

Cammarato v 16 Admiral Perry Plaza LLC

2024 NY Slip Op 30272(U)

January 19, 2024

Supreme Court, Kings County

Docket Number: Index No. 514454/2020

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 19th day of January 2024

HONORABLE FRANCOIS A. RIVERA

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DOROTHY CAMMARATO, Individually and as a Member of 16 ADMIRAL PERRY PLAZA, LLC,

DECISION & ORDER

Plaintiff,

Index No. 514454/2020

-against-

16 ADMIRAL PERRY PLAZA LLC, FRANCIS PACHESA, BRUNHILDA PACHESA, JABA REALTY HOLDINGS LLC, LUCY PELLEGRINO, CITI ABSTRACT INC., UNIVERSAL ASSOCIATES INC., U.S. BANCORP COMMUNITY INVESTMENT CORPORATION and U.S. BANK NATIONAL ASSOCIATION, as Trustee for VELOCITY COMMERCIAL CAPITAL LOAN TRUST 2018-T,

Defendants.

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By notice of motion filed on March 4, 2021, under motion sequence two, defendant U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-1 sued herein as U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-T (hereinafter USBNA) sought an order: (1) pursuant to CPLR 3212; CPLR 3016(b); and CPLR 3211(a) (1), (5) and (7) dismissing the complaint of Dorothy Cammarato, individually and as a member of 16 Admiral Perry Plaza, LLC (hereinafter the plaintiff); and (2) pursuant to CPLR 6514(a) and (b) cancelling the plaintiff's notice of pendency.

The plaintiff opposed the motion.

PROCEDURAL BACKGROUND

By decision and order dated May 6, 2021, the Court granted USBNA's motion under sequence number two in part and denied it in part as follows:

The Court granted the branch of USBNA's motion pursuant to CPLR 3212 seeking to dismiss the complaint as time barred. The Court found that the plaintiff's causes of action accrued on July 8, 2012, the date of the allegedly fraudulent conveyance, and the instant action was commenced more than six years thereafter. These facts shifted the burden to the plaintiff to demonstrate that plaintiff was entitled to a discovery toll of the statute of limitations. The Court found that the plaintiff should have discovered the alleged fraud with reasonable diligence more than two years prior to the commencement of this action due to the recording of the July 8, 2012, conveyance in 2012. The Court further found that the branch of USBNA's motion seeking summary judgment on its counterclaim pursuant to CPLR 3212 and seeking to cancel the notice of pendency pursuant to CPLR 6514 were premature and was denied without prejudice to renewal upon completion of discovery.

The Court also denied those branches of the motion made pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(5) as untimely. The Court did not determine the branch of USBNA's motion to dismiss the complaint pursuant to CPLR 3211(a)(7) because it had dismissed the complaint as time barred pursuant to CPLR 3212.

The plaintiff appealed the order dated May 6, 2021, insofar as it granted that branch of the motion of the defendant USBNA's motion for summary judgment dismissing the complaint insofar as asserted against it. USBNA cross appealed the order, insofar as it denied those branches of USBNA's motion for summary judgment on its counterclaim to quiet title and to cancel a notice of pendency filed by the plaintiff against the subject property and, in effect, denied, as academic, that branch of that defendant's motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against it.

By decision and order of the Appellate Division Second Department dated May 17, 2023, the Court's order of May 6, 2021, was modified, on the law as follows. The provision granting that branch of the motion of the defendant USBNA for summary judgment dismissing the complaint insofar as asserted against it was deleted and was substituted by a provision denying that branch of the motion. Also, the provision which, in effect, denied, as academic, that branch of the motion of the defendant USBNA for an order pursuant to CPLR 3211(a)(7) dismissing the complaint insofar as asserted against it was also deleted. The Appellate Division remitted the matter to the Supreme Court, Kings County, for a determination on the merits of that branch of the motion of the defendant USBNA which was pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it.

On August 9, 2020, the plaintiff commenced the instant action, inter alia, to recover damages for fraud and conspiracy to defraud by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). The verified complaint alleges thirty-nine allegations of fact in support of five denominated causes of action. The first cause of action is for the defendants' fraudulent transfer of the subject property July 8, 2012. The second cause of action is for monetary damages based on the alleged fraud. The third cause of action is for the defendants' unjust enrichment by the fraud. The fourth is for an accounting. The fifth is for legal fees.

The plaintiff and her brother, the defendant Francis Pachesa, were owners of certain real property as joint tenants. In March 2001, the property was transferred by deed to the defendant 16 Admiral Perry Plaza, LLC, of which the plaintiff, her brother, and others were members. By deed dated July 18, 2012, and recorded on August 14, 2012, the plaintiff's brother alone caused 16 Admiral Perry Plaza, LLC, to transfer the property to the defendant Jaba Realty Holdings,

LLC (hereinafter Jaba Realty), for \$60,000. Jaba Realty subsequently transferred the property to the defendant Lucy Pellegrino, Jaba Realty's managing member, for no consideration. In January 2018, Pellegrino borrowed the sum of \$805,000 from Velocity Commercial Capital, LLC, secured by a mortgage on the property, and that mortgage was subsequently assigned to the defendant USBNA. The plaintiff alleged in particular that she did not consent to the July 18, 2012 sale, for which the \$60,000 sales price was "ridiculously low," such that it evinced an intent to defraud her. The plaintiff further alleged that she did not discover the allegedly fraudulent transaction until August 9, 2018.

LAW AND APPLICATION

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*E & D Grp., LLC v. Violet*, 134 AD3d 981, 982 [2nd Dept 2015]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2nd Dept 2017]).

A Court is permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7) (*E & D Grp., LLC*, 134 AD3d 981 citing *Sokol v. Leader*, 74 AD3d 1180,1181 [2nd Dept 2010]; see CPLR 3211[c]; *Mawere v. Landau*, 130 AD3d 986, 988 [2nd Dept 2015]). However, on a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party and a plaintiff will not be penalized because he [or she] has not made an

evidentiary showing in support of his [or her] complaint (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 [1976]; see *Nonnon v. City of New York*, 9 NY3d 825, 827 [2007]).

When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it dismissal should not eventuate (*E & D Grp., LLC* 134 AD3d 981 citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]; see *Mawere*, 130 AD3d at 988; *Nasca v. Sgro*, 130 AD3d 588, 589 [2nd Dept 2015]).

Rather, a Court must determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*) USBNA has moved for dismissal of the complaint pursuant to CPLR 3211(a) (7). The Court must ascertain, first, whether there are factual allegations that give USBNA and the Court notice of the transactions or occurrences intended to be proved, and second, whether those factual allegations allege any cognizable cause of action.

The plaintiff's complaint alleges fraud on the part of USBNA, USBNA's unjust enrichment by the fraud, and the plaintiff's right to an accounting.

A cause of action to recover damages for fraud requires allegations of (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages (*Stein v Doukas*, 98 AD3d 1024 [2nd Dept 2012]). Moreover, CPLR 3016(b) requires that the circumstances underlying a cause of action based on fraud be stated in detail (CPLR 3016 [b]; see *Scott v. Fields*, 92 A.D.3d 666, 668 [2nd Dept 2012]).

In support of the motion, USBNA pointed out the following undisputed facts. There is no allegation of fact in the complaint that USBNA made any representations to plaintiff. There is no allegation in the complaint that USBNA had any role in the execution, delivery or even the recording of any of the deeds of which plaintiff complains. There is also no allegation of fact that USBNA received any money or other ascertainable item of value from the plaintiff.

In sum, the causes of action alleging fraud by USBNA contain only bare and conclusory allegations, without any supporting detail. Thus, the complaint fails to satisfy the requirements of CPLR 3016(b)(*Id*). The complaint also fails to plead a cognizable claim of fraud or unjust enrichment against USBNA.

Generally, the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest (see *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 [1st Dept 1997],

A fiduciary relationship arises when one is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation (*Oddo Asset Mgt. v. Barclays Bank PLC*, 19 N.Y.3d 584, 592–593 [2012] quoting *Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 [2011]). It is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). A conventional business relationship, without more, is insufficient to create a fiduciary relationship (*Id*).

The verified complaint contained no allegations of fact demonstrating a fiduciary relationship between the plaintiff and USBNA. Consequently, the complaint also fails to plead a

cognizable claim for an accounting. The plaintiff's opposition papers did not remedy the insufficiency of the pleadings pointed out by USBNA.

Regarding the plaintiff's fifth cause of action for attorney's fees, New York follows the general rule that attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule (*WFB Realty, LLC v R & W Brokerage*, 219 A.D.3d 1469 [2nd Dept 2023], citing *Alpha/Omega Concrete Corp. v. Ovation Risk Planners, Inc.*, 197 A.D.3d 1274, 1282 [2nd Dept 2021]).

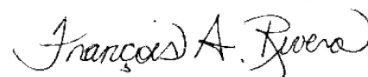
The verified complaint did not allege a statute, Court rule or agreement between the plaintiff and USBNA in support of attorney's fees.

CONCLUSION

The branch of the motion by U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-1 sued herein as U.S. Bank National Association, as Trustee for Velocity Commercial Capital Loan Trust 2018-T (hereinafter UBNA) for an order pursuant to CPLR 3016(b) and CPLR 3211(a) (7) dismissing the complaint of Dorothy Cammarato, individually and as a member of 16 Admiral Perry Plaza, LLC is granted.

The foregoing constitutes the decision and order of the Court.

ENTER



J.S.C.