

<b>Polite v 1st Am. Homes LLC</b>
2017 NY Slip Op 31549(U)
May 17, 2017
Supreme Court, Queens County
Docket Number: 007028/2015
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS  
Justice

IA Part 30

LATOYA POLITE,

Index  
Number 007028/2015

Plaintiff,

-against-

FILED  
MAY 25 2017  
COUNTY CLERK  
QUEENS COUNTY

Motion  
Date January 23, 2017

1<sup>ST</sup> AMERICAN HOMES LLC,

Defendants.

Motion Seq. No. 3

The following papers numbered 1 to 9 read on this motion by defendant to dismiss the complaint pursuant to CPLR 3211 (a)(7).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Answering Affidavits - Exhibits .....	5 - 7
Reply Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to quiet title to premises located at 114-25 210<sup>th</sup> Street, in Cambria Heights, New York 11411. Plaintiff asserts causes of action for fraudulent misrepresentation, declaratory judgment and constructive trust against defendant. Plaintiff alleges that she never intended to convey her ownership interest in the subject premises to defendant and that she was defrauded into doing so.

By the instant motion, defendant moves to dismiss the complaint, pursuant to CPLR 3211 [a][7], for failure to state a cause of action and, alternatively, for summary judgment in its favor pursuant to CPLR 3212. Plaintiff opposes the motion.

### Facts

The complaint alleges that on March 21, 2013, plaintiff, believing that she was obtaining a loan, conveyed her ownership interest in real property known as 114-25 210<sup>th</sup> Street, in Cambria Heights, New York to defendant 1<sup>st</sup> American Homes, LLC (“1<sup>st</sup> American”). Plaintiff’s first cause of action alleges that 1<sup>st</sup> American “deliberately defrauded and misrepresented to plaintiff that the documents that she was signing were merely to obtain mortgage forbearance and in no way were said documents conveying plaintiff’s interest in the subject premises to 1<sup>st</sup> American. Plaintiff second and third causes of action stem from the first and seek, respectively, a declaratory judgment that plaintiff is the sole owner of the property and the imposition of a constructive trust.

Plaintiff testified upon an examination before trial that some time prior to the conveyance she made contact with a Nathan Barnwell for the purpose of retaining Barnwell’s services for “credit cleanup”. Plaintiff testified that she was referred to Barnwell by her brother. According to plaintiff, Barnwell represented to her that “he gets in contact with creditors and work out a plan in order to clear up the credit.” Plaintiff paid Barnwell \$1,800.00 for that service. After being retained by plaintiff for his credit cleanup services, Barnwell then introduced plaintiff to a Shazam Husain, a person identified by Barnwell as his boss. Plaintiff testified that she was led to believe that Husain was to obtain a loan for her in the amount of \$125,000. Plaintiff stated that from the time that she first met Husain until the conveyance, Husain was in contact with plaintiff “looking for [plaintiff] to present [Husain] with specific documents. Those documents included a copy of prior title holder’s death certificate, a copy of the title, plaintiff’s driver’s license and plaintiff’s social security information. Husain also visited the property to see its condition. Prior to the conveyance, plaintiff testified, Husain called plaintiff to advise her that she “was approved for the loan”. Barnwell called plaintiff to advise plaintiff of the closing date. At the closing of the March 21, 2013 conveyance, plaintiff was introduced by Messrs. Husain and Barnwell to Jonathan Somerstein, Esq, as her lawyer. Plaintiff testified that it was explained to her by Somerstein that certain documents executed at the closing of the conveyance were “for the deed.” At the closing, plaintiff testified, she communicated with Barnwell, Somerstein and Husain. Plaintiff stated that the proceeds from the conveyance were issued by Somerstein and at Somerstein’s direction. Believing that she was owed additional loan proceeds, plaintiff inquired of Somerstein as to when she would receive those proceeds and was advised that “[Somerstein] would discuss it with [plaintiff] after the closing.”

Sam Shrem, 1<sup>st</sup> America's managing member, testified as follows: he is self-employed and in the business of real estate investment. Prior to his occupation as a real estate investor, Shrem was in the business of mortgage banking. From 2004 to 2007, Husain was a mortgage broker that Shrem used to solicit business. After being employed as a mortgage banker, Shrem engaged in his present business as a real estate investor. Shrem purchases properties for the purpose of rehabilitating them and then reselling them. As part of his business, Shrem testified, he is contacted from time to time by third parties such as brokers to ascertain his interest in acquiring certain properties. Several weeks prior to the subject conveyance, Husain contacted Shrem to ascertain Shrem's interest in acquiring the subject property. After that initial contact from Husain, Shrem determined that he was interested in purchasing the property. The instant conveyance is the only transaction Shrem was a party to in which Husain acted as a real estate broker. Prior to the March 21, 2013 closing, Shrem recalls meeting plaintiff on one occasion when he did a walk-through of the subject property. Shrem testified that he met plaintiff's attorney for the first time at the closing, and similarly, had never met Barnwell prior to the March 21, 2013 closing.

### Discussion

"In considering a motion to dismiss for failure to state a cause of action . . . the pleadings must be liberally construed . . . The sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Dinerman v Jewish Bd. of Family & Children's Servs., Inc.*, 55 AD3d 530, 530-531 [2008], quoting *Gershon v Goldberg*, 30 AD3d 372, 373 [2006]; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Moreover, "a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d at 88).

To properly plead a cause of action for fraudulent misrepresentation, a plaintiff must allege (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance by the plaintiff on the misrepresentation or material omission, and (4) injury (see *Lewis v Wells Fargo Bank, N.A.*, 134 A.D.3d 777, 778, 22 N.Y.S.3d 461, 463; *Blanco v Polanco*, 116 A.D.3d 892, 986 N.Y.S.2d 151; *Bernardi v. Spyrtos*, 79 A.D.3d 684, 687, 912 N.Y.S.2d 627; *Pidwell v. Duvall*, 28 A.D.3d 829, 831-832, 815 N.Y.S.2d 754). Moreover, CPLR 3016 (b) requires that "the circumstances constituting the wrong shall be stated in detail." However, "[t]his provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to 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 a fraud" (*Pike v New York Life Ins. Co.*, 72

AD3d 1043, 1050 [2010], quoting *Lanzi v Brooks*, 43 NY2d 778, 780 [1977]). In addition, “at this early stage of the litigation, plaintiff is entitled to the most favorable inferences, including inferences arising from the positions and responsibilities of defendant,” and “plaintiff need only set forth sufficient information to apprise defendants of the alleged wrong[s]” (*Selechnik v. Law Office of Howard R. Birnbach*, 82 A.D.3d 1077, 1078–79, 920 N.Y.S.2d 128 [2011], citing *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [2010]).

Here, the allegations contained in the first cause of action, as amplified by the supporting affidavit (*see, Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 N.Y.2d 175, 182, 451 N.Y.S.2d 663, 436 N.E.2d 1265), state facts from which a jury may infer that defendant made a representation or a material omission of fact that the documents plaintiff was signing was to obtain a loan modification and not to convey her interest in the subject premises; that plaintiff signed the documents in reliance that upon her signature, she was to obtain a loan modification; that plaintiff justifiably relied on the misrepresentation or material omission because otherwise if she had known of the misrepresentation or material omission, plaintiff would not have signed the documents; that plaintiff suffered injury as she no longer has title to the subject property. It therefore, states a cause of action in fraud (*Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403, 406–407, 176 N.Y.S.2d 259, 151 N.E.2d 833; *Black v. Chittenden*, 69 N.Y.2d 665, 668, 503 N.E.2d 1370, 1371–72 (1986)

The complaint also contains “sufficient detail to clearly inform [the] defendant with respect to the incidents complained of” (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 402 N.Y.S.2d 384, 373 N.E.2d 278) and, therefore, complies with the additional requirement of CPLR 3016(b) that in an action for fraud, “the circumstances constituting the wrong shall be stated in detail.

Finally with respect to the fraud cause of action, whether plaintiff could have discovered the truth about the transaction through the “exercise of ordinary intelligence” presents questions of fact mandating the denial of defendant's summary judgment motion (*see Black v. Chittenden*, 69 N.Y.2d 665, 669, 503 N.E.2d 1370, 1372 [1986]).

“A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration” (*Staver Co. v. Skrobisch*, 144 A.D.2d 449, 450, 533 N.Y.S.2d 967; *see Rockland Light & Power Co. v. City of New York*, 289 N.Y. 45, 51, 43 N.E.2d 803; *Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d 1148, 1150, 930 N.Y.S.2d 34; *Law Research Serv. v. Honeywell, Inc.*, 31 A.D.2d 900, 901, 298 N.Y.S.2d 1; *see also* 5–3001 Weinstein–Korn–Miller, N.Y. Civ. Prac. CPLR ¶ 3001.13). Accordingly, where a cause of action is sufficient to invoke the court's power to “render a declaratory judgment . . . as to the rights and other legal relations

of the parties to a justiciable controversy” (CPLR 3001; *see* CPLR 3017[b] ), a motion to dismiss that cause of action should be denied (*see St. Lawrence Univ. v. Trustees of Theol. School of St. Lawrence Univ.*, 20 N.Y.2d 317, 325, 282 N.Y.S.2d 746, 229 N.E.2d 431; *Rockland Light & Power Co. v. City of New York*, 289 N.Y. at 51, 43 N.E.2d 803; *Tilcon N.Y., Inc. v. Town of Poughkeepsie*, 87 A.D.3d at 1150, 930 N.Y.S.2d 34; *Staver Co. v. Skrobisch*, 144 A.D.2d at 450, 533 N.Y.S.2d 967; *Ackert v. Union Pac. R.R. Co.*, 4 A.D.2d 819, 821, 165 N.Y.S.2d 330; *see also* 5–3001 Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 3001.13).

Here, defendant failed to demonstrate that the declaratory judgment cause of action does not present a justiciable controversy sufficient to invoke the Supreme Court's power to render a declaratory judgment (*see* CPLR 3001; *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945, 946, 995 N.Y.S.2d 145, 147 [2014]).

The branch of the motion which is to dismiss the cause of action for a constructive trust, is granted. “[T]o obtain the remedy of a constructive trust, a plaintiff generally is required to demonstrate four factors: (1) a fiduciary or confidential relationship between the parties, (2) a promise, (3) a transfer of some asset in reliance upon the promise, and (4) unjust enrichment flowing from the breach of the promise” (*Mei Yun Chen v. Mei Wan Kao*, 97 A.D.3d 730, 730, 948 N.Y.S.2d 426). Here, the plaintiff failed to adequately plead a cause of action against defendant for the imposition of a constructive trust, as the plaintiff failed to allege the existence of a confidential or fiduciary relationship with defendant, or that the plaintiff was in possession of property which it transferred in reliance on a promise of defendant (*see Kalmon Dolgin Affiliates, Inc. v. Tonacchio*, 110 AD3d 848, 851, 973 N.Y.S.2d 304, 306; *Pfeiffer v. Jacobowitz*, 29 A.D.3d 661, 662, 815 N.Y.S.2d 165; *Old Republic Natl. Tit. Ins. Co. v. Cardinal Abstract Corp.*, 14 A.D.3d 678, 679–680, 790 N.Y.S.2d 143).

#### Conclusion

The branches of the motion which are to dismiss the fraudulent misrepresentation and declaratory judgment causes of action, are denied.

The branch of the motion which is to dismiss the cause of action for a constructive trust, is granted.

Dated: May 17, 2017

  
Hon. Emeré A. Buggs, JSC

FILED  
MAY 25 2017  
COUNTY CLERK  
QUEENS COUNTY