

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SARAH WEINBERG,

Plaintiff,

Index No.652273/2013

-against-

DECISION/ORDER

LESLIE SULTAN, ET AL.,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

| Papers | Numbered |
|--|-----------------|
| Notice of Motion and Affidavits Annexed..... | <u>1,2,3,4</u> |
| Affirmations in Opposition to the Motion | <u>5,6</u> |
| Reply Affidavits..... | <u>7,8,9,10</u> |
| Exhibits..... | _____ |

This action was commenced by plaintiff Sarah Weinberg against various defendants to challenge the sale of a building owned by her located at 371 West 46th Street (the "Building"). After various defendants made motions to dismiss the complaint, the parties entered into a stipulation whereby all of the defendants agreed to withdraw their motions to dismiss without prejudice and it was agreed that plaintiff would file an amended complaint. Plaintiff has now filed an amended complaint in which she has discontinued her claim against some of the parties. All of the remaining defendants have now made motions to dismiss the complaint as against them. The defendants Linda Salamon and 371 West 46th Street Properties, LLC (referred to herein as the "Purchaser") has also brought a motion for an order granting the Purchaser's

counsel leave to disburse to the Purchaser the \$166,153 being held in escrow pursuant to the so ordered stipulation in this action and the plaintiff has brought a cross-motion for an order granting plaintiff's attorney leave of the court to disburse \$368,474.03 held in escrow pursuant to the same stipulation. All of the motions are consolidated for disposition. As will be explained more fully below, the third through sixth causes of action are dismissed and the motions to dismiss the first and second causes of action will be converted to motions for summary judgment, with the parties being given an additional opportunity to brief the summary judgment motions. The Purchaser's motion to disburse the escrow funds is granted and the plaintiff's cross-motion to disburse the escrow funds is denied at the present time.

The relevant facts, as alleged in either the complaint, amended complaint or in judicial or other documents, are as follows. For forty years, up until 2013, plaintiff was the owner of the Building. In 2008, plaintiff entered into a cash-out mortgage on the Building in the amount of \$2,325,000. Plaintiff failed to make the required payments on the loan secured by the mortgage and the default provisions of the mortgage, including a 24% penalty rate, were invoked in 2012. In January 2013, the holder of the mortgage on the Building commenced a foreclosure action against plaintiff and a receiver was appointed for the Building with the authority to manage the property and collect rents. During the foreclosure action, a conference was held before Justice Singh on February 19, 2013. During that conference, at which plaintiff was present, the court allowed the plaintiff a 30 day stay to explore the possibility of refinancing the mortgage on the Building and avoiding the foreclosure. At that hearing, the Judge specifically informed plaintiff as follows:

Folks, while you are out of the room my proposal is as follows: We first try to do a

refinancing to see where it goes. The banks's attorney has raised a valid point which both attorneys have to review, and that is that it's going to be a private lender.

No bank is going to want to touch this property. The question then becomes if it's refinanced, is there enough money to make it work, because what you don't want to do is lose the equity, and then get foreclosed upon by the private lender, and you've lost the equity, and the building is gone.

So it needs to be done quickly because just now you're paying a 24 percent interest rate with a default rate of interest.

The plaintiff did not refinance the Building and the lender moved for summary judgment in the foreclosure action, by notice of motion dated April 10, 2013. After the lender brought the motion for summary judgment in the foreclosure action, plaintiff entered into a contract to sell the Building to the Purchaser on April 22, 2014. The Purchaser purchased the Building from the plaintiff for \$3,500,000 by deed dated May 22, 2013. Of that amount, approximately \$2,800,000 was used to pay off the mortgage which was in the process of being foreclosed. The balance of the proceeds, after the payment of certain expenses, was placed in escrow for plaintiff and potentially for the Purchaser.

At the closing, plaintiff executed an escrow agreement whereby she agreed to deposit \$100,000 in escrow, which she would receive when she vacated the building, which was supposed to be no later than two weeks after closing. The escrow agreement provided that the \$100,000 would be held in escrow to secure plaintiff's removal from the Building which was to occur no later than May 15, 2013. The agreement further provided that in the event plaintiff failed to vacate the Building, the \$100,000 would be applied to all costs incurred by Purchaser in connection with removing plaintiff from the Building, including fair use and occupancy at the rate of \$5,000 per month. Plaintiff continues to reside in the Building and has not paid any use

and occupancy other than \$5,000 ordered by the Housing Court.

