

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

BRIAN ESTRADA,
Plaintiff,
-v-
METROPOLITAN PROPERTY GROUP, INC., et al.,
Defendants.

INDEX No. 110123/11
MOTION DATE _____
MOTION SEQ. No. 004
MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____

| | |
|--|-----------------|
| | PAPERS NUMBERED |
| Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... | <u>1, 2</u> |
| Answering Affidavits- Exhibits _____ | <u>3</u> |
| Replying Affidavits _____ | <u>4-6</u> |
| CROSS-MOTION: _____ YES <input checked="" type="checkbox"/> NO | |

FILED

Upon the foregoing papers, it is ordered that this motion is:

AUG 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER.

Dated: 7/30/12

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION _____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

BRIAN ESTRADA,

Plaintiff,

- against -

METROPOLITAN PROPERTY GROUP, INC.,
WELLS FARGO BANK, N.A. and VICTORIA
HUGHES,

Defendants.

INDEX NO.
110123/11

DECISION/ORDER

FILED

AUG 10 2012

DONNA M. MILLS, J:

Motion sequence numbers 004 and 005 are consolidated for disposition.

NEW YORK
COUNTY CLERK'S OFFICE

In this action for damages, plaintiff is seeking compensatory damages against Metropolitan Property Group, Inc., ("MPG"), Wells Fargo Bank, N.A. ("Wells Fargo") and Victoria Hughes ("Hughes"). In sequence number 004, Wells Fargo moves pursuant to CPLR 2221 to reargue its motion to dismiss the fourth and fifth causes of action alleged against it in the Amended Verified Complaint.

In sequence number 005, Hughes moves pursuant to CPLR 3212(a) seeking summary judgment dismissing the eighth cause of action alleged against her in the Amended Verified Complaint. Metropolitan cross moves pursuant to CPLR 3212(a) seeking summary judgment dismissing the first and second causes of action alleged against it in the Amended Verified Complaint.

BACKGROUND

This case arises out of the purchase of a residential cooperative apartment unit under a contract of sale executed on October 11, 2005. It is undisputed that plaintiff responded to an advertisement placed by Metropolitan for the sale of the subject apartment. After seeing the apartment, plaintiff subsequently applied to Wells Fargo for a loan to finance the purchase of the subject apartment. Before the closing date, Wells Fargo

ordered an appraisal to assess the value of the apartment. Hughes completed the appraisal, and submitted an appraisal report to Wells Fargo on or about February 23, 2006. Thereafter, plaintiff obtained a mortgage based in part upon the appraisal which indicated the size of the premises as 451 square feet, and valued it at exactly the price in the Contract of Sale, \$440,000.00. On or about March 16, 2006, Wells Fargo granted a loan to plaintiff in the original principal amount of \$352,000.00.

In 2009, Mr. Estrada sought to refinance his mortgage but was unable to do so based upon the fact that the appraisal conducted for the refinance indicated the size of the premises as 376 square feet, and valued it at \$350,000.00. In 2010, Mr. Estrada commissioned a historical appraisal of the premises as of March 16, 2006. The appraiser who conducted the historical appraisal measured the size of the premises as 344 square feet and valued it at \$330,000.00, which was \$110,000.00 less than plaintiff had paid for it on March 16, 2006.

All defendants moved previously for an order dismissing the action. On March 27, 2012, this Court issued an order dismissing Plaintiff's deceptive practices claims against all defendants, the negligence claim against Wells Fargo, and the breach of contract claim against Hughes. This Court did not, however, dismiss any of Plaintiff's causes of action for fraud, nor the cause of action against Metropolitan for breach of fiduciary duty. Wells Fargo now seeks to reargue this Courts March 27, 2012 decision and order, denying its request to dismiss the fourth and fifth causes of action.

APPLICABLE LAW AND DISCUSSION

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions

previously decided” (Foley v Roche, 68 AD2d 558 [1st Dept. 1979]).

Here, Wells Fargo claims that Plaintiff’s Amended Verified Complaint should have been dismissed in the March 27, 2012 decision, because Plaintiff failed to sufficiently plead the elements for fraud in the fourth and fifth causes of action brought against it.

In the fourth cause of action, Plaintiff alleges that Wells Fargo willfully, deliberately and fraudulently chose to retain an appraiser which it had reason to believe would appraise the premises at the purchase price indicated in the Contract of Sale, regardless of the accuracy of the appraised value and that Wells Fargo intended for Plaintiff to rely on the misrepresentations, and finally that Plaintiff did indeed rely upon Well Fargo’s fraudulent misrepresentation.

The fifth cause of action alleges that Wells Fargo willfully, deliberately and fraudulently chose to ignore anomalies in the appraisal issued by Defendant Hughes. Plaintiff also claims that Wells Fargo could reasonably have foreseen that Plaintiff would rely upon its fraudulent misrepresentations and that Plaintiff did in fact rely upon Wells Fargo’s fraudulent misrepresentations, to his detriment.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see CPLR 3026). This court accepts the facts as alleged in the complaint as true, accords plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (Morone v Morone, 50 NY2d 481, 484 [1980]). Under CPLR 3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see Heaney v Purdy, 29 NY2d 157 [1971]). In assessing a motion under CPLR 3211 (a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Rovello v Orofina Realty Co., 40 NY2d 633, 635 [1976]), and the criterion is whether the proponent

of the pleading has a cause of action, not whether he has stated one (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]).

“The essential elements of a cause of action for fraud are representation of a material existing fact, falsity, scienter, deception and injury.” Daly v. Kochanowicz, 67 AD3d 78 [2d Dept 2009][internal citations omitted]. Wells Fargo argues that plaintiff's fraud claims should be dismissed because plaintiff fails to allege any of the required elements. In this Court's earlier decision, I found that the Plaintiff alleged in the pleading that the defendants misrepresented the size of the apartment and thus misled him. However, upon review of the Amended Verified Complaint, I now find that Plaintiff failed to allege the elements of fraud against Wells Fargo. Specifically, the Complaint does not identify any purportedly false statement made by Wells Fargo, as opposed to its co-defendants. As such, Wells Fargo's motion to reargue is granted, and upon reargument its motion to dismiss the fourth and fifth causes of action, should also be granted.

Metropolitan and Hughes seek summary judgment with respect to Plaintiff's Second and Eighth Causes of Action for fraud. Metropolitan and Hughes both argue that there are no triable issues of material fact with respect to Plaintiff's causes of action for fraud. Plaintiff claims that both Metropolitan and Hughes made misrepresentations pertaining to the size of the apartment. Plaintiff, by way of his Complaint asserts that he relied upon the misrepresentations of the square footage in deciding to purchase the apartment.

As stated earlier, the elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages (Nottenberg v. Walber 985 Co., 160 A.D.2d 574, 575, 554 N.Y.S.2d 217). Plaintiff must show not only that he actually relied on the misrepresentations, but also that such reliance was reasonable (CPC International v. McKesson Corp., 70 N.Y.2d 268, 285, 519 N.Y.S.2d 804, 514 N.E.2d 116). Where a party has the means to discover the true nature of the

transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant's misrepresentations (88 Blue Corp. v. Reiss Plaza Associates, 183 A.D.2d 662, 664, 585 N.Y.S.2d 14).

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

This Court finds that there are no questions of fact as Plaintiff has failed to meet its burden to establish the existence of material issues pertaining to the fraud causes of action. Plaintiff's reliance on the misrepresentations of the size of the apartment was not reasonable or justifiable. Plaintiff could have easily measured the apartment for himself, particularly after receiving not one, but two different estimates from Metropolitan and then receiving the appraisal from Hughes which was also different. Plaintiff failed to do his due diligence, and proceeded to close on the purchase of the residence while fully realizing that

he was presented with three different measurements for the apartment.

This Court also does not find that there are triable issues of fact pertaining to whether Metropolitan breached its fiduciary duty of care to Plaintiff. To state a claim for breach of fiduciary duty, plaintiff must allege that (1) Metropolitan owed him a fiduciary duty, (2) Metropolitan committed misconduct, and (3) he suffered damages caused by that misconduct (see RNK Capital LLC v. Natsource LLC, 76 A.D.3d 840, 841–842, 907 N.Y.S.2d 476 [2010], lv. denied 16 N.Y.3d 709, 2011 WL 1237542 [2011]; Rut v. Young Adult Inst., Inc., 74 A.D.3d 776, 777, 901 N.Y.S.2d 715 [2010]; PJI 3:59, Comment). Plaintiff's allegations of "misconduct" on the part of Metropolitan are in essence claims of fraud that have not been pleaded with particularity (see CPLR 3016[b]), and is deficient as a matter of law, since this Court found no justifiable reliance to sustain the fraud allegations.

Accordingly it is

ORDERED that the motion of Wells Fargo for leave to reargue its motion to dismiss the fourth and fifth causes of action is granted; and it is further

ORDERED that upon reargument, the Court vacates that part of its prior order, dated March 27, 2012, and grants Well Fargo's motion to dismiss the fourth and fifth causes of action; and it is further

ORDERED that co-defendants Metropolitan Property Group and Victoria Hughes' motion and cross-motion for summary judgment is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against Wells Fargo, Metropolitan Property Group and Victoria Hughes, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

Dated: 7/30/12

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

AUG 10 2012

NEW YORK
COUNTY CLERK'S OFFICE.