

Gibbs v Mel's Adv. & Leads Servs., Inc.

2024 NY Slip Op 32205(U)

June 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 517703/20

Judge: Ingrid Joseph

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27 day of June, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X

JAMES GIBBS and MASMAUREEN GIBBS,
Plaintiffs,

DECISION AND ORDER

-against-

Index No. 517703/20

MEL'S ADVERTISING & LEADS SERVICES, INC.,
WILHEMINA SMITH,
NORMANDY CAPITAL TRUST, by and through its trustee,
WILMINGTON SAVINGS FUND SOCIETY, FSB,
EVANDER M. LOUIS, and MICHELINE M. LOUIS,
Defendants.

Mot. Seq. No. 1

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The following e-filed papers read herein:

NYSCEF Doc Nos.:

Order to Show Cause, Affirmations (Affidavits),
and Exhibits Annexed
Opposing Affirmation

35, 17-34
37

In this action to recover damages for fraud, defendants Mel's Advertising & Leads Services, Inc. ("MALS"), Wilhemina Smith ("Smith"), and Smith's children, Evander M. Louis and Micheline M. Louis ("Smith's children" and collectively with MALS and Smith, "defendants"), move, pre-answer, by order to show cause, dated March 3, 2022 (NYSCEF Doc No. 35), for an order dismissing the verified complaint, dated September 21, 2020 (NYSCEF Doc No. 1), of plaintiffs James Gibbs ("Gibbs") and Masmaureen Gibbs (collectively with Gibbs, "plaintiffs"), as barred by documentary evidence and for failure to state a claim, pursuant to CPLR 3211 (a) (1) and (7), respectively, as well as for failure to plead fraud with particularity, pursuant to CPLR 3016 (b).

Plaintiffs allegedly are the victims of a foreclosure rescue scam in connection with their primary residence, a two-family house located at 5564 Kings Highway in Brooklyn, New York (the "underlying property"). Plaintiff had owned the underlying property since December 2008 when they acquired it for \$595,000, with a purchase-money mortgage in the principal amount of \$575,141 (Complaint, ¶¶ 9, 15-16; CRFN 2009000020464 [Deed]; CRFN 2009000020465 [Mortgage]).

¹ The caption herein conforms to the amended caption set forth in the Order Substituting Defendant and Amending the Caption, dated July 9, 2021 (NYSCEF Doc No. 13).

Six years later in December 2014, the underlying property went into foreclosure (*see CP-SRMOF II 2012-A Trust v Gibbs*, index No. 511558/14 [Sup Ct, Kings County]) (“foreclosure action”) (Complaint, ¶ 18). In December 2017, a judgment of foreclosure and sale was entered in the foreclosure action. Thereafter, in or about 2019, plaintiffs either contacted or were contacted by Smith who “represented to [them] that she would assist [them] in modifying [and/or refinancing] the mortgage to avoid foreclosure” (Complaint, ¶¶ 23-24).

Plaintiff alleges that Smith – acting on her own and through her children, as well as through her children’s wholly owned corporation known as MELS – fraudulently induced plaintiffs to pay her \$45,000 sometime in 2019 and, thereafter in September 2019, to convey title to the underlying property to MALS for the alleged purchase price of \$700,000 (Complaint, ¶¶ 24-25, 30-37, 39-42; CRFN 2019000351196 [the purportedly fraudulent Deed]). To finance the purported purchase of the underlying property from plaintiffs, MALS borrowed \$656,200 (via two loans) from a third party in September 2019 (Complaint, ¶ 44; CRFN 2019000351197 and 2019000351199 [the purportedly fraudulent Mortgages]). Plaintiffs allegedly received no consideration in connection with the purportedly fraudulent conveyance of title to MELS and the latter’s purchase-money mortgages (Complaint, ¶ 44). Following the purportedly fraudulent conveyance and financing of the underlying property in September 2019, Smith (through her children and MELS) “has been collecting the rents from the residential tenants [at the underlying property], as well as [from] the plaintiffs [themselves]” (Complaint, ¶ 45). Two months later, in November 2019, the foreclosure action was discontinued.²

Plaintiffs advance a cause of action for fraud (or fraud and deceit) among a host of legal theories of recovery against defendants (Complaint, ¶¶ 58-65, 74-79). They seek (in addition to equitable relief) an award of \$1 million in compensatory damages, inclusive of the \$45,000 which they allegedly paid to Smith (Complaint, ¶¶ 65, 79, and 78). Defendants have moved, by order to show cause, to dismiss the complaint.

Upon a motion to dismiss pursuant to CPLR 3211 (a)(1), dismissal is warranted where documentary evidence refutes plaintiff’s factual allegations and establishes a defense as a matter of law (*Leon v Martinez*, 84 N.Y.2d 83 88 [1994]; *Goshum v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Brio v Roth*, 121 A.D.3d 733 [2d Dept. 2014]). To constitute documentary evidence, the evidence

² Thereafter in May 2021, the assignee of the MELS mortgages brought a foreclosure action against MELS and plaintiffs herein (among others) to foreclose on the underlying property (*see Normandy Capital Trust, by and through its trustee, Wilmington Savings Fund Society, FSB v Mel’s Advertising & Leads Service, Inc.*, index No. 510884/21 [Sup Ct, Kings County]) (“subsequent foreclosure action”). According to “WebCivil Supreme-Appeal Detail” for the subsequent foreclosure action, the underlying property was sold at a court-ordered auction held on April 25, 2024. To date, no further detail regarding the auction sale of the underlying property appears in the electronic docket for the subsequent foreclosure action. Normandy Capital Trust, as the foreclosing mortgagee in the subsequent foreclosure action, has interposed an answer as a named co-defendant in this action (NYSCEF Doc No. 14).

must be “unambiguous, authentic, and undeniable,” such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable (*Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 996 [2d Dept. 2010]; *Prott v. Lewin & Baglio, LLP*, 150 AD3d 908 [2d Dept 2017]). An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit (*Xu v Van Zqienen*, 212 A.D.3d 872 [2d Dept. 2023]; *Phillips v Taco Bell Corp.*, 152 A.D.3d 806 [2d Dept. 2017]; *Fontanetta v John Doe I*, 73 A.D.3d 78 [2d Dept. 2010]). Similarly, neither deposition testimony nor letters are considered documentary evidence within the intended meaning of CPLR 3211 (a)(1) (*Cives Corp. v George A. Fuller Co., Inc.*, 97 A.D.3d 713 [2d Dept. 2012]; *Integrated Const. Services, Inc., v Scottsdale. Ins. Co.*, 82 A.D.3d 1160 [2d Dept. 2011]).

Where documentary evidence contradicts the allegations of the complaint, the court need not assume the truthfulness of the pleaded allegations (*West Branch Conservation Assn, Inc., v County of Rockland*, 227 A.D.2d 547 [2d Dept. 1996]; *Greene v Doral Conference Center Associates*, 18 A.D.3d 429 [2d Dept. 2005]); *Penato v. George*, 52 A.D.2d 939, 941 [2d Dept 1976]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137 [2017]; *Duncan v Emeral Expositions LLC*, 186 A.D.3d 1321 [2d Dept. 2020]; *Dinerman v Jewish Bd. of Family & Children’s Services Inc.*, 55 A.D.3d 530 [2d Dept. 2008]; *Nisari v. Ramjohn*, 85 A.D.3d 987, 989 [2d Dept 2011]). The defendant bears the burden of demonstrating that the proffered evidence conclusively refutes plaintiff’s factual allegations (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]; *Kolchins v Evolution Mkts. Inc.*, 31 NY3d 100 [2018]; *Goshen v Mutual Life Ins. Co. of NY*, 98 NY2D 314 [2002]).

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181). Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*;

Rovello at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

Although the various documents proffered by defendants (*i.e.*, plaintiffs' deed to MEL and the latter's purchase-money mortgages at NYSCEF Doc Nos. 27 and 26, respectively) contain unambiguous language about the intended effect of their execution and delivery, all plaintiffs' claims hinge on the allegations that their conveyance of the underlying property to MEL (together with the latter's financing thereof) in September 2019 was procured by fraud. Against this backdrop, defendants' submissions do not wholly resolve the issues presented (*see Bennett v Bennett*, 223 AD3d 1013, 1017-1018 [3d Dept 2024]; *Ortiz v Silver Investors*, 165 AD3d 1156, 1158 [2d Dept 2018]). Smith's supporting affidavits, though imbued with righteous indignation,³ "do not constitute documentary evidence within the meaning of CPLR 3211 (a) (1)" (*Goldin Real Estate, LLC v Shukla*, NY Slip Op 02304, *2 [2d Dept 2024]).

To state a cause of action to recover damages for fraud, which must be pleaded with the requisite particularity under CPLR 3016(b), a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*DeMartino v Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf*, 189 A.D.3d 774 [2d Dept. 2020]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 A.D.3d 914 [2d Dept. 2009]). If the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to him or her of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or he or she will not be heard to complain that he or she was induced to enter into the transaction by misrepresentations (*ACA Financial Guar. Corp. v Goldman, Sachs, & Co.*, 25 N.Y.3d 1043 [2015];

³ *See e.g.* Smith's Affidavit in Support of Order to Show Cause, dated December 24, 2021, ¶ 17 ("Our assistance to . . . Gibbs has created an open wound that bleeds away our needed resources on a monthly basis. In essence, we have made the mortgage payments he should have been making, thus permitting him to continue to reside in the premises and afford him the opportunity to improve his financial circumstances and obtain his own financing."); *see also* Smith's Supplemental Affidavit in Support of Motion to Dismiss, dated February 12, 2022, ¶ 9 ("Gibbs is unlawfully holding us and the premises hostage, while enjoying the comforts of home, while we bear all the burden, responsibility and potential liability in case of fire and/or injury.") (NYSCEF Doc Nos. 19 and 31, respectively).

Danann Realty Corp. v Harris, 5 N.Y.2d 317 [1959]; *Schumacher v Mather*, 133 N.Y. 590 [1892]; *R. Vig Properties, LLC v Rahimzada*, 213 A.D.3d 871 [2d Dept. 2023]). Moreover, “when the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of them. A party cannot reasonably rely on such representations without making additional inquiry to determine their accuracy (*ACA Financial Guar Corp.* at 1045; *Central Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269 [2011]).

Plaintiffs’ allegations in the complaint that they were vulnerable and unsophisticated homeowners facing foreclosure, that they were victims of a foreclosure rescue scam which was orchestrated by Smith (with the assistance of her children and their company), and that they were deprived of \$45,000 in cash and lost title to the underlying property, are sufficient to state a fraud (or fraud and deceit) cause of action against defendants to satisfy the pleading requirements of CPLR 3211 (a) (7) (*see Abraham v Torati*, 219 AD3d 1275, 1280 [2d Dept 2023]).

Likewise, plaintiffs’ allegations in the complaint are sufficient to inform defendants of the complained-of incidents and thus satisfy the particularity requirements of CPLR 3016 (b) (*see J.P. Morgan Mtge. Acquisition Corp. v S. Homes, Inc.*, 189 AD3d 1381, 1384 [2d Dept 2020]).

All other issues not addressed herein are either without merit or moot.


Accordingly, it is hereby,

ORDERED that defendants’ order to show cause in Seq. No. 1 is denied in its entirety; and it is further,

ORDERED that, pursuant to CPLR 3211 (f), defendants shall answer the complaint within ten (10) days after electronic service of this decision and order with notice of entry by plaintiffs’ counsel on defendants’ counsel and on co-defendant’s counsel; and it is further,

ORDERED that plaintiffs’ counsel shall electronically serve a copy of this decision and order with notice of entry on defendants’ counsel and on co-defendant’s counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice