

O'Reilly v 341 Vernon Holding, LLC

2015 NY Slip Op 32990(U)

September 8, 2015

Supreme Court, Kings County

Docket Number: Index No. 500822/15

Judge: Edgar G. Walker

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

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FELICIA O'REILLY,

Plaintiff(s),

Hon. Edgar G. Walker
Part 90

-against-

Index No. 500822/15

341 VERNON HOLDING, LLC, and
CONTINENTAL CAPITAL GROUP, LLC,

Defendant(s).

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The branch of the plaintiff's motion seeking the removal of several proceedings which are pending before the Civil Court of the City of New York under L&T index numbers 98380/14, 98381/14 and 98382/14, and having them consolidated with the within matter, is denied. The branch of the plaintiff's motion enjoining and restraining defendant 341 VERNON HOLDING, LLC (hereinafter referred to as defendant 341) from further encumbering and/or transferring title to the building known as, and located at, 425 East 35th Street, Brooklyn, New York, is granted, and the above referenced Civil Court actions are stayed, all pending the outcome of the within action. Defendant 341's cross motion to dismiss the verified complaint, pursuant to CPLR §3211(a)(1) and (7), is denied in its entirety.

This is an action based upon an alleged fraudulent inducement and transfer of real property. In February of 2005, the plaintiff purchased property located at 425 East 35th Street in Brooklyn, New York. Although the plaintiff was the named title holder to the property, she claims that she was only able to purchase the property with the financial assistance of non-party Mitzie Simon-Ross; that Ms. Simon-Ross was the individual who was "responsible for making the monthly payments that were due on the mortgage", which Ms. Simon-Ross confirms in her affidavit, which is annexed to the plaintiff's papers; and that Ms. Simon-Ross and some family members also resided in some of the apartments located within the premises. According to the affidavits of both the plaintiff and Ms. Simon-Ross, at some point Ms. Simon-Ross fell behind in the mortgage payments, and in 2012 a foreclosure proceeding was commenced against the plaintiff. According to the affidavits, out of concern about both retaining her financial interest in

the property, as well as remaining in possession of the building and apartments, Ms. Simon-Ross, through a friend of her father, was introduced to non-party Quinn Isaac, who claimed to be a mortgage broker. Both the plaintiff and Ms. Simon-Ross assert that Mr. Quinn gained their confidence and assured them that he would help to “save” the building by finding a company that would pay off the outstanding mortgage debt, which could be reimbursed at a later date, and that they could remain and continue to live in the building.

Allegedly unbeknownst to Ms. Simon-Ross, the plaintiff had agreed to meet with Mr. Isaac in July of 2014 to sign certain documents that she was told would help Ms. Simon-Ross. Both the plaintiff and Ms. Simon-Ross claim that it was not until later that they learned that the plaintiff had signed a deed which transferred ownership of the building to defendant 341. The plaintiff further claims that at that meeting in July of 2014, she “[d]id not have any legal counsel, and no one explained to me the significance of any of the documents”. The plaintiff further alleges that she never received a HUD-1 settlement statement; that there is no satisfaction of mortgage filed with Acris; that defendant 341 encumbered the subject property with two (2) mortgages, one for \$400,000 and one for \$100,000, both with defendant CONTINENTAL CAPITAL GROUP; and that defendant 341 commenced summary holdover proceedings against the occupants of the apartments in the building, despite Mr. Isaac’s assurances that the tenants would be able to remain in possession of their apartments. Finally, the plaintiff alleges that defendant 341, and “[i]ts sole member, Michael Lefkowitz, engaged in ‘equity stripping’ whereby they managed to get title to the building through a foreclosure rescue scam, and then get an additional \$500,000.00 by using the building as collateral.”

The plaintiff’s motion, which seeks removal and consolidation of the civil court actions with this action is denied as unnecessary at this juncture. The result of the within action will determine the viability of the holdover proceedings, which, more properly, belong before the L&T Court.

In its cross motion, Defendant 341 argues that, based upon “documentary evidence”, the plaintiff’s second, third, fourth, fifth and sixth causes of action should be dismissed. Defendant 341 also contends that the plaintiff’s seventh cause of action should be dismissed for “failure to state a cause of action”, and that the plaintiff’s first cause of action should be dismissed based upon both the documentary evidence and the plaintiff’s failure to state a cause of action.

It is well established that in order for a motion to dismiss to be granted based upon “documentary evidence”, the document must be, essentially, undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based. Berger v Temple Beth-El of Great Neck, 303 A.D.2d 346. The documentary evidence must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. Trade Source v Westchester Wood Works, 290 AD2d 437. Affidavits and emails do not qualify as “documentary evidence” for purposes of a motion to dismiss based upon documentary evidence. CPLR 2311(a)(1); U.S. Fire Ins. Co. v. North Shore Risk Management, 114 A.D.3d 408; Rodolico v Rubin & Licatesi, P.C., 112 A.D.3d 608.

As this case involves a transfer of real property, and all of the plaintiff's allegations and causes of action surround and involve the legitimacy of said transfer, defendant 341's reliance on the very documents that were and are at the center of this lawsuit is misplaced and, in the opinion of this Court, the documents in no way conclusively resolve all factual issues as a matter of law. In addition, the Court notes that defendant 341 offers both affidavits and e-mails in conjunction with the documentary evidence upon which it relies, which the Court will not consider on a CPLR §3211 motion to dismiss based upon documentary evidence. As such, the branch of its motion seeking dismissal of the plaintiff's first, second, third, fourth, fifth and sixth causes of action based upon documentary evidence is denied.

Defendant 341 also seeks dismissal of the plaintiff's first and seventh causes of action, based upon its contention that the plaintiff has failed to state a cause of action upon which relief can be granted. A complaint should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible favorable inference, a cause of action exists. Rovello v. Orofino, 40 NY2d 633. After reviewing the plaintiff's first cause of action, sounding in fraud and misrepresentation, the Court finds that the plaintiff has adequately stated a cause of action. Despite the specificity requirements set forth in CPLR §3016(b), it is well settled that “[t]he standard is simply whether the allegations are set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of, and this rule of pleading must not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting fraud.” Etzion v. Etzion, 62 A.D.3d 646; Pericon v. Ruck, 56 A.D.3d 635.

Finally, defendant 341 contends that the plaintiff's seventh cause of action, which is for rescission of the conveyance at issue pursuant to Real Property Law §265-a, should also be dismissed for failure to state a cause of action upon which relief can be granted. Upon review of the plaintiff's complaint, the Court finds that the plaintiff has satisfactorily pled a cause of action pursuant to §265-a of the Real Property Law, also known as the Home Equity Theft Prevention Act. Although defendant 341 attempts to argue that the plaintiff failed to allege that she was a resident at the time of the transfer, there is no requirement that such an allegation be pled, and defendant 341 offers nothing more than its conjecture as to whether the plaintiff was residing at the premises when the transfer at issue was effectuated. "Moreover, the Home Equity Theft Prevention Act is a remedial statute, designed to stem 'mortgage rescue' schemes, and its provisions should be liberally construed in favor of equity sellers." Lucia v Goldman, 68 A.D.3d 1064. Claims made pursuant to the Home Equity Theft Prevention Act "[n]eed not be predicated upon claims of forgery, fraud in the factum or fraudulent inducement, but may simply be predicated upon claims that the conveyance and concomitant mortgage violated the provisions of this statute." RPL §265-a; Wells Fargo Bank, NA v Edsall, 22 Misc.3d 1113(A).

Accordingly, the portion of the plaintiff's motion seeking removal and consolidation of holdover proceedings pending before the Civil Court of the City of New York under L&T index numbers 98380/14, 98381/14 and 98382/14, is denied, and the portion of the plaintiff's motion seeking an Order enjoining and restraining defendant 341 from further encumbering and/or transferring title to the building known as, and located at, 425 East 35th Street, Brooklyn, New York, is granted, and the above referenced Civil Court actions are stayed, all pending the outcome of the within action. Defendant 341's cross motion to dismiss the verified complaint, pursuant to CPLR §3211(a)(1) and (7), is denied in its entirety.

This constitutes the Decision and Order of the Court.

Dated: September 8, 2015



 HON. EDGAR G. WALKER, J. S.

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