

Yarbro v Wells Fargo Bank, N.A.

2014 NY Slip Op 33449(U)

February 6, 2014

Supreme Court, New York County

Docket Number: 153031/2014

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ERIC YARBRO and GRACE YARBRO, Plaintiffs, INDEX NO. 153031/2014
MOTION DATE 01-28-2015
MOTION SEQ. NO. 007
MOTION CAL. NO.

WELLS FARGO BANK, N.A., US BANK NATIONAL ASSOCIATION, as Trustee for TSAA HOME EQUITY TRUST 2007-9 ASSET BACKED CERTIFICATES SERIES 2007-09, VISIONS FEDERAL CREDIT UNION, as Successor by Merger to PARAGON FEDERAL CREDIT UNION, CAMBRIDGE ABSTRACT, LTD., CITIBANK, NATIONAL ASSOCIATION, as Trustee for TSSA HOME EQUITY TRUST 2007-9 ASSET BACKED CERTIFICATES SERIES 2007-09, MARCO MATERASSI P.C., MARCO MATERASSI, ESQ., MANDEEP KAUR, ESQ., DOMINIC SARNA, ESQ., FIDELITY NATIONAL TITLE INSURANCE SERVICES, INC., and JOHN DOE CORP.

Defendants

The following papers, numbered 1 to 7 were read on this motion to dismiss.

Table with 2 columns: Description of papers and PAPER NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that this motion to dismiss the Amended Complaint as against defendant Dominic Sarna, Esq. is granted.

Eric and Grace Yarbro (herein "Plaintiffs") purchased their home located at 240-45 43rd Avenue, Douglaston, New York (herein "Home") in September of 2004 for \$1,310,000 by obtaining a mortgage in the amount of \$999,999. From 2004 through 2006, Plaintiffs obtained a second, third, and fourth subordinate mortgage loan from defendant Visions Federal Credit Union (herein "Visions") in the form of a home equity line of credit. In May of 2007, the Plaintiffs refinanced their Home with defendant Wells Fargo Bank, N.A. (herein "Wells Fargo") for a loan in the amount of \$1,470,000 (herein "First Mortgage"), thereby paying off the prior mortgage and subordinate mortgages. After receiving the funds from Wells Fargo, Visions granted plaintiff a subordinate credit line mortgage home equity loan in the amount of \$500,000 (herein "Second Mortgage").

After the closing, the liens on the Home held by Wells Fargo (First Mortgage) and Visions (Second Mortgage) were recorded, in error, in reverse order, thereby giving the Second Mortgage priority in the deed over the First Mortgage. In February 2009 Wells Fargo assigned the First Mortgage to defendant U.S. Bank National Association, as the Trustee for TSAA Home Equity Trust 2007-9 Asset Backed Certificates Series 2007-09, Ltd. (herein "U.S. Bank"). In March of 2009, upon the Plaintiffs' default on their loan payments, Wells Fargo commenced a foreclosure action in the Supreme Court, Queens County against the Plaintiffs (Index No. 5216/2009 - herein "Queens Action"). The

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

Plaintiffs failed to timely answer the Queens Action and were in default. Three years after the default, the Plaintiffs moved by Order to Show Cause for leave to file a late answer, which was denied. The Plaintiffs then moved pursuant to CPLR §3216 to dismiss the Queens Action for want of prosecution, which was denied on February 6, 2014 as the Plaintiffs "failed to comply with the statutory pre-condition of serving the answer." The Queens Action is still pending.

After the denial of the motion to dismiss for failure to prosecute in the Queens Action, the Plaintiffs commenced the instant action on March 31, 2014 by Summons and Complaint. The Complaint alleges that due to these errors at the closing, the Plaintiffs sustained financial injury. The Plaintiffs assert causes of action against all parties involved in the closing.

Defendants Cambridge Abstract Ltd., Wells Fargo, and U.S. Bank moved pre-answer to dismiss the Amended Complaint, which this Court granted because the statute of limitations had expired.

The Amended Complaint alleges that three years after the foreclosure action was commenced in Queens County, defendant Dominic Sarna, Esq. contacted plaintiffs, identified himself as an attorney for Wells Fargo, and promised to resolve the lien priority issue and obtain a modification of plaintiffs' outstanding mortgages (see Amended Complaint ¶¶ 66-70, 176). The Amended Complaint further alleges that plaintiffs believed Sarna was their attorney and acted on their behalf (*Id.*). The Amended Complaint asserts causes of action for bad faith, legal malpractice, violation of Judiciary Law §487 as against Sarna.

Sarna now moves to dismiss the Amended Complaint as against him pursuant to CPLR §3211(a)(1),(5)&(7) arguing that the doctrine of collateral estoppel precludes the causes of action asserted against him; that the causes of action for bad faith and legal malpractice are duplicative; and that plaintiffs fail to state a cause of action for legal malpractice and violation of Judiciary Law §487.

There is no basis at law for a cause of action for bad faith. Plaintiffs do not oppose dismissal of the bad faith cause of action. Further, the allegations in the Amended Complaint for bad faith and legal malpractice are duplicative. The Seventh cause of action for bad faith against Sarna is severed and dismissed.

On a motion to dismiss, non-moving parties are accorded the benefit of every possible favorable inference (See *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970 [1976]), and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). The test of the sufficiency of a complaint is whether liberally construed it states in some recognizable form a cause of action known to the law (*Union Brokerage, inc., v. Dover Insurance Company*, 97 A.D. 2d 732, 468 N.Y.S.2d 885 [1st. Dept. 1983]).

“Recovery for professional malpractice against an attorney requires proof of three elements: (1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages (Mendoza v. Schlossman, 87 AD2d 606, 607, 448 NYS2d 45 [1982]). It requires the plaintiff to establish that counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that ‘but for’ the attorney’s negligence the plaintiff would have prevailed in the matter or would have avoided damages (Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker, 56 A.D.3d 1, 865 N.Y.S.2d 14, 15 [1st Dept., 2008], citing to, AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434, 866 NE2d 1033, 834 NYS2d 705 [2007])

The Amended Complaint alleges that Sarna was negligent in failing to disclose that he was counsel for defendant Stewart Title Insurance Company, and that Sarna induced plaintiffs into providing personal and confidential information. The Amended Complaint fails to allege that ‘but for’ the negligence of Sarna, plaintiffs would have prevailed in the foreclosure action, would have timely answered and successfully defended the foreclosure action, and would have avoided damages in the foreclosure action. Further, the decision rendered by Justice Siegal dated March 22, 2013 denied plaintiffs’ Order to Show Causes to file a late answer more than three years after the commencement of the foreclosure action. Plaintiffs were served with the Summons and Complaint in the foreclosure action on March 11, 2009 and moved in July of 2012 to file a late answer.

Justice Siegal held that Erik Yarbro’s claim that “my attorney told me that I can show that I did not answer the foreclosure because I was told by Wells Fargo that it was unnecessary to do so,” and that alleged statements by Sarna that he worked for Wells Fargo and that plaintiffs did not have to answer the foreclosure action did not give rise to a reasonable excuse pursuant to CPLR §3012(d) [see Aff. in Supp., Exhibit D]). Justice Siegal also held that plaintiffs failed to set forth a meritorious defense. Plaintiffs did not “dispute the fact that they are in default and blamed their inability to pay the mortgage on a drastic decrease in Eric Yarbro’s income” (Id.).

The Amended Complaint fails to state a valid cause of action for legal malpractice as against moving defendant. The Tenth cause of action for legal malpractice against Sarna is severed and dismissed.

Judiciary Law §487 states that:

An attorney or counselor who:

- 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,**
 - 2. Wilfully delays his client’s suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,**
- Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.**

The Amended Complaint states that Sarna is an attorney admitted to practice in the State of New York, and [t]hat in violation of Judiciary Law 487 and Sections 1.6 and 1.7 of the Rules of Professional Conduct, said defendant Dominic Sarna did during the course of the foreclosure proceeding, practice deceit or collusion, or did consent to deceit or collusion, with intent to deceive the Plaintiffs" (see Amended Complaint ¶¶ 301). Plaintiffs' claims of deceit or collusion are not "pleaded with sufficient particularity" and "plaintiffs' assertions of scienter are conclusory, lacking sufficient facts to support such an inference" (Briarpatch Ltd., L.P. v. Frankfurt, Garbus, Klein & Selz, P.C., 13 A.D.3d 296, 297-298, 787 N.Y.S.2d 267 [1st Dept., 2004]).

The Eighteenth cause of action for violation of Judiciary Law §487 as against Sarna is severed and dismissed.

Accordingly, it is ORDERED that defendant Dominic Sanra, Esq.'s pre-answer motion to dismiss the Amended Complaint is granted, and it is further,

ORDERED, that the causes of action for bad faith, legal malpractice, violation of Judiciary Law §487 as against Sarna asserted in the Amended Complaint are hereby severed and dismissed, and it is further,

ORDERED, that the Clerk of the Court enter judgment accordingly.

Enter: **MANUEL J. MENDEZ**
~~_____~~ **J.S.C.**

Dated: February 6, 2014


MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE