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| <b>Stewart v Christiana Trust</b>  |
| 2021 NY Slip Op 32770(U)   |
| December 22, 2021  |
| Supreme Court, Kings County  |
| Docket Number: Index No. 520631/2018   |
| Judge: Francois A. Rivera  |
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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of December 2021

HONORABLE FRANCOIS A. RIVERA

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CLARENCE STEWART and RUTH ANN CRAWFORD,

Plaintiffs,

**DECISION & ORDER**

Index No. 520631/2018

- against -

CHRISTIANA TRUST, A DIVISION OF WILMINGTON SAVINGS FUND SOCIETY, AS TRUSTEE For PENNYMAC LOAN TRUST 2011-, NPL1, PENNYMAC LOAN TRUST 2011- NPL1, PENNYMAC FINANCIAL SERVICES, INC., PENNYMAC LOAN SERVICES, LLC, WILMINGTON SAVINGS FUND SOCIETY, FEIN, SUCH & CRAIN and FAY SERVICING, LLC

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on June 16, 2021 under motion sequence number five, by plaintiffs Clarence Stewart and Ruth Ann Crawford (hereinafter collectively as plaintiffs) for an order: vacating the stipulation of consent; vacating the order confirming the stipulation of consent; restoring the motion to the calendar; and upon restoration a reasonable time to oppose the motion. This motion is opposed by defendant Fay Servicing, LLC (hereinafter Fay).

- Notice of Motion
- Affirmation in Support
- Exhibits A to B
- Fay's Affirmation in Opposition
- Memorandum of Law in Opposition
- Exhibits A to D
- Reply Affirmation
- Exhibit A

## MOTION PAPERS

Plaintiffs' motion papers consist of a notice of motion, an affirmation of counsel and two annexed exhibits labeled A to B. Exhibit A is a copy of an email from chambers directing the parties to appear for oral argument before this Court on June 10, 2021.

Exhibit B is a copy a Notice of Motion to Dismiss by Fay dated April 22, 2021.

Fay's opposition papers consist of an affirmation of counsel, memorandum of law, and four annexed exhibits labeled A through D. Exhibit A is 232 pages. It includes a printout from the NYSCEF system dated April 22, 2021 at 1:35 P.M., listing NYSCEF document numbers 93 to 106. It also includes Fay's notice of motion to dismiss dated April 22, 2021, an affirmation in support, a memorandum of law in support, and exhibits A through J. Exhibit B is a copy of the certified transcript of the proceedings held on June 10, 2021, via Microsoft Teams. Exhibit C includes the Notice of Entry, dated June 16, 2021, and an Order of this Court dated June 10, 2021. Exhibit D includes the Notice of Entry, dated March 23, 2021, and an Order of this Court dated November 19, 2020 under Index Number 509473/2020.

## BACKGROUND

On October 18, 2018, the plaintiffs commenced the instant action (hereinafter the 2018 Action) by electronically filing a summons with notice with the Kings County Clerk's office (hereinafter the KCCO).

On November 27, 2018, defendant Fein, Such & Crane, L.L.P. i/s/h/a Fein, Such & Crain filed a notice of appearance and a demand for a complaint.

On December 4, 2018, defendants PennyMac Loan Services, LLC, PennyMac Financial Services, Inc., PennyMac Loan Trust 2011-NPL1 and Christiana Trust, A Division of Wilmington Savings Fund Society, as Trustee for PennyMac Loan Trust 2011-NPL1'S filed a demand for a complaint.

On April 10, 2019, defendant Fay filed a demand for a complaint.

Shortly thereafter on April 12, 2019, defendants PennyMac Loan Services, LLC, PennyMac Financial Services, Inc., PennyMac Loan Trust 2011-NPL1 and Christiana Trust, a Division of Wilmington Savings Fund Society, as Trustee for PennyMac Loan Trust 2011-NPL1 filed a pre-answer motion seeking to dismiss the plaintiffs' complaint pursuant to CPLR 3012 (b) (hereinafter motion sequence one).

On May 1, 2019, the plaintiffs electronically filed a verified complaint containing sixty-seven allegations of fact in support of three causes of action and ten annexed exhibits labeled A through J with the KCCO. The first cause of action is for malicious prosecution. The second cause of action alleges, inter alia, that the defendants acted in bad faith and that the plaintiffs seek punitive damages. The third cause of action claims

that the defendants were grossly negligent and engaged in malicious prosecution and abuse of process.

On May 16, 2019, defendant Fein, Such & Crane, LLP s/h/a Fein, Such & Crain filed a pre-answer motion to dismiss the claims as asserted against it pursuant to CPLR 3012 (b) (hereinafter motion sequence two).

On June 17, 2019, defendant Fay filed a pre-answer motion to dismiss the plaintiff's complaint as asserted against it pursuant to CPLR 3012 (b), CPLR 308, and CPLR 312-a (hereinafter motion sequence three).

By Order of this Court dated July 19, 2019, the Court granted motion sequences one and two to dismiss the complaint asserted against those defendants. The order also denied motion sequence three and Fay was given twenty days to answer the plaintiffs' complaint.

On August 8, 2019, Fay interposed an answer to the complaint.

On June 6, 2020<sup>1</sup>, the plaintiffs commenced a subsequent action by electronically filing a summons<sup>2</sup>, a verified complaint and eight annexed exhibits labeled A through J, with the KCCO (hereinafter the 2020 Action). Fay is also a named defendant in the 2020 action.

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<sup>1</sup> The NYSCEF system under Index Number 509473/2020 indicates that the summons and complaint was filed on June 6, 2020 and received on June 8, 2020.

<sup>2</sup> Document number one in the NYSCEF system, under Index Number 509473/2020, is listed as a summons. However, the document is titled summons with notice.

On July 1, 2020, Fay filed a pre answer motion to dismiss the 2020 action pursuant to CPLR 3211 (a) (4). This motion was later withdrawn by Fay on July 20, 2020, prior to the return date.

On July 20, 2020, Fay filed a subsequent pre answer motion to dismiss the 2020 Action pursuant to CPLR 3211 (a) (1), (4) and (7) (hereinafter Fay's July 2020 Motion).

By Order of this Court, dated November 19, 2020, Fay's July 2020 Motion to dismiss was granted to the extent that the plaintiffs' complaint in the 2020 Action was discontinued against Fay.

On April 22, 2021, Fay filed a motion to dismiss the 2018 action pursuant to CPLR 3211 (a) (7) (hereinafter Fay's April 2021 Motion).

On June 10, 2021, this Court signed the following order (hereinafter the June 10 Order): "[a]fter a virtual hearing held on June 10, 2021, Defendant's Motion to Dismiss the Complaint is withdrawn. The Plaintiff stipulates on the record to discontinue this action as against Defendant Fay Servicing, LLC without prejudice."

## **LAW AND APPLICATION**

In the instant motion, the plaintiffs seek to vacate the June 10 Order, restore Fay's April 2021 Motion to the calendar, and upon restoration of Fay's April 2021 Motion, an opportunity to oppose the motion. The motion is supported by an affirmation of their counsel, Regina Felton, Esq. (hereinafter Felton), a copy of an email notice from the Court regarding the scheduled oral argument of the motion on June 10, 2021, and the Notice of Motion for Fay's April 2020 Motion.

A stipulation of settlement between parties is a binding contract enforceable by the court and, as such, is favored and not lightly cast aside (*Rogers v Malik*, 126 AD3d 874, 875 [2nd Dept 2015] [internal quotations omitted], citing *Hallock v New York*, 64 NY2d 224, 230 [1984]). This is especially true where the party seeking to vacate the stipulation was represented by counsel (*Rogers*, 126 AD3d at 875, citing *Matter of Mercer*, 113 AD3d 772 [2nd Dept 2014]). “A stipulation made by the attorney may bind a client even where it exceeds the attorney's actual authority if the attorney had apparent authority to enter into the stipulation” (*121 Willow, LLC v Bd. of Assessors of County of Nassau*, 181 AD3d 587, 588 [2nd Dept 2020], quoting *Davidson v Metropolitan Tr. Auth.*, 44 AD3d 819, 819 [2nd Dept 2007]).

Moreover, stipulations of settlement, which are made in open court and whose terms are placed upon the record by parties who are represented by counsel, are judicially favored (*Davenport v Davenport*, 199 A3d 637 [2nd Dept 2021]; see also *Haik v Haik*, 197 AD3d 465 [2nd Dept 2021]). Particularly “in the case of open court stipulations...where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process” (*Matter of Roach*, 190 AD3d 978, 979 [2nd Dept 2021], quoting *McSherry v McSherry*, 163 AD3d 650, 651 [2nd Dept 2018]).

Furthermore, an open-court stipulation is an independent contract between the parties ... and will be enforced according to its terms (*Lenge v Eklecco Newco, LLC*, 172 AD3d 843, 844 [2nd Dept 2019]). A party seeking to set aside such a stipulation will be granted such relief only upon a showing of good cause sufficient to invalidate a contract

(*Dom Ben Realty Corp. v New York City Loft Bd.*, 177 AD3d 731, 736 [2nd Dept 2019], quoting *Macaluso v Macaluso*, 62 AD3d 963, 963, [2nd Dept 2009]). Accordingly, “[a]bsent a showing of fraud, overreaching, mistake, or duress, the stipulation should not be disturbed by the court” (*Davenport*, 199 AD3d at 637, quoting *Hymowitz v Hymowitz*, 119 A.D.3d 736, 740 [2nd Dept 2014]).

Here, the plaintiffs seek to rescind their attorney’s stipulation of consent to discontinue on the record due to a series of purportedly “anomalies.” Felton’s affirmation describes the “anomalies” as follows: 1) the motion to dismiss was not delivered to Felton; 2) June 10, 2021, was the first time the motion appeared on the calendar and Felton only became aware of the motion on that day; 3) the notice for the appearance for the motion was less than 24 hours; and 4) the Court’s calendar day was changed to Thursday. Felton contends that she believed the motion to dismiss was Fay’s motion under the 2020 Action. Felton further contends that the Court advised her that she was confused during the oral argument.

Nevertheless, a party seeking reformation or rescission of a contract by reason of a mistake must establish, with clear and convincing evidence, that the contract was executed under mutual mistake, or a unilateral mistake induced by the other party’s fraudulent misrepresentation (*Mooney v Manhattan Occupational, Physical and Speech Therapies, PLLC*, 166 AD3d 957, 960 [2nd Dept 2018], citing *Moshe v Town of Ramapo*, 54 AD3d 1030, 1031 [2nd Dept 2008], quoting *Yu Han Young v Chiu*, 49 AD3d 535, 536, [2nd Dept 2008]; *Perretta v Perretta*, 187 AD3d 1076, 1078 [2nd Dept 2020]).



Fay's opposition includes among other things the certified transcript of the proceedings on June 10, 2021. On June 10, 2021, Felton appeared on behalf of the plaintiffs and Quenten Gillam, Esq. on behalf of Fay. While the transcript reveals that Felton was under the initial misapprehension that Fay's motion to dismiss in the 2018 Action was resolved in 2019 (Pargament Tr at 4, lines 21-22), the Court through its independent recollection, review of its motion calendar and the NYSCEF documents under the 2018 Action clarified with both parties that the 2018 Action had not been dismissed as to Fay. Felton later clarifies that she is not confused and later stipulates to withdraw the 2018 Action against Fay.

Here, contrary to the plaintiffs' contentions, they have failed to establish by clear and convincing evidence that the stipulation in open court and on the record was executed due to mistake, fraud, overreaching, or duress (*see Davenport*, 199 A3d 637; *see also Dom Ben Realty Corp.*, 177 AD3d at 736). The claims set forth in the affirmation submitted by Felton have failed to establish a basis to relieve the plaintiffs of the consequences of the stipulation of discontinuance (*see Rogers*, 126 AD3d at 875, citing *Hallock*, 64 NY2d at 230; *see also 121 Willow, LLC*, 181 AD3d 587, 588.) The Court notes that pursuant to its Part Rules as cited on the New York State Courts' website that its regular motion calendar is Thursday. There is no dispute that Felton appeared on June 10, 2021, having received an email notice of same from the Court on June 9, 2021. Furthermore, when Felton's virtual connection was interrupted during the morning calendar, the matter was moved to the afternoon calendar to allow Felton to participate

fully in the proceedings. The certified transcript also indicates that Felton was given an opportunity to oppose Fay's motion but instead chose to withdraw the 2018 Action.

**CONCLUSION**

The motion of plaintiffs Clarence Stewart and Ruth Ann Crawford for an order: vacating the stipulation of consent; vacating the order confirming the stipulation of consent; restoring the motion to the calendar; and upon restoration a reasonable time to oppose the motion is denied.

ENTER:



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J.S.C.