

Wachovia Mtge. FSB v Akpinar

2012 NY Slip Op 30412(U)

February 14, 2012

Supreme Court, Suffolk County

Docket Number: 09-6911

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

COPY

Hon. JOSEPH C. PASTORESSA
Supreme Court Justice

Mot. Seq. # 001 - MD #002 - MD #003 - MD
004 - MD #005 - MD #006 - MD
007 - MD # 008 - MD #009 - Mot-d
#10-MG

-----X

WACHOVIA MORTGAGE, FSB, :

Plaintiff, :

- against - :

BULANT AKPINAR a/k/a BILL AKPINAR, GEORGE O. :
 GULDI, 2027 DEERFIELD LTD., THE LAW OFFICES :
 OF WEISS & WEISS, DAVID WEISS, WASHINGTON :
 TITLE INSURANCE CO., DUSTIN DENTE, YOLANDA :
 BARBACCIA, SUBURBAN ABSTRACT TITLE :
 COMPANY, ELLNER & BEDELL, ETHAN ELLNER, :
 HOMECOMINGS FINANCIAL NETWORK, INC., :
 RESCOMM HOLDINGS NO. 02, LLC, DB CENTRAL, :
 INC. RESIDENTIAL FUNDING COMPANY, LLC, :
 MORTGAGE ELECTRONIC REGISTRATION :
 SYSTEMS, INC., AS NOMINEE FOR GREENPOINT :
 MORTGAGE FUNDING, INC., THE ESTATE OF :
 WALTER E. GULDI, KATHRYN SHOWERS, :
 GREGORY GULDI, WALTER GULDI, JR., FRED :
 GULDI, GRACIE DURKIN, BARBARA MCINTYRE, :
 STATE OF NEW YORK, UNITED STATES OF :
 AMERICA and JOHN DOE NO. 1 to JOHN DOE NO. :
 XX, inclusive, the last twenty names being fictitious and :
 unknown to plaintiff, the person or parties intended being :
 the tenants, occupants, person or corporations, if any, :
 having or claiming an interest in or lien upon the premises :
 described in the complaint, :

Defendant. :

-----X

MCCARTER V ENGLISH, LLP
Attorney for Plaintiff
245 Park Avenue, 27th Floor
New York, New York 10167

SCOTT MICHAEL MOORE, ESQ.
Attorney for Defendant Bulant Akpinar
45 Rockefeller Plaza, Suite 2000
New York, New York 10111

GEORGE O. GULDI, ESQ., Pro Se
100 Mill Road
Westhampton Beach, New York 11978

JOHN F. DIFFLEY, ESQ.
Attorney for Defendants 2027 Deerfield LTD,
Rescomm Holdings No. 02, DB Central, Inc.,
Estate of Walter E. Guldi, Kathryn Showers,
Gregory Guldi, Walter Guldi, Jr., Fred Guldi
Gracie Durkin, Barbara McIntyre & Co-Counsel
to George O. Guldi
12-55 150th Street
Whitestone, New York 11357

WEISS & HILLER, PC
Attorney for Defendants Law Offices of
Weiss & Weiss & David Weiss
600 Madison Avenue
New York, New York 10022

Upon the following papers numbered 1 to 109 read on this motion cross-motions for dismissal and default Notice of Motion/ Order to Show Cause and supporting papers (001) 1-13 ; Notice of Cross Motion and supporting papers (002) 14-22; (003) 23-27; (004) 28-38; (005) 39-50 ; (006) 51-58; (007) 59-62; (008) 63-67; Answering Affidavits and supporting papers 68-74; 75-79; 80-85; 86-87; 88-89; Replying Affidavits and supporting papers 90-91; 92-94; 95-96 97-98; 99-100; 101-102 ; Other Mem/Law 103-104; 105; 106; 107; Reply Mem/Law 108-109 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the defendant, Washington Title Insurance Company, for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint as asserted against it is denied; and it is further

ORDERED that this cross motion (#002) by the defendant Bill Akpinar for an order pursuant to CPLR CPLR 3211 (a)(1) and (7) dismissing the causes of action as asserted against him is denied; and it is further

ORDERED that this cross motion (#003) by the defendants George O. Guldi, Rescomm Holdings No. 2, LLC, DB Central, Inc., Estate of Walter Guldi, Kathryn Showers, Gregory Guldi, Walter Guldi, Jr., Fred Guldi, Gracie Durkin and Barbara McIntyre, for an order pursuant to CPLR 3211(a) (1), (3), (7), (8) and (10) and General Business Law §349 dismissing the complaint as asserted against them is denied; and it is further

ORDERED that this cross motion (#004) by the defendant Bill Akpinar for an order pursuant to CPLR 3211(a)(1) and (7) dismissing each of the cross claims asserted against him by the defendants Law Offices of Weiss & Weiss and David Weiss is denied; and it is further

ORDERED that this cross motion (#005) by the plaintiff Wachovia Mortgage, FSB for an order pursuant to CPLR 3215 granting default judgment against the defendants Dustin Dente, Ellner & Bedell, Ethan Ellner, Suburban Abstract Title Company, and Mortgage Electronic Registration Systems for failure to appear, plead or otherwise defend in this action is denied as to defendant Mortgage Electronic Registration Systems and is granted as to defendants Dustin Dente, Ellner & Bedell, Ethan Ellner, and Suburban Abstract Title Company, and the assessment of damages shall abide the trial or other disposition of the action against the defendants who have answered; and the plaintiff is directed to serve and file a copy of this order with notice of entry upon all parties within thirty days of the date of this order; and it is further

ORDERED that this cross motion (#006) by the defendant Washington Title Insurance Company for an order pursuant to CPLR 3211 (a)(7) and 3016(b) dismissing the cross claims asserted against it by the defendants David Weiss and the Law Offices of Weiss and Weiss and by the defendants Residential Funding Company, LLC, and Homecomings Financial LLC f/k/a Homecomings Financial Network, Inc. is denied; and it is further

ORDERED that this cross motion (#007) by the defendant Washington Title Insurance Company for an order pursuant to CPLR 3211 (a)(7) dismissing the cross claim asserted against it by the defendant Mortgage Electronic Registration Systems, Inc. is denied; and it is further

ORDERED that this cross motion (#008) by the defendant Bill Akpinar for an order pursuant to CPLR 3211(a)(1) and (7) dismissing the cross claims asserted against him by the defendant Mortgage Electronic Registration Systems is denied; and it is further

ORDERED that this cross-motion (#009) by the defendant George Guldi pursuant to CPLR 2201 to stay this action pending the resolution of a related criminal action against George Guldi is denied; and it is further

ORDERED, that this motion(#010) by counsel for the defendants David Weiss and the Law Offices of Weiss and Weiss seeking an order granting them leave to withdraw as attorney of record for said defendants is

considered under CPLR §321 and is granted, conditionally, subject to the fulfillment of the following conditions: (1) that movant serves, within forty-five (45) days of the date of this order, a copy of this order with notice of its entry upon each of the defendants David Weiss and the Law Offices of Weiss and Weiss by regular mail at their addresses; and (2) the movant serves and files proof that service has been effected as herein directed; and it is further,

ORDERED, that all proceedings herein are stayed forty-five (45) days from the date of this order to afford the defendants David Weiss and the Law Offices of Weiss & Weiss the opportunity to retain new counsel. In the event that each of the defendants fail to avail themselves of such opportunity, they shall, upon the expiration of the stay period, be deemed to be proceeding pro se.

The plaintiff, Wachovia Mortgage, FSB (Wachovia), has commenced this action to determine its rights and asserts numerous claims arising from the May 19, 2008 closing of a mortgage loan advanced by Wachovia to defendant Bill Akpinar (Akpinar loan) for the purchase of real property located at 2027 Deerfield Road, Water Mill, New York. Wachovia seeks declaratory judgment holding that as a result of the transactions carried out by the various parties at the closing, Wachovia, as the holder of the note and mortgage on the property, has a secured interest on the property which may properly be recorded with the Suffolk County Clerk. Wachovia further seeks a judgment of foreclosure on the property. Wachovia claims that the mortgage has not been recorded with the Suffolk County Clerk although it advanced the funds for the Akpinar loan in return for the note and mortgage, and that it does not currently have a recorded lien on the property to secure a priority interest for Wachovia. Wachovia asserts the property was procured by fraud and a controversy exists regarding the disposition of the proceeds advanced by Wachovia for the purchase of the property.

The complaint sets forth that 2027 Deerfield Corporation, the seller of the property to Akpinar, is a business corporation with its principal place of business located at 2027 Deerfield Road, Water Mill, New York. It is asserted that defendant George Guldi formed the 2027 Deerfield corporation in approximately June 2004. Weiss & Weiss law firm, in particular, David Weiss, Esq., was engaged by Wachovia to represent Wachovia at the closing and it is claimed that Weiss & Weiss improperly, without the authorization of Wachovia, outsourced its obligations as closing agent to defendant Dustin Dente, Esq., the attorney for Akpinar in the purchase of the property. Dente, it is claimed, did not act as an "independent third party" at the closing as he represented both the seller and purchaser. The defendant Yolanda Barbaccia was appointed and authorized attorney-in-fact to purchase the property for Akpinar. The defendant Washington Title was the title insurer. The defendant Suburban Abstract Title Company was the agent for Washington Title which is partially owned by defendant Ethan Ellner. The defendant Ellner and Bedell is a law firm engaged by Suburban Abstract to act as the closing agent for the title insurer Washington Title. The defendant Homecomings Financial Network is asserted to be a foreign limited liability company authorized to conduct business in the State of New York and is the plaintiff in a pending mortgage foreclosure action involving the subject property, captioned *Homecomings Financial LLC f/k/a Homecomings Financial Network, Inc. v George O. Guidi as Administrator of the Estate of Walter E. Guldi et al*, Suffolk County Index No. 05-12220, wherein Homecomings Financial claims it is the current owner and holder of a \$1,500,000.00 first mortgage and related loan instruments on the property. The defendant Rescomm Holdings is alleged to be a domestic limited liability company and a defendant in the aforementioned action and is the current owner and holder of a \$300,000.00 mortgage on the property that is subordinate and junior to Homecomings Financial's first mortgage. Rescomm purportedly assigned a part of its interest in its \$300,000.00 mortgage to the defendant DB Central, Inc., a domestic corporation allegedly formed by George Guldi. The defendant Residential Funding, it is alleged, was the plaintiff in a mortgage foreclosure action, *Residential Funding Company, LLC v The Estate of Walter E. Guldi et al*, Index No. 08-2973, wherein Residential Funding claims it is the owner and holder of a \$1,500,000.00 first mortgage and related loan involving the subject property. It is claimed that defendant Walter E. Guldi (now deceased) executed a

purchase money mortgage on the property in the amount of \$1,500,000.00 and was the title holder of the subject property prior to George Guldi and 2027 Deerfield. The defendant Mortgage Electronic Registrations Systems, Inc. is asserted to be the original mortgagee of the original mortgage loan to Walter E. Guldi on or about August 6, 2004, and was once the plaintiff in *Homecomings Financial LLC*, and may be the current owner and holder of a \$1,500,000.00 first mortgage and related loan instruments on the subject property. Also named as defendants in this action are the purported heirs to the estate of Walter E. Guldi: Kathryn Showers, Gregory Guldi, Walter Guldi, Jr., Fred Guldi, Gracie Durkin, and Barbara McIntyre. New York State is a defendant for the purpose of extinguishing any New York State franchise, corporate or other state taxes which may be due and owing by 2027 Deerfield.

