

Old Republic Natl. Title Ins. Co. v Chowdhury
2024 NY Slip Op 35180(U)
October 9, 2024
Supreme Court, Bronx County
Docket Number: Index No. 813330/2023E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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OLD REPUBLIC NATIONAL TITLE INSURANCE
COMPANY,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 813330/2023E

ABDUL CHOWDHURY AKA ABDUL CHOUDHURY,
RAZIA S. CHOWDHURY, & NURUAL A.
CHOWDHURY,

Motion Sequence No. 1

Defendants.

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GUZMAN, J.

This action arises from the sale of real property located at 1955 Ellis Avenue, Bronx, New York. The property, consisting of a two-family dwelling, was owned by Defendants Abdul Chowdhury a/k/a Abdul Choudhury (referred to herein as Abdul Chowdhury), Razia S. Chowdhury, and Nurual A. Chowdhury. On September 21, 2021, Defendants sold the property to Abdul Chowdhury and Monowara Islam, as husband and wife.

Defendants, who had an existing mortgage on the property, obtained a payoff letter from their loan servicing company, non-party NewRez c/o PHH Mortgage Services. The letter, dated September 17, 2021, indicated the Defendants' payoff amount was \$217,858.54, valid through October 1, 2021. Also on September 21, 2021, Plaintiff Old Republic National Title Insurance Company ("Old Republic") issued a lender's title insurance policy in connection with purchase of the property by Abdul Chowdhury and Monowara Islam.

According to Plaintiff, on the date of the closing, Defendants' closing agent confirmed payoff of their mortgage in the amount of \$217,858.54, but one year later, "received back" the payoff check due to a shortage in payment of property taxes. By letter dated January 24, 2023, Old Republic informed Defendants that "due to the year of delay [of the] current owner [in] failing to timely respond to the communications from the Mortgage lender and the closing agent, the total shortage required to payoff and satisfy the said Mortgage was \$20,987.36 for a total payoff amount of \$238,845.36." See NYSCEF Doc. 31.

The letter further advised that the Defendants' warranty deed "contain[ed] certain covenants and warranties of title and [they] also made material representations of no existing liens or encumbrances which Old Republic relied on to issue its policy and which the new lender relied on to

issue its loan for a purchase money mortgage to its detriment.” According to Old Republic, Defendants had therefore been “unjustly enriched as a result of Old Republic's payment as the owner of real property is solely responsible for the payment of property taxes and the mortgage payoff was [Defendants'] obligation to pay and satisfy which [they] failed to do.” See NYSCEF Doc. 6. After Defendants failed to remit payment for the shortfall, Old Republic commenced this action alleging causes of action for breach of contract, fraud, and unjust enrichment.

On the motion before the Court, Defendants Nural A. Chowdhury and Razia S. Chowdury move to dismiss the complaint pursuant to CPLR § 3211(a)(1), CPLR § 3211 (a)(3), and CPLR § 3211(a)(7). Old Republic cross-moves for leave to amend its complaint pursuant to CPLR § 3025 (b).

The movants first contend that the complaint must be dismissed because Plaintiff, a foreign corporation, lacks capacity to sue. “Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review.” *Matter of Town of Riverhead v. New York State Bd. of Real Prop. Servs.*, 5 N.Y.3d 36, 41, 799 N.Y.S.2d 753 (2005). Pursuant to CPLR § 3211(a)(3), a defendant may move to dismiss a complaint where the party asserting the cause of action does not have legal capacity to sue. On such a motion, the movant has the burden of establishing lack of capacity as a matter of law. See *Brunner v. Estate of Lax*, 137 A.D.3d 553, 27 N.Y.S.3d 148 (1st Dep't 2016).

Here, the movants contend that Plaintiff may not maintain this action pursuant to BCL § 1312 (a), which provides, in part, that “[a] foreign corporation doing business in [New York] without authority shall not maintain any action . . . in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees and taxes imposed under the tax law or any related statute [. . .].” In support of its argument, however, the movants merely state that “Plaintiff's attorney avers that Plaintiff is a Florida Corporation, and fails to plead whether Plaintiff is authorized to conduct business in the State of New York.” See NYSCEF Doc. 16 at ¶ 18. This statement is insufficient to show that Plaintiff engaged in systematic and regular business activities in New York without authorization. See *Palisades Tickets, Inc. v. Daffner*, 118 A.D.3d 619, 620, 989 N.Y.S.2d 25, 26 (1st Dep't 2014). In any event, Plaintiff has submitted proof that it is licensed to write insurance in New York, and as such it is not barred by BCL § 1312 from bringing this action. Accordingly, the moving Defendants are not entitled to dismissal on this ground.¹

¹ Moreover, noncompliance with BCL §1312(a) “may be cured prior to the resolution of the action.” *Uribe v. Merchants Bank of New York*, 266 A.D.2d 21, 697 N.Y.S.2d 279 (1st Dep't 1999).

Next, the movants contend that the complaint must be dismissed because Plaintiff failed to name a necessary party, NewRez c/o PHH Mortgage Services, the loan servicer that issued Defendants' payoff letter. CPLR § 1001 (a) provides that "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." The failure to join a necessary party "is a ground for dismissal of an action without prejudice." CPLR § 1003. Here, Defendants have not established that NewRez "would be inequitably affected by any judgment that might result in this action." *Amsellem v. Host Marriott Corp.*, 280 A.D.2d 357, 359, 721 N.Y.S.2d 318, 321 (1st Dep't 2001). The movants present no legal argument in support of their application, aside from a conclusory statement that Plaintiff would have a remedy against NewRez if this action is dismissed. Thus, the movants have not met their burden on this issue.

Finally, the movants contend that the complaint fails to state a cause of action against them because (1) they have no fiduciary or contractual relationship with Plaintiff; (2) the title policy issued by Plaintiff was issued for the benefit of Abdul Choudhury; (3) the covenants of the warranty deed concern only the grantor and grantee; and (4) Plaintiff cannot claim unjust enrichment based on the voluntary payment doctrine.

In determining a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must give the pleadings a liberal construction, accept all of the facts alleged in the complaint as true, and draw every possible inference in the plaintiff's favor in order to determine whether those facts fit within any cognizable legal theory." *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 154 N.Y.S.3d 290 (2021). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142, 53 N.Y.S.3d 598, 601 (2017).

Here, the complaint fails to state a cause of action for breach of any provisions of the warranty deed. "A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary. . . and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract." *LaSalle Natl. Bank v Ernst & Young*, 285 A.D.2d 101, 108, 729 N.Y.S.2d 671 (1st Dep't 2001) (citation omitted). Old Republic is not named in the warranty deed. As noted above, however, Old Republic cross moves to amend its complaint. In its proposed amended pleading, the document which forms the basis of its cause of action for breach of contract is the closing affidavit signed by Defendants. The affidavit states, *inter alia*:

I am (we are) aware of the payoff letter(s) from our current Lender showing the total amount to pay off our loan(s) and to satisfy the existing mortgage(s). In consideration of your omitting the existing mortgage(s), I (we) do hereby agree to pay you, on demand, any additional monies required by the lender to enable you to obtain a recordable satisfaction. I acknowledge that the lender has the right to deduct any shortages from the tax escrow account. If the mortgage being paid off is a credit line mortgage, I (we) hereby consent to have the account frozen, and request that the lender accept the payoff check as full settlement to close and satisfy the account.

See NYSCEF Doc. 36. The proposed amended complaint therefore states a cause of action for breach of contract based on the closing affidavit. Of note, Defendants have filed no opposition papers to Old Republic's cross-motion to amend the complaint.

Defendants also move to dismiss Old Republic's claim for unjust enrichment on the grounds that it is barred by the voluntary payment doctrine. To prevail on a claim for unjust enrichment, a plaintiff must establish (1) that the defendant was enriched; (2) at the plaintiff's expense; and (3) it is against equity and good conscience to permit the defendants to retain what is sought to be recovered. See *Old Republic Natl. Tit. Ins. Co. v Luft*, 52 A.D.3d 491, 491-492, 859 N.Y.S.2d 261 (2008). "[A] plaintiff need not be in privity with the defendant to state a claim for unjust enrichment." *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 1018, 831 N.Y.S.2d 760 (2007). Instead, a plaintiff must allege that services were performed for the defendant or "indicate a relationship between the parties that could have caused reliance or inducement." *Georgia Malone & Co., Inc. v Rieder*, 19 N.Y.3d 511, 950 N.Y.S.2d 333 (2012); see *Kagan v. K-Tel Entm't*, 172 A.D.2d 375, 568 N.Y.S.2d 756 (1st Dep't 1991).

"[T] voluntary payment doctrine . . . bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law." *Dillon v. U-A Columbia Cablevision of Westchester*, 100 N.Y.2d 525, 760 N.Y.S.2d 726 (2003). "As its name suggests, the voluntary payment doctrine applies only to voluntary payments, not to payments made as a result of fraud or duress." *Wurtz v. Rawlings Co., LLC*, 2016 WL 7174674, at *5 (E.D.N.Y. 2016), citing *DRMAK Realty LLC et al. v. Progressive Credit Union*, 133 A.D.3d 401, 18 N.Y.S.3d 618 (1st Dep't 2015). Here, Old Republic alleges, by virtue of its cross-motion, that in the closing affidavit, Defendants misrepresented that the property was free and clear of any encumbrances, agreed to satisfy the existing mortgage(s), and agreed to pay any additional monies required by the lender to obtain a recordable satisfaction. Since Old Republic alleges that it paid \$20,986.82 to satisfy Defendants' existing loan, the voluntary payment doctrine would not bar its claims. The

Court notes that Defendants do not move to dismiss Old Republic's claim for unjust enrichment on any other grounds.

Finally, Defendants do not set forth any specific argument as to why Old Republic's cause of action for misrepresentation should be dismissed, and therefore the court declines to address this issue. As noted above, Defendants' do not oppose Old Republic's cross-motion to amend the complaint. Accordingly, it is hereby:

ORDERED AND ADJUDGED that the motion filed by Defendants Nural A. Chowdhury and Razia S. Chowdury to dismiss the complaint pursuant to CPLR § 3211(a)(1), CPLR § 3211(a)(3), and CPLR § 3211(a)(7) is denied; and it is further

ORDERED AND ADJUDGED that the cross-motion filed by Plaintiff Old Republic National Title Insurance Company for leave to amend its complaint pursuant to CPLR § 3025 (b) is granted, without opposition filed thereto; and it is further

ORDERED AND ADJUDGED that Plaintiff's proposed amended complaint, as contained in NYSCEF Doc. 41, is deemed served; and it is further

ORDERED AND ADJUDGED that Defendants' time to serve an amended answer is extended until twenty days after service upon them of a copy of this Decision & Order; and it is further

ORDERED AND ADJUDGED that all parties shall appear for an in-person conference to explore potential settlement of this matter in Part 7, Courtroom 624, on October 24, 2024, at 10:00 a.m.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
October 9, 2024



HON. WILMA GUZMAN, J.S.C.