SHORT FORM ORDER

INDEX No. 10-27015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 9/30/10 (#001)
MOTION DATE 3/2/11 (#002 & #003)
MOTION DATE 7/13/11 (#004, #005 & #006)
ADJ. DATE 7/13/11
Mot. Seq. #001 - MotD
Mot. Seq. #002 - MD
Mot. Seq. #003 - MD
Mot. Seq. #004 - XMD
Mot. Seq. #005 - XMotD
Mot. Seq. #006 - XMotD

JEANINE BIRD n/k/a JEANINE HART,

Plaintiff,

- against -

WASHINGTON MUTUAL BANK, FA, JP MORGAN CHASE BANK, NATIONAL ASSOCIATION as successor to interest to WASHINGTON MUTUAL BANK, FA, JP MORGAN CHASE & CO., KATHY O'REILLY, LOVULLO ASSOCIATES, INC. and CAPELL & ASSOCIATES, INC.,

Defendants.

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Upon the following papers numbered 1 to 129 read on this motion to dismiss; motion and cross motions for summary judgment; cross motion for consolidation; Notice of Motion/ Order to Show Cause and supporting papers 1-6; 7-12 ; Notice of Cross Motion and supporting papers 13-32; 33-48; 49-60; 61-73 ; Answering Affidavits and supporting papers 74-78; 79-80; 81-88; 89-94; 95-96; 97-103; 104-105; 106-107; 108-110; 111-114; 115-118 ; Replying Affidavits and supporting papers 119-121; 122-123; 124-125; 126-127; 128-129 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions and cross-motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant JP Morgan Chase Bank, National Association as acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation acting as receiver, i/s/h/a JP Morgan Chase Bank, National Association as successor in interest to Washington Mutual Bank, FA and JP Morgan Chase & Co., for an order pursuant to CPLR §3211 (a) (1) and (7) dismissing the complaint against it, is granted to the extent of dismissing the plaintiff's tenth cause of action, and is otherwise denied; and it is further

ORDERED that the motion by the defendant LoVullo Associates, Inc. for an order granting summary judgment dismissing the complaint and all cross claims against it, and awarding attorney's fees and disbursements, is denied; and it is further

ORDERED that the cross-motion by the defendant Price, Capell & Associates, i/s/h/a Capell & Associates, Inc., for an order pursuant to CPLR §3212 granting summary judgment dismissing the plaintiff's third, fourth, and twelfth causes of action and all cross claims against it, is denied; and it is further

ORDERED that the cross-motion by the defendant LoVullo Associates, Inc. for an order granting summary judgment dismissing the complaint and all cross claims against it, and awarding attorney's fees and disbursements, is denied; and it is further

ORDERED that the cross-motion by the plaintiff for an order (i) pursuant to CPLR §602 (a), consolidating this action with an action entitled *Bird v Malpigli & Salvaggio Ins. Agency* (Supreme Court, Suffolk County, Index #10-32017), and (ii) pursuant to CPLR §3025 (b), permitting the plaintiff to amend or supplement the summons and complaint in this action to reflect the proposed consolidation, is granted to the extent of consolidating the actions as stated below, and is otherwise denied; and it is further

ORDERED that the cross-motion by the defendant Kathy O'Reilly for an order (i) pursuant to CPLR §602 (a), consolidating this action with an action entitled *Bird v Malpigli & Salvaggio Ins. Agency* (Supreme Court, Suffolk County, Index #10-32017), and (ii) pursuant to CPLR §3212, granting summary judgment dismissing the complaint against her, is granted to the extent of granting summary judgment dismissing the complaint against her, and is otherwise denied.

This is an action to recover damages allegedly sustained by the plaintiff arising from water damage to her home.

According to the complaint, at all relevant times, the plaintiff was the owner of property located at 38 River Road, Eastport, New York. On or about October 31, 2007, she retained the services of Kathy O'Reilly (hereinafter O'Reilly), an insurance agent, to procure a homeowner's insurance policy on her behalf. O'Reilly subsequently procured a homeowner's policy issued by Scottsdale Insurance Company (hereinafter Scottsdale) covering the period October 31, 2007 through October 31, 2008 for which the plaintiff timely paid all the premiums due. On or about February 15, 2008, the property suffered a "catastrophic" loss caused by water damage, rendering it uninhabitable. On or about March 19, 2008, Scottsdale disclaimed coverage for the loss, advising that water damage was not a covered peril under the policy. As a result of the loss, the plaintiff claims that she was forced not only to expend large sums of money to repair the damage and to restore the property to a habitable and saleable condition, but also to secure and pay for temporary rental housing for one year or more until she was able to restore the property. She also claims that as a result of the loss and during the time that the property was off the market, market conditions deteriorated and the value of the property declined sharply.

