| **Yang v Di** |
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| 2015 NY Slip Op 30959(U) |
| June 3, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 08-45907 |
| Judge: Jr., Andrew G. Tarantino |
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[* 1]

SHORT FORM ORDER

INDEX No. 08-45907

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

*PRESENT:*

Hon. ANDREW G. TARANTINO, JR.
Acting Justice of the Supreme Court

MOTION DATE 9/12/14 (#008)
MOTION DATE 10/21/14 (#009)
MOTION DATE 12/9/14 (#010, #011 #012)
ADJ. DATE 12/23/14

Mot. Seq. #008 - MD
Mot. Seq. #009 - MD
Mot. Seq. #010 - MotD
Mot. Seq. #011 - MotD
Mot. Seq. #012 - MG

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WEN RUI YANG,

Plaintiff,

- against -

DAN DI, DI YANG, XAIODONG YANG, CHEVY CHASE BANK, NATIONAL CITY BANK, SCOTT S. SNYDER, HONG LI SNYDER, and WELLS FARGO BANK, N.A.,

Defendants.

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Upon the following papers numbered 1 to 200 read on this motion to compel additional deposition; motion to vacate default; motions for leave to amend answer; motion for leave to amend complaint; Notice of Motion/ Order to Show Cause and supporting papers 1-8; 9-12; 13-31; 32-47; 48-58; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 59-61; 62-63; 64-69; 70-75; 76-86; 87-104; 105-114; 115-116; 117-136; 137-138; 139-141; 142-160; 161-162; 163-165; 166-167; 168-187; Replying Affidavits and supporting papers 188-190; 191-192; 193-196; 197-200; Other defendant Xaiodong Yang's memorandum of law (#009); defendant National City Bank's memorandum of law (#010); defendant National City Bank's reply memoranda of law (#010); defendant National City Bank's memorandum of law (#011); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

***ORDERED*** that these motions are hereby consolidated for purposes of this determination; and it is further

***ORDERED*** that the motion by the plaintiff for an order pursuant to CPLR 3124, compelling defendant National City Bank to comply with a deposition notice dated August 5, 2014 requiring it to produce for deposition an additional representative with knowledge about the loan origination process at National City Bank and about the mortgage at issue in this action, is denied; and it is further

***ORDERED*** that the motion by defendant Xaiodong Yang for an order pursuant to CPLR 5015 (a), vacating the default judgment entered against him and permitting him to litigate this action on the merits, is denied; and it is further

***ORDERED*** that the motion by defendant National City Bank for an order (i) pursuant to CPLR 3025 (b), granting leave to amend its answer to assert a cross claim against defendants Scott S. Snyder, Hong Li Snyder, and Wells Fargo Bank, N.A. reinstating its mortgage should it be held liable and be required to divest proceeds of the "short sale" closing which it received in satisfaction of its mortgage, and (ii) pursuant to CPLR 3124 and 3126, compelling the plaintiff to produce documents responsive to its supplemental request for the production of documents dated August 26, 2014, imposing sanctions for spoliation, and striking the complaint, is granted to the extent of granting leave to amend its answer in the proposed form annexed to the moving papers, and is otherwise denied; and it is further

***ORDERED*** that the motion by the plaintiff for an order (i) pursuant to CPLR 3025 (b), granting leave to amend the complaint to assert causes of action against defendants Chevy Chase Bank, National City Bank, and Wells Fargo Bank, N.A. for aiding and abetting a fraud and for unjust enrichment, and (ii) pursuant to CPLR 603, severing this action against defaulting defendants Dan Di and Xaiodong Yang, is granted to the extent of directing that the assessment of damages and entry of judgment against Dan Di and Xaiodong Yang be held in abeyance pending the trial or other disposition of the action as to remaining defendants, that service of this order be made on Dan Di in the manner prescribed under CPLR article 3, and that service of this order be made on Xaiodong Yang by serving his attorney of record in the manner prescribed for the service of papers generally (*see* CPLR 2103, 3215 [d]), and is otherwise denied; and it is further

***ORDERED*** that the motion by defendant Chevy Chase Bank for an order pursuant to CPLR 3025 (b), granting leave to amend its answer to assert a cross claim against defendants Scott S. Snyder, Hong Li Snyder, and Wells Fargo Bank, N.A. reinstating its mortgage should it be held liable and be required to divest proceeds of the "short sale" closing which it received in satisfaction of its mortgage, is granted; and it is further

***ORDERED*** that all attorneys of record are directed to appear for a Compliance Conference on **JULY 7, 2015**, 9:30AM.

In this action, the plaintiff seeks declaratory and injunctive relief, as well as damages, arising from a series of allegedly fraudulent transfers of the property located at 2 Jefferson Landing Circle, Port Jefferson, New York.

It appears from the amended complaint that Dan Di is the plaintiff's ex-wife, and that Di Yang is the daughter of the plaintiff and Dan Di; that the plaintiff and Di Yang purchased the property, as joint tenants with rights of survivorship, for a price of $810,000.00, by deed dated November 13, 2003 and recorded on December 1, 2003; that on or about May 5, 2004, a power of attorney was executed on his behalf, purporting to appoint Dan Di as his attorney-in-fact with authority to act in real estate transactions, banking transactions, and tax matters; that the plaintiff never executed the power of attorney, that his signature was forged by Dan Di or by someone acting on her behalf, and that Dan Di knew that she did not have the plaintiff's authority to act as his attorney-in-fact; that on or about July 12, 2004, a second power of attorney was executed in which Di Yang appointed Dan Di as her attorney-in-fact with authority to act in real estate transactions, banking transactions, and tax matters; that on July 21, 2004, Dan Di, allegedly acting on behalf of the plaintiff and Di Yang, transferred the deed to the property to Xaiodong Yang; that the deed, listing a purchase price of $990,000.00, was recorded on October 13, 2004; that the power of attorney from the plaintiff to Dan Di was also recorded on October 13, 2004; that a mortgage for the transaction in the amount of $742,500.00, listing the mortgagor as Chevy Chase Bank, was also recorded on October 13, 2004; that on October 16, 2005, Xaiodong Yang executed a power of attorney in which he appointed Dan Di as his attorney-in-fact with authority to act in real estate transactions, banking transactions, insurance transactions, personal relationships and affairs, and tax matters; that on November 22, 2005, Dan Di, acting on behalf of Xaiodong Yang, took out a second mortgage on the property in the amount of $200,000.00, listing the mortgagor as National City Bank, and that the mortgage was recorded on December 16, 2005; that on January 20, 2006, Dan Di, acting on behalf of Xaiodong Yang, transferred the deed to the property to Di Yang, and that the deed was recorded on July 24, 2006; and that the plaintiff did not learn of the forgeries and fraudulent conveyances until he attempted to move into the house in September 2006. This action followed.

It also appears that on December 29, 2010, following the commencement of this action, the property was sold to Scott S. Snyder and Hong Li Snyder as a "short sale"; that the mortgage loans given by Chevy Chase Bank and National City Bank were satisfied, in reduced amounts, from the sale proceeds; and that a deed and a mortgage for the transaction in the amount of $390,600.00, listing the mortgagor as Wells Fargo Bank, N.A., were recorded on January 20, 2011.

The plaintiff pleads four causes of action in his amended complaint. The first, against Dan Di, Di Yang, Xaiodong Yang, Scott S. Snyder, and Hong Li Snyder, is to recover damages for fraud; the second, against the same defendants, is for injunctive relief, vacating the aforesaid mortgages and restoring his ownership interest in the property, and to recover damages, on a theory of unjust enrichment; the third, against Dan Di, Di Yang, and Xaiodong Yang, is for injunctive relief, vacating the aforesaid mortgages and restoring his ownership interest in the property, and to recover damages, ostensibly on a theory of conspiracy to commit fraud; and the fourth, against Di Yang, Scott S. Snyder, Hong Li Snyder, Chevy Chase Bank, National City Bank, and Wells Fargo Bank, N.A., brought under RPAPL article 15, is for judgment declaring that the plaintiff is vested with an absolute and unencumbered title in fee to his share of the joint tenancy in the property and that the defendants be barred from all claims in the plaintiff's estate or interest in the property.

By order dated March 31, 2014, the court granted the plaintiff leave to enter a default judgment against Dan Di based on Dan Di's repeated failure to appear for court conferences, including a conference held on March 18, 2014.

Similarly, by order dated May 15, 2014, the court granted the plaintiff leave to enter a default judgment against Xaiodong Yang based on Xaiodong Yang's failure to appear for court conferences held on March 18, 2014 and May 13, 2014.

Now, having taken the deposition of National City Bank by Brian Lutton, assistant vice-president of lending services at PNC Bank (a successor to National City Bank), on July 18, 2014, and having subsequently served a notice dated August 5, 2014 to take a further deposition of a National City Bank representative with knowledge of the bank's loan origination process, and National City Bank having refused to produce the requested witness, the plaintiff moves to compel National City Bank's compliance with the August 5, 2014 notice. The plaintiff contends, based on Lutton's deposition testimony, that Lutton's knowledge was limited to his department's responsibilities for monitoring accounts in litigation, and that there are others at the bank with knowledge as to how loans are originated and approved. The plaintiff also contends that the information as to loan origination which Lutton was unable to provide is material to the prosecution of

this action, in that it may demonstrate the existence of irregularities in the origination process and that National City Bank knew or should have known that the loan was fraudulently obtained. The plaintiff separately moves for leave to amend the complaint to assert causes of action against defendants Chevy Chase Bank, National City Bank, and Wells Fargo Bank, N.A. for aiding and abetting a fraud and for unjust enrichment, and severing this action against the defaulting defendants.

Addressing first the plaintiff's request for a severance, the court deems it appropriate instead to make an order permitting further proceedings against any defaulting defendant to take place following a determination as to the liability of the remaining defendants (*see* CPLR 3215 [d]).

For the reasons set forth below, the remaining items of relief requested by the plaintiff are denied in their entirety.

As to the plaintiff's request for leave to amend the complaint, it is evident that the proposed amended complaint fails to state a cause of action against any of the banks either for aiding and abetting a fraud or for unjust enrichment. Although leave to amend a pleading should generally be granted in the absence of prejudice or surprise to the opposing party (*see* CPLR 3025 [b]), it should not be granted where the proposed amendment is totally without merit or palpably insufficient as a matter of law (*see* ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2007]). In the case of a motion for leave to amend a complaint, this means that the motion will be denied if the new causes of action would not withstand a motion to dismiss under CPLR 3211 (a) (7) (***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2008]; *see also* ***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2010]). "To properly plead a cause of action for fraud, a plaintiff must allege all of the following requisite elements: (1) the defendant made a misrepresentation or a material omission of fact which was false and which the defendant knew to be false; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) the plaintiff justifiably relied on the misrepresentation or material omission; and (4) injury" (***Bannister v Agard***, 125 AD3d 797, 798, 5 NYS3d 114, 115 [2015]). A plaintiff pleading a cause of action for aiding and abetting a fraud must allege the existence of the underlying fraud and that the defendant knew of and provided substantial assistance in perpetrating that fraud (***Oster v Kirschner***, 77 AD3d 51, 905 NYS2d 69 [2010]). Here, the plaintiff failed to allege any material misrepresentation upon which he reasonably relied to his detriment (*see* ***Nabatkhorian v Nabatkhorian***, 127 AD3d 1043, 7 NYS3d 479 [2015]). Upon review of the proposed amended complaint, it is clear that the fraud of which the plaintiff complains is the implied representation by Dan Di that the signature on the May 5, 2004 power of attorney was the plaintiff's–suggesting that the plaintiff had authorized the transfer of his joint tenancy–together with the use of the forged signature and of that fraudulent document to cause the plaintiff to be divested of his ownership interest in the property. But that representation was made neither to him, nor for the purpose of inducing his reliance (*see* ***Art Capital Group v Neuhaus***, 70 AD3d 605, 896 NYS2d 35 [2010]). Consequently, the plaintiff cannot satisfy a necessary element of his proposed claim. Nor does the plaintiff plead, in requisite detail sufficient to permit a reasonable inference of the alleged conduct, how the approval of the short sale is claimed to have assisted, substantially or otherwise, in the perpetration of any fraud (*see* CPLR 3016 [b]; ***Goel v Ramachandran***, 111 AD3d 783, 975 NYS2d 428 [2013]). Whether, as the plaintiff further suggests, any of the defendant banks was negligent in failing to prevent the alleged fraud is immaterial for purposes of this determination, as the plaintiff does not propose to assert a cause of action sounding in negligence; in any event, a mortgagee does not owe "any duty of care to ascertain the validity of the documentation presented by the individual who falsely claimed to have authority to act on behalf of the borrower" (***Tenenbaum v Gibbs***, 27 AD3d 722, 723, 813 NYS2d 155, 156 [2006]; *accord* ***Mathurin v Lost & Found Recovery***, 65 AD3d 617, 884 NYS2d 462 [2009]). The proposed cause of action to recover damages for unjust enrichment is likewise deficient. To plead a legally sufficient cause of action for unjust enrichment, a plaintiff must allege that the defendant was enriched at the plaintiff's expense, and that it would be against equity and good conscience to permit the defendant to retain what the plaintiff seeks to recover (*see* ***Suntrust Mtge. v Mooney***, 113 AD3d 836, 978 NYS2d 901 [2014]). Here, the plaintiff pleads that the defendant banks were unjustly enriched only by the receipt of "mortgage payments, interest payments, and other forms of compensation" related to their respective mortgages, and, in the case of Chevy Chase Bank and National City Bank, by what they were able to recoup following the short sale–none of which, presumably, was paid by the plaintiff. As such, their "enrichment" is hardly unjust, at least with respect to the plaintiff, and the allegation that they received those payments, without more, is insufficient to sustain the cause of action (*see* ***Goel v Ramachandran***, *supra*; ***Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.***, 14 AD3d 678, 790 NYS2d 143 [2005]).

The plaintiff's further request to take a second deposition of defendant National City Bank is denied as well. "In order to show that additional depositions are necessary, the moving party must show (1) that the representatives already deposed had insufficient knowledge, or were otherwise inadequate, and (2) there is a substantial likelihood that the persons sought for depositions possess information which is material and necessary to the prosecution of the case" (***Zollner v City of New York***, 204 AD2d 626, 627, 612 NYS2d 627, 628 [1994]). The plaintiff failed to demonstrate that the information sought is material and necessary to the prosecution of the action. Rather, it would appear to be relevant only to the bank's own fraud or negligence, and the plaintiff has not alleged (successfully, in any event) that the bank perpetrated a fraud, aided or abetted a fraud, or breached any relevant duty of care owed to him.

Xaiodong Yang's motion to vacate the May 15, 2014 order striking his answer and granting the plaintiff leave to enter a default judgment against him is denied. Where, as here, a court grants judgment by default to a plaintiff pursuant to Uniform Rules of Trial Courts (22 NYCRR) § 202.27 (a) based on a defendant's default in appearing at a conference, the default may be vacated only if the defendant can demonstrate both a reasonable excuse for the default and a meritorious defense (CPLR 5015 [a] [1]; ***9 Bros. Bldg. Supply Corp. v Buonamicia***, 106 AD3d 968, 965 NYS2d 380 [2013]). Even assuming, for purposes of this determination, that Xaiodong Wang presented a reasonable excuse for his failure to appear at the March 18, 2014 and May 13, 2014 conferences, he failed to establish a meritorious defense. Although it is claimed in his papers that he is a "completely innocent party" who "at no point had any involvement or knowledge whatsoever about any purported fraud" and who, "like the plaintiff," was also "fraudulently divested of his interests in the premises," those statements appear only in the reply affirmation of his attorney (and, to similar effect, in his supporting memorandum of law); as the attorney has not been shown to have any personal knowledge of the facts, the court finds those bare allegations insufficient to demonstrate the existence of a meritorious defense (*see* ***Karalis v New Dimensions HR***, 105 AD3d 707, 962 NYS2d 647 [2013]). Nor has Xaiodong Wang submitted in support of his application a copy of an answer containing evidentiary facts and verified by an individual with knowledge of those facts as might be accepted in lieu of an affidavit of merit (*see* CPLR 105 [u]; ***Bethlehem Steel Corp. v Solow***, 51 NY2d 870, 433 NYS2d 1015 [1980]; ***Pampalone v Giant Bldg. Maintenance***, 17 AD3d 556, 793 NYS2d 462 [2005]). And although his attorney offhandedly claims–again for the first time in his reply affirmation–never having received notice of the March 18 conference, he makes no such claim with respect to the May 13 conference, his failure to appear at which prompted the order of default (*cf.* ***Tragni v Tragni***, 21 AD3d 1084, 803 NYS2d 617 [2005]).

As to the separate applications by Chevy Chase Bank and National City Bank for leave to assert cross claims against Scott S. Snyder, Hong Li Snyder, and Wells Fargo Bank, N.A. reinstating their respective mortgages in the event they are required to divest proceeds of the "short sale" closing received in satisfaction of those mortgages, the court deems it appropriate, given the permissive standards generally applicable to motions for leave to amend a pleading (***Lucido v Mancuso***, *supra*), to grant the relief requested. Should Scott S. Snyder, Hong Li Snyder, and Wells Fargo Bank, N.A. wish to test the merits of those cross claims, they may later move for summary judgment upon a proper showing (*see id.*). The proposed amended answers of Chevy Chase Bank and National City Bank, in the form annexed to their moving papers, shall be deemed served upon service of a copy of this order with notice of its entry.

Finally, to the extent that National City Bank seeks to compel the production of documents by the plaintiff, to impose sanctions, and to strike the complaint, its motion is denied, as its attorney failed to provide the required affirmation of a good faith effort to resolve the issues raised by the motion (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a]). Such an affirmation must indicate the time, place, and nature of the consultation, the issues discussed and any resolutions, or must show good cause why no such conferral with opposing counsel was held (Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [c]; ***148 Magnolia v Merrimack Mut. Fire Ins. Co.***, 62 AD3d 486, 878 NYS2d 727 [2009]).

> The "good faith" requirement is intended to remove from the court's work load all but the most significant and unresolvable disputes over what has been the most prolific generator of pretrial motions: discovery issues. Most seasoned litigators know that, with a modicum of good sense, discovery disputes can and should be resolved by the attorneys without the necessity of judicial intervention.

(***Eaton v Chahal***, 146 Misc 2d 977, 982, 553 NYS2d 642, 645 [1990]). Section 202.7 (a) of the Uniform Rules of Trial Courts reflects the policy of this court not to determine motions relating to disclosure unless and until it is satisfied that such an effort has been made. Only when the seeking party has made the required effort and has related the details of that effort in affidavit or affirmation form will the court intervene. Here, although the attorney states in an affirmation that his firm sent letters dated September 29, 2014 and October 17, 2014 to the plaintiff's attorney requesting that the plaintiff comply with the outstanding demand, neither the affirmation nor the letters refer to any communications with the plaintiff's attorney, much less any issues discussed in an attempt to resolve the issues raised by the motion (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.7 [a], [c]; ***Mironer v City of New York***, 79 AD3d 1106, 915 NYS2d 279 [2010]; ***148 Magnolia v Merrimack Mut. Fire Ins. Co.***, *supra*), or reflect any efforts to modify or simplify the demand (*see* ***Amherst Synagogue v Schuele Paint Co.***, 30 AD3d 1055, 816 NYS2d 782 [2006]). In fact, the letters do little more than contest the plaintiff's objections and demand that the plaintiff immediately produce the requested documents and identify the efforts taken to ensure that a complete search was conducted. Simply labeling such items of correspondence "good faith" letters, as the attorney has done, does not make it so. The parties are strongly advised to make a determined effort to resolve their discovery dispute without additional motion practice.

Dated: JUNE 3 2015

A.J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**

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