

McDowell v HSBC Bank, USA, N.A.

2016 NY Slip Op 32493(U)

December 20, 2016

Supreme Court, New York County

Docket Number: 154900/13

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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NICOLA NICHOLAS, as Administrator of the
Estate of Cecilia V. McDowell, deceased,

Plaintiff,

Index No. 154900/13

-against-

HSBC BANK, USA, N.A.; OCWEN LOAN SERVICING
LLC; OCWEN FINANCIAL CORPORATION; PERRI
FUNDING CORP.; SHAPIRO, DICARO and BARAK,
LLP; and MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Motion Seq. Nos:
004, 005, 006

DECISION & ORDER

Defendants.

-----X

HON. SHLOMO S. HAGLER, J.S.C.:

Motion Sequence Numbers 004, 005 and 006 are consolidated
for disposition.

In Motion Sequence Number 004, defendants HSBC Bank, USA,
N.A. ("HSBC"), Ocwen Loan Servicing LLC ("Ocwen Loan Servicing"),
Ocwen Financial Corporation ("Ocwen Financial") and Mortgage
Electronic Registration Systems, Inc. ("MERS"). (collectively, the
"bank defendants") move, pursuant to CPLR 3211 (a) (1) and (a)
(7), to dismiss the Amended Verified Complaint as against them.¹
Plaintiff Nicola Nicholas, as Administrator of The Estate of
Cecilia V. McDowell, deceased ("plaintiff" or "Nicholas") opposes

¹The bank defendants withdrew their motion to dismiss
insofar as asserted under CPLR 3211(a)(5), namely that the action
against is barred by the applicable statute of limitations (Tr.
Oral Argument, August 12, 2015 at 2).

the motion. In Motion Sequence Number 005, defendant Shapiro, DiCaro & Barak, LLC s/h/a Shapiro, DiCaro and Barak, LLP (the "Shapiro Firm") moves, pursuant to CPLR 3212, for summary judgment, or alternatively, pursuant to CPLR 3211, to dismiss the Amended Verified Complaint as against it. Nicholas opposes the motion. In Motion Sequence Number 006, plaintiff moves for leave to file a Second Amended Verified Complaint.² The bank defendants and the Shapiro Firm oppose the motion.

BACKGROUND

Plaintiff is the administrator of the Estate of Cecilia V. McDowell ("McDowell"), and is McDowell's daughter. She commenced this action in May 2013, seeking to recover damages resulting from defendants' allegedly predatory lending practices. The original Verified Complaint asserted five causes of action: violation of section 6-1 of the Banking Law against all defendants ("First Cause of Action"); violation of section 349 of the General Business Law against all defendants ("Second Cause of Action"); violation of the Federal Truth in Lending Act and the

²At Oral Argument on August 12, 2015, this Court granted leave to plaintiff to file a motion to amend her Amended Verified Complaint (Motion Sequence Number 006). On October 27, 2015, this Court held oral argument on Motion Sequence Number 004 and Motion Sequence Number 005 as they relate to the Second Amended Verified Complaint with no objection from defendants' counsel. Accordingly, the Court will treat the bank defendants' motion to dismiss and the Shapiro Firms's motion for summary judgment or alternatively, to dismiss, as directed to the Second Amended Verified Complaint (see *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 [1ST Dept 1998]).

Home Ownership and Protection Act against all defendants ("Third Cause of Action"); fraud and misrepresentation against all defendants ("Fourth Cause of Action"); and fraud on the court pursuant to Judiciary Law § 487 against the Shapiro Firm only ("Fifth Cause of Action") (Notice of Motion, Sequence Number 004, Exhibit "D" [Summons and Verified Complaint]).

By Order, dated April 28, 2014, this Court dismissed the First Cause of Action in its entirety, with leave to replead solely as against HSBC, Ocwen Loan Servicing, Ocwen Financial and MERS; dismissed the Second Cause of Action on grounds that the transactions alleged do not constitute consumer fraud as defined by the statute; dismissed the Third Cause of Action as barred by the applicable statute of limitations, without prejudice to its being alleged as an affirmative defense in any foreclosure action; dismissed the Fourth Cause of Action as to defendant Perri Funding Corp. ("Perri Funding") only; dismissed the Fifth Cause of Action as against the Shapiro Firm; and granted plaintiff's motion to file an Amended Complaint to the extent that it would be limited to restatement of the First and Fourth Causes of Action (*Id.*, Exhibit "E" [Order dated April 28, 2014]). On May 27, 2014, plaintiff filed an Amended Verified Complaint as permitted by this Court. Plaintiff now seeks to file a Second Amended Verified Complaint (Motion Sequence Number 006) which asserts only one cause of action, that is for fraud and

misrepresentation (see *Tr. Oral Argument*, October 27, 2015 at 8).³

Allegations in the Second Amended Verified Complaint

McDowell was an "elderly person of color" who owned premises located at 530 West 142nd Street, in Harlem, New York City (the "Property") (Second Amended Verified Complaint, ¶ 3). The Property was registered as a single room occupancy dwelling, but was used primarily for McDowell's residence and that of her daughter, Nicholas, and her grandson, Gordon Gardner ("Gardner"). At the relevant times, McDowell suffered from recurrent eye problems that interfered with her ability to read. Gardner was primarily a resident at Syracuse University from 2002 to 2006. Before that time, McDowell frequently asked him to read documents to her (*Id.*, ¶¶ 3, 4). Gardner advanced funds to his grandmother to make monthly mortgage payments, and began to investigate the circumstances leading his grandmother to incur debt. McDowell passed away on October 13, 2007 (*Id.*, ¶¶ 15, 19).

Nonparty Delta Funding Corporation ("Delta") was a New York corporation specializing in offering subprime mortgages to low-

³In the Amended Verified Complaint, plaintiff asserted two causes of action, namely alleging a cause of action for violation of section 6-1 of the Banking Law, and for fraud and misrepresentation (Notice of Motion, Exhibit "F"). As asserted by counsel for the bank defendants, and undisputed by plaintiff, at partial oral argument on April 27, 2015, the first cause of action, for violation of section 6-1 of the Banking Law, was dismissed (Affirmation in Opposition, Motion Sequence Number 006 [Weinberg Affirmation] at ¶ 15).

income individuals. Delta became subject to enforcement litigation by the United States and New York State, and eventually filed for bankruptcy (*Id.* at ¶ 22).

Ocwen Loan Servicing is a Delaware limited liability company authorized to do business in New York State, and controlled by Ocwen Financial, which realizes profits from its controlling role (Ocwen Loan Servicing and Ocwen Financial, collectively, "Ocwen"). Ocwen acted as service agent for loans obtained by Delta, including the loans to McDowell (*Id.* at ¶¶ 23-25).⁴

MERS is a Delaware corporation authorized to do business in New York State. MERS facilitates the assignment and transfer of mortgages through an electronic data base. Ocwen and MERS shared common offices and officers, who executed mortgage documents for either corporation (*Id.* at ¶¶ 27, 37). HSBC is a bank with its principal place of business in New York, and is sued herein only in its individual capacity.⁵

In 2000, Delta and the United States entered into a consent decree in the United States District Court for the Eastern District of New York that provided that Delta would refrain from

⁴Although separately named as defendants herein, Ocwen Financial and Ocwen Loan Servicing are referred to in the Second Amended Verified Complaint as "Ocwen" and thus it is difficult to discern whether these two entities had similar servicing roles.

⁵The Second Amended Verified Complaint inaccurately states that HSBC is being sued herein as "trustee for the registered Note holders of Renaissance Home Equity Loan Trust 2006-2" when only HSBC is named in the caption.

various fraudulent practices. It prohibited Delta from extending credit to borrowers based on collateral rather than the borrower's ability to repay (*Id.*, ¶¶ 58-59). Nonetheless, according to plaintiff, Delta actively sought and financed subprime mortgages that did not meet the standards set forth by the Federal Housing Authority or Fannie Mae. These high-risk loans were securitized through Renaissance Mortgage Acceptance Corp. ("Renaissance"), a subsidiary of Delta. Defendant Perri Funding marketed Delta's mortgages by making blanket solicitations by mail to areas that contained predominantly low income minority households.

Plaintiff alleges that Ocwen solicited McDowell for new financing on behalf of Delta when McDowell was in default on her existing mortgage payments. McDowell entered into the following mortgage transactions, which plaintiff alleges, were consummated "through the instrumentality of Perri Funding":

- a. June 1, 2001: Mortgage from Delta securing a loan in the amount of \$170,000. Ocwen was the servicing agent.
- b. April 24, 2002: Mortgage from Delta securing a loan in the amount of \$260,000. Ocwen was the servicing agent.
- c. September 19, 2003: Mortgage from MERS, as nominee for Delta, securing a loan in the amount of \$330,000. Ocwen was the servicing agent.
- d. June 11, 2004: Mortgage from MERS, as nominee of

Accredited Home Lenders, Inc., securing a loan in the amount of \$440,000 ("2004 Mortgage").⁶

- e. March 21, 2005: Mortgage from MERS, as nominee of Delta, securing a loan in the amount of \$540,000. Ocwen was the servicing agent.
- f. April 28, 2006: Mortgage from MERS, as nominee of Delta, securing a loan in the amount of \$116,365. Ocwen was the servicing agent.
- g. 4/28/2006: Consolidation Agreement with MERS, as nominee of Delta, securing a loan in the amount of \$650,000. Ocwen was the servicing agent (*Id.*, ¶ 67).

The last three transactions are at issue in this litigation: the March 21, 2005 note and mortgage for \$540,000 ("2005 Mortgage"); the April 28 2006 note and mortgage for \$116,365 ("2006 Mortgage"); and the April 28, 2006 consolidated mortgage in the amount of \$650,000 ("Consolidated Mortgage") pursuant to the "Mortgage Consolidation and Extension Agreement" ("CEMA") (*Id.*, ¶ 68). Plaintiff alleges that "when Ms. McDowell inevitably defaulted on her monthly payments, Perri Funding on behalf of Delta [r]eadily obtained new mortgage financing by flipping her old mortgage into a new one that allowed her to pay-off the defaulted mortgage. Her proceeds from such transactions

⁶The Second Amended Verified Complaint fails to indicate which entity was servicer on this loan.

provided her with a small amount of cash and the charges for flipping the mortgage amount to as much as 45% of the net cash proceeds" (*Id.*, ¶ 69).

Regarding the 2005 Mortgage and the CEMA at issue here, plaintiff alleges that Delta wrote McDowell on April 21, 2006 with an offer and instructions on how to process a new \$600,000 mortgage that would reduce her payments. McDowell's credit scores annexed to the offer are not sufficient to support an application for a \$600,000 loan (*Id.*, ¶¶ 72-73). The "Uniform Residential Credit Application" ("Credit Application") purportedly attached to the letter was not the same transaction as the CEMA transaction that occurred seven days later. Unlike the Credit Application, which projected a reduction of McDowell's monthly payments, the CEMA loan resulted in a monthly payment higher than McDowell's reported monthly income (*Id.*, ¶¶ 74-75).

After graduating from Syracuse University in 2006, McDowell revealed to Gardner her dire economic condition, that she had incurred mortgage debt beyond her ability to pay, and that she did not understand her loan or why she could not afford it. The final mortgage loan was for \$650,000, but McDowell thought that the \$55,270.62 that she received from the proceeds of the loan was the amount of her liability. She was also not aware that she was charged \$20,000 in prepayment penalties, and did not know how her monthly payment of \$4,125.00 was calculated (*Id.*, ¶¶ 6-10,

13-14).

According to plaintiff, on April 28, 2006, at the time the 2006 Mortgage and the CEMA were executed, McDowell was in default under the 2005 Mortgage. Among the papers in the closing attorney's file (closing of the 2006 Mortgage and the CEMA) was a notarized document entitled "Ability to Pay/Cashout/Purpose of Loan Affidavit/Letter of Explanation." It stated in bold type: "[Borrowers must complete all statements in their own handwriting]." The first paragraph is blank following the preprinted statement "I know I can pay this loan back on a timely basis because:" Similarly, the remaining sections were also left blank, which state: "2) CASHOUT: I am receiving money from this transaction. I will be using this money for the following purpose(s):"; and "3) PURPOSE OF LOAN: The reason I am taking out this loan on: 530 West 142nd Street New York, NY 10036 is because:" In addition, there is an item on the form stating "4) LETTER OF EXPLANATION: for credit history." There is no such letter with the file.

2008 Foreclosure Action

HSBC Bank USA, N.A., as Indenture Trustee for the registered Noteholders of Renaissance Home Equity Loan Trust 2006-2 (the "HSBC Trust"), represented by the Shapiro Firm, commenced an action to foreclose on the Consolidated Mortgage under the CEMA

in July of 2008 (the "Foreclosure Action").⁷ The motion for foreclosure included a written assignment of mortgage evidencing the assignment of the CEMA from MERS, as nominee for Delta, to the HSBC Trust (Notice of Motion, Motion Sequence Number 006, Exhibit "D"). Plaintiff alleges that the assignment, submitted by the Shapiro Firm in the Foreclosure Action, was purportedly executed by Scott Anderson as an Ocwen officer, in March 2008, when the "loan" was already in default. Plaintiff avers that copies of the note submitted in this action and the Foreclosure Action do not match and there are three executed copies of a "1-4 Family Rider" which also have signatures that do not match. Plaintiff alleges that "[t]he mortgage notes are rendered unenforceable by either their alteration or forgery. The mortgage notes proffered by the defendants and their diversity are evidence of the fraudulent nature of the transactions that ensnared Ms. McDowell" (Second Amended Verified Complaint, ¶ 107).

⁷An action was originally commenced against Lydia Anderson ("Anderson"), a prior representative of McDowell's estate. In March 2009, plaintiff was substituted in place and stead of Anderson. By Decision & Order, dated September 25, 2009, the Court (Hon. Michael D. Stallman, J.S.C.) denied the motion for summary judgment by the HSBC Trust, and granted defendant's cross-motion to amend the Answer (Notice of Motion, Motion Sequence Number 006, Exhibit "K"). On or about May 6, 2010, the HSBC Trust renewed its motion for summary judgment. By Order, dated September 24, 2010, the Court (Hon. Eileen A. Rakower, J.S.C.) denied the HSBC Trust's motion for summary judgment, without prejudice with leave to renew upon a mandatory settlement conference.

The HSBC Trust, as represented by the Shapiro Firm, moved for summary judgment in the Foreclosure Action, and annexed as an exhibit to its papers was a "Universal Financial Loan Application" which purportedly demonstrated that McDowell could afford the mortgage payments. However, the financial statement was not that of McDowell, but of 'Robert Amato' of Westchester County (Second Amended Verified Complaint, ¶¶ 104-105).

Plaintiff alleges, of the proceeds of the 2005 Mortgage, \$467,000 was used to pay off the \$446,480 balance due for the 2004 Mortgage, including a prepayment penalty. McDowell received \$26,976.48 and Perri Funding and Delta received a total of \$46,023.52. That 2005 refinance raised McDowell's monthly payment from \$2,692 to \$3,147.86. McDowell's total monthly gross income at that time was \$3,242.59 (Second Amended Verified Complaint, ¶¶ 109-111).

The 2006 Mortgage had a face amount of \$116,634.23.⁸ McDowell received \$62,406.62, and the fees and charges for the loan totaled \$47,395.68, which was 45% of the loan amount. After the consolidation of the two loans, McDowell's monthly payment was \$4,125.56, which exceeded her monthly income of \$3,242.59 by \$882.97 (Second Amended Verified Complaint, ¶¶ 112-114).

Plaintiff alleges that the Property was misidentified when

⁸The Second Amended Verified Complaint also alleges that the amount of the 2006 Mortgage was \$116,365 (Second Amended Verified Complaint, ¶ 67).

added to a mortgage trust pool entitled "Renaissance Home Equity Loan Trust 2006-2," even though the Property was correctly addressed for mailing and notices. The faulty zip code that was used, primarily 10036 (instead of 10031), is in an area where property values are significantly higher. The block number was also misidentified. Plaintiff alleges that these misidentifications shielded defendants from questions that would otherwise have been raised with underwriters about the validity of the loans (Second Amended Verified Complaint, ¶¶ 115-124).

Cause of Action for Fraud and Misrepresentation

In the Second Amended Verified Complaint, plaintiff's cause of action for fraud and misrepresentation alleges, among other things, that Ocwen engaged in fraudulent activity by reason of McDowell's execution of "at least" seven notes securing mortgages that were in excess of her ability to pay and not supported by the financial data McDowell provided, defendants concealed the fact that her loan was destined for a pool of high risk loans that were likely to be foreclosed, McDowell was being charged fees that were in violation of the law, and the loan was being offered in violation of the consent decree (Second Amended Verified Complaint, ¶¶ 126-136.)⁹ She claims damages based on

⁹Plaintiff also makes allegations against nonparty Delta and defendant Perri Funding. By Order, dated April 28, 2014, the Court dismissed plaintiff's fraud and misrepresentation cause of action against Perri Funding.

exorbitant closing fees and commissions, the placing of exorbitant mortgage liens on the Property, payment of interest on notes obtained by fraud, inability to finance needed improvements due to the fraudulent lien on the Property, and reduction of the Property's value due to the cloud on title by reason of the fraudulent mortgages.

DISCUSSION

Motion to Dismiss

In deciding a motion brought pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiff the benefit of every possible favorable inference (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law' " (*Id.*).

A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998], quoting *Leon v Martinez*, 84 NY2d 83, 88; *Foster v Kovner*, 44 AD3d 23, 28 [1st Dept 2007] ["[t]he documentary evidence must resolve all factual

issues and dispose of the plaintiff's claim as a matter of law"]).

Fraud

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996] [internal citations omitted]). See also *Albert Apt. Corp. v Corbo Co.*, 182 AD2d 500, 500 [1st Dept 1992]; *Bank Leumi Trust Co. of N.Y. v D'Evori Int'l*, 163 AD2d 26, 31 [1st Dept. 1990]). "Although a cause of action for fraud may be predicated on acts of concealment, there must first be proven a duty to disclose material information" (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]).

Motion by plaintiff for Leave to Amend the Amended Verified Complaint (Motion Sequence Number 006)

Plaintiff moves to amend the Verified Complaint for a second time, after being given permission to make this motion at oral argument on August 12, 2015.

"[L]eave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. Mere delay is insufficient to defeat a motion for leave to amend" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept

2011] [internal citations omitted]; see generally *Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). CPLR 3025 (b) provides further that "any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Here, defendants argue that plaintiff does not highlight or otherwise indicate the changes between the first and Second Amended Verified Complaints (Affirmation in Opposition, Motion Sequence Number 006 [Weinberg Affirmation], ¶ 22-24; Affidavit in Opposition, Motion Sequence Number 006 [DiCaro Affidavit], ¶ 5). In reply, plaintiff contends that defendants "have responded in great detail to the allegations of the proposed amended complaint and shown no prejudice" (Reply Affirmation, Motion Sequence Number 006, ¶ 9).

There is very little case law dealing with this relatively recent requirement in CPLR 3025. In *Davis v The New York City Tr. Auth.* (2015 WL 246545, *11-14 [Sup Ct, NY County 2015]), the court (Michael D. Stallman, J.S.C.) permitted the amendment of a pleading where the proposed amended pleading did not clearly show the changes and additions on grounds that the movant's attorney set forth the changes in his reply papers. Here, oral argument was held on October 27, 2015, where defendants were given a full and fair opportunity to argue their motions to dismiss the Second Amended Verified Complaint, and as such, defendants have not

demonstrated any prejudice. In addition, based on the oral argument and an examination of the motion papers, this Court has been able to discern the changes between the first and Second Amended Verified Complaint. Accordingly, plaintiff's motion to file a Second Amended Verified Complaints is granted.

Motion by the bank defendants to dismiss the Second Amended Verified Complaint (Sequence Number 004)

In Motion Sequence Number 004, the bank defendants move to dismiss the Amended Verified Complaint based on documentary evidence pursuant to CPLR 3211(a)(1) and for failure to state a cause of action pursuant to CPLR 3211(a)(7). The only remaining cause of action is for fraud and misrepresentation.

HSBC

Plaintiff's allegations in the Second Amended Verified Complaint as to HSBC is based on "endemic" mortgage fraud" (see Second Verified Amended Complaint, ¶¶ 44-53). Significantly plaintiff names HSBC Bank USA, N.A. as the defendant in the caption, but there is no allegation in the Second Amended Verified Complaint that said HSBC entity played any role in the subject Foreclosure Action.¹⁰ Plaintiff makes vague allegations that the assignment of mortgage in the Foreclosure Action was fraudulent. However, it is the HSBC Trust entity and not HSBC

¹⁰Merely alleging in paragraph 29 of the Second Amended Verified Complaint that HSBC is being sued individually and as the HSBC Trust, without any application to amend the caption, is not sufficient to make HSBC Trust a party to this action.

that was assigned the subject Consolidated Mortgage by MERS as nominee for Delta (Notice of Motion, Motion Sequence Number 005, Exhibit "D"; Tr. Oral Argument, August 12, 2015 at 14; Tr. of Oral Argument, October 27, 2015 at 23-25). Even if the Court were to determine that the HSBC Trust is a proper defendant, plaintiff's contention that the HSBC Trust "inherited" Delta's position is insufficient to support allegations of a fraudulent assignment of mortgage¹¹ in the Foreclosure Action. Accordingly, the bank defendants' motion to dismiss the Second Amended Verified Complaint as to HSBC is granted.

MERS

Likewise, the allegations set forth in the Second Amended Verified Complaint that MERS had any role in the subject transaction other than acting as nominee of Delta for the purpose of recording the mortgage, fail to state a cause of action for fraud (Second Amended Verified Complaint, ¶ 37-40; Tr. Oral Argument, August 12, 2005, at 14; Tr. Oral Argument, October 27, 2015 at 4). The Second Amended Verified Complaint is devoid of allegations that MERS engaged in fraudulent activity. Vague allegations that the officers of MERS and Ocwen are "interchangeable" and that the two entities have common offices, do not sufficiently plead a cause of action for fraud and

¹¹Incorrectly denominated as an "Assignment of Note" by plaintiff (Second Amended Verified Complaint at ¶ 98).

misrepresentation against MERS (Tr. Oral Argument, October 27, 2015 at 5, 27; Tr. Oral Argument, August 12, 2015 at 14). Accordingly, the bank defendants' motion to dismiss the Second Amended Verified Complaint as to MERS is granted.

Ocwen¹²

Accepting plaintiff's factual allegations as true, plaintiff has failed to plead with sufficient particularity her cause of action for fraud against Ocwen. The Second Amended Verified Complaint alleges that Ocwen engaged in activity it knew or should have known was fraudulent with the purpose of having McDowell execute mortgages and notes leading to mortgage payments in excess of her ability to pay, that Ocwen was the servicing agent on all but one of such mortgages, that in reliance of "actions of Ocwen", McDowell entered into predatory loans (Second Amended Verified Complaint, ¶¶ 127, 129-131). The Second Amended Verified Complaint is devoid of any allegation as to the "nature of the alleged misrepresentation" made by Ocwen directly to McDowell (*Bank Leumi Trust Co. of N.Y. v D'Evori Int'l*, 163 AD2d at 32). Further, plaintiff fails to allege that any misrepresentations were made by Ocwen to McDowell for the purpose

¹²All allegations in the Second Amended Verified Complaint are asserted against "Ocwen" which is defined to include Ocwen Financial and Ocwen Loan Servicing. It is undisputed that Ocwen Loan Servicing was the servicer of the subject loans and is a subsidiary of Ocwen Financial. Plaintiff alleges that Ocwen Financial owns and controls the policies and actions of Ocwen Loan Servicing (Second Amended Verified Complaint at ¶ 24).

of inducing her reasonable reliance (see *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914 [2d Dept 2009]). "Conclusory allegations or mere suspicion of fraud are wholly insufficient" (*Bank Leumi Trust Co. of N.Y. v D'Evori Int'l*, 163 AD2d at 32).

Likewise, plaintiff fails to plead fraud against Ocwen predicated upon concealment. Plaintiff alleges that 'defendants' concealed from McDowell that her loan was "destined for a pool of high risk loans which were likely to be foreclosed upon" (Second Amended Verified Complaint, ¶ 137). However, Plaintiff lacks standing to allege fraud with respect to the secondary mortgage market on the basis that plaintiff never purchased the security associated with the allegedly fraudulent filing (see generally *In re Lehman Brothers Securities and Erisa Litigation*, 684 FSupp2d 485, 490). Accordingly, the bank defendants' motion to dismiss the Second Amended Verified Complaint as to Ocwen Loan Servicing and Ocwen Financial is granted.

Motion by the Shapiro Firm to dismiss the Second Amended Verified Complaint, or alternatively for summary judgment (Motion Sequence Number 005

The Shapiro Firm also seeks to dismiss the action as against it pursuant to CPLR 3211(a)(7), or alternatively, for summary judgment pursuant to CPLR 3212. The Court will consider the Shapiro Firm's motion as a motion to dismiss under CPLR 3211 as it is the standard more favorable to plaintiff.

The Shapiro Firm represented HSBC in the prior Foreclosure

Action. There is no allegation that it was ever involved in the application, origination and/or closings of the underlying mortgage loan transactions.

Plaintiff has failed to plead the required elements of a fraud cause of action against the Shapiro Firm. The Second Amended Verified Complaint specifically refers to the Shapiro Firm only six times (Second Amended Verified Complaint, ¶¶ 30, 93, 98, 99, 104, 108). Plaintiff alleges that the assignment of the note submitted by the Shapiro Firm in the Foreclosure Action was executed while McDowell was in default, the Shapiro Firm submitted a note in the Foreclosure Action which differed from other copies of the notes, the Shapiro Firm submitted a loan application form which demonstrated that McDowell was in good financial condition when she was already in default, and in an unrelated case, the Shapiro Firm was found to have submitted false notes. Such allegations do not constitute a viable action for fraud. Plaintiff has failed to plead with particularity the necessary elements of a cause of action sounding in fraud as against the Shapiro Firm. Accordingly, the motion by the Shapiro Firm to dismiss the Second Amended Verified Complaint as to it is granted.

CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to amend the Amended

Verified Complaint (Motion Sequence Number 006) is granted, and the Second Amended Verified Complaint is deemed filed and served *nunc pro tunc*; and it is further


ORDERED, that the motion of defendants HSBC Bank, USA, N.A., Ocwen Loan Servicing LLC, Ocwen Financial Corporation, Perri Funding Corp.¹³ and Mortgage Electronic Registration Systems, Inc. to dismiss (Motion Sequence Number 004) is granted, and the Second Amended Verified Complaint is dismissed as against said defendants; and it is further

ORDERED, that the motion of defendant Shapiro, DiCaro & Barak, LLC s/h/a Shapiro, Dicaro and Barak, LLP (Motion Sequence Number 005) is granted, and the Second Amended Verified Complaint is dismissed as against said defendant; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: December 20, 2016

ENTER:



J.S.C.

SHLOMO HAGLER
J.S.C.

¹³Fraud cause of action as against Perri Funding dismissed by prior Order of this Court, dated April 28, 2014.