[* 1]

SHORT FORM ORDER

INDEX No. 09-2465
CAL. No. 11-01831EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 10-17-11 (#003)
MOTION DATE 11-3-11 (#004)
ADJ. DATE 12-8-11
Mot. Seq. # 003 - MG
004 - XMG

---X

KENNETH STEPHENSON,

Plaintiff,

- against -

LILLIAN M. TERRON-CARRERA, EMC MORTGAGE CORPORATION, BRIDGEVIEW MORTGAGE CORPORATION, and CHRISTOPHER SIOUKAS,

Defendants.

---X

CIARELLI & DEMPSEY
Attorney for Plaintiff
200 Howell Avenue
Riverhead, New York 11901

LILLIAN M. TERRON-CARRERA, Pro Se
129 Fox Run Lane
Aquebogue, New York 11901

BONCHONSKY & ZAINO, LLP
Attorney for Defendant EMC Mortgage
228 Seventh Street, Suite 200
Garden City, New York 11530

KUSHNICK & ASSOCIATES, P.C.
Attorney for Defendant Bridgeview and Sioukas
445 Broad Hollow Road, Suite 124
Melville, New York 11747

Upon the following papers numbered 1 to 21 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5 ; Notice of Cross Motion and supporting papers 6 - 9 ; Answering Affidavits and supporting papers 10 - 16 ; Replying Affidavits and supporting papers 17 - 21 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Bridgeview Mortgage Corporation and Christopher Sioukas for summary judgment in their favor is granted and the complaint is hereby severed and dismissed as to these defendants; and it is further

ORDERED that the cross motion by defendant EMC Mortgage Corporation for summary judgment in its favor is granted and the complaint is hereby severed and dismissed as to this defendant.

On April 27, 2005, plaintiff and co-defendant Lillian Terron-Carrera ("Carrera"), purchased a single family house located at 129 Fox Run Lane in Aquebogue, New York (the "Property"). The Property was held by plaintiff and Carrera as joint tenants with the right of survivorship. Plaintiff and Carrera financed 100% of the $408,000 purchase price with loans from Fremont Investment & Loan ("Fremont") in the amount of $326,400, secured by a first mortgage on the Property, and in the amount of $81,600, secured by a second mortgage on the Property. Mortgage Electronic Registration Systems, Inc. ("MERS") was named as the nominee for Fremont on both mortgages. On June 29, 2005, defendant EMC Mortgage Corporation ("EMC") acquired both loans from Fremont. By deed dated May 31, 2007 (the "Deed"), plaintiff transferred his interest in the Property to Carrera. On June 29, 2007, Carrera refinanced with JP Morgan Chase in the amount of $342,200 (the "Chase Mortgage"), paying off the first mortgage loan on the Property. MERS, on behalf of EMC, executed an agreement subordinating the second mortgage to the Chase Mortgage.

On January 20, 2009, plaintiff commenced this action alleging fraud, fraudulent inducement, breach of promise and violations of General Business Law ("GBL") § 349, known as the Deceptive Practices Act. In addition to compensatory and punitive damages, plaintiff seeks a rescission or reformation of the Deed, cancellation of the second mortgage and note held by EMC, and a declaration that the second mortgage and note are void and unenforceable against him, a declaration that the subordination agreement signed by MERS on behalf of EMC is null and void, and to enjoin the enforcement of the note and mortgage as against him.

There is no dispute that plaintiff purchased the Property with Carrera, attended the April 2005 closing, and signed and initialed the loan documents obligating him to pay the first and second mortgages. Having entered into the contract to purchase and mortgage the Property upon terms with which he agreed, plaintiff now seeks to evade one of the contracts, i.e., the second mortgage loan agreement. Plaintiff has not provided any ground upon which the court should grant a rescission and the ground upon which he seeks to be released from his obligation under the second mortgage is without merit.

Plaintiff concedes that he executed a document which transferred his interest in the Property to Carrera, but denies that the signature on the Deed is his. The document which plaintiff claims he signed in 2007 exonerating him of his obligations to pay the second mortgage in exchange for relinquishing his interest to Carrera has not been proffered. Plaintiff does not seek to rescind the Deed based upon forgery, or to cancel the Chase Mortgage which was obtained based upon the allegedly fraudulently obtained Deed. Rather, plaintiff seeks to rescind or reform the Deed and cancel the second mortgage that was obtained two years prior to the execution of the Deed at issue. The basis upon which he seeks such relief is an oral promise purportedly made by Sioukas in 2005 that plaintiff alleges induced him to agree to obtain the original mortgage loans to purchase the Property with Carrera. Specifically, plaintiff alleges Sioukas represented to plaintiff that after two years of making payments on the loans and remaining current, Sioukas would secure funds for Carrera to refinance the Property to pay off the first and second mortgages, thereby relieving plaintiff of the debts. The alleged fraud continued in 2007, plaintiff alleges, when he was presented with a document to effectuate the transfer of his one-half interest to Carrera. Plaintiff alleges that he was induced to execute the document based on the defendants' representations that the first and second mortgages would be satisfied from the proceeds of the refinance obtained by Carrera with the assistance of Bridgeview/Sioukas. Plaintiff alleges that it was not until May 2008, when he began receiving collection

calls from EMC, that he learned the second mortgage had not been satisfied.

Plaintiff also alleges that the original mortgage loans were fraudulently obtained by using false information on the loan application. Additionally plaintiff alleges that Bridgeview/Sioukas charged excessive fees. Specifically, plaintiff alleges that at the April 2005 closing Bridgeview/Sioukas received fees totaling $11,424 which fees had not been fully disclosed and exceed 3.5% of the first mortgage, and that at the June 1, 2007 closing Bridgeview/Sioukas received additional fees of $11,189.69. Plaintiff further alleges that Bridgeview/Sioukas engaged in a pattern of deceptive business practices by charging excessive broker fees, over-appraising the Property to a price that exceeded the fair market value, financing and re-financing the Property based on the inflated value, targeting people of color and offering grossly unfair and inferior terms, falsifying Carrera's income on loan documents, and knowingly accepting inaccurate income and valuation information. It is also alleged that Bridgeview/Sioukas insisted that plaintiff be represented by an attorney chosen by them. Plaintiff alleges that EMC was the mortgage lender and participated in the purportedly fraudulent mortgage loan transactions. Plaintiff also alleges that the assignment to EMC was fraudulent.

Issue has been joined, discovery completed, and the note of issue filed. A default judgment in plaintiff's favor has been granted against Carrera for failure to answer or otherwise appear in the action. Bridgeview/Sioukas now move, and EMC cross-moves for summary judgment dismissing the complaint.

Bridgeview/Sioukas argue that they neither committed any fraud nor induced plaintiff to execute the Deed, and maintain that the causes of action in the complaint are without merit. These defendants also contend that Sioukas cannot be held personally liable as he was acting in his official capacity as a mortgage broker on behalf of his disclosed principal, Bridgeview. EMC argues that the complaint fails to allege any detailed allegations of fraud committed by it, or any details as to how it engaged in the purportedly fraudulent schemes to induce plaintiff to purchase and then transfer his interest in the Property. EMC maintains that it is a good faith holder and bona fide lender for value without knowledge or complicity of the fraud alleged in the complaint.

It is well established that the remedy of rescission of a deed and a concomitant cancellation of a mortgage is available to a claimant where it is established that the deed was either forged or obtained under false pretenses (fraud in the factum) or fraudulently induced (***Wells Fargo Bank, NA v Edsall***, 22 Misc 3d 1113[A], 880 NYS2d 877 [Sup Ct Suffolk County 2009], citing ***Euba v Euba***, 40 AD3d 689, 835 NYS2d 688 [2d Dept 2007] and ***Betz v N.Y.C. Premiere Prop., Inc.***, 38 AD3d 815, 833 NYS2d 153 [2d Dept 2007] and ***Cruz v Cruz***, 37 AD3d 754, 832 NYS2d 217 [2d Dept 2007]). A deed obtained by forgery or false pretenses is void ab initio and a mortgage obtained based on such a deed is likewise invalid (***GMAC Mtge. v Chan***, 56 AD3d 521, 867 NYS2d 204 [2d Dept 2008]; ***Karan v Hoskins***, 22 AD3d 638, 803 NYS2d 666 [2d Dept 2005]). In contrast, the remedy of rescission is not available against a bona fide purchaser or encumbrancer for value of a fraudulently induced deed as such a deed is merely voidable (*see* ***Wells Fargo Bank, NA v Edsall***, *supra*; RPL §§ 266; ***Fischer v Sadov Realty Corp.***, 34 AD3d 630, 824 NYS2d 434 [2d Dept 2006]; ***Miner v Edwards***, 221 AD2d 934, 634 NYS2d 306 [2d Dept 1995]). However, these remedies, are not available to those who come into court with unclean hands.

Here, plaintiff admitted that he never lived at the Property, and never intended to do so, although at the closing in April 2005, he signed and initialed documents which expressed that the Property would be his

primary residence. Thus, as plaintiff played a role in the duplicitous scheme about which he now complains, and comes to this court with unclean hands in connection with the purchase of the Property, he is barred from all equitable relief (*see* ***Vasquez v Zambrano***, 196 AD2d 840, 602 NYS2d 29 [2d Dept 1993]; ***Ta Chun Wang v Chun Wong***, 163 AD2d 300, 557 NYS2d 434 [2d Dept 1990], *lv denied* 77 NY2d 804, 568 NYS2d 912 [1991], *cert. denied* 501 US1252, 111 S Ct 2893 [1991]). Similarly, as plaintiff played a role in the alleged fraud to obtain the mortgages, he does not have a remedy under GBL § 349 (*see* ***Fremont Investment & Loan v Haley***, 23 Misc 3d 1138[A], 889 NYS2d 505 [Sup Ct Queens County 2009]); ***Fremont Investment & Loan v Laroc***, 21 Misc 3d 1124[A], 873 NYS2d 511 [Sup Ct Queens County 2008]). It is also noted that as the Deed reflects the actual agreement of the parties, an action for reformation will not lie (***Ta Chun Wang v Chun Wong***, *supra*).

Plaintiff's fraud and deceptive practices claims cannot be sustained on other grounds. Plaintiff's GBL claim must be dismissed as a matter of law for lack of injury (*see* ***Ovitz v Bloomberg, L.P.***, 18 NY3d 753, —NYS2d— [2012]). It is well settled that a prima facie showing requires allegations that a "defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (***Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank***, 85 NY2d 20, 25, 623 NYS2d 529 [1995]; *see* ***Ovitz v Bloomberg, L.P.***, *supra*). During his EBT plaintiff testified that he did not incur any out of pocket expenses for the closing, and that he never made any payments on the first or second mortgage. Plaintiff admitted during his EBT that other than legal fees relative to the instant action, he has not sustained any damages as a result of the defendants' alleged deceptive practices.

The court notes that during his EBT testimony, plaintiff revealed that he did not know the amount of the Chase Mortgage loan or that the loan was insufficient to satisfy both the first and second mortgages. Plaintiff also did not consult with an attorney prior to relinquishing his interest in the Property and did not attend the closing of the Chase Mortgage. Plaintiff also conceded that only Carrera represented to him that both mortgages would be satisfied upon refinancing thereby absolving him of any responsibility for payment. It has been held that a fraud or fraudulent inducement claim cannot be established for lack of justifiable reliance where a party fails to conduct due diligence, ask questions, and otherwise make use of means available to verify representations (*see* ***Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.***, 17 NY3d 269, 929 NYS2d 3 [2011]; ***HSH Nordbank AG v UBS AG***, ___AD3d___, 941 NYS2d 59 [1st Dept 2010]; ***Stuart Lipsky P.C. v Price***, 215 AD2d 102, 625 NYS2d 563 [1995] [fraud claim dismissed where plaintiff relied solely upon the alleged oral representations without any effort to verify the information]).

Turning to the fraud and fraudulent inducement claims, as to Sioukas, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud for which the claimant seeks damages (*see* ***Polenetsky v Better Homes Depot, Inc.***, 97 NY2d 46, 735 NYS2d 479 [2001]; ***Marine Midland Bank v Russo Produce Co.***, 50 NY2d 31, 427 NYS2d 961 [1980]). The alleged fraudulent misrepresentation need not have been communicated directly to the plaintiff (*see* ***Buxton Mfg. Co., Inc. v Valiant Moving & Storage, Inc.***, 239 AD2d 452, 657 NYS2d 450 [2d Dept 1997]). Nonetheless, the representation allegedly made by Sioukas in 2005 regarding refinancing and satisfying the mortgage loans, even if true, is a mere expression of opinion of a future expectation which is not considered a promise when examining the issue of fraud in the inducement (***Goldman v Stough Real Estate***, 2 AD3d 677, 770 NYS2d 94 [2d Dept 2003]; *see* ***Cerabono v Price***, 7 AD3d 479, 775 NYS2d 585 [2d Dept 2004],

lv denied 4 NY4d 704, 792 NYS2d 897 [2005]; ***Jobe v Akowchek***, 259 AD2d 735, 736, 687 NYS2d 417 [2d Dept 1999]). Moreover, plaintiff has not demonstrated that, at the time the alleged assurance was given, Sioukas did not intend to secure the financing (*see* ***Citibank v Plapinger***, 66 NY2d 90, 495 NYS2d 309 [1985]; ***Jobe v Akowchek***, *supra*).

To the extent plaintiff asserts Bridgeview/Sioukas committed a fraud by failing to verify the information on the loan application, it has been held that a broker is not responsible for preparing an application with false statements where such misstatements are contrived by the applicant (*see* ***Matter of Arrington v Lomenzo***, 51 AD2d 743, 379 NYS2d 477 [2d Dept 1976]). Here, in his affidavit in opposition to the motion, plaintiff clarifies that the mortgage fraud committed by Carrera with the assistance and cooperation of Bridgeview/Sioukas included securing the initial mortgages with the aid of a letter dated February 12, 2005. The handwritten letter addressed to Sioukas at Bridgeview reads:

> In regards to the purchase of 129 Fox Run Lane with my fiancee Lilian, the reason for the purchase is because the new home is bigger than my current residence at Jamesport. The extra space will be useful for our future family planning. Hope this letter helps explain the reason for the move.
> Thank you.

Although the letter is signed by "Kenneth Stephenson", plaintiff denies that the signature is his or that he ever represented to Sioukas that Carrera was his fiancee. Accepting plaintiff's assertions as true, Bridgeview/Sioukas had no obligation to seek independent verification that Carrera and plaintiff were engaged. Moreover, plaintiff does not allege that Bridgeview/Sioukas had reason to believe that the information contained in the letter was false (*cf.* ***Madison Valencia Group, Inc. v Cuomo***, 57 AD2d 896, 394 NYS2d 284 [2d Dept 1977], *appeal denied* 42 NY2d 806, 398 NYS2d 1027 [1977]).

Moreover, to the extent plaintiff blames Bridgeview/Sioukas for submitting a mortgage application with incorrect and exaggerated monthly income for Carrera, again plaintiff played a role by signing the loan documents wherein the income figures were provided. It is settled law that the signer of a written agreement is deemed to be conclusively bound by its terms, and that he may not have read it prior to its execution is of no moment (*see* ***Pimplinello v Swift & Co.***, 253 NY 159 [1930]; ***Kypreos v Spiridellis***, 124 AD2d 786, 508 NYS2d 505 [2d Dept 1986]; ***Columbus Trust Co. v Campolo*** 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Thus, plaintiff's argument is not dispositive.

With respect to the claim by plaintiff that Bridgview/Sioukas are guilty of overreaching in fraudulently inducing him to enter into the original mortgage loans, he presents no evidence indicating an absence of meaningful choice on his part (*see* ***Fremont Investment & Loan v Laroc***, *supra*, citing ***King v Fox***, 7 NY3d 181, 818 NYS2d 833 [2006] and ***Gillman v Chase Manhattan Bank, N.A.***, 73 NY2d 1, 537 NYS2d 787 [1988]). Plaintiff has further failed to demonstrate that the value of the Property was inflated, that the appraisal was fraudulent at the time it was issued, or that it was intended for his benefit, and he justifiably relied upon the representations therein when deciding to enter into the transactions (*see* ***Fremont Investment & Loan v Laroc***, *supra*).

To the extent plaintiff asserts Sioukas advised him that he did not need an attorney to represent him in relation to the original mortgage transactions and the 2005 closing, "there is no constitutional, statutory or

regulatory requirement that a borrower be represented by legal counsel in relation to a mortgage loan transaction" (***Eastern Savings Bank, FSB v Aguirre***, 30 Misc 3d 1230[A], *9, 924 NYS2d 308 [Sup Ct Queens County 2011]). In addition, plaintiff makes no assertion that he expressed a desire to be represented by legal counsel and Bridgeview/Sioukas interfered by refusing to permit him to bring an attorney to the closing to represent him (*see* ***id.***).

As to the broker fees charged by Bridgeview/Sioukas, Sioukas testified that the fees are determined based upon the type of loan, the yield spread and the risk. According to Sioukas, based on his recollection, the loans chosen by plaintiff and Carrera and for which they qualified, were not full documentation loans, the trade off for which was higher risk to the lender and increased rates and fees. To the extent plaintiff objects to the mortgage broker fees charged by Bridgeview/Sioukas in connection with the original loans and the refinance, he has failed to proffer proof that Sioukas, as the mortgage broker, violated any law or committed any fraud in charging such fees. It is also noted, that plaintiff did not pay the mortgage broker fees and, as noted above, has never made a payment on any of the mortgage loans, and thus has not suffered any damages.

With respect to the allegation that Bridgeview/Sioukas targeted people of color and offered them high interest rate loans, upon questioning during his EBT plaintiff testified that he would consider himself a white prospective home buyer and not a person of color. Plaintiff also testified that Carrera is Hispanic and that is why she was allowed to get a mortgage. Plaintiff has offered no admissible evidence to support his allegation that Carrera was targeted.

With regard to EMC, critical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action. CPLR 3016(b) requires that the circumstances constituting the alleged wrong be stated in detail (*see* ***Lanzi v Brooks***, 54 AD2d 1057, 388 NYS2d 946 [1976], *affd* 43 NY2d 778, 402 NYS2d 384 [1977]). Here, plaintiff has not plead with the necessary specificity, the alleged misrepresentations made by EMC, and the papers submitted in opposition fail to cure the deficiency. Other than collection calls, plaintiff does not allege that he had any contact with EMC or that he justifiably relied upon any misrepresentations made by EMC (*see* ***Lama Holding Co v Smith Barney***, 88 NY2d 413, 321, 646 NYS2d 76 [1996]; ***Deutsche Bank Nat. Trust Co. v Gordon***, 84 AD3d, 443, 922 NYS2d 66 [1st Dept 2011]) . Indeed, plaintiff conceded that no one from EMC told him that he would be relieved of his obligations to pay the second mortgage in exchange for relinquishing his one-half interest in the Property. Similarly, other than the conclusory statements that the assignment and the subordination agreement were fraudulent, plaintiff has not provided details of the purported wrong.

Furthermore, "although it is well settled that an assignee of a mortgage takes it subject to the equities attending the original transaction (*see* ***Lapis Enterprises, Inc. v Intl. Blimpie Corp.***, 84 AD2d 286 [1981]), [EMC] cannot be required to answer in damages for alleged misrepresentations committed by [Fremont] in connection with the making of the [original] mortgage loan[s]" (***US Bank National Assn v McPhearson***, 33 Misc 3d 1219[A], 2012 NY Slip Op 50742[U], 2012 WL 1521862 [Sup Ct Queens County]). Therefore, plaintiff's allegations of fraud and fraudulent inducement cannot be sustained against EMC. As the complaint does not assert any other claims against EMC, the cross motion for summary judgment dismissing the complaint as to this defendant must be granted.

Accordingly, the motion and cross motion for summary judgment dismissing the complaint as to defendants Bridgeview, Sioukkas and EMC are granted.

Dated: 6/5/12

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**