Sucher v Goldman Sachs Group, Inc.
2016 NY Slip Op 30571(U)
April 7, 2016
Supreme Court, New York County
Docket Number: 653803/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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JOEL SUCHER and LAYLA SUCHER,

Plaintiffs,

Index No. 653803/14

-against-

GOLDMAN SACHS GROUP, INC., and OCWEN FINANCIAL CORPORATION,

Defendants.

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BANNON, J.:

Motion sequence numbers 001 and 003 are consolidated for disposition.

In motion sequence number 001, defendant Goldman Sachs Group, Inc. (Goldman Sachs), moves, pursuant to CPLR 3211 (a) (5)and (a) (7) and CPLR 3016 (b), to dismiss the complaint insofar as asserted against it. In motion sequence number 003, defendant Ocwen Financial Corporation (Ocwen) moves, pursuant to CPLR 3211 (a) (5) and (a) (7) and 3016 (b), to dismiss the fraud cause of action insofar as asserted against it, which is the only cause of action asserted against it in the complaint.

FACTS

This action arises out of a loan and mortgage given by plaintiffs, encumbering real property known as 460 Ridge Road, Hartsdale, New York, 10530, as security for the loan obligation. Plaintiffs defaulted on the obligation when they failed to make the

monthly installment that was due on January 1, 2006. Nonparty Litton Loan Servicing, L.P. (Litton), began servicing the loan on November 16, 2006. On July 1, 2009, a foreclosure action entitled *Wells Fargo Bank, N.A. v Sucher*, was commenced against the plaintiffs in the Supreme Court, Westchester County, under Index No. 14881/2009.

The plaintiffs commenced this action on December 11, 2014, alleging fraud as against Ocwen and Goldman Sachs (first cause of action) and interference with right of contract and/or prospective business advantage against Goldman Sachs (second cause of action). The complaint alleges that Goldman Sachs is the former owner of Litton, having purchased Litton in December 2007. It is in that capacity that plaintiffs sued it.

According to the complaint, the mortgage loan was originally owned by Washington Mutual. After plaintiff Joel Sucher declared bankruptcy in 2005, Quantum Servicing Corp. (Quantum) bought the loan from Washington Mutual. Quantum negotiated a forbearance agreement, dated June 21, 2006, with plaintiffs, a copy of which was never sent to plaintiffs. Litton became the new servicer of the loan in November 2006, and it, too, did not receive the forbearance agreement. Litton maintained that the sum outstanding for three months of missed payments was approximately $34,000. Litton and plaintiffs began negotiating a proposed forbearance agreement and a modification of the mortgage. In May 2007, the

loan modification was allegedly approved, but the legal materials pertaining to the loan modification were not produced. In December 2007,[1] Litton advised plaintiffs that it would not honor the forbearance agreement that Quantum had negotiated with plaintiffs, and a "Notice of Default and Intent to Accelerate" was sent to plaintiffs by letter dated December 8, 2007. That letter also informed plaintiffs that foreclosure would commence in 45 days.

In September 2008, Joel Sucher was contacted by an attorney at SJ Baum, asking whether he was interested in reopening negotiations for a loan modification. Upon receiving a positive response, SJ Baum arranged a call between Joel Sucher, SJ Baum's attorney, and Christopher Wyatt of Litton. SJ Baum's attorney indicated that Litton was committed to working out a loan modification arrangement. Negotiations continued through April 2009, at which time SJ Baum's attorney promised to forward loan modification documentation for review. On July 6, 2009, Litton served plaintiffs with a foreclosure notice. Plaintiffs discovered that Wells Fargo had become the servicer on the loan.

Plaintiffs' loan was by then owned by a securitized trust, Asset-Backed Pass-Through Certificates Series 2006-SHL1 that was serviced by Litton. Litton's management of the trust was governed

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[1] The dates of these events as recorded in the complaint appear to be incorrect. The court has attempted to figure out what dates are correct. Any inaccuracies do not affect the outcome of this motion.

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by a special purpose vehicle (SPV), the terms of which required Litton to serve the best interest of the trust.

Goldman Sachs was not the owner of plaintiffs' mortgage. It was, however, the parent company of Goldman Sachs Bank, USA, which had made monetary advances to Litton. Litton was required to pay the investors in the trusts their share of principal and interest in connection with mortgages contained in the SPVs, whether or not the homeowner paid Litton. Litton was often also required to make payments for property taxes and other expenses associated with the real properties that were the subject of the loans. Eventually, Goldman Sachs demanded a return of its advances. Litton could thereafter recoup the expenditures financed by Goldman Sachs if the loans were foreclosed by the trustees of the SPVs.

Plaintiffs assert that Goldman Sachs is liable for fraud on a respondeat superior basis, because Litton was acting as its agent. They claim that Ocwen is liable for fraud as the successor-in-interest to Litton because it acquired all the assets and liabilities of Litton in September 2011. Plaintiffs further allege that Goldman Sachs interfered with Litton's administration of plaintiffs' loan and directed Litton's actions, thereby depriving plaintiffs of the chance to modify their mortgage. They submit an affidavit of Christopher Wyatt, a former vice president of Litton, in support of their allegations.

DISCUSSION

In motion sequence number 001, Goldman Sachs moves pursuant to CPLR 3211(a) to dismiss the complaint insofar as asserted against it, which alleges fraud and tortious interference causes of action against it. Goldman Sachs points out that it did not originate the mortgage, conduct any of the loan servicing, or have any dealings with plaintiffs. Goldman Sachs maintains that plaintiffs have not alleged facts sufficient to hold it liable for fraud under a theory of respondeat superior, agency, or on any other basis that would result in piercing the corporate veil. Further, Goldman Sachs asserts that plaintiffs' causes of action to recover damages for tortious interference with contract and tortious interference with prospective business advantage are barred by the applicable statute of limitations. In this regard, it argues that plaintiffs have failed to allege that there was any breach of a contract to which the plaintiffs are a party, or that any conduct by Goldman Sachs was improper and without justification. Goldman Sachs also incorporates the arguments made by Ocwen in its motion.

In motion sequence number 003, Ocwen moves pursuant to CPLR 3211(a) to dismiss the complaint as against it. It argues that plaintiffs failed to properly plead that Ocwen is a successor-in-interest to Litton, failed to properly plead a fraud cause of action, and that the fraud cause of action is, in any event, time-barred.

Fraud Cause of Action (against Goldman Sachs and Ocwen)

The cause of action to recover damges for fraud against Goldman Sachs is based on the theory of respondeat superior, and alleges that Litton acted as Goldman Sachs's agent. Thus, in their complaint, plaintiffs do not directly assert a fraud cause of action against Goldman Sachs. Goldman Sachs contends that plaintiffs failed to allege facts sufficient to support an agency theory of indirect liability against Goldman Sachs. Rather, it avers that plaintiffs merely allege in conclusory terms that Goldman Sachs had control over Litton and, in that capacity, demanded that Litton deny plaintiffs a loan modification.

Plaintiffs' cause of action against Ocwen is based on its allegation that Ocwen is the successor-in-interest to Litton, inasmuch as Ocwen allegedly acquired all of the assets and liabilities of Litton in September 2011.

In order to assert a claim sounding in fraud, a plaintiff must allege an intentional misrepresentation of facts, made to induce the other party to rely on it, reasonable reliance of the damaged party on those facts, and damages. Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 (1996).

In their opposition papers, plaintiffs maintain that Goldman Sachs and Ocwen misrepresented Wells Fargo's interest in and rights to plaintiffs' mortgage, and that plaintiffs, as laymen, could not be expected to detect the defects in that representation. However,

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the complaint does not raise this issue as the basis for the fraud cause of action. Rather, it asserts that Litton, acting as Goldman Sachs's agent, made modification offers to plaintiffs in bad faith, causing interest and penalties to accrue, and lulling plaintiffs into believing that they would obtain a loan modification. The complaint further alleges that Litton failed to present any of the purported modification offers to the trustees of the trust, allowed penalties and interest to accrue so that plaintiffs could no longer afford to enter into a modification agreement, and misrepresented to plaintiffs the nature and identity of the entity for whose benefit Litton was actually working. Complaint, ¶ 30.

Ocwen maintains that plaintiffs have not sufficiently pleaded that Ocwen is a successor-in-interest to Litton. Rather, it contends that there is only a general, conclusory allegation to that effect. Further, Ocwen maintains that there are no allegations in the complaint regarding any specific misrepresentations that Ocwen made to plaintiffs, nor are there any allegations that plaintiffs relied on any such misrepresentations, or that plaintiffs were damaged by them. Ocwen further argues that plaintiffs failed to adequately plead a cause of action sounding in fraud, and such a cause of action is, in any event, time-barred.

The defendant met its threshold burden of demonstrating, prima facie, that the complaint was time-barred. In opposition, the plaintiffs failed to raise a question of fact as to whether the

statute of limitations was tolled or was otherwise inapplicable, or whether they actually commenced the action within the applicable limitations period. See Williams v New York City Health & Hosps. Corp., 84 AD3d 1358, 1359 (2nd Dept 2011). The last alleged misrepresentation in the complaint occurred in September 2008, which was more than six years before the complaint was filed. While plaintiffs correctly point out that the statute of limitations applicable to actions to recover damages for fraud can be extended to two years from the date of discovery of the fraud (CPLR 203 [g]), they do not assert in the complaint, or explain in their opposition papers, when they discovered the fraud, or why they could not have discovered the fraud earlier. Hence, they have failed to allege facts that would enable them to avail themselves of the extension of the statute of limitations for causes of action sounding in fraud. See Mazella v Markowitz, 303 AD2d 564 (2d Dept 2003). Accordingly, the fraud cause of action is time-barred and must be dismissed. In light of the court's determination, it need not address the other grounds for dismissal of the fraud cause of action urged by the defendants.

Tortious Interference (against Goldman Sachs)

Goldman Sachs maintains that plaintiffs' causes of action sounding in tortious interference with contract and tortious interference with prospective business advantage are both time-barred. These causes of action are subject to a three-year statute

of limitations. See CPLR 214 (4); Kronos, Inc. v AVX Corp., 81 NY2d 90, 92 (1993); Andrew Greenberg, Inc. v Svane, Inc., 36 AD3d 1094, 1099 (3rd Dept 2007); American Fed. Group v Edelman, 282 AD2d 279 (1st Dept 2001). The latest that plaintiffs can claim to have lost their chance to modify their mortgage was when Litton served them with a foreclosure notice on July 6, 2009. This action was not commenced until more than five years after that date.

Plaintiffs contend that a two-year statute of limitations following discovery should apply to these claims. However, they cite no support for applying such an extension to tortious interference claims; such an extension generally applies only to fraud claims, and not to causes of action sounding in tortious interference with contract or business opportunity. See Andrew Greenberg, Inc. v Svane, Inc., 36 AD3d at 1099 (3rd Dept 2007) American Fed. Group v Edelman, 282 AD2d 279 (1st Dept 2001). In any event, plaintiffs do not make any allegation regarding when they discovered the alleged tortious interference, as they would be required to do in order to avail themselves of a limitations period governed by a date-of-discovery rule. Hillman v City of New York, 263 AD2d 529, 529 (2d Dept 1999).

Consequently, the tortious interference causes of action are dismissed, and the court need not examine the other bases raised by defendants for such dismissal.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Goldman Sachs Group, Inc. (motion sequence no. 001), is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further,

ORDERED that the motion of Ocwen Financial Corporation (motion sequence no. 003) is granted and the complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 4, 2016

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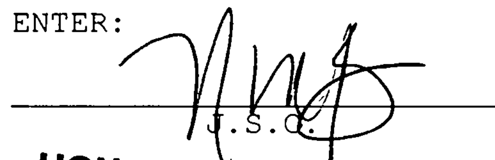

J.S.C.

HON. NANCY M. BANNON