

<b>Matter of Fidelity Natl. Title Ins. Co. of N.Y. v Cuttino</b>
2011 NY Slip Op 33078(U)
November 21, 2011
Supreme Court, New York County
Docket Number: 601682/09
Judge: Joan A. Madden
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## SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDENPART 11

Justice

Fidelity National Title Ins Co.  
Plaintiff

INDEX NO.: 601682/09

OF NY

MOTION DATE:

- v -

Cuthwo

MOTION CAL. NO.

Defendant.

001

MOTION SEQ. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  NoUpon the foregoing papers, it is ordered that this motion is decided in accordance with  
The Curved Memorandum Decision Order

FILED

NOV 28 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated:

November 26, 2011

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 11

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In the Matter of the Application of  
FIDELITY NATIONAL TITLE INSURANCE  
COMPANY OF NEW YORK,

Index No. 601682/09

Plaintiff,

-against-

CONTE CUTTINO,

Defendant.

**FILED**

*NOV 28 2011*

JOAN MADDEN, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff Fidelity National Title Insurance Company ("Fidelity") moves for summary judgment on the three causes of action in its complaint filed against defendant Conte Cuttino ("Cuttino"). Cuttino opposes the motion, which is denied for the reasons set forth below.

Background

Fidelity is a title insurance company which insured title for nonparty Neville Francois ("Francois"), the purchaser of the property located at 607 Van Siclen Avenue, Brooklyn, New York (the "Property"). Cuttino was the record owner of the Property and his mortgage agreement (the "Mortgage") had been assigned to Washington Mutual Bank, F.A. ("WAMU").

In this action, Fidelity seeks to recover money it paid to WAMU as a result of Cuttino's alleged misrepresentation to WAMU that the sale price for the Property was to be \$215,000.00, when in fact it was \$270,000.00. Fidelity alleges that as a result of this misrepresentation, WAMU agreed to accept the sum of \$200,000.00 in a short sale<sup>1</sup> as a

<sup>1</sup> A short sale occurs when a lender agrees to release the lien that is secured to the property upon receipt of less money than is owed

full and complete payoff of the Mortgage, which originally totaled \$225,519.83. Fidelity claims, however, that at the closing, the contract of sale was modified to reflect an actual sales price of \$270,000.00, and in support of this contention submits the real estate transfer tax forms for the Property (Guy Aff. ¶ 5, Exhibit D).<sup>2</sup>

Based on the remitted short sale payoff to WAMU, Fidelity issued a fee policy (the “Policy”) of title insurance to Francois which omitted the Mortgage as a lien on the Property (Guy Aff. ¶ 5). After receiving documentation from Cuttino showing an actual sales price higher than the short sale price of \$215,000 allegedly represented by Cuttino, by letter dated November 6, 2002, WAMU rejected the payoff totaling \$199,250.00 and returned a check amounting to \$199,363.60 (Guy Aff. ¶ 6, Exhibit E). As a result, the Mortgage remained a lien on the Property and Francois had a claim under the Policy with Fidelity. Fidelity submits evidence, including a letter and a check to WAMU, that it then paid WAMU \$45,750 to satisfy the Mortgage and to prevent a loss under the Policy, an amount Fidelity claims represented the balance due on the Mortgage plus interest. Fidelity now seeks summary judgment and a money judgment on three causes of action in its complaint for fraud, unjust enrichment, and money had and received.

Cuttino opposes this motion and submits his affidavit in which he states that he lacked knowledge of any misrepresentation that lead to Fidelity’s harm. He also states that he did not receive any proceeds of the sale at closing. He explains that when he sold his property it was in distress and that he was contacted by an individual he did not know, Alty Adamson. Mr. Adamson introduced Cuttino to a representative at Cobourn Enterprises who recommended attorney Derrick G. Arjune (“Arjune”). Cuttino states that

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<sup>2</sup> In contrast, the HUD-1 Settlement Agreement (the “Agreement”) submitted by Cuttino states a final sales price of \$280,000.00. Plaintiff’s closing statement also indicates a sales price of \$280,000.00

he did not negotiate the sale and submits copies of checks showing that Arjune, Mr. Adamson, and Cobourn Enterprises received money at the closing as well as another individual who Cuttino states he does not know. Cuttino also submits evidence that Arjune was disbarred effective August 7, 2003.

#### Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tending sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). Under the standard provided above, plaintiff is not entitled to summary judgment at this stage in the litigation.

To maintain a cause of action for fraud, a plaintiff must allege a representation of a material existing fact, falsity, scienter, justifiable reliance and damages. Callas v. Eisenberg, 192 AD2d 349, 350 (1st Dept 1993). Each of these essential elements must be supported by factual allegations sufficient to satisfy CPLR 3016 (b), which requires, in a cause of action based on fraud, that "the circumstances constituting the wrong shall be stated in detail." See Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, 210 (1st Dept 1991). Here, the fraud claim is based on allegations that Cuttino misrepresented the final sales price of the Property to WAMU. Subsequently, Fidelity claims to have detrimentally relied on Cuttino's alleged misrepresentation, leading to its pecuniary harm.

Here, numerous issues of material fact exist, including whether Cuttino made misrepresentations or omissions of material fact regarding a \$215,000 purchase price to either plaintiff Fidelity or to nonparty WAMU, and, if so, whether Cuttino knew it was false when made. Accordingly, summary judgment on Fidelity's fraud claim is not warranted.

Plaintiff also seeks summary judgment on its second cause of action for unjust enrichment. To be entitled to recovery on this claim, a plaintiff must show that a defendant received money belonging to or provided by plaintiff, defendant benefitted from receipt of this money, and that under principles of equity and good conscience, defendant should not be permitted to retain the benefit. Matter of Estate of Witbeck, 245 AD2d 848 (3<sup>rd</sup> Dept. 1997).

Here, issues of fact exist, including whether Cuttino received the proceeds of the sale at closing which preclude a grant of summary judgment on this claim.<sup>3</sup> In particular, Cuttino claims that the attorney who represented him in the sale, along with several other agents, negotiated the short sale and received checks from the transaction. Cuttino points to record evidence of attorney's suspension and disbarment and his ongoing investigation regarding attorney's malfeasance, if any, regarding this transaction.

Moreover, while an unjust enrichment claim does not require that the party enriched take an active role in obtaining the benefit (Aetna Cas. and Sur. Co. v LFO Const. Corp., 207 AD2d 274 [1<sup>st</sup> Dept. 1994]), at this early stage in the litigation prior to any discovery, this court cannot conclusively find that defendant was unjustly enriched.

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<sup>3</sup> While Cuttino avers he did not receive a check, it must be noted that the closing statement indicates cash to seller in the amount of \$7,529.98.

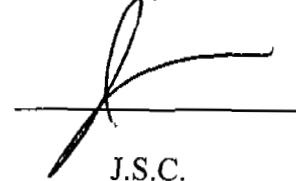
The third cause of action is for money had and received. A cause of action for money had and received is based on "an obligation which the law creates in the absence of an agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another." Parsa v State of New York, 64 NY2d 143, 148 (1984) (citations omitted). Here, as indicated above, there are triable issues of fact as to whether Cuttino obtained any proceeds from the sale. Accordingly, summary judgment is not warranted with respect to this claim.

In view of the above, it is

ORDERED that Fidelity's motion for summary judgment is denied, and it is further

ORDERED that the parties shall appear for a preliminary conference on December 15, 2011 at 9:30 AM in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: November 28, 2011



J.S.C.

**FILED**

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