

Global Bank v 43 Mott Realty Owner LLC

2024 NY Slip Op 33953(U)

November 1, 2024

Supreme Court, New York County

Docket Number: Index No. 850477/2023

Judge: Francis A. Kahn III

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III PART 32

Justice

INDEX NO. 850477/2023

GLOBAL BANK, Plaintiff, MOTION DATE

- v -

MOTION SEQ. NO. 003

43 MOTT REALTY OWNER LLC, TAI CHEUNG REALTY, INC., NEWBANK, NYC DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, NYC DEPARTMENT OF FINANCE, NYS DEPARTMENT OF TAXATION AND FINANCE, KEVIN YE, PING CHEUNG, GRAND TOP LLC,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 78, 79, 80, 81, 82

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion is determined as follows:

The within action is to foreclose on a consolidated, modified and extended mortgage encumbering a parcel of real property located at 43-45 Mott Street, New York, New York. The mortgage was given by Defendants 43 Mott Realty Owner LLC ("Mott") and Tai Cheung Realty, Inc. ("Realty") to Plaintiff, Global Bank ("Global"). The mortgage secures an indebtedness of \$10,170,000.00 memorialized by a consolidated note of the same date as the mortgage. The loan documents were executed by Defendants Kevin Ye ("Ye") as Managing Member of Mott and Ping Cheung ("Cheung") as President of Realty. Mott and Realty were owners of the encumbered premises in equal shares. Concomitantly, therewith Defendants Ye and Cheung executed an individual guaranty of the indebtedness. Further, Defendant Grand Top, LLC ("Grand"), by its Managing Member, Ye, also executed a guaranty of the indebtedness.

Plaintiff commenced this action and pled in the complaint that Defendants "defaulted in the payment of said subordinate mortgage which has resulted in foreclosure proceedings being commenced by such subordinate mortgage holder which foreclosure proceedings are still pending". The holder of the subordinate mortgage is NewBank which is named as a Defendant in this action. Defendants Ye, Grand, Cheung, Realty and Mott answered jointly and pled, inter alia, four cross claims against Defendant NewBank as follows: [1] interference with contractual relations, [2] interference with prospective economic advantage, [3] fraud, and [4] negligent misrepresentation. Defendant NewBank replied to the cross claims. The parties stipulated to sever these cross claims and consented to Plaintiff's motion for summary judgment. A judgment of foreclosure and sale was entered on May 15, 2024.

1 The action is pending before this Court and is titled NewBank v 43 Mott Street Realty Owner, LLC, NY Cty Index No 850034/2022. NewBank's motion for summary judgment and an order of reference was granted by order of this Court dated May 3, 2024. A referee's report of the amount due was filed on October 3, 2024 (NYSCEF Doc No 169).

Now, Defendant NewBank moves pursuant to CPLR §3211[a][7] to dismiss the cross claims for failure to state a cause of action. Defendants Ye, Grand, Cheung, Realty and Mott oppose the motion.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], “the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In evaluating a pleading in this procedural context, the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (see *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). Further, “whatever may be implied from [the] statements [in the pleading] by reasonable intention” is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). “Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss” (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). Nevertheless, when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted the presumption falls away (see *Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). If the evidence reaches this threshold, the court must determine whether the proponent of the pleading has a cause of action, not whether they have stated one (see *Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

In support of their cross claims, Defendants pled that its default under Global’s mortgage was brought about “solely by the negligent and/or intentional and wrongful acts of New Bank” by encumbering the subject premises with the NewBank second mortgage. Cheung alleges she executed the Realty guarantee “under the understanding that no aspect of the NewBank . . . Loan would jeopardize the . . . Global . . . and she did not understand that the execution of the New Bank \$500,000 Mortgage immediately put the \$9,900,000 Global Bank Mortgage into default”. Cheung also pled that she was “misled by an agent or employee i.e., the loan officer, of New Bank, who told her before the loan closing that she did not need to involve Global . . . in the transaction” and that, absent being misled, she would not have assented to the NewBank loan.

After Defendants encountered financial distress because of the COVID-19 pandemic, they approached Global for relief. Defendants aver that Global refused to assent unless the entire indebtedness secured by its mortgage was superior to the NewBank mortgage. NewBank purportedly refused to subordinate its position without compensation. Eventually, Global and NewBank reached a subordination agreement in “secret” and then presented it to Defendants as “a take-it-or-leave-it proposition”. Defendants claim they were unaware that as part of the subordination agreement, which also did not recount same, that Global would pay \$380,000 to NewBank at the expense of Defendants as additional debt. Defendants plead they “had no choice but to comply with [the banks’] demand . . . because they needed these funds to continue business operations and to avoid foreclosure”. In the end, Defendants executed a forbearance agreement with Global dated May 25, 2022.

I. Interference with contractual relations.

“The tort of inducement of breach of contract, now more broadly known as interference with contractual relations, consists of four elements: (1) the existence of a contract between plaintiff and a

third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" *Kronos, Inc. v. AVX Corp.*, 81 NY2d 90, 94 [1993]; *see also Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]). Defendants' cross claim is based upon the flawed premise that the mere act of giving the second mortgage to NewBank, supposedly at its behest, caused Global to declare a default on its mortgage. The subordination agreement undermines this claim entirely. In addition, the default notice issued by Global, dated February 25, 2022, expressly states that the default it recognized was "permitting the existing second mortgage held by New Bank go into default resulting in the filing of a foreclosure action against the Premises".

II. Tortious interference with prospective economic advantage.

To state a cause of action for tortious interference with prospective business advantage, "a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]; *see also Purgress v Sharrock*, 33 F3d 134, 142 [2d Cir. 1992]).

To establish the third element, a claimant must show a defendant utilized "wrongful means" or that defendant acted for the sole purpose of harming the plaintiff (*see Glen Cove Assocs. v North Shore Univ. Hosp.*, 240 AD2d 701, 702 [2d Dept 1997]; *Bancorp v Fleet/Norstar Fin. Group*, 215 AD2d 990 [3d Dept 1995]). "Wrongful means" include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 [1980]). More importantly, this element concerns "conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]; *Havana Cent. NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70 [1st Dept 2007]).

In this case, the acts alleged to have been committed by NewBank are insufficient as a matter of law because there is no claim of an attempt to harm Global. The allegations also do not support that NewBank acted solely to harm plaintiff, rather than in mere self-interest or for other economic motivations (*Phillips v Carter*, 58 AD3d 528 [1st Dept 2009]). Indeed, NewBank's had a clear economic interest in this matter separate from any possible malicious motive (*see Vitro S.A.B. de C.V. v Aurelius Capital Mgt., L.P.*, 99 AD3d 564 [1st Dept 2012]). Likewise, to the extent Defendants allege NewBank acted in a negligent manner, either through act or omission, that also fails to constitute wrongful conduct (*see Alvord & Swift v Stewart M. Muller Constr. Co., Inc.*, 46 NY2d 276, 281 [1978]; *De Vito v Yeh*, ___AD3d ___, 2024 NY Slip Op 04739 [1st Dept 2024]).

III. Fraud.

As to the third cross claim, a properly pled fraud claim states the existence of (1) a material misrepresentation of fact by defendant; (2) knowledge by the defendant of its falsity; (3) an intent to induce reliance; (4) justifiable reliance by plaintiff; and (5) damages (*see People by Schneiderman v Credit Suisse*, 31 NY3d 622, 638 [2018]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). While incontrovertible proof of fraud is not required at the pleading stage, CPLR 3016[b] mandates particularity such that elementary facts from which misconduct may be inferred must

be stated (*see id.*). Allegations of fraud should be dismissed as insufficient where the claim is unsupported by specific and detailed allegations of fact in the pleadings (*see Callas v Eisenberg*, 192 AD2d 349 [1st Dept 1993]; *see also Ben-Zvi v Kronish Lieb Weiner & Hellman LLP*, 278 AD2d 167 [1st Dept 2000]).

The only specific misrepresentation pled to have been made by NewBank was that Defendants' "did not need to involve Global Bank in the transaction". Its purported reliance on that statement was not justified as all the terms of Defendants' transaction with Global were discernable and in writing. On this point, there is no allegation Defendants, as sophisticated business persons and entities, took "reasonable steps to protect itself against deception", to wit reviewing the Global documents and/or consulting an attorney (*see DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154; *see also Schumaker v Mather*, 133 NY 590, 596 [1892] [A party is obliged use "the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation"]). The claim Defendants were unaware that Global was providing \$380,000.00 to NewBank as part of the transaction is entirely belied by the check disbursement list signed by Ye and Cheung expressly stating same (NYSCEF Doc No 30).

IV. Negligent misrepresentation.

"A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2nd Dept 2004), *quoting Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Here, there is no representation pled that Defendants and NewBank were in confidential relationship or position of reciprocal trust. The relationship between a bank and its customer is nothing more than an arm's length, debtor and creditor association (*see Max Markus Katz, P.C. v Sterling Natl. Bank*, 206 AD3d 533, 534 [1st Dept 2022]; *MBF Clearing Corp. v JPMorgan Chase Bank, N.A.*, 189 AD3d 546, 547 [1st Dept 2020]).

Accordingly, it is

ORDERED that the motion by Defendant NewBank is granted and all of the crossclaims asserted by Defendants Ye, Grand, Cheung, Realty and Mott are dismissed.

11/1/2024
DATE

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

FRANCIS A. KAHN III A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.