The complaint further alleges that on February 12, 2008, Akpinar personally executed a Contract of Sale and a Rider to Contract of Sale of improved residential property for the property located at 2027 Deerfield Road, Water Mill, New York, for a purchase price of \$3,500,000.00, for which Akpinar sought to borrow \$1,826,000.00. 2027 Deerfield was stated to be the record owner and seller of the subject property. Previously the property was owned by the Guldi family, and before that, by the Ellner family. Quick Fund was allegedly engaged by Akpinar to act as his mortgage broker for the procurement of financing for the purchase of the property. Akpinar executed a Uniform Residential Loan Application through Quick Fund on or about May 5, 2008 along with a Borrower's Certification & Authorization. Wachovia agreed to act as the mortgage lender for Akpinar's purchase of the property in the amount of \$1,826,000.00. Akpinar was required to sell his residence located at 11 Eastland Drive, Glen Cove, the proceeds of which were to be applied to the borrowed funds, which would total the purchase price for the property. He was to eliminate his automobile financing obligations as well. Wachovia claims that any previous mortgage holders of the subject property were to be paid off so that Wachovia's mortgage could be recorded in a first lien position, however, the previous mortgages were not satisfied as evidenced by the aforementioned lawsuits relating to the property.

Wachovia asserts that it received wiring instructions on Weiss & Weiss letterhead for the purpose of placing borrowed funds into an account with the name David C. Weiss, IOLA, where Wachovia asserts it wired the funds to on May 19, 2008. The borrowed funds were then sent from Weiss & Weiss to Ellner and Bedell and/or Ellner at the direction of Dente and were deposited into Ellner's personal "Trust/IOLA" account. Weiss & Weiss, David Weiss and Dente failed to ensure that the prior lien holders of the property were paid by the closing and that no less than two mortgage foreclosure actions on the property are still pending. Despite Wachovia advancing the borrowed funds, 2027 Deerfield remains the record title owner and remains in possession of the property. Wachovia asserts that after the closing, Akpinar failed to make any mortgage payments to Wachovia as required by the note and mortgage and is in default. However, Akpinar claims that he did not authorize the loan for the purchase of the property, did not execute a valid durable general power of attorney, that Barbaccia did not have the power to consummate the transaction for the property, that Guldi obtained the loan provided by Wachovia by fraud as his identification was stolen and that the sale of his Glen Cove home was without his knowledge or consent. Wachovia claims that Akpinar and his counsel attempted to extort \$400,000.00 from Guldi to cease any investigation; that Barbaccia represented that she was paid by Guldi to undertake the transactions at the closing pursuant to the power of attorney; that Akpinar's Glen Cove house still remains in Akpinar's name; and that Weiss & Weiss claims that Dente ordered the documents from Wachovia stating he was a staff member of Weiss and Weiss, which he was not and never was, and that Dente, without authorization, put Weiss and Weiss' name on the HUD documents, and that Weiss and Weiss were not present at the closing as they had no knowledge of the closing and it was not their closing.

CPLR 3211(a)(1) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the defense is founded upon documentary evidence. CPLR 3211(a)(3) provides that the party asserting the cause of action has not legal capacity to sue. CPLR 3211(a)(7) provides the

pleading fails to state a cause of action. CPLR 3211(a)(8) provides that the court has not jurisdiction of the person of the defendant. CPLR 3211(a)(10) provides that the court should not proceed in the absence of a person who should be a party.

In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim, (*Knitwork Acquisition LLC v Verizon New York Inc.*, 2008 NY Slip Op 31284U [Sup. Ct., Queens County]). To obtain pre-answer dismissal pursuant to CPLR 3211(a)(1), a defendant must allege that its defense is fully founded upon documentary evidence. Moreover, the documentary evidence offered in that defense must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim. Documentary evidence within the meaning of CPLR 3211(a)(1) must be unambiguous and of undisputed authenticity and does not anticipate or intend the use of affidavits submitted as testimony substitutes. Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211. In the contest of CPLR 3211(a)(1), the narrow exception to this general rule might be affidavits used solely to establish the bona fides of other, genuinely documentary evidence. A certifying affidavit establishing a true and accurate copy of a filed deed might support a motion for dismissal under CPLR 3211(a)(1). By nature, the pre-answer motion to dismiss deprives the parties of the opportunity and obligation to have a trial, to exchange discovery, or for the non-moving party to have even a responsive pleading in the action. It is a drastic remedy reserved for cases which turn on an undisputed and undisputable documents, and should not be used as a pre-answer alternative for what is more properly a request for summary judgment pursuant to CPLR 3212 (see, *VIT Acupuncture, PC v State Farm Automobile Ins. Co.*, 28 Misc3d 1230A [Civil Court of the City of New York, Kings County 2010]). In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference (see, *Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721 [2nd Dept 2008]; *Warwick v Cruz*, 270 AD2d 255 [2nd Dept 2000]). Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed (see, *Fireman's Fund Ins. Co. v Farrell*, supra; *Becker v Elm A.C. Corp.*, 143 AD2d 965 [2nd Dept 1988]).

In considering a motion to dismiss pursuant to CPLR 3211 (a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion. As a general rule, the court may only consider affidavits for the limited purpose of remedying any defects in the complaint. The issue on a 3211(a)(7) motion is whether the plaintiff has stated a cause of action and not whether he or she may ultimately be successful on the merits (*Leon v Martinez*, 84 NY2d 83 1994]). The court should accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the alleged facts fit within any cognizable legal theory (see, *Turkat v Lalezarian Developers, Inc.*, 52 AD3d [2nd Dept 2009]; *Town of Riverhead v County of Suffolk*, 39 AD3d 537 [2nd Dept 2007]; *Hartman v Morganstern*, 28 AD3d 423 [2nd Dept 2006]). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (see, *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1st Dept 1976]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the purpose of correcting defects in the complaint (see, *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

In a motion pursuant to CPLR 3211(a)(8), it is well settled that personal jurisdiction is a prerequisite to the court's exercise of its discretionary authority. A defendant who is otherwise subject to a court's jurisdiction may seek dismissal based on the claim that service was not properly effectuated. A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2). However, where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction

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must be established by a preponderance of evidence at a hearing. When the requirements for service of process have not been met, it is irrelevant that the defendant may have actually received the documents (*Clintonville Plaza LLC v Dotheke Group Corp. d/b/a Pawfect Puppies and Andrew Christodoulides*, 2008 NY Slip Op 32886U [Sup. Ct., Queens County]).

MOTION (001)

In motion (001), the defendant, Washington Title Insurance Company, seeks an order pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint as asserted against it. It is noted that the third and seventh causes of action are asserted against Washington Title Insurance Company. The third cause of action is asserted against Washington Title for breach of the implied covenant of good faith and fair dealing. The seventh cause of action is asserted against Washington Title wherein Wachovia asserts that it entered into an agreement with Washington Title to issue a title insurance policy for the property. Washington Title issued title insurance policy number 2200-004590 to Wachovia insuring against loss or damage as a result of defects in the title to the property. Subsequent to the closing, Akpinar's attorney notified Wachovia that Akpinar did not authorize the loan for the purchase of the property and did not validly execute a Durable Power of Attorney giving Barbaccia the power to consummate the transaction for the transfer of title to the property, and upon notification of Washington Title of the same, that Washington Title has refused to honor its obligations to Wachovia pursuant to the agreement causing Wachovia to sustain damage in the amount of \$1,826,000.00.

Under an analysis pursuant to CPLR 3211(a)(7), it is determined that the plaintiff has pleaded a third cause of action against Washington Title for breach of the implied covenant of good faith and fair dealing of agreement and a seventh cause of action for breach of agreement. Thus, that part of Washington Title's application for dismissal pursuant to CPLR 3211(a)(7) is denied.

It is asserted that Suburban Abstract, alleged to be owned in part by Ellner, is the agent for Washington Title. Yolanda Barbaccia set forth in her affidavit dated August 7, 2008 that she was the recipient of the Power of Attorney from Bill Akpinar. Although she signed all of the bank's documents, a problem developed when Mr. Dente presented the Title Closer with the Power of Attorney from Mr. Akpinar. The Title Closer refused to accept it as it was not notarized. The closing adjourned with the agreement that Mr. Dente would provide a properly acknowledged Power of Attorney the following day along with a Mortgage payoff letter. Therefore, the closing did not take place on May 19th. Mr. Dente left the closing, taking all the documents with him that she signed for the bank. To her knowledge the file never closed as the missing items were never provided.

Dente, as attorney for the lender, and someone on behalf of Suburban then signed a statement that reads, "It is hereby agreed that the closing of 2027 Deerfield Rd., Bridgehampton is adjourned pending the receipt of a properly notarized power of attorney and payoff letters ... items also along with original mortgage must be received by 5 p.m. 5/20/08 or the closing shall be deemed cancelled."

A fax dated May 22, 2008 from Ethan Ellner to Dustin (Dente) states, "I still don't have the power or payoff letters. Is the deal dead?" A letter dated August 4, 2008 to Mr. Mason at Wachovia from Jerry Anton, Senior Underwriting Officer at Washington Title, advises their letter of July 30, 2008 was received and that his office is investigating the matter with their title agent. By letter dated August 5, 2008, Mr. Anton advised Mr. Mason that the closing was scheduled for May 19, 2008, but was adjourned and no payment was made to their agent for a Policy of Title Insurance with Washington Title.

A letter dated August 4, 2008 to Sharon Mason at Wachovia Mortgage from Ethan Ellner indicates that on

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May 19, 2008, the subject closing was progressing smoothly until he was presented with a Power of Attorney which ran from Bill Akpinar and was not notarized. Ellner states that he advised the buyer's attorney, Dustin Dente (whom he states he believed was also representing the lender) that the closing could not be completed with that Power. Dente requested that they close in escrow and that he would get a properly notarized power the next day. Ellner further set forth that he contacted Dente every day for approximately a week and was advised that Dente would have the power for him shortly and that Ellner would be able to speak to Mr. Akpinar to confirm that he was alive and well and had not revoked the Power. Dente finally advised him that the file had been reclosed by another title company. Suburban never received title charges or recording fees. Ellner notified Dente to return the "alta" policy, but did not receive the same to date. He further states that Suburban received a demand from Weiss & Weiss requesting they record the documents from the closing despite the fact they never received payment. Ellner further set forth that if the mortgage is the product of fraud such action would only compound the problems and that Suburban will be "actively investigating this matter."

Here, the submitted supporting papers leave factual issues concerning whether a closing did take place at some time, whether Suburban Abstract appeared as the agent for Washington Title and whether anyone from Suburban Abstract or Washington Title received any payment at the closing or thereafter. Here, the documentary evidence submitted does not resolve all the factual issues as a matter of law and does not conclusively and definitively dispose of the plaintiff's claim as asserted against Washington Title (*Knitwork Acquisition LLC v Verizon New York Inc., supra*).

Accordingly, motion (001) is denied.

