

Lucky of 195 Madison St. Roofing & Contr. Inc. v Creif 109 LLC
2019 NY Slip Op 33320(U)
November 7, 2019
Supreme Court, New York County
Docket Number: 153437/2017
Judge: Robert R. Reed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT R. REED

PART

IAS MOTION 43EFM

Justice

-----X

INDEX NO.

153437/2017LUCKY OF 195 MADISON STREET ROOFING &
CONTRACTING INC,

12/31/2017,

MOTION DATE

10/27/2018

Plaintiff,

MOTION SEQ. NO.

001 003

- v -

CREIF 109 LLC, BIL-MAN ASSET MANAGEMENT,
LLC, PROPERTY RESEARCH, GOLDBERG WEPRIN
FINKEL GOLDSTEIN LLP, ROBERT LO SCHIAVO, ASK
ABSTRACT, BALLON STOLL BADER & NADLER, VANO
HAROUTUNIAN, OLD REPUBLIC TITLE INSURANCEE
CO., MAIN STREET TITLE AGENCY INC., DOES 1-100
INCLUSIVE

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 34, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 65

were read on this motion for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 101

were read on this motion to

CONSOLIDATE/JOIN FOR TRIAL

Motion sequence numbers 001 and 003 are hereby consolidated for disposition.

This action arises out of plaintiff's attempt to dispute the legitimacy of various mortgages and liens placed upon four lots of property. Plaintiff asserts four causes of action against defendant Crief 109 LLC (Crief): (1) lack of standing; (2) quiet title; (3) declaratory relief (4) set aside mortgage.

In motion sequence number 001, Creif moves for dismissal pursuant to CPLR 3211 (a)(1), (7) and (10), 3013, 308(b) and 3024(a), as to the first, second, third and fourth causes of action. Plaintiff cross-moves for relief pursuant to CPLR 3025(b) for leave to amend the complaint to add additional defendants.

In motion sequence number 003, plaintiff moves for consolidation pursuant to CPLR 602 of this action with a foreclosure action pending in this county, specifically Index No. 850028/2018.

BACKGROUND

Crief is one of the original mortgage lenders, having lent \$47.55 million to plaintiff pursuant to a mortgage dated August 19, 2016, which was executed by a duly authorized signatory of plaintiff. Crief is also the assignee of a \$3.5 million mortgage and a \$5 million mortgage, originated by defendant Bil-Man Asset Management (Bil-Man). Both of these mortgages were allegedly executed on behalf of plaintiff by Allen James Stevo, secretary of plaintiff.

DISCUSSION

"The scope of a court's inquiry on a motion to dismiss under CPLR 3211 is narrowly circumscribed" (*P. T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N. V.*, 301 AD2d 373, 375[1st Dept 2003]). Thus, on a "motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court "must accept as true the facts alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.

Plaintiff's four causes of action against Creif all allege that Stevo fraudulently executed the mortgages on behalf of plaintiff. Where a cause of action is based upon fraud, CPLR 3016(b)

provides “the circumstances constituting the wrong shall be stated in detail” (see CPLR 3016[b]). The pleading requirements of CPLR 3016(b) are a matter of procedure, governed by the law of the forum (*Westdeutsche Landesbank Girozentrale v. Learsy*, 284 AD2d 251, 252 [1st Dep’t 2001]). Plaintiff must plead facts sufficient for the fact-finder to make a reasonable inference of fraud (see *Pludeman v. N. Leasing Sys., Inc.*, 10 NY3d 486, 493 [2008]). “A cause of action for fraud requires plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance and (5) damages” (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]).

The complaint does not allege that Creif knew or should have known that Stevo was not, in fact, an authorized signatory of plaintiff, empowered to enter into the mortgages. Plaintiff fails to plead any alleged fraudulent conduct by Crief with any particularity. The conclusory allegations of fraud do not meet the pleading requirements for a claim based on fraud under CPLR 3016(b) or CPLR 3013

In opposition, plaintiff files a cross-motion to amend the complaint. Pursuant to CPLR 3025 (b), “[a] party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” As a general proposition, leave to amend pleadings “should be freely granted” (*RBP of 400 W. 42 St., Inc. v 400 W. 42nd St. Realty Assoc.*, 27 AD3d 250, 250 [1st Dept 2006]), although the court retains the sound discretion over whether to permit the amendment (see *Pellegrino v New York City Transit Auth.*, 177 AD2d 554, 557 [2d Dept 1991]). When the court is presented with a motion to amend the pleadings, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted” (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]). A motion for leave to

amend in response to a motion to dismiss the complaint is “futile” and should be denied where “the defects [in the complaint] are [not] cured by the proposed . . . amended complaint” (*see Meimeteas v Carter Ledyard & Millburn LLP*, 105 AD3d 643, 643 [1st Dept 2013]).

Plaintiff contend that the proposed amended complaint addresses all of the problems inherent in the original complaint. However, plaintiff's proposed amended complaint does not remedy the pleading deficiencies in the complaint as against Crief. Thus, because the proposed amendments are legally insufficient, plaintiff's cross-motion for leave to amend is futile and must be denied (*see 41 Carol v Madison Plaza Assoc, LLC*, 95 AD3d 735 [1st Dept 2012]).

Plaintiff's motion to consolidate this matter with the foreclosure action pending in this county, specifically Index No. 850028/2018, is denied. The issues in each matter are sufficiently different and do not warrant consolidation.

Accordingly, it is

ORDERED that the motion of defendant Crief 109 LLC (motion sequence no. 001) to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that plaintiff's cross-motion for leave to amend the complaint herein is denied; and it is further

ORDERED that plaintiff's motion to consolidation (motion sequence no. 003) is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 43, Room 412, 60 Centre Street, New York, New York, on December 12, 2019 at 9:30 a.m.

11/7/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☒

GRANTED

☐

DENIED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE



ROBERT R. REED, J.S.C.