket Number: 006536/07

Judge: Stephen A. Bucaria

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FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

**ORIGINAL**

TRIAL/IAS, PART 1  
NASSAU COUNTY

ELEMER GALL, a/k/a CSABA GALL,

Plaintiff,

INDEX No. 006536/07

MOTION DATE: Oct. 8, 2014

Motion Sequence #019

-against-

FRANCES COLON-SYLVAIN WELLS  
FARGO, N.A., JOSEPH GRANT, EMPIRE  
LAND SERVICES CORP., ANTHONY  
MICHAEL CAMISA, DAVID M. FISH and  
JJRG ENTERPRISES, INC.,

Defendants.

WELLS FARGO, N.A.,

Counterclaim-Plaintiff,

-against-

ELEMER GALL, FRANCES COLON-SYLVAIN,  
JOSEPH GRANT and JJRG ENTERPRISES, INC.,

Counterclaim-Defendants.

The following papers read on this motion:

Notice of Motion.....	X
Affidavit in Support.....	X
Affirmation in Opposition.....	X
Memorandum of Law.....	X

Upon renewal, defendant Wells Fargo, NA's motion to dismiss for failure to prosecute is **denied**.

This action, sounding in breach of fiduciary duty and attorney malpractice, arises from a residential real estate transaction. By order dated May 21, 2012, the court dismissed the action as against defendant Wells Fargo, the lender, for failure to prosecute. The action was tried as to defendants Anthony Camisa, who represented the lender and the purchaser at the closing, and as to defendant David Fish, who represented the seller. After trial, judgment was granted against defendants Camisa and Fish in the amount of \$100,000 without interest. The action has been disposed of as to the other defendants.

Around February 2005, plaintiff Elemer Gall and defendant Grant formed a joint venture for the purpose of acquiring and renovating a parcel of residential property located at 75 Oakdale Boulevard in Farmingdale. Gall contributed approximately \$200,000 as the down payment, and the balance of the purchase price, approximately \$190,000, was obtained through a purchase money mortgage. Although Grant contributed no cash to the deal, he was the sole party responsible for the mortgage debt and undertook to perform the renovation work on the property. While title was originally taken in Grant's name, he subsequently transferred the property to defendant JJRG Enterprises, Inc. Gall and Grant are each 50 % shareholders in the company. The partners had utilized the procedure of taking title in Grant's name with respect to other properties.

After Grant defaulted on the mortgage debt, New Century Mortgage, the mortgagee, commenced a foreclosure action against the property. In an effort to avoid a foreclosure sale, and unable to obtain conventional refinancing, Grant arranged for defendant Colon-Sylvain, his close personal friend, to purchase the property. Although Colon-Sylvain had no cash to put into the deal, Grant's plan was for Colon-Sylvain to obtain a new mortgage loan, in sufficient amount to pay off Grant's mortgage debt and to provide some additional cash to Gall, as a return on his investment.

Neither plaintiff nor defendants called Grant as a witness at the trial. From Gall's testimony, it appears that Grant disclosed to Gall that a foreclosure action was pending, and that an application had been submitted for a new loan. Nevertheless, it appears that Gall did not learn that title was to be transferred to Colon-Sylvain, until just before or at the closing. In any event, Colon-Sylvain, or Grant acting on her behalf, submitted a mortgage loan application to Steven Valente, a home mortgage consultant for Wells Fargo. Valente referred Colon-Sylvain, or Grant acting on her behalf, to defendant Michael Camisa, an attorney on Wells Fargo's approved list of mortgage closers. Camisa prepared a contract of sale, whereby JJRG would sell the property to Colon-Sylvain for a purchase price of \$468,000. Wells Fargo subsequently issued a mortgage commitment to make a new loan in the approximate amount of \$351,000. The commitment required the

payoff of the existing first mortgage, held by New Century Mortgage in the amount of \$358,359.43, at the closing. Wells Fargo was to receive a conventional insured first mortgage as security for the new loan. On paper, the deal required the purchaser to contribute \$118,493.15. However, in reality, Colon-Sylvain was not required to come up with any cash, as Camisa planned to take her cash contribution out of the loan proceeds at the closing.

The deal included a "seller's concession," to help the purchaser pay her closing expenses. After the contract was signed by Grant on behalf of JRRG, Grant and Colon-Sylvain, pursuant to Camisa's direction, agreed to reduce the seller's concession to \$17,475. It appears that, when the seller's concession was reduced, Wells Fargo agreed to adjust, i.e. increase, the amount of the new loan accordingly.

Prior to the closing, Grant instructed Colon-Sylvain to ask Camisa whether he could also represent the seller in the transaction. Camisa explained to her that he could not represent the seller, as he was already representing the purchaser and the lender. However, Camisa gave Colon-Sylvain the names of three attorneys, whom he felt comfortable working with in the transaction.

One of the three names, the attorney Grant actually retained on behalf of JRRG Enterprises, was defendant David Fish an attorney with little real estate experience. Camisa did not testify as to the qualifications, or even the names, of the other two attorneys that he recommended.

Fish's sole responsibility prior to closing was obtaining documents purporting to establish that Grant had authority to execute a deed on behalf of JRRG Enterprises. Among those documents, was an affidavit in which Grant claimed to be the 100 % owner of JRRG, and also a power of attorney, whereby Grant was granted power to transfer real property on behalf of Elmer Gall. Why a power of attorney was necessary, if Grant was the 100 % shareholder of JRRG, and Gall had no interest in the company, was a question that appears not to have been addressed by Fish.

The closing took place on December 26, 2006 at Camisa's office. Camisa, representing both Colon-Sylvain and Wells Fargo, acted as the "settlement agent," or loan closer, and prepared the HUD-1 settlement statement. As noted, defendant Fish was the attorney for the seller, JRRG. Having been notified by Grant, Gall attended the closing. Upon arriving at the closing, Gall notified Camisa that he was a 50 % shareholder in JRRG and was in fact Grant's "partner." Gall was then informed by Camisa that, after satisfying the existing loan, and paying off closing expenses, the net sales proceeds were

\$82,048.13, of which Gall was to receive only \$52,620. Outraged that he was to be paid barely 25 % of his original \$200,000 investment, Gall informed all parties that he expected to clear at least \$100,000 on the transaction and strenuously objected to JRRG's selling the property.

The power of attorney, signed by Gall and notarized by Colon-Sylvain, which purported to give Grant the power to transfer real property on Gall's behalf, was produced at the closing. Also produced was Grant's affidavit in which he claimed to be the sole shareholder of JRRG. Based upon these documents, the title company, defendant Empire Land, had concluded, in advance of the closing, that Grant had authority to execute the deed. A representative of the title company, Nelini Megnath, was present at the closing. However, it appears that Ms. Megnath was not sufficiently trained to appreciate the conflict between the affidavit and the power of attorney, or the significance, with respect to the power of attorney, of Gall's appearance at the closing.

Despite Gall's objection, Camisa and Fish determined to go forward with the sale transaction. Thus, the deed was accepted by Colon-Sylvain, and the mortgage was accepted by Wells Fargo. Camisa issued a check from his mortgage disbursement account to Gall in the amount of \$52,620. Camisa never explained why he had determined to give Gall only that amount, rather than \$82,048.13, the net cash proceeds to seller, as shown on the settlement statement. Although no check was issued to Grant, he benefitted through the payoff of the New Century Mortgage loan in the amount of \$358,359.43, for which Grant was solely responsible.

Camisa claimed to have relied primarily on the title company's determination that Grant was authorized to issue a deed. Fish claimed to have relied upon the title company and also upon Camisa. While Camisa and Fish testified that Gall consented to the transaction, the court rejected their testimony and found that Gall unequivocally manifested his objection to Grant's delivery of the deed, both verbally and by refusing to sign any documents at the closing.

Fish testified that he and Camisa urged Gall to take the \$56,620, which Camisa offered, rather than "receive nothing," when the property was sold in foreclosure. However, there was no proof that a foreclosure sale was actually scheduled. Fish's other ostensible reason for pressuring Gall to consent to the sale was that the "payoff letter" was about to expire. However, the prudent course would certainly have been to pay even a few days interest, to buy the time to perform the rudimentary legal research, required to determine whether Grant was authorized to consummate the transaction. Nor was it in

Colon-Sylvain's interest to accept a deed when there was clearly a question as to whether Grant had authority to execute it. From the perspective of the buyer and the seller, time was not "of the essence" in this real estate transaction.

The court noted that there appeared to be irregularities with regard to the real estate transaction. Even deducting the \$17,000 seller's concession, it is impossible to buy a \$451,000 home, with only a \$351,000 loan, and not put any cash into the transaction. Therefore, there must have been another \$100,000 loan, which is not shown on the settlement statement. Indeed, Camisa alluded to another loan in his testimony. In view of her subsequent bankruptcy, Colon-Sylvain's creditworthiness for a \$451,000 loan appeared marginal, at best.

During his testimony, Camisa, when shown the figures on the HUD-1, readily conceded that there was \$25,923.02 unaccounted for in the borrower's transaction.<sup>1</sup> Although Camisa testified that there was a second version of the HUD-1, he never produced it in court or offered it into evidence.

Based upon the evidence admitted, the court was unable to determine what happened to the unaccounted for \$25,923.02 in the borrower's transaction. Nevertheless, from plaintiff Gall's perspective, these funds represented additional money which might have been available as additional cash due to seller at the closing.

This action was commenced by Gall on April 16, 2007. Plaintiff asserted claims against Grant for breach of fiduciary duty and against Fish for malpractice. Reading the amended complaint broadly, it states claims against Camisa for breach of fiduciary duty towards Gall and aiding and abetting breach of fiduciary duty by Grant. Additionally, the amended complaint states a claim against defendant Wells Fargo for vicarious liability for Camisa's actions.

At the time the action was commenced, plaintiff was represented by attorney Judith Reardon. Gall had never deposited his \$52,620 check, apparently because he thought that accepting the check would prejudice his rights. In any event, Reardon requested Gall to sign an authorization, instructing Camisa to issue a new check in the same amount, payable to Reardon, as attorney. The \$52,620 thus became Reardon's retainer applicable to her legal fee.

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<sup>1</sup>According to the HUD-1, the gross amount due from the borrower, including sales price, settlement charges, and prepaid taxes was \$486,968.15. Deducting \$351,000 for the new loan leaves \$135,968.15. Deducting the seller's concession of \$17,475 leaves \$118,493.15. Deducting \$10,522.00 settlement charges leaves \$107,971.15. Minus \$82,048.13 net cash to seller leaves \$25,923.02 unaccounted for in the borrower's transaction.

Wells Fargo subsequently commenced a third-party action against Reardon, on the (in retrospect) far-fetched theory that her \$52,620 retainer was the proceeds of a fraudulent loan transaction. More specifically, Wells Fargo's theory was that the loan was fraudulent as to Wells Fargo because Colon-Sylvain was a "straw buyer," who never intended to pay the loan or live in the property. Aside from the fact that there is no proof that Gall was aware of Colon-Sylvain's plan, it is highly unlikely that Camisa relied upon Colon-Sylvain's representations. Indeed, Camisa did not claim at trial that he was in any way defrauded in the loan transaction.

After Reardon was named as a party in the case, the court granted her motion for leave to withdraw. Gall proceeded pro se for the remainder of the case, including the trial. Reardon settled Wells Fargo's third party action against her for \$47,000 before the court could reach the merits of the claim.

While Gall was still finding his bearings as a pro se plaintiff, Wells Fargo moved to dismiss the complaint for failure to prosecute on the ground that Gall failed to file a timely note of issue. With regard to the merits, Wells Fargo argued that it was not vicariously liable for Camisa's actions at the closing. As noted, the court granted Wells Fargo's motion on May 21, 2012.

In its order finding for plaintiff against defendants Camisa and Fish, the court granted plaintiff leave to renew and reargue defendant Wells Fargo's motion to dismiss for failure to prosecute. Plaintiff now renews and reargues that motion.

In opposition to the motion, defendant Wells Fargo argues that the court lacks discretionary authority to reconsider the motion because the May 21, 2012 order is final. Alternatively, defendant argues that it has been prejudiced by trial in its absence and lack of an opportunity for discovery.

CPLR 3216 provides that, "Where a party unreasonably neglects to proceed generally in an action..., or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits. Under the plain language of CPLR 3216, a court retains some discretion to deny a motion to dismiss, even when plaintiff fails to comply with the requirement to file a note of issue within 90 days and proffers an inadequate excuse for the delay (*Baczowski v Collins Construction*, 89 NY2d 499, 504 [1997]). A court has inherent power to vacate its orders and judgment in the interest of substantial justice (*Hudson Saving Bank v Cohen*, 2014 N.Y. Ap. Div. LEXIS 6131 [2d Dept 2014]).

Because the order of May 21, 2012 does not “specify otherwise,” it is not on the merits. As the court has discretion to grant or deny a motion to dismiss for want of prosecution, an order granting the motion may also be reviewed as a matter of discretion. From the evidence adduced at the first trial, the court concludes that the order dismissing the action as against Wells Fargo should be reviewed in the interest of substantial justice.

Generally, the relationship between a borrower and a bank is contractual in nature and does not create a fiduciary relationship between them (*Baumann v Hanover Community Bank*, 100 AD3d 814, 817 [2d Dept 2012]). Because the seller in a real estate transaction ordinarily has no contractual relationship with the bank, the seller ordinarily deals at arm’s length with the lender at the closing.

However, determining whether a fiduciary relationship exists necessarily involves a fact-specific inquiry (*AG Capital Funding v State Bank*, 11 NY3d 146, 158 [2008]). A fiduciary relationship exists between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation (Id). Essential elements of a fiduciary relation are reliance, de facto control, and dominance on the part of one of the parties (Id). Stated differently, a fiduciary relation exists when confidence is reposed on one side and there is superiority and influence on the other (Id).

Camisa, as the representative of the bank, clearly had de facto control, dominance, superiority, and influence with regard to the real estate transaction. Since Colon-Sylvain had no cash to put into the deal, and the property was in foreclosure, the borrower and the seller had little choice but to rely on Camisa to effectuate the transaction fairly. Camisa’s relationship with Valente, the Wells Fargo mortgage consultant, ensured that he could control the terms of the loan, including not only the amount of money to be borrowed, but also the required documentation. Because of his de facto dominance and control, Camisa was under a fiduciary duty of good faith to Gall, with respect to the real estate transaction (See, *Brunetti v Musallam*, 11 AD3d 280 [1<sup>st</sup> Dept 2004]).

Camisa breached his fiduciary duty of good faith by allowing the transaction to go forward over Gall’s objection. Camisa recognized that Gall and Grant were equal “partners.” Thus, Camisa could not, in good faith, favor Grant over Gall by allowing the transaction to go forward over Gall’s protest. Nor could Camisa in good faith rely upon the title company’s determination that Grant was authorized to issue the deed. The title company’s determination was based upon a discredited affidavit that Grant was the sole shareholder, as well as a power of attorney that was clearly revoked by Gall’s appearance and actions at the closing (*Matter of Ferrara*, 7 NY3d 244, 254 [2006]). Moreover, the

obligation of the title company ran to the lender and the purchaser. Camisa could not rely upon the title company to protect Gall's interest, because the title company had no obligation to the seller in the transaction. Thus, a reasonable loan closer in Camisa's position would not have gone forward with the transaction because he would have seen that the shareholders of the seller were deadlocked.

Under the doctrine of respondent superior, the principal may be vicariously liable for the tortious acts of its agent, if the acts were committed in furtherance of the principal's business and within the scope of employment (*N.X. v Cabrini Med Center*, 97 NY2d 247, 251 [2002]). A principal is generally not responsible for torts committed by a non-servant agent (*Halpin v Prudential Ins. Co.*, 48 NY2d 906 [1979]). However, the principal may be liable where it owes a third party a non-delegable duty, which the agent has been retained to fulfill (*Sullivan v New York*, 137 AD2d 165 [3d Dept 1988]).

As the settlement agent, Camisa was clearly acting in furtherance of Wells Fargo's business and within the scope of his employment. As a closing attorney, Camisa was not a servant. However, a bank may owe a non-delegable duty to consummate a real estate transaction fairly, at least where it has dominance and control over the transaction (Compare *Weisberg v DeMeo*, 254 AD2d 351 [2d Dept 1998][non-bank lender]). The court concludes that plaintiff may have a meritorious claim against Wells Fargo. Plaintiff's delay in filing the note of issue should be excused because plaintiff was not represented by counsel and in view of the other circumstances in the case.

Defendant Wells Fargo has not been prejudiced by its absence from the first trial because the issue of vicarious liability, including ratification of Camisa's conduct, was not reached. In this regard, the factual issues of whether Wells Fargo reviewed Camisa's HUD-1's and whether he continued on the approved list after the subject transaction remain open. The court's findings as to Camisa and Fish's breaches of professional responsibility are stare decisis. However, the issues of relative fault as between Camisa and Fish, the exact terms of the loan, and the value of Gall's property interest remain open. As to these issues, defendant will be granted an opportunity to conduct discovery. Accordingly, upon renewal, defendant Wells Fargo's motion to dismiss for want of prosecution is denied.

The matter is scheduled for a status conference before the undersigned on December 17, 2014 at 9:30 am.

All arguments not addressed have been considered and are deemed without merit.  
This constitutes the decision and order of the court.

Dated NOV 05 2014

*Stephen A. Liscia*  
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J.S.C.

**ENTERED**  
NOV 12 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

RECEIVED  
NOV 13 2014  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE