

Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

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VELAPPAN VEERASWAMY and KAREN
VEERASWAMY,

Plaintiffs,

Index No.: 31867/01

Motion Date: 6/3/09

Motion Cal. No.: 54

-against-

MERIDIAN CAPITAL GROUP LLC and
INDEPENDENCE COMMUNITY BANK,
Defendants.

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The following papers numbered 1 to 24 read on this motion by defendant **MERIDIAN CAPITAL GROUP LLC** (hereinafter, “Meridian”) for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiffs’ complaint as against Meridian and an order imposing sanctions against plaintiff for bringing a frivolous action; and cross-motion by defendant **INDEPENDENCE COMMUNITY BANK**, succeeded by Sovereign Bank by merger, (hereinafter, “Independence”) for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint as against Independence.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law.....	5-6
Notice of Cross-Motion-Affirmation-Exhibits.....	7-10
Affirmation in Opposition-Exhibits.....	11-13
Affidavit-Exhibits.....	14-16
Reply Affidavit-Exhibits.....	17-19
Memorandum of Law.....	20-21
Reply Affidavit-Exhibits.....	22-24

Upon the foregoing papers it is ordered that the motion by defendant Meridian for an order pursuant to CPLR § 3211 (a)(1) & (7), dismissing plaintiffs’ complaint as against Meridian and an order imposing sanctions against plaintiffs for bringing a frivolous action; and cross-motion by defendant Independence for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint as against Independence, are decided as follows:

According to defendant Meridian, this action involves a loan plaintiffs sought from

Independence during November 2000 and Meridian acted as plaintiffs' mortgage broker. The loan was in the amount of one million ninety thousand dollars (\$1,090,000.00) and on or about November 28, 2000 plaintiffs and Independence entered into a Commitment Agreement for the loan. This Agreement provided that it could not be modified, except by a writing signed by the party against whom enforcement of such change was sought. It also provided that plaintiffs would pay certain loan application fees to Independence, including a good faith deposit fee in the amount of ten thousand nine hundred dollars (\$10,900.00), a rate lock fee in the amount of twenty one thousand eight hundred dollars (\$21,800.00) and an appraisal fee of three thousand dollars (3,000.00.) Plaintiff gave these amounts to Meridian and Meridian gave the good faith deposit and the appraisal fee to the Bank and gave the rate lock fee to Fannie Mae. The Agreement also stated that if the loan does not close, then the commitment fee, the rate lock fee and the appraisal fee are non-refundable. The loan did not close and thereafter plaintiffs commenced the instant action. Defendant Meridian now seeks to dismiss the First and Fourth Causes of Action in the complaint as against Meridian and defendant Independence seeks to dismiss the complaint as against Independence. Plaintiffs oppose this motion.

The First Cause of Action against Meridian Capital Group LLC sets forth claims that on October 17, 2000 plaintiff Veeraswamy and Meridian signed an agreement pursuant to which Meridian agreed to obtain a mortgage loan for \$1,090,000.00. Thereafter, plaintiffs applied for the loan with Independence and on November 28, 2000 Independence approved the loan "to be secured by the purchase of the premises known as 1151 Elder Avenue, Bronx, New York, and issued a Commitment Letter." Plaintiffs executed the Letter and paid Meridian thirty seven thousand two hundred dollars (\$37,200) and the closing was scheduled for February 1, 2001. This closing did not take place due to Independence's refusal and/or failure to close and plaintiff approached another bank and closed the deal. Thereafter, Meridian agreed to refund the \$37,200 but to date has not done so and plaintiffs seek damages in this amount. The Fourth Cause of Action states it is against the Defendants and sets forth claims that Independence knew or should have known that its unreasonable refusal to close is a breach of the agreement and would result in additional expense and damages to plaintiff. It also sets forth claims that this refusal was reckless and/or negligent and plaintiff suffered one million dollars in damages (\$1,000,000.00.)

