

<b>Araka v Seterus, Inc.</b>
2017 NY Slip Op 32414(U)
October 4, 2017
Supreme Court, Bronx County
Docket Number: 302167/2015
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

BENEDICT ARAKA,

INDEX NUMBER: 302167/2015

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

SETERUS, INC.,

*Justice*

Defendant.

The following papers numbered 1 to 3,

Read on this Defendant's Motion to Dismiss the Amended Complaint

On Calendar of 5/2/16

Notice of Motion/Exhibits and Affirmation 1

Affirmation in Opposition and Exhibits 2

Reply Memorandum of Law 3

Upon the foregoing papers, defendant's motion to dismiss the Amended Complaint is granted for the reasons set forth herein.

Plaintiff is the owner of a property located at 502 East 184<sup>th</sup> Street, Bronx, New York. Defendant Seterus, Inc. (hereinafter "Seterus") is a loan servicing company based in the State of Oregon. Plaintiff alleges that he sent his mortgage loan payments to Seterus in connection with the aforementioned property. Plaintiff alleges that Seterus paid the New York City Water Board (hereinafter "Water Board") \$18,000 for a water bill that plaintiff failed to pay for water charges allegedly incurred at plaintiff's home. Seterus then charged plaintiff for that amount and applied plaintiff's mortgage payments to the outstanding \$18,000 debt for the water bill. Plaintiff claims that Seterus had no right to make the payment, especially in light of the fact that they never contacted him prior to making the payment to the Water Board. Based on the foregoing, plaintiff alleges claims of breach of contract, negligence, breach of fiduciary duty and conversion as against Seterus. Plaintiff seeks

compensatory and punitive damages, seeks to compel Seterus to apply his monthly payments to the mortgage and have Seterus pay his legal fees, costs and disbursements.

When a defendant moves to dismiss the complaint based on legal insufficiency, plaintiff has no obligation to show evidentiary facts to support the allegations of the complaint. Generally, on a motion to dismiss made pursuant to C.P.L.R. §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). On a motion to dismiss pursuant to C.P.L.R. §3211(a)(7), the complaint survives when it gives notice of what is intended to be proved and the material elements of each cause of action. Rovello v. Orofino Realty Co., Inc. 40 N.Y.2d 633 (1976); Underpinning & Foundation Construction v. Chase Manhattan Bank, 46 N.Y.2d 459 (1979). "CPLR 3013's liberal pleading provision notwithstanding, a pleading must still be particular enough to provide the court and parties with notice of the transaction or occurrences to be proved." Travelers Insurance Co. v. Ferco, Inc., 511 N.Y.S.2d 594 (1<sup>st</sup> Dept. 1986). See also, Sibersky v. New York City, 706 N.Y.S.2d 323 (1<sup>st</sup> Dept. 2000) (Pleadings that are not particular enough to provide the court and the parties with notice of the transaction or occurrences to be proved must be dismissed). Furthermore, on a motion to dismiss for legal insufficiency, it is proper to consider the facts in plaintiff's affidavit for the limited purpose of sustaining the pleading. Ackerman v. Vertical Club Corp., 462 N.Y.S.2d 657 (1<sup>st</sup> Dept. 1983). Here, plaintiff does not submit an affidavit but relies on his attorney's affirmation in opposition. In reviewing plaintiff's complaint, this Court accepts the facts as alleged as true and accords plaintiff the benefit of every possible favorable inference. However, when determining whether the facts as stated by plaintiff fit into the cognizable legal theories alleged, this Court finds that the pleadings here do not.

The elements of a breach of contract claim are the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. Harris v. Seward Park Housing Corp., 913 N.Y.S.2d 161 (1<sup>st</sup> Dept. 2010). Vague and conclusory allegations are insufficient to sustain a breach of contract cause of action. Gordon v. Dino De Laurentiis Corp., 529 N.Y.S.2d 777 (1<sup>st</sup> Dept. 2003). Plaintiff alleges in the Amended Complaint that on or about February 21, 2014, he "observed and noted" that Seterus "assumed debts, costs, and charges illegally assessed against the subject property" by the Water Board in the amount of \$18,584.99. Plaintiff claims that Seterus assumed the debt without any form of communication or appropriate verification from him. Plaintiff alleges that as a result, he could be or was denied refinancing or

borrowing money from any of his properties. These allegations do not state a cause of action for breach of contract. Plaintiff fails to identify any contract between the parties, although plaintiff's counsel refers to the mortgage in his affirmation in opposition. Plaintiff contends that Seterus had a contractual obligation with plaintiff and argues that "when one reads... the Mortgage Contract..., it can be deducted that the Lender owed obligations to the Plaintiff... Section 3(b) states 'Lender may not charge me for holding or keeping the Escrow funds, for using the Escrow funds... or for receiving or verifying and totaling assessment and bills...'. This provision in the mortgage, however, does not state what plaintiff alleges. The provision does not require Seterus to withhold payment of an outstanding water bill charged to plaintiff. In fact, the mortgage actually provides, in Section 3(a) that plaintiff agrees to "pay to Lender all amounts necessary to pay for... water charges." Plaintiff fails to reference any contract that was breached in his Amended Complaint. Additionally, plaintiff himself does not submit an affidavit in opposition to the motion for the limited purpose of sustaining the pleading. See, Ackerman, 462 N.Y.S.2d at 660. Moreover, plaintiff's counsel's interpretation of the mortgage is flawed in that the provision he cites does not support his contention that Seterus was prevented from paying the outstanding water bill. He states that "[i]t is humbly submitted that a thorough review of the section would show that the contract imposed duties of verification of any assessed bills with the borrower...". Yet, there is no such verification in the mortgage. Furthermore, the mortgage at Section 3(a) authorized the lender to pay necessary water charges and assess the borrower for those charges.

In his second cause of action for negligence, plaintiff alleges that Seterus owed him a "duty of care... as the mortgagee and/or financier of the Plaintiff's loan," to apply mortgage payments and to report the payments to third parties such as credit bureaus. He further alleges that Seterus owed him a duty of care to "ascertain and verify" with plaintiff whether the "water bill was incurred as a matter of fact" before assuming its "authenticity". Finally, he claims that Seterus breached a duty of care by reporting to unidentified credit agencies that he was delinquent on his mortgage payments. The negligence cause of action, a parallel claim to the breach of contract cause of action, is properly dismissed as duplicative of the contract claims. See, Sebastian Holdings, Inc. v. Deutsche Bank, AG., 969 N.Y.S.2d 46 (1<sup>st</sup> Dept. 2013).

In his third cause of action, plaintiff claims that Seterus breached its "fiduciary duty" by applying plaintiff's mortgage payments to the water bill debt. A cause of action for breach of fiduciary duty requires plaintiff to show the existence of a fiduciary relationship of trust and confidence. Horn v. 440 East 57<sup>th</sup> Co., 547 N.Y.S.2d 1 (1<sup>st</sup> Dept. 1989). A breach of fiduciary duty claim is properly dismissed where plaintiff's allegations

are insufficient to show that defendant sought to gain plaintiff's trust and confidence. Batas v. Prudential Insurance Co. of America, 724 N.Y.S.2d 3 (1<sup>st</sup> Dept. 2001). A fiduciary relationship is "founded upon trust or confidence reposed by one person in the integrity and fidelity of another; the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed, embracing both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another." Braddock v. Braddock, 871 N.Y.S.2d 68 (1<sup>st</sup> Dept. 2009) quoting Wende C. v. United Methodist Church, N.Y. W. Area, 776 N.Y.S.2d 390, *affd.* 4 N.Y.3d 293 (2005).

Plaintiff's Amended Complaint fails to state a cause of action for breach of fiduciary duty. Seterus is a loan servicing company and does not originate, finance, hold or own loans and therefore could not be the mortgagee of a loan with plaintiff. Moreover, it is well-settled that an assignee or lender owes no duty to a borrower. River Glen Associates, Ltd. v. Merrill Lynch Credit Corp., 743 N.Y.S.2d 870 (1<sup>st</sup> Dept. 2002)(This Court has repeatedly held that an arm's length borrower-lender relationship is not of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation); AJW Partners LLC v. Itronics Inc., 892 N.Y.S.2d 46 (1<sup>st</sup> Dept. 2009)( The negligent misrepresentation and breach of fiduciary duty were properly dismissed, as there can be no fiduciary obligation in a contractual arm's length relationship between a debtor and note-holding creditor); Korea First Bank of N.Y. v. Noah Enterprises, Ltd., 787 N.Y.S.2d 2 (1<sup>st</sup> Dept 2004)(The negligent misrepresentation claim was deficient absent a confidential or fiduciary relationship giving rise to a duty to speak with care. The bank-borrower relationship here was not such a relationship); Cuomo v. Mahopac National Bank, 774 N.Y.S.2d 779 (2d Dept. 2004)(The arms-length contractual relationship between the plaintiffs and the defendant did not give rise to a fiduciary relationship).

Plaintiff's fourth cause of action alleges conversion. In order to establish conversion, plaintiff must show that he owned and had a right to possess certain real property, such property is in the unauthorized possession of another and that person has acted to exclude the right of the owner. Republic of Haiti v. Duvalier, 626 N.Y.S.2d 472 (1<sup>st</sup> Dept. 1985). See also, Peters Griffin Woodward, Inc. v. WCSC Incorporated, 452 N.Y.S.2d 599 (1<sup>st</sup> Dept. 1982)(Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. Money, if specifically identifiable, may be the subject of a conversion action. However, an action for conversion can not be validly maintained where damages are merely being sought for breach of contract). Here, not only does the Amended Complaint fail to identify any item over which Seterus exercised unauthorized dominion, but plaintiff's allegations are entirely

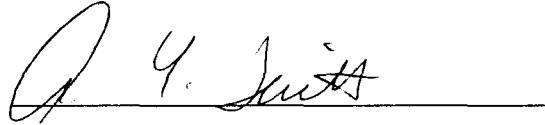
duplicative of the allegations in his breach of contract claim, his claim for conversion must fail. See, Sebastian Holdings, Inc. v. Deutsche Bank, AG, 969 N.Y.S.2d 46 (1<sup>st</sup> Dept. 2013)( Dismissing the conversion claim where it was duplicative of the breach of contract claim); Yeterian v. Heather Mills N.V., Inc., 583 N.Y.S.2d 439 (1<sup>st</sup> Dept. 1992)(The cause of action for conversion merely restates the cause of action for breach of contract and alleges no independent facts sufficient to give rise to tort liability. Since an action for conversion cannot be predicated on a mere breach of contract, plaintiff's conversion claim was properly dismissed).

Defendants' motion pursuant to C.P.L.R. §3211(a)(7) is granted. A plaintiff sufficiently states a cause of action where (1) the pleading states any cause of action (and not whether there is evidentiary support of the complaint) Guggenheimer, Rovello, supra; (2) the complaint must be liberally construed in the light most favorable to the plaintiffs; and, (3) all factual allegations must be accepted as true. Guggenheimer. In applying these principles to the instant matter, plaintiff failed to state a cause of action.

This constitutes the decision and Order of this Court.

Dated:

Oct 4, 2017



**Hon. Alison Y. Tuitt**