MOTION (002)

In cross motion (#002), the defendant Bill Akpinar seeks an order pursuant to CPLR 3211 (a)(1) and (7) dismissing the causes of action as asserted against him. In support of this application, he has submitted an attorney's affirmation

In the first cause of action, Wachovia seeks declaratory judgment that it is the owner of the note and mortgage and that it may be properly filed in the office of the Clerk in the County of Suffolk. The second cause of action is one for foreclosure on the Note and Mortgage in the amount of \$1,826,000.00 with interest thereon at the rate of 7.43 percent per annum from May 19, 2008 on the property based upon the failure of Akpinar to comply with the conditions of the Mortgage and Note for failure to pay principal and interest, plus taxes, assessments, water rates, insurance premiums, escrow and other charges claimed to be due and owing. The third cause of action is asserted against Akpinar for breach of the implied covenant of good faith and fair dealing. The eighth cause of action for fraud is asserted against Akpinar, Barbaccia, Guldi and 2027 Deerfield on the basis that Akpinar engaged in a scheme with the aforementioned co-defendants to defraud Wachovia by inducing Wachovia to advance funds to Akpinar based upon their untrue representations made to Wachovia premised upon the items set forth in the complaint.

It is determined that the complaint sets forth cognizable causes of action for declaratory judgment, foreclosure on the note and mortgage, breach of implied covenant of good faith and fair dealing, and for fraud. Therefore that part of Akpinar's motion for dismissal of the complaint pursuant to CPLR 3211(a)(7) is denied.

It is further determined that the documentary evidence submitted by Akpinar leaves factual issues concerning whether a closing did take place at some time, whether the signature on the Power of Attorney was Akpinar's signature, and whether he engaged in a fraudulent activity with the co-defendants. Factual issues concerning whether or not a closing took place on May 19, 2008 for the Deerfield Road property or for Akpinar's

home in Glen Cove. The Power of Attorney allegedly granted to Yolanda Barbaccia is not signed and Akpinar claims through his counsel that he did not sign a power of attorney, yet acknowledges that he did sign papers for Guldi when Akpinar's wife was in the hospital having a baby. Those documents have not been identified. Here, the documentary evidence submitted does not resolve all the factual issues as a matter of law and does not conclusively and definitively dispose of the plaintiff's claim against him (*Knitwork Acquisition LLC v Verizon New York Inc., supra*).

Accordingly, motion (002) is denied.

CROSS MOTION (003)

In cross motion (#003), the defendants, George O. Guldi, Rescomm Holdings No. 2, LLC, DB Central, Inc., Estate of Walter Guldi, Kathryn Showers, Gregory Guldi, Walter Guldi, Jr., Fred Guldi, Gracie Durkin and Barbara McIntyre seek an order pursuant to CPLR 3211(a) (1), (3), (7), (8) and (10) and General Business Law §349 dismissing the complaint as asserted against them. In support of this application, the moving defendants have submitted an attorney's affirmation; an affidavit by George Guldi; a copy of the summons and complaint with annexed exhibits; a copy of a mostly illegible check in the amount of \$100,000.00 from what appears to be on a "Signature Bank" check.

In the first cause of action Wachovia seeks declaratory judgment that Wachovia is the lawful holder of the properly executed Note and Mortgage which may properly be filed with the Suffolk County Clerk's Office. The eighth cause of action for fraud is asserted against Akpinar, Barbaccia, Guldi and 2027 Deerfield on the basis that Akpinar engaged in a scheme with the aforementioned co-defendants to defraud Wachovia by inducing Wachovia to advance funds to Akpinar based upon their false representations made to Wachovia premised upon the items set forth in the complaint. In the eleventh cause of action, Wachovia claims that Guldi, Ellner and 2027 Deerfield were unjustly enriched by Wachovia's transfer of funds to them and that Guldi and Ellner have received the funds and 2027 Deerfield have benefitted by the receipt of the funds and that the defendants have retained both the funds and property, causing damage to the plaintiff in the amount of \$1,826,000.00.

It is determined that the plaintiff has set forth cognizable causes of action in the complaint with regard to the first, eighth and ninth causes of action for declaratory judgment, fraud and unjust enrichment. Therefore, that part of the moving defendants' motion premised upon CPLR 3211(a)(7) is denied.

Turning to that part of the moving defendants' application for dismissal of the complaint pursuant to CPLR 3211(a)(1), counsel for the moving parties asserts Wachovia and its authorized agents were the only parties able to carry out and perpetuate the alleged fraudulent transaction. No original deed for 2027 Deerfield was delivered to Akpinar. No current deed for the premises has been submitted to this court. No records concerning the transfers of money have been submitted to this court for review. No records demonstrating an accounting for the disputed monies have been submitted by any of the parties. Discovery is far from complete and depositions have not been conducted, leaving many factual issues which are not resolved by the documents submitted. Guldi claims he is the sole shareholder of 2027 Deerfield, but no documentation demonstrating that has been submitted. Although Guldi's attorney claims Guldi signed the Affidavit of Effectiveness on May 19, 2008, Akpinar disputes having signed the Power of Attorney and Barbaccia claims that it was not notarized and that no closing took place on May 19, 2008. However, counsel for Guldi affirms at paragraph 26 that Guldi did not sign the Affidavit of Effectiveness as he was not present at the closing on May 19, 2008. This court cannot determine whether or not a closing took place and if ownership of the premises at 2027 Deerfield transferred from Guldi's corporation to Akpinar or some other entity. Here, the documentary evidence does not resolve all the factual issues as a matter of law and does not conclusively

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and definitively dispose of the plaintiff's claims asserted against the moving defendants (*Knitwork Acquisition LLC v Verizon New York Inc.*, *supra*). Therefore, that part of motion (003) premised upon CPLR 3211(a)(1) is denied.

The application premised upon CPLR 3211(a)(3) that Wachovia does not have legal capacity to sue is also denied as the defendants have submitted no admissible evidence with regard thereto and support the application with conclusory accusations and assumptions.

The moving defendants also seek dismissal of the complaint on the basis of CPLR 3211(a)(8) claiming that a necessary party, QuikFund, Inc., has not been joined in this action. It is claimed that QuikFund is the mortgage broker Akpinar engaged to procure financing on his behalf from Wachovia. However, the defendants do not claim that QuikFund was present on May 19, 2008 at any purported closing and whether it would be able to verify if QuikFund had knowledge of the events of May 19, 2008, whether a closing took place, whether there was a transfer of funds, or any other relevant information. Therefore, that part of the defendants' application for dismissal of the causes of action asserted against them on the basis that QuikFund is a necessary party has not been established.

Accordingly, that part of the defendants' motion to dismiss the complaint on the basis of CPLR 3211(a)(8) is denied.

General Business Law §349 (a) declares as unlawful deceptive acts and practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York, with no further elaboration of the prohibited conduct. As enacted in 1970, the statute entrusted sole enforcement power to the Attorney General. A decade later, the legislature added a private right of action for any person who has been injured by reason of any violation of §349, allowing injunctive relief and damages, as well as reasonable attorney's fees. Plaintiffs claiming the benefit of General Business Law §349, whether individuals or entities, must charge conduct of the defendant that is consumer-oriented. In addition to a showing that defendant's acts are directed to consumers, a prima facie case under General Business Law §349 requires a showing that defendant is engaging in an act or practice that is deceptive or misleading in a material way and that the plaintiff has been injured by reason thereof. It is not necessary that a plaintiff establish intent to defraud or mislead (*Oswego Laborers Local 214 Pension Fund et al v Marine Midland Bank, N.A.*, 85 NY2d 20 [1995]).

The moving defendants also seek dismissal of the complaint premised upon Wachovia's alleged violation of General Business Law §349 by accepting a power of attorney on behalf of its customer signed by a party on the opposite side of that alleged transaction. What counsel fails to recognize is that Akpinar disputes that he signed the power of attorney; that Barbaccia set forth in her affidavit that the power of attorney was not notarized; that the letter signed by Suburban and Ellner address the issue that the Power of Attorney was not notarized and that the closing was being adjourned; and that Guldi, who claims he was not present at the closing, signed the Affidavit of Effectiveness despite the power of attorney not being in proper form.

Accordingly, that part of the application premised upon violation of General Business Law §349 is denied.

The moving defendants further assert by counsel that Wachovia has failed to identify who the actual holder of the note and mortgage is. However, Wachovia seeks declaratory judgment on the issue that it is based upon it transferring the amount of \$1,826,000.00, and has alleged in the complaint that it received wiring instructions on Weiss & Weiss letterhead for the purpose of placing the borrowed funds into an account with the name David C. Weiss, IOLA, where Wachovia wired the funds to on May 19, 2008. The borrowed funds were allegedly then sent from Weiss & Weiss to Ellner and Bedell and/or Ellner at the direction of Dente and that the funds were then

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deposited into Ellner's personal "Trust/IOLA" account. It is claimed that Weiss & Weiss, David Weiss and Dente failed to ensure that the prior lien holders of the property were paid by the closing and that no less than two mortgage foreclosure actions on the property are still pending. Wachovia contends that despite it advancing the borrowed funds, 2027 Deerfield remains the record title owner and remains in possession of the property. The moving defendants have submitted no documentary evidence to the contrary. Therefore, their conclusory assertions are unsubstantiated.

Counsel for the moving defendants sets forth in his affirmation that Wachovia suggests that MERS may be a current holder of a note on 2027 Deerfield and argues that Wachovia must identify the actual holder of the note and mortgage. Mortgage Electronic Registrations Systems, Inc. is asserted in the complaint to be the original mortgagee of the original mortgage loan to Walter E. Guldi on or about August 6, 2004, and was once the plaintiff in the Homecomings Financial LLC, and may be the current owner and holder of a \$1,500,000.00 first mortgage and related loan instruments on the subject property. Counsel for the defendants submits no documentary evidence to warrant dismissal of the causes of action against them on the basis that Wachovia is not a holder of the note and mortgage. No assignments of the mortgage and note have been submitted and the submitted papers do not warrant any decision in favor of the moving defendants as a matter of law. Counsel's claim is conclusory and unsupported.

Accordingly, dismissal of the first cause of action is denied.

Counsel for defendant asserts that although wire fund transfers occurred as between Guldi, Ethan Ellner and Dente, no monies related to this purported transaction were received by Guldi. No documentary evidence, such as accounting records or bank statements have been produced in support of this claim, and Guldi's conclusory affidavit is insufficient to warrant dismissal of the causes of action asserted against him. Therefore, any claim that the plaintiff has no basis to proceed on a cause of action premised upon unjust enrichment is without basis and dismissal of the cause of action for unjust enrichment is denied.

Accordingly, motion (003) is denied in its entirety.

CROSS MOTION (004)

In motion (004), Akpinar moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the cross claims asserted against him by the Law Offices of Weiss & Weiss and David Weiss. However, Akpinar has not submitted a copy of the answer with the cross claims allegedly served by the co-defendant Law Offices of Weiss & Weiss and David Weiss, which he seek to dismiss. Counsel for Akpinar argues that the first and second cross claims asserted by the Weiss defendants are dependent upon the allegations contained in the complaint, and that Akpinar has filed a motion for dismissal of the complaint. Based upon the claimed dependency and in that motion (001) has been denied, motion (004) is also denied, not only for failure to provide a copy of the Weiss defendants' cross claims, but also because the evidentiary submissions do not establish entitlement to dismissal of the cross claims.

In his supporting affidavit, Akpinar states that he never signed a power of attorney before any notary; that the sale of his Glen Cove home and the purported purchase of 2027 Deerfield Road were without his consent, were unauthorized and are invalid; he did not sign or authorize to be signed, the "residential contract of sale", or the "official check in the amount of \$100,000," the "Uniform Residential Loan Application," the "Residential Contract of Sale," the "Vehicle Return Statement," the "Mortgage," the "Adjustable Rate Mortgage," the "Bargain and Sale Agreement," or the "HUD-1 Uniform Settlement Statement." He states he was not present at any purported closing on May 19, 2008 and did not authorize anyone to appear on his behalf or sign any documents on his behalf. He further avers that although he had previously engaged George Guldi to investigate real estate investment strategies on Long Island, his attorney, Scott Michael Moore, sent a letter to Guldi on May 15, 2008 revoking any possible

powers of attorney which may have been in existence without his knowledge after he learned that CPA Steven Sundack, who was working with Guldi, filed a federal tax return for 2007 without his knowledge or permission.

Scott M. Moore, attorney for Akpinar, has set forth in his affirmation that on May 15, 2008¹, he revoked any and all powers of attorney that Akpinar may have unknowingly signed in his dealings with Mr. Sundack and George Guldi. He states Akpinar also received a letter on or about July 2008 from attorney Samuel Glass threatening foreclosure on property at 6 Union Street, Sag Harbor, New York, which property Akpinar knew nothing of. There were a total of six properties involved. Another alleged fraudulent power of attorney dated March 18, 2008 appointed Dustin J. Dente as "Attorney-in-Fact" notarized by someone Akpinar never appeared before and which contained no Affidavit of Effectiveness. Moore learned that real estate documents were purportedly guaranteed by Akpinar to a group of investors on six real estate properties which Akpinar had no knowledge of and did not authorize. He states no response was received from attorney Dente when he revoked any power of attorney and demanded all documents which were signed under the purported authority of the March 18, 2008 power of attorney. Dente was also advised by notice sent September 3, 2008, that attorney Brandon Lisi of Dente's firm appeared in the documents for the six properties wherein Lisi signed both as a mortgage guarantor and in the capacity as a Managing Member of two corporate purchasers, Captain Hulbert House, LLC, and Clear Blue Water, LLC.

These affidavits do not conclusively establish as a matter of law Akpinar's entitlement to dismissal of the cross claims asserted against him in this action which are asserted to be dependent upon dismissal of the complaint, which application has been denied.

Accordingly, motion (004) is denied.

CROSS MOTION (005)

In motion (005) by way of an amended notice of motion, the plaintiff, Wachovia Mortgage, FSB, seeks an order pursuant to CPLR 3215 granting default judgment in its favor as against Dustin Dente, Ellner & Bedell, Ethan Ellner, Suburban Abstract Title Company, and Mortgage Electronic Registration Systems for failure to appear, plead or otherwise defend in this action.

The complaint of this action was filed on February 19, 2009. In support of this application, Wachovia has submitted affidavits of service for the Summons and Complaint with annexed exhibits upon Dustin Dente, Ellner & Bedell, Ethan Ellner, Suburban Abstract Title Company and Mortgage Electronic Registration Systems. Such service has been made within 120 days of the filing of the summons and complaint. The plaintiff claims that the aforementioned defendants have not appeared by notice of appearance or otherwise served an answer pursuant to CPLR 320(a). This application has been made within one year of the alleged default (see, CPLR 3215).

Pursuant to CPLR 3215(d), "[w]henver a defendant has answered and one or more other defendants have failed to appear, plead or proceed to trial of an action reached and called for trial, notwithstanding the provisions of subdivision (c) of this section, upon application to the court within one year after the default of any such defendant, the court may enter an ex parte order directing that proceedings for the entry of a judgment or the making of an assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the defendant who has answered. Such order shall be

¹ Copy of the letters of May 18, 2008 to Sundack and Guldi are annexed as Exhibits C & D to the moving papers.

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served on the defaulting defendant in such manner as shall be directed by the court.”

It is noted in cross motion (008) that defendant Akpinar has moved to dismiss the cross claims asserted by defendant Mortgage Electronic Registration System and has included a copy of the answer with the cross claim asserted by MERS against the co-defendants for indemnification and contribution. Therefore, Wachovia has not demonstrated entitlement to default judgment as against MERS.

Accordingly, that part of cross motion (005) for default judgment against Mortgage Electronic Registration System is denied.

However, Wachovia has demonstrated entitlement to default judgment against the non-answering and non-appearing defendants Dustin Dente, Ellner & Bedell, Ethan Ellner, and Suburban Abstract Title Company.

Accordingly, motion (005) for default judgment against the defendants Dustin Dente, Ellner & Bedell, Ethan Ellner, and Suburban Abstract Title Company is granted and proceedings for the entry of a judgment shall abide the trial or other disposition of the action against the defendants who have answered.

CROSS MOTION (006)

In cross motion (#006) by way of an amended notice of motion, Washington Title Insurance Company seeks an order pursuant to CPLR 3211 (a)(7) and 3016(b) dismissing the cross claims asserted against it by the defendants David Weiss and the Law Offices of Weiss and Weiss, Homecomings Financial LLC f/k/a Homecomings Financial Network, Inc. and Residential Funding Company, LLC. In its first cross claim, David Weiss and the Law Offices of Weiss and Weiss seeks judgment over against the co-defendants based upon their culpable conduct for any damages suffered by Wachovia. In its second cross claim the Weiss defendants seek an apportionment of damages between and among the defendants based upon their culpable conduct. Here it is determined pursuant to CPLR 3211(a)(7) that the cross claims sets forth claims for judgment over and an apportionment of liability. The defendants Homecomings Financial, LLC and Residential Funding Company have set forth a cross-claim for indemnification and contribution against all defendants.

Accordingly, that part of the application by Washington Title for dismissal of the cross claims by the Weiss defendants and Homecomings Financial, LLC and Residential Funding Company pursuant to CPLR 3211(a)(7) is denied.

Liability of the parties has not yet been determined. Therefore, no basis for dismissal of the cross claims for apportionment of liability, contribution and indemnification has been demonstrated as it relates to the cross claims asserted by the Weiss defendants and Homecomings Financial, LLC and Residential Funding Company.

Accordingly, that part of the application pursuant to CPLR 3016 by Washington Title for dismissal of the cross claims asserted by the Weiss defendants and Homecomings Financial, LLC and Residential Funding Company is denied.

CROSS MOTION (007)

In motion (007), the defendant Washington Title seeks dismissal pursuant to CPLR 3211(a)(7) for dismissal of the cross claim asserted by Mortgage Electronic Registration Systems, Inc. MERS has set forth a cross claim for contribution and indemnification as against all co-defendants other than Homecomings Financial, LLC and Residential Funding Company, LLC. It is determined that MERS has stated a cross claim for contribution and indemnification as against Washington Title.

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Accordingly, motion (007) by Washington Title for dismissal of the cross claim asserted against it by MERS is denied.

CROSS MOTION (008)

In cross motion (008), Akpinar seeks an order pursuant to CPLR 3211(a)(1) and (7) dismissing the cross claims asserted against him by the defendant Mortgage Electronic Registration System's, Inc.. The cross claim asserted by MERS against co-defendant Akpinar is for contribution and indemnification. No documentary or evidentiary submissions other than an attorney's affirmation and a copy of the answer served by MERS has been submitted in support of this motion by Akpinar.

Accordingly, cross motion (008) by defendant Akpinar for dismissal of the cross claim asserted against him by MERS is denied pursuant to CPLR 3211 (a)(1) and (7).

CROSS MOTION (009) STAY

In the instant action, the defendant George Guldi's motion (#009) seeking a stay of the civil action pending the resolution of a criminal prosecution is denied as moot in light of the defendant's recent plea to the indictment in the matter of People v George Guldi, Case No. S: I1709-A-Q-2009.

CROSS- MOTION (010)

The law firm of Weiss & Hiller, P.C. move for an order (010) permitting them to withdraw as attorneys for the defendants David Weiss and the Law Offices of Weiss & Weiss. The defendant David Weiss's cross-moves for an order, inter alia, staying the matter for sixty (60) days to retain new counsel and return of \$33,000 in paid legal fees to Weiss & Hiller, P.C.

CPLR §321(b)(2) provides in pertinent part that an "attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action..." A lawyer is allowed "to withdraw from representing a client if the client, by his or her conduct, renders it unreasonably difficult for the lawyer to carry out employment effectively. The courts of New York routinely grant motions to withdraw as counsel on the grounds of nonpayment of legal fees and/or a breakdown in the attorney-client relationship (see, *Misek-Falkoff v Metropolitan Tr. Auth.*, 65 AD3d 576; *Weiss v Spitzer*, 46 AD3d 675; *Winters v Winters*, 25 AD3d 601; *Kay v Kay*, 245 AD2d 549; *Galvano v Galvano*, 193 AD2d 779; *Stephen Elridge Realty Corp. v Green*, 174 AD2d 564). Attorneys should not be placed in a trap of having to continue representing a client who refuses to cooperate or assist or even communicate with the attorney" (*Dillon v Otis Elevator Co. et al*, 22 AD3d 1). Moreover, "[t]his includes irreconcilable differences between the attorney and the client with respect to the course to be pursued in litigation" (*Winters v Rise Steel Erection Corp.*, 231 AD2d 626; see, *Walker v Mount Vernon Hosp.*, 5 AD3d 590; *Charles Lake v M.P.C. Trucking, Inc.*, 279 AD2d 813). Here, the movant's established that there has been "irreconcilable differences" in this matter with respect to the defendants defense in this matter and nonpayment of legal fees. Accordingly, the court finds that there has been a breakdown of the attorney/client relationship and the nonpayment of legal fees concerning the course of this litigation and therefore the movants are relieved from representing the defendants David Weiss and the Law Offices of Weiss & Weiss (see, *Winters v Rise Steel Erection Corp.*, supra; *Walker v Mount Vernon Hosp.*, supra; *Charles Lake v M.P.C. Trucking, Inc.*, supra). All proceedings herein are stayed forty five (45) days from the date of this order to afford the defendants Davis Weiss and The Law Offices of Weiss & Weiss the opportunity to retain new counsel. The defendant Weiss may commence a separate civil action against Weiss and Hiller, P.C. to reclaim monies allegedly paid pursuant to the retainer agreement between the

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parties. The defendant Weiss's cross-motion seeking various other relief is denied.

This shall constitute the decision and order of the court.

Dated: February 14, 2012



HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION X NON-FINAL DISPOSITION

DEL BELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP

Attorney for Defendant Washington Title Insurance Co.

One North Lexington Avenue

White Plains, New York 10601

DUSTIN DENTE, ESQ., ProSe

One Cross Island Plaza, Suite 203C

Rosedale, New York 11422

YOLANDA BARBACCIA, ProSe

914 Scudders Lane, Glen Head, New York 11545 or

151-18-79 Street #2, Howard Beach, New York 11414

SUBURBAN ABSTRACT TITLE CO.

52 Woodfield Road

Stony Brook, New York 11790

ELLNER & BEDELL

Attorney for Defendants Ellner & Bedell & Ethan Ellner, Esq.

494 Express Drive North, Suite 200

Ronkonkoma, New York 11779

ZEICHNER, ELLMAN & KRAUSE

Attorney for Defendant Homecomings Financial LLC & MERS

575 Lexington Avenue

New York, New York 10022

RESIDENTIAL FUNDING CO., LLC

80 State Street

Albany, New York 12207

ANDREW M. CUOMO, ESQ., Attorney General of the State of New York

Attorney for Defendant State of New York

300 Motor Parkway, Suite 205

Hauppauge, New York 11788

ERIC HOLDER, Attorney General

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Attorney for Defendant United State of America Office of the Attorney General

U.S. Department of Justice

950 Pennsylvania Avenue, NW

Washington, DC 20530-0001