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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

PEOPLE OF THE STATE OF NEW YORK by ANDREW M. CUOMO, Attorney General of the State of New York,	TRIAL/IAS, PART 41 NASSAU COUNTY INDEX NO.: 09-017767
Plaintiff, -against- EMPIRE PROPERTY SOLUTIONS, LLC, et al., Defendants.	MOTION SUBMISSION DATE: 3-2-12 MOTION SEQUENCE NO. 006

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Memorandum of Law in Opposition	X

Motion by the attorney for defendants Zornberg & Hirsch, Barry Zornberg, Nancy Hirsch, and H&R Abstract, Inc. (the Zornberg defendants) for an order pursuant to CPLR 2221 for leave to reargue their motion to dismiss the complaint is granted, and upon reargument the court adheres to its decision dated November 15, 2011 denying the application to dismiss the complaint pursuant to CPLR 3211(a)(7) and CPLR 3016(b) against the Zornberg defendants.

It is well settled that a motion for reargument is addressed to the sound discretion of the court, and may be granted upon a showing that the court overlooked

or misapprehended the relevant facts or misapplied any controlling principle of law (*see McGill v Goldman*, 261 AD2d 593, 594). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented (*McGill v Goldman, supra*; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27).

The complaint and pleadings allege the Zornberg defendants facilitated the closings of the real estate transactions and cloaked them with an air of legitimacy, thereby aiding in the fraudulent scheme of the co-defendants. The pleadings also allege that the Zornberg defendants engaged in a persistent fraud by permitting the transactions to go forward despite alleged obvious irregularities, disbursements of the loan proceeds in a manner not authorized by the lenders, and then misrepresenting the terms of the transaction to the lenders.

Although the strict pleading requirements of CPLR 3016(b) apply to common law fraud claims, the general notice pleading requirement of CPLR 3013 apply to Executive Law § 63(12) claims. The strict pleading requirements for causes of action sounding in common law fraud (CPLR 3016) do not apply to causes of action alleging violation of Executive Law 63(12). *See Joannou v Blue Ridge Ins. Co.*, 289 AD2d 531. *People v Wells Fargo Ins. Services,* Inc., 62 AD3d 404 is the only case cited by defendants in support of their argument that a claim under Executive Law §

63(12) must meet the pleading requirements of CPLR 3016(b). Contrary to defendants' assertion, that case does not so hold. While the court did state that the fraud claim was not stated with sufficient particularity, the court's reasoning was based entirely on the fact that the complaint failed to state "wrongdoing within the meaning of Law (Executive § 63[12])." *People v Wells Fargo Ins. Services, Inc. supra,* p. 495. The court never stated that it was applying CPLR 3016(b), and in affirming the case, the Court of Appeals never applied the standards of CPLR 3016(b), nor suggested, in any way that they applied. *People v Wells Fargo Ins. Service, Inc.*, 16 NY3d 166.

The claim for fraud under Executive Law § 63(12) is not based solely on omissions or a failure to act. The complaint alleges that the Zornberg defendants and H&Z Abstract defendants reached an agreement with the other defendants that the Zornberg defendants would act as attorneys for the lenders in the transaction, and the H&Z Abstract defendants would act as the title company (Verified Complaint ¶ 61). Both the Zornberg and H&Z defendants acted affirmatively in their roles as attorneys and as the title company, even though they allegedly had knowledge of the fraudulent nature of the transactions, and thus enabled the fraud to be consummated. It is alleged that when representing consumers, the attorney defendants, including the Zornberg defendants, advised their clients or caused their clients to initial statements

on the lease agreements that the attorneys knew were false, and advised or caused their clients to sign the lease agreements. (Verified Complaint ¶ 66). In their role as attorneys for the lenders, the Zornberg defendants knowingly prepared HUD-1 Settlement Statements containing material misrepresentations and omissions of material fact (Verified Complaint ¶¶ 69-71), and in their role as attorneys for the buyers or sellers, caused their clients to sign the HUD-1s, even though they knew they were inaccurate. (Verified Complaint ¶ 70).

Contrary to defendants' argument, the fraud claim does not merely allege that the Zornberg defendants made false representations to parties they did not represent. Instead, it specifically alleges, for example, that they defrauded the sellers when acting in their role as attorneys for the sellers by knowingly preparing materially misleading documents and causing their clients to sign documents that they knew to be false and misleading (Verified Complaint ¶¶ 66-70). For example, when the Zornberg defendants prepared the HUD-1 Settlement Statement, it is alleged they intentionally omitted the names of the title company used in the transactions in order to minimize the risk the lenders would detect the relationship between the lender attorneys and their title company, and the fact that H&Z was wholly owned by the lender attorneys, the Zornberg defendants (Verified Complaint ¶ 69). The complaint also alleges that the Zornberg defendants and H&Z Abstract defendants wrongfully

profited from the fraud by sharing in the proceeds of the closing, and misappropriating funds that rightfully belonged to the consumers. (Verified Complaint, Prelim. Statement ¶¶ 46, 70, 105-06).

Movants' assertion that any title company would have done the same or that the transactions were "single, shot private contract disputes unique to the parties" rather than "a series of transactions" involving common players and common fraudulent practices is speculative and conclusory, not sufficient to oppose a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211. A motion to dismiss pursuant to CPLR 3211(a)(7) will fail if taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to the law. *Sheroff v Dreyfus Corp.*, 50 AD3d 877.

The complaint and accompanying pleadings set forth with specificity the names of consumers allegedly wronged. Moreover, the court recognizes that "sale-and-lease-back agreements" are not inherently illegal, fraudulent or deceptive.

Counsel for movants relies on *National Westminster Bank USA v Weksel*, 124 AD2d 144, a case where the attorneys to the transaction only discovered the allegedly fraudulent transaction at a subsequent time. In the within action it is alleged the fraudulent acts existed from the inception, *i.e.*, the allegation that *ab initio* counsel

failed to comply with the reporting requirements when completing the HUD-1. Movants' reliance on *National Westminster Bank USA v Weksel*, *supra*, for the proposition that "there is no case where mere inaction by a defendant has been held sufficient to support aider and abettor liability for fraud" is overly broad, and specifically criticized in *Vereins-Und Westbank, AG v Carter*, 691 F.Supp. 704 at pp. 704-716. Under New York law, a defendant may be charged with substantially assisting in advancing the commission of the fraud when a defendant affirmatively assists or helps conceal or fails to act when required to do so thereby enabling the fraud, which is what is alleged in the within action. *See Nathan v Siegel*, 592 F.Supp.2d 452,; *Oster v Kirschner*, 77 AD3d 51.

A claim under GBL Section 349 must as a threshold matter charge conduct of the defendant that is consumer-oriented. It is conduct that potentially affects similarly situated consumers. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20. To make out a *prima facie* case under GBL Section 349, a plaintiff must demonstrate that (1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result. *Maurizio v Goldsmith*, 230 F.3d 518, 521. "Deceptive acts" are defined objectively "as acts that are likely to mislead a reasonable consumer acting reasonably under the circumstances." *Id.* (internal

quotations omitted). Although contacts unique to the parties are not covered by GBL Section 349, "plaintiff . . . need not show that the defendant committed the complained-of acts repeatedly – either to the same plaintiff or to other consumers – but instead must demonstrate that the acts or practices have a broader impact on consumers at large." *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, *supra*, at p. 25. The allegations adequately support the claim that the actions of the movants affected the public interest in New York. GBL Section 349 covers real estate transactions and principals of the companies that undertake the deceptive practice. *Polenetsky v Better Home Depot, Inc.*, 97 NY2d 46, 53-55. It is not a "single-shot" transaction that is unique to the parties as asserted by the Zornberg defendants but rather a complaint that sets forth allegations involving consumer-oriented behavior as defined by New York courts. *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, *supra*, at p. 25. BCL § 349 prohibits "acts or practices [that] have a broader impact on consumers at large." BCL§ 349 "is a remedial statute" that requires "a liberal construction and application." *New York Public Interest Research Group, Inc. v Insurance Information Institute*, 140 Misc 2d 920 [Supreme Court New York County 1988], *aff'd* 161 AD2d 504. The plaintiff has alleged that the homeowners were the victims of a deceptive act or practice; that the Zornberg defendants knew of the deceptive practices; that they lent substantial

assistance to the co-defendants by structuring the closing so as to hinder the ability of the buyers and sellers to timely review the documents.

A review of the movant's submissions establishes that the instant application for reargument is, in substance, founded upon the same theory which this court already considered and rejected in connection with the original application. None of the movant's presently asserted allegations warrants a result different from that reached by the court in its order dated November 5, 2011. Accordingly, and inasmuch as the movant's papers fail to establish that the court misapprehended or overlooked relevant facts or misapplied any controlling principle of law with respect to his claims, the motion must be denied.

The foregoing constitutes the decision and order of this Court.

Dated: April 10, 2012

STEVEN M. JAEGER, A.J.S.C.

ENTERED

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COUNTY CLERK'S OFFICE