

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA PART 24
Justice

MAUDLINE SMITH	x	Index Number <u>32879</u> 2002
-against-		Motion Date <u>July 31,</u> 2007
AMERIQUEST MORTGAGE COMPANY, et al.		Motion Cal. Numbers <u>35 and 36</u>
		Motion Seq. Nos. <u>20, 21</u>

x

The following papers numbered 1 to 18 read on this motion by defendant Daniel Chan for an order granting summary judgment dismissing plaintiff's first and second causes of action set forth in the amended complaint. Defendant NationsCredit Financial Services Corporation separately moves for an order granting summary judgment dismissing plaintiff's first and second causes of action set forth in the amended complaint.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit - Exhibits (A-K)	1-4
Opposing Affirmation - Exhibits (A-O)	5-6
Reply Affirmation	7-8
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Opposing Affirmation - Exhibits (A-O)	13-15
Reply Affirmation - Exhibits (Y-HH)	16-18

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

The note of issue filed on September 21, 2006 was vacated pursuant to an order dated May 5, 2007. Therefore, the within motions for summary judgment are timely.

Plaintiff's amended complaint alleges a cause of action for fraud against all defendants, a cause of action for negligent misrepresentation against all defendants, a cause of action for promissory estoppel against Ameriquest and Simms, and a cause of action for civil conspiracy to commit fraud against all of the defendants.

This court, in an order dated September 18, 2006, granted defendants Ameriquest and Simms' motion and EquiCredit's cross motion for summary judgment dismissing the fourth cause of action for civil conspiracy. Only the first and second causes of action for fraud and negligent misrepresentation remain against defendants Daniel Chan and NationsCredit Financial Services Corporation (NationsCredit). Defendant NationsCredit is the successor in interest to defendant EquiCredit.

It is well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence in admissible form that demonstrates the absence of any material issues of fact (see Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Stahl v Stralberg, 287 AD2d 613 [2001]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

To prevail on a cause of action alleging fraud, a plaintiff must prove "(1) that the defendant made material representations that were false, (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff, (3) that the plaintiff justifiably relied on the defendant's representations, and (4) that the plaintiff was injured as a result of the defendant's representations" (Giurdanella v Giurdanella, 226 AD2d 342 [1996]). These elements must be proven by clear and convincing evidence (see Gaidon v Guardian Life Ins. Co. of Am., 94 NY2d 330, 349-350, 177 [1999]; Simcuski v Saeli, 44 NY2d 442, 452 [1978]; Leno v DePasquale, 18 AD3d 514 [2005]).

Defendants Chan and NationsCredit, in support of their motions for summary judgment dismissing the complaint, have submitted an affidavit from Chan, as well as portions of Ms. Smith's deposition testimony and documentary evidence pertaining to the closing. Defendant Chan, in his affidavit, states that he was the settlement agent representing the interests of the second mortgagee, EquiCredit Corporation of NY, now known as NationsCredit Financial Services Corporation, at the March 11, 1998 closing. He states that he arrived at the closing shortly after 5:00 P.M. at 1 Cross

Island Plaza, Rosedale, New York, to represent EquiCredit, and that he informed Ms. Smith that he was the attorney for said lender and presented her with the lender's closing documents for her signature. He states that the only conversation he had with Ms. Smith was to ask her for photo identification, and upon verifying her identity, he presented and explained each of the bank's documents to her prior to obtaining her signature. He stated that after he obtained her signature on each document, he left the closing. He states that he had no further conversations or transactions with Ms. Smith that day, and that he had no conversations or transactions with Ms. Smith prior to, or after the closing.

Plaintiff, in her complaint alleges, among other things, that Daniel Chan acted as the agent for EquiCredit in soliciting, arranging and closing the EquiCredit balloon mortgage loan transaction as subordinate financing in the mortgage loan transaction at issue. Plaintiff, in her complaint, at her deposition, and in the affidavits submitted herein, asserts that Mr. Chan arrived at the closing and told her that he was not an attorney, but that he had arrived with an attorney who was downstairs parking his car. Plaintiff alleges, and it is undisputed that Chan is listed as the recipient of attorney's fees in the sum of \$600.00 on EquiCredit's HUD-1 settlement statement. She also asserts that Chan introduced himself as the representative of Ameriquest. Plaintiff asserts that Chan gave her and Golding additional papers to sign and told them that they should begin to sign the papers in order to save time, and that Chan did not read or explain any of the documents to them or instruct them to read the documents. She also alleges that Chan requested that she provide him with the title to the subject premises, and asked Golding for a pay stub, that after they ceased signing the documents she asked Chan to return the title to her and that he told her that it would be mailed to her in a couple of days. Plaintiff asserts that she was instructed by Chan to initial a document which she now believes is a quitclaim deed. She states that defendant Simms had told her that she did not need a lawyer, that the bank would have a lawyer, and that she thought that the attorney who was parking the car was there to represent her. She states that when she asked Chan about the lawyer, he gave her Ameriquest's number to call, but that no one answered the phone at that number. She states that she and Golding stopped signing the documents, as the attorney had not arrived, that she felt uneasy, and they left the closing. Plaintiff alleges that she only signed four documents prior to leaving the closing. Plaintiff also alleges that prior to Chan's arrival she and Golding were alone in the room, and that she noticed a document entitled Notice of Right to Cancel which she placed in her purse. Plaintiff alleges that

