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| Horizon Estates, LLC v TBG Funding LLC |
| 2018 NY Slip Op 34394(U) |
| August 18, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 607878/2017E |
| Judge: William B. Rebolini |
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Horizon Estates, LLC and Romaz Properties, Ltd., Index No.: 607878/2017E

Plaintiffs, Motion Sequence No.: 002; MG
Motion Date: 5/23/18
Submitted: 5/23/18

-against-

TBG Funding LLC, Eli Karman, Cheryl Jaeger, Motion Sequence No.: 003; MG
Michael Pfeifer, Silver Arch Capital Partners, LLC Motion Date: 5/23/18
and Sky Capital, Submitted: 5/23/18

Defendants. Attorney for Plaintiffs:

Attorney for Defendant
Silver Arch Capital Partners, LLC:

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Eli Karman and Cheryl Jaeger:

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Clerk of the Court

Upon the following E-File document list numbered 41 to 55 read upon the application by defendant Michael Pfeifer and the application by defendant Silver Arch Capital Partners, LLC for an order granting them summary judgment dismissing the amended complaint; it is

ORDERED that the motion by defendant Michael Pfeifer for summary judgment dismissing the amended complaint pursuant to CPLR 3212 is granted, without opposition; and it is further

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ORDERED that the motion by defendant Silver Arch Capital Partners, LLC for summary judgment dismissing the amended complaint as against it pursuant to CPLR 3212 is granted, without opposition; and it is further

ORDERED that the claims against defendants Silver Arch Capital Partners, LLC and defendant Michael Pfeifer are severed and the claims asserted against the remaining defendants shall continue.

Plaintiffs commenced this action by the electronic filing of a summons and complaint on April 25, 2017. Defendant Silver Arch Capital Partners, LLC ("Silver Arch"), e-filed its answer to the complaint on May 17, 2017. Defendant Michael Pfeifer ("Pfeifer") e-filed his answer to the complaint on July 26, 2017. Plaintiffs e-filed an amended complaint on July 28, 2017. Defendant Silver Arch e-filed its answer to the amended complaint on August 8, 2017 and defendant Pfeifer e-filed his answer to the amended complaint on March 15, 2018. By notice of motion dated and e-filed on May 23, 2017, defendants TBG Funding, LLC (TBG), Eli Karman and Cheryl Jaeger moved for an order dismissing the complaint. By decision dated November 29, 2017 this Court granted the motion to dismiss.

This action arises out of plaintiffs' attempt to refinance a \$3,100,000.00 loan at 12% interest from TBG by note dated September 24, 2014 which was secured by a mortgage. The note matured on September 21, 2015 and upon default of payment under the note, the interest rate increased to 24% per annum. When the note became due in September 2015, plaintiffs sought and obtained an extension of the maturity date for six months while they continued their attempts to refinance the loan. On March 21, 2016, plaintiffs sought and obtained another extension which extended the maturity date for three months until June 23, 2016. It is plaintiffs' contention that "in or about July 27, 2016, Defendant Karman, who is a lending officer at TBG, recommended that Plaintiffs discharge broker [James] Kogut and utilize broker Defendant Pfeifer." The cause of action against defendant Silver Arch seeks a return of the good faith deposit tendered by plaintiff Romaz Properties, Ltd ("Romaz") based upon the term sheet executed by plaintiffs. The only cause of action against defendant Pfeifer alleges that he "violated his obligations to Plaintiff, under NYS banking law §590, by, among other things, willfully and/or negligently failing to act in Plaintiff's best interest, and with reasonable skill, care and diligence. Specifically, he failed to secure a mortgage loan for Plaintiff Romaz from a responsible commercial lender and failed to promptly address with the Defendant Silver Arch, the spurious reasons for the numerous changes in the amount of the loan being offered after the Term Sheet had been signed and the good faith deposit had been paid by the Plaintiffs." Plaintiffs further allege that "as a result of Defendant Pfeifer's malpractice, the Plaintiff Romaz sustained damages of \$235,000.00 consisting of \$210,00 interest paid to Defendant TBG for ten (10) months after TBG's loan become due on June 23, 2016 and the \$25,000 good faith deposit paid to Defendant Sky Capital."

The claims against both defendants Pfeifer and Silver Arch arise from a written and executed term sheet for a \$3 million dollar loan. The term sheet signed by plaintiffs specifically provides that it is "nonbinding" and that "final terms and conditions of any Loan will be subject to, among other

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things, Lender's due diligence legal review, including documentation, credit review procedures and internal approvals." The term sheet also specifically provided that any loan by defendant Silver Arch would have a maximum loan to value ratio of 45% of the appraised property. According to the appraisal report, the property was valued at \$3,600,000, such that the maximum loan plaintiffs could expect from defendant Silver Arches was \$1,620,000, not \$3 million dollars. Despite this, the plaintiffs were offered a loan for \$2,000,000. In regards to the \$25,000 paid by plaintiff Romaz, this was to be "non-refundable" pursuant to the provisions of the term sheet and this fee paid by plaintiff Romaz was considered a due diligence deposit, to be applied towards the site inspection, evaluation, appraisal and underwriting procedures for the loan, with any balance to be credited against the origination fee at a loan closing.

Defendants Pfeifer and Silver Arch now move for summary judgment dismissing the complaint as against them.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, *supra*). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*Alvarez, supra*, 68 N.Y.2d at 324-325, 508 N.Y.S.2d 923, 501 N.E.2d 572). It is beyond cavil that the court's role is "issue-finding, rather than issue-determination." at this juncture (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, [1957]; *In re Brandie B.* 109 A.D.3d 987, 971 N.Y.S.2d 701 [2nd Dept.2013]). Here, plaintiffs were served with the motion papers and submitted no opposition. When a party fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (*Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Madeline D'Anthony Enter., Inc. v. Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co, LLC v. Mentasana*, 79 AD3d 1079, 915 NYS2d 591 [2nd Dept 2010]).

To the extent that plaintiffs purport to allege defendant Silver Arch breached the term sheet, the elements of a cause of action for breach of contract are (1) the existence of a contract between plaintiff and defendant, (2) performance by the plaintiff, (3) defendant's failure to perform, and (4) damages resulting from such failure to perform (see *Furia v Furia*, 116 AD2d 694 [2d Dept. 1986]; 2 NY PJ2d 4:1, at 676 [2013]). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records* 98 N.Y.2d 562, 569 [2002]). "If the language of the agreement is free from ambiguity, its meaning

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may be determined as a matter of law on the basis of the writing alone without resort to extrinsic evidence” (*Salerno v Odoardi*, 41 AD3d 574, 575 [2d Dept 2007]). Here, defendant Silver Arch established its entitlement to summary judgment dismissing the complaint, as the term sheet governs the obligations and duties of the parties. Defendant Silver Arch indeed proceeded with its due diligence pursuant to the express language of the term sheet. The due diligence deposit was applied as stated under the term sheet and plaintiff cannot sustain its claim against defendant Silver Arch in light of the express and unequivocal provisions contained within the term sheet. The court notes that there are no claims purportedly made by plaintiff Horizon Estates, LLC (“Horizon”) against defendant Silver Arch nor are there any allegations that defendant Silver Arch had any relationship with plaintiff Horizon. The court further notes that, as to the request by defendant Silver Arch for attorneys’ fees and costs, no counterclaim was asserted by defendant Silver Arch requesting this relief and defendant Silver Arch did not seek summary judgment on any purported claim for attorneys’ fees and costs in its notice of motion. As such, this request is not properly before this Court.

As to the claim against defendant Pfeifer, “general allegations of wrongdoing based upon undisclosed facts do not state a cause of action” (*see Cruciated v. O’Donnell & McLaughlin*, 149 AD3d 1034 [2d Dept. 2017]). To the extent that plaintiffs purport to allege malpractice by defendant Pfeifer, malpractice is defined as a “professional misfeasance towards one’s client” (*Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 NY2d 20, 725 NYS2d 592 [2001]). A mortgage broker, however, is not considered to be a “professional” subject to a malpractice claim (*Id.*; *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 799 NYS2d 170 [2005]; *Santiago v. 1370 Broadway Associates, L.P.*, 96 NY2d 765, 725 NYS2d 599 [2001]; *Vista Food Exchange, Inc. v. Benefitmall*, 138 AD3d 535, 31 NYS3d 9 [1st Dept. 2016]; *Manes Organization, Inc. v. Meadowbrook-Richman, Inc.*, 2 AD3d 292, 770 NYS2d 27 [1st Dept. 2003]). To the extent that plaintiffs claim against defendant Pfeifer can be viewed as one sounding in negligence, an “essential element of negligence is a breach of duty owed to plaintiff by defendant” (*Pulka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). A negligence claim against a broker can only stand if alleged wrongful act or omission caused an injury to the plaintiff (*Id.*). While a broker or agent is required to exercise good faith, reasonable diligence, and such skill as is ordinarily possessed by persons engaged in the same business (*see Heinemann v. Heard*, 50 NY 27, 35 [1872]; *MacDonald v. Carpenter & Pelton, Inc.*, 31 AD2d 952, 298 NYS2d 780 [2d Dept. 1969]; *Brown v. Stinson*, 821 F.Supp. 910 [SDNY 1993]; *Restatement (Second) Torts §299A*), here, there are no allegations that defendant Pfeifer acted negligently in failing to exercise a particular level of skill as a financial broker or that he otherwise did not meet his obligations to plaintiffs. In that regard, plaintiff has not set forth the grounds upon which to assert any negligence by defendant Pfeifer. Even if this Court were to view the allegations as a claim for breach of fiduciary duty, there are no allegations of a fiduciary relationship and no allegations that defendant Pfeifer misled plaintiff by making false representations (*see Roni LLC v. Arfa*, 74 AD3d 442, 444, 903 NYS2d 352 [1st Dept. 2010] *aff’d* 18 NY3d 846, 939 NYS2d 746 [2011]; *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 799 NYS2d 170 [2005]). Were this Court to view the claim against defendant Pfeifer as one alleging negligent misrepresentation, plaintiff again has not alleged the requisite elements for such a claim (*see Brown v. Stinson*, 821 F.Supp. 910 [SDNY 1993]). Defendant Pfeifer claims that the term sheet signed by plaintiffs

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establishes the loan to value ratio required of defendant Silver Arches and defendant Pfeifer could not have been expected to secure a loan that exceeded 45% of the loan to value ratio. Indeed, plaintiff has not alleged the manner in which defendant Pfeifer departed from the customary care and practice of a mortgage broker under the circumstances presented.

Accordingly, in the absence of any allegations of wrongdoing or negligence on the part of defendant Pfeifer, summary judgment dismissing the claim against defendant Pfeifer is warranted.

For the above reasons, the motions by defendants Silver Arch and Pfeifer for summary judgment dismissing the amended complaint as against them, are granted, without opposition.

Dated: 8/18/2018

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HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION