U.S. Bank, N.A. v Israeli
2012 NY Slip Op 30660(U)
March 5, 2012
Supreme Court, Suffolk County
Docket Number: 4993/2007
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Index No: 4993/2007

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 008 MD
009 MG

PRESENT:
Hon. RALPH T. GAZZILLO
A.J.S.C.

U.S. BANK, N.A., AS TRUSTEE
c/o Homecomings Financial, LLC
9350 Waxie Way
San Diego, CA 92123
Plaintiff(s),

- against -

MICHAEL ISRAELI, HOMECOMINGS FINANCIAL, LLC, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS FOR COLUMBIA HOME LOANS, LLC, D/B/A BROKERS FUNDING SERVICES, CO., ANNABELLE SCOTT HACKNEY and MICHELLE SCOTT HACKNEY,
Defendant(s).

ANNABELLE SCOTT,
Third-Party Plaintiff

-against-

CLIFFORD B. OLSHAKER, ESQ., KENNETH ARAGON, A/K/A KENNY ARAGON, FIDELITY BORROWING, LLC D/B/A FIDELITY BORROWING MORTGAGE BROKERS,
Third-Party Defendants

Upon the following papers numbered 1 to 32 read on this motion pursuant to CPLR §3211; Notice of Motion and supporting papers numbered 1-11; movant's Memorandum of Law numbered 12, Cross motion and supporting papers numbered 13-31; Defendant Scott's Memorandum of Law in opposition to the motion numbered 32; it is,

ORDERED that the motion of Columbia Home Loans, LLC (seq 008) for an Order pursuant to CPLR §3211 dismissing the cross claims asserted against it by Annabelle Scott is denied with leave to renew following the conclusion of discovery; and it is further

ORDERED that the unopposed cross-motion (seq 9) of defendant Scott pursuant to CPLR §3126 is granted and defendants Aragon and Olshaker are hereby directed to complete all outstanding discovery demands within 90 days of the date of service of a copy of this Short Form Order with Notice of Entry, and it is further

ORDERED that should Aragon and Olshaker fail to comply with the directives of this order, then, and in that event, this Order will be self executing and said Olshaker's and Aragon's answers will be stricken; and it is further

ORDERED that in the event defendants, Aragon and Olshaker respond to Scott's discovery requests as directed herein, then this Order striking their answer is academic and null and void; and it is further

ORDERED that counsel for Scott is directed to notify the Court and all parties by letter of correspondence of defendants' failure to appear for said examinations before trial; and it is further

ORDERED that counsel for movant shall serve a copy of this order, with notice of entry, upon all other parties, pursuant to CPLR 2103(b)(l), (2) or (3) within thirty days of the date the order is entered.

This is an action in foreclosure commenced by the plaintiff against Michael Israeli, and, *inter alia* Annabelle Scott, the lessee and former owner of the home now owned by Israeli.

This motion was brought by Columbia Home Loans, LLC (hereinafter "Columbia") to dismiss the cross claims asserted against it by Annabelle Scott (hereinafter "Scott") which allege, inter alia, that Columbia participated in perpetrating a fraud on Scott by participating, along with the third party defendants in a scheme wherein Scott, who was facing foreclosure due to financial difficulties, was allegedly lured into a "buy/sell" arrangement whereby Scott could save her home from foreclosure. The alleged scheme involved Scott selling her house to a third party/ "straw" buyer who agreed to hold title to the home while Scott leased the property back with the equity made on the "sale". Following the expiration of the lease Scott was supposed to be provided with an opportunity to repurchase her home at "fair market value".

While the plan may have been good in theory, Scott asserts that due to the bad faith of those who came to her "aid", she was deprived of her residence as well as the bulk of the equity in it. In addition, Scott claims that she was deprived of the opportunity to modify the mortgage she had with the lender on her home thereby possibly saving it from foreclosure.
Specifically, Scott alleges that defendants Kenneth Aragon, an agent for defendant Fidelity Borrowing and or Fidelity Borrowing Mortgage Brokers, Michael Israeli and Clifford Olshaker,

Esq., (an attorney selected by Aragon to "represent" Scott in the transaction) orchestrated the scheme where Israeli[1] would purchase the house pursuant to a contract drafted by Olshaker using financing arranged through Aragon. Scott went through with the transaction as planned and at the closing, among many other things, Scott paid all of the expenses of Israeli's purchase as well as a $15,000 landcaping bill generating by Aragon's father's landscaping company. Although some of Scott's other bills were paid from the loan closing proceeds, not all were paid as promised. In the end, Scott claims that the defendants ran away with the money, Israeli defaulted on the mortgage and a foreclosure action was initiated by the plaintiff, U.S. Bank N.A. as Trustee (hereinafter U.S. Bank).

In addition to Scott, who was residing in the home with her daughter pursuant to the "lease back" agreement she had with Israeli, Mortgage Electronic Registration LLC's Systems, Inc. as Nominee for Columbia Home Loans, LLC was named as a defendant. Upon receiving service of process, Scott initiated a third party action naming her attorney Clifford Olshaker, Kenneth Aragon and his mortgage brokerage Fidelity Borrowing, LLC as defendants. Scott did not name Columbia Home Loans, LLC as a third party defendant but instead, cross claimed against them in her answer.

Columbia now seeks dismissal of the cross claims against it asserting 1) that there is no in personam jurisdiction over it, 2) that Scott has failed to sufficiently allege fraud as against it, 3) that Scott's claims that it violated §349 of the General Business Law fails to state a cause of action and 4) Scott's claim that it failed to comply with several federal loan disclosure regulations fails to also state a cause of action. While additional discovery may eventually reveal that Columbia is entitled to dismissal of the action, the Court cannot grant Columbia's application at this juncture.

Initially, Columbia claims that it is not subject to the jurisdiction of this Court as it was never served with the answer and cross claims of Scott. The fact that Columbia was not served is undisputed by Scott. However, Scott asserts that Columbia has voluntarily submitted itself to the jurisdiction of the Court by fully participating in the litigation for a two and one half year period and by failing to formally raise its jurisdictional defense until the instant motion was submitted. The Court agrees.

"When a defendant participates in a lawsuit on the merits, he indicates his intention to submit to the court's jurisdiction over the action. By appearing "informally" in this manner, he confers in personam jurisdiction on the court (see, McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C320:2, p. 363–364; 1 Weinstein–Korn–Miller § 320.12; Taylor v. Taylor, 64 A.D.2d 592, 407 N.Y.S.2d 172)." ***Rubino v. City of New York***, 145 A.D.2d 285, 288, 538 N.Y.S.2d 547.

Columbia does not dispute that it actively participated in the litigation of the action for in excess of two years prior to the submission of this motion. Accordingly, in light of Columbia's

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[1]Apparently, Israeli was convicted of a crime in connection with the purchase of Scott's residence and was forced to pay restitution to Scott in connection therewith. Scott also filed a grievance against *her* attorney Clifford B. Olshaker, Esq. with the Grievance Committee of the 10th Judicial District..

[* 4]

voluntary participation in the litigation, dismissal of the action at this late stage would create an unfair result to the litigants.

Second, Columbia asserts that it Scott has failed to sufficiently allege her cross claim of fraud and negligent misrepresentation as against it.

It is axiomatic that on a motion to dismiss a complaint for failure to state a cause of action, the challenged pleading is to be construed liberally (see CPLR §3026; ***Leon v Martinez***, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972; ***Bernberg v Health Mgt. Sys***., 303 AD2d 348, 349, 756 N.Y.S.2d 96). Accepting the facts alleged as true, and according the plaintiff the benefit of every possible favorable inference, the court must determine only whether the facts alleged fit within any cognizable legal theory (see ***Leon v Martinez***, 84 NY2d at 87-88; ***Bernberg v Health Mgt. Sys***., 303 AD2d at 349).

In her answer Scott alleges several separate counter/cross claims relating to Columbia and others. Specifically, Scott alleges in detail that, based upon the "buy/sell" agreement and the closing wherein Columbia funded Israeli's purchase, Columbia participated in a "predatory" lending scheme, that they engaged in "deceptive acts and practices", "fraud" and "negligent misrepresentation". In addition, Scott claims that Columbia failed to provide her with several loan disclosure forms which are mandated by federal law. A review of the cross claims shows that the facts, if accepted as true, fit within the legal theories asserted by the plaintiff. Therefore, they are not dismissible. Although Scott admits to having no direct contact with Columbia, the nature of the allegations made; i.e. fraud, et al, are such that factual support may not be readily available to her to substantiate her claims. Accordingly, this determination is without prejudice to Columbia such that at the conclusion of discovery, Columbia may renew its motion to dismiss or, if appropriate, move for summary judgment on the cross-claims asserted.

Columbia's third and fourth grounds for dismissal of the cross-claims asserts that Scott's cross-claims for violation of General Business Law §349, 12 USC §2601 and 15 USC §1639 all relating to loan disclosures, are dismissible since the statutes cited relate to loan disclosures that lenders, such as Columbia, are required to make to their loan consumers; in this instance, defendant Michael Israeli. While the application of these statutes is not in dispute, Scott's cross-claims alleges, perhaps uniquely, that the "buy/sell" transaction was actually intended to operate as a refinance of her home and that therefore, she was entitled to received certain disclosures from Columbia as a "borrower". Again, the allegations, when taken as true do state a viable cause of action. Once the viable cause of action is stated, the question becomes; can the cause of action be sustained? Although the disclosure based cross-claims appear somewhat far fetched at this juncture, is not possible to determine, without further discovery, whether Scott can substantiate her claims. As such, Columbia's motion is denied without prejudice to renew at the conclusion of discovery.

Lastly, Scott moves pursuant to CPLR § 3124 and 3126 seeking to compel third-party defendants Aragon and Olshaker to respond to the following discovery demands made by Scott: Notice of Discovery and Inspection, Demand for Expert Witness Statement, Notice for Deposition Upon Oral Examination.

The cross-motion is unopposed, and lack of opposition is tantamount to consent (*see,* ***Tortorello v Larry M. Carlin,*** 260 AD2d 201). Accordingly, defendant's Aragon and Olshaker

are directed to respond to the outstanding discovery demands of Scott within 90 days of the date Notice of Entry of this Short Form Order is served.

Accordingly, the motion is denied for the reasons specified herein.

Dated: 3/5/12
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION

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