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| <b>Wilson v Quicken Loans</b>                                                                                                                                                                                                  |
| 2024 NY Slip Op 35386(U)                                                                                                                                                                                                       |
| June 12, 2024                                                                                                                                                                                                                  |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 702015/2019                                                                                                                                                                                           |
| Judge: Phillip Hom                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
QUEENS COUNTY**



PRESENT: HON. PHILLIP HOM PART 14

*Justice*

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DARRYL WILSON, DENISE VIERA-WILSON,

INDEX NO. 702015/2019

MOTION DATE 06/22/2023

MOTION SEQ. NO. 004

Plaintiffs,

- v -

QUICKEN LOANS, GMAC MORTGAGE, LLC, OCWEN  
LOAN SERVICING, LLC, SETERUS MORTGAGE, LLC,  
SELENE FINANCE, LP, WILMINGTON SAVINGS FUND  
SOCIETY FSB,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that this motion to dismiss by defendant Ocwen Loan Servicing, LLC, is determined as follows:

On April 3, 2008, the plaintiffs executed a note in the amount of \$383,000, together with a mortgage on certain real property known as 115-29 179<sup>th</sup> Street, Jamaica, NY 11434, Block 10314, Lot 69 (the "Premises") as security for the note, to Quicken Loans, Inc. ("Quicken"). The mortgage was eventually assigned to Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust ("Wilmington").

In August 2018, Wilmington commenced an action to foreclose on the mortgage in Queens County, Supreme Court, under index No. 713457/2018 (the "foreclosure action"). The complaint in the foreclosure action alleged, among other things, that via a series of assignments from 2011 to 2018, the mortgage was assigned by Quicken to GMAC Mortgage, LLC ("GMAC"), by GMAC to Ocwen Loan Servicing, LLC ("Ocwen"), by Ocwen to Federal National Mortgage Association ("Fannie Mae"), and by Fannie Mae to Wilmington.

In February 2019, while the foreclosure action was pending,<sup>1</sup> the plaintiffs Darryl Wilson and Denese Viera-Wilson ("Plaintiffs") commenced this action against defendants Quicken,

<sup>1</sup> It is noted that in an order dated April 10, 2023, the court (Jackman Brown, J.) granted Wilmington's motion in the foreclosure action to, among other things, discontinue same.

GMAC, Ocwen, Wilmington, Seterus Mortgage, LLC, and Selene Finance, LP asserting causes of action for breach of contract, breach of fiduciary duty, an accounting, prima facie tort, and intentional infliction of emotional distress. Plaintiffs assert that each of the defendants failed to properly collect and allocate escrow funds, leading to damages exceeding \$500,000.

Via a stipulation, so-ordered November 18, 2019, the court (Latin, J.) discontinued the instant action as against Quicken (EF 68). Via a separate stipulation dated November 14, 2019, the court (Latin, J.) discontinued the action as against defendants Wilmington, Seterus Mortgage, LLC, and Selene Finance, LP (EF 69). As such, the remaining defendants in the instant action are GMAC and Ocwen.

Now, Ocwen makes the instant motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint insofar as asserted against it with prejudice. Plaintiffs oppose.

“On a motion pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a cause of action, the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*U.S. Bank N.A. v Herman*, 174 AD3d 831, 831-32 [2d Dept 2019], quoting *Shah v Exxis, Inc.*, 138 AD3d 970, 971 [2d Dept 2016]).

“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” (*Wedgewood Care Ctr., Inc. v Kravitz*, 198 AD3d 124, 130 [2d Dept 2021], quoting *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). “Evidentiary material submitted by the plaintiff in opposition to such a motion may be considered to remedy defects in the complaint” (*NFA Group v Lotus Research, Inc.*, 180 AD3d 1060, 1061 [2d Dept 2020]).

### *Breach of Contract*

First, the Court turns to Plaintiffs’ cause of action alleging breach of contract. In their complaint, Plaintiffs allege that, at the closing of the mortgage loan, they signed agreements with the lender that contained “specific responsibilities for each party.” Plaintiffs further allege that pursuant to said “agreements”, each defendant was an escrow agent. Plaintiffs allege that as a result of the defendants’ failure to perform their contractual obligations, Plaintiffs suffered damages exceeding \$500,000.

“The essential elements of a breach of contract cause of action are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*Ripa v Petrosyants*, 203 AD3d 768, 769-70 [2d Dept 2022], quoting *Stewart v Berger*, 192 AD3d 940, 941 [2d Dept 2021]). “To state a cause of action to recover damages for a breach of contract, the plaintiff’s allegations must identify the provisions of the contract that were breached” (*NFA Group*, 180 AD3d at 1061, quoting *Barker v Time Warner Cable, Inc.*, 83 AD3d 750, 751 [2d Dept 2011]). “Generally, a party alleging a breach of contract must demonstrate the existence of a [] contract reflecting the terms and conditions of their []

purported agreement” (*Canzona v Atanasio*, 118 AD3d 837, 839 [2d Dept 2015] [internal quotation marks and citations omitted]).

Here, Plaintiffs fail to state a cause of action for breach of contract. In their complaint, Plaintiffs set forth that each defendant was:

“...obligated to exercise reasonable care to make sure that the monthly monetary payments by the plaintiff were properly assigned to the correct escrow account...obligated to keep complete, contemporaneous and correct records of each escrow payment...required to perform an accounting of the escrow account at the time the account left their possession and explain any deficiencies...[and] required to perform an accounting upon taking possession of the account, by servicing agreement or assignment.”

However, Plaintiffs fail to identify the specific agreement that Ocwen breached; they fail to identify any agreement reflecting the abovementioned provisions; they fail to allege what terms of an agreement Ocwen breached; and they failed to allege how any such breach caused the plaintiffs to suffer damages. Plaintiffs’ vague and conclusory allegations are insufficient to sustain a breach of contract cause of action (*see id.*; *Island Surgical Supply Co. v Allstate Ins. Co.*, 32 AD3d 824, 824 [2d Dept 2006]; *Marino v Vunk*, 39 AD3d 339, 340 [1<sup>st</sup> Dept 2007]). In addition, the evidentiary material submitted by Plaintiffs in opposition to Ocwen’s motion fail to remedy this defect in the complaint (*see NFA Group*, 180 AD3d at 1061). As such, that branch of the motion to dismiss the cause of action alleging breach of contract insofar as asserted against Ocwen is granted.

#### *Breach of Fiduciary Duty*

Next, the Court turns to Plaintiffs’ cause of action alleging breach of fiduciary duty. “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” (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017], quoting *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]). “A cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016 (b)” (*WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018, 1023 [2d Dept 2021]).

Here, even accepting that Ocwen had a fiduciary duty to Plaintiffs as their escrow agent (*see Cash v Titan Fin. Servs., Inc.*, 58 AD3d 785, 789 [2d Dept 2009]; *Takayama v Schaefer*, 240 AD2d 21, 25 [2d Dept 1998]), the complaint fails to allege factual details and circumstances of Ocwen’s alleged misconduct, and how such misconduct caused Plaintiffs to suffer damages in the amount of \$500,000 (*see CPLR 3016 [b]*; *Stortini v Pollis*, 138 AD3d 977, 979 [2d Dept 2016]; *see also Faith Assembly v Titledge of N.Y. Abstract, LLC*, 106 AD3d 47, 62 [2d Dept 2013]).

Although Plaintiffs argue in opposition that a bank, as escrow holder of funds to be used for payment of taxes, may be held liable on a theory of breach of fiduciary duty for nonpayment (*see Standard Fed. Bank v Healy*, 7 AD3d 610, 612 [2d Dept 2004]; *FGH Realty Credit Corp. v*

*Bonati*, 226 AD2d 188, 188 [1<sup>st</sup> Dept 1996]; *Davis v Dime Sav. Bank of N.Y.*, 158 AD2d 50, 52 [3d Dept 1990]), Plaintiffs fail to make any allegation that Ocwen did not pay taxes on Plaintiffs' behalf.

Moreover, the breach of fiduciary duty claim must be dismissed as duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages (*see Federico v Brancato*, 144 AD3d 965, 967 [2d Dept 2016]; *Canzona v Atanasio*, 118 AD3d 841, 843 [2d Dept 2014]; *Chowaike & Co. Fine Art Ltd. v Lacher*, 115 AD3d 600, 600 [1<sup>st</sup> Dept 2014]).

### *Accounting*

Turning to Plaintiffs' cause of action for an accounting, insofar as that branch of the motion to dismiss the cause of action alleging breach of fiduciary duty as against Ocwen is granted, that branch of the motion to dismiss the cause of action seeking an accounting as asserted against Ocwen is also granted (*see Swartz v Swartz*, 145 AD3d 818, 825 [2d Dept 2016]; *Stortini*, 138 AD3d at 979).

### *Prima Facie Tort & Intentional Infliction of Emotional Distress*

Next, the Court turns to Plaintiffs' cause of action alleging prima facie tort. "The elements of prima facie tort are (1) intentional infliction of harm, (2) resulting in special damages, (3) without any excuse or justification, (4) by an act or acts otherwise lawful" (*Ahmed Elkoulily, M.D., P.C. v New York State Catholic Healthplan, Inc.*, 153 AD3d 768, 772 [2d Dept 2017]). "To adequately plead prima facie tort, the complaint must plead the defendant's malicious intent or disinterested malevolence as the sole motive for the challenged conduct" (*id.*).

Here, Plaintiffs fail to sufficiently plead Ocwen's malicious intent or disinterested malevolence as the sole motive for the challenged conduct and fail to sufficiently plead special damages (*see Nachbar v Cornwall Yacht Club*, 160 AD3d 972, 973-74 [2d Dept 2018]). Additionally, as to the cause of action alleging intentional infliction of emotional distress, the complaint does not allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*id.* at 973 [internal quotation marks and citations omitted]). As such, those branches of the motion to dismiss Plaintiffs' causes of action for prima facie tort and intentional infliction of emotional distress insofar as asserted against Ocwen are granted.

In accordance with the foregoing, it is hereby **ORDERED** that Ocwen's motion to dismiss the complaint insofar as asserted against it is granted to following extent:

It is hereby **ORDERED** that Plaintiffs' complaint is dismissed without prejudice<sup>2</sup> as against Ocwen; and it is further

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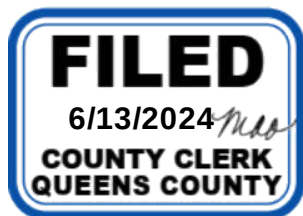
<sup>2</sup> While Ocwen moves to dismiss the complaint against it with prejudice, "[d]ismissals for pleading deficiencies or for failure to timely serve process are not on the merits and are without prejudice" (*Cadet-Duval v Gursim Holding, Inc.*, 147 AD3d 718, 720 [2d Dept 2017]; *see also Komolov v Segal*, 96 AD3d 513, 513 [1<sup>st</sup> Dept 2012]). As such, the complaint is dismissed against it without prejudice.

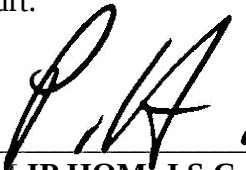
**ORDERED** that Ocwen shall serve, via regular mail, a copy of this Order with Notice of Entry upon GMAC, within thirty (30) days of the date of entry; and it is further

**ORDERED** that Ocwen shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Plaintiffs, within five (5) days of the date of entry.

This constitutes the Decision and Order of this Court.

Dated: June 12, 2024



  
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PHILLIP HOM, J.S.C.