The Court shall first address the motion by Meridian to dismiss the complaint, as against it, pursuant to CPLR 3211. Meridian claims the First Cause of action must be dismissed since plaintiffs' conclusory claims against it fail to state a cause of action, since, there are no allegations against Meridian that sound in contract, tort or otherwise. They also

argue the allegations that it “promised” to refund the money in fees is contradicted by the documentary evidence that shows Meridian did not retain the money for the fees. Meridian has submitted the Commitment Agreement, a Credit Memo dated January 24, 2001, and copies of all relevant checks from plaintiffs that shows Independence and Fannie Mae retained the subject loan application fees and not Meridian. This evidence also shows that the Commitment Agreement states that the loan application fees are not refundable in the event the loan fails to close. Regarding the fourth cause of action, Meridian claims it must be dismissed since there is no reference to Meridian in the claims set forth.

Plaintiffs oppose this motion claiming that they paid money to Meridian for finding an institution that would lend “issue a mortgage on this multi-family apartment building in the Bronx.” Instead, plaintiffs claim Meridian introduced them to a purported reputable bank that took money and did not provide a loan and Meridian did nothing to protect plaintiffs’ interests. Plaintiffs have submitted an affidavit of Velappan Veeraswamy, their Answer, and a copy of the Compliance Conference Order to support their claims.

The branch of the motion seeking dismissal of the First Cause of Action pursuant to CPLR 3211(a)(7) is denied and the branch of the motion seeking dismissal of the Fourth Cause of Action pursuant to CPLR 3211 (a)(7) is granted. "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference. (Jacobs v Macy’s East, Inc., 262 AD2d 607, 608; Leon v Martinez, 84 NY2d 83.) The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (see, Stukuls v State of New York, 42 NY2d 272; Jacobs v Macy’s East Inc., *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading. (See, Rovello v Orofino Realty Co., Inc., 40 NY2d 633.) The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint. (See, Rovello v Orofino Realty Co., Inc., *supra*; Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159.) In determining a motion brought pursuant to CPLR 3211(a)(7), the court "must afford the complaint a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory ." (1455 Washington Ave. Assocs. v Rose & Kiernan, *supra*, 770-771; Esposito-Hilder v SFX Broadcasting Inc., 236 AD2d 186.) Based on this standard, the First Cause of Action sets forth a cause of action

for a breach of Meridian's promise to refund plaintiffs the fees paid. However, the Fourth Cause of Action fails to set forth any cognizable cause of action against Meridian. This cause of action is completely silent as to any act that Meridian did that caused the loan to be withheld by Independence. Accordingly, the Fourth Cause of Action is dismissed, as against Meridian, pursuant to CPLR 3211 (a) (7)

The branch of the motion seeking dismissal of the First and Fourth Causes of Action pursuant to CPLR 3211(a)(1) is granted. CPLR 3211 (a) (1) provides that "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence" In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim" (Fernandez v Cigna Property and Casualty Insurance Company, 188 AD2d 700, 702; Vanderminden v Vanderminden, 226 AD2d 1037; Bronxville Knolls, Inc. v Webster Town Center Partnership, 221 AD2d 248.)

The evidence submitted by Defendants on this motion qualifies as "documentary evidence" within the meaning of CPLR 3211(a)(1). This documentary evidence establishes that Meridian had paid the fees to Independence and Fannie Mae and those fees were non-refundable, pursuant to the Commitment Agreement. This evidence also shows there was no basis for plaintiffs to receive a refund of these fees from Meridian since Meridian had no control over Independence or Fannie Mae. Accordingly, Meridian has established a defense that resolves in their favor all issues relating to the causes of action in the complaint. Plaintiffs have failed to submit sufficient documentary evidence to raise an issue of fact with Meridian's defense. There is no indication that a promise was made by Meridian to refund the money. Furthermore, there is nothing to indicate Meridian's actions in introducing plaintiffs to Independence and facilitating the processing of the loan were inappropriate or caused the refusal by Independence to give the loan. Accordingly, the First Cause of Action and Fourth Cause of Action, as against Meridian, are dismissed pursuant to CPLR 3211 (a) (1)

The branch of the motion seeking an order imposing sanctions against plaintiffs for bringing a frivolous action is denied. The Court finds that there is an insufficient basis to impose sanctions given the issues raised in the instant motion.

The Court shall now address the cross-motion by Independence, by merger succeeded by Sovereign Bank, for an order granting summary judgment in its favor and dismissing the complaint as against Independence. As mentioned above, Independence and plaintiffs entered

into a Commitment Agreement in November 2000 wherein Independence agreed to loan money to plaintiffs for the purchase of certain premises in the Bronx. According to Independence, the Agreement stemmed from various representations made by plaintiffs, including those made regarding the rental income of the premises as being twenty five thousand four hundred thirty one and sixteen cents (\$25,431.16.) Pursuant to the Commitment Agreement, plaintiffs paid certain non-refundable fees. The closing was set for February 1, 2001 and on or about December 13, 2000, plaintiffs were sent a letter that detailed all the information and documentation they needed to provide to the Bank for the loan to close; included was a complete certified rent roll. On January 26, 2001, plaintiffs were sent a letter informing plaintiffs of their need to provide the documentation, including the rent roll. On February 1, 2001, plaintiffs did not have sufficient funds to satisfy all closing expenses and plaintiffs revealed for the first time that there were rental arrears not reflected in its loan application. There was no closing, in part due to plaintiffs' violation of the Commitment Agreement that required all information submitted to the Bank to be true and correct in all respects and that the plaintiffs' financial condition had not changed. Since the rent roll information submitted by plaintiffs was deemed to be inaccurate, and plaintiffs' financial condition had changed, the Bank refused to close. On February 7, 2001, plaintiffs sought a new closing date and provided the Bank with rent receipts; no new closing date was given. On February 8, 2001, plaintiffs appeared at a closing with the seller of the premises but the Bank was not present as it had not given approval to schedule a closing. On February 15, 2001, plaintiffs provided the Bank with rent arrears information and the Bank reviewed this material and on February 18 requested clarifications from plaintiffs. On February 19, 2001 plaintiffs' requested an additional extension of time to close and prior to receiving a response, plaintiffs' obtained funding through Meridian from a different lender. The Bank has submitted various documents that support the above claims.

The Bank claims it has shown a clear and unambiguous agreement that provided plaintiffs would not be refunded any of the money they seek to recover if the loan failed to close. The Bank has also shown that the loan did not close due to plaintiffs' failure to have sufficient funds and for providing incomplete and faulty information regarding the rental arrears. Additionally, the Bank has shown that plaintiffs have not shown the basis for the \$1,000,000.00 sought in damages. Accordingly, the Bank claims summary judgment should be granted in its favor. Plaintiffs oppose this cross-motion.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there

are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v County of Albany*, 50 NY2d 247 (1980); *Miceli v Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v Johnson*, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." In the instant case, the Bank has established its entitlement to summary judgment and plaintiffs have not shown the existence of a triable issue of fact.

Contrary to plaintiffs' claim, it is appropriate for this Court to hear this cross-motion since plaintiffs' have been afforded a full opportunity to oppose this motion and they have not shown any prejudice to them if this motion is heard. *See, Sheehan v Marshall*, 9 AD3d 403 (2d Dept 2004.) Moreover, plaintiffs' have not shown that discovery is needed for them to respond to this motion. CPLR 3212 (f). Finally, there is nothing in the Compliance Conference Order that prohibits the Bank from making this cross-motion. Regarding the merits of plaintiffs' opposition, their claim that rent arrears were not discussed and were not a part of the loan application is refuted by the documents provided by the Bank. Moreover, this evidence clearly shows that plaintiffs' representations for securing the loan commitment regarding the rental income and rental arrears of the premises were not accurate. Furthermore, plaintiffs have not submitted sufficient evidence that they had the needed funds to close the loan. Finally, plaintiffs have not shown any basis for the fees to be refunded. Accordingly, plaintiffs have not raised an issue of fact regarding whether it should be refunded the fees paid in securing the loan or that the Bank is liable to plaintiffs for any damages as a result of its refusal to close the loan. Accordingly, the motion for summary judgment is granted in the Bank's favor and the complaint is dismissed as to defendant Independence Community Bank, succeeded by Sovereign Bank by merger.

In sum, the motion by Meridian to dismiss the complaint, as against it, pursuant to CPLR 3211 (a) (1) & (7) is granted and the cross-motion by the Bank for an order pursuant to CPLR 3212 is granted and the complaint is dismissed as against the Bank.

Dated: June 9, 2009

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ORIN R. KITZES, J.S.C.