Brandofino v Sheil

2017 NY Slip Op 33139(U)

October 26, 2017

Supreme Court, Putnam County

Docket Number: 1640/2016

Judge: Paul I. Marx

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

PUTNAM COUNTY CLERK
2017 OCT 27 PM 1:42

SUPREME COURT : STATE OF NEW YORK
COUNTY OF PUTNAM
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

---X

JOHN BRANDOFINO and MARIA BRANDOFINO,

Plaintiffs,

-against-

SHARON SHEIL, NRT NEW YORK, LLC, A DELAWARE LIMITED LIABILITY COMPANY, COLDWELL BANKER RESIDENTIAL BROKERAGE, A DELAWARE LIMITED LIABILITY COMPANY, BUILDING CARE CORP., A NEW YORK CORPORATION D/B/A ALL COUNTY PEST CONTROL, EDWARD BINNS, and CHASE BANK, N.A.,

Defendants.

---X

DECISION AND ORDER

Index No. 1640/2016

Motion Date: July 5, 2017
Motion Seq. No. 1

The following papers numbered 1 to 4 were read on Defendant JPMorgan Chase Bank, N.A.'s[1] ("Chase") motion to dismiss Plaintiffs John and Maria Brandofino's ("Plaintiffs") complaint and co-defendants Sharon Sheil, NRT New York, LLC and Coldwell Banker Residential Brokerage's ("Co-Defendants") cross-claims against Chase pursuant to CPLR §§ 3211(a)(1) and (7), with prejudice:

Notice of Motion/Affirmation of Scott W. Parker, Esq./Exhibits A-K 1-2
Affirmation of Mitchell P. Lieberman, Esq. in Opposition and in Support of Plaintiffs' Cross-Motion to Amend the Complaint[2]/Exhibits 1-4 3
Affirmation of Scott W. Parker, Esq. in Reply 4

---

[1] Chase states that it was improperly sued as "Chase Bank, N.A." and that its proper name is JPMorgan Chase Bank, N.A.

[2] In his Affirmation in Opposition, counsel seeks to amend the caption of the complaint to correct Chase's name. No notice of motion was filed. Therefore, the Court cannot consider the request. Counsel also states that: "This Affirmation should be read in conjunction with the attached Memorandum of Law and Exhibits." There was no memorandum of law attached to the Affirmation.

Upon reading the foregoing papers, it is ORDERED that Chase's motion to dismiss Plaintiffs' complaint and Co-Defendants' cross-claims is granted, with prejudice.

BACKGROUND:

On November 22, 2016, Plaintiffs filed a summons and verified complaint alleging fifteen causes of action against the Defendants. The complaint alleges that Plaintiffs entered into a contract with Mark Rodriguez and Danielle Rodriguez (the "Purchasers") for the sale of residential real property located at 212 Union Valley Road, Mahopac, NY (the "Home") on or around June 22, 2015. The contract was conditioned upon the Purchasers securing a mortgage commitment for a Veterans Administration Mortgage Loan ("VA Mortgage Loan") from Chase. (Compl. ¶ 10).

As part of the Purchasers' application for a VA Mortgage Loan from Chase, a termite and insect infestation inspection of the Home was conducted by Defendant Building Care Corp., a New York Corporation d/b/a All County Pest Control ("All County") (Compl. ¶ 12). The complaint alleges that Chase had designated All County to perform insect and termite inspections of homes to be used as collateral to secure VA Mortgage Loans. (Compl. ¶ 12). The complaint also alleges that Chase and All County agreed that All County would provide remediation services for any insect or termite infestation found in such homes. (Compl. ¶ 13).

All County, by Edward M. Binns ("Binns"), shareholder, director, officer and owner of All County, issued a written report dated July 22, 2016 regarding its inspection of the Home (the "Report"). The complaint alleges that the Report "falsely and inaccurately" indicated that there was evidence of "wood destroying insects" in the Home. (Compl. ¶ 14). Upon receipt of the Report, the Purchasers demanded that Plaintiffs pay for remediation of the Home. (Compl. ¶ 15).

Plaintiffs, upon receipt of the Report, hired two "separate, independent, reputable, nationally known termite and wood destroying insect inspection and remediation companies, 'Terminix' and 'Orkin Pest Control'" to inspect and report on the presence of termites at the Home (Compl. ¶ 16). The complaint alleges that these reports indicated that there was no evidence of termites or wood destroying insects in the Home. These reports were delivered to the Purchasers and the Defendants, including Chase, and Plaintiffs allegedly requested that All County's Report be corrected. (Compl. ¶ 16).

The complaint alleges that before Plaintiffs had a chance to respond to the Purchasers' demand for remediation of the Home, Co-Defendants Coldwell Banker Residential Brokerage ("Coldwell") and Sharon Sheil ("Sheil") advised the Purchasers and Chase that Plaintiffs refused to perform the remediation and that the mortgage commitment should therefore be denied and the contract cancelled (Compl. ¶ 17).

Upon the alleged refusal of Chase, All County, and the Co-Defendants Coldwell and Sheil to consider a new inspection or accept the other inspection reports, Plaintiffs requested that either Terminix or Orkin be permitted to remediate the Home. Defendants allegedly refused to consider this offer. (Compl. ¶ 21).

The complaint alleges that Chase declined the mortgage commitment as a result of being advised by Co-Defendants Coldwell and Shiel that Plaintiffs refused to perform the remediation with All County. (Compl. ¶ 22, 23).

The complaint alleges that Chase was aware of and permitted All County "to engage in the practice of producing fraudulent reports and thereby compelling sellers of real property to veterans obtaining VA Mortgage Loans to pay for unnecessary remediation or risk Defendant Chase denying the loan application resulting in the contract being terminated." (Compl. ¶ 25).

Chase filed the instant motion to dismiss on May 8, 2017. Chase seeks to dismiss Plaintiffs' seventh, ninth, eleventh and twelfth causes of action alleged against it. The seventh cause of action alleges that Chase tortiously interfered with Plaintiffs' contract with the Purchasers, causing "the contract to be terminated and the Home to remain unsold." (Compl. ¶ 55-59). The ninth cause of action alleges that Chase, together with All County and Binns, violated 18 U.S.C. § 1962(a) by engaging in an illegal scheme to defraud and extract money from sellers of residential properties. (Compl. ¶ 64-71). The eleventh cause of action alleges that Chase, together with All County, violated 18 U.S.C. § 1962(c). (Compl. ¶ 75-77). The twelfth cause of action alleges that Chase, together with All County and Binns, violated 18 U.S.C. § 1962(d) by conspiring "to engage in the pattern of racketeering and continue to do so". (Compl. ¶ 78-80). Chase also seeks to dismiss Co-Defendants Coldwell, Sheil and NRT New York, LLC's cross-claims for indemnification.

DISCUSSION:

Plaintiff's Seventh Cause of Action - Tortious Interference with Contract:

Chase argues that Plaintiffs have not stated a claim for tortious interference with contract because they have not alleged a breach of the contract, but have merely stated that the contract was "cancelled" or "terminated". Chase also argues that Plaintiffs have failed to establish a breach of contract because they have not alleged any wrongdoing by the Purchasers warranting breach of contract. Chase argues that the Purchasers did not breach the contract, but were merely exercising their right to cancel the contract pursuant to paragraph 8 of the contract and paragraph R2 of the Purchaser's Rider.

Chase further argues that Plaintiffs have not stated a claim for tortious interference with contract because they have not alleged any wrongdoing by Chase. Relying on *Chambers v Exec. Mtge. Corp.*, 229 AD2d 416 [2nd Dept 1996], Chase argues that its reliance on a third party vendor to evaluate or inspect the Property to the dissatisfaction of the Plaintiffs does not form the basis for tortious interference. Chase also asserts that it did not act intentionally or improperly in denying the VA Loan, because it was merely complying with the VA Loan requirements, over which it had no control. Chase argues that it could not alter or waive the requirements without written authority from the Purchasers and approval from the VA. Chase points to the documents attached to counsel's affirmation in support.[3]

Plaintiffs argue that the complaint sufficiently alleges a breach of the contract and that defense counsel assigns too much significance to the use of the word "cancelled". Plaintiffs also

---

[3] In connection with its motion for dismissal of the complaint, Chase submitted a number of documents attached to counsel's affirmation as exhibits C-K, which it seeks to have the Court take judicial notice of pursuant to CPLR § 4511(b) and (d). Chase asserts that each document in exhibits C-J is published and maintained by the Department of Veterans Affairs and that the document in exhibit K is published and maintained by the New York Department of Environmental Conservation, Bureau of Pest Management. Chase contends that the Court may take judicial notice of these documents, as they are public records and are "promulgated by a federal government agency". Chase did not provide the exact website links of the documents attached as exhibits to its motion.

Plaintiffs did not contest the existence of these documents on the website. However, Plaintiffs argued that these documents are not documents within the meaning of CPLR § 3211(a)(1), nor are they rules or statutes. Plaintiffs argue that the documents do not establish that Plaintiffs were not required to remediate the Home.

argue that the contract was not terminable at will, and that but for Chase's denial of a mortgage commitment, the contract would have been consummated.

Plaintiffs also argue that the complaint sufficiently alleges misconduct by Chase. In support, Plaintiffs quote paragraphs 56, 57, 58, 65, 66, 67, 68, 69 and 73 of the complaint.

CPLR § 3211(a)(7) provides that: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 7. the pleading fails to state a cause of action".

On a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must "afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588-89 [2nd Dept 2014].

There are four elements to a claim for tortious interference with contract: "(1) the existence of a contract, enforceable by the plaintiff, (2) the defendant's knowledge of the existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff." *Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]. The claim presupposes that a contract has been breached. *Lama Holding Co v Smith Barney, Inc.*, 88 NY2d 413, 424 [1996] ("Tortious interference with contract requires . . . actual breach of the contract . . ."); *NBT Bancorp. Inc v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 620 [1996] ("Ever since tortious interference with contractual relations made its first cautious appearance in the New York Reports – decades after the seminal case *Lumley v Gye* (2 El & Bl 216, 118 Eng.Rep. 749 [1853]) – our Court has repeatedly linked availability of the remedy with a breach of contract. Indeed, breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations").

The complaint does not allege that the Purchasers breached the contract. The complaint states that the contract was "cancelled" or "terminated", but does not allege that the Purchasers acted contrary to the terms of the contract or did not perform in accordance with the contract, so as to have breached the contract. "The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach." *PFM*

Packaging Machinery Corp. v ZMY Food Packing, Inc., 131 AD3d 1029, 1030 [2nd Dept 2015]. The complaint alleges that the "contract was conditioned upon the Purchasers securing a mortgage commitment for a Veterans Administration Mortgage Loan" (Compl. ¶ 10). The complaint also alleges that the Purchasers cancelled the contract because they could not obtain the necessary mortgage commitment from Chase. (Compl. ¶ 23). Plaintiffs do not allege that the Purchasers acted wrongfully or contrary to the terms of the contract. As such, the complaint has not alleged a breach of contract. Since Plaintiffs have not alleged a breach of contract, they have not alleged tortious interference with contract with regards to the contract. *Lama Holding Co., supra*; *NBT Bancorp, Inc., supra.*

In light of the foregoing, the Court need not consider Chase's other arguments regarding this cause of action.[4]

Plaintiffs' RICO Causes of Action:

Chase argues that the ninth, eleventh and twelfth causes of action fail because Plaintiffs have failed to plead the elements of a RICO claim. The ninth cause of action alleges that Chase, together with All County and Binns, violated 18 U.S.C. § 1962(a) by engaging in an illegal scheme to defraud and extract money from sellers of residential properties. (Compl. ¶ 64-71). The eleventh cause of action alleges that Chase, together with All County, violated 18 U.S.C. § 1962(c). (Compl. ¶ 75-77). The twelfth cause of action alleges that Chase, together with All County and Binns, violated 18 U.S.C. § 1962(d) by conspiring "to engage in the pattern of racketeering and continue to do so". (Compl. ¶ 78-80).

18 U.S.C. § 1962(a) provides in relevant part that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a **pattern of racketeering activity** or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any

---

[4] Chase's request that the Court take judicial notice of the VA guidelines it attached as exhibits C-K appear to have been submitted only in relation to this cause of action. As such, this argument also need not be considered for the resolution of the remaining claims.

> enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis added).

18 U.S.C. § 1962(c) provides that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(d) provides that: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

Chase argues that Plaintiffs have failed to allege a predicate act. Chase alleges that "extortion" requires that the tortfeasor obtain something of value from the victim. Chase asserts that Plaintiffs have not alleged that Chase, All County or Binns acquired any item of value from Plaintiffs.

Chase also argues that Plaintiffs have failed to allege a pattern of racketeering activity. Chase argues that even if Plaintiffs had alleged a predicate act of extortion, Plaintiffs did not allege a second occurrence of the predicate act. Chase argues that Plaintiffs' speculation that Chase, together with All County and Binns, engaged in extortion of other sellers of residential real property, is not sufficient to allege a second occurrence of the predicate act.

Chase further argues that Plaintiffs have failed to allege that Chase was part of an association-in-fact enterprise. Chase argues that it did not participate in the conduct alleged by Plaintiffs, that only All County and Binns would benefit from the alleged conduct, and that its interests were not furthered by denying the Purchasers' loan application. Chase argues that it was merely conducting its own affairs, and was not acting in furtherance of an alleged enterprise's affairs.

Chase argues that since Plaintiffs failed to allege a RICO claim, the twelfth cause of action for a RICO conspiracy must also fail.

Plaintiffs argues that they properly pleaded a predicate act of extortion. Plaintiffs argue that although they did not pay Defendants, they were damaged by the breach of the contract. Plaintiffs argue that the complaint alleges that Chase took money from residential homeowners for unnecessary services.

Plaintiffs argue that they have sufficiently alleged a pattern of racketeering activity. In support, Plaintiffs quote paragraphs 65-69 of their complaint. Plaintiffs argue that the complaint

alleges that the conduct alleged by Plaintiffs against Defendants is occurring to other homeowners, and that this allegation should be accepted as true. Plaintiffs also assert that the allegation does not need to be more specifically pleaded.

Plaintiffs argue that the complaint alleges that each of the Defendants benefitted from the alleged conduct, that Chase took money from residential homeowners for unnecessary services, and that "[t]he nature and extent of the benefit for Chase and its employees and agents will be determined through discovery." (Affirmation of Mitchell P. Lieberman, par. 13). Plaintiffs also assert that Chase was "clearly" involved in an association with All County and Binns.

Plaintiffs argue that it has sufficiently alleged an agreement tantamount to a conspiracy among the Defendants.

In reply, Chase argues that in order to determine whether there is a pattern of racketeering activity, the Court must look to see whether there is sufficient continuity of the predicate acts to comprise a pattern. Chase asserts that continuity can be "closed ended" or "open ended". Chase argues that Plaintiffs have not alleged either. Chase argues that there is no closed ended continuity here because from the date the Plaintiffs entered into the listing agreement on March 26, 2015 to the date on which the Purchasers cancelled the contract on August 30, 2015, only five months had passed, which is too short a duration to qualify as a closed ended continuity. Chase also argues that there is no open ended continuity here because there is no threat of future acts relating to Plaintiffs' property since the contract was cancelled, and Plaintiffs only vaguely refer to an illegal scheme to defraud unidentified sellers of residential property.