after she returned home, she timely canceled the Ameriquest loan agreement, but that Simms persuaded her to reinstate that loan agreement.

Plaintiff, in opposition to defendants' motions, has submitted an affidavit in which she repeats the allegations made in her complaint and at her deposition. She also submits a portion of the deposition of Greg Blackmer, who appeared on behalf of NationsCredit. Mr. Blackmer stated that Mr. Chan was hired as its closing agent for the March 11, 1998 transaction, and that he was paid a legal fee of \$600.00. Mr. Blackmer further stated that he had very little experience dealing with settlement agents, but that he believed that the settlement agent should be someone who is impartial, who represents the interest of both the bank and the borrower, and has a dual responsibility or obligation to the bank and the borrower. He stated that this belief was based upon "the expectation that somebody who's in the room representing the handling of the closing of a major financial deal like this, like a mortgage would represent the interest of both." He also stated that the closing attorney, also known as a closing or settlement agent, had the general duty of making sure that the documents were signed, and notarized if necessary, and that checks were distributed to creditors, or arrangements were made to pay creditors. The documents presented at the closing would include the mortgage, note and notice of right to cancel.

Defendant NationsCredit has submitted an errata sheet executed by Mr. Blackmer in which he makes substantive changes to his testimony regarding the role of the settlement agent. However, as Mr. Blackmer fails to state the reasons for these changes, as required by CPLR 3116(a), the court cannot consider the errata sheet.

The affirmations of plaintiff's counsel shall also be disregarded to the extent that they contain numerous allegations regarding the alleged conduct of Chan and NationsCredit, as counsel lacks personal knowledge of the facts (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Defendants Chan and NationsCredit have established that plaintiff does not have a prima facie claim for fraud as to these defendants. Ms. Smith has failed to present any evidence that Mr. Chan solicited and arranged for the EquiCredit loan of \$20,000.00. Although Ms. Smith testified that she signed about 11 papers prior to Mr. Chan's arrival and thereafter only signed four documents, at her deposition she admitted to signing each and every one of the 47 loan documents at issue, and authenticated her signatures on each of these documents. It is noted that Ms. Smith

has consistently stated that many of the documents she signed were not filled in, and that one document was completely blank except for her signature. This claim, however, is insufficient to establish that Chan solicited and arranged for the Equicredit loan.

Plaintiff's claims regarding Mr. Chan's status as an attorney, and her expectation that there would be an attorney at the closing does not constitute a misrepresentation of a material fact. Assuming arguendo, that Mr. Chan misrepresented that he was not an attorney, plaintiff had no reason to believe that Mr. Chan was an attorney who would represent her interests at the closing. Furthermore, assuming arguendo, that defendant Chan told plaintiff that an attorney was downstairs parking the car, as no one else arrived at the closing, plaintiff had no reason to believe that the lender was providing her with an attorney.

Plaintiff's claims that Chan asked her for identification and misrepresented that he would mail back the deed to her in a few days, and that he stated that he represented Ameriquest and gave her Ameriquest's telephone number to call, even if assumed to be true, are insufficient to establish that Mr. Chan, individually, or as agent for NationsCredit made false statements which were material in nature, and that she justifiably relied upon these statements when she executed the EquiCredit loan agreement and the quitclaim deed. Plaintiff's claims, thus, are insufficient to establish fraud on the part of Chan and NationsCredit regarding either the Equicredit loan or the quitclaim deed.

The evidence presented also establishes that plaintiff cannot maintain a claim against Chan and NationsCredit for negligent misrepresentation. A cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information (see Fresh Direct, LLC v Blue Martini Software, Inc., 7 AD3d 487 [2004]; Fleet Bank v Pine Knoll Corp., 290 AD2d 792 [2002]; Grammar v Turits, 271 AD2d 644 [2000]). Recovery for negligent misrepresentation may be had for "...pecuniary loss arising from negligent representations where there is actual privity of contract between the parties or a relationship so close as to approach that of privity." (Ossining Union Free School District v Anderson, LaRocca Anderson, 73 NY2d 417, 424 [1989]; see also Parrott v Coopers & Lybrand, L.L.P., 95 NY2d 479 [2000]; Goldfine v DeEsso, 309 AD2d 895, 897 [2003]).

