

**88th Realty, Inc. v Environmental Appraisers &
Bldrs.**

2022 NY Slip Op 30721(U)

February 28, 2022

Supreme Court, New York County

Docket Number: Index No. 154912/2021

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY BANNON PART 42

Justice

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88TH REALTY, INC.,

Plaintiff,

- v -

ENVIRONMENTAL APPRAISERS AND BUILDERS, MARC STRONGWATER, G.S. ADJUSTMENT COMPANY, INC., GARY SCHWARTZ, J.P. MORGAN CHASE & CO. d/b/a J.P. MORGAN CHASE BANK, N.A.

Defendants.

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INDEX NO. 154912/2021
MOTION DATE 11/04/2021
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for DISMISSAL.

In this action to recover \$339,554.16 in insurance proceeds, the only cause of action asserted against defendant J.P Morgan Chase & Co. d/b/a J.P. Morgan Chase Bank, N.A. ("Chase"), holder of a note and mortgage on the plaintiff's real property, is a claim for breach of fiduciary duty in regard to its alleged unauthorized release of the proceeds to co-defendant Environmental Appraisers and Builders, a contractor hired by the plaintiff to perform emergency repairs to the premises after a fire, and its principal, defendant Marc Strongwater. All defendants except Chase filed answers.

Defendant Chase moves, pre-answer, to dismiss the complaint as against it pursuant to CPLR 3211(a)(1), a defense founded upon documentary evidence, and CPLR 3211(a)(7), failure to state a cause of action. Essentially, Chase argues (1) that no fiduciary relationship, but only a contractual one, existed between it and the plaintiff, and (2) that it properly paid over the insurance proceeds. Chase asserts that it disbursed the funds only after the plaintiff endorsed the check from its insurer over to Chase as required and Chase determined, after inspection by a construction consultant it was entitled to hire, that 90% of the remediation work was completed, thereby satisfying the terms of the mortgage. Chase argues that, under the

circumstances, its sole contractual responsibility was to ensure that 90% of the remediation work had been completed before disbursing the proceeds and that is properly relied upon the plaintiff's endorsement on the check from the insurer and upon the report of its construction consultant and the use of its "reasonable judgment" as per the terms of the mortgage.

The mortgage includes a provision that states, "the lender shall have the right and power to receive and control all insurance proceeds required to be paid to it" and the borrower "authorizes and empowers lender, in its own name or as attorney-in-fact for borrower.. to make proof of loss, to settle, adjust and compromise any claim under insurance policies on the property." (sec. 4.4.6[b]). The mortgage further provides that "No payment made prior to the final completion of the restoration shall exceed ninety percent of the value of the work performed and material incorporated into the property from time to time, as such value is determined by lender in its reasonable judgment. Lender may retain a construction consultant to inspect the restoration and related matters on lender's behalf and to advise lender with respect thereto and borrower shall pay the cost therefor, provided that neither borrower nor any other person or entity other than the lender shall have any right to rely on any inspection or advice of such consultant. (sec. 4.4.6[d]).

The plaintiff opposes the motion, maintaining that the mortgage terms created a fiduciary relationship between it and Chase and Chase breached that duty by paying out the proceeds for remediation work which, in its view, was deficient and incomplete. The plaintiff further argues that it did not endorse the check from the insurer and that the purported signature of Christina Ting, owner of the plaintiff, was forged.

The motion is granted and the complaint is dismissed as against defendant Chase, without prejudice, pursuant to CPLR 3211(a)(7) on the ground that it fails to state a cause of action for breach of fiduciary duty, the sole cause of action alleged against Chase.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013];

Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct. See Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 (2nd Dept 2010); Kurtzman v Bergstol, 40 AD3d 588, 590 (2nd Dept 2007). Applying these standards, defendant Chase has met its burden on the motion. Even construing the complaint liberally, the plaintiff's conclusory allegation that Chase "undertook to serve as a fiduciary" with regard to the insurance proceeds, falls short of stating any fiduciary relationship. Nor does the complaint allege any particular "misconduct" on the part of Chase, and thus cannot show any damages cause by misconduct.

"[T]he relationship between a borrower and a bank is a contractual one which generally does not give rise to a fiduciary duty (Walts v First Union Mtge. Corp., 259 AD2d 32; Bank Leumi Trust Co. of N.Y. v Block 3102 Corp., 180 AD2d 588)." Standard Federal Bank v Healy, 7 AD3d 610, 612 (1st Dept. 2004); see STS Partners Fund, LP v Deutsche Bank Securities, Inc. 149 AD3d 667 (1st Dept. 2017). It is also well settled that "a fiduciary relationship cannot be imposed unilaterally." Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Comm. Synagogue, 45 AD3d 33, 37 (1st Dept. 2007) *aff'd* 11 NY 15 (2008) [internal quotation marks omitted]. As further explained by the Court of Appeals in EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19-20 (2005), a fiduciary relationship, "necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (see Northeast Gen. Corp. v Wellington Adv., 82 NY2d 158, 162 [1993]). Generally, where parties have entered into a contract, courts look to that agreement "to discover the nexus of [the parties] relationship and the particular contractual expression establishing the parties' interdependency" (see *id.* at 160). "If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*id.* at 162). The court declines to do so here.

In regard to the alternate ground for dismissal, under CPLR 3211(a)(1), Chase relies upon the endorsed check as documentary evidence and argues that the check "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); see

Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431, 433 (1st Dept. 2014). Even were the court to discount the plaintiff's allegation of forgery and the affidavit of Christina Ting denying she signed the check, the check alone does not resolve all factual issues in regard to a breach of fiduciary duty cause of action. In any event, the claim is subject to dismissal under CPLR 3211(a)(7), as discussed above.


Accordingly, it is

ORDERED that the motion of defendant J.P. Morgan Chase & Co. d/b/a J.P. Morgan Chase Bank, N.A. to dismiss the complaint as against it pursuant to CPLR 3211(a)(7) is granted, and the complaint is dismissed as against that defendant, without prejudice, and it is further

ORDERED that the remaining parties shall proceed with discovery and appear for a preliminary conference on April 14, 2022, at 2:30 p.m., and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

2/28/2022
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED		