Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

PRESENT: HONORABLE VALERIE BRATHWAITE NELSON IA Part 7
Justice

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DOMINGO ABREU, Index No. 702561/14

Plaintiff, Motion Date: 8/7/14
Motion Seq. No.: 2
Motion Calendar No. 3

-against-

Motion Date: 7/30/14
Motion Seq. No.: 3
JAMAICA AVENUE FUNDING, LLC, ET AL., Motion Calendar No. 2

Defendants.

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The following numbered papers read on this motion by defendants Jamaica Avenue Funding, LLC (Jamaica Avenue), Club Capital, LLC (Club Capital), ERG Property Advisors, LLC (ERG Property), and James Guarino pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them; and this motion by defendants Harris Beach PLLC (Harris Beach) and Robert Chanis pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them, and for an award of costs and attorneys' fees, including sanctions against plaintiff and plaintiff's counsel pursuant to 22 NYCRR 130-1.1; and this cross motion by plaintiff for leave to enter a default judgment against defendants Club Capital, LLC, Harris Beach and Chanis.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	EF #37-57, 86-119
Notice of Cross Motion- Affidavits - Exhibits	EF #135-148
Answering Affidavits - Exhibits	EF #73-85

Reply Affidavits .....EF #149-154

Upon the foregoing papers it is ordered that the motions with sequence numbers 2 and 3 are consolidated only for the purpose of disposition and are determined as follows:

Plaintiff commenced this action by filing a summons with notice on April 16, 2014. In his complaint, plaintiff alleges that defendants conspired to gain possession of a promissory note and mortgage dated May 12, 2006 encumbering his real property known as 202-19 Jamaica Avenue, Queens, New York. Plaintiff executed the mortgage in the original principal amount of $427,500.00 and with an adjustable rate of interest (capped at a 13.125% APR) in connection with his purchase of the property, and the mortgage was assigned, through a series of assignments to defendant Jamaica Avenue Funding, LLC. Prior to its assignment to defendant Jamaica Avenue Funding, LLC on February 28, 2014, the mortgage loan was in arrears. Plaintiff entered into a forbearance agreement dated as of June 7, 2012 with U.S. Bank National Association, as Trustee (U.S. Bank), the then holder of the note and mortgage, to avert foreclosure. The forbearance agreement contained an acknowledgment by plaintiff that the total mortgage debt owed as of June 7, 2012 was $430,528.57, and required plaintiff to pay certain amounts towards current interest and arrears, and taxes and insurance during the forbearance period ending July 1, 2013. The forbearance agreement provided, among other things, that upon plaintiff's timely and full payments during the forbearance period, the note and mortgage would be modified to reflect a principal balance in the amount of $372,932.29, and that a balloon payment in the amount of $40,395.71 would be due at the maturity of the original loan documents on September 1, 2031. The forbearance agreement also provided that upon a default by plaintiff thereunder, the mortgage debt would become immediately due and payable, and permitted the lender to proceed with foreclosure. Plaintiff alleges that near the end of the forbearance period, Jemcap, LLC (Jemcap), U.S. Bank's servicing agent, learned of an open tax lien on the property. Plaintiff allegedly paid the tax lien in full, and negotiated an agreement with Jemcap, whereby Jemcap agreed to a lump-sum payoff in the amount of $300,000.00 of the mortgage loan then totaling approximately $482,425.00. Plaintiff contacted "hard money" lenders to obtain a loan to fund the discounted payoff, and allegedly secured a commitment from a lender offering a two-year loan at 15% APR interest, plus fees and closing costs. Plaintiff however allegedly ended his search for financing when defendant Guarino, the principal of defendants Jamaica Avenue, Club Capital and ERG Property, and ERG Property agreed to make him a one-year loan at 12% APR interest, with an option for a one-year extension, plus a 4% brokerage fee payable at closing, with the condition that upon default under the loan, the transaction would be restructured as a "note purchase with forbearance" and "the full amount of the unpaid principal balance on the existing loan would come due." Plaintiff alleges he introduced defendants to Jemcap based upon their misrepresentation that they needed to perform due

diligence to evaluate the validity of the debt and title to the property. Plaintiff also alleges that instead of scheduling a closing at which both the "note purchase and the hard money loan" transactions would be closed, defendants purchased the note and mortgage from Jemcap at the discounted price of $300,000.00, and then demanded plaintiff agree to loan terms for a short-term usurious loan. Plaintiff further alleges that defendants conspired to interfere with his prospective economic advantage by "converting" the discount he had negotiated with Jemcap, for their own use and attempted to craft a loan transaction which would disguise their usurious intent and theft of his equity. Plaintiff asserts causes of action for tortious interference with contractual relations, tortious interference with prospective economic advantage, conversion, usury, fraudulent inducement and unjust enrichment; seeks to declare the transaction as void, to expunge the recorded assignment to defendants and to "award possession" of the mortgage to plaintiff; and seeks an award of damages, including attorneys' fees, or in the alternative, to permit plaintiff to payoff the subject mortgage for $300,000.00, minus the legal fees and costs incurred in bringing this action.

Defendants Jamaica Avenue, Club Capital, ERG Property and Guarino move pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them, and defendants Chanis and Harris Beach move pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them and pursuant to 22 NYCRR 130-1.1 for an award of sanctions against plaintiff and his counsel. Plaintiff claims that defendants Club Capital, Harris Beach and Chanis are in default in answering the complaint. He opposes the motion by defendants Chanis and Harris Beach as untimely made and barred under the "single motion" rule, and cross moves for leave to enter a default judgment against defendants Club Capital, Harris Beach and Chanis. Defendants Harris Beach and Chanis oppose the cross motion.

Defendants Harris Beach and Chanis served a notice of appearance and made a timely demand for the complaint on April 29, 2014 (*see* CPLR 3012[b]). Plaintiff filed a copy of the complaint on May 19, 2014, and in response, defendants Harris Beach and Chanis e-filed their motion to dismiss the complaint. The motion by defendants Harris Beach and Chanis was marked off the calendar on July 1, 2014, without consideration of the merits and did not result in an order. Their counsel admittedly arrived late at the calendar call due to traffic delays. Defendants Harris Beach and Chanis refiled their motion to dismiss on July 9, 2014.

On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default (*see* CPLR 3215[f]). Under CPLR 3211(e), a motion to dismiss a complaint pursuant to CPLR 3211(a) may be made at any time before service of the responsive pleading is required but no more than one such motion shall be permitted (*see Ramos v City of New York*, 51 AD3d 753 [2008]).

In lieu of answering, defendants Harris Beach and Chanis timely served the motion to dismiss the complaint insofar as asserted against them upon plaintiff on June 9, 2014 (CPLR 2103[b][7]; 3012[a]; 3211[e]). Defendants Harris Beach and Chanis therefore are not in default in failing to answer or move in relation to the complaint. In addition, the failure by counsel for defendants Harris Beach and Chanis to appear at the motion calendar in support of their motion was not wilful and is excusable. Plaintiff, having had notice of the arguments by those defendants that the complaint fails to state a cause of action against those defendants, has failed to demonstrate any prejudice to him resulting from their short delay in re-filing the motion on July 9, 2014. The refiling of the motion does not violate the "single motion" rule, which is meant to prevent repetitive motions to dismiss (*see* CPLR 3211[e]; *Schwartzman v Weintraub*, 56 AD2d 517 [1st Dept 1977]), or subsequent motions to dismiss on alternative grounds (*see e.g. McLearn v Cowen & Co.*, 60 NY2d 686 [1983]). Under the circumstances of this case, and in light of the strong public policy in favor of deciding matters on their merits, that branch of the cross motion by plaintiff for leave to enter a default judgment as against defendants Harris Beach and Chanis is denied, and the motion by defendants Harris Beach and Chanis to dismiss the complaint insofar as asserted against them shall be entertained by the Court.

With respect to the branch of the cross motion by plaintiff for leave to enter a default judgment as against defendant Club Capital, plaintiff offers an affidavit of service indicating service of process upon defendant Club Capital pursuant to Limited Liability Law § 303, by delivery of duplicate copies of the summons with notice to the Secretary of State on April 16, 2014 and payment of the appropriate fee. Service of process on a limited liability company is complete when the Secretary of State is so served (Limited Liability Law § 303[a]). The motion made by defendant Club Capital to dismiss the complaint insofar as asserted against it was not made within the time provided by CPLR 320(a). See also CPLR 3211[e], [f]. Defendant Club Capital does not seek to extend its time to make such motion or to permit late service of an answer and does not proffer any excuse for its delay in making the untimely motion pursuant to CPLR 3211(a)(7) or its default in answering (*see McGee v Dunn*, 75 AD3d 624 [2d Dept 2010]; *cf. Hense v Baxter*, 79 AD3d 814 [2d Dept 2010]). Plaintiff, however, has failed to present an affidavit indicating additional service of the summons by first class mail has been made upon defendant Club Capital at its last known address at least twenty days before the entry of judgment (CPLR 3215[g][[4][I]; *see Crespo v A.D.A. Management and Mandy Associates, LLC*, 292 AD2d 5 [1st Dept 2002]; *Cars & Manniello, P.C. v MLG Capital Assets LLC*, 2003 WL 1093402, 2003 NY Slip Op 50598[U] [NY City Ct, White Plains, March 4, 2003]). Under such circumstances, that branch of the cross motion by plaintiff for leave to enter a default judgment as against defendant Club Capital is denied. The motion by defendant Club Capital to dismiss the complaint insofar as asserted against it is denied (*see* CPLR 320 [a]; 3211[e]; *McGee v Dunn*, 75 AD3d 624).

With respect to the motion by defendants Jamaica Avenue, ERG Property, Guarino and the motion by defendants Harris Beach and Chanis, statements in a pleading must be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action (CPLR 3013). In considering a motion to dismiss a complaint for failure to state a cause of action (*see* CPLR 3211[a][7]), the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rochdale Vil. v Zimmerman*, 2 AD3d 827 [2d Dept 2003]). The criterion is whether the proponent of the pleading has a cause of action, not whether it has stated one (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). " 'A party seeking dismissal on the ground that its defense is founded on documentary evidence under CPLR 3211(a)(1) has the burden of submitting documentary evidence that "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" ' " (*Sullivan v State of New York*, 34 AD3d 443, 445 [2d Dept 2006], quoting *Nevin v Laclede Professional Prods.*, 273 AD2d 453, 453 [2d Dept 2000]; *see Leon v Martinez*, 84 NY2d at 88)" (*Uzzle v Nunzie Ct. Homeowners Assn., Inc.*, 70 AD3d 928 [2d Dept 2010]).

With respect to the claim for tortious interference with contract, the elements of tortious interference with a contract are "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]) (*see Bernberg v Health Management Systems, Inc.*, 303 AD2d 348 [2d Dept 2003]). The complaint herein does not allege that Jemcap breached the alleged contract to sell the note and mortgage to plaintiff. Thus, it is insufficient to state a cause of action against defendants Jamaica Avenue, ERG Property, Harris Beach and Chanis for intentional interference with contractual relations.

With respect to the claim for tortious interference with prospective economic advantage, this cause of action is established where a defendant uses wrongful means to engage in conduct directed at a third party with whom a plaintiff has or seeks to have a business relationship, causing damage to the plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]; *see also White v Ivy*, 63 AD3d 1236, 1238 [3d Dept 2009]). Plaintiff alleges he sought a hard money loan from defendants to take advantage of the discounted payoff negotiated with Jemcap, and that defendants wrongfully used the information he supplied to them regarding the debt to purchase the note and mortgage directly from Jemcap, thereby interfering with his business relationship with Jemcap. Plaintiff, however, makes no allegation that he personally had the financial ability to take advantage of the negotiated

discounted payoff with Jemcap without obtaining financing from a lender. Plaintiff hence cannot establish that but for the alleged wrongful interference of defendants Jamaica Avenue, ERG Property, Guarino Harris Beach and Chanis, he would have been able to payoff the mortgage. Plaintiff also has failed to identify the "wrongful means" used by defendants Jamaica Avenue, ERG Property, Guarino Harris Beach and Chanis to interfere with any prospective economic relations with Jemcap. Allegations of mere self-interest or economic motivations do not suffice (*see Monex Financial Services, Ltd. v Dynamic Currency Conversion, Inc.*, 62 AD3d 675 [2d Dept 2009]). To the extent plaintiff alleges that he expected to enter a forbearance agreement with defendants Jamaica Avenue, ERG Property and Guarino, and defendants Jamaica Avenue, ERG Property and Guarino tortiously interfered with such prospective contract, the complaint fails to state a cause of action against them for tortious interference with prospective economic advantage since they are not a third party. The complaint fails to state a cause of action against defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis for tortious interference with prospective economic advantage.

With respect to the claim against defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis based upon usury, plaintiff does not allege that defendants Harris Beach or Chanis made a loan to plaintiff or charged plaintiff interest. To the extent plaintiff alleges that defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis are the holders of the note and mortgage, plaintiff makes no allegation that the note and mortgage call for payment of a usurious rate of interest. To the extent plaintiff alleges that those defendants "attempted to coerce" him into accepting usurious terms in a proposed forbearance agreement, plaintiff has failed to allege he entered into a forbearance agreement with any defendant. The complaint additionally lacks any allegation of a usurious interest rate. The price allegedly paid by defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis to Jemcap to purchase the note and mortgage is not relevant to the amount of interest being charged to plaintiff pursuant to the terms of the note and mortgage. Under such circumstances, the complaint fails to state a cause of action for usury against defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis.

To state a cause of action for unjust enrichment, a plaintiff must allege that the defendant was enriched, the enrichment came at the plaintiff's expense, and to permit the defendant to retain what the plaintiff seeks to recover would be " 'against equity and good conscience' " (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 , quoting *Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]; *Baron v Pfizer, Inc.*, 42 AD3d 627, 629–630 [3d Dept 2007]). As a general rule, the existence of a valid and enforceable written contract governing a particular subject matter precludes recovery in quasi-contract on theories of quantum meruit and unjust enrichment for events arising out of the same subject matter (*see Marc Contracting, Inc. v 39 Winfield Associates, LLC*, 63 AD3d 693 [2d Dept

2009]). The complaint herein alleges that defendants have been enriched through "possession of the Subject Mortgage." Plaintiff, however, makes no claim the note and mortgage are invalid or unenforceable, or that defendants Chanis and Harris Beach are holders of the underlying note and mortgage. The allegation that defendants Jamaica Avenue, ERG Property and Guarino purchased the note and mortgage, cannot serve as the predicate for the unjust enrichment claim, insofar as a holder of the note and mortgage has the contractual right to enforce such note and mortgage pursuant to their terms. Therefore, plaintiff has failed to state a cause of action to recover for unjust enrichment as against defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis.

With respect to the claim for fraudulent inducement, the elements of a cause of action alleging fraud in the inducement are representation of a material existing fact, falsity, scienter, reliance and injury (*see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 407 [1958]; *Urstadt Biddle Props., Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2d Dept 2009]; *Urquhart v Philbor Motors, Inc.*, 9 AD3d 458, 458-459 [2d Dept 2004]). Plaintiff, in his complaint, fails to allege defendants Harris Beach or Chanis made any false misrepresentations to him, upon which he relied to his detriment. Rather, plaintiff alleges that defendants ERG Property and Guarino misrepresented they intended to provide him with a hard money loan to payoff the subject mortgage but needed to perform due diligence, so to induce plaintiff to introduce them to Jemcap. Plaintiff also alleges that such defendants intended to obtain the note and mortgage for themselves, so to convert equity in the property for their own use. To the extent plaintiff admits defendants ERG Property and Guarino represented they needed to conduct due diligence before making any loan to him, plaintiff cannot have reasonably relied upon any representation by defendants that they would give him a loan on the terms he sought. The complaint fails to state a cause of action against defendants Jamaica Avenue, ERG Property, Guarino, Harris Beach and Chanis for fraudulent inducement.

That branch of the motion by defendants Jamaica Avenue, ERG Property and Guarino to dismiss the complaint insofar as asserted against them is granted. That branch of the motion by defendants Harris Beach and Chanis to dismiss the complaint insofar as asserted against them is granted. That branch of the motion by defendants Harris Beach and Chanis for an award of sanctions, including attorneys' fees, against plaintiff and plaintiff's counsel is denied in an exercise of this Court's discretion (22 NYCRR 130-1.1[a]; *see Wagner v Goldberg*, 293 AD2d 527 [2d Dept 2002]).

Dated: 12/8/14

VALERIE BRATHWAITE NELSON, J.S.C.