

**Fidelity Natl. Title Ins. Co. v Smith Buss & Jacobs,
LLP**

2014 NY Slip Op 31953(U)

June 27, 2014

Sup Ct, Bronx County

Docket Number: 301293/13

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

FIDELITY NATIONAL TITLE INSURANCE COMPANY,
individually and as subrogee of its insureds, THOMAS
PICONE, JOSEPH PICONE, PRAN N. GROVER,
RAMEH MEHTA, SUNITA MEHTA, BALDEBHAI
PATEL PHYSICIAN PC, PEDRO GARCIA,
CHRISTINE GARCIA, DASHARATHBHAI
VITALDAS PATEL, DVS FAMILY, LLC, VIDA
FAMILY LLC and WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

**MEMORANDUM
DECISION/ORDER**
Index No.: 301293/13

SMITH BUSS & JACOBS, LLP, EDWARD N. KISS,
TROY G. BLOMBERG, STEVEN COLON and
STEVEN COLON, P.C.,

Defendants.

HON. MARK FRIEDLANDER

Defendants, Steve Colon and Steven Colon, P.C. (collectively "Colon"), move for an order, pursuant to CPLR§3211(a)(5), dismissing plaintiff's amended complaint against Colon, and any and all cross-claims asserted against Colon, and for costs associated in making this motion. Defendant, Troy G. Blomberg ("Blomberg"), moves for an order, pursuant to CPLR§3211(a)(5), dismissing plaintiff's amended complaint against Blomberg, on the ground that it is barred by the statute of limitations. Defendant, Smith Buss & Jacobs ("SBJ"), moves for an order, pursuant to CPLR§3211(a)(1)(7), dismissing plaintiff's amended complaint against SBJ. Defendant, Edward N. Kiss ("Kiss"), moves for an order, pursuant to CPLR§3211(a)(5), dismissing plaintiff's amended complaint against Kiss, on the ground that it is barred by the statute of limitations. These motion are consolidated for disposition and

decided as hereinafter indicated.

This is an action by plaintiffs to recover monetary damages, in an amended complaint which asserts causes of action for fraud, aiding and abetting fraud, conversion, breach of fiduciary duties, legal malpractice and breach of contract against law firms which represented sellers and purchasers of units in the Bridgeview Estates Condominium development ("Bridgeview"). In essence, plaintiffs allege that the sponsor and its principals defrauded purchasers of 16 condominium units by failing to use the funds of such purchasers, after closing, to satisfy the portion of the blanket mortgages held by New York Community Bank ("NYCB") allocated to each such unit of the condominium, as well as six mortgages held by Al Perma (the "Perma mortgages") against certain condominium units of Bridgeview. In addition, a breach of contract cause of action, brought against the attorney representing Wells Fargo Bank at the closing, alleges failure to follow the closing instructions requiring all liens of record to be satisfied at the closing.

The factual allegations in plaintiff's amended complaint are as follows: Plaintiff, Fidelity National Title Insurance Company ("Fidelity") is a title insurance company. Imagine Title Agency, Inc. ("Imagine") was engaged in the business of acting as policy issuing agent for Fidelity and providing related escrow services to clients, Fidelity having retained Imagine to issue insurance policies to owners of interests in real property pursuant to an August 8, 2002 agency agreement ("the agency agreement").

Pursuant to the agency agreement, Imagine was required, *inter alia*, to keep all moneys entrusted to it by Fidelity and others safely segregated in an FDIC escrow/trust account and to exercise a fiduciary duty with respect to the owners of all such moneys.

In and around 2004, Empire Builders ("Empire") acquired land in Bronx County which was

ultimately used to build the Bridgeview condominium development. Empire was owned and controlled by Robert H. Van Zandt, his son, Robert J. Van Zandt and Robert J. Van Zandt's wife Kimmarie Gervasi Van Zandt (collectively referred to the "Van Zandts"). The Van Zandts also controlled Imagine. At Empire's insistence, Imagine was to act as title agent for all sales of Bridgeview condominium units at issue in this action. In order for Empire to acquire the land and to construct the condominiums, Empire took out a mortgage from Ponce de Leon Federal Bank, which assigned the mortgages to NYCB. By agreement, these mortgages were consolidated into a \$7,300,000.00 NYCB blanket mortgage on the development. As each unit was sold, a portion of the mortgage would be distributed among those units pursuant to a formula stated in the agreement with Empire.

It is further alleged by plaintiff that, beginning in 2008, Empire, Imagine, the Van Zandts and seller's attorneys, SBJ, engaged in a fraudulent scheme to misappropriate the monies that Empire received from the sale of these units, that as part of the fraud, sixteen units were sold, and that NYCB never received money to satisfy the portions of the mortgage on those sixteen units, resulting in a continuation of the mortgage lien. The purchasers of these sixteen units allegedly relied on Empire, the seller's attorney and the title insurance issued for the satisfaction of any title defects on these units, based on the issuance of funds to seller's attorney at the closing. However, the encumbrances on the sixteen units subject to the NYCB and Perma mortgages were not removed. Notwithstanding that these mortgages had not been satisfied, Imagine issued title insurance policies on behalf of Fidelity to the purchasers and Wells Fargo Bank, N.A. ("Wells Fargo"), without exception for the unsatisfied NYCB and Perma mortgages, exposing Fidelity to the risk that NYCB and Perma would foreclose their mortgages against those units and Fidelity would be obligated to indemnify the purchasers and

Wells Fargo for their losses in protecting the purchasers' title to their units. Further, Fidelity did make payments under the title policies issued by Imagine, and is subrogated to the rights of the co-plaintiffs.

Empire conducted the first several sales of the Bridgeview condominium units largely in accordance with the terms of the NYCB mortgage and accepted real estate industry practices. Prior to the closing of each of those sales, SBJ requested a "payoff letter" from NYCB indicating the amount of the outstanding mortgage attributable to the unit that was to be sold. NYCB provided that figure in writing and SBJ incorporated it into the closing statement for the transaction, as moneys that must be disbursed to NYCB at the closing. SBJ provided the closing statement to each purchaser's attorney, who consequently caused a certified check in that amount, payable to NYCB, to be brought to the closing. NYCB provided an original release to the title agent (Imagine), which caused it to be recorded at the office of the City Register.

The sixteen units of Bridgeview, sold from December 2008 through April 2010, which provide the basis for this lawsuit, are as follows:

Date of Sale	Address	Unit	Buyer's Lawyer	Buyer
12/19/08	6 Marisa Court	1	Blomberg	T. Picone
9/9/2009	1 Marisa Court	1B	Blomberg	Grover
9/30/2009	4 Marisa Court	4B	Blomberg	T. Picone
10/14/2009	2 Angela's Place	2B	Blomberg	J. Picone
10/14/2009	3 Angela's Place	3B	Blomberg	Mehta
10/21/2009	3 Samantha Way	3B	Colon	B. Patel Phys. PC
10/21/2009	2 Samantha Way	2B	Colon	B. Patel Phys. PC
12/1/2009	1 Angela's Place	1A	Kiss	Garcia

1/12/2010	1 Angela's Place	1B	Colon	B. Patel Phys. PC
1/12/2010	1 Samantha Way	1B	Colon	Picone
1/21/2010	3 Angela's Place	3A	Colon	D.V. Patel
1/21/2010	2 Samantha Way	2A	Colon	Picone
2/5/2010	1 Samantha Way	1A	Colon	DVS Family LLC/Patel
2/5/2010	2 Angela's Place	2A	Colon	Vidi Family LLC/Patel
2/26/2010	4 Samantha Way	4A	Colon	Vidi Family LLC/Patel
4/28/2010	3 Samantha Way	3A	Colon	Vidi Family/Picone

The dates of sale listed in the above table refer to the dates title closed on each of the condominium units.

Plaintiffs filed a Summons With Notice with the Bronx County Clerk on February 25, 2013. Plaintiff's amended complaint contains six causes of action. The sixth cause of action is essentially a claim for legal malpractice and is directed only against defendants Colon, Kiss and Blomberg. Colon, Kiss and Blomberg, all separately move for an order dismissing plaintiff's amended complaint against them, pursuant to CPLR§3211(a)(5), on the ground that plaintiff's claim against them is barred by the statute of limitation, pursuant to CPLR§214(6), having been commenced more than three years after the alleged legal malpractice. In the instant action, any claim of plaintiff against defendants Colon, Kiss and Blomberg for legal malpractice accrued separately, on the date title to each condominium unit closed. *Int'l Electron Devices (USA) LLC v. Menter, Rudin & Trivelpiece, P.C.*, 71 A.D.3d 1512 (4th Dept. 2010); *Dignelli v. Berman*, 293 A.D.2d 565 (2nd Dept. 565).

The Colon Motion:

Colon acted as attorney for purchasers of ten condominium units at Bridegview. Colon

concedes that the sales of 4 Samantha Way, Unit 4A, on February 26, 2010, and of 3 Samantha Way, Unit 3A, on April 26, 2010, fall within the statute of limitations for legal malpractice, and does not seek dismissal of plaintiff's amended complaint with respect to them. However, Colon seeks dismissal of plaintiff's legal malpractice claims against him predicated on the sales of the other eight condominium units of Bridgeview, in which he acted as attorney for the purchasers, all of which occurred prior to February 25, 2010. Plaintiff opposes dismissal of its legal malpractice claims predicated on the first eight sales, asserting that they are timely under the continuous representation doctrine.

According to plaintiff's amended complaint, Colon acted as attorney for: (1) B. Patel Phys. PC for the purchase of four condominium units at Bridgeview; (2) Picone for the purchase of one condominium unit at Bridgeview; (3) D.V. Patel for the purchase of one condominium unit at Bridgeview; (4) DVS Family LLC/Patel for the purchase of one condominium unit at Bridgeview; and (5) Vidi Family LLC for the purchase of one condominium unit at Bridgeview. Plaintiff's amended complaint further alleges that Baldevbhai Patel controlled all of these entities and purchased these condominium units as part of an investment plan, and that, since these entities all used Colon as their attorney for these purchases, the continuous representation doctrine applies. As stated by the Court of Appeals:

“Application of the continuous representation ... doctrine is nonetheless generally limited to the course of representation concerning a specific legal matter (*McDermott v Torre*, 56 NY2d 399, 405). Thus, the doctrine is not applicable to a client's ... continuing general relationship with a lawyer ... involving only routine contact for miscellaneous legal representation ..., unrelated to the matter upon which the allegations of malpractice are predicated (*see, Young v New York City Health & Hosps. Corp.*, 91 NY2d 291, 296; *Nykorchuck v. Henriques*, 78 NY2d 255; *Glamm v Allen*, *supra*, 57 NY2d, at 94). Instead, in the context of a legal malpractice action, the continuous representation tolls the Statute of Limitations only where the continuing representation pertains specifically to the matter in which the attorney committed the

alleged malpractice (*see, Glamm, supra, at 94; see also, Weiss v. Manfredi, 83 NY2d 974, 977.*” *Shumsky v. Eisenstein, 96 N.Y.2d 164 (2001).*

See also, Int’l Electron Devices (USA) LLC v. Menter, Rudin & Trivelpiece, P.C., supra. The Court finds that, notwithstanding that these separate and distinct entities have a common principal, such commonality is insufficient to invoke the continuous representation doctrine. *See, Int’l Electron Devices (USA) LLC v. Menter, Rudin & Trivelpiece, P.C., supra; Booth v. Kreigel, 36 A.D.3d 312 (1st Dept. 2006); Goldman v. Akin Gump Strauss Hauer & Feld, LLP, 46 A.D.3d 481 (1st Dept. 2007).* Accordingly, the sixth cause of action in plaintiff’s amended complaint against Colon for legal malpractice, to the extent predicated on the first eight sales in which Colon acted as attorney for the purchasers, is dismissed, as being barred by the Statute of Limitations.

The Kiss Motion:

Kiss acted as attorney for the Garcias, who purchased one condominium unit in Bridgeview, 1 Angela’s Place. The closing for this condominium unit took place on December 1, 2009, which occurred more than three years prior to plaintiffs filing of the Summons with Notice. Accordingly, the sixth cause of action in plaintiff’s amended complaint against Kiss for legal malpractice is dismissed, as being barred by the Statute of Limitations.

The Blomberg Motion:

Blomberg acted as attorney for purchasers of five condominium units at Bridgeview. Blomberg seeks dismissal of plaintiff’s legal malpractice claims against him predicated on the sale of the five condominium units in which he acted as attorney for the purchasers. The closings for the sales of all the condominium units at Bridgeview, in which Blomberg acted as attorney for the purchasers thereof, took

place from December 19, 2008 through October 14, 2009, which is more than three years prior to plaintiff's filing of a Summons with Notice. Accordingly, the sixth cause of action in plaintiff's amended complaint against Blomberg for legal malpractice is dismissed, as being barred by the Statute of Limitations.

Plaintiff's fifth cause of action in the amended complaint, against Blomberg, only, reads as follows (Paragraph 47) :

"Troy Blomberg's allowing the 6 Marisa Court purchase and mortgage transaction to close and Wells Fargo's moneys to be disbursed at that closing constituted a breach of the closing instructions that Wells Fargo gave to him and which he accepted. Specifically, he allowed the transaction to close and Wells Fargo's loan proceeds to be disbursed without satisfaction of the part of the NYCB mortgage that encumbered that property as the closing instructions required. In consequence thereof, Fidelity has suffered damages in an amount in excess of \$250,000, for which Troy Blomberg is liable.

Plaintiff argues that Blomberg was not acting as Wells Fargo's attorney, but as an escrow agent, and that the alleged breach is of a contractual obligation, governed by the six year Statute of Limitations, not the three year legal malpractice Statute of Limitations.

Blomberg's motion is made pursuant to CPLR§3211(a)(5), and is predicated solely on the grounds that the plaintiff's amended complaint is barred by the Statute of Limitations. Blomberg has not demonstrated under which capacity he acted with respect to Wells Fargo, or whether he acted in a dual capacity, etc. Consequently, dismissal of the fifth cause of action in plaintiff's amended complaint against Blomberg is denied. Furthermore, at this juncture, the Court need not address whether there was in fact legal malpractice or a breach of contract by Blomberg with respect to the transaction pertaining to the purchase of 6 Marisa Court.

The SBJ Motion:

Plaintiff's first, second, third and fourth causes of action in the amended complaint, directed solely against SBJ, sound in fraud, aiding and abetting of its clients' fraud, conversion and breach of fiduciary duties. SBJ asserts that the claim of fraud against SBJ is insufficiency pleaded, pursuant to CPLR§3016(b).

In *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553(2009), the Court of Appeals stated:

“We recently explored the pleading requirement of CPLR§3016(b) in *Pludeman v. Northern Leasing Sys., Inc.* (10 NY3d 486 [2008]). In that case, we noted that the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute ‘should not be so strictly interpreted 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’ (*id.* at 491 [internal quotation marks and citation omitted]). Although there is certainly no requirement of ‘unassailable proof’ at the pleading stage, the complaint must ‘allege the basic facts to establish the elements of the cause of action’ (*id.* at 492). We therefore held that CPLR 3016(b) is satisfied when the facts suffice to permit a ‘reasonable inference’ of the alleged misconduct (*id.*). And, ‘in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud’ (*id.* at 493).”

In addition, viable claims for the aiding and abetting of any tort rest upon the allegation of facts constituting the elements of the underlying tort, knowledge thereof by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the tortious act. *Winkler v. Battery Trading, Inc.*, 89 A.D.3d 1016 (2nd Dept. 2011). Actual knowledge of the fraud may be generally averred. *Stanfield Assets v. Metropolitan Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dept. 2009).

On a motion to dismiss a complaint pursuant to CPLR§3211(a)(7), a Court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the

benefit of every favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory. *Siegmund Strauss, Inc. v. East 149th St. Realty Corp.*, 104 A.D.3d 401 (1st Dept. 2013).

The gravamen of plaintiff's amended complaint against SBJ is that it knew that it was standard and accepted practice in the real estate field in Bronx County, for an attorney representing a seller of real property, including condominium units, to obtain a "payoff letter" from the mortgagee, indicating the amount of the outstanding mortgage attributable to the unit, and for the buyer to have a certified or bank check for that amount, payable to the mortgagee, at the closing. Further, with respect to the condominium sales which are the subject of this lawsuit, SBJ deviated from what it knew to be standard and accepted practice by directing the buyers of the Bridgeview units and their attorneys to have certified or bank checks (to satisfy any existing mortgages) made payable at the closings to Imagine or Imagine's attorney, Lease, instead of the mortgagee, and plaintiff alleges that SBJ knew that Empire, Imagine, Lease and the Van Zandts would divert these funds for their own benefit and not for their intended purpose and use.

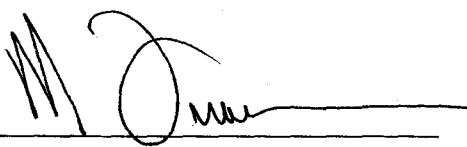
Here, accepting the facts as alleged in the plaintiff's amended complaint to be true, and according the plaintiff the benefit of every favorable inference, the amended complaint sufficiently pleads, with the required particularity (*see* CPLR§3211[b]), causes of action against SBJ to recover damages for fraud, aiding and abetting of its clients' fraud, conversion and breach of fiduciary duties, there being reasonable inferences of the alleged misconduct. Plaintiff has sufficiently alleged that the fraud could not have occurred without the substantial assistance of SBJ in requiring payments earmarked for removal of mortgage liens to be made to Imagine and Lease instead of to the mortgagee.

SBJ has not disputed plaintiff's claim of what is accepted and standard practice in these types of real estate transactions or furnished an explanation for the change instituted with regard to the closings of the Bridgeview condominium units. Thus, dismissal of these causes of action is inappropriate at this juncture.

Consequently, SBJ's motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: 6/27/14



MARK FRIEDLANDER, J.S.C.