The plaintiff alleges twelve causes of action in her complaint. The first, against O'Reilly, is for negligent procurement of a homeowner's policy which did not provide customary coverage for risk of loss related to water damage. The second and the third against LoVullo Associates, Inc. (hereinafter LoVullo) and Capell & Associates, Inc. (hereinafter Capell), both of whom are alleged to be O'Reilly's employer, are for negligent training and supervision in connection with the procurement of the policy. The fourth, against LoVullo and Capell, alleges negligent procurement of the policy and negligent misrepresentation that the policy provided customary homeowner's coverages, including risk of loss caused by or relating to water damage. The fifth through seventh, all of which are against Washington Mutual Bank (hereinafter WaMu), alleged to be the holder of a first mortgage loan secured by the property, are premised on WaMu's failure to notify the plaintiff that the policy provided insufficient coverage for loss caused by water damage or to obtain or "force place" a policy that would have provided sufficient coverage for such loss; the fifth is for negligence, the sixth for breach of fiduciary duty and the seventh for breach of contract. The eighth, tenth (the complaint omits reference to a ninth cause of action), and eleventh, all of which are against JP Morgan Chase Bank, National Association as successor in interest to Washington Mutual Bank, FA and JP Morgan Chase & Co. (hereinafter Chase), are premised on Chase's assumption of all WaMu's liabilities pursuant to a purchase and assumption agreement, dated September 25, 2008; the eighth relates to the negligence alleged in the fifth cause of action, the tenth to the breach of fiduciary duty alleged in the sixth cause of action, and the eleventh, to the breach of contract alleged in the seventh cause of action. The twelfth, against all the defendants, pleads that due to each defendant's negligence, the plaintiff suffered "severe financial and personal hardship" as well as "severe emotional and psychological injuries and distress resulting in physical pain, injury and discomfort."

Chase now moves, pre-answer, to dismiss the complaint pursuant to CPLR §3211 (a) (1), alleging that under the purchase and assumption agreement, Chase did not assume any liability or obligations for borrowers' claims arising from loans made by WaMu prior to September 25, 2008. Chase also moves to dismiss the plaintiff's tenth cause of action, pursuant to CPLR §3211 (a) (7), alleging that the relationship between a bank and its customer is not a fiduciary relationship, that the plaintiff and WaMu did not have a fiduciary relationship and, therefore, that no liability for breach of a fiduciary duty may be imputed to Chase.

To the extent that Chase seeks relief pursuant to CPLR §3211 (a) (1), its motion is denied. A motion to dismiss under CPLR §3211 (a) (1) will be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (***Goshen v Mutual Life Ins. Co. of N.Y.***, 98 NY2d 314, 326, 746 NYS2d 858, 865 [2002]) and only if the documentary evidence submitted is legally admissible (***Advanced Global Tech. v Sirius Satellite Radio***, 44 AD3d 317, 843 NYS2d 220 [2007]) and of undisputed authenticity (***Fontanetta v John Doe 1***, 73 AD3d 78, 898 NYS2d 569 [2010]). In support of its motion, Chase submits the affidavit of G. Renee Robinson (hereinafter Robinson), an assistant vice president, who attests that she "reviewed the copy of the asset and purchase agreement annexed to th[e] motion" and that it "is a true and accurate copy of the original agreement." Even assuming, for purposes of the motion, that Robinson is competent to attest to the authenticity or accuracy of her employer's records and that the document says what she claims it says, her affidavit, which was signed and notarized in the State of Florida, is insufficient in that it was not accompanied by a certificate verifying that the manner in which the oath was taken conforms with Florida law (*see* CPLR §2309 [c]; Real Property Law § 299-a [1]; ***PRA III v Gonzalez***, 54 AD3d 917, 864 NYS2d 140 [2008]; ***Discover Bank v Kagan***, 8 Misc 3d 134[A], 803 NYS2d 18 [2005]; ***Ford Motor Credit Co. v Prestige Gown Cleaning Serv.***, 193 Misc 2d 262, 748 NYS2d 235 [2002]). Absent a certificate of conformity, Robinson's affidavit is, in effect, unsworn (*see* ***Worldwide Asset Purch. v Simpson***, 17 Misc 3d 1128[A], 851 NYS2d 75 [2007]). The affirmation of Chase's attorney is likewise insufficient to support the admissibility of the document as it does not appear that he is competent to verify its authenticity or accuracy. In any event, the Court is dubious that the document submitted is the final version of the purchase and assumption agreement, particularly as each page bears the legend "Execution Copy" and the signature page has typed insertions in lieu of signatures.

The remaining portion of Chase's motion, which is to dismiss the plaintiff's tenth cause of action pursuant to CPLR §3211 (a) (7), is granted. When a defendant moves to dismiss a complaint under CPLR §3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners 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, 275, 401 NYS2d 182, 185 [1977]). As a general rule, "[t]he legal relationship between a borrower and a bank is a contractual one of debtor and creditor and does not create a fiduciary relationship between the bank and its borrower or its guarantors"

(***Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.***, 180 AD2d 588, 589, 580 NYS2d 299, 301, *lv denied* 80 NY2d 754, 587 NYS2d 906 [1992]). While there may be circumstances under which such a relationship may arise between a bank and a borrower (*see* ***Bauer v Mellon Mtge. Co.***, 178 Misc 2d 234, 680 NYS2d 397 [1998], *mod* 259 AD2d 322, 686 NYS2d 428, *lv dismissed in part, denied in part* 94 NY2d 795, 700 NYS2d 424 [1999]), here the plaintiff pleads only that WaMu "had a fiduciary obligation as lender, escrow agent and/or loan servicer to the plaintiff * * * to ensure that risk of Loss to the Premises was properly insured," and does not allege any facts from which it may be inferred that the requisite relationship existed (*see* ***Kopelowitz & Co. v Mann***, 83 AD3d 793, 921 NYS2d 108 [2011]). Even on a motion to dismiss for failure to state a cause of action, "bare legal conclusions are not presumed to be true" (***Kupersmith v Winged Foot Golf Club***, 38 AD3d 847, 848, 832 NYS2d 675, 677 [2007]).

LoVullo and Capell separately move for summary judgment (and LoVullo cross-moves for summary judgment) dismissing the complaint and all cross claims against them because, *inter alia*, the plaintiff's claims are barred by the applicable statute of limitations, that they did not owe the plaintiff a duty of care, and that the plaintiff failed to plead the necessary elements to recover for negligent infliction of emotional distress.

Both the motions and the cross-motion (which is redundant in any event) are denied, as LoVullo and Capell have failed to support their respective applications with a complete set of the pleadings (*see* CPLR §3212 [b]; ***Zellner v Tarnell***, 54 AD3d 329, 861 NYS2d 598 [2008]; ***Matsyuk v Konkalipos***, 35 AD3d 675, 824 NYS2d 918 [2006]; ***Wider v Heller***, 24 AD3d 433, 805 NYS2d 130 [2005]). The failure of a party seeking summary judgment to submit a copy of the pleadings with its moving papers is a fatal defect, irrespective of whether the pleadings are otherwise before the Court (***Ahern v Shepherd***, 89 AD3d 1046, 933 NYS2d 597 [2011]; ***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2008], *revg* 2007 NY Slip Op 31364[U] [Supreme Court, Suffolk County 2007]).

The plaintiff cross-moves to consolidate this action with a subsequently commenced, related action against Malpigli & Salvaggio Insurance Agency (hereinafter Malpigli) and for leave to amend her complaint to add claims for breach of contract against O'Reilly, LoVullo, Capell, and Malpigli. According to the plaintiff, she only recently learned that Malpigli was O'Reilly's employer in October 2007 when O'Reilly procured the subject policy for the plaintiff, notwithstanding that Capell was listed as the broker of record. In the related action, the plaintiff alleges three causes of action in her complaint, each premised on the claim that Malpigli was O'Reilly's employer. Each cause of action likewise relates to the procurement of the subject policy and mirrors a cause of action asserted by the plaintiff in this action.

The plaintiff's cross-motion is granted to the extent of consolidating the two actions. Given that the actions arise from the same incident (*see* CPLR §602 [a]), and absent any

showing of prejudice,[1] the Court finds that consolidation is appropriate. Accordingly, the actions shall be consolidated under Suffolk County Clerk's Index #10-27015 and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JEANINE BIRD n/k/a JEANINE HART,	:
Plaintiff,	:
-against-	:
WASHINGTON MUTUAL BANK, FA, JP MORGAN CHASE BANK, NATIONAL ASSOCIATION as successor in interest to WASHINGTON MUTUAL BANK, FA, JP MORGAN CHASE & CO., KATHY O'REILLY, LOVULLO ASSOCIATES, INC., CAPELL & ASSOCIATES, INC., and MALPIGLI & SALVAGGIO INSURANCE AGENCY, INC.,	:
Defendants.	:

The plaintiff shall promptly serve a copy of this order upon the Suffolk County Clerk, who shall consolidate the files of these actions under Index #10-27015, and upon the Calendar Clerk of this Court.

As for the remaining relief requested by the plaintiff, the Court notes that the plaintiff's time to amend her complaint as of right has not yet expired and, therefore, her application for leave to amend the complaint is superfluous. "A party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it" (CPLR §3025 [a]). Where, as here, there are multiple defendants, a plaintiff may amend the complaint once as of right no later than twenty days after service of the last pleading responding to it (***Citibank [N.Y. State], N.A. v Suthers***, 68 AD2d 790, 418 NYS2d 679 [1979]). Since Chase's motion to dismiss extended its time to answer the complaint (*see* CPLR §3211 [f]), it also extended the time in which the plaintiff could amend her complaint as of right (*see* ***Johnson v Spence***, 286 AD2d 481, 730 NYS2d 334 [2001]; ***STS Mgt. Dev. v New York State Dept. of Taxation & Fin.***, 254 AD2d 409, 678 NYS2d 772 [1998]). The

[1] The Court notes that none of the defendants object to a consolidation of the actions; in fact, the attorney for Kathy O'Reilly (and for Malpigli in the related action) specifically endorses the proposed consolidation in her answering affirmation.

proposed "amended and consolidated verified complaint," in the form annexed to the moving papers, shall be deemed served upon service of a copy of this order with notice of its entry upon the defendants, and the defendants shall serve their answers to the amended complaint within thirty days after the date of such service.

O'Reilly cross-moves, *inter alia*, to consolidate this action with the related action, and for summary judgment dismissing the complaint against her. O'Reilly contends, in part, that she cannot be held individually liable because, at all relevant times, she was employed by either Capell or Malpigli and was acting within the scope of her employment.

Based on her supporting affidavit, the Court finds that O'Reilly established her prima facie entitlement to summary judgment by demonstrating that she acted solely within the course and scope of her employment in procuring the subject insurance and, as such, that she cannot be held liable in her individual capacity (***Ali v Pacheco***, 19 AD3d 439, 797 NYS2d 101 [2005]; ***Mendez v City of New York***, 259 AD2d 441, 687 NYS2d 346 [1999]; ***Urbach, Kahn & Werlin v 250/PAS Assoc.***, 176 AD2d 151, 574 NYS2d 36 [1991]). The plaintiff, in opposition, failed to raise a triable issue of fact. Although the plaintiff asserts that summary judgment is premature because no discovery has been conducted, she offers no proof to suggest that discovery may lead to relevant evidence (*e.g.* ***Lambert v Bracco***, 18 AD3d 619, 795 NYS2d 662 [2005]). Since O'Reilly's application is directed only to the original complaint, the Court will allow a second, timely motion for summary judgment addressing the claims added in the amended complaint.

To the extent O'Reilly seeks an order consolidating the two actions, her application is denied as academic in light of the Court's determination relative to the plaintiff's cross-motion.

Finally, as to O'Reilly's request for an order directing the professional liability carrier currently defending Capell assume her defense as well, that carrier is not a party to this action.

FEB 29 2012

Dated: _____

Peter Fox Cohalan

J.S.C.

HON. PETER FOX COHALAN

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION