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SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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DENISE TYSON,

Plaintiff(s),

Action No. 1
Index No. 9589-2008

-against-

PADMINE NARAIN, ARGENT MORTGAGE CO., LLC, HOMECOMINGS FINANCIAL NETWORKS, INC., CHEDDI B. GOBERDHAN, P.C., CHEDDI B. GOBERDHAN, HUGUE LAPOMARADE, GALE RAMSARAN, WASHINGTON MUTUAL BANK, NA, and JP MORGAN CHASE BANK, AS TRUSTEE,

Defendant(s).

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DENISE TYSON,

Plaintiff(s),

Action No. 2
Index No. 22017-2010

-against-

PADMINE NARAIN, ARGENT MORTGAGE CO., LLC, HOMECOMINGS FINANCIAL NETWORKS, INC., CHEDDI B. GOBERDHAN, P.C., CHEDDI B. GOBERDHAN, HUGUE LAPOMARADE, GALE RAMSARAN, WASHINGTON MUTUAL BANK, NA, and JP MORGAN CHASE BANK, AS TRUSTEE,

Defendant(s).

Motion Seq. No.: 001 & 003
Motion Submitted: 2/28/12

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The following papers read on this motion:

Notice of Motions/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

This motion by JP Morgan Chase Bank ("Chase"), as Trustee, for an order pursuant to CPLR 3211(a)(4), (7), (8) dismissing the complaint in Action No. 2 against it is determined as provided herein.

This motion by the defendant Argent Mortgage Co., LLC for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint in Action No. 2 against it is determined as provided herein.

By order dated December 22, 2011, the above captioned actions were consolidated.

Action No. 1 was commenced on May 23, 2008. In her complaint in that action, as and for her first cause of action, Tyson alleges that she was the owner of property located at 51 2nd Avenue, Westbury, New York ("Property") and that on November 30, 2004, defendants Narain, Goberdhan, Ramsaran, Washington Mutual Bank, NA ("WAMU"), Argent and Homecomings "fraudulently, unlawfully and deceptively induced [her] to execute a deed transferring title of that [Property] . . . to Narain, and other documents, including a mortgage on the [Property] to co-defendant Argent." In the second cause of action in that action, she asserts that on November 30, 2004, Narain, as an employee of WAMU, forged her signature on a deed transferring the Property to him and that such forgery took place at Goberdhan's office. In the third cause of action in that action, she alleges that $320,000 was written from Goberdhan's escrow account

"for the alleged benefit of Tyson, to persons and entities, without [her] consent . . ." Via her fourth cause of action in that action, she seeks punitive damages.

Action No. 2 was commenced on November 29, 2010. In that complaint, Tyson again alleges that she owned property at 51 2nd Avenue in Westbury until November 30, 2004. She alleges that in October 2004, she contacted WAMU about a mortgage loan modification which was approved by letter in November. She alleges that Narain contacted her in November 2004 representing himself to be an Executive of WAMU and that he instructed her to appear for the loan modification on November 30, 2004 at Goberdhan's office. In her first cause of action in that action, Tyson alleges that at the meeting that day, Narain was wearing a WAMU uniform and acting in the capacity of an executive of WAMU. She alleges that Narain fraudulently, unlawfully and deceptively induced her to execute a deed to her property transferring title to him as well as other documents, including a mortgage to Argent. In the alternative, she also alleges that Narain forged her signature on the deed and other documents. She alleges that Narain, acting in concert with Homecomings, Goberdhan, Ramsaran, WAMU and Argent, defrauded her causing damages of at least $400,000. In her second and third causes of action in that action, Tyson alleges that Ramsaran, as an employee of Argent and/or Homecomings, arranged for the loan by Argent to enable Narain's fraudulent acquisition of her property. She alleges that Ramsaran, acting on behalf of Argent and/or Homecomings, fraudulently, unlawfully and deceptively induced her into executing the deed transferring title to Narain and that in the alternative, she forged her signature on the deed. Argent is also alleged to have been acting in concert with Narain, Homecomings, Gobderhan, Ramsaran and WAMU. In her fourth and fifth causes of action in that action, the plaintiff alleges that acting as attorney for WAMU, Gobderhan

and Goberdhan, P.C., fraudulently, unlawfully, and deceptively induced her to execute the deed transferring title to Narain and/or in the alternative, forged her signature. In her sixth cause of action, in that action, Tyson alleges that acting in her individual capacity, Ramsaran fraudulently, unlawfully and deceptively induced her to execute the deed transferring title to Narain as well as other documents including the mortgage and that in the alternative, she also forged her signature on those documents. In her seventh cause of action, in that action, Tyson alleges acting through Narain, WAMU fraudulently, unlawfully and deceptively induced her to execute the deed transferring title to Narain as well as other documents and again, that she forged her signature on those documents and that Chase has acquired WAMU's assets. Via her eighth cause of action, she seeks to recover punitive damages.

Chase seeks dismissal of the complaint against it pursuant to CPLR 3211(a)(4) based upon another action pending; pursuant to CPLR 3211(a)(8) based upon a lack of personal jurisdiction; and, pursuant to CPLR 3211(a)(7) for failure to state a cause of action on the grounds that liability does not lie with it but rather lies with the Federal Deposit Insurance Corporation ("FDIC") which has been appointed the receiver for WAMU and is accordingly, "responsible for winding up the affairs of [WAMU] under federal law."

The plaintiff has established that service was made on Chase pursuant to CPLR 311(a) on March 22, 2011. Dismissal pursuant to CPLR 3211(a)(8) is denied.

Pursuant to CPLR 3211(a)(4), an action may be dismissed on the ground that "there is another action pending between the same parties for the same cause of action. . . ." The statute however does not require dismissal but rather directs the court to "make such orders as justice requires." CPLR 3211(a)(4). The court has broad discretion. Whitney v Whitney, 57 NY2d 731

(1982); Cherico, Cherico and Assoc. v Midollo, 67 AD3d 622 (2nd Dept 2009). The court must determine whether there is "substantial identity" of the parties, whether the claims advanced in both actions are the same and whether the relief is "the same or substantially similar." White Light Prods., v On the Scene Prods., 231 AD2d 90, 94 (1st Dept 1997). "It is not necessary that the precise legal theories presented in the first action also be presented in the second action, rather, it is sufficient if the two actions are 'sufficiently similar' and that the relief sought is the 'same or substantially the same.' " Cherico, Cherico and Assoc. v Midollo, supra, citing Matter of Schaller v Vacco, 241 AD2d 663 (3rd Dept 1997); Montalvo v Air Dock Sys., 37 AD3d 567 (2nd Dept 2007); Liebert v TIAA-CREF, 34 AD3d 756, 757 (2nd Dept 2006); White Light Prods. v On The Scene Prods., supra. The critical element is that " 'both suits arise out of the same subject matter or series of alleged wrongs.' " White Light Prods. v On The Scene Prods., supra, at p. 94, quoting Kent Dev. Co. v Liccione, 37 NY2d 899, 901 (1975). A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted where there is a danger of conflicting rulings on the same matter. Diaz v Philip Morris Cos., Inc., 28 AD3d 703, 705 (2nd Dept 2006), citing White Light Prods. v On the Scene Prods., supra, at p. 93-94; Matter of Feustel v Rosenblum, 24 AD3d 549 (2nd Dept 2005); Lopez v Shaughnessy, 260 AD2d 551 (1999).

The plaintiff has made additional allegations against Chase in Action No. 2 which were not advanced in her complaint in the Action No. 1, to wit, that Chase "is an acquirer of certain assets and liabilities of WAMU." In view of the consolidation of these actions, there is no risk of conflicting rulings. Chase's motion to dismiss the complaint against it in Action No. 2 pursuant to CPLR 3211(a)(4) is denied.

"In considering a motion to dismiss the complaint for failure to state a cause of action

pursuant to CPLR 3211(a)(7), the pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference." Danna v Malco Realty, Inc., 51 AD3d 621 (2nd Dept 2008), citing 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002); Gershon v Goldberg, 30 AD3d 372, 373 (2nd Dept 2006). "The court must determine whether factual allegations are discerned from the pleadings' four corners which, taken together, manifest any cause of action cognizable at law." Danna v Malco Realty, Inc., supra, at p. 621, 622, citing 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra at p. 151-152.

Chase has established that pursuant to the Home Owners' Loan Act ("HOLA") and the Federal Deposit Insurance Act ("FDIA"), by order of the Office of Thrift Supervision dated September 25, 2008, the FDIC was appointed Receiver of WAMU. Chase has also established that while that same day the FDIC as Receiver of WAMU sold WAMU's assets and certain specifically delineated liabilities to it pursuant to a written Purchase and Assumption Agreement, "any liability associated with borrower claims for payment of or liability to any borrower for monetary relief or that provide for any other form of relief to any borrower . . . related in any way to any loan or commitment to lend made by WM" made prior to WAMU being placed in Receivership were specifically not assumed by Chase.

The plaintiff's claims are borrower claims that relate to a loan by WAMU prior to WAMU's failure, the liabilities for which were not assumed by Chase pursuant to the Purchase and Assumption Agreement. As the court in Molina v Washington Mut. Bank (2010 WL 431439 [S.D. Cal. 2010]) stated at pg. 4, "[p]laintiff's claims arising out of JP Morgan's alleged status as successor in interest to plaintiff's borrowed claims against WAMU must fail." See also,

Federici v Monroy, 2010 WL 1345276 (N.D.Cal. 2010); JP Morgan Chase Bank N.A. v Miodownik, 91 AD3d 546 (1st Dept 2012); Yeomaiakis v F.D.I.C., 562 F3d 56 (1st Cir. 2009); Cassese v Washington Mut. Inc., 2008 WL 7022845 (E.D.N.Y. 2008), citing Payne v Security Sav. & Loan Ass'n, 924 F2d 109, 111 (7th Cir. 1991).

The complaint is dismissed against JP Morgan Chase pursuant to CPLR 3211(a)(1), (7).

Argent seeks summary judgment dismissing the complaint against it on the grounds that all of the plaintiff's allegations against it are based upon defendant Gale Ramsaran's actions in his capacity of its employee; that she was not then nor was she ever its employee; and, it did not otherwise owe the plaintiff a duty to protect her from torts by third parties.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2nd Dept 2004), affd as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2nd Dept 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2nd Dept 1990).

Via the affidavit of its Executive Vice President of Human Resources Lou Grig, Argent has established that Ramsaran is not and never was its employee. And, it notes that banks do not owe individuals like the plaintiff who are not their customers a duty to protect them from torts of their customers. In re Terrorist Attacks on September 11, 2001, 349 F.Supp2d 765 (S.D.N.Y. 2005) affd., 538 F.3d 71 (2nd Cir. 2008), cert den. sub nom. Federal Ins. Co. v Kingdom of Saudi Arabia, 129 S Ct. 2859 (2009); Renner v Chase Manhattan Bank, 1999 WL 47239 (S.D.N.Y. 1999).

The plaintiff in opposition has submitted the HUD-1 statement from the November 30th closing which lists Argent as the lender, represented by the defendant Cheddi B. Goberdhan and Cheddi B. Goberdhan, P.C. who, the plaintiff maintains, have been involved in a wide-ranging mortgage fraud scheme. Assuming, arguendo, that Argent Mortgage Company was represented by Goberdhan in the subject transaction, that is an insufficient basis for continuing the plaintiff's claims against Argent. However, Argent would be liable for any misrepresentations allegedly made by its employees (Scott v Fields, 92 AD3d 666 [2nd Dept 2012]; citing Selechnik v Law Office of Howard R. Birnback, 82 AD3d 1077 [2nd Dept 2011]; Manno v Mione, 249 AD2d 372 [2nd Dept 1998]) and dismissal based solely upon a possible misnomer of the individual who engaged in the alleged wrongdoing on behalf of Argent Mortgage Company does not lie at this juncture.

" 'To make out a prima facie case of fraud, the complaint must contain allegations of a representation of material fact, falsity, scienter, reliance and injury.' " Moore v Liberty Power Corp., LLC, 72 AD3d 660, 661 (2nd Dept 2010), lv den., 14 NY3d 713 (2010), quoting Small v Lorillard Tobacco Co., 94 NY2d 43, 57 (1999). "CPLR 3016(b) further requires that the

circumstances of the fraud must be 'stated in detail' including specific dates and items (citations omitted)." Moore v Liberty Power Corp., LLC, supra, at p. 661.

Liability for fraud may be premised on knowing participation in a scheme to defraud, even if that participation does not by itself suffice to constitute the fraud. Danna v Malco Realty, Inc., supra, at p. 622, citing CPC Intern. Inc. v McKesson Corp., 70 NY2d 268, 286 (1987). The plaintiff alleges that all of the defendants acted in concert by, inter alia, fraudulently inducing her into execute a deed to her property. As for Argent, she alleges that in her capacity as Argent's employee, Ramsaran arranged for the mortgage loan with Argent and "fraudulently, unlawfully and deceptively" induced her to execute a deed to her property to Narain as well as other documents including the mortgage to Argent. She alternatively alleges that Ramsaran on behalf of Argent forged her signature on the aforementioned documents. The plaintiff has adequately plead a claim sounding in fraud against Argent. Argent's motion to dismiss the complaint against it pursuant to CPLR 3211(a)(7) is **denied**.

This constitutes the Decision and Order of the Court.

Dated: April 20, 2012
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.