

**Smith v CJS Land Servs., Inc.**

2024 NY Slip Op 30422(U)

February 2, 2024

Supreme Court, Kings County

Docket Number: Index No. 512728/2023

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of February 2024

HONORABLE FRANCOIS A. RIVERA

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GLORIA SMITH and CLAUDIA SMITH

Plaintiff,

**DECISION & ORDER**

Index No.: 512728/2023

CJS LAND SERVICES, INC., CHRISTINE A. BOCHAT, P.C., BOCHAT & BOCHAT P.C., CHRISTINE A. BOCHAT, and SPECIALIZED LOAN SERVICING LLC,

Defendants.

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By notice of motion, filed on November 10, 2023, under motion sequence number one, defendants Christine A. Bochat, P.C., Bochat & Bochat P.C. and Christine A. Bochat (hereinafter the movants) have jointly moved for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the complaint of Gloria Smith and Claudia Smith (hereinafter the plaintiffs). The plaintiffs have opposed the motion.

The following NYSCEF documents numbers 42 through and including 52 were considered.

**BACKGROUND**

On April 28, 2023, the plaintiffs commenced the instant action by filing a summons with notice with the Kings County Clerk’s office (KCCO). On May 19, 2023, defendant CJS Land Services, Inc filed a notice of appearance and demand for a complaint with the KCCO. On May 25, 2023, defendant Specialized Loan Servicing LLC filed a notice of appearance and demand for a complaint with the

KCCO. On May 30, 2023, the movants filed a notice of appearance and demand for a complaint with the KCCO.

On May 30, 2023, the plaintiffs filed a verified complaint. On August 21, 2023, defendant CJS Land Services, Inc interposed and filed a verified answer with KCCO.

The verified complaint alleges eighty-nine allegations of fact in support of three denominated causes of action. The first and third cause of action is for breach of a fiduciary duty; the second is for declaratory judgment.

## **MOTION PAPERS**

In support of the motion, the movants submitted an affirmation of their counsel and a memorandum of law in support. The affirmation of counsel references thirteen annexed exhibits labeled A through M. Exhibit A is the verified complaint. Exhibit B is defendant CJS Land Services, Inc.'s verified answer. Exhibit C is denominated as the Closing Disclosure, dated February 18, 2022. Exhibit D is denominated as the Chase Bank's Wire Receipt Notification, dated February 18, 2022. Exhibit E is denominated as a copy of attorney Bochat's IOLA account report, dated February 18, 2022. Exhibit F is denominated as a copy of checks disbursed from attorney Bochat's IOLA Account, dated February 18, 2022. Exhibit G is denominated as a copy of the Cashier's Check remitted by Attorney Bochat to Specialized Loan Servicing LLC dated February 18, 2022. Exhibit H is denominated as a copy of the Cashier's Check purportedly shipped by CJS, dated February 18, 2022. Exhibit I is denominated as a copy of the Cover Letter CJS enclosed with the

Cashier's Check, received by SLS on February 22, 2022. Exhibit J is denominated as a copy of SLS's correspondence to plaintiffs, dated December 19, 2022. Exhibit K is denominated as a copy of e-mail correspondence between CJS, SLS, and plaintiffs' counsel, dated February 21, 2023, and March 3, 2023, respectively. Exhibit L is denominated as a copy of CJS's Declaration of Lost, Stolen or Destroyed Cashier's Check. Exhibit M is denominated as a copy of Chase Bank's replacement check issued to SLS, dated February 10, 2023.

In opposition plaintiff Claudia Smith submitted her affidavit with one annexed exhibit labeled A, and a memorandum of law. Annexed exhibit A was described as evidence of the denial of the plaintiff's loan application.

In reply the movants submitted a memorandum of law and an affirmation of their counsel which referred to two annexed exhibits labeled N and O. Exhibit N is described as a Third-Party Authorization, executed by plaintiffs on February 18, 2022. Exhibit O is described as a Closing Check List, executed by Plaintiffs on February 18, 2022.

## **LAW AND APPLICATION**

After review of the motion papers submitted and hearing oral argument, the order of the Court is as follows for the reasons set forth herein. In assessing a motion pursuant to CPLR 3211(a)(7) to dismiss a complaint, a court must accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). Where

evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes 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 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 (*Graphic Arts Mut. Ins. Co. v Pine Bush Cent. Sch. Dist.*, 159 AD3d 769, 771[2d Dept 2018]).

A motion to dismiss based on CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). For evidence to be considered documentary, it must be unambiguous and of undisputed authenticity (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case (*Bedford-Carp Constr., Inc. v Brooklyn Union Gas Co.*, 215 AD3d 907, 908 [2d Dept 2023]).

Here, the affirmation of the movants' counsel, refers to several documents, such as emails, letters and copies of checks which do not constitute documentary evidence within the intendment of CPLR 3211[a][1] (*see County of Westchester v Unity Mech. Corp.*, 165 AD3d 883, 885 [2d Dept 2018]). The remaining documents, that include the pleadings, closing documents and other items do not utterly refute the plaintiff's

allegations or conclusively establish a defense as a matter of law (*see 25-01 Newkirk Ave., LLC v Everest Nat. Ins. Co.*, 127 AD3d 850 [2d Dept 2015]).

Furthermore, the evidentiary materials submitted by the movants did not, as a matter of law, resolve the parties' factual disputes such that it could be said that the allegations in the complaint were not facts at all (*Bonavita v Gov't Emps. Ins. Co.*, 185 AD3d 892, 894 [2d Dept 2020], citing *County of Westchester*, 165 AD3d at 886).

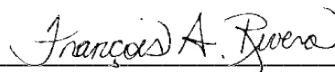
### CONCLUSION

The motion by defendants Christine A. Bochat, P.C., Bochat & Bochat P.C. and Christine A. Bochat for an order pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7) dismissing the complaint of Gloria Smith and Claudia Smith is denied.

The defendants Christine A. Bochat, P.C., Bochat & Bochat P.C. and Christine A. Bochat shall file an answer within thirty (30) days of entry of this Order.

The foregoing constitutes the decision and order of this Court.

ENTER:



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J.S.C.