

Bruce v Solny

2021 NY Slip Op 32578(U)

December 6, 2021

Supreme Court, Kings County

Docket Number: Index No. 510162/2020

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 6th day of December, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN

JUSTICE

JANET BRUCE,

Plaintiff,

- against -

SANFORD SOLNY, et al

Defendants.

Index No.: 510162/2020

Motion Seq. # 9

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affirmation and Exhibits	1
Wohlberg Affirmation in Opposition	2
Bendet Affirmation in Opposition	3
Repl Affirmation	4

Plaintiff moves this court to dismiss Affirmative Defenses 2, 3, 4, 6, 7, 8, 9, 10 and 11 and counterclaims 1, 2 and 3 to the Answer to the Amended Complaint with Counterclaims of defendants, Sanford Solny, Shandelle Solny in her personal capacity and her capacity as President of A to Z Management Corp, E. 29 St Realty Inc. and A to Z Management Corp. The court will consider each Affirmative Defense and Counterclaim separately.

SECOND AFFIRMATIVE DEFENSE

Plaintiff moves to dismiss the Second Affirmative Defense alleging the Summons and Complaint were not properly served on defendants. There has been extensive litigation concerning service of process in this matter and the court ruled on April 8, 2021 that the Solny defendants could be served by email directed to their counsel. That service was complied with. The corporate defendants were served by delivery to the Secretary of State. The defendants

oppose dismissal of the Second Affirmative Defense on the basis that the issue of service of process has been appealed. However, based upon this court's determination, service has been properly made. Accordingly, the Second Affirmative Defense is dismissed.

THIRD AFFIRMATIVE DEFENSE

Plaintiff moves to dismiss the Third Affirmative Defense alleging that plaintiff's fraud claim was not served within the State of Limitations on the basis that defendants concealed their fraud over years and the court should apply the doctrine of equitable estoppel to bar defendants from asserting their Statute of Limitations defense. The court cannot determine this issue on a motion to dismiss. Plaintiff has leave to renew this aspect of its motion at the close of discovery.

FOURTH AFFIRMATIVE DEFENSE

Defendants' Fourth Affirmative Defense asserts that plaintiff has not plead her fraud claims with the required particularity. Plaintiff moves to dismiss this Affirmative Defense on the basis that a review of the Amended Complaint, paragraphs 29 - 143, makes clear that the fraud scheme defendants allegedly engaged in was plead with the required particularity. The court agrees. Accordingly, the Fourth Affirmative Defense is dismissed.

SIXTH AFFIRMATIVE DEFENSE and FIRST COUNTERCLAIM

The plaintiff's Sixth Affirmative Defense asserts a claim for tortious interference with contract. The requirements of a claim for tortious interference with contract are "1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of that contract; 3) defendant's intentional procurement of the third-party's breach of the contract without justification; 4) actual breach of the contract; and 5) damages resulting

therefrom. *Internal citations omitted* ***Lama Holding Co. v Smith Barney, Inc. 88 NY2d 413, 424 (1996)***. In its opposition to the instant motion, defendants assert that their Fourth Affirmative Defense relates to the contract of sale between plaintiff and defendants. Defendants have misapplied the first requirement of a claim for tortious interference with contract: that the contract be between plaintiff and a third party.

The First Counterclaim also asserts that plaintiff has a “secret investor” and that she is a mere “straw Plaintiff” in violation of state law prohibiting champerty and maintenance. The absurd basis for this assertion is, essentially, that plaintiff is a poor woman who had trouble paying her mortgage and she had somehow obtained competent counsel who is giving defendants’ counsel a hard time. Plaintiff annexes as Exhibit A to her attorney’s Affirmation in support of the instant motion an Affirmation of defendant’s counsel, Benyomin Bendet wherein he states that it “defies logic that [plaintiff] is prosecuting this action and impeding Defendant from having her note and mortgage resolved unless more is going on.” ***Exhibit A at ¶29***. It is insulting to the plaintiff and to the court that defendants believe that the only way the plaintiff could obtain competent counsel to represent her in this action is if she has a “secret investor”. For all these reasons, the Sixth Affirmative Defense is dismissed as is the First Counterclaim.

