

<b>Everbank v Rosenzweig</b>
2016 NY Slip Op 32555(U)
December 16, 2016
Supreme Court, Kings County
Docket Number: 511353/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 16<sup>th</sup> day of December, 2016.

**PRESENT:**

Hon. LARRY D. MARTIN, J.S.C.

**EVERBANK, A FEDERAL SAVINGS ASSOCIATION,**

**PLAINTIFF,**

**-VS-**

INDEX No. 511353/14

**JACOB ROSENZWEIG and RACHEL ROSENZWEIG,**

**DEFENDANTS.**

The following papers numbered 1 to 8 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>1-2, 5-6</u>
Answering Affidavit (Affirmation) _____	<u>3 7</u>
Reply Affidavit (Affirmation) _____	<u>4 8</u>

Upon the foregoing papers, plaintiff Everbank, A Federal Savings Association (“Everbank”) moves for an order: (1) pursuant to CPLR 3124, compelling defendants Jacob Rosenzweig (“Jacob”) and Rachel Rosenzweig (“Rachel”; collectively, “defendants”) to produce discovery responses to its First Set of Interrogatories on Jacob dated March 6, 2015, the Demand for Production of Documents from Jacob dated March 6, 2015, its First Set of Interrogatories on Rachel dated March 6, 2015 and the Demand for Production of Documents from Rachel dated March 6, 2015 by a date certain; (2) pursuant to CPLR 3126, striking defendants’ answer in the event they fail to comply; or, in the alternative (3) pursuant to CPLR 3126, precluding defendants from offering into evidence any documents or testimony responsive to said discovery demands. Defendants cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint herein.

**Background**

In this action seeking to quiet title and for declaratory relief, Everbank asserts causes of action sounding in equitable subrogation, unjust enrichment, fraud, reformation. Everbank alleges that on May 13, 2004, Jacob, as attorney-in-fact for non-party Sara Rosenzweig (“Sara”), executed an adjustable rate note in favor of BNY Mortgage Company, LLC (“BNY”) in the sum of \$255,000

encumbering the property located at 1047 56<sup>th</sup> Street in Brooklyn, New York. Jacob and Rachel are husband and wife. Sara is Jacob's mother and is now deceased. BNY is Everbank's predecessor in interest. Everbank alleges that Jacob did not sign the note. Everbank further alleges that, on that same date, Jacob, in his individual capacity and as attorney-in-fact for Sara, executed a mortgage in favor of BNY. Everbank asserts that the sums from the BNY Mortgage were used in part to fully satisfy two previously existing mortgages executed by Jacob and Rachel in the sum of \$125,000 in favor of Olympia Mortgage Corp. ("Olympia") and in the sum of \$58,300 in the form of an Open-End/Credit Line mortgage from Andreadis Realty Corporation ("Andreadis"), respectively, encumbering the subject property.

On or about December 15, 2010, Everbank commenced a foreclosure action against Jacob and Sara entitled *Everbank v Rosezweig, Jacob aka Jacob Rosnezweg, Sara Rosnezweig aka Sara Rosenzweg, NYCECB, NYCDOF-PVB, USA, John Doe and Jane Doe*, index no. 30461/10 (the "foreclosure action") for their failure to pay the instalments due under the terms of the underlying adjustable rate note and mortgage. On or about September 28, 2012, Jacob and Everbank entered into a loan modification agreement settling the foreclosure action and it was marked "disposed." Everbank claims that Jacob made one payment under the terms of the loan modification agreement and failed to make any payments thereafter.

Subsequently, Everbank commenced the instant action. Here, Everbank seeks a judgment declaring that both Jacob and Rachel should have signed the loan modification agreement settling the foreclosure action.

In addition, Everbank alleges that Rachel "might unjustly claim an interest or estate in" the subject property that is "adverse to that of" Everbank and that said interest "is ineffective and invalid as against [Everbank's] interest" in the property (Complaint, ¶¶ 23, 24). In effect, Everbank asserts that any claims that may be asserted by Rachel "as to the [subject property] are subject to the BNY Mortgage" (Complaint, ¶ 26).

In its equitable subrogation cause of action, Everbank claims that it is entitled to be equitably subrogated to both the Olympia and Andreadis mortgages and also that it has an "equitable mortgage secured by the [p]roperty for which" Jacob and Rachel are obligors (Complaint, ¶¶ 29-32).

Everbank also claims that, as a result of Rachel's failure to "pay the monies due and owing" to it, Rachel "has been unjustly enriched in the amount of not less than \$255,000" at its expense (Complaint, ¶34).

In its fraud cause of action, Everbank alleges that, at the time Jacob executed the BNY mortgage in his individual capacity and the BNY note as attoreny-in-fact for Sara, he was aware that Sara had no ownership interest in the subject property and “made the representation to deceive [Everbank] and to induce [Everbank] to fund and disperse the proceeds of the BNY Mortgage.” Everbank asserts that at the time the BNY Mortgage and Note were executed by Jacob, Everbank’s predecessor-in-interest “did not know the true facts and believed the representations were true and relied upon them and was thereby induced to fund and disperse the proceeds of the BNY Mortgage” (Complaint, ¶¶ 41, 42).

Finally, Everbank seeks reformation of the BNY Mortgage and BNY Note on the basis that “due to mutual mistake of” Everbank’s predecessor-in-interest and Jacob “and/or fraud on the part of” Jacob, “the BNY Note and BNY Mortgage were mistakenly drafted for execution by” Sara and Jacob rather than by Rachel and Jacob (Complaint, ¶47). Everbank claims that the BNY Mortgage only secures the interest in the property held by Jacob and that its predecessor-in-interest “intended to secure the BNY Note with a mortgage encumbering the entire fee interest of the [subject property]” (Complaint, ¶¶ 44, 46).

### Analysis

Although defendants cite to CPLR 3212 in support of their motion to dismiss the complaint herein, the arguments made by defendants are akin to a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action. In any event, even if defendants are seeking judgment as a matter of law, the Court finds that they have failed to meet their initial prima facie burden of proof (*see* CPLR 3212).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*F & M General Contracting v Oncel*, 132 AD3d 946, 947 [2d Dept 2015], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

With respect to Everbank’s cause of action for a declaratory judgment, the Court finds that Everbank has properly plead a cause of action for a judgment declaring that: (1) the BNY Mortgage should have been signed by Rachel because she holds title to the subject premises with Jacob; (2) the BNY Note should have been signed by both Rachel and Jacob as the owners of the subject property; and (3) the loan modification agreement should have been signed by Rachel presuming the afore-

mentioned items had been complied with. As such, the Court denies that branch of defendants' motion to dismiss the first cause of action.

With respect to Everbank's cause of action pursuant to Article 15 of the Real Property Actions and Proceedings Law, the Court finds that Everbank, as the alleged mortgagee, has sufficiently stated a cause of action for a judgment declaring that its interest in the subject property is superior to any claim or interest that Rachel may assert in the subject property. Defendants' request for dismissal of said claim is denied.

Under the doctrine of equitable subrogation, where the "property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder" (*King v Pelkofski*, 20 NY2d 326, 333, internal quotation marks omitted).

"To state a cause of action to recover damages for unjust enrichment, a plaintiff must allege that (1) the other party was enriched, (2) at [the plaintiff's] expense and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Levin v Kitsis*, 82 AD3d 1051, 1052-1053 [2d Dept 2011]). "The essence of unjust enrichment is that one party has received money or a benefit at the expense of another" (*Levin*, 82 AD3d at 1053, internal citation and quotation marks omitted). Here, Everbank alleges that Rachel was unjustly enriched because the BNY mortgage fully satisfied two prior mortgages held by Jacob and Rachel and that Rachel failed to pay the sums due and owing to Everbank. As such, the Court finds that Everbank has sufficiently plead a cause of action for unjust enrichment as against Rachel and denies that branch of defendants' cross-motion to dismiss said cause of action.

"The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages. CPLR 3016 (b) requires that the circumstances of the fraud must be stated in detail, including specific dates and items" (*Cremosa Food Co., LLC v Amelia*, 130 AD3d 559, 559 [2d Dept 2015], internal citation and quotation marks omitted). Here, Everbank has properly plead a cause of action for fraud in that it alleges that Jacob knew that Sara had no ownership interest in the subject property at the time he executed the BNY mortgage in his individual capacity and as attorney-in-fact for Sara as well as the BNY note as attorney-in-fact for Sara. Everbank claims that it was unaware of the fact that Sara lacked an ownership interest in the

subject property, it relied upon Jacob’s representations and, as such, was induced to disburse the proceeds of the BNY mortgage. As a result, Everbank claims that it sustained damages. In light of the foregoing, that branch of defendants’ cross-motion to dismiss the cause of action for fraud as asserted against Jacob is dismissed.

The essential elements of a cause of action for reformation are “either mutual mistake of the parties or mistake of one, coupled with fraud of the other” (*see Barrick v Barrick*, 24 AD2d 895, 895-895 [2d Dept 1965]). The Court finds that Everbank has sufficiently stated a cause of action for reformation based on either mutual mistake of Jacob and Everbank’s predecessor-in-interest or the mistake of Everbank and fraud on the part of Jacob. As such, that branch of defendants’ cross-motion to dismiss the cause of action for reformation is denied.

In light of the foregoing, defendants’ cross-motion to dismiss is denied.

The Court will now turn to Everbank’s motion. The Court finds that Everbank has failed to demonstrate that defendants’ conduct was willful or contumacious so as to warrant an order of preclusion or striking of the answer (*see* CPLR 3126). Nevertheless, the discovery sought is material and relevant to the prosecution of the instant action. As such, Everbank’s motion is granted to the extent that, within 30 days of service of this decision and order with notice of entry, defendants are directed to respond to Everbank’s discovery demands.

**Conclusion**

Accordingly, Everbank’s motion is granted to the extent that, within 30 days of service of this decision and order with notice of entry, defendants are directed to respond to Everbank’s First Set of Interrogatories on Jacob dated March 6, 2015, the Demand for Production of Documents from Jacob dated March 6, 2015, its First Set of Interrogatories on Rachel dated March 6, 2015 and the Demand for Production of Documents from Rachel dated March 6, 2015. Defendants’ cross-motion to dismiss is denied.


The foregoing constitutes the decision and order of the Court.

For Clerks use only

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Motion Seq. #	
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ENTER,

  
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 HON. LARRY D. MARTIN  
 J.S.C.