Chase also argues that Plaintiffs' failure to allege an enterprise cannot be circumvented by "merely hoping that discovery might one day address those deficiencies".

Plaintiff's Eleventh Cause of Action - 18 U S C. § 1962(c)[5]:

"[A] violation of section 1962(c) 'requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity .... Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of 1962, nor is mere commission of the predicate offenses.'" *Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc.*, 354 F Supp 2d 293, 299 [SDNY 2004].

---

[5] Section (c) will be addressed first as the Court's determination of the parties' arguments with respect to this section will result in the disposition of section (a).

Plaintiffs have not stated a pattern of racketeering activity. In order to establish a pattern of racketeering activity, Plaintiff must allege two or more predicate acts which are related and "pose a threat of continuous criminal activity". *Reich v Lopez*, 858 F3d 55, 59 [2nd Cir. 2017]; 18 U.S.C. § 1961[5]; *Greenstone Roberts Advertising/Florida, Inc. Vv Gold Star Cruises of Galveston, L.C.*, 951 F Supp 402, 402 [EDNY 1997]; *East 32nd St. Assoc. v Jones Lang Wootton USA*, 191 AD2d 68 [1st Dept 1993].

Plaintiffs have not alleged more than one potential predicate act. The complaint alleges that Chase hired and knowingly permitted All County to make a false report of termite infestation in the Plaintiffs' home, which would have required Plaintiffs to pay for an unnecessary remediation. Plaintiffs have not alleged more than one such instance. Plaintiffs do not argue in their opposition that any other predicate acts were alleged in the complaint. A blanket statement that the alleged extortion is occurring to others is not sufficient to allege a second predicate act. *Jaggie v Northstar Tubular Corp.*, 195 AD2d 336, 336 [1st Dept 1993] ("In order to satisfy this requirement of the RICO statute, a plaintiff must allege that the defendants committed at least two of the predicate acts which are specifically enumerated in 18 U.S.C. § 1961(1) . . ."); *Dow v Meyers*, 182 AD2d 1128 [4th Dept 1992] ("In addition, plaintiff failed to plead, with sufficient particularity, the alleged predicate acts giving rise to his RICO causes of action. For predicate acts, plaintiff relies on a single securities transaction and 'numerous acts * * * relating to mail fraud and wire fraud'. In alleging mail and wire fraud, plaintiff failed to 'specify the time, place, manner and content of the allegedly fraudulent mailings and communications'. In the absence of such detail, plaintiff's causes of action cannot stand"); *Lichtenstein v Polizzotto*, 152 Misc2d 241, 246 [Sup Ct, New York County 1991] ("A party who seeks to bring a civil action under RICO must set forth in the complaint the predicate offenses with reasonable specificity in order for the Court to identify the predicate acts and be able to determine their relationship from one to another"). As such, Plaintiffs have failed to plead a pattern of racketeering activity, thereby failing to allege a cause of action under § 1962(c).

Accordingly, Chase's motion to dismiss the eleventh cause of action is granted.

Plaintiff's Ninth Cause of Action - 18 U.S.C. § 1962(a):

"[T]o state a claim for civil damages under 1962(a), a plaintiff must allege injury from the defendants' investment of racketeering income in an enterprise." *Ouaknine v MacFarlane*, 897 F2d

75 [2nd Cir. 1990]. "The purpose of 18 U.S.C. 1962(a) is 'to prevent racketeers from using their illgotten gains to operate, or purchase a controlling interest in, legitimate businesses.' In order to state a claim under 1962(a), plaintiff must make two basic allegations: 'first, that the defendants used or invested racketeering income to acquire or maintain an interest in the alleged enterprise, and second, that the plaintiff[s] suffered an injury as a result of that investment by the defendants.' 'Failure to satisfy this two part test will result in the dismissal of the plaintiffs' claims.' This latter requirement is referred to as the 'investment injury.' The rationale for this requirement is that 1962(a) aims at punishing not the predicate offenses but the investment of the ill-gotten gains of the predicate offenses." *Allen v New World Coffee, Inc.*, 2002 WL 432685, at *2 [SDNY 2002].

