

**Muniz v Graziose**

2018 NY Slip Op 33821(U)

May 23, 2018

Supreme Court, Nassau County

Docket Number: 602568-17

Judge: Jerome C. Murphy

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.

0

**SUPREME COURT: STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**VANESSA ROSE MUNIZ a/k/a VANESSA ROSE  
FERRELLI,**

**Plaintiff,**

**- against -**

**TRIAL/IAS PART 14  
Index No.: 602568-17  
Motion Date: 3/6/18  
Sequence Nos.: 001, 002  
MG, MI  
DECISION AND ORDER**

**CHRISTINE GRAZIOSE, JEFFREY GRAZIOSE,  
ALFONSO GRAZIOSE, WENWOOD DRIVE, LLC,  
JOSEPH WALSH, ESQ., RICHARD GERTLER,  
ESQ., and DECISION 2000 REAL ESTATE  
SERVICES, INC.,**

**Defendants.**

The following papers have been read on this motion:

Sequence No. 001:

Motion of Motion, Affirmation and Exhibits.....1

Memorandum of Law in Support.....2

Affirmation in Opposition and Exhibits.....3

Reply Memorandum of Law in Further Support.....4

Sequence No. 002:

Notice of Motion, Affidavit in Support and Exhibits.....5

Affirmation in Opposition and Exhibits.....6

Reply Affidavit and Exhibits.....7

**PRELIMINARY STATEMENT**

In Sequence No. 001, defendants, Christine Graziose, Jeffrey Graziose, Alfonso Graziose, Wenwood Drive, LLC and Joseph Walsh, Esq. bring this application for an an order pursuant to CPLR § 3211(a)(1) and(a)(7) dismissng plaintiff's complaint in its entirety as against the moving

defendants, together with such other and further relief as may be deemed just and proper. Plaintiff has submitted opposition to this application.

In Sequence No. 002, defendants, Christine Graziouse, Jeffrey Graziouse, Alfonso Graziouse, Wenwood Drive, LLC and Joseph Walsh, Esq., bring this application for an order pursuant to CPLR § 3212 dismissing plaintiff's complaint in its entirety as against the defendant, together with such other and further relief as may be deemed just and proper. Plaintiff has submitted opposition to this application.

### BACKGROUND

Plaintiff commenced this action by filing a Summons and Verified Complaint on March 24, 2017. The action involves sale of premises known as 6 Wenwood Dr., Brookville, New York to Wenwood Drive, LLC. According to the Contract of Sale (Exh. "G"), to Motion Seq. 001, the sales price was \$200,000, with \$20,000 upon conveyance, and \$180,000 payable to Walsh & Roth, LLP, attorney for Purchaser, to be delivered to Seller upon vacating the premises on or before June 1, 2014. ¶ 3<sup>rd</sup> of the Contract provides as follows:

- 3<sup>rd</sup> Purchaser agrees to accept title to the premises subject to the following liens:
- (1) Mortgage to Ridgewood Savings Bank in the amount of Two Million Four Hundred Thirty-two Thousand Five Hundred (\$2,432,500.00 dated October 23, 2007.
  - (2) HELOC Mortgage in favor of JP Morgan Chase Bank, N.A., in the amount of Three Hundred Forty Seven Thousand Five Hundred Dollars (\$347,500.00).
  - (3) Internal Revenue Service lien, Lien Serial Number 857990912 in the amount of \$63,593.44 recorded 4/11/12.
  - (4) New York State Tax Commission judgment in the amount of \$24,588.78.
  - (5) Judgment in favor of Segundo Pineda docketed 5/11/2013 in the amount of \$5,293.06.
  - (6) Judgment in favor of Dash windows (sic.) of LI docketed 12/6/2013 in the amount of 2,888.16.
  - (7) New York State Tax Commission judgment in the amount of \$14,600.00 docketed 3/13/2014.

The Ridgewood Savings Bank Mortgage in the original amount of \$2,432,500 was dated October 23, 2007. On the same date, Ferelli executed a Credit Line Mortgage with JP Morgan Chase in the amount of \$347,500. The First Mortgage was modified on March 19, 2010. On June 11, 2013, Ridgewood S.B. commenced a foreclosure action, and on July 10, 2013, they filed a Lis Pendens.

Ridgewood subsequently moved to discontinue the foreclosure action and remove the Lis Pendens. On March 6, 2014, the Order canceling the foreclosure and removing the lis pendens was entered. On March 28, 2014, at which time no foreclosure was pending, and no lis pendens was a lien against the premises, Wenwood and Fenelli entered into the Sales Agreement, and closed title on the same day.

In her Complaint, Ms. Muniz claims that defendants Jeffrey Graziose, and Alfonso Graziose advised her that they were aware that her Ridgewood S.B. mortgage was in foreclosure, and that they would pay her the estimated equity in the home, and indemnify her for all other debts attached to plaintiff and the house. She contends that defendants were aware of her financial distress and devised a plan to deprive her of her home.

She claims that the dwelling was a "covered property" within the meaning of Real Property Law § 265-a. Entitled the Home Equity Theft Protection Act, it is intended to protect owners of homes in foreclosure from individuals who take advantage of their circumstances, and induce them to sell their equity in the home for less than its true value, or even for nothing.

Plaintiff sets forth five causes of action as follows:

FIRST: Fraud against the Graziose and Wenwood defendants. She contends that they were equity purchasers who were aware of the requirement of § 265-a to include in the contract a provision for rescission within three days of the contract. She claims that the Graziose and Wenwood defendants falsely represented to plaintiff that their proposal would save the home from foreclosure.

SECOND: Constructive Fraud. Defendants allegedly had superior knowledge of facts, law, and information than plaintiff, which enabled them to commit a constructive fraud by concealing material facts, law and information, and breached a fiduciary duty owed her. She claims that with the assistance of Gertler, who she contends was her attorney, and Walsh, who represented Wentwood and the Graziones, the were able to conceal from her the rights she was entitled to under § 265-a..

THIRD: Plaintiff alleges breach of contract against the Grazioses and Wentwood.

FOURTH: Because Graziose and Wentwood deprived plaintiff of her rights under Real Property Law § 265-s, the Contract is deemed null and void, and plaintiff is entitled to revision.

FIFTH: Plaintiff asserts a claim of legal malpractice against Gertler, in failing to provide for indemnification against all indebtedness.

In Motion Sequence No. 2, defendant Gertler moves for summary judgment and to dismiss the Complaint against him since he claims he did not represent plaintiff as an individual.

#### DISCUSSION

In Sequence No. 1, defendants move to dismiss the Complaint under CPLR §§ 3211 (a)(1) and (a)(7). § 3211 (a)(1) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence;

In order to succeed in a claim based upon documentary evidence, “. . . the defendant must establish that the documentary evidence which form the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff’s claim” (*Symbol Technologies, Inc. v. Deloitte & Touche, LLP*, 69 A.D.3d 191, 194 [2d Dept. 2009]); (*DiGiacomo v. Levine*, 2010 WL 3583424 (N.Y.A.D. 2d Dept.)).

CPLR § 3211 (a)(7) provides as follows:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action.

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction, facts as alleged in the complaint are accepted as true, and the plaintiff is accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable legal theory (*Uzzle v. Nunzie Court Homeowners Ass’, Inc.* 55 A.D.3d 723 [2d Dept. 2008]). A pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment; the question is whether the requisite allegations of any valid cause of action cognizable by the state courts can be fairly gathered from all the averments (*Brinkley v. Casablanacas*, 80 A.D.2d 815 [1<sup>st</sup> Dept.

1981])).

The First Cause of Action alleges fraud. In order to sustain a cause of action for actual fraud, plaintiff must prove:

- defendant made a representation, as to a material fact;
- the representation was false;
- the representation was known to be false by defendant;
- it was made to induce the other party to rely upon it;
- the other party rightfully relied upon the representation;
- the party relying upon the representation was ignorant of its falsity;
- the party suffered injury or damage based on its reliance (*Otto Roth & Co.*

*Inc., v. Gourmet Pasta, Inc.* 277 A.D.2d 293 [2d Dept. 2000]). Liability can also be premised upon representations which are recklessly made (*Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112 [1969]).

Recklessness imports more than mere negligence. A person is reckless when they assert that something is true within their own personal knowledge, or makes such an absolute, unqualified, and positive statement as implies knowledge on their part, when in fact the person has no knowledge as to whether the statement is true or false, and the statement proves to be false, the person is equally as culpable as if they had willfully asserted something to be true which they absolutely knew to be false, and is equally chargeable with fraud (*Daly v. Wise*, 132 N.Y. 306 [1892]).

CPLR § 3016 (b) requires that a cause of action for fraud, the circumstances constituting the wrong must be stated in detail. The only alleged misrepresentation set forth in the First Cause of Action is that in addition to paying plaintiff her equity in the premises, they would indemnify her against all other debts attached to plaintiff and the property (Pagano Affidavit [Exh. "A"] at ¶ 18).

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of

every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.* at 88). In assessing a motion under CPLR 3211(a)(7), however, the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and the court's inquiry then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one (*Id.*). Allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by the evidence, are not presumed to be true and are not accorded every favorable inference (*Biondi v. Beekman Hill House Apt.*, 94 N.Y.2d 659 [2000]).

Assuming the truth of the allegation at ¶ 18 of the Complaint, that Jeffrey and Alfonso Graziose represented to Ms. Muniz that they had sufficient funds to purchase her equity, and that they would indemnify her against all debts attached to her or to the property, she has not set forth an action for fraud. The thrust of the allegation is that defendants misrepresented their intention to indemnify plaintiff from all debts. This not a misrepresentation of a material present fact, since a mere misrepresentation of an intent to perform is insufficient to allege fraud (*Lalima v. Consolidated Edison Co. of New York, Inc.*, 151 A.D.3d 832 [2d Dept. 2017]).

Additionally, the claim that defendants were to indemnify and hold plaintiff harmless from all indebtedness attached to her or the property is belied by the language of the written contract. The contract states that defendants would take title subject to the existing mortgage and other liens, not that they would take subject to and assume to pay. “ ‘A party who executes a contract is presumed to know its contents and to assent to them’ ” (*Prompt Mort. Providers of North America, LLC v. Zarour*, 155 A.D.3d 912, 914, quoting *Nerey v. Greenpoint Mtge. Funding, Inc.* 144 A.D.3d 646, 648 [2d Dept. 2016]).

Plaintiff also failed to establish justifiable reliance on the alleged representations with respect to holding her harmless for all indebtedness attached to the dwelling. Her claim that she was unrepresented by an attorney who could explain the language of the contract is without merit. She relies upon the cross-motion of Richard Gertler, Esq., that he did not represent her in an individual capacity, to establish that she was unrepresented. Gertler represented her, but he

claims that he represented her as a member of the firm of Davidoff Hatcher & Citron. He does not claim that he did not represent her at all. Having been represented by an attorney, and having the opportunity to read the Sales Contract, plaintiff cannot establish justifiable reliance upon an alleged oral representation made by two of the defendants.

Plaintiff's First Cause of Action for Fraud is dismissed.

Plaintiff's Second Cause of Action for Constructive Fraud must also be dismissed. The elements of constructive fraud are the same as fraud, except that the element of scienter on the part of the defendant is not present. This element, however, is replaced that plaintiff must establish the existence of a fiduciary or confidential relationship, warranting the trusting party to repose their confidence in the defendant, and thereby relax the care and vigilance ordinarily expected in such circumstances (*Levin v. Kitsis*, 82 A.D.3d 1051 [2d Dept. 2011], citing *Brown v. Lockwood*, 76 A.D.2d 721, 731 [2d Dept. 1980]).

Plaintiff and the moving defendants were not in a fiduciary relationship; rather, they were involved in an arms-length transaction, and the claim of constructive fraud is unavailable. The Second Cause of Action is dismissed.

The Third Cause of Action for Breach of Contract must be dismissed as against defendants Christine Graziose, Jeffrey Graziose, and Alfonso Graziose, since they are not parties to the Sales Contract. The sole signatory on behalf of the Purchaser is Christine Graziесе, Member of Wenwood Drive, LLC, Purchaser. Ms. Graziose also wrote the term "managing member next to her typewritten name. There is no authority for a party to maintain a cause of action for breach of contract against a party with whom they are not in privity. Where, as here, the agreement clearly states that it was entered into on behalf of a limited liability company, the individual representative of the company, who signed as such, will not be held personally liable (*Metropolitan Switch Bd. Col, Inc. v. Amici Associates*, 20 A.D.3d 455 [2d Dept. 2005])

Plaintiff has not identified any breach of the contract by Wenwood, the purchaser under the contract. In the absence of an allegation of the manner in which defendant breached a contract, it must be dismissed (*Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750 [2d Dept. 2011]). The Third Cause of Action against all named defendants is dismissed.

In the Fourth Cause of Action, plaintiff alleges that she is entitled to rescission because the contract violates Real Property Law § 265-a. That statute, designed to protect parties from the loss of their home, by a purchaser seeking to take advantage of the financial difficulties, must involve a “covered contract.” A “covered contract” is defined as any contract, agreement, or arrangement, or any term thereof, between and equity purchaser and equity seller which:

(i) is incident to the sale of a residence in foreclosure; or (ii) is incident to the sale of a residence in foreclosure or default where such contract, agreement or arrangement includes a reconveyance arrangement. The foreclosure action was discontinued by the mortgagee prior to the contract and conveyance of title, so that subdivision (i) was inapplicable. With respect to subdivision (ii), the Agreement did not involve a provision for reconveyance.

The transaction was not governed by § 265-a, and the Fourth Cause of Action for rescission is dismissed.

In Motion Sequence No. 2, defendant Richard Gertler, Esq. claims that he did not represent plaintiff in his individual capacity, but, rather, as a member of his law firm.

In regard to this fifth course of action, defendant Mr. Gertler argues that his law firm represented the plaintiff and not him, individually. He never says that he did not act as the plaintiff’s attorney even though he claims his law firm performed legal work on behalf of the plaintiff; but not with respect to the closing.

The plaintiff in her sworn verified complaint claims that Mr. Gertler acted as her attorney and proximately caused the plaintiff financial injuries and damages.

Thus, there are questions of fact which are raised in the motion papers. Given the questions of fact, the Court must deny defendant Gertler’s motion for summary judgment brought pursuant to CPLR § 3212, since Mr. Gertler’s motion papers do not resolve those open questions and he has the burden of proof to do this.

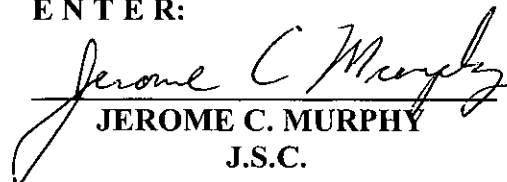
The application for the imposition of sanctions upon Ms. Muniz and her counsel, Mr. Demiris is denied in all respects.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
May 23, 2018

**ENTER:**

  
**JEROME C. MURPHY**  
J.S.C.

**ENTERED**  
MAY 25 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE