

<b>Kuka v One W. Bank</b>
2019 NY Slip Op 31838(U)
May 3, 2019
Supreme Court, Bronx County
Docket Number: 24875/2005
Judge: Doris M. Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX – PART STP

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ARBEN KUKA and ABK LLC  
Plaintiff,

Index No. 24875/2005

- against -

DECISION/ ORDER

ONE WEST BANK, et al.  
Defendants.

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**Hon. Doris M. Gonzalez**

Upon the foregoing papers, the instant motion by defendant One West Bank seeks an order: (i) precluding plaintiffs, under the doctrine of judicial estoppel, from arguing that One West Bank was not a bona fide purchaser for value; and (ii) precluding plaintiffs from arguing that it did not elect its remedies in an prior action and dismissing the complaint. Upon review of the papers, together with the opposition submitted thereto; and upon review of the Court file; and after due deliberation, the motion is denied in its entirety.

**FACTS & PROCEDURAL BACKGROUND**

This is an action to quiet title and void a mortgage granted by One West Bank’s predecessor-in-interest. Commenced in 2005, this matter enjoys a long background and procedural history. Plaintiff Arben Kuka and defendant Alfonso Angelisi formed plaintiff ABK, LLC in 2003 allegedly for the sole purpose of purchasing the property in question. As relevant here, defendant Angelisi and plaintiff Kuka, as sole members of ABK, Inc., executed an agreement whereby the property was transferred entirely to Angelisi encumbered by \$100,000 mortgage held by a non-party bank. Allegedly, that agreement was drafted by non-party attorney Kathleen Bradshaw. Defendant Angelisi took out a mortgage from One West

Bank's predecessor-in-interest for \$240,000 and satisfied the \$100,000 mortgage. As part of that mortgage origination, attorney Bradshaw allegedly represented that she was the attorney that formed ABK, LLC and that Angelisi owned the entity exclusively, without mention of Kuka.

This action was commenced on December 16, 2005, against Angelisi only, seeking specific performance of a contract between Kuka and Angelisi and damages for the breach. Angelisi filed for Chapter 13 bankruptcy on August 3, 2010, which caused this matter to be stayed by operation of law. Prior to the filing of Chapter 13, plaintiffs commenced a separate action against attorney Bradshaw for alleged malpractice committed during the formation of ABK, LLC and drafting the agreement that permitted the property to be unlawfully conveyed to Angelisi. That action sought damages against Bradshaw, *inter alia*, for fraud perpetrated by the letter she sent One West Bank's predecessor-in-interest, which was allegedly relied upon in granting the mortgage.

Plaintiffs commenced a Chapter 7 adversary proceeding seeking to void the deed from ABK, LLC to Angelisi and invalidate the mortgage. United States Bankruptcy Judge Shelley C. Chapman granted plaintiffs summary judgment finding that the transfer was indeed fraudulent, but deferred determination of the validity of the mortgage to this Court. Plaintiffs were granted default judgment in the action against attorney Bradshaw and, following the ruling by the Bankruptcy court, moved in this action to amend their complaint to assert claims against One West Bank seeking to invalidate the mortgage. That motion was granted by

decision and order dated April 30, 2012 (Sherman, J.). The instant motion seeks to preclude plaintiffs from arguing that One West Bank was not a bona fide purchaser for value and to dismiss this matter as plaintiffs elected their remedy by pursuing attorney Bradshaw and obtaining judgment against her.

### LEGAL STANDARD & DISCUSSION

Judicial estoppel “prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed” (*Herman v 36 Gramercy Park Realty Assoc., LLC*, 165 AD3d 405, 406 [1st Dept 2018]).

It is well-settled that where two or more remedies for the same wrong are consistent with each other, the choice of one will not operate as a bar until there has been a satisfaction of the judgment, since there can be but one adequate compensation for the wrong done (*Lbr. Mut. Cas. Ins. Co. of New York v Friedman*, 176 Misc 703, 706 [Sup Ct 1941]). There can be an election of remedies only when a choice is made between inconsistent, alternative, or mutually exclusive remedies, not between consistent or cumulative remedies, so long as there has been no satisfaction of the claim under the first remedy (1 N.Y. Jur. 2d Actions § 11). The doctrine must be pleaded as an affirmative defense (*Roberge v Winne*, 144 NY 709, 710 [1895]).

Applying these legal principles to this action, the Court finds the doctrine of judicial estoppel does not apply. In the malpractice action, plaintiffs alleged Bradshaw committed

fraud by representing to One West Bank's predecessor-in-interest that defendant Angelisi owned the property. Here, plaintiffs claim One West Bank's predecessor-in-interest acted unreasonably in its reliance on the letter. Plaintiffs' claims against attorney Bradshaw alleging fraud were not contrary or inconsistent to their position taken herein, thus the doctrine does not apply. Turning to defendant's contention that plaintiffs elected their remedy by pursuing attorney Bradshaw, the Court finds defendant failed to assert that affirmative defense in their answer. However, even if it were adequately pled, there has been no satisfaction of judgment. **ACCORDINGLY**, it is hereby

**ORDERED**, that defendant's motion is denied in its entirety.

Dated:

5/3/19

E N T E R,



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Doris M. Gonzalez, J.S.C.