

Gleason v Wells Fargo Home Mtge., Inc.

2013 NY Slip Op 32075(U)

August 28, 2013

Supreme Court, New York County

Docket Number: 651311/11

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JEFFREY K. OING
J.S.C. Justice

PART 48

Index Number : 651311/2011
GLEASON, JOHN P.
vs.
WELLS FARGO HOME MORTGAGE,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

"This motion is decided in accordance with the annexed decision and order of the Court."

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/28/13

Signature of Jeffrey K. Oing, J.S.C.

- 1. CHECK ONE: CASE DISPOSED (checked), NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED (checked), DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
-----x

JOHN P. GLEASON,

Plaintiff,

Index No.: 651311/11

-against-

Mtn Seq. No. 001

WELLS FARGO HOME MORTGAGE, INC.
D/B/A AMERICA'S SERVICING CO.,

DECISION AND ORDER

Defendant.

-----x

JEFFREY K. OING, J.:

Relief Sought

Defendant, Wells Fargo Home Mortgage, Inc., moves, pursuant to CPLR 3211(a) [5] and [7], to dismiss the complaint.

Background

In December 2006, plaintiff, John P. Gleason ("Gleason" or "plaintiff"), appearing *pro se*, entered into a mortgage loan that was acquired from the original lender by defendant Wells Fargo Home Mortgage, Inc. ("Wells Fargo"), which services mortgage loans under the name America's Servicing Co. ("ASC"). According to the complaint, the mortgage, note, and other loan documents (collectively the "loan agreement") was for the principal amount of \$221,426.41, and was secured by plaintiff's pledge of his ownership interest in the real property located at 47 Baker Road, Woodstock, New York (Moving Papers, Ex. A, Complaint, ¶ 6). Plaintiff claims that he paid ASC the amount in principal and interest due under the loan agreement in monthly installments

(Id. at ¶ 7). Plaintiff alleges that in April or May 2010 ASC offered to modify the loan agreement so that the interest rate charged by ASC under the loan agreement would be less than the interest rate originally set by the loan agreement (Id. at ¶ 8). Plaintiff claims he accepted ASC's offer that the loan agreement be modified so that the interest rate due would be reduced and plaintiff's monthly payments of principal and interest would go from \$1,452.26 per month to \$900 per month (Id. at ¶¶ 10-11).

Plaintiff asserts that ASC accepted his payments of \$900 for a time. Thus, plaintiff contends that there was a modification of the loan agreement, agreed to by ASC and plaintiff, on which plaintiff based his performance (Id. at ¶ 13). Plaintiff alleges that later, in breach of the modification of the loan agreement, ASC demanded that plaintiff make monthly payments in an amount equal to the original interest and principal payment and threatened foreclosure (Id. at 14).

Plaintiff commenced this action asserting causes of action for: 1) reformation; 2) false pretenses and misrepresentations; and 3) slander of title. Also, while not set forth as separate causes of action, plaintiff describes in the complaint the "nature of the action" as follows:

This action seeks ... a declaratory judgment ... that the several rights and legal relations that exist between Gleason and ASC resulted in a modification of that certain loan transaction by which ASC extended a home mortgage to Gleason. In addition, Gleason seeks reformation of the loan agreements (mortgage, note, and

other loan documents, collectively, the "Loan Agreement") to reflect the true intent and agreement by and between Gleason and ASC. Gleason seeks a further judgment declaring that ASC is estopped from enforcing the original loan transaction by its conduct upon which Gleason reasonably relied and enjoining ASC from seeking to foreclose.

(Id. at ¶ 1).

Discussion

I. Reformation

"A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake" (Greater New York Mutual Insurance Company v United States Underwriters Insurance Company, 36 AD3d 441 [1st Dept 2007]). As for a mutual mistake, it must be alleged that the parties reached an oral agreement and, unknown to either side, the signed writing does not express that agreement (Chimart Associates v Paul, 66 NY2d 570, 573 [1986]). "[I]n the case of a unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement" (Greater New York Mutual Insurance Company v United States Underwriters Insurance Company, 36 AD3d 441, supra). Thus, a claim for reformation in either case is based upon the existence of a written agreement that contained a mistake at the time the agreement was executed.

Here, plaintiff fails to allege that the written documents, signed and executed by the parties in 2006, contain a mistake, either unilateral or mutual. Instead, plaintiff claims that the loan agreement was modified by a subsequent oral agreement. As such, plaintiff does not state a cause of action for reformation.

Assuming arguendo that a reformation claim is properly pleaded, defendant next argues that plaintiff's claim for reformation is barred by the statute of frauds. Under the statute of frauds, "[a]n estate or interest in real property ... cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing" (General Obligations Law § 5-703).

Defendant contends that where the initial agreement is subject to the statute of frauds an agreement modifying its terms will not be given effect unless it also satisfies the statute of frauds (Charlay v Northeast Savings F.A., 178 AD2d 859 [3rd Dept 1991]). Here, defendant points out that the complaint fails to allege that the parties reduced the alleged modification to a writing. Nor did plaintiff attach any such document to the complaint. Although these factual deficiencies may undermine plaintiff's reformation claim, the complaint also sets forth allegations indicating an oral modification, which may be sufficient to avoid the statute of frauds.

Under General Obligations Law § 5-703[4], an oral modification of a written mortgage is enforceable only when the party seeking to uphold the modification partially performs under its terms, detrimentally relies on the modification, and the partial performance is unequivocally referable to the modification (Messner Vetere Berger McNamee Schmetterer Euro RSCG Inc. v Aegis Group, 93 NY2d 229 [1999]; Martini v Rogers, 6 AD3d 404 [2nd Dept 2004]).

Here, as defendant points out, plaintiff does not assert a cause of action for breach of the oral modification. Critically, with respect to the part performance exception to the statute of frauds, that exception is inapplicable because plaintiff does not allege detrimental reliance.

Plaintiff argues, however, that the statute of frauds is inapplicable to the facts of this case. In that regard, plaintiff claims that defendant submitted to him a Home Affordable Modification Plan ("HAMP") with a Request for Modification and Affidavit ("RMA"). Plaintiff contends that he completed these documents and submitted them to defendant in March 2011 and again in November 2011 (Gleason Aff., ¶¶ 8-10). Plaintiff goes on to argue that he agreed with defendant to modify the loan, not the terms of the mortgage (Gleason Aff., ¶ 11). Plaintiff's position is that this fact is an important distinction because the essential terms of the loan are contained

in the note, not the mortgage which serves as security to secure the note obligations (Gleason Aff., ¶ 12). Thus, the agreement at issue constitutes an enforceable loan, not a mortgage, and, therefore, the statute of frauds is inapplicable (Gleason Aff., ¶ 14). This argument is unavailing.

Plaintiff asserts in his complaint that he is seeking "reformation of the loan agreements (mortgage, note, and other loan documents, collectively, the "Loan Agreement")", and that the modification at issue involved a "loan transaction by which ASC extended a home mortgage to Gleason" (Complaint, ¶ 1). As such, plaintiff cannot now claim that the statute of frauds does not apply because the modification does not involve the mortgage, only the note. Given that all of the loan documents involved were executed in contemplation of ASC extending a home mortgage to plaintiff, plaintiff's position that the note stands on its own, apart from the mortgage, and is not subject to the statute of frauds, is without merit.

II. Fraud

As for the fraud cause of action, plaintiff must allege "a misrepresentation or material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (Lama Holdings Co. v Smith Barney Inc., 88 NY2d 413

[1996]). Further, plaintiff must plead fraud with particularity and allege in detail the factual basis for each element of the cause of action (CPLR 3016[b]; Barclay Arms, Inc. v Barclay Arms Associates, 74 NY2d 644 [1989]).

In the cause of action for fraud, plaintiff alleges that "ASC gave false information about the [loan modification] program's requirements (for example, telling Gleason that he had to default on the mortgage before receiving the modification)" and that "ASC made promises of action on the loan modification application to Gleason knowing they were false and then sent foreclosure notices and other threats of legal action against Gleason" (Moving Papers, Ex. A, Complaint, ¶¶ 22 and 23). These allegations without more do not, however, provide a sufficient and particular factual basis as to each element of a fraud claim, and thus fail to meet the pleading requirement of CPLR 3016(b). In fact, a review of the allegations show that they lack any specificity as to who made these representations.

As to how or to what extent plaintiff relied upon the representations, plaintiff merely asserts in his affidavit that he "reasonably relied on defendant's promise to modify the loan" and that it "is inferable that defendant misrepresented its promise" (Gleason Aff., ¶ 35). Such allegations are insufficient to plead justifiable reliance.

III. Slander of Title

In order to plead a claim for slander of title, plaintiff must allege facts which demonstrate that defendant made false communications casting doubt on the validity of plaintiff's title with malicious intent, or at a minimum, with reckless disregard for their truth or falsity (Vollbrecht v Jacobson, 40 AD3d 1243 [3rd Dept 2007]).

Here, plaintiff's slander of title cause of action alleges that "[i]n the event ASC has or will file of record a claim against the Property, such claim is or will be unfounded and cast a cloud on Gleason's title to the Property and therefore actionable as slander of title" (Complaint, ¶ 26). As defendant correctly argues, plaintiff does not allege that defendant has actually "made false communications casting doubt on the validity of [his] title." Rather, plaintiff merely alleges that "in the event [defendant] has or will file of record a claim against the property." Thus, plaintiff's cause of action for slander of title is entirely speculative. Furthermore, the cause of action lacks the requisite specificity (CPLR 3016[a]), and plaintiff fails to allege that a claim by defendant against the property would be malicious.

IV. Declaratory Judgment

Plaintiff also seeks "a declaratory judgment ... that the several rights and legal relations that exist between Gleason and

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ASC resulted in a modification of that certain loan transaction by which ASC extended a home mortgage to Gleason" (Complaint, ¶ 1). While plaintiff asserts this claim in the "Nature Of The Action" portion of the complaint, plaintiff does not assert the claim for a declaratory judgment in the "Prayers For Relief" portion of the complaint. Plaintiff's prayers for relief are based on the claims for reformation, fraud, and slander of title. Given those claims have been dismissed herein, plaintiff's claim for a declaratory judgment must fail.


Accordingly, defendant's motion to dismiss the complaint is granted, and the complaint is hereby dismissed.

ORDERED that the motion to dismiss the complaint is granted, and the complaint is hereby dismissed; and it is further

ORDERED that the Clerk is respectfully directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/28/13



HON. JEFFREY K. OING, J.S.C.