Plaintiff's counsel concedes that Chan was the agent for EquiCredit (NationsCredit) at the closing. Plaintiff, in her

complaint, merely alleges the existence of a special relationship, and restates the alleged misrepresentations that are set forth in the cause of action for fraud. However, plaintiff's complaint, her deposition testimony, and her affidavit are devoid of any facts that establish the existence of a special relationship between herself and defendant Chan or NationsCredit. Plaintiff's assertion that she believed that the bank's attorney would be present at the closing and would ensure that the transaction was legal, is insufficient to establish the existence of an lawyer-client relationship between herself and Chan. Rather, plaintiff has consistently asserted that she was unaware of the fact that Chan was an attorney. In addition, Mr. Blackmer's testimony is insufficient to establish that Mr. Chan was hired by NationsCredit to represent both the lender and the borrower at the closing. Mr. Blackmer's statements in this regard is based upon his own subjective understanding of the role of the settlement agent, and not upon any company policy or practice. Finally, plaintiff cannot establish that she reasonably relied upon any of the misrepresentations allegedly made by Chan when she executed the loan agreements and the quitclaim deed. Plaintiff, therefore, cannot maintain the second cause of action against Chan and NationsCredit for negligent misrepresentation.

The court finds that no triable issue of fact exists which would warrant the denial of defendants' motions for summary judgment. Contrary to plaintiff's assertions, the evidence presented establishes that Ms. Smith received the benefit of the NationsCredit loan of \$20,000.00 loan. Copies of checks from Mr. Chan's IOLA account establish that a payment was made to Madison Resources Ltd. Mortgage, a prior creditor of Ms. Smith, in the sum of \$15,500.00; that a payment was made to Associates Mortgage, an assignee of Madison Resources, in the sum of \$2,360.00; that the lender was paid for its expenses, including an origination fee (\$200.00), credit report (\$6.96), application fee (\$250.00), title expenses (\$783.00), closing attorney fee (\$600.00), and a tax service fee (\$77.00), and that the balance of \$222.05 was paid to Ms. Smith.

Ms. Smith's claim that Mr. Simms and Mr. Lindenmann improperly notarized certain loan documents, does not raise a triable issue of fact as regards the claims against Chan and NationsCredit. Although Ms. Smith does not identify the alleged documents, all of NationCredit's documents submitted herein are notarized by Mr. Chan, and none of these documents are notarized by either Simms or Lindenmann.

Ms. Smith's claim regarding a payment to Stuart Schoenfeld in the sum of \$350.00, does not raise a triable issue of fact, as this payment was made by Ameriquest, and not by NationsCredit or Chan.

Ms. Smith's claim that her age, and that of Golding was falsified on her Ameriquest loan application, does not raise an issue of fact as regards her claims against NationsCredit and Chan, as she does not allege that Chan or NationsCredit falsified her age on the Ameriquest loan application.

Ms. Smith's claims regarding the cancellation and reinstatement of the Ameriquest loan does not raise a triable issue of fact, as she does not claim that the NationsCredit loan was ever canceled and then reinstated.

Ms. Smith's claims regarding the conduct of her prior attorneys who she retained to commence an action and to represent her in this action, does not raise any triable issue of fact as regards her claims against NationsCredit or Chan.

Ms. Smith's claims regarding the March 11, 1998 quitclaim deed does not raise any triable issues of fact regarding her claims against NationsCredit and Chan. Ms. Smith admits that she was told that Mr. Golding was a co-signer on the loan, admits to signing the deed, and to initialing the change whereby she transferred 1% of her interest in the property to Golding, rather than 50% of her interest.

Finally, plaintiff's request to defer summary judgment pending further discovery (see CPLR 3212[f]), is without merit, as such an assertion must be supported by something more than surmise. Plaintiff's speculative assertions and expressions of hope that further discovery may produce favorable evidence supportive of her contentions is insufficient under the circumstances to defer resolution of the within motions (see Harris v Alcan Aluminum Corp., 91 AD2d 830 [1982], affd 58 NY2d 1036 [1983]; Corrigan v DiGuardia, 166 AD2d 408 [1990]).

In view of the foregoing, the motions of defendants Daniel Chan and NationsCredit for summary judgment dismissing the first and second causes of action are granted.

Dated: October 2, 2007

AUGUSTUS C. AGATE, J.S.C.