Kimmel v Schon
2013 NY Slip Op 32318(U)
September 26, 2013
Sup Ct, Kings County
Docket Number: 015633/2012
Judge: Bernard J. Graham
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At an IAS Term, Part 36 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 23rd day of September, 2013.

PRESENT:

HON. BERNARD J. GRAHAM,
Justice.

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JAY KIMMEL, AS NOMINEE,

Plaintiff,

- against - Index No. 15633/12

JOSEPH SCHON, ET AL.,

Defendants.

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AND AN ACTION ON A COUNTERCLAIM

The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1- 2
Opposing Affidavits (Affirmations)	3- 5
Reply Affidavits (Affirmations)	6- 8
______ Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Jay Kimmel, as Nominee (Kimmel) (1) moves, (a) pursuant to CPLR 3211(a)(1), (4) and (7), for an order dismissing the counterclaims filed by defendants Joseph Schon (Schon) and Pnina Schon (Pnina) (collectively, the Schons, or

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[* 2]

borrowers); (b) striking the Schons' answer; (c) pursuant to CPLR 3212, for an order granting summary judgment on his action to foreclose on real property; and (d) for other relief ancillary thereto; and, separately, (2) moves for an order consolidating the above-captioned action with one pending in another part of this court under Index Number 19722/10 which was commenced by the Schons naming, as defendants, Herbert Tepfer, Esq., Tepfer & Tepfer, P.C., Eliyahu Weinstein and Heshy Shtern.

BACKGROUND

The within motions arise out of an action commenced by plaintiff for a Judgment of Foreclosure and Sale concerning a Note signed by defendants in favor of plaintiff in the principal amount of $1.0 million (the Note), which was secured by a Mortgage and Security Agreement dated September 1, 2004 (the Mortgage). Said mortgage encumbers a certain parcel of residential real property owned by the defendants/borrowers which is located at 1654 49th Street, in Brooklyn, New York. According to plaintiff's papers, defendants, who represented that the proceeds of the loan were to be used "for investment purposes only," defaulted in or about April of 2009, and timely demand was made for cure of same.

The Schon Lawsuit

Following the foregoing demand, the Schons commenced a lawsuit (*Schon v Tepfer, et al,* Index No. 19722/10) (the Schon lawsuit) before Justice Martin Solomon of this court, where, naming as defendants Herbert Tepfer, Esq., Tepfer & Tepfer, P.C., Eiyahu a/k/a Eli Weinstein, and Heshy Shtern, they alleged, in substance, that the defendants, including the

Tepfer law firm, all working together, provided the Schons with fraudulent information in order to induce them to use their real property as collateral for the loan received by them. Defendants further alleged that they then lent that money to Weinstein, who, in actuality, used the proceeds to fund his Ponzi scheme rather than for the stated purpose of investing in Texas real estate, and rather than reimbursing defendants and paying defendants an additional $100,000.00 as promised, Weinstein defaulted on the loan. Kimmel and Shtern claimed to know nothing of how defendants were investing the money, and alleged that it was only later that they discovered that the money was invested with Weinstein.

The Schons' complaint alleged five causes of action. The first and second were against Tepfer and the Tepfer Law Firm. The first alleged that the attorneys acted on behalf of Weinstein, and the second alleged a cause of action for legal malpractice. The third cause of action was against Weinstein for breach of contract. The fourth and fifth causes of action, which were the subject of a dismissal motion before Justice Solomon, alleged, respectively, that Kimmel conspired with Shtern to defraud the Schons, and that Shtern conspired with Weinstein for the same purpose. Finding that the last two causes of action failed to set forth the allegations of fraud with particularity (CPLR 3016[b]), Justice Solomon granted defendants' motion and dismissed same for failure to state a cause of action.

The Present Action and Motion for Summary Judgment

On August 1, 2012, plaintiff commenced this action by filing an amended summons and verified complaint and notice of pendency with the Kings County Clerk. Three

defendants are named–the Schons, the Environmental Control Board, and the City of New York. In addition, thirty "John Does" were also named as defendants.

In response, the Schons served an amended verified answer, which also alleges various affirmative defenses and five counterclaims.[1] In their counterclaims, which sound in fraud, breach of fiduciary duty and a declaration to quiet title, the Schons allege that Stern (or Shtern), acting through his agents and nominees, including plaintiff, Tepfer, the Tepfer law firm, and Weinstein, made certain material misrepresentations of fact as detailed and which concerned the purpose of the loan which the plaintiffs were to fund with the proceeds of the borrowed monies. The Schons further maintain that they were denied effective legal representation because the Tepfer firm had a conflict of interest and was, in reality, counsel to Stern, and that firm was instructed not to draft any agreements that would protect the Schons' rights against Weinstein or Weinstein's property in the event of a default. The specific acts are alleged in greater detail therein.

The instant motion, by which plaintiff seeks dismissal of the counterclaims and summary judgment appointing a referee to compute, is supported solely by the plaintiff's attorney's affirmation. Also provided as exhibits in support of the instant motion are (1) an affirmation of Miriam W. Hermann (Hermann), and (2) an affirmation of Kimmel. In support of plaintiff's argument disputing the Schons' assertion that Tepfer & Tepfer did not represent him at the loan closing, Hermann states that, as an attorney associated with the law

[1]Plaintiffs on the counterclaim served their answer with a summons and caused it to be assigned a separate index number.

firm of Ferro Labella & Zucker LLC, she represented the lender in the subject transaction, drafted the papers and attended the closing at which the Schons were represented by Tepfer & Tepfer, P.C. In addition, she states that at the closing, the borrowers signed a closing statement, and were provided with an opinion letter by Tepfer & Tepfer.

In further support, stating that he is an attorney duly admitted to practice in the State of New York, Kimmel provides, as plaintiff, his own attorney's affirmation. He states that as lender and administrator of the subject loan, he received all payments made thereunder, and he (1) never agreed to extinguish the note, (2) never agreed to accept a new note to replace the one that is at issue here, and (3) there was never a new obligation that replaced the Note, and no new contract was discussed or drafted with respect thereto.

DISCUSSION

Plaintiff is not entitled to prevail on any grounds asserted under CPLR 3211.

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Teitler v Pollack & Sons*, 288 AD2d 302, 302, [2001]). Plaintiff's submissions fail to meet this standard.

Similarly, plaintiff cannot prevail on the related contentions that he is entitled to do so under CPLR 3211(a)(4) and/or CPLR 3211(a)(7). Pursuant to CPLR 3211(a)(4), a court may, but is not required to, dismiss a cause of action where "there is another action pending between the same parties before another court of any State or the United States." On a

motion to dismiss made pursuant to CPLR 3211(a)(7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *see also Gaidon v Guardian Life Ins. Co. of America,* 94 NY2d 330 [1999]; *In re Loukoumi, Inc.,* 285 AD2d 595, 596 [2001]). Further, "[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer*, 43 NY2d at 275; *Doria v Masucci,* 230 AD2d 764 [1996]). The court finds that the substance of the allegations in the counterclaim before it differ sufficiently from those causes of action that were dismissed by Justice Solomon, and denies plaintiff's motion on said grounds. Similarly, causes of action are amply stated in the counterclaim so as to warrant denial of that branch of plaintiff's motion brought under CPLR 3211(a)(7).

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a prima facie showing of its entitlement to summary

judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

Plaintiff's motion for summary judgment must be denied. It is well settled that on a motion for summary judgment, an affidavit of counsel who demonstrates no knowledge of the underlying facts is without probative value (*see Zuckerman,* 49 NY2d at 563, citing *Columbia Ribbon & Carbon Mfg. Co. v A-1-A Corp.*, 42 NY2d 496, 500 [1977]; *Israelson v Rubin*, 20 AD2d 668 [1964], *aff'd* 14 NY2d 887 [1964]; *Lamberta v Long Is. R. R.*, 51 AD2d 730 [1976]). Here, plaintiff's counsel's affirmation is silent regarding his basis of knowledge of the underlying facts. Moreover, the affirmation of plaintiff, an attorney, is not admissible in this instance. Under the language of CPLR 2106,[2] the use of an unsworn affirmation bearing the individuals signature alone, in lieu of an affidavit, is prohibited where the signatory, even if otherwise authorized by the statute, is a party to the action (*see*

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[2]CPLR 2106 provides that "[t]he statement of an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action, when subscribed and affirmed by him to be true under the penalties of perjury, may be served or filed in the action in lieu of and with the same force and effect as an affidavit."

Slavenburg, Corp. v Opus Apparel, Inc, 53 NY2d 799, 801[FN] [1981]; *Schutzer v Suss-Kolyer,* 57 AD2d 653 [1977]; *Fitzgerald v Willes,* 83 Misc 2d 853 [App Term 1975]). Consequently, plaintiff has failed to meet his initial burden of making a prima facie showing of entitlement to judgment as a matter of law, requiring denial of his motion and regardless of the sufficiency of the opposing papers (*see Vega v Restani Const. Corp.,* 18 NY3d 499 [2012]). In any event, were it necessary to do so, the court would find that defendants have met their burden of raising an issue of fact in opposition to plaintiff's motion through their particularized showing, in admissible form, that the underlying transaction was permeated with, and arose out of, fraudulent conduct.

Finally, plaintiff's motion to consolidate the remaining causes of action in the Schon lawsuit with the present matter under CPLR 602 is granted, and both matters shall hereafter be heard by this court. The caption shall be deemed amended in the form proposed by movant in said motion.

The foregoing constitutes the decision and order of the court. A copy, with the amended caption annexed as an exhibit, shall be served by plaintiff on the Clerk of the Court within 30 days of date of entry.

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