SEVENTH and EIGHTH AFFIRMATIVE DEFENSES and SECOND and THIRD COUNTERCLAIMS

The Seventh and Eighth Affirmative Defenses and Second and Third Counterclaims concern unjust enrichment. The elements of a claim for unjust enrichment are: “1) the defendant was enriched; 2) at the plaintiff’s expense; and 3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.” *Internal citations omitted* ***Betz v Blatt, 74 NYS3d 75, 81 (2nd Dept 2018)***, Plaintiff argues that defendants

have not properly plead a claim for unjust enrichment. Particularly, the first element, that the plaintiff was enriched, is stated in the hypothetical, i.e “if the deed is reversed”. At the present time, the deed has not been returned to plaintiff. Moreover, defendants have not indicated that the monies they assert they expended to defend the foreclosure action or to repair the property went to the plaintiff. Defendants also assert that plaintiff will be enriched by \$500,000. They have failed, as plaintiff points out, to allege that this increase in value of the property is at E 29th St. Realty Inc.’s expense. Accordingly, the Seventh and Eighth Affirmative Defenses are dismissed. However, defendants should have an opportunity to re-plead the Second and Third counterclaims. Accordingly, defendants have 30 days from the date of this Decision and Order to re-plead the Second and Third counterclaims. Failure to timely do so will result in this aspect of plaintiff’s motion being granted.

NINTH AFFIRMATIVE DEFENSE

The Ninth Affirmative Defense asserts that plaintiff’s Complaint is frivolous, does not make out any cause of action or legal theory and should be dismissed pursuant to 22 NYCRR §130-1.1. As plaintiff points out, there is no separate cause of action for violation of Rule 130 nor is Rule 130 a basis upon which to dismiss the Complaint. Accordingly, the Ninth Affirmative Defense is dismissed.

TENTH AFFIRMATIVE DEFENSE

The Tenth Affirmative Defense states that plaintiff’s action pursuant to HEPTA, the Home Equity Theft Prevention Act, was filed beyond the statute’s two-year Statute of Limitations. However, as plaintiff points out, the Statute of Limitations contained in HEPTA is six years, not two years. Accordingly, the Tenth Affirmative Defense is dismissed.

ELEVENTH AFFIRMATIVE DEFENSE

The Eleventh Affirmative Defense asserts that plaintiff's claim pursuant to §349 of the GBL (the Deceptive Business Practices Act) is untimely and should be dismissed as well because the claims do not have any public ramifications. Plaintiff asserts that this court has already ruled that plaintiff's claims are of public interest when it denied defendants' motion to strike references to the Brooklyn and Queens District Attorneys' prosecutions and a New York Times article concerning Black homeowners losing their properties to fraud. Any even cursory reading of the news over the past several years would indicate that mortgage fraud and attempts to steal property from vulnerable property owners are rampant and of public interest. Accordingly, the Eleventh Affirmative Defense is dismissed on the basis that plaintiff's claims pursuant to §349 of the GBL are not of public interest. As to the Statute of Limitations defense to plaintiff's GBL claim, plaintiff's Complaint details her factual claims in this allegedly on-going fraud that fall within the applicable Statute of Limitations and defendants fail to respond to these assertions. Accordingly, the defense that the GBL claim is beyond the Statute of Limitations is dismissed.

ATTORNEY SIGNATURE ON THE ANSWER

Plaintiff seeks to strike defendants' Answer on the basis that defendants' counsel has "signed" the Answer with a "/s". The court finds that this "signature" is sufficient under the law for a document filed with NYSCEF by an attorney. Accordingly, the court declines to strike the Answer or to direct defendants' counsel to sign the Answer in a different manner.

For all the foregoing reasons, plaintiff's motion to dismiss various Affirmative Defenses and counterclaims in defendants' Answer to First Amended Complaint with Counterclaims is decided as follows

- 1) the motion to dismiss Affirmative Defenses 2, 4, 6, 7, 8, 9, 10 and 11 is GRANTED;
- 2) the motion to dismiss Third Affirmative Defense is DENIED with leave to renew at the close of discovery;
- 3) defendants have thirty (30) days from the date of this Decision and Order to re-plead the Second and Third Counterclaims. Failure to timely re-plead will result in the counterclaims being dismissed.
- 4) plaintiff's application to have the court direct defendants' counsel to sign their Answer is DENIED.

This is the Decision and Order of the court.

E N T E R



HON. LOREN BAILY-SCHIFFMAN
