| **Bizzell v Bizzell** |
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| 2018 NY Slip Op 33732(U) |
| March 26, 2018 |
| Supreme Court, Nassau County |
| Docket Number: 607035/17 |
| Judge: Denise L. Sher |
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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MICHELE BIZZELL,

Plaintiff,

- against -

ALVIN BIZZELL, AUGUSTIN D. TELLA, ESQ., NEW YORK COMMUNITY BANK, FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO, COHN & TERRANA, LLP,

Defendants.

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TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 607035/17
Motion Seq. No.: 02
Motion Date: 10/26/17

**The following papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Affidavit in Opposition, Affirmation in Opposition and Exhibits | 2 |
| Reply Affirmation | 3 |

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants New York Community Bank ("NYCB") and Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana ("Forchelli') move, pursuant to CPLR § 3211(a)(1), (5) and (7), for an order dismissing plaintiff's Complaint as against them. Plaintiff opposes the motion.

Plaintiff commenced the instant action with the filing of a Summons and Complaint on or about July 26, 2017. *See* Defendants NYCB and Forchelli's Affirmation in Support Exhibit 1.

Counsel for defendants NYCB and Forchelli submits, in pertinent part, that "[p]**laintiff** commenced the instant action naming various parties regarding events that allegedly occurred or arose out of the previously commenced Foreclosure Action by **NYCB** against **Plaintiff**, Defendant Alvin Bizzell and others.... [S]ince the **Plaintiff's** complaint literally fails to state any cause of action against **NYCB** and is further devoid of any allegations that could be reasonably discerned to state a cause of action against **NYCB**, the Complaint should be dismissed as to **NYCB**. Moreover, to the extent that **Plaintiff** is deemed to have somehow alleged a cause of action against **NYCB**, such a cause of action would nevertheless require dismissal based on Res Judicata.... Here, since (i) every allegation in the present case arises out of the same series of transactions relating to the Foreclosure Action, (ii) **NYCB** and **Plaintiff** were adverse parties in the Foreclosure Action, and (iii) there was a full adjudication of the parties' rights in the Foreclosure Action pursuant to a Judgment and Foreclosure and Sale, **Plaintiff** is precluded from relitigating any claims that were or could have been adjudicated in the Foreclosure Action.... Additionally, contrary to **Plaintiff's** claim that she was never 'contacted by telephone, letter, fax or email, nor advised in any way nor had any knowledge that the mortgage on her home was in default since 2008, until her eviction on October 23, 2016' ..., there is undeniable proof that **Plaintiff** and her husband, co-Defendant Alvin Bizzell, were served with the pleadings and other court documents in the Foreclosure Action, including the Judgment of Foreclosure and Sale. Specifically, the affidavit of service of the summons and complaint in the Foreclosure Action state that **Plaintiff** was personally served with such summons and complaint pursuant to Section 308 of the CPLR on November 17, 2009 and, thereafter, provided with the summons and complaint by way of an additional mailing on February 1, 2010.... Therefore, contrary to **Plaintiff's** bald assertions in her Complaint in the within action, there is undisputed documentary evidence that **Plaintiff** was properly served with (*sic*) summons and complaint in the Foreclosure

Action.... Moreover, there is documentary evidence in the form of the Residential Foreclosure Conference Order in the Foreclosure Action signed by the Court Attorney-Referee, Leonard N. Florio, dated February 2, 2011, establishing that **Plaintiff** actually appeared in court at the Pre-Foreclosure Conference on December 3, 2010: ... [T]here is overwhelming evidence establishing that **Plaintiff** was properly served with papers in the Foreclosure Action including, most notably, the Notice of Entry of Judgement of Foreclosure and Sale, and despite the foregoing, failed to respond, move or otherwise raise any issues regarding that Foreclosure Action. Thus, since all of **Plaintiff's** allegations in this action arise out of the same series of transactions relating to the Foreclosure Action and could have been raised in the Foreclosure Action, they cannot be asserted in this action. Accordingly, the Judgment of Foreclosure and Sale in the Foreclosure Action constitutes a final judgment for purposes of Res Judicata and any attempt by **Plaintiff** to amend her Complaint to allege a cause of action against **NYCB** in the instant action should be precluded under the doctrine of Res Judicata. Additionally, to the extent that **Plaintiff's** Complaint attempts to reargue the Judgment of Foreclosure and Sale, such a cause of action would require dismissal because such relief is improper and time-barred pursuant to Section 5015(a)(1) of the CPLR.... In the case sub judice, since the Foreclosure Action was venued in the County of Queens and the Judgement of Foreclosure and Sale was served on **Plaintiff** with Notice of Entry on September 16, 2015, any attempts by **Plaintiff** to now reargue the Judgment of Foreclosure and Sale or vacate same would be clearly improper, untimely and frivolous." *See* Defendants NYCB and Forchelli's Affirmation in Support Exhibits 1 and 3-9.

Counsel for defendants NYCB and Forchelli further asserts, in pertinent part, that, "[t]he Second Cause of Action in the Complaint claims that **THE FORCHELLI FIRM** allegedly 'committed legal malpractice by submitting a patently false Affidavit to the Court by stating that Plaintiff Michele Bizzell appeared by an attorney and was notified of the CPLR Section 3408

conference, which is mandated by law as a required conference wherein a settlement of the outstanding debt is to be discussed.'... First, to the extent the Second Cause of Action claims to be based on 'legal malpractice', **Plaintiff** clearly fails to allege the required elements of such a claim.... In the instant case, since there was never a claim that **Plaintiff** and **THE FORCHELLI FIRM** ever had an attorney-client relationship, as no such relationship ever existed, **Plaintiff's** Second Cause of Action requires dismissal on that basis alone. Additionally, to the extent that the Second Cause of Action is deemed to be a claim against **THE FORCHELLI FIRM** based on an alleged misrepresentation to the Courts in the Foreclosure Action regarding **Plaintiff's** appearance at a court-ordered conference, documentary evidence clearly establishes that such a claim would be completely devoid of any merit.... [T]he Residential Foreclosure Conference Order states that **Plaintiff**, as one of the defendants in the Foreclosure Action, was on notice as to the Residential Foreclosure Conference of February 2, 2011 by means of a Pre-Foreclosure Court Conference on December 3, 2010. The Residential Foreclosure Conference Order also states that **Plaintiff** defaulted in appearing at (*sic*) Residential Foreclosure Conference. The foregoing Residential Foreclosure Conference Order was not a document that **THE FORCHELLI FIRM** either prepared or signed, but was and is a court document prepared and signed by the Court Attorney-Referee, Leonard N. Florio, who reached the determination reflected in the Residential Foreclosure Order based on his own findings. As such, any attempt by **Plaintiff** to claim that **THE FORCHELLI FIRM** submitted any intentionally false affidavit regarding the appearance or notification of **Plaintiff** in the Foreclosure Action in clearly and unequivocally contradicted by the Residential Foreclosure Conference Order which states that **Plaintiff**, as a defendant in the Foreclosure Action, was provided notice of the Residential Foreclosure Conference at the Pre-Foreclosure Conference on December 3, 2010 and, despite being provided such notice, defaulted in appearing at the Residential Foreclosure Conference of February 2, 2011. In light of the foregoing, **Plaintiff's** attempt to allege a claim against **THE FORCHELLI FIRM** fails to state a cause of action and is conclusively defeated by the documentary evidencing (*sic*) in this

matter." *See* Defendants NYCB and Forchelli's Affirmation in Support Exhibits 1 and 5.

In opposition to the motion, plaintiff argues, in pertinent part, that, "[m]y attorney Marvin J. Weinroth, Esq. retrieved the almost One (*sic*) thousand papers of the foreclosure file in the Queens County records office after the City Marshal appeared at my front door in October, 2016 to evict me and introduce the new owner of my home. Until that moment I had absolutely no knowledge whatsoever of any of the facts and/or documents involved in that case. When they appeared at the front door, Alvin Bizzell, my husband of twenty-eight years ran out the door and has never returned. I had always given him the mortgage payment in cash and he has always promised to pay the mortgage at the bank, since he was unemployed and I had a full-time job. I have learned that starting in September, 2008, he took the money and NEVER made any subsequent mortgage payments. The financial repercussions have been devastating, my credit has been ruined, and I have had to move into my parents' home. My attorney has explained to me that the New York State Legislature enacted Civil Practice Law & Rule (*sic*) section 3408 to provide a foreclosure defendant a basic final opportunity to participate in a Court mandated and required settlement conference with the foreclosing financial institution to attempt to resolve, if possible, any and all outstanding issues. My attorney and I have discovered that FCDSMC&T, LLP requested this conference to be scheduled by Katherine (*sic*) Sammon Burns, Esq. an attorney with the firm on July 29, 2010.... The Queens Supreme Court on November 4, 2010 notified me by mail, which I never received, nor signed for, nor knew anything about, that the Pre-foreclosure (*sic*) Conference would be held on December 3, 2010. Since I knew NOTHING about this scheduled conference I of course did not appear. Ms. Burns, Esq., however stated in Affirmations under the penalties of perjury AS TRUE that, "The Defendants appeared at the Conference and were informed of the Foreclosure Conference to be held on February 2, 2011.... The representation by Ms. Burns, Esq. was absolutely false, and was either gross negligence on her part or something else known only to her. I did not appear at the conference and the Court by Hon Leonard N. Florio, Court Attorney-Referee held on February 2, 2011 that my husband and I

had defaulted, had been on notice of that day's settlement conference based upon our appearance at the December 3, 2010 conference, and ordered the case to proceed by Order of Reference/Motion.... Ms. Burns, Esq. was intimately involved in the foreclosure case against me from its very inception. She had the Process Server paid to commence this lawsuit.... She constantly swore or affirmed that she had examined the Plaintiff's file on numerous occasions and stated that she affirmed '... that to the best of my knowledge, information and belief, the Summons, Complaint, and other papers filed or submitted to the Court in this matter contain no false statements of fact or law. I understand my continuing obligation to amend that Affirmation in light of newly discovered material facts following its filing.'... I am not trying to contest the foreclosure, nor in any way trying to open that case. It has been explained to me that the decisions(s) in that case are final and Res Judicata. My reason for bringing this case is to find out why certain errors or misrepresentations were allowed to occur. Simply put, I want to know why Ms. Burns, Esq. submitted the statements that weren't true; I never appeared at the initial CPLR section 3408 conference, didn't know about any aspect of the foreclosure action until the City Marshal and new owner appeared at my door.... I have moved on with my life and just need to know what happened whether by the attorneys' explanation or by discovery." *See* Plaintiff's Affidavit in Opposition Exhibits A-G.

In further opposition to the motion, counsel for plaintiff argues, in pertinent part, that, "[t]his action does not seek to relitigate the underlying Foreclosure case, whose decisions are Res Judicata, nor does it seek to hold NYCB liable in any way for any actions acts (*sic*), or documents in the Foreclosure case. Based upon an examination by the Plaintiff and myself of the nearly one thousand pages contained in the Court record in this matter, certain irregularities and false statements were made and submitted to the Court concerning the CPLR section 3408 Compulsory Foreclosure Settlement Conference. Was this gross negligence or something else? Since my client knows nothing about these conferences, nor any aspect of the foreclosure case due to the intentional deception by her husband Alvin Bizzell, she lost her home of twenty-eight

years. The Plaintiff understands that any and all mailings, service of process and notice addressed to her were signed for and received by her husband, who was unemployed and purportedly staying at home each day. I explained to her that substituted service in all these instances as revealed in our examination of the enormous file was valid and proper. There is no effort or claim that anything was improper in said mailing or service. The Plaintiff and I simply want an explanation why it was maintained by Ms. Burns, Esq. that the Plaintiff appeared at the CPLR section 3408 Pre-conference. Was this gross negligence, a mistake or something else? ... By representing to the Court that she and her husband appeared at the Pre-Conference, which they did not, my client was cast in a negative prejudicial light when their default occurred on February 2, 2011 at the Foreclosure Conference. The Plaintiff has stated that she was financially able to settle the mortgage indebtedness at any and all times if she had only known about the foreclosure proceedings. If Ms. Burns, Esq. had not made the statements she did, who knows what the Court would have done or how it would have ruled at the February 2, 2011 conference. My client wants an explanation and answer as to what caused Ms. Burns, Esq. to act as she did, and under the circumstances, I believe she is entitled to a response from FCDSMC&T, LLP."

In reply to plaintiff's opposition, counsel for defendants NYCB and Forchelli submits, in pertinent part, that, "**[p]laintiff's** complete and total failure to oppose that portion of the **Moving Defendants'** motion which seeks the dismissal of claims against **NYCB** and to remove **NYCB** from the caption of this action warrants the Court's issuance of an order granting such relief. As was addressed in **Moving Defendants'** initial motion papers, and will only be referenced briefly here, **Plaintiff's** Complaint literally fails to state any cause of action against **NYCB** and is further devoid of any allegations that state a cause of action against **NYCB**. Therefore, the Complaint should be dismissed as to **NYCB**. Moreover, to the extent that **Plaintiff** is deemed to have somehow alleged a cause of action against **NYCB**, such a cause of action would nevertheless require dismissal based on Res Judicata. Indeed, Plaintiff acknowledges that she 'is not trying to contest the foreclosure, nor in any way trying to open [the Foreclosure Action]. It has been

explained to me that the decision(s) in that case are final and Res Judicata.'"

Counsel for defendants NYCB and Forchelli further contends that, "**THE FORCHELLI FIRM** is entitled to dismissal of **Plaintiff's** Second Cause of Action since (1) **Plaintiff** admits in her Opposition Papers that **Plaintiff** has no basis to assert a malpractice claim against **THE FORCHELLI FIRM** in the Second Cause of Action, (2) **Plaintiff** admits that the purpose for asserting the Second Cause of Action was because **Plaintiff** 'simply want[s] an explanation [as to] why it was maintained by Ms. Burns, Esq. that the **Plaintiff** appeared at the CPLR section 3408 Pre-Conference', (3) **Plaintiff's** claim is an impermissible collateral attack of the proceedings in the Foreclosure Action, (4) the undisputed documentary evidence regarding the Pre-Foreclosure Conference states that **Plaintiff** appeared at such conference and (5) the undisputed documentary evidence clearly contradicts the allegations made by **Plaintiff** in the Complaint.... **Plaintiff's** confessed purpose for naming **THE FORCHELLI FIRM** in this action illustrates that **Plaintiff's** Second Cause of Action is an impermissible collateral attack of the Judgment of Foreclosure and Sale in the Foreclosure Action, thereby requiring the dismissal of the Second Cause of Action. [citations omitted].... In the case sub judice, since the **Plaintiff's** admitted explanation for naming **THE FORCHELLI FIRM** in this action is to find out why the Residential Foreclosure Conference Order signed by the Court Attorney-Referee, and the subsequent affirmations of Ms. Burns based thereon, stated that **Plaintiff** appeared at the CPLR section 3408 Pre-Conference, the only proper remedy and forum for **Plaintiff** would be the Foreclosure Action. **Plaintiff's** failure to seek recourse in the Foreclosure Action does not allow **Plaintiff** to use the current forum to collaterally attack the matters at issue in the Foreclosure Action. [citations omitted].... Moreover, any alleged misrepresentation to the Court in the Foreclosure Action regarding **Plaintiff's** appearance at a court-ordered conference is clearly contradicted by the undisputed documentary evidence."

"In reviewing a motion to dismiss pursuant to CPLR 3211(a)(7), '"the court will 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 within any cognizable legal theory.'" *Mills v. Gardner, Tompkins, Terrace, Inc.*, 106 A.D.3d 885, 965 N.Y.S.2d 580 (2d Dept. 2013) *quoting Matter of Walton v. New York State Dept. of Correctional Servs.*, 13 N.Y.3d 475, 893 N.Y.S.2d 453 (2009) *quoting Nonnon v. City of New York*, 9 N.Y.3d 825, 842 N.Y.S.2d 756 (2007); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011); *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). The task of the Court on such a motion is to determine whether, accepting the factual averment of the complaint as true, plaintiff can succeed on any reasonable view of facts stated. *See Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995). In analyzing them, the Court must determine whether the facts as alleged fit within any cognizable legal theory (*see Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001)), not whether plaintiff can ultimately establish the truth of the allegations. *See 219 Broadway Corp. v. Alexander's Inc.*, 46 N.Y.2d 506, 414 N.Y.S.2d 889 (1979). The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. *See Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 A.D.3d 788, 967 N.Y.S.2d 119 (2d Dept. 2013). However, bare legal conclusions are not presumed to be true. *See Goel v. Ramachandran*, 111 A.D.3d 783, 975 N.Y.S.2d 428 (2d Dept. 2013); *Felix v. Thomas R. Stachecki Gen. Contr., LLC*, 107 A.D.3d 664, 966 N.Y.S.2d 494 (2d Dept. 2013). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." *Leon v. Martinez*, *supra* at 88.

To recover damages for legal malpractice, a plaintiff must prove, *inter alia*, the existence of an attorney-client relationship. *See Berry v. Utica Nat. Ins. Group*, 66 A.D.3d 1376, 886 N.Y.S.2d 784 (4th Dept. 2009). Since an attorney-client relationship does not depend on the

existence of a formal retainer agreement or upon payment of a fee, the court must look to the words and actions of the parties to ascertain the existence of such a relationship. *See Moran v. Hurst*, 32 A.D.3d 909, 822 N.Y.S.2d 564 (2d Dept. 2006).

When viewing plaintiff's Complaint in light of the criteria set forth above, the Court finds that plaintiff has failed to state a cause of action against either defendant NYCB or defendant Forchelli that falls within a cognizable legal theory.

CPLR § 3211(a)(1) states that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded upon documentary evidence." To obtain dismissal of a complaint pursuant to CPLR § 3211(a)(1), a defendant must submit documentary evidence which "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002) *citing Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994). An application predicated upon this section of law will be granted only upon a showing that the "documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010) *quoting Scadura v. Robillard*, 256 A.D.2d 567, 683 N.Y.S.2d 108 (2d Dept. 1998). "[T]o be considered documentary evidence, it must be unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1*, *supra*, *citing* SIEGEL, PRACTICE COMMENTARIES, MCKINNEY'S CONS LAWS OF NY, BOOK 7B, CPLR 3211:10 pp. 21-22. "[T]hat is, it must be 'essentially unassailable.'" *Torah v. Dell Equity, LLC*, 90 A.D.3d 746, 935 N.Y.S.2d 33 (2d Dept. 2011) *quoting Schumacher v. Manana Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010).

A complaint may be dismissed pursuant to CPLR § 3211(a)(1), based on documentary evidence, only if the factual allegations are definitively contradicted by the evidence or a defense is conclusively established. *See Yew Prospect v. Szulman*, 305 A.D.2d 588, 759 N.Y.S.2d 357 (2d Dept. 2003). A motion to dismiss based on documentary evidence may be granted only where such documentary evidence utterly refutes the plaintiffs' factual allegations, resolves all factual

issues as a matter of law and conclusively disposes of the claims at issue. *See Yue Fung USA Enters., Inc. v. Novelty Crystal Corp.*, 105 A.D.3d 840, 963 N.Y.S.2d 678 (2d Dept. 2013). In sum, the analysis is two-pronged - the evidence must be documentary and it must resolve all the outstanding factual issues at bar.

The Court finds that the documentary evidence submitted by defendants NYCB and Forchelli resolves all factual issues as a matter of law and conclusively dispose of the claims at issue.

Accordingly, the branches of defendants NYCB and Forchelli's motion, pursuant to CPLR § 3211(a)(1) and (7), for an order dismissing plaintiff's Complaint as against them, is hereby **GRANTED**.

Consequently, the branch of defendants NYCB and Forchelli's motion, pursuant to CPLR § 3211(a)(5), for an order dismissing plaintiff's Complaint as against them, is hereby **DENIED as moot**.

It is further ordered that the remaining parties shall appear for a Preliminary Conference on May 10, 2018, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

**ENTER:**

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York
March 26, 2018

**ENTERED**

MAR 28 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE