

**Mincone & Mincone, P.C. v Irwin Union Bank & Trust
Co.**

2012 NY Slip Op 30962(U)

April 3, 2012

Supreme Court, Nassau County

Docket Number: 16936-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 19
NASSAU COUNTY

**MINCONE & MINCONE, P.C. - TITLE
INSURANCE AGENCY,**

Decision and Order

Plaintiff,

-against-

**MOTION SEQUENCE:01, 02
INDEX NO. 16936-10**

**IRWIN UNION BANK AND TRUST COMPANY
and FIRST FINANCIAL BANK,**

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion and cross motion:

Notice of Motion	1
Notice of Cross Motion	2
Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment	3
Plaintiff's Affirmation in Reply and in Opposition to Defendants' Cross Motion	4
Defendants' Memorandum of Law in Reply to Plaintiff's Opposition to to Defendants' Cross Motion for Summary Judgment	5

The Plaintiff, Mincone & Mincone, P.C. ("Mincone") moves for an order, *inter alia*, pursuant to CPLR 3212 granting it summary judgment against the Defendants, Irwin Union Bank and Trust Company ("Irwin Union") and First Financial Bank ("First Financial") in the amount of \$25,545.24, plus interest. The Defendants oppose Mincone's motion and cross-move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint.

For the reasons that follow, the motion is denied and the cross motion is granted.

Factual and Procedural Background

By referee's deed dated April 8, 2008, Irwin Union acquired title to the property located at 33 Stirling Avenue, Freeport, New York ("property") (Ex. "4" to Cross-Motion). On September 8, 2009, a contract for the purchase and sale of the property was entered into between Nations First (Green Tree Servicing, LLC) and FC NY, LLC ("buyer") (Ex. "6" to Cross-Motion). Green Tree Servicing was the attorney in fact for Irwin Union (Ex. "C" to Plaintiff's Opposition to Defendants' Cross-Motion). Ten days later, on September 18, 2009, Irwin Union closed and was placed in receivership and the Federal Deposit Insurance Company ("FDIC") was named as the receiver for Irwin Union (Ex. "E" to Motion). On the same day, First Financial entered into an agreement with the FDIC whereby First Financial assumed certain assets, debts and obligations of Irwin Union (Ex. "1" to Cross-Motion). The precise nature of the relationship between First Financial, Irwin Union, Green Tree Servicing and the subject property is unclear from the record and has not been fully explained by the parties.

On November 24, 2009, Irwin Union requested that Mincone, the title agent which procured a title insurance policy on behalf of the buyer, provide a final title bill "indicating the amounts required to be paid by Irwin Union in order for [Mincone] to clear the title exceptions" related to the real estate taxes raised in the title report (Ex. "A" at ¶¶ 7, 9). A title search had revealed various encumbrances on the property, including taxes owed thereon (Ex. "A" at ¶ 8). The "final closing statement" indicated that the seller (Irwin Union) was responsible for charges totaling \$54,975.97 and the buyer was responsible for charges totaling \$3,904, with a net amount owed by Irwin Union of \$49,715, consisting of the following charges: 2008/09 school tax (\$26,018.19); 2009 general tax (\$1,551.28); 2009/10 village tax (\$6,980.45); 2009/10 1 ½ school (\$4,303.80); 2008/09 village tax lien (\$5,318.09); 2007/08 village tax lien (\$5,544.16); and water (\$5,000) (Ex. "F" to Motion). Following the "final closing statement", there were several e-mail exchanges with respect Irwin Union's objection to the water charge. None of the e-mails made reference to any of the tax charges mentioned in the "final closing statement" other than one e-mail wherein Gayle Colavito (on behalf of Irwin Union) referred to the "huge amounts on all tax fronts" (Ex. "H" to Motion).

A copy of the HUD-1, dated November 25, 2009, was provided to Mincone prior to closing (Kapnick Affidavit in Support of Cross-Motion at ¶ 6; Ex. "7"). The HUD-1 charged the seller (Irwin Union) with 2009 general taxes due in the amount of \$1,551.28 and 2008/2009 school taxes in the amount of \$26,018.19 (Ex. "7" to Cross-Motion).¹ The closing took place November 25, 2009; Irwin Union was charged with the 2009 general taxes and the 2008/09

¹ Mincone asserts in the complaint that Irwin Union only paid \$26,018.19, which represents the amount owed for the 2008/09 school tax, however, the HUD-1 indicates that Irwin Union also paid the 2009 general tax in the amount of \$1,551.28.

school taxes. The remaining tax charges referenced in the “final closing statement” were not indicated on the HUD-1 (Ex. “7” to Cross-Motion).²

Mincone did not discover the shortfall for unpaid taxes (in an amount exceeding \$20,000) until six days after the closing, at which time Mincone asked the buyer’s attorney to try and recover the additional tax money from Irwin Union (Iorio Affidavit in Support of Motion at ¶ 14). By letter dated June 10, 2010, Mincone again requested that Irwin Union pay the remaining amount due for the taxes. Specifically, Mincone wrote:

Based upon your representation that the taxes would be paid at closing, the title exceptions for these items were omitted. However, at the closing, our client was only paid the sum of \$26,018.19 . . . representing the above referenced 2008/09 School Tax. The other taxes shown on the title invoice, totaling \$23,697.78, were not paid, and remain due and owing (Ex. “J” to Motion).

Mincone then commenced an action against Irwin Union and First Financial asserting causes of action for breach of contract, promissory estoppel, and unjust enrichment (Ex. “A” to Motion).³ Issue was joined after which the parties moved and cross-moved for summary judgment.

The Court’s Determination

The Defendants argue that Mincone lacks standing to pursue a breach of contract cause of

² According to the complaint, “the sum of \$49,715.97 was required to be paid by the seller Irwin Union in order to clear the title objections, which sums Irwin Union agreed to pay in consideration for the clearance of the RE Tax title exceptions raised in the title report” (Ex. “A” at ¶ 10). On the date of the closing, Mincone omitted all of the real estate taxes exceptions and Irwin Union paid the sum of \$26,018.19 (which represented a portion of the taxes owed) and conveyed the property to the buyer (Ex. “A” at ¶¶ 11,12).

³ The breach of contract claim asserts that Irwin Union “failed to pay [Mincone] the sums required to satisfy the RE Taxes, and thus breached its agreement with [Mincone] pursuant to which it agreed to pay [Mincone] the sums needed to satisfy the title exceptions related to the RE Taxes in consideration for the clearance of those title exceptions” (Ex. “A” to Motion at ¶ 14). In the second cause of action based on promissory estoppel, Mincone asserts that Irwin Union “made a clear and unambiguous promise to [Mincone] to pay the amounts required to satisfy the RE Tax exceptions raised in the title report as indicated on the Title Bill” and that Mincone “reasonably relied on this unambiguous promise and cleared the RE Taxes title exceptions raised in the title report” (Ex. “A” to Motion at ¶¶ 20-21). Mincone alleges in the third cause of action that Irwin Union has been unjustly enriched given that Irwin Union did not satisfy the real estate taxes but was nevertheless paid the full purchase price for the property (Ex. “A” at ¶ 26).

action in that it was neither a party to the purchase contract nor a third-party beneficiary thereof. Mincone's breach of contract cause of action appears to be based on a theory of implied contract, although some allegations in Mincone's submissions suggest the existence of an express agreement. Irrespective of how Mincone's breach of contract cause of action is categorized, however, Mincone has failed to establish the existence of any duty, either express or implied, as between itself and the Defendants. In this regard, the sole contractual duties clearly articulated in the parties' submissions relating to the subject transaction are those contained in the contract between Irwin Union and the buyer. The court views the attempt by Mincone to establish a faux contractual relationship between itself and the Defendants as an effort to avoid application of the merger doctrine—which would extinguish contractual obligations arising out of the purchase contract, and which would apply had Mincone become subrogated to the rights of the buyer by paying the outstanding tax charges. In any event, even assuming that Mincone could establish the existence of a duty between the Defendants and itself, Mincone's failure to allege or prove that it suffered any injury (i.e., by paying the outstanding taxes), requires dismissal of the breach of contract cause of action (*see generally Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804 [2d Dept 2011]; Williston on Contracts § 1:5 [4th ed.] [the legal effect of an express contract and an implied contract are identical]).

Mincone's promissory estoppel and unjust enrichment causes of action are likewise without merit. Regarding the former claim, the following is noted:

The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance (*Matlin Patterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836 [1st Dept 2011]). Here, as a matter of law, Mincone cannot show that Irwin Union or First Financial made a "clear and unambiguous promise" to it to pay or escrow taxes⁴ or that Mincone suffered injury by paying such taxes itself.

Regarding Mincone's unjust enrichment claim, it is relevant to note that in order to sustain a cause of action for unjust enrichment, an aggrieved party must show that the other party was enriched, at the aggrieved party's expense, and that it is against equity and good conscience to permit the enriched party to retain what is sought to be recovered (*Zamor v L&L Associates Holding Corp.*, 85 AD3d 1154 [2d Dep 2011]). As stated, it is undisputed that Mincone did not pay the outstanding real estate taxes which are the subject of this action. Without a showing of payment, Mincone cannot demonstrate that Irwin Union or First Financial were enriched 'at Mincone's expense' and, thus, cannot prevail on its' claim for unjust enrichment.

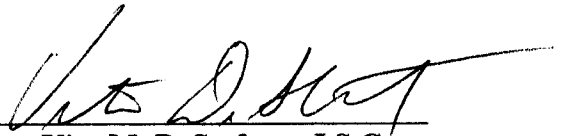
Based on the foregoing, it is hereby ordered that the Defendants' cross motion is granted

⁴ Contrary to Mincone's assertion, the "final closing statement" submitted to Irwin Union the day prior to closing did not "memorialize the agreement between the parties" that monies were to be placed in escrow by Irwin Union in consideration for Mincone clearing title to the property (Affirmation in Support at ¶ 19).

and the complaint is dismissed.⁵ It is further ordered that Mincone's motion is denied.

This constitutes the decision and order of the court.

Dated: April 3, 2012


Hon. Vito M. DeStefano, J.S.C.

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⁵ The Defendants' other arguments in favor of dismissal are either without merit or were not established to the court's satisfaction. In this regard, Irwin Union argues that Mincone's claims should be dismissed on the basis that the court lacks subject matter jurisdiction to adjudicate the claims between Mincone and Irwin Union. Specifically, the Defendants argue that prior to any action against a bank in receivership, a plaintiff is required to exhaust the administrative review process set forth in 12 USC § 1821(d), which Mincone failed to do (Memorandum of Law in Support of Cross-Motion at pps 5-7). However, because the service of performing title work was conducted after Irwin Union went into receivership, Mincone's claim does not require administrative review by the FDIC.

In addition, the Defendants seek dismissal of the complaint insofar as asserted against First Financial on the basis that the subject property was not among the assets purchased by First Financial (Stollings Affidavit in Support of Cross Motion at ¶¶ 7-9; Defendants' Memorandum of Law in Support of Cross Motion at p 7). However, as indicated, the relationship between First Financial, the subject property, and the parties to this action is not sufficiently clear from the record to grant dismissal on this basis.