

Yelena Voronova & Filton LLC v Gordan

2018 NY Slip Op 34001(U)

February 27, 2018

Supreme Court, Kings County

Docket Number: 500356/2017

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35 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 27th day of February, 2018.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

-----X
YELENA VORONOVA AND FILTON LLC,

Plaintiffs,

- against -

Index No. 500356/2017

DMITRIY GORDAN A/K/A DMITRIY GORODICHEV,
AMERIMAX CAPITAL LLC, AND HANA SMALL
BUSINESS LENDING, INC.,

Defendants.

-----X
The following papers numbered 1 to 8 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-2, 3-5
Opposing Affidavits (Affirmations)_____	6-7
Reply Affidavits (Affirmations)_____	8
Other Papers <u>Letter Dated 7/11/17 from Michael Song</u> _____	9

Upon the foregoing papers, plaintiffs Yelena Voronova and Filton LLC cross- move for an order, pursuant to CPLR 3025, granting them leave to amend their complaint (Motion Sequence No. 2).¹ Defendant Hana Small Business Lending (Hana) moves for an order,

¹ Plaintiffs cross-moved in response to a motion to dismiss brought by defendants Dmitriy Gordan and Amerimax Capital LLC (Amerimax). By way of an amended partial stipulation of discontinuance dated February 16, 2018, plaintiffs discontinued the action as against Gordon and Amerimax. This February 16, 2018 stipulation corrected the defect contained in a previous stipulation, which was not signed by counsel for all of the parties. Based

pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the complaint on several grounds, including that the complaint fails to state a cause of action.

Plaintiffs' cross motion is granted, and the proposed amended complaint is deemed served on Hana. Hana's motion is granted and the amended complaint is dismissed.

Turning first to plaintiffs' cross motion, as none of the defendants had answered at the time plaintiffs moved for leave to amend the complaint, plaintiffs could have amended the complaint as of right and without leave of court (*see Matter of Gansburg v Blachman*, 111 AD3d 935, 936 [2d Dept 2013]; *Johnson v Spence*, 286 AD2d 481, 483 [2d Dept 2001]; CPLR 3025 [a]). Accordingly, there is no basis for denying plaintiffs' cross motion (*see Matter of Gansburg*, 111 AD3d at 936). The amended complaint supersedes the original complaint, and is now the only complaint in the action (*see D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 957 [4th Dept 2014]).

Hana's motion to dismiss was made shortly after plaintiffs' cross motion, and is addressed to plaintiffs' original complaint. Nevertheless, Hana, in a July 11, 2017 letter to the court, effectively elected to apply its motion to dismiss to the amended complaint (*see Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170 [2d Dept 2017]).

In the amended complaint, plaintiff Yelena Voronova alleges that, in March 2014, she began negotiating for the purchase of a property located at 3079 Brighton 13th Street, in

on this prior defective stipulation, Gordon and Amerimax, in a letter dated February 5, 2018, had already requested that the court mark their motion to dismiss off of the calendar in view of the discontinuance of the action as against them.

Brooklyn, New York.² Voronova, thereafter, entered into an agreement with Gordon and Amerifax who would act as a mortgage broker to assist her in obtaining a loan for the purchase if a loan was required. Much of the complaint involves plaintiffs' assertions that Gordon and Amerifax were not properly licensed and that they improperly insisted that Voronova needed a commercial loan rather than a residential loan to purchase the premises. Plaintiff further asserts that, as a result, plaintiffs faced higher fees and costs.

The only factual assertions contained in the amended complaint relating to Hana's role in the transaction are allegations that Voronova ultimately dealt directly with Hana without the involvement of Gordon or Amerifax (Amended Complaint at ¶¶ 20-21), that Hana "took part in the transaction as a financier (sic) or loan initiator for the transaction" (Amended Complaint at ¶ 64), and that "all Defendants were involved in financing and transferring the property known as 3079 Brighton 13th Street, Brooklyn, NY" (Amended Complaint at ¶ 54). Based on these factual allegations, plaintiffs assert, in the fifth cause of action premised on common law negligence, that all of the defendants owed plaintiffs a duty to "ensure that the transaction was of a proper nature and done according to the applicable laws in accordance with the best interests of the plaintiffs" (Amended Complaint at ¶ 55) and that defendants violated their duties by "[m]isinforming the plaintiffs as to the loan requirements," "[n]ot providing plaintiffs with proper disclosures," and "[p]rocurring unnecessary (sic) loans

² Although plaintiff Filton LLC's role in this action is not detailed in the amended complaint, it is undisputed that Filton LLC is the name of the entity that Voronova formed to serve as the purchaser and owner of 3079 Brighton 13th Street.

despite knowing the proper use of the property” (Amended Complaint at ¶ 56).

Plaintiffs, in the sixth cause of action, seek a declaratory judgment. Plaintiffs allege that unnamed John Does took part in the transactions at issue “as investors or financiers (sic) to obtain funds for the plaintiffs” and that these John Does “may have claims against plaintiffs due to their involvement and improper loan procurement” resulting from the alleged improper actions of the named defendants (Amended Complaint at ¶¶ 65-68). Accordingly, plaintiffs seek a judgment declaring that plaintiffs’ “involvement in no way influenced the conduct of [the named] defendants . . . and that any claims of liability from John Does or others, plaintiffs did not force the loan to be obtained under current terms” (Amended Complaint at ¶ 69). In the “wherefore clause” of the amended complaint, plaintiffs restate their request for relief relating to the sixth cause of action and request an order “granting a declaratory judgment stating that plaintiffs are not liable to any other entities or individuals for misconduct of the defendants” (Amended Complaint at ¶ 6 of the wherefore clause).

Although Hana seeks relief under several subdivisions of CPLR 3211, the only subdivision relevant to the amended complaint is CPLR 3211 (a) (7). In considering a motion to dismiss for failing to state a cause of action under CPLR 3211 (a) (7), the pleading is to be afforded a liberal construction (CPLR 3026), and the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (*see*


Hurrell-Harring v State of New York, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1995]). The court, in assessing the motion, “may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion [then becomes] whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Leon*, 84 NY2d at 88 [internal quotation marks and citations omitted]).

Applying this standard to plaintiffs’ amended complaint, the court finds that plaintiffs’ fifth cause of action for negligence against Hana fails to state a cause of action. In so finding, the court notes that plaintiffs’ very limited factual allegations relating to Hana’s conduct are insufficient to allow an inference of negligence as to Hana. Perhaps more importantly, plaintiffs’ allegations fail to demonstrate that any of Hana’s alleged conduct violated a duty owed by Hana to plaintiffs. In this respect, plaintiffs’ rights and obligations with respect to Hana primarily arose out of its contract/loan agreement with Hana. However, “a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated” (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389-390 [1987]; *cf. Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]). Here, plaintiffs have failed to identify any basis for a duty independent of any contract with Hana, nor have they pled any facts showing that the violation of any contractual or statutory right would allow for tort recovery in the context of this case, where the alleged harm is economic, and does not involve the kind of injury typically associated with recovery for negligence (*see Sommer*, 79 NY2d at 552; *Verizon v Optical Communications Group, Inc.*, 91 AD3d 176,

181-182 [2d Dept 2011]). Additionally, Voronova’s affidavit provides no additional facts relating to Hana’s actions that would warrant a different finding (*cf. Leon*, 84 NY2d at 88).

Hana is also entitled to dismissal of the sixth cause of action for a declaratory judgment. Plaintiffs’ allegations fail to allege a justiciable controversy in that the declaration requested involves unnamed parties who are not before the court and “would be contingent upon the occurrence of events which may or may not come to pass at some point in the future” (*Premier Restorations of N.Y. Corp. v New York State Dept. of Motor Vehs.*, 127 AD3d 1049, 1049 [2d Dept 2015]). In essence, plaintiffs’ sixth cause of action must be dismissed because it requests that this court issue an impermissible advisory opinion (*id.*; *Waterways Dev. Corp. v LaValle*, 28 AD3d 539, 540 [2d Dept 2006]; CPLR 3001).

This constitutes the decision, order and judgment of the court.

ENTER,

J. S. C. Rothenberg
Karen B. Rothenberg
Justice, Supreme Court




NANCY T. SUNSHINE
Clerk

KINGS COUNTY CLERK
FILED
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