Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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MARIA GARCIA,

Plaintiff(s),

Index No. 600178/11

Motion Submitted: 10/19/11
Motion Sequence: 001, 002, 003, 004

-against-

FIRST FIDELITY MORTGAGE GROUP, LLC, FIRST FIDELITY MORTGAGE GROUP, LTD, FRANK LAGRIECA, JR., BLACKACRE TITLE AGENCY, DANIEL B. GALGANO, GRIFFEN D. FINDLAY, APPRAISAL ONE AND HOME INSPECTION ONE, JAN BOIKE, BART D. KAPLAN, P.C., BART D. KAPLAN, JARED KAPLAN,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXXX
Answering Papers.....XX
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....XXXXX

Motion by defendants Appraisal One and Home Inspection One, Inc., s/h/a Appraisal One and Home Inspection One and Jan Boike (hereafter collectively "Appraisal One") for judgment pursuant to CPLR §§ 3211(a)(5) and (7) dismissing the ammended (sic) complaint (hereafter "the amended complaint") is denied with leave to renew upon appropriate papers.

Motion by plaintiff pursuant to CPLR § 3215(a) for default judgment against Appraisal One is granted as set forth below.

Motion by defendants Bart D. Kaplan, P.C., Bart D. Kaplan, and Jared Kaplan (hereafter collectively "the Kaplan defendants") for judgment pursuant to CPLR §§ 3211(a)(5) and (7) dismissing the claims against them is granted pursuant to CPLR § 3211(a)(5).

Ammended (sic) motion by plaintiff (hereafter "the amended motion") for *nunc pro tunc* relief, costs and attorneys fees, and limited discovery is denied.

According to the amended complaint, plaintiff and her son financed the purchase of their home in July, 2001, for approximately $77,000 at a fixed interest rate of 9%. In late 2004 plaintiff began receiving unsolicited calls offering a refinance package at a lower rate. On April 14, 2005, plaintiff refinanced her mortgage based upon an allegedly fraudulently-inflated appraisal and on terms that had been misrepresented to her. Plaintiff does not speak English and was allegedly intimidated into signing the closing documents. The loan adjusted within two years to an interest rate above 14%. According to plaintiff's attorney, plaintiff's home was fraudulently appraised at $160,000, when its true value was $135,000, and that the loan she was induced to accept in the amount of $117,865 stripped away her equity of $5,486.67 (Bruno affirmation dated Sept. 12, 2011 at par. 76).

Plaintiff alleges that she began to experience difficulty in making payments when the interest rate was adjusted. She then attempted a further refinancing. In March, 2008, plaintiff alleges that she was told she owned a "double wide" and not a "frame structure" as described by Appraisal One in the Boike Appraisal. She learned this through the later Ridgway Appraisal for Countrywide Bank. It appears that at the time of the 2005 refinance her dwelling was compared to a "Ranch, Cape Cod and a Log Ranch in sales Comparisons," instead of comparing her "Double Wide to other Double-Wides in the area" (Bruno affirmation dated September 12, 2011, at par. 83).

Plaintiff was unable to refinance a second time, and a foreclosure action was commenced against her in November, 2009. According to plaintiff, the foreclosure action was dismissed because the original note could not be located.

Plaintiff commenced this action by electronic filing on April 15, 2011. Her amended complaint contains eighteen causes of action against all individuals and entities involved in the closing of the 2005 refinance.

Defendant Appraisal One moves for judgment dismissing the complaint pursuant to CPLR §§ 3211(a)(5) and (7), notwithstanding the fact that it is admittedly in default in answering. It does not request an extension of time to answer (***CPLR § 3012[d]***), nor does it request leave to vacate its default (***CPLR § 5015[a][1]***).

Statutory time frames are not options; they are requirements (***Miceli v. State Farm Mut. Auto. Ins. Co.***, 3 N.Y.3d 725, 726, 819 N.E.2d 995, 786 N.Y.S.2d 379 [2004]). A dismissal motion pursuant to CPLR § 3211 must be made "before service of the responsive pleading is required" (***CPLR § 3211[e]***). A motion to dismiss made after that date does not operate to relieve a party's default in pleading (***Holubar v. Holubar***, 89 A.D.3d 802, 2011 WL 5433728 (2d Dept., 2011); ***Wenz v. Smith***, 100 A.D.2d 585, 473 N.Y.S.2d 527 (2d Dept., 1984); *see* ***McGee v. Dunn***, 75 A.D.3d 624, 906 N.Y.S.2d 74 [2d Dept., 2010]). Before the Court can consider dismissal of the complaint, Appraisal One must seek leave to vacate its default in pleading. Based on the foregoing, the motion by Appraisal One is summarily denied.

Plaintiff seeks a default judgment against Appraisal One pursuant to CPLR § 3215. She submits proof of service on Appraisal One, but omits an affidavit of facts constituting her claims. Luckily for plaintiff, Appraisal One annexed a copy of the complaint to its opposition papers, and because it is verified, the complaint may be used as the affidavit of facts (***CPLR § 3215[f]***). Plaintiff has met her burden for a default judgment on the issue of liability against Appraisal One.

Appraisal One opposes the motion based upon the various statutes of limitations. While such a defense may be meritorious, the unconfirmed assumption that a party is entitled to a first extension of time to answer is unacceptable (***Stracar Medical Services, P.C. v. State Farm Mut. Auto. Ins. Co.***, 18 Misc.3d 136(A), 859 N.Y.S.2d 899, 2008 WL 442576 [NY App Term 2008]). Furthermore Appraisal One's belief that the Standards of Civility (22 NYCRR 1200, Appendix A) virtually guarantee it a first adjournment is a serious misunderstanding, and will lead to sloppy pleading and wasteful motion practice.

Of course this state has a strong public policy of resolving disputes on the merits (***Zeccola & Selinger, LLC v. Horowitz***, 88 A.D.3d 992, 931 N.Y.S.2d 536 (2d Dept., 2011); ***Merchants Ins. Group v. Hudson Valley Fire Protection Co. Inc.***, 72 A.D.3d 762, 898 N.Y.S.2d 242 [2d Dept., 2010]), and whether to vacate a default is a matter addressed to the sound discretion of the trial court (***Dimitriadis v. Visiting Nurse Serv. of NY***, 84 A.D.3d 1150, 923 N.Y.S.2d 691 (2d Dept., 2011); ***Gerdes v. Canales***, 74 A.D.3d 1017, 903 N.Y.S.2d 499 [2d Dept., 2010]). Should Appraisal One move to vacate its default in answering on appropriate papers, that include an explanation of its law office failure or other reasonable excuse and its potentially meritorious defenses, within 15 days of service of a copy of this Order, the Court will entertain such a motion.

Based on the foregoing plaintiff's motion for a default judgment is granted on the issue of Appraisal One's liability.

In an Amended Motion plaintiff files an "amended motion paper" "for the purpose of correcting grammar; organization of issues and facts argued for the ease of readers; and uploading exhibits, Table of Contents and Authorities, not done so with original filing" (Bruno affirmation dated September 12, 2011, at par. 2). The CPLR provides for no such amendments; multiple filings create confusion and extra unnecessary work for the court and the other parties.

Plaintiff's request for "*Nunc Pro Tunc*" relief is not clearly identified in her notice of motion. Buried in her attorney's affirmation (Bruno affirmation dated Sept.12, 2011, at p. 40) plaintiff argues that due to "technical difficulty" she was unable to file her pleading electronically on April 14, 2011 despite hours of attempts. She complains that the Court E-filing records show a filing date of April 15, 2011 because that is the date when her payment was accepted, when in fact her action should have been filed on April 14, 2011.

Nunc pro tunc relief in general is reserved for correcting irregularities in the entry of judicial mandates or like procedural errors and may not be wielded when third parties have substantive rights in play that may be altered (***Gletzer v. Harris***, 12 N.Y.3d 468, 476, 909 N.E.2d 1224, 882 N.Y.S.2d 386 [2009]). Such is the case here, in that the *nunc pro tunc* relief sought by plaintiff would extend the limitations periods for various defendants and thereby alter their substantive rights. While the Court is not unmoved by the "lasting disabilities" suffered by plaintiff's attorney as a result of a "tragic collision from a drunk driver," plaintiff is bound by the CPLR, as are all litigants. An action is commenced by filing (***CPLR § 304***). Should plaintiff choose to file electronically, then she must comply with the rules for electronic filing (***22 NYCRR 202.5-b***). (For the record, where "technical problems" prevent filing electronically, and a deadline for filing will expire, service of a hard copy is authorized (***22 NYCRR 202.5-b[d][1][ii]***). Based on the foregoing, *nunc pro tunc* relief finding the date of filing for purposes of commencement of this action to be April 14, 2011, instead of April 15, 2011, is denied.

Plaintiff's request for costs and attorneys fees pursuant to 22 NYCRR 130.1-1 is summarily denied at this time. There has been no showing that defendant's papers have been "frivolous" within the meaning of 22 NYCRR 130.1-1.

Plaintiff's final request is for "limited discovery." No basis for this request has been shown, and it is accordingly, denied.

Bart D. Kaplan, P.C. is the law firm that represented the lender on April 14, 2005, at the time of plaintiff's refinance of her mortgage. Plaintiff alleges that Bart Kaplan was the attorney who attended the closing and allegedly misled plaintiff to believe that "her interests were being protected" (amended complaint, par. 105). Jared Kaplan was the notary at the closing.

Plaintiff alleges thirteen causes of action against Bart D. Kaplan, P.C. and Bart Kaplan. She alleges one cause of action against Jared Kaplan, for notarial misconduct. The Kaplan defendants move for judgment dismissing all claims against them pursuant to CPLR §§ 3211 (a)(5) and (7).

On a motion to dismiss pursuant to CPLR § 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory (***Samiento v. World Yacht Inc.***, 10 N.Y.3d 70, 79, 883 N.E.2d 990, 854 N.Y.S.2d 83 (2008); ***Arnav Industries, Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP***, 96 N.Y.2d 300, 303, 751 N.E.2d 936, 727 N.Y.S.2d 688 [2001]). Dismissal is available pursuant to CPLR § 3211(a)(5), *inter alia*, where the plaintiff has failed to comply with the appropriate statute of limitations. The criterion on a motion pursuant to CPLR § 3211(a)(7) is whether the pleader has a cause of action (***Leon v. Martinez***, 84 N.Y.2d 83, 88, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

The following are the statutes of limitation for each of plaintiff's causes of actions:

(1) breach of implied covenant of good faith and fair dealing - 6 years which begins to run from the time of the breach - ***CPLR § 213(2)***; (***Ely-Cruikshank Co., Inc. v. Bank of Montreal***), 81 N.Y.2d 399, 403, 615 N.E.2d 985, 599 N.Y.S.2d 501 [1993];

(2) breach of fiduciary duty seeking money damages only - 3 years - CPLR § 214(4); breach of fiduciary duty seeking equitable relief - 6 years - CPLR § 213(1); both run from date of breach; (***IDT Corp v. Morgan Stanley Dean Witter & Co.***, 12 N.Y.3d 132, 140, 907 N.E.2d 268, 879 N.Y.S.2d 355 (2009); ***Scott v. Fields***, 85 A.D.3d 756, 925 N.Y.S.2d 135 [2d Dept., 2011]);

(3) constructive trust and unjust enrichment - CPLR § 213(1) - 6 years which runs from the occurrence of the wrongful act, not its discovery; (***Coombs v. Jervier***, 74 A.D.3d 724, 906 N.Y.S.2d 267 (2d Dept., 2010), lv app den 16 N.Y.3d 709 [2011]);

(4) notarial misconduct - 6 years from date of execution; (***Pericon v. Ruck***, 56 A.D.3d 635, 868 N.Y.S.2d 118 [2d Dept., 2008]);

(5) unlawful kickback, common law fraud, fraudulent inducement, fraudulent concealment, civil conspiracy to commit mortgage fraud, and aiding and abetting fraud - 6 years from the fraud, or 2 years from the time the fraud was discovered, or reasonably could have been discovered (***CPLR § 213(8)***; ***Chung v. Wang***, 79 A.D.3d 693, 912 N.Y.S.2d 647 [2d Dept., 2010]);

(6) unconscionability - 6 years - ***CPLR § 213(2)***; ***35 Park Ave. Corp. v. Campagna***, 48 N.Y.2d 813, 399 N.E.2d 1144, 424 N.Y.S.2d 123 [1979]);

(7) undue influence - 6 years from time of execution of contract sought to be rescinded- ***CPLR § 213(1)***; *see* ***Baratta v. Kozlowski***, 94 A.D.2d 454, 464 N.Y.S.2d 803 [2d Dept., 1983]);

(8) violation of Gen Bus. Law 349 - accrues 3 years from time of violation (***CPLR § 214(2)***; ***Gaidon v. Guardian Life Ins. Co. of Am.***, 96 N.Y.2d 201, 209, 750 N.E.2d 1078, 727 N.Y.S.2d 30 [2001]).

On this record, where plaintiff admittedly commenced this action six years and one day after the closing on the subject refinance, all of plaintiff's claims against the Kaplan defendants, that do not involve fraud, are untimely.

In order to survive the limitations defense, plaintiff first argues that she is entitled to equitable tolling. Equitable estoppel will apply when a plaintiff is induced by fraud, misrepresentation or deception to refrain from filing a timely action (***Zumpano v. Quinn***, 6 N.Y.3d 666, 849 N.E.2d 926, 816 N.Y.S.2d 703 (2006), ***Jones v. Safi***, 58 A.D.3d 603, 871 N.Y.S.2d 647, lv app dsmd 13 N.Y.2d 901 [2009]). All of the conduct at issue herein took place on or before the closing date of April 14, 2005. No conduct has been alleged herein that any of the defendants took affirmative steps after the closing date to prevent plaintiff from commencing this action.

Furthermore, a plaintiff may not rely upon the same acts that constitute the basis of the substantive claim to support equitable estoppel (***Ross v. Louise Wise Servs., Inc.***, 8 N.Y.3d 478, 491, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007]). There must be some conduct on the part of the defendant after the initial wrongdoing; mere silence does not suffice (***Id.***).

Due diligence on the part of the plaintiff is an essential element of the doctrine of equitable estoppel (***Simcuski v. Saeli***, 44 N.Y.2d 442, 450, 377 N.E.2d 713, 406 N.Y.S.2d 259 [1978]). However this Court does not reach the question of due diligence, because no intentional concealment of the wrongful conduct at issue has been alleged. For the record, plaintiff's attempts to compare her circumstances to that of non-English speaking prisoners

(***Diaz v. Kelly***, 515 F.3d 149, [2nd Cir. 2008], *cert den sub nom* ***Diaz v. Conway***, 555 U.S. 870, 129 S.Ct. 168, 172 L.Ed.2d 121, 77 USLW 3201 [2008]), including one who has been expressly denied access to Spanish language materials or a translator (***Pabon v. Mahanoy***, 654 F.3d 385 [3rd Cir. 2011]), are inapposite.

Overall, no basis for equitable tolling in this action has been established.

Plaintiff's follow-up argument is that the closing did not occur until April 19, 2005. She bases this argument on copies of various checks representing loan proceeds that are dated April 19, 2005. Apparently the loan funds continued to be dispersed until October 4, 2005. However, disbursement of proceeds following a closing does not restart the limitations period (***Avalon LLC v. Coronet Properties Co.***, 306 A.D.2d 62, 762 N.Y.S.2d 48 [1st Dept., 2003], lv app den 100 N.Y.2d 513 [2003]).

Nor is the toll of a "continuous representation" until October, 2005, available here because the amended complaint contains no cause of action for professional malpractice (*see generally* ***Shumsky v. Eisenstein***, 96 N.Y.2d 164, 167-168, 750 N.E.2d 67, 726 N.Y.S.2d 365 [2001]), and fails to allege a mutual understanding of continued representation after the closing (***Scott v. Fields, supra***; *see also* ***McCoy v. Feinman***, 99 N.Y.2d 295, 306, 785 N.E.2d 714, 755 N.Y.S.2d 693 [2002]).

As to the fraud claims, while the six year limitations period running from the date of the closing expired on April 14, 2011, the two year limitations period for discovery runs from the date on which the plaintiff possessed knowledge of facts from which the alleged fraud could have been discovered with reasonable diligence (***Marasa v. Andrews***, 69 A.D.3d 584, (2d Dept., 2010); ***Oggioni v. Oggioni***, 46 A.D.3d 646 [2d Dept., 2007]). Plaintiff's pleading provides:

> On or about March 2008, an appraiser sent from a potential refinancing lender discovered that Plaintiff owned a double wide and not a frame structure as described by Defendant/s appraisal. This finding devalued her property and consequently Plaintiff lacked the "LTV" ratio to support refinancing.

(Amended complaint, par. 26). Her attorney now describes this March 2008 date as "a typographical error: It should have read June 12, 2008" (Bruno Affirmation dated October 17, 2011, at par. 48).

Assuming *arguendo* for the purposes of this motion that the correct date for triggering plaintiff's discovery of the fraud she alleges is June 12, 2008, the date of the Ridgway

Appraisal, this action is not timely, inasmuch as the statute of limitations expired on June 12, 2010, more than ten months short of the commencement of this action.

Based on the foregoing, the motion by the Kaplan defendants for judgment dismissing all claims against them as time-barred pursuant to CPLR § 3211(a)(5) must be granted.

Under these circumstances there is no need for the Court to consider the additional basis for dismissal, namely, failure to state a cause of action pursuant to CPLR § 3211(a)(7), and this Court makes no ruling on this latter basis. While the facts of this case as alleged by plaintiff may warrant relief, none is available where the claims pursued are untimely.

The foregoing constitutes the Order of this Court.

Dated: December 14, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.