

7296-7304 Realty Corp. v Guastamaccia

2011 NY Slip Op 31286(U)

May 10, 2011

Sup Ct, Richmond County

Docket Number: 100705/08

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM PART 3

**Calendar No.: 3839-007
117-008
159-009**

7296-7304 REALTY CORP and NICHOLAS ANTONELLI,

Index No.: 100705/08

Plaintiffs,

against

**DECISION
HON. JOSEPH J. MALTESE**

**STEVEN GUASTAMACCIA, CATHERINE
GUASTAMACCIA, VITO LENTINI, ANNETTE
LENTINI, COUNTRYWIDE HOME LOANS, HCI
MORTGAGE A/K/A HOME CONSULTANTS, INC,
EAM LAND SERVICES, INC., AND
LOUIS CANNIZZARO,**

Defendants.

The following papers numbered 1 to 9 were submitted on the 18th day of March, 2011:

	Pages Numbered
Notice of Motion to Dismiss by Defendant EAM Land Services, Inc., with Supporting Papers, Exhibits and Memorandum of Law (dated November 24, 2010) _____	1
Notice of Cross Motion to Serve and File an Amended Complaint and to Compel Discovery by Plaintiffs, with Supporting Papers, Exhibits and Memorandum of Law (dated January 10, 2011) _____	2
Notice of Cross Motion to Consolidate (with Action bearing Index No. 102612/09) by Defendants Countrywide Home Loans and HCI Mortgage a/k/a Home Consultants, Inc., with Supporting Papers and Exhibits (dated January 14, 2011) _____	3
Affirmation by Plaintiffs (dated January 19, 2011) _____	4
Reply Affirmation by Defendant EAM Land Services, Inc., with Supporting Papers, Exhibits and Memorandum of Law (dated February 9, 2011) _____	5

Affirmation by Plaintiffs (filed under Index No. 102612/09) (dated March 1, 2011)	6
Reply Affirmation by Plaintiffs, with Supporting Papers and Exhibit (dated March 10, 2011)	7
Affirmation in Opposition by Defendants Countrywide Home Loans and HCI Mortgage a/k/a Home Consultants, Inc. (dated March 15, 2011)	8
Reply Affirmation by Defendants Countrywide Home Loans and HCI Mortgage a/k/a Home Consultants, Inc. (dated March 15, 2011)	9

Upon the foregoing papers, the motion (No. 3839-007) to dismiss by defendant EAM Land Services, Inc (hereinafter “EAM”) is granted in part and denied in part. Plaintiff’s cross motion (No. 117-008) to serve and file an amended complaint is granted, as is the cross motion (No. 159-009) by defendants Countrywide Home Loans and HCI Mortgage a/k/a Home Consultants, Inc (collectively, hereinafter “Countrywide”) to consolidate this action with that commenced by the same plaintiffs under Index No. 100705/08.

This is an action, inter alia, to impose a constructive trust, fraud and commercial bad faith in a real estate transaction, as well as a declaratory judgment to invalidating the mortgages and transfers of two separate parcels of real property situated on Staten Island to individual defendants Steven and Catherine Guastamaccia (hereinafter Guastamaccia) and Vito and Annette Lentini, (hereinafter Lentini), respectively. As alleged in the complaint, defendants Countrywide and EAM were, inter alia, negligent in failing to follow proper underwriting guidelines and industry standards with regard to their acceptance of certain false and inaccurate documentation proffered in support of the mortgage applications of the individual defendants, thereby assisting them in committing a fraud against plaintiffs. According to plaintiffs, both properties had been fraudulently conveyed to these individual defendants by the plaintiff realty corporation for no consideration and without the individual plaintiff’s consent¹. As to the remaining defendant, plaintiffs claim that Louis Cannizzaro,

¹Plaintiff Nicholas Antonelli sues individually and as a purported shareholder in the plaintiff corporation, 7296-7304 Realty Corp.

as accountant for the corporate plaintiff, breached his fiduciary duty by providing false and inaccurate information to the defendant mortgagors.²

It is undisputed that this is the first of two actions commenced by plaintiff Nicholas Antonelli (hereinafter, plaintiff) individually and on behalf of the plaintiff corporation under the caption of *Antonelli, et al. v. Decker, et al.* (Index No.102612/09), alleges that plaintiff was fraudulently induced by defendant Steven Decker, Esq. and the law firm of Decker, Decker, Dito & Internicola, LLP, to invest \$600,000 in a development project with defendants Guastamaccia and Lentini to acquire property for the construction and sale of eight houses on Staten Island at a profit. Accordingly, the second action sounds, *inter alia*, in legal malpractice, breach of fiduciary duty and fraud predicted on allegations of, *e.g.*, misrepresentation as to the nature of the above investment.

It is conceded in both actions that the plaintiff corporation was established to hold title to all eight parcels. Plaintiff Antonelli maintains that he was intended to become the sole shareholder and director of said corporation, but this status (if it was ever formalized) was effectively ignored in practice (*see infra*). Eventually all eight houses were completed. According to plaintiffs, six of the eight houses were ultimately sold, but the remaining two, the subject of this lawsuit, were allegedly conveyed without plaintiffs' knowledge or consent to Guastamaccia and Lentini for no consideration. Subsequently both parcels were mortgaged by these defendants and the money invested elsewhere. It is further alleged that Countrywide was the mortgagor and EAM the title company on both transactions.

In its current motion to dismiss the complaint or in the alternative, for summary judgment, defendant EAM maintains that it never provided any services to plaintiffs and, given this lack of privity, owed them no duty. It is undisputed that EAM, a title abstract company, was directly contacted by Countrywide to do the title work for these two properties, and that plaintiff Antonelli had no personal involvement with EAM. In fact, he was not even aware of its involvement until he received a copy of the title report. On this basis, EAM asserts that the complaint fails to state any cause of action against it for negligent misrepresentation or aiding-and-abetting a fraud.

²Plaintiffs' prior motion for a default judgment against defendants Guastamaccia and Lentini was granted by this Court in 2008. Plaintiffs' motion default judgment against defendant Louis Cannizzaro was granted in 2010. Hence, the only remaining defendants are Countrywide and EAM.

In support of these claims, it is attested by EAM's president that it was his understanding that the lack of consideration for the transfer of title of the subject properties was for the purpose of facilitating the acquisition of loans on properties known as 7300 and 7302 Amboy Road on Staten Island, and that the mortgage proceeds were to be utilized for the development of same (*see* Affidavit of Eric Fein). Further, EAM had purportedly been supplied with a sworn affidavit stating that Catherine Guastamaccia and Vito Lentini were the sole owners and principals of the plaintiff corporation, which held the title to both houses (*see* EAM's Exhibit "J"). It is also claimed that, a "No Consideration Affidavit" was duly executed by Catherine Guastamaccia and Vito Lentini at the closing, in keeping with terms of the transaction as known by EAM (*see* EAM's Exhibit "K"). In addition, EAM has submitted copies of the title report and title insurance policies for both premises (*see* EAM's Exhibits "L", "M", "N").

A motion to dismiss a complaint based on documentary evidence may be appropriately granted only when the evidence submitted conclusively establishes a complete defense to the action as a matter of law (*see City line Rent a Car, Inc v. Alfess Realty LLC*, 33 AD3d 835 [2nd Dept 2006]; *Saxony Ice Co., Div of Springfield Ice Co v. Ultimate Energy Rest. Corp.*, 27 AD3d 445, 446 [2d Dept 2006]). In addition, it is well settled that on a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 [a][7]), the action may be dismissed only when, after accepting the allegations in the complaint as true and according plaintiffs the benefit of every possible favorable inference, the facts alleged fail to fit within any cognizable legal theory (*see Dickinson v. Igoni*, 76 AD3d 943, 945 [2nd Dept 2010]; *Hallman v. Kantor*, 72 AD3d 895 [2nd Dept 2010]). Applying these principles to the case at bar, EAM has failed to demonstrate its right to dismissal of the complaint against it as a matter of law. In the opinion of this Court, the documentary evidence submitted by EAM does not utterly refute plaintiffs' claims of fraud, in which privity between the parties is not required (*see Valazquez v. Decaudin*, 49 AD2d 712, 716 [2d Dept 2008]).³ Accordingly, this branch of EAM's motion must be denied.

³ A plaintiff asserting a cause of action for aiding-and-abetting a fraud must allege the existence of the underlying fraud, actual knowledge, and substantial assistance (*see Oster v. Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). "[A]ctual knowledge need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind...[i.e., a]n intent to commit fraud...[This requires] actual [rather than constructive] knowledge of the fraud as [may often be] discerned from the surrounding circumstances." (*id.*).

As a general rule, a title company hired by one party is not, in the absence of fraud, collusion, or other special circumstances, subject to a suit for negligence by anyone other than the party which contracted for its services (*see Velazquez v. Decaudin*, 49 AD3d at 716 [2nd Dept 2008]; *Sabo v. Alan B. Brill, PC*, 25 AD3d 420, 421 [1st Dept 2006]). Here, although it is undisputed that plaintiff Antonelli did not have any relationship or contact with the title abstractor, EAM, one who nevertheless aids-and-abets a breach of fiduciary duty is liable for that breach, even if he or she had no independent fiduciary obligation to the injured party, so long as the alleged aider-and-abettor rendered substantial assistance to said fiduciary in effecting the alleged breach of duty (*see Velazquez v. Decaudin*, 49 AD3d at 716). In the opinion of this Court, the complaint at bar sufficiently alleges that EAM either aided or participated in a scheme to defraud plaintiffs to withstand dismissal of their cause of action for negligence (*id.*).

Contrariwise, the complaint fails to allege a legally sufficient cause of action for negligent misrepresentation against EAM, wherein privity is required (*cf. Calamari v. Grace*, 98 AD2d 74 [2nd Dept 1983]).

In their cross motion for leave to serve an amended complaint, plaintiffs seek to assert additional allegations against EAM including, inter alia, its failure to obtain certified copies of the certificates of incorporation and corporate resolutions, as well as its failure to verify the ownership of the properties and the corporation. It is well settled that leave to amend a pleading shall be freely given in the absence of prejudice, and that the decision of whether to grant such application is committed to the sound discretion of the Court (CPLR 3025[b]; *see Dickinson v. Igoni*, 76 AD3d at 946). Here, since the newly asserted allegations of fact introduced in support of plaintiffs' amended claims for aiding-and-abetting(1) are "not palpably insufficient or patently devoid of merit" and (2) the proposed amendment would cause neither prejudice nor surprise, the motion should be granted (*Dickenson v. Igoni*, 76 AD3d at 946 [internal quotation marks omitted]).

Finally, Countrywide moves to consolidate this action with the subsequently commenced action entitled *Antonelli et al. v. Decker et al.* (Index No.102612/09). Consolidation pursuant to CPLR 602 (a) is appropriate where it will avoid unnecessary duplication of trials, save cost and expense, and prevent the injustice which might result from divergent decisions based on the same set of facts (*see Viafax Corp v. Citicorp Leasing Inc*, 54 AD3d 846, 850 [2d Dept 2008]). Here, both actions arise from the same transaction or series of transactions, concern the same parties, and involve common questions of law and fact (*id.*). Under these circumstances, and in the absence of any showing of prejudice (*see Nigro v. Pickett*, 39 AD3d 720, 722 [2nd Dept 2008]; *Nationwide Assocs*

STEVEN DECKER, ESQ. and DECKER, DECKER,
DITO & INTERNICOLA, LLP,

Third-Party Plaintiffs,

-against-

SUSAN GUIFFRE,

Third-Party Defendants.

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And it is further

ORDERED that the cross motion to serve and file an amended complaint in the consolidated action is granted; and it is further

ORDERED that any such amended complaint shall be filed and served upon each of the named defendants within 20 days after the service upon plaintiffs of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that defendants shall have 20 days after the service upon them of a copy of the above complaint within which to interpose an answer; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

ENTER,

DATED: May 10, 2011

Joseph J. Maltese
Justice of the Supreme Court