

Nerey v Greenpoint Mtge. Funding, Inc.

2012 NY Slip Op 33634(U)

September 14, 2012

Sup Ct, Queens County

Docket Number: 12918/2010

Judge: Marguerite A. Grays

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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

RAMON NEREY AND DULCE NEREY, X

Plaintiff(s)

-against-

GREENPOINT MORTGAGE FUNDING, INC.,
GINA HYUN SOON PARK, TAYSEER RAZIK,
REMAX UNIVERSAL REAL ESTATE, STEPHEN
J. SIKORSKI, STEVEN WEISS, THE MORTGAGE
MALL INC., JOUNG HO KIM, Esq., and BANK
OF AMERICA.

Defendant(s)

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Motion
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Motion Seq. No.: 5

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FILED

The following papers numbered 1 to 7 read on this motion by defendant Greenpoint Mortgage Funding, Inc., ("Greepoint"), for an order pursuant to CPLR §3211, dismissing the complaint.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Memoranda of Law	5
Answering Affidavits - Exhibits	6
Reply Affidavits	7

Upon the foregoing papers it is ordered that the motion is determined as follows:

I. The Allegations of the Plaintiffs

In or about October 2006, defendant ReMax Universal Real Estate listed property known as 149-30 46th Avenue, Flushing, New York for sale. Plaintiff Ramon Nerey and plaintiff Dulce Nerey, who speak Spanish and who have only a limited command of

English, contacted defendant Gina Hyun Soon Park, a ReMax agent, that month about viewing the property. After viewing the property, the plaintiffs and their friend, Edmond Paskal, who acted as a translator, went to a ReMax office for the purpose of making an offer for the property in the amount of \$870,000, which the seller accepted. The plaintiffs informed Park that their monthly mortgage payments could not exceed \$3,000. The plaintiffs signed a binder showing the \$870,000 sales price and requiring a down payment of \$40,000 with a sum of \$47,000 due at a later time.

Defendant Park referred the plaintiffs to defendant Steven Weiss, a mortgage broker and the owner of defendant Mortgage Mall. On October 17, 2006, the plaintiffs, their friend, Edmond Paskal who acted as a translator, defendant Park, and defendant Weiss held a meeting at which the mortgage broker inquired into the plaintiffs' financial circumstances. The plaintiffs informed Weiss that Ramon Nerey, suffering from a disability, received monthly benefits in the amount of \$3,003 and that Dulce Nerey did not have a job. The plaintiffs told Weiss that they had approximately \$205,000 in liquid assets. Paskal informed Weiss that the plaintiffs had received payment of \$235,000 in settlement of a claim and that they would receive an additional \$500,000 in the future. The plaintiffs informed Weiss that they could afford a mortgage which required a monthly payment of no more than \$3,000 per month. Weiss eventually assured the plaintiffs that their monthly mortgage payment would be approximately \$3,000. Weiss completed the mortgage applications on the plaintiffs behalf, but he misrepresented information about their monthly income and work history.

Weiss hired defendant Stephen J. Sikorski to make an appraisal of the property, and he gave an appraisal of \$904,000 which exaggerated the market value of the property. Sikorski earned a fee of \$300 for his work. "Defendant Greenpoint's appraiser drove by the property, reviewed Defendant Sikorski's appraisal and deemed it accurate."

The plaintiffs received approval for two mortgages on the property. The first mortgage in the amount of \$720,000 was a negative amortization five-year adjustable rate loan which would reset after five years at the prevailing rate. (A negative amortization mortgage is one where the loan payment for a period is less than the interest charged and the difference is added to the loan balance over that period.) The second mortgage was a \$90,000 five year interest only home equity line of credit. (A mortgage is "interest only" if the scheduled monthly mortgage payment is for interest only with the result that the principal due remains unchanged.)

Defendant Park also referred the plaintiffs to defendant Joung Ho Kim, Esq., who provided representation to the plaintiffs for the purchase of the property. Kim does not speak Spanish, and the plaintiff's friend Edmond Paskal acted as a translator. In or about November, 2006, the plaintiffs signed a contract for the sale of the property in the presence

of defendant Park and their attorney, defendant Kim. Their attorney did not explain the terms of the contract to them. Title closed on December 6, 2006. Kim directed the plaintiffs to sign the closing documents, including two notes secured by two mortgages, but their attorney did not explain the nature of the documents they were required to sign.

At the time that title closed in December, 2006, the plaintiffs thought they had financed the purchase with just one mortgage, not two. None of the defendants explained the terms of the mortgages to them, and the plaintiffs had no familiarity with a negative amortization mortgage. The plaintiffs discovered that they had a negative amortization mortgage in or about September, 2007 when they contacted defendant Greenpoint Mortgage Funding, Inc. for information about why their mortgage balance had increased instead of decreased. The plaintiffs also discovered that a second mortgage had been placed on the property when they received a bill in the mail in or about January, 2007.

II. Procedural History

On or about May 21, 2010, the plaintiffs began this action by the filing of a summons and a complaint in the New York State Supreme Court, County of Queens. Defendant Greenpoint Mortgage Funding, Inc. filed a notice removing the case to the United States District Court for the Eastern District of New York. The plaintiffs served an amended complaint dated October 8, 2010 asserting causes of action for fraud, conspiracy to commit fraud, unjust enrichment, violation of General Business Law §349, and violation of Banking Law §6(1), against defendant Greenpoint. On September 29, 2011, the federal court dismissed the complaint without prejudice for lack of subject matter jurisdiction and remanded the case back to state court.

III. Decision

On a motion to dismiss pursuant to CPLR §3211, the pleadings are afforded a liberal construction and the Court accepts facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Morone v Morone*, 50 NY2d 481; *Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). In determining whether a complaint is sufficient to withstand a motion pursuant to CPLR §3211 (a)(7), the sole criterion is whether the plaintiff has a cause of action, not whether he has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). If, upon examination of the four corners of the pleadings, factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (*Guggenheimer v Ginzburg*, 43 NY2d 268; *1414 Realty Corp. v G&G Realty Co.*, 272 AD2d 309 [2000]; *Sanders v. Winship*, 57 NY2d 391 [1982]; *511 W 232nd Owners Corp. v Jennifer Realty Co.*,

98 NY2d 144; *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46; *Porcelli v Key Food Stores Co-op, Inc.*, 44 AD3d 1020 [2007]).

Giving the most favorable intendment to the allegations set forth in the instant amended complaint, as well as to plaintiffs' opposing affirmation (*Vaz v Sipsas*, 1 AD3d 503; *Lynch v McQueen*, 309 AD2d 790; *Rovello v Orofino Realty Co.*, 40 NY2d 633), the Court finds that the amended complaint adequately alleges for pleading survival purposes (*Leon v Martinez, supra*), legally cognizable causes of action for fraud (Sixth Cause of Action), and conspiracy to commit fraud (Seventh Cause of Action) as against Greenpoint. Thus those branches of defendant Greenpoint's motion to dismiss are denied.

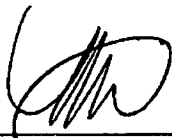
However, the amended complaint fails to set forth a viable cause of action sounding in unjust enrichment (Ninth Cause of Action), and violation of GBL §349 (Tenth Cause of Action). No quasi-contract will be enforced where a contract exists that covers the dispute in issue. (*R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890 [2008]; *Hochman v. LaRea*, 14AD3d 653 [2005]). Here, plaintiffs and defendant Greepoint entered into a note and mortgage agreement.

Notwithstanding the above, the Ninth Cause of Action is also denied as time barred (CPLR §214[3]).

The Tenth Cause of Action accuses defendant Greenpoint of violating General Business Law §349. The plaintiffs failed to adequately allege that the defendant's deceptive acts, if any, had a broad impact on consumers at large. (*See, New York University v. Continental Ins. Co.*, 87 NY2d 308; *U.S. Bank Nat. Ass'n v. Pia*, 73 AD3d 752.) Private transactions without consequences for the public at large are not the proper subject of a cause of action under General Business Law §§ 349 and 350. (*See, Canario v. Gunn*, 300 AD2d 332.)

Finally, the branch of Greepoint's motion to dismiss plaintiffs' Eleventh Cause of Action for violation of Banking Law §6(1), is granted there being no opposition.

Dated: SEP 14 2012


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