Pirrelli v Dick
2019 NY Slip Op 30675(U)
March 20, 2019
Supreme Court, Suffolk County
Docket Number: 05-30026
Judge: Denise F. Molia

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 05-30026

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 8-7-17 (015)
MOTION DATE 8-29-17 (016)
MOTION DATE 2-20-18 (017)
MOTION DATE 2-16-18 (018)
MOTION DATE 2-16-18 (019)
ADJ. DATE 3-9-18
Mot. Seq. # 015 - MG # 018 - MG
016 - MG # 019 - MG
017 - MD

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RONALD PIRRELLI and JANET PIRRELLI,

Plaintiffs,

- against -

DEXTER DICK, LONG ISLAND ASSOCIATES 2, INC., PETER LIBARDI, KAREN LIBARDI, MICHAEL LUPO, FRANKLIN FIRST FINANCIAL, LTD., US BANK, WMC MORTGAGE CORP., EQUITY SETTLEMENT SERVICES, INC., TAMMY TRIOLO, and RALPH PECORALE,

Defendants.

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 6, 41 - 45, 48 - 55 ; Notice of Cross Motion and supporting papers 12 - 20, 21 - 23; Answering Affidavits and supporting papers 24 - 32, 56 - 57 ; Replying Affidavits and supporting papers 9 - 11, 33 - 38, 46 ;

RST

Other Sur-Reply 39 - 40 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that pending motions (015, 016, 017, 018 and 019) are combined herein for disposition; and it is

ORDERED that motion (015) by defendant WMC Mortgage Corp. for summary judgment is granted and the complaint is hereby severed and dismissed as to this defendant; and it is further

ORDERED that cross motion (016) by defendant U.S. Bank, N.A., as Trustee and defendant Ocwen Loan Servicing, LLC for summary judgment is granted and the complaint is hereby severed and dismissed as to these defendants; and it is

ORDERED, ADJUDGED AND DECLARED that the mortgages dated December 22, 2004 and recorded in the office of the Suffolk County Clerk on January 13, 2005 held by defendant US Bank as assignee of defendant WMC Mortgage Corp. based on the deed dated December 22, 2004 conveying the real property located at 74 Bay View Drive in Sag Harbor, New York from plaintiffs to defendant Dexter Dick are valid and enforceable; and it is further

ORDERED, ADJUDGED AND DECLARED that plaintiffs, their successors, heirs, assigns and any and all persons or entities claiming any interest in the subject property shall be and are hereby forever barred, estopped and foreclosed from making any claims to any estate or interest in or to the real property described on the ground that said mortgages were fraudulently obtained by the original mortgagee defendant WMC Mortgage Corp.; and it is further

ORDERED that cross motion (017) by plaintiffs for summary judgment against defendants Franklin First Financial, Ltd., US Bank, NA, WMC Mortgage Corp., Equity Settlement Services, Inc., Tammy Triolo and Ralph Pecorale, is denied; and it is further

ORDERED that motion (018) by defendant Ralph Pecorale for summary judgment is granted and the complaint is hereby severed and dismissed as asserted against him; and it is further

ORDERED that cross motion (019) by defendants Equity Settlement Services, Inc. and Tammy Triolo for summary judgment is granted and the complaint is hereby severed and dismissed as to them.

Plaintiffs commenced this action for a declaratory judgment, to quiet title and discharge mortgages on the property at 74 Bay View Drive in Sag Harbor, New York (the "subject property"), claiming that defendants acted together to fraudulently procure the deed by, among other things, misrepresenting to them that in signing certain papers they were refinancing their mortgage when, in fact, they were selling the subject property to defendant Dexter Dick ("Dick"). Plaintiffs also claim that they did not sign the sales contract or the deed and that their signatures were forged or a forgery.

In their amended verified complaint, plaintiffs allege that as a result of defendants' fraudulent scheme, they are no longer on the title, Dick is now seeking to sell the property that is nominally titled in his name but equitably owned by them, and the subject property is facing foreclosure. Plaintiffs assert

causes of action alleging violation of the Fraudulent Conveyance Act or Article 10 of the New York Debtor and Creditor Act (first, second and third causes of action), negligent and/or intentional infliction of emotional distress (fifth cause of action), violation of the Real Estate Settlement Procedures Act ("RESPA") , 12 USC § 2601 et seq (sixth cause of action), breach of fiduciary duty (seventh cause of action), violation of sections 595-a (4) and 598 of the New York Banking Laws (eighth cause of action), and consumer fraud under General Business Law ("GBL") § 349 (ninth cause of action). The fourth cause of action seeks to quiet title under article 15 of the Real Property and Proceedings Law ("RPAPL"). They seek to recover actual and punitive damages, attorneys' fees and to set side the fraudulent deed, as well as a declaration that the mortgages and notes are unenforceable, that defendants are barred from claiming an interest in the property and that plaintiffs are vested with an absolute and unencumbered title to the property.

Defendant WMC Mortgage Corp. ("WMC), defendant U.S. Bank, defendant Franklin First Financial Ltd. ("Franklin First"), defendants Equity Settlement Services and Tammy Triolo (collectively Equity/Triolo), and defendant Ralph Pecorale have interposed answers with affirmative defenses, including, *inter alia*, that the action is barred by the doctrines of unclean hands, ratification, estoppel, waiver, and by the statute of limitations, and that any damages were the result of plaintiffs' own culpable conduct in knowingly participating in the fraudulent scheme. WMC also asserts affirmative defenses that it is a bona fide lender without notice, and that it no longer has an interest in the notes and mortgages as they were sold on the secondary market. US Bank has also asserted affirmative defenses that plaintiffs' claims are barred by the doctrines of title by estoppel and estoppel by deed, and that as an assignee it stands in the shoes of the assignor WMC. U.S. Bank also asserts counterclaims seeking a declaratory judgment that the mortgages are valid, and, alternatively, for equitable subrogation and unjust enrichment. Plaintiffs have not responded to the counterclaims. Pecorale's and Equity/Triolo's affirmative defenses include lack of duty to plaintiffs, and Franklin's and Percole's affirmative defenses include that they are entitled to judgment based upon documentary evidence.

Discovery has been completed and the note of issue filed. Dick, defendant Long Island Associates 2 ("LIA2"), and its principals, defendants Peter and Karen Libardi (the "Libardis"), have not answered or otherwise appeared in the action. The answering defendants and plaintiffs now seek summary judgment. The following has been gleaned from the verified pleadings, deposition transcripts, sworn statements and documents submitted by the movants.

In 2004, plaintiffs attempted to refinance a $450,000 mortgage held by Household Finance Company ("HFC") on the subject property to pay off debts and obtain cash for themselves and for their son to invest in property located in Vermont. Plaintiffs completed an application with an online lending exchange, but did not qualify for a refinance on affordable terms as their credit was poor. Plaintiffs admit that they had refinanced the subject property several times, the most recent being in a few months prior. Defendant Michael Lugo ("Lupo") a mortgage broker at Franklin First responded to the online application, and facilitated the fraudulent scheme, suggesting that plaintiffs allow Dick to obtain a loan in his name as he had good credit. In exchange, plaintiffs would make the monthly mortgage payments and remain in possession of the subject property for approximately one year to improve their credit rating and then apply for a loan in their own names. The sales contract, dated 2004 and purportedly executed by plaintiffs as sellers and Dick as purchaser, lists the purchase price as $625,000 with a seller's concession of $25,000 and $600,000 payable at closing upon delivery of the deed. Paragraph 29 of the sales contract includes terms allowing

plaintiffs to occupy the subject property post-closing upon depositing into escrow $41,500. Paragraph 19 of the sales contract provides that "[t]he deed shall "be delivered upon the receipt of said payment at Purchaser's lending institution or at the Law Office of Ralph Pecorale...[in] Hauppauge." Pecorale is also referred to as the seller's attorney beginning at paragraph 25.

On December 17, 2004, Dick completed two mortgage applications which were submitted by Lupo to WM and he was approved for a $500,000 purchase money mortgage and a $125,000 second mortgage. On December 22, 2004, Triolo, an employee of Equity Settlement Services, Inc. ("Equity Settlement"), conducted what she referred to as a split-closing of title. Lupo and Dick appeared at the office of Equity Settlement, where Dick executed the notes secured by mortgages on the subject property and the necessary documents for his portion of the closing; Triolo, purportedly as an accommodation to plaintiffs who did not want to travel to Equity's office in Smithtown, went to the subject property where plaintiffs executed the documents to complete the closing. While plaintiffs admit they executed the closing documents, they allege that they were not presented with a deed or the contract of sale and during their deposition denied signing such documents. Additionally, Janet Pirrelli testified that Triolo completed the closing quickly, covered up the text of each document being signed, and did not explain the contents thereof. However, according to plaintiffs, they were either informed by Triolo or she made them believe that they were executing documents for a refinance not a sale. Janet Pirrelli conceded that she and her husband were not prevented from taking the documents from Triolo to read and review before signing, but they did not do so. Triolo testified that plaintiffs signed the deed and the sales contract, which she notarized. Included in the documents before the court is a copy of both documents executed by plaintiffs in favor of Dick.

Plaintiffs testified that they aware that from the proceeds, WMC would be paid, the HFC loan satisfied, Equity Settlement would be paid its fees which they thought were high but did not contest, Franklin First would be paid a brokerage commission, and Pecorale would be paid attorney's fees. After the three-day period to rescind the transaction, plaintiffs received the balance of the proceeds, $114,758. Janet Pirrelli testified she had reservations about the transaction but did not exercise the right to rescind it as of utmost importance was providing her son $65,000 for the investment property in Vermont.

On January 13, 2005, the deed and mortgages were recorded in the Suffolk County Clerk's Office. Also in January 2005, the mortgage statements addressed to Dick were sent to the subject property monthly and until September 2005, plaintiffs made the monthly payments of $3,316 on the first mortgage, and $1,189 on the second mortgage, and then stopped. Janet Pirrelli testified that she stopped making the payments in September as she discovered that they were not on the deed and that Dick held record title to the subject property. Equity and Ocwen dispute plaintiffs' allegation and contend that prior to September 2005, plaintiffs were aware that Dick was the sole record title owner as evidenced by their notarized signatures on the deed. Ocwen also asserts that it maintained detailed logs which reflect conversations with Janet Pirrelli prior to September 2005 wherein she was informed that they were not the titleholders.

In September 2005, plaintiffs entered negotiations to have Dick transfer title back to them. Dick allegedly requested payment of the $15,000 fee he was promised in exchange for obtaining the loans, and, as an alternative, offered to sell the subject property and split the equity with plaintiffs. Title was not transferred back to plaintiffs. Thereafter, Dick purportedly transferred title for a $10 consideration to LIA2. In November 2005, plaintiffs were served with a 30-day notice to terminate for failure to pay rent on the

subject property. Plaintiffs were not evicted, and in December 2005, LIA2 purportedly transferred title back to Dick for the same consideration. In December 2005, plaintiffs commenced the instant action. In November 2006, US Bank commenced actions to foreclose the first and second mortgages, which were thereafter consolidated with the instant action for purposes of joint trial. As of the date of the instant motions, plaintiffs continued to occupy the subject property.

"New York has adopted the provisions of the Uniform Fraudulent Conveyance Act ('UFCA') as Article 10 of the Debtor and Creditor Law" (***Southern Indus. Inc. v Jeremias***, 66 AD2d 178, 181, 411 NYS2d 945 [2d Dept 1978]; *see* ***Marine Midland Bank v Murkoff***, 120 AD2d 122, 508 NYS2d 17 [2d Dept 1986]). Section 276 of the Debtor and Creditor Law provides that every conveyance made with the actual intent to hinder, delay or defraud creditors is fraudulent as to both present and future creditors (***Eberhard v Marcu***, 530 F3d 122, 129 [2d Cir 2008]; ***Southern Indus. Inc. v Jeremias***, *supra* at 181). "The conveyance is not void per se, but voidable by creditors of the transferor" (***Eberhard v Marcu***, *supra* at 129). Thus, under this law, one must be a creditor to obtain relief (id.). Debtor and Creditor Law § 270 defines a creditor as any "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (***Paragon v Paragon***, 164 AD3d 1460, 1461-1462, 84 NYS3d 582 [2d Dept 2018]). Here, plaintiffs have failed to establish their status as creditors of any of the defendants (*see* ***Paragon v Paragon***, *supra*; ***Galgano v Ortiz***, 287 AD2d 688, 732 NYS2d 77 [2d Dept 2001]). Thus, plaintiffs' first, second and third causes of action cannot be sustained, and are hereby severed and dismissed.

Plaintiffs' fourth cause of action is based on Article 15 of the RPAPL, and seeks a judgment declaring that plaintiffs are the owners of the subject property and barring all of the defendants from claiming an interest in the subject property as the deed was a forgery. "A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid" (***Ortiz v Silver Investors***, 165 A3d 1156, 1157, 87 NYS3d 50 [2d Dept 2018]; ***Jiles v Archer***, 116 AD3d 664, 666, 983 NYS2d 283 [2d Dept 2014]; ***ABN AMRO Mtge. Group, Inc. v Stephens***, 91 AD3d 801, 803, 939 NYS2d 70 [2d Dept 2012]; *see* ***Weiss v Phillips***, 147 AD3d 1, 65 NYS3d 147 [1st Dept 2017]). "If a document purportedly conveying a property interest is void, it conveys nothing, and a subsequent bona fide purchaser or bona fide encumbrancer for value receives nothing" (***ABN AMRO Mtge. Group, Inc. v Stephens***, *supra* at 803; ***First Natl. Bank of Nevada v Williams***, 74 AD3d 740, 741, 904 NYS2d 707 [2d Dept 2010]; *see* ***Weiss v Phillips***, *supra* at 11 ["the interest of subsequent bona fide purchasers or encumbrancers for value are thus not protected under Real Property Law § 266 when their title is derived from a forged deed or one that is the product of false pretenses"]). "In contrast, a fraudulently induced deed is merely voidable, not void" (***Weiss v Phillips***, *supra* at 11), and thus the conveyance is subject to ratification (*see* ***Rosen v Rosen***, 243 AD2d 618, 663 NYS2d 228 [2d Dept 1997]). However, a party seeking equitable relief must not have unclean hands (***Ortiz v Silver Investors***, *supra*).

Plaintiffs acknowledge that they agreed to have Dick added to the deed for the sole purpose of being able to qualify for a refinance. Although plaintiffs contend they were not presented with a deed to sign at the closing, they admit they knew the closing would not take place without Dick's name being added to the deed. They also acknowledge that under the scheme, Dick was to execute a quick claim deed conveying the subject property back to plaintiffs after the loan was obtained from a mortgage company. Plaintiffs admittedly having played a role in the duplicitous scheme about which they now complain, come to this court with unclean hands in connection with the subject real estate transaction, and thus are barred from all

equitable relief (*see* ***Vasquez v Zambrano***, 196 AD2d 840, 602 NYS2d 29 [2d Dept 1993]; ***Ta Chun Wang v Chun Wong***, 163 AD2d 300, 557 NYS2d 434 [2d Dept 1990], *lv denied* 77 NY2d 804, 568 NYS2d 912 [1991], *cert. denied* 501 US1252, 111 S Ct 2893 [1991]; *see also* ***Festinger v Edrich***, 8 Misc 3d 700, 705, 799 NYS2d 381 [Sup Ct Kings Count 2005, *affd* 32 AD3d 412, 820 NYS2d 302 [2d Dept 2006] [Pursuant to the doctrine of unclean hands, and as a matter of public policy, "reconveyance of property will be denied to the plaintiff where the plaintiff transferred the property with the intent to defraud"]).

Plaintiffs' signatures on the documents are presumed to be genuine as they were acknowledged by a notary public and thus may be rebutted only upon a showing of clear and convincing evidence to the contrary (***ABN AMRO Mtge. Group, Inc. v Stephens***, 91 AD3d 801, 939 NYS2d 70 [2d Dept 2012]; ***Beshara v Beshara***, 51 AD3d 837, 858 NYS2d 351 [2d Dept 2008]; ***Son Fong Lum v Antonelli***, 102 AD2d 258, 260, 476 NYS2d 921 [2d Dept 1984]). Moreover, US Bank has proffered the affidavit and curriculum vitae of a handwriting expert who attests that known exemplars of plaintiffs' signatures were compared with the signatures on the deed and sales contract. The exemplars are attached to the expert's affidavit who states, to a reasonable degree of certainty, that the signatures are by the same individuals. Thus, the expert's affidavit is sufficient to show that the plaintiffs' signatures are genuine (*cf.* ***Al-Kabyalle v Ali***, 159 AD3d 477, 70 NYS3d 40 [1st Dept 2018]).

Plaintiffs have not submitted any evidence to counter the handwriting expert's conclusion, and have not proffered any other evidence to support their allegations of forgery. Inadequate is their assertion that their signatures on the deed and sale contract are forgeries. "Something more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (***Banco Popular N. Am. v Victory Taxi Mgt.***, 1 NY3d 381, 385, 774 NYS2d 480 [2004]; ***Kanterakis v Minos Realty, LLC***, 151 AD3d 452, 455, 55 NYS3d 452 [2d Dept 2017]; *see* ***JP Morgan Chase Bank, NA v Bauer***, 92 AD3d 641, 938 NYS2d 190 [2d Dept 2012] [defendant's affidavit alone insufficient]). Therefore, the declaratory relief sought is denied and the fourth cause of action is dismissed.

In any event, plaintiffs ratified the mortgage loans by making payments for nine months, knowing that the mortgage statements were not in their names but in Dick's name only (*see* ***CIT Tech. Fin. Servs., Inc. v Franklin First Fin., Ltd.***, 132 AD3d 715, 18 NYS3d 112 [2d Dept 2015]). Plaintiffs admitted that they retained the benefits of the WMC mortgage loans and that they were aware these benefits came from the proceeds of the mortgage loans. To the extent that plaintiffs claim they were unaware of the terms of the mortgage loans they "cannot be willfully ignorant and avoid liability for the acts of their [admitted] agent [Dick] by failing to make a thorough inquiry that would reveal the pertinent facts" (***CIT Tech. Fin. Servs., Inc. v Franklin First Fin., Ltd.***, *supra* at 716). Therefore, the deed and mortgages will not be set aside and cancelled.

The fifth cause of action alleging negligent and/or intentional infliction of emotional distress is also summarily dismissed. Plaintiffs' allegations are insufficient to demonstrate that any of the defendants' conduct was calculated to intentionally cause distress or "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable

in a civilized community" (***Murphy v American Home Prods. Corp***, 58 NY2d 293, 303, 461 NYS2d 232 [1983] [internal citation omitted]; *see* ***Howell v New York Post***, 81 NY2d 115, 122, 596 NYS2d 320 [1993]). Similarly, as plaintiffs' allegations do not demonstrate that their safety was unreasonably endangered, the cause of action for negligent infliction of emotional distress cannot be sustained (*see* ***Daluise v Sottile***, 40 AD3d 801, 837 NYS2d 175 [2d Dept 2007] [negligent infliction of emotional distress is premised upon a breach of duty which unreasonably endangers the plaintiff's safety or causes the plaintiff to fear for her safety]; ***E.B. Liberation Publs.***, 7 AD3d 566, 777 NYS2d 133 [2d Dept 2004]). Thus, this cause of action cannot stand.

The statute of limitations period for a claim based on the Real Estate Settlement Procedures Act (RESPA) is one year and thus must be brought within one year of the alleged violation (*see* 12 USC 2614; ***Calvgano v Bisbal***, 430 F Supp 2d 95 [EDNY 2006]; ***McKay v Sacks***, 2005 WL 1206810, No. 05 CV 2307 [EDNY 2005]). At the latest, plaintiffs' RESPA claim accrued at the time of the closing (*see* ***McKay v Sacks***, *supra*). As plaintiffs did not interpose the claim until nearly four years after it accrued, the RESPA claim is time-barred, and therefore, must be dismissed.

Consequently, WMC is entitled to summary judgment in its favor, as only the first, second, third, fourth, fifth and sixth causes of action are asserted against it. Similarly, US Bank is entitled to summary judgment dismissing the complaint against it, as only the heading in the fourth cause of action contains the name of this defendant and no allegations are actually made against it.

US Bank is also entitled to summary judgment on its first counterclaim. In this counterclaim, US Bank contends that the two mortgages and liens on the subject property are valid, as Dick acted as the nominee and alter ego and agent for his undisclosed principals, plaintiffs, to obtain the mortgage loans for plaintiffs' benefit. Thus, US Bank posits that plaintiffs, as Dick's undisclosed principals, are bound by the notes and mortgages. US Bank also contends that having received the financial benefit of the two mortgage loans, and having knowledge of the facts and made the monthly payments on the loans, plaintiffs ratified the acts of their agent Dick and are estopped from denying the validity and efficacy of the mortgage liens. It contends that should plaintiffs recover title from Dick, the subject property should remain subject the to mortgage liens. US Bank also maintains that the notes and mortgages should be reformed and deemed amended to reflect that, in addition to Dick, plaintiffs are borrowers and responsible for the obligations thereunder. Finally, US Bank seeks attorneys fees incurred in the defense and prosecution of the instant action as set forth under the terms of the notes and mortgages.

US Bank has established that WMC, as its predecessor, owed no duty to plaintiffs to prevent Dick, Lupo or any other defendant from inducing them to enter into the subject mortgage transaction, to ascertain the validity or accuracy of the documentation and information provided by Dick in his mortgage application, or to authenticate the genuineness of their signatures on the deed and sales contract (*see* ***Euba v Euba***, 78 AD3d 761, 911 NYS2d 402 [2d Dept 2010]; ***Muthurin v Lost & Found Recovery, LLC***, 65 AD3d 617, 618, 884 NYS2d 462 [2d Dept 2009]; ***Harris v Adejumo***, 36 AD3d 855, 830 NYS2d 561 [2d Dept 2007]). The documentary evidence proffered establishes that plaintiffs signed the deed and other closing documents.

Plaintiffs conceded that they were not prevented from reading or forced to sign the documents, or from obtaining legal or financial counsel prior to entering into the transaction, and that they were not deceived or pressured by WMC to execute the deed (*see* ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Moreover, to the extent that plaintiffs signed the deed to Dick without reviewing or knowing its contents, they risked that the transaction at issue would be more than a simple refinance (***American Home Mtg. Servicing, Inc. v McGhee***, 2012 WL 6761506 [Sup Ct Suffolk County 2012], citing ***Stephenson v Terron-Carrera***, 2012 WL 2636004, 201 NY Slip Op 31614U [Sup Ct Suffolk County 2012]). WMC also established that it acted as a bona fide lender for value, without any prior notice of any facts or circumstances which would put a prudent lender on notice as to any alleged fraud or as to any right, title or interest in conflict with its position as a mortgagee (*see* Real Property Law § 266). Therefore, US Bank is a bona fide encumbrancer for value, since WMC, its assignor, did not have notice of any fraudulent intent of its immediate grantor (*see* ***CitiMortgage, Inc. v Caldaro***, 145 AD3d 851, 44 NYS3d 138 [2d Dept 2016]). In opposition, plaintiffs failed to demonstrate any basis for preventing US Bank from enforcing the terms of the mortgages. Thus, US Bank's cross motion for summary judgment declaring that the mortgages on the subject property are valid is granted.

The seventh, eighth and ninth causes of action in the amended complaint are alleged only against Dick, Lupo, Franklin First, Triolo, Equity Settlement and Pecorale. In the seventh cause of action for breach of fiduciary duty, plaintiffs allege that these defendants were their agents and had a fiduciary duty to act primarily for the benefit of, and to deal fairly with plaintiffs and not make a profit from the agency at the expense of their principals. Plaintiffs allege that these defendants breached their duty by developing a fraudulent scheme to defraud them of record title to the subject property, obtaining mortgage loans with unfavorable terms that were not disclosed to them, and collecting fees and expenses from them for kickbacks and referrals. Plaintiffs further allege that in executing the documents for the subject real estate transaction they detrimentally relied on the misrepresentations of defendants that they would remain the title owners of the subject property.

Although in their notice of cross motion plaintiffs seek summary judgment in their favor against Franklin First on the breach of fiduciary cause of action, no evidence has been submitted in support thereof. Thus, having failed to satisfy their initial summary judgment burden, the cross motion is denied without the need to consider Franklin First's opposition papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

To establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary duty, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct (***Kurtzman v Bergstol***, 40 AD3d 588, 590, 835 NYS2d 644 [2d Dept 2007]). A necessary element of such claim is the existence of a fiduciary relationship. A fiduciary relationship exists when one party reposes confidence in another and relies on the other's superior expertise or knowledge (*see* ***Eurycleia Partners, LP v Steward & Kissel***, 12 NY3d 553, 883 NYS2d 147 [2009]; ***Faith Assembly v Titledge of N.Y. Abstract, LLC***, 106 AD3d 47, 62, 961 NYS2d 542 [2d Dept 2013]).

Plaintiffs allege that they had an attorney-client relationship with Pecorale and that he breached his attendant fiduciary duty. While the relationship of client and counsel is one of "unique fiduciary reliance" (***Jay Deitz & Assocs. of Nassau County, Ltd. v Breslow & Walker, LLP***, 153 AD3d 503, 505, 59 NYS3d 443 [2d Dept 2017]), plaintiffs have failed to establish that an attorney-client relationship exists with Pecorale. "In determining the existence of an attorney-client relationship, a court must look to the actions of the parties to ascertain the existence of such a relationship" (***Wei Cheng Chang v Pi***, 288 AD2d 378, 380, 733 ANYS2d 471 [2d Dept 2001]). A plaintiff's unilateral belief does not confer upon him or her the status of client (*see* id.; ***Volpe v Canfield***, 237 AD2d 282, 654 NYS2d 160 [2d Dept 1997]). "Rather, an attorney-client relationship is established where there is an explicit undertaking to perform a specific task" (***Wei Cheng Chang v Pi***, *supra* at 380; *see* ***Volpe v Canfield***, *supra*). Plaintiffs have admitted that they do not know Pecorale, never spoke to him, did not retain him as their attorney, and that he did not appear at the closing with them. In fact, plaintiffs assert that Pecorale was hired by Dick and the other defendants. It was not reasonable for plaintiffs to rely on the representations of the purchaser's attorney (*see* ***Cascardo v Stacchini***, 100 AD3d 675, 954 NYS2d 177 [2d Dept 2012]; ***Mann v Rusk***, 14 AD3d 909, 788 NYS2d 686 [3d Dept 2005]). Therefore, plaintiffs are not entitled to summary judgment on this branch of their cross motion against Pecorale.

Moreover, in support of his motion for summary judgment, Pecorale has established that he did not have an attorney-client relationship or other fiduciary relationship with plaintiffs. Pecorale affirms and Lupo testified that the sales contract was a form contract which Pecorale used for his client Franklin First. Lupo was provided this sales contract as a sample, not to create an attorney-client relationship. In opposition to Pecorale's prima facie showing, plaintiffs have failed to raise an issue of fact. Plaintiffs have not proffered any evidence demonstrating that Pecorale either affirmatively led them to believe that he was acting as their attorney or knowingly allowed plaintiffs to proceed under that misconception (*see* ***Moran v Hurst***, 32 AD3d 909, 822 NYS2d 564 [2d Dept 2006]). The payment of an attorney's fee by a third party, that is, Equity Settlement, does not, in and of itself, create an attorney-client relationship (id.). Therefore, plaintiffs' cross motion for summary judgment against Pecorale on the seventh cause of action is denied, and Pecorale's motion for summary judgment is granted. As this is the only remaining cause of action against Pecorale, the complaint is hereby severed and dismissed as to him.

Plaintiffs have not established that a fiduciary relationship existed between them and Equity Settlement/Triolo. In support of their motion for summary judgment dismissing the breach of fiduciary claim, Equity Settlement/Triolo has demonstrated the lack of a fiduciary duty. Vincent G. Danzi, Esq., general counsel at Equity Settlement, testified, as did Triolo, that its clients were the lenders (here WMC) and the mortgage brokers (here Franklin First). Danzi and Triolo also testified that Equity Settlement acted as the settlement agent and title closer on the subject real estate transaction. Thus, Equity Settlement/Triolo had a responsibility to its clients, not to plaintiffs (*see* ***In re Gaines***, 109 AD3d 766, 967 NYS2d 766 [2d Dept 2013]; ***Chemical Bank v Bowers***, 228 AD2d 407, 643 NYS2d 653 [2d Dept 1996]; *see also* ***In re Kapchan***, 86 AD3d 110, 924 NYS2d 338 [1st Dept 2011]). In any event, even if a fiduciary duty existed, plaintiffs admit that they reviewed the form setting forth how the loan proceeds were to be disbursed, and signed it authorizing the disbursements. Such authorization by plaintiffs, together with the documents

submitted revealing that the proceeds were disbursed accordingly, are fatal to the breach of fiduciary claim asserted against these defendants (*see* ***Mauro v Countrywide Home Loans, Inc.***, 116 AD3d 930, 984 NYS2d 398 [2d Dept 2014]). Therefore, the seventh cause of action is also dismissed as to Equity Settlement and Triolo.

The eighth cause of action alleging violations of Banking Law §§ 595-a(4) and 598 also is dismissed. Section 595-a authorizes the superintendent to impose fines for violations of the Banking Law statute. It does not provide a private right of action for individuals (*see* ***Grimes v Fremont***, 933 F Supp 2d 584, 609 [SDNY 2013]). Plaintiffs also have failed to allege facts sufficient to establish that they have a cause of action to recover damages for a violation under § 598, the New York State Anti-Predatory Lending Law (*see* ***Glassman v Zoref***, 291 AD2d 430; 737 NYS2d 537 [2d Dept 2002]).

As plaintiffs played a role in the alleged fraud to obtain the mortgages, they do not have a remedy under GBL § 349 (*see* ***Fremont Investment & Loan v Haley***, 23 Misc 3d 1138[A], 889 NYS2d 505 [Sup Ct Queens County 2009]; ***Fremont Investment & Loan v Laroc***, 21 Misc 3d 1124[A], 873 NYS2d 511 [Sup Ct Queens County 2008]). In any event, GBL § 349 declares as unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" (*see* GBL § 349 [a]), and is directed at wrongs against the consuming public (*see* ***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 623 NYS2d 529 [1995]). Private contract disputes unique to the parties do not fall within the ambit of the statute" (*id.*). Here, it cannot be said that the alleged fraudulent scheme, a private transaction, had an impact on consumers at large. Therefore, the ninth case of action is summarily dismissed.

Dated: 3-20-19

Hon. Denise F. Molia
A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

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