Jaybar Realty Corp. v Armato
2014 NY Slip Op 34022(U)
November 19, 2014
Supreme Court, Westchester County
Docket Number: 57692/13
Judge: Mary H. Smith

DECISION AND ORDER

FILED & ENTERED
11/19/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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JAYBAR REALTY CORP. and JB PARKS PLACE REALTY, LLC,

Plaintiffs,

MOTION DATE: 11/14/14
INDEX NO.: 57692/13

-against-

JOSEPH ARMATO, ADJUSTRITE, INC., MICHAEL CASTELLANO a/k/a MIKE CASTELLANO, VENETIAN CONTRACTING, INC., NATIONWIDE CONTRACTING CONSULTING, INC., CAPITAL ONE, N.A. a/k/a CAPITAL ONE BANK (USA), N.A. a/k/a CAPITAL ONE FINANCIAL CORP., SANTANDER BANK, N.A. f/k/a SOVEREIGN BANK, N.A.,

Defendants.

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The following papers numbered 1 to 8 were read on this motion by defendant Santander Bank, N.A., f/k/a Sovereign Bank, N.A. for an Order dismissing the complaint pursuant to CPLR 3211, subdivision (a), paragraph 7.

Papers Numbered

Notice of Motion - Affirmation (Malloy) - Exhs. (1-4)[1] - Memorandum of Law 1-4

[1]This Part's Published Rules require separately tabbed motion exhibits.

Answering Affirmation (Addona) - Exhs. (1-6) - Memorandum of Law 5-7
Replying Memorandum of Law 8

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendant Santander Bank, N.A., f/k/a Sovereign Bank, N.A. ("Santander") is disposed of as follows:

The complicated set of facts in this action previously have been set forth at length by this Court in its 13-page, May 19, 2014, Decision and Order, addressing, inter alia, then third-party defendant Santander's pre-answer motion to dismiss. The facts shall not be repeated herein, except to the extent necessary for this Court's analysis of the sub judice motion. After issuance of this Court's Decision and Order, plaintiffs had served their amended complaint naming Santander a direct defendant and pleading sixteen separate causes of action against defendants. As against defendant Santander, plaintiff has pleaded claims for conversion (second cause of action), unjust enrichment, monies had and received and constructive trust (collectively third cause of action), damage to property (twelfth cause of action), equity (thirteenth cause of action), negligence (fourteenth and fifteenth causes of action) and breach of fiduciary duty (sixteenth cause of action). Presently, defendant Santander is moving to dismiss plaintiff's complaint, arguing that no viable cause of action as against it has been stated.

As previously noted by this Court, on a motion to dismiss a cause of action, the Court initially must accept the facts alleged in the complaint as true, giving the plaintiff the benefit of every possible inference, and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. See Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); People v. New York City Transit Authority, 59 N.Y.2d

343, 348 (1983); Morone v. Morone, 50 N.Y.2d 481 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98 (3rd Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821 (2nd Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable intendment. See Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 868 (2nd Dept. 1980); Penato v. George, 52 A.D.2d 939 (2nd Dept. 1976). The test is whether the pleading gives notice of the transactions relied upon by the plaintiff and whether sufficient material elements of the cause of action have been asserted. See Stoianoff v. Gahona, 248 A.D.2d 525, 526 (2nd Dept. 1998).

Where extrinsic evidentiary material is considered, the Court need not assume the truthfulness of the pleaded allegations. The criterion to be applied in such a case is whether the plaintiff actually has a cause of action, not whether he has properly stated one. Guggenheimer v. Ginzburg, supra at 275; Kaufman v. International Business Machines Corp., 97 A.D.2d 925 (3rd Dept. 1983), affd. 61 N.Y.2d 930 (1984); Rappaport v. International Playtex Corporation, 43 A.D.2d 393, 395 (3rd Dept. 1974). Thus where it has been shown that a material fact or facts as claimed by the plaintiff "have been negated beyond substantial question" by the documentary evidence or affidavits and other evidentiary submissions, and/or where the very allegations set forth in the complaint fail to support any cause of action, the complaint should be dismissed. See CPLR 3211, subd. (a), par. 1; DePaulis Holding Corp. v. Vitale, 66 A.D.3d 816, 818 (2nd Dept. 2009); Biondi v. Beekman Hill House Apartment Corp., 257 A.D.2d 76 (1st Dept. 1999), affd. 94 N.Y.2d 659 (2000); Robinson v. Robinson, 303 A.D.2d 234 (1st Dept. 2003).

Applying the foregoing principles of law to the facts at bar, and upon careful consideration of the parties' respective arguments, defendant Santander's dispositive motion is granted in full and all stated causes of action are hereby dismissed as against it.

The second cause of action for conversion is dismissed because there is no view of the facts upon which it can be found that Santander had exercised unauthorized dominion over the insurance proceeds to the exclusion of plaintiffs' right, see Korsinsky v. Rose, 120 A.D.3d 1307 (2nd Dept. 2014); National Center for Crisis Management, Inc. v. Lerner, 91 A.D.3d 920 (2nd Dept. 2012), the undisputed facts demonstrating that Santander had made the insurance proceed checks payable to plaintiffs and had mailed same to Mr. Barone's apparent if not actual agent, in accordance with Mr. Barone's written authorization directing such.

The third cause of action for unjust enrichment and constructive trust also are unavailing since plaintiffs do not allege, nor can it be demonstrated, that Santander in fact had received money or a benefit at plaintiffs' expense which in good conscience it cannot keep, see Hairman v. Jhawarer, 2014 WL 5638549 (2nd Dept. 2014); Goldman v. Simon Property Group, Inc., 58 A.D.3d 208, 220 (2nd Dept. 2008), or that it is holding any property that it is under a duty to convey to plaintiffs. See Enzien v. Enzien, 96 A.D.3d 1136, 1137 (3rd Dept. 2012).

Similarly, plaintiffs' third cause of action, to the extent it alleges a claim for monies had and received, is hereby dismissed. The essential elements of a cause of action for money had and received are that the defendant received money belonging to the plaintiff, that the defendant benefitted from receipt of the money, and under the principles of equity

and good conscience the defendant should not be permitted to keep the money. See Lebovits v. Bassman, 120 A.D.3d 1198 (2nd Dept. 2014). No such elements properly have been pleaded, nor can any element of such a cause of action be demonstrated upon the facts presenting.

Plaintiffs' twelfth cause of action for property damage also is hereby dismissed. While this Court does not dispute that plaintiffs properly may claim in the circumstances presenting that they have sustained property damage, the Court agrees with Santander that plaintiffs have failed properly to state any separate theory against Santander supporting such damages. Plaintiffs have failed to specifically identify what actions by Santander proximately had caused their property damage and, as this Court finds infra, there does not exist any basis for finding that Santander's actions had been a direct and substantial factor in causing damage to plaintiffs' property.

Plaintiffs' thirteenth cause of action alleging in conclusory terms a claim for equity too is hereby dismissed as against all defendants. Plaintiffs have stated actions at law for which they are seeking monetary damages, and they are not seeking any relief other than monetary damages. In this circumstance, the Court finds no basis for an independent "equity" claim.

Defendant Santander's motion seeking dismissal of the fourteenth cause of action alleging that Santander had been negligent in failing to investigate the legitimacy of the authorization that had been presented to it by Venetian, a third party, directing payment of the insurance proceeds to that third-party, also is granted.

Established law provides that where the acts of a third party intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically

severed but instead turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant. See Martinez v. Lazaroff, 48 N.Y.2d 819 (1979); Megally v. LaPorta, 253 A.D.2d 35 (2nd Dept. 1998). If the intervening act is extraordinary under the circumstances, and not foreseeable in the normal course of events or independent of, or far removed from the defendant's conduct, it may be a superseding act which breaks the causal nexus. See Ruocco v. L-K Bennett Enterprises, LLC, 31 Misc.3d 1214(A) (Sup. Ct. Or. Co. 2011). Generally, "an intervening intentional or criminal act will generally sever the liability of the original tort-feasor." Kush v. City of Buffalo, 59 N.Y.2d 26, 33 (1983). Although the issue of proximate cause is generally one for the finder of fact, see Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315, (1980), it is clear that "liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes. (Citations omitted)." Castillo v. Amjack Leasing Corp., 84 A.D.3d 1298 (2nd Dept. 2011).

This Court cannot find that the injury-producing intentional act of Venetian's having endorsed and deposited into its bank account checks that had been made payable to Jaybar and Park Place had been a foreseeable consequence of Santander's simple mailing of said checks to Venetian, and thus the Court finds that Santander's negligence in mailing the checks, if any, had been superseded by Venetian's wrongful actions. Even assuming that Santander had been negligent in failing to investigate whether the

authorization given to it bearing Mr. Barone's signature in fact had been legitimate before its having mailed to Venetian certain insurance proceed checks,[2] which finding however this Court does not herein make, the Court necessarily finds that any such negligence had not been the proximate cause of plaintiffs' damages but instead only had furnished the occasion for Venetian's fraudulent, if not criminal, actions in endorsing said checks and depositing same into its account as payment for work it had failed to do.

Based upon the same foregoing analysis, the Court also hereby dismisses plaintiffs' fifteenth cause of action alleging that Santander had been negligent in failing to undertake reasonable and adequate inspections of the construction work at the premises prior to its releasing the insurance proceeds. Even accepting plaintiffs' claim, vigorously disputed by Santander, that defendant Santander had undertaken a duty to inspect the construction work progress based upon its allegedly having charged a fee to perform said inspection and its having represented in separate letters both to plaintiffs and Venetian that it would not distribute the insurance proceeds until it had inspected the property, and that Santander had breached said duty in failing to have undertaken the required inspections, this Court does not find that said negligence proximately had caused plaintiffs' damages. Rather, again, plaintiffs' damages solely had flowed from Venetian's unforeseeable act of endorsing and depositing into its own account the checks that Santander had mailed to Venetian but which had been made payable to Jaybar and Park Place.

Finally, the Court dismisses plaintiffs' sixteenth cause of action pleading breach of a fiduciary duty predicated upon defendant Santander's alleged promise that it would not

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[2]Mr. Barone's signature has not been proven to have been forged.

release insurance proceeds until after it had inspected the premises and had confirmed that the construction work had been performed. Damages for breach of a fiduciary duty may be recovered only where there exists a fiduciary relationship, there has been misconduct by the defendant, and the alleged damages directly had been caused by the defendant's misconduct. See Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804, 807 (2nd Dept. 2011). Not only does this Court find that plaintiffs' mortgage relationship with defendant Santander had been that of a commercial arm's length nature, not that fiduciary in nature, see Dobroshi v. Bank of America, N.A., 65 A.D.3d 882, 884 (1st Dept. 2009); Taberna Preferred Funding II, Ltd. v. Advance Realty Group LLC, 45 Misc.3d 1204(A) 2014 WL 4974959 (Sup. Ct. NY Co. 2014), but the Court also finds that no misconduct by Santander, as typically is in the nature of fraud, has been asserted, nor demonstrated on the facts at bar. Once again, as above-stated, plaintiffs' damages are not found to have been proximately caused by Santander's actions, whether negligent or not.

Defendant Santander's dismissal motion therefore is granted in its entirety. This action is hereby severed and Ordered continued. The parties shall appear in the Compliance Conference Part, Room 811, at 9:30 a.m., on December 9, 2014.

Dated: November 19, 2014
White Plains, New York

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J.S.C.

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