

Cadet v James B. Nutter & Co.
2013 NY Slip Op 34012(U)
August 8, 2013
Supreme Court, Kings County
Docket Number: 519/11
Judge: David I. Schmidt
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At an IAS Term, Part Com-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of July, 2013.

P R E S E N T:

HON. DAVID L. SCHMIDT,
Justice.
-----X
GISELE CADET,
Plaintiff,

- against -

Index No. 519/11

JAMES B. NUTTER & COMPANY, LEXINGTON
CAPITAL CORP., AND ADAM THIESSEN,
Defendants.
-----X

The following papers numbered 1 to 9 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-3
Opposing Affidavits (Affirmations) _____	4-5
Reply Affidavits (Affirmations) _____	6-9
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant James B. Nutter & Company (Nutter) moves for an order pursuant to CPLR §3016 (b), §3211 (a) (1) and §3211 (a) (7) dismissing all of the causes of action asserted against Nutter in plaintiff Gisele Cadet's amended complaint.

Background

Defendant Nutter is a company in the business of providing home equity conversion loans (commonly referred to as a reverse mortgage) to borrowers throughout the United States.¹ Defendant Lexington Capital is a mortgage brokerage firm. On or about June 2009, plaintiff and her now deceased husband Gerard Cadet, sought to refinance the mortgage on their premises located at 116 East 57th Street in Brooklyn because they had fallen behind on the payments. It appears that the Cadets met with defendant Adam Thiessen who was employed by Lexington. Ultimately a reverse mortgage was taken out solely by Gerard Cadet on July 8, 2009, by and through a power of attorney held by plaintiff. This reverse mortgage was recorded on July 29, 2009 and was deemed a Home Equity Conversion Reverse Mortgage.

It appears that in order for the Cadet's to borrow an amount of money sufficient to pay off their existing mortgage, it was necessary for plaintiff to deed title to the home solely to her husband, who was older. Mr. Cadet passed away on July 27, 2009, three weeks after the closing. Plaintiff contends that on or about June 11, 2010, Nutter informed her that the entire mortgage was due and payable because a condition of the mortgage was that it was due upon Gerard Cadet's death. Nutter stated that it was prepared to commence a foreclosure proceeding if the mortgage was not paid back by a certain date.

¹A reverse mortgage allows borrowers 62 years of age and older to obtain cash by pledging their home as security for the loan. No mortgage payments are made during the lifetime of the borrowers so long as at least one borrower resides in the house. At such time as the borrower dies, moves, or sells the home the entire mortgage will come due.

Plaintiff subsequently commenced the instant lawsuit containing claims of fraud, fraudulent inducement and negligence.

Nutter's Motion

Nutter moves for an order pursuant to CPLR §3016 (b), §3211 (a) (1) and §3211 (a) (7) dismissing all of the causes of action asserted against Nutter in plaintiff's amended complaint. Nutter argues that plaintiff's negligence claim must fail inasmuch as Nutter owed no cognizable duty of care to plaintiff because no relationship existed between Nutter and plaintiff since it was Mr. Cadet that was the sole mortgagor. Accordingly, Nutter argues this claim should be dismissed pursuant to CPLR 3211 (a) (7).

"On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated" (*Manfro v McGivney*, 11 AD3d 662, 663 [2004] [internal quotations omitted]); however, "[a]ffidavits and other evidentiary material may also be considered to 'establish conclusively that plaintiff has no cause of action'" (*Simmons v Edelstein*, 32 AD3d 464, 465 [2006], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Moreover, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1994]).

For a plaintiff to survive a motion to dismiss for failure to state a cause of action, the factual allegations in the claim cannot be “merely conclusory and speculative in nature and not supported by any specific facts” (*Residents for a More Beautiful Port Washington, Inc. v Town of North Hempstead*, 153 AD3d 727, 729 [1989]). “The allegations in the complaint cannot be vague and conclusory” (*Stoianoff v Gahona*, 248 AD2d 525 [1998], *appeal dismissed* 92 NY2d 844 [1998], *cert denied sub nom. Stoianoff v New York Times*, 525 US 953 [1998]).

Contrary to the plaintiff’s claims in her amended complaint, Nutter did not owe her any duty with regard to the reverse mortgage at issue, especially in light of the fact that she was not even the borrower, and was merely acting as attorney in fact for her husband in this transaction (*see Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617, 617-618 [2009] [holding that bank did not owe a duty, in effect, to prevent the defendants from inducing plaintiff into entering into a fraudulent mortgage transaction pursuant to which they allegedly effected the transfer of real property owned by the plaintiff to another entity under the guise of helping the plaintiff to refinance her mortgage]; *see also Harris v Adejumo*, 36 AD3d 855, 856 [2007]; *Burger v Singh*, 28 AD3d 695, 697 [2006]; *Tenenbaum v Gibbs*, 27 AD3d 722, 723 [2006]; *Beckford v Northeastern Mtge. Inv. Corp.*, 262 AD2d 436, 437 [1999]; *Chemical Bank v Bowers*, 228 AD2d 407, 408 [1996]).

Accordingly, that branch of Nutter's motion seeking to dismiss plaintiff's negligence cause of action as asserted against Nutter is granted and said claim is dismissed as against Nutter.

Nutter further argues that plaintiff's fraud and fraudulent inducement claims should also be dismissed as asserted against Nutter since she has failed to state what acts or representations Nutter made to plaintiff constituting the alleged fraud and fraudulent inducement in sufficient detail as required by CPLR 3016 (b). Moreover, Nutter argues that there is sufficient documentary evidence to refute plaintiff's allegations as asserted against Nutter.

A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Long v Allen AME Transp. Corp.*, 43 AD3d 1114 [2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2005]; *Scadura v Robillard*, 256 AD2d 567 [1998]).

"To properly plead a cause of action to recover damages for fraud, the plaintiff must allege that (1) the defendant made a false representation of fact, (2) the defendant had knowledge of the falsity, (3) the misrepresentation was made in order to induce the plaintiff's reliance, (4) there was justifiable reliance on the part of the plaintiff, and (5) the plaintiff was injured by the reliance" (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188-1189

[2012]). Further, a cause of action sounding in fraud must be pled with sufficient particularity "to permit a reasonable inference of the alleged misconduct" (*Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1189 [2012]; *see also* CPLR 3016 [b]). CPLR 3016 (b) requires that "the circumstances of the fraud must be stated in detail, including specific dates and items" (*Moore v Liberty Power Corp., LLC*, 72 AD3d 660, 661 [2010]). Finally "[t]he mere fact that the expectations of the parties were frustrated is an insufficient ground upon which to predicate a claim of fraud" (*Tutak v Tutak*, 123 AD2d 758 [1986]).

In opposition to Nutter's motion, plaintiff contends that she and her husband had requested that defendants Thiessen and Lexington attempt to help them obtain financing in order to refinance their existing mortgage, but instead a reverse mortgage was obtained for her husband only. She contends that the consequences of the removal of her name from the deed to the subject premises, and the procurement of a reverse mortgage solely in her husband's name, was never explained to her or her husband. Plaintiff further claims that the signatures on a copy of a Certificate of Counseling explaining the consequences purporting to be the signatures of her and her husband are forgeries. Additionally, plaintiff maintains that Nutter, acting through its agent at the closing, failed to inform her that removing her name from the deed and subsequently adding it back after the reverse mortgage was recorded, made her rights subject to the reverse mortgage and the payment of it. She claims that she believed that the reverse mortgage would not become due and payable until after either her or her husband's death, which ever came later.

In reply, Nutter presents various documents in support of its' motion to dismiss the fraud and fraudulent inducement claims. Nutter through an affidavit of its Vice President Paul Madson, submits various documents signed by plaintiff² which demonstrate that she was given counseling regarding the implications of the reverse mortgage. These documents signed by plaintiff, as attorney in fact, for her husband Gerard Cadet, include: a Certificate of HECM (Home Equity Conversion Mortgage) Counseling from Springboard Non Profit Consumer Credit Management Inc., dated May 18, 2009; Acknowledgment of Receipt, dated July 1, 2009 (which acknowledges the receipt of various documents including a notice to applicants for reverse mortgage loans, reverse mortgage counseling, list of counselors in the area and a counseling statement); Counseling Statement, signed by plaintiff on July 1, 2009 in which she states that:

I have read these documents thoroughly and completely, including the statement that advises me of the importance of obtaining independent counseling and information on reverse mortgages before entering into a reverse mortgage loan . . . On or about 5/18/09 (date), I (we) obtained independent counseling on reverse mortgage loans from Beatriz Cortez (counselor), who explained the benefits, costs, terms and other features of different types of reverse mortgage loans to me (us).

² The court notes that the signature purporting to be that of plaintiff on the documents submitted by Nutter match the signature of plaintiff on her affidavit in opposition to the instant motion.

Plaintiff also signed a Waiver of Counseling Affidavit which pertinently states that she

read the materials described above (which included Notice to Applicants for Reverse Mortgage Loans; Two-page document on Reverse Mortgage Counseling; List of Counselors in my area (if available; Statement to be signed by applicant(s) that I (we) have obtained counseling; Affidavit to be signed by applicant (s) that I (we) have chosen not to obtain counseling; Third -party designation form).

Additionally, Nutter submits documents signed by plaintiff entitled "Important Notice to Reverse Mortgage Loan Applicant" and "Reverse Mortgage Advisor Disclosure." In the latter document plaintiff indicated that she consulted with her daughter, Elise Beaubrun, about this transaction. Finally, plaintiff signed a document entitled "Home Equity Conversion Mortgage Disclosure Important Terms." This document includes a statement which states "[w]e can terminate your HECM and immediately require payment of the entire outstanding balance in one payment if: All of the Borrowers have died."

In the instant case, the court finds that plaintiff has failed to plead a cause of action sounding in fraud with sufficient particularity as to Nutter. She fails to demonstrate what false statements were made by Nutter to induce her to enter into the reverse mortgage as attorney in fact for her husband (see *Orchid Constr. Corp. v Gottbetter*, 89 AD3d 708, 710 [2011]; *Moore*, 72 AD3d at 661]). Moreover, the documentary evidence submitted by Nutter refutes plaintiff's allegations that Nutter failed to explain the implications of the reverse mortgage or in anyway fraudulently induced her to enter in to this transaction..

Plaintiff's amended complaint does not include any allegation that she, or her husband, ever spoke with any Nutter employee at all. The record reveals that plaintiff signed numerous documents attesting to the fact that she had read the documents thoroughly and that she had discussed the implications and alternatives of the reverse mortgage; that she was made aware of the importance of obtaining independent counseling and that she chose not to do so and chose not to consult with an attorney. Accordingly, that branch of Nutter's motion seeking to dismiss plaintiff's fraud and fraudulent inducement claims is granted.

Conclusion

Nutter's motion to dismiss plaintiff's claims as asserted against Nutter is granted in its entirety and said claims are hereby dismissed as against Nutter.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. DAVID I. SCHMIDT

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