

**CFS-4, LLC v JDARM LLC**

2018 NY Slip Op 32741(U)

October 15, 2018

Supreme Court, Kings County

Docket Number: 506585/13

Judge: Mark I. Partnow

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This opinion is uncorrected and not selected for official publication.

At an IAS Term Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of October, 2018.

P R E S E N T:

HON. MARK I. PARTNOW,  
Justice.

-----X  
CFS-4, LLC and NOVATO 20012, LLC,

Plaintiffs,

- against -

JDARM LLC, CONEY ISLAND AVENUE, LLC,  
EILAT OHLMAN, DORIS MENASHE, NEW YORK  
CITY ENVIRONMENTAL CONTROL BOARD and  
JOHN DOE #1 through JOHN DOE #15,

Defendants.

-----X  
The following papers numbered 1 through 4 read herein:

Notice of Motion, Affidavit, Affirmation,  
and Exhibits Annexed \_\_\_\_\_  
Affirmation in Opposition and Exhibits Annexed \_\_\_\_\_

Index No. 506585/13

Papers Numbered:

1-3  
4

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In this action to foreclose a mortgage on the commercial property at 1812 Coney Island Avenue in Brooklyn (Property), plaintiff Novato 2012, LLC (Novato) moves for an order, pursuant to CPLR 3211 (a) (1) and (a)-(7), dismissing defendants' counterclaims.

***Background***

Novato, the former owner and holder of the commercial mortgage on the Property, commenced this foreclosure action by filing a summons and complaint on October 28, 2013. On March 6, 2015, during the pendency of this action, Novato assigned and transferred the loan to plaintiff CFS-4, LLC (CFS). By a July 25, 2016 order, the court (Wade, J.) joined CFS as an additional plaintiff.

*The Note and Mortgage*

On December 23, 2002, Coney Island Avenue, LLC (Coney Island), as borrower, executed an adjustable rate note for \$300,000.00, which was secured by a mortgage in favor of the original lender, Greenpoint Mortgage Funding, Inc.

Paragraph (ii) (A) of the note provides, in relevant part, that:

“[m]aker will make monthly payments of principal and interest on the first day of each month beginning on February 1, 2003. Maker will make these payments every month until Maker has paid all of the Principal Sum, interest and any other charges that Maker may owe under this Note. . . . *All payments will be applied first to interest and then to principal*” (emphasis added).

The note further provides that:

“AND THE MAKER FURTHER HEREBY EXPRESSLY AGREES WITH THE Lender AS FOLLOWS:

\* \* \*

“13. The Maker and any and all guarantors of this Note hereby irrevocably and unconditionally:

\* \* \*

“(e) waive the right, in litigation in which it and the Lender are adverse parties, to trial by jury and *the right to assert any set-off or counterclaim of any nature or description*” (emphasis added).

Like the note, the mortgage similarly provides, at paragraph 44, that “[t]he Mortgagor hereby waives the right . . . to assert a counterclaim in any action or proceeding in which the Mortgagor and the Mortgagee are parties brought by the Mortgagee to enforce its rights

hereunder” (emphasis added). Paragraph 45 of the mortgage further provides that the mortgagor waives the right to assert counterclaims against any mortgage assignee:

“Any assignee of this Mortgage and the Note shall take the same free and clear of all offsets, counterclaims and defenses of any nature whatsoever which the Mortgagor may have against any assignor of this Mortgage and the Note and no such offset, counterclaim or defense shall be interposed or asserted by the Mortgagor in any action or proceeding brought by any such assignee upon this Mortgage and/or the Note and any such right to interpose or assert any such offset, counterclaim or defense in any such action or proceeding is hereby expressly waived by the Mortgagor.”

### ***The Amended Complaint***

On December 28, 2017, CFS filed an amended complaint seeking to foreclose on the mortgage. The amended complaint alleges that “Borrower” defaulted under the loan by failing to: (1) “make timely, monthly debt service payments toward the indebtedness under the Loan and as required by the Note and Mortgage when the debt service became due and payable”; (2) “maintain adequate escrow reserves as required by the Note and Mortgage”; and (3) “pay property taxes and other fees assessed on the Mortgaged Premises.” The amended complaint asserts two causes of action seeking to foreclose the mortgage and a claim against Eilat Ohlman (Ohlman) and Doris Menashe (Menashe) as guarantors.

### ***Defendants’ Amended Answer and Counterclaims***

On January 17, 2018, defendants JDARM, Coney Island and Menashe<sup>1</sup> collectively filed an amended answer in which they denied the material allegations in the amended complaint and asserted affirmative defenses, including that “[d]efendant tendered payment

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<sup>1</sup> Defendant Ohlman failed to answer or otherwise appear in this action.

as required” and “[p]laintiff knowingly and intentionally failed to pay the property taxes as required and instead converted the funds for its own benefit.”

Defendants also asserted counterclaims against Novato based on the allegation that, although defendant remitted payments for principal, interest and estimated taxes, Novato misapplied the tax payments and “purposefully caused the taxes on the property to remain unpaid, then declared a default and accelerated the loan.” Defendants assert six counterclaims against Novato alleging that: (1) it breached its duty of good faith and fair dealing; (2) it was unjustly enriched because “[p]laintiff in at least 10 instance[s] since succeeding as mortgagee charged Defendant late fees which were inappropriate and unjustified [and] misapplied Defendant’s payments to satisfy these unjustifiable late fees . . .”; (3) it breached the covenant of good faith and fair dealing “by charging late fees for payments that were timely [and] Plaintiff misapplied Defendant’s payments to satisfy these unjustifiable late fees rather than applying said payments towards payments of taxes, principal and interest as required”; (4) it committed fraud by “consistently engag[ing] in misrepresentation[s] by sending defendant monthly statements demanding defendant remit funds in the amount of \$842.53 into escrow for purposes of payment of taxes” and “[p]laintiff did not pay the taxes out of the escrow funds remitted by defendant and instead allowed taxes on the property to remain unpaid”; (5) it breached its fiduciary duty; and (6) “[p]laintiff commenced a frivolous lawsuit and asserted material factual statements that are false” warranting the imposition of sanctions, pursuant to 22 NYCRR § 130-1.1 and CPLR 8303-a.

### *Novato's Dismissal Motion*

Novato now moves for an order dismissing defendants' counterclaims, pursuant to CPLR 3211 (a) (1) and (a) (7).<sup>2</sup> Novato argues that "[a]s a matter of law, the parties' written agreements are a complete bar to Defendants' assertion of tort-based counterclaims – all of which arise from an alleged failure to apply loan payments to a tax escrow that was *established under the Loan*." Novato also asserts that "counterclaims for unjust enrichment and breach of the covenant of good faith should also be dismissed as a matter of law because they are duplicative of a claim based on breach of contract – and any such claim or defense can be asserted only against CFS, which is the holder of the Loan." Novato further contends that "documentary evidence provides a second, conclusive basis for dismissal of the counterclaims" because "[u]nder the express terms of the Note and the Mortgage, the Borrower knowingly relinquished all rights to assert counterclaims against Novato." Additionally, Novato asserts that "[t]he evidence shows conclusively that the Borrower's failure to pay the Loan – and *not* any fraud or other conduct by Novato – resulted in default and this foreclosure action."

In support of its dismissal motion, Novato submits the affidavit of Noel Rabb (Rabb), a Director, Special Asset Management, at Trimont Real Estate Advisors, LLC (Trimont), the

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<sup>2</sup> Novato timely moves to dismiss defendants' counterclaims, since this motion was filed after the court denied Novato's prior dismissal motion without prejudice and *with leave to renew*.

prior servicer of the loan during the time when Novato was the owner and holder of the loan.<sup>3</sup>

Rabb submits copies of monthly invoices that Trimont compiled and issued to Coney Island on behalf of Novato from January 23, 2013 through September 2013, and attests that “the Loan was significantly in arrears when the Original Lender assigned the Loan to Novato.”

Rabb further attests that:

“[d]ue to the increasing arrearages, payments received from the Borrower were applied first to interest and then to amortize the Loan’s outstanding principal amount, in accordance with the terms of the Note . . . . Consequently, the past due amounts for the tax escrow increased as the Borrower’s late payments were applied first to reduce the past due interest, and then, the remaining funds were applied to past due principal.”

In addition to the invoices, Rabb’s affidavit also annexes the invoice stubs that were included with Coney Island’s payments, copies of Coney Island’s checks and the postmarked envelopes in which Coney Island submitted its mortgage payments. According to Rabb, these documents reflect that Coney Island’s 2013 payments were submitted 2-3 months late.

Novato asserts that “[t]he documentation shows that the arrearages in the Loan’s tax escrow were caused by *the Borrower’s* repeatedly late Loan payments . . . .” Novato explains that “[a]lthough Defendants allege, *inter alia*, that Novato engaged in fraud and breach of fiduciary duties by paying down the Mortgage instead of paying taxes, this was expressly the *manner in which the Loan was designed to operate*” and “[a]fter applying the Borrower’s repeatedly late payments to interest first and then to principal, no funds remained for the tax escrow, which increased substantially.”

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<sup>3</sup> According to Rabb, Novato was the owner and holder of the loan from December 19, 2012 through March 6, 2015, at which time Novato assigned and transferred the loan to CFS.

Defendants, in opposition, submit an affirmation from Chezki Menashe, Esq., Menashe's son, arguing that Novato's dismissal motion must be denied since "serious questions of fact exist as to Plaintiff's own proffered invoices . . ." because "[they] are unreliable and fabricate numbers." Defendants further contend that their counterclaims are not barred by the terms of the note and mortgage because "certain counterclaims are never waived, regardless of an agreement purporting waiver." Defendants argue that the courts will not enforce contractual provisions waiving counterclaims for fraud and lack of good faith based on public policy.

In addition, defendants contend that:

"Here, by misapplying the payments (i.e., in a manner inconsistent with its representations in its statements and inconsistent with the mortgage) and by then using that misallocation as a basis to foreclose on the Defendant, Plaintiff evinced a breach of its duty to act in good faith and to deal fairly with the Defendant."

Defendants further argue that "the thrust of Defendants' fraud argument with regard to the monthly statement [is] that those statements were a fraudulent inducement to cause Defendants to continue paying taxes believing they would be taken care of by the Plaintiff." While defendants concede that "the relationship between a borrower and a bank is a contractual one which generally does not give rise to a fiduciary duty[,]" they contend that **"a bank, in its capacity as escrow holder of funds to be used for the payment of property taxes, may be held liable on a theory of breach of fiduciary duty for the failure to make required tax payments."**

Novato, in reply, argues that "[d]efendants' opposition papers fail to address the overwhelming New York case law holding that where the parties' relationship is governed

by a written agreement, duplicative claims arising from the same or similar facts are subject to dismissal” and that “New York courts routinely invalidate fraud claims that arise from or seek the same recovery as breach-of-contract claims.”

#### *Discussion*

In the mortgage and note, defendants expressly waived their right to assert counterclaims in response to any action commenced by the lender or its assignees to enforce the obligations thereunder and to recover the debt. However, defendants’ fourth counterclaim alleging fraud with respect to Novato’s invoices for tax escrow payments survives such a waiver, as a matter of law (*Archer Capital Fund, L.P. v GEL, LLC*, 95 AD3d 800, 802 [2012]). The Appellate Division, Second Department has specifically held that a waiver of counterclaims “is not against public policy and will be enforced *in the absence of fraud or negligence in the disposition of collateral*” (*N. Fork Bank v Computerized Quality Separation Corp.*, 62 AD3d 973, 974 [2009] [emphasis added]).

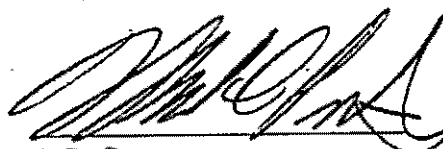
While the fourth counterclaim for fraud survives a contractual waiver, Novato has also moved to dismiss this counterclaim for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). “The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages” (*Mitchell v Diji*, 134 AD3d 779, 780 [2015] [internal quotations omitted]). The fourth counterclaim alleges that “[p]laintiff consistently engaged in misrepresentation by sending defendant monthly statements demanding defendant remit funds in the amount of \$842.53 into escrow

for purposes of payment of taxes”; “Defendant relying on Plaintiff’s misrepresentations remitted \$842.53 each month as demanded by Plaintiff for purposes of payment of real estate taxes”; “Plaintiff did not pay the taxes out of the escrow funds remitted by defendant and instead allowed taxes on the property to remain unpaid”; “Plaintiff[’s] activities constitute deceptive and fraudulent conduct” and defendant suffered damages (answer at ¶¶ 51-56). The fourth counterclaims fails to adequately allege the essential elements of a fraud claim, including a misrepresentation of existing fact with an intent to induce reliance thereon. Consequently, the fourth counterclaim is subject to dismissal. Accordingly, it is

**ORDERED** that Novato’s motion to dismiss defendants’ counterclaims is granted and defendants’ counterclaims are dismissed.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. MARK I PARTNOW  
SUPREME COURT JUSTICE**

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