

**Persaud v Stetch**

2020 NY Slip Op 32492(U)

June 24, 2020

Supreme Court, Queens County

Docket Number: 254/12

Judge: Janice A. Taylor

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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RAJPATTIE PERSAUD AND  
KISSON C. PERSAUD,

Plaintiff(s),

- and -

**705066/2020**

Index No.:254/12

Motion Date:1/7/20

Motion Cal. No.:  
37, 38

Motion Seq. No:  
7,8

HELENE S STETCH, ESQ., HELENE S. STETCH,  
P.C., KENNETH B. SCHWARTZ, ESQ., KENNETH  
B. SCHWARTZ, P.C., BANK OF AMERICA, N.A.,  
EMPIRE LAND SERVICES CORP., WASHINGTON  
TITLE INSURANCE COMPANY, RISHI MAHADEO  
and RE/MAX EXEL,

Defendant(s).  
-----x

**FILED**

**6/26/2020**

**9:01 AM**

**COUNTY CLERK  
QUEENS COUNTY**

The following papers read on this motion by defendant Bank of America, N. A., for an order granting summary judgment dismissing plaintiffs' claim against it; for summary judgment in its favor dismissing the cross claims of Helene Stetch against it and for summary judgment as to liability on its second and third cross claims against Stetch ; defendants Kenneth B. Schwartz, Esq. and Kenneth B. Schwartz, P.C. (Together "Schwartz"), move for an order to strike the answer of Stetch on the ground that she has repeatedly failed to submit to examination before trial; Plaintiffs move by cross motion for an order granting leave to file an amended summons and complaint pursuant to CPLR 3025[b] and 203[e].

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

Plaintiffs in this legal malpractice, fraud and conversion action seek damages in connection with the alleged sale of property known as 142-20 123<sup>rd</sup> Street, Jamaica, New York 11436. This action stems from a contract for the purchase of the aforementioned property between Charlene Bassie (seller) and plaintiffs Rajpattie Persaud and Kisson

C. Persaud (buyers), for the amount of \$390,000. As part of the purchase of the property, plaintiff Rajpattie Persaud obtained a loan from BANA in the amount of \$318,811.20. All the funds to purchase the property for the closing, including the loan from BANA and funds provided by plaintiffs were deposited in defendant Schwartz' attorney trust account. Part of the funds were to be used to pay off the underlying mortgage of the property given to Charlene Bassie and held by the Deutsche Bank National Trust Co. (Deutsche). On December 28, 2009, after the alleged "closing", for the sale of the property, plaintiffs took possession of the property. Thereafter, plaintiffs were served with a summons and complaint on a foreclosure action commenced by Deutsche due to the fact that the mortgage it held with Charlene Bassie was never satisfied. In addition to the mortgage not being satisfied, the deed for the property transferring title to plaintiff was never filed. Plaintiffs have been residing in the property since the date of the "closing" which they now allege was a complete fraud.

In 2014, Stetch and Schwartz were indicted in Queens County under Indictment number 508/2014. On January 26, 2015, the Court stayed proceedings in the instant matter pending resolution of the criminal actions against Stetch and Schwartz. Both Stetch and Schwartz pled guilty to the offenses, and on January 2, 2018, the stay due to the criminal indictment was lifted. In addition to lifting the stay, the court granted BANA's motion for summary judgment as to liability only as to Stetch and Schwartz.

As relevant herein, BANA now moves for summary judgment dismissing plaintiffs' claim of negligence, for summary judgment in its favor, dismissing the cross claims of Helene Stetch against it and for summary judgment as to liability on its second and third cross claims against Stetch. The BANA motion is opposed by plaintiffs. Schwartz moves to strike the answer of Stetch based upon her repeated failure to appear for examination before trial. The Schwartz motion is opposed by Stetch. Plaintiffs cross move for leave to file an amended summons and complaint to add a claim of breach of contract against BANA. The cross motion is opposed by BANA.

Motion by BANA for summary judgment

To prevail on a negligence cause of action, a plaintiff

must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages. "Absent a duty of care, there is no breach, and without breach there can be no liability" (*Fox v Marshall*, 88 AD3d 131, 135 [2d Dept 2011], citing *Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Here, BANA did not owe any duty of care to ascertain the theft by Stetch or to prevent the said misappropriation of the loan proceeds (see *Tenenbaum v Gibbs*, 27 AD3d 722, 723 [2d Dept 2006]; *PNC Bank, N.A. v Steinhardt* 159 AD3d 999, 1000 [2d Dept 2018]). A lender, such as BANA, has no "special" relationship with its customers, such as plaintiffs, and thus owes no tort duty to them (see e.g. *Dobroshi v Bank of Am., N. A.*, 65 AD3d 882, 884 [1<sup>st</sup> Dept 209]; cf., *Banque Nationale de Paris v 1567 Broadway Ownership Assoc.*, 214 AD2d 359, 360 [1<sup>st</sup> Dept 1995]). Therefore, the branch of the motion which is to dismiss plaintiffs' negligence claim against BANA, is granted.

The branch of the motion by BANA which is for summary judgment dismissing Stetch's cross claims for indemnification and contribution is granted without opposition (see *McNamee Const. Corp v City of New Rochelle*, 29 AD3d 544, 545-46 [2d Dept 2006]) ("The Supreme Court . . . erred in failing to dismiss the third-party plaintiff's claim for contribution/common law indemnification, as the third-party plaintiff failed to address or controvert the third-party defendants' arguments in this regard."). (citations omitted).

The branches of the motion by BANA which are for summary judgment in its favor on its second (fraud) and third (conversion) cross claims against Stetch are granted. Stetch signed the (unsatisfied) confession of judgment, which acknowledges BANA's repeated claims and contained an admission of liability.

#### Motion by Schwartz to strike the answer of Stetch

The motion to strike the answer of Stetch and for related jury charges at trial, is granted. CPLR 3126 provides that when a discovery order is willfully disobeyed, the court may "make such orders \* \* \* as are just", including "an order striking out pleadings". The willful and contumacious character of a party's conduct can be inferred from his repeated failures to appear for examination before trial, coupled with inadequate excuses for these defaults (*Mills v Ducille*, 170 AD2d 657, 658 [2d Dept 1991], quoting *Chase Manhattan Bank v Abad*, 131 AD2d 312 [1<sup>st</sup> Dept 1987]). Here, the record indicates that Stetch's repeatedly failure to appear

for examination before trial, coupled with an inadequate excuse for such noncompliance (see *Garfield v Done Fashion, Inc.*, 227 AD2d 128, 128-29 [1st Dept 1996]; *Mills v Ducille*, 170 AD2d 657 [2d Dept 1991]).

### Cross Motion

The cross motion by plaintiffs for leave to amend the complaint to add a claim against BANA for breach of contract, is denied. " 'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' " (*Calamari v Panos*, 131 AD3d 1088, 1089 [2d Dept 2015], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008]). " 'A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed' " (*Krigsman v Cyngiel*, 130 AD3d 786, 786 [2d Dept 2015], quoting *Gitlin v Chirinkin*, 60 AD3d 901, 902 [2d Dept 2009]; see *Murray v City of New York*, 43 NY2d 400, 405 [1977]). " 'In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered' " (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2d Dept 2015], quoting *Cohen v Ho*, 38 AD3d 705, 706 [2d Dept 2007]; see *Pellegrino v New York City Tr. Auth.*, 177 AD2d 554 [2d Dept 1991]). " '[W]here, as here, the application for leave to amend is made long after the action has been certified for trial, judicial discretion in allowing such amendments should be discrete, circumspect, prudent, and cautious' " (*Yong Soon Oh v Hua Jin*, 124 AD3d at 640-641 [internal quotation marks omitted], quoting *Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828 [2d Dept 2008]). "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (Siegel, *Practice Commentaries, McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR 3025:5, p. 477).

Here, the motion was not made until approximately seven years after service of its answer, after the parties had completed discovery, and after the note of issue had been filed. Under these circumstances, BANA would suffer significant prejudice from the delay in adding a new cause of action (*Civ. Serv. Employees Ass'n v County of Nassau*, 144

AD3d 1075, 1076-77 [2d Dept 2016]; *cf. Garafola v Wing Inc. Specialty Trades*, 139 AD3d 793 [2d Dept 2016]). Moreover, the facts set forth by the plaintiffs in support of the proposed cause of action were known to plaintiffs at the time that it served its answer, and no excuse has been offered for the delay (see *Cseh v New York City Tr. Auth.*, 240 AD2d 270, 272 [1<sup>st</sup> Dept 1997]; *cf. Board of Educ. of Sachem Cent. School Dist. v Donohue Assoc.*, 298 AD2d 482 [2d Dept 2002]). Accordingly, the cross motion for leave to amend the complaint to add a claim against BANA for breach of contract, is denied.

Accordingly, the motion by Bank of America, N.A. is hereby granted. Likewise, the instant motion by defendant Schwartz is also granted. Finally, the cross motion by plaintiffs is denied.

Dated: June 24, 2020

  
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**JANICE A. TAYLOR, J.S.C.**

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**FILED**

**6/26/2020**

**9:01 AM**

**COUNTY CLERK  
QUEENS COUNTY**