A review of § 1962(a) reveals that it presupposes that a pattern of racketeering activity has been established. Since Plaintiffs have not alleged a pattern of racketeering activity, Plaintiffs have failed to allege a cause of action under § 1962(a).

Accordingly, Chase's motion to dismiss the ninth cause of action is granted.

Twelfth Cause of Action - 18 U.S.C. § 1962(d):

"'[A] claim under section 1962(d) alleging a conspiracy to violate the other subsections fails as a matter of law if the substantive claims based on the other subsections are defective.'" *Peralta v Figueroa*, 2007 WL 4104122, at *12 [Sup Ct, Kings County 2007]; *Grafstein v Schwartz*, 78 AD3d 772, 773 [2nd Dept 2010] ("As the ninth cause of action based upon 18 USC 1962(d), alleging a conspiracy, is dependent upon the eighth cause of action alleging a substantive RICO violation, dismissal of the eighth cause of action necessitated the dismissal of the ninth cause of action").

As Plaintiffs' § 1962(a) and § 1962(c) causes of action have been dismissed, Plaintiffs cannot state a cause of action under § 1962(d) based on a conspiracy to violate those sections.

Accordingly, Chase's motion to dismiss the twelfth cause of action is granted.

All Other Causes of Action:

Chase argues that the remaining causes of action must be dismissed because they do not allege any wrongdoing by Chase. Plaintiffs do not oppose. To the extent that the wherefore clause can be read as seeking damages against Chase under the remaining causes of action, which do not

allege any wrongdoing by Chase, it is improper and the remaining causes of action must be dismissed against Chase.

Accordingly, Chase's motion to dismiss the remaining causes of action against it is granted.

Co-Defendants' Cross-Claims:

Chase argues that the Co-Defendants' cross-claims for indemnification and contribution should be dismissed because it is not liable to Plaintiffs. Neither Plaintiffs nor the Co-Defendants oppose. Accordingly, the Co-Defendants' cross-claims against Chase are dismissed as unopposed.

SUMMARY:

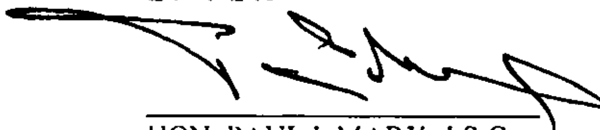
Chase's motion to dismiss Plaintiffs' complaint against it pursuant to CPLR § 3211(a)(1) and (7) is granted in its entirety, with prejudice.

Chase's motion to dismiss the Co-Defendants' cross-claims against it is granted in its entirety, with prejudice.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 26, 2017
Carmel, New York

ENTER



HON. PAUL I. MARX, J.S.C.

To:

Mitchell P. Lieberman, Esq. Lieberman & LeBovit *Attorneys for Plaintiffs* 334 Underhill Ave. #4A Yorktown Heights, NY 10598	Scott W. Parker, Esq. Parker Ibrahim & Berg, LLC *Attorneys for Defendant, JPMorgan Chase Bank, N.A., improperly s/h/a Chase Bank, N.A.* 270 Davidson Ave. Somerset, NJ 08873
Christina L. Gallinari, Esq. Ahmuty, Demers & McManus, Esqs. *Attorneys for Defendants Sharon Sheil, NRT New York, LLC, a Delaware Limited Liability Company, Coldwell Banker Residential Brokerage, a Delaware Limited Liability Company* 1531 Route 82 Hopewell Junction, NY 12533	