In plaintiff's amended complaint, she asserts six causes of action. Based on plaintiff's attorney's description of the complaint, the first and second cause of action is for legal malpractice against the attorneys that she alleges represented her in the closing of the Building in 2013, defendant Leslie Sultan and defendants Jeffrey Asher and his law firm Robinson Brog I.einwand Greene Genovese & Gluck P.C. The third cause of action is a declaratory judgment action and rescission against the Purchaser. The fourth cause of action is for professional misconduct and fraud against David Kaminsky and his law firm Kaminsky PC ("Kaminsky") and the fifth and sixth causes of action are against all defendants for aiding and abetting fraud and conspiracy to commit fraud.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, the courts have made clear that a court is not required to attempt to save a complaint which is totally confusing and where the court would have to struggle simply to determine whether a cause of action might possibly be stated. *See Kent v. Truman*, 9 A.D.2d 649 (1st Dept 1959).

In order to prevail on a defense founded on documentary evidence pursuant to CPLR §

3211 (a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995).

Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002). In considering a motion to dismiss based on documentary evidence, "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts and any other papers, the contents of which are 'essentially undeniable' would qualify as 'documentary evidence.'" *Fontanetta v. John Doe 1*, 73 A.D.3d 78, 84 (2d Dept 2010).

In the present case, the Purchaser's motion to dismiss the amended complaint's third cause of action for rescission of the contract of sale based on fraud or undue influence on the ground that it fails to state a claim and is not plead with sufficient particularity is granted. To plead a cause of action for fraud, a plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by 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." *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413 (1996); *see also Barclay v. Barclay Arms Associates*, 74 N.Y.2d 644 (1989). Additionally, pursuant to CPLR § 3016(b), "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, ...the circumstances constituting the wrong shall be stated in detail."

The third cause of action seeking rescission based upon fraud and/or undue influence must be dismissed on the ground that plaintiff fails to allege any specific acts of fraud or undue influence performed by the Purchaser. Plaintiff alleges in the third cause of action in her

amended complaint that the Purchaser, who was an attorney, obtained the Building for below market value, that the Purchaser had an unfair bargaining advantage, that the Purchaser violated the Code of Professional Responsibility and that based “on the fraud, conspiracy, and other claims throughout the Complaint, the sale of the Building was induced unlawfully and should be rescinded.” However, the amended complaint fails to allege any misrepresentation or a material omission of fact which was false and known to be false by the Purchaser, made by the Purchaser for the purpose of inducing plaintiff to rely upon it nor does it allege plaintiff justifiably relied on any misrepresentation or material omission. Nor does the third cause of action allege the undue influence that the Purchaser exerted on plaintiff. Moreover, none of the allegations asserted in the third cause of action are supported by factual assertions containing the details constituting the alleged wrong, as required by CPLR § 3016(b).

To the extent that plaintiff is attempting to allege that the individual Purchaser owed plaintiff some heightened duty based on her status as an attorney, there is absolutely no legal basis for this proposition. The mere fact that the purchaser of a property is an attorney or has a law degree does not impose any special duty on a purchaser over and above any other purchaser of a property. Thus, plaintiff’s allegations that the Purchaser violated the Code of Professional Responsibility does not support plaintiff’s fraud claim against the Purchaser.

To the extent plaintiff is attempting to allege in the third cause of action against the Purchaser that the contract should be rescinded on the ground that the contract was substantially breached, she fails to state a claim as plaintiff has failed to allege any facts which would constitute a breach of the contract of sale.

The court also finds that the fourth cause of action asserted against Kaminsky should be

dismissed for failure to state a cause of action. The fourth cause of action, which is untitled in the complaint but which plaintiff's attorney describes as a fraud claim and a claim for professional misconduct in his opposition papers, states that Kaminsky is plaintiff's former son-in-law, that he attended the closing of the sale of the Building, that he knew or should have known that plaintiff did not understand the transaction, that he orchestrated the transaction which led to the sale of the Building, that he abused his relationship with the other defendants and participated in defrauding plaintiff, that he was paid a fee at the closing of \$200,000 and that he violated the Code of Professional Responsibility.

To the extent that plaintiff is attempting to assert a fraud claim against Kaminsky, this claim must be dismissed on the ground that plaintiff fails to allege any specific acts of fraud on the part of Kaminsky. The amended complaint fails to allege any misrepresentation or a material omission of fact which was false and known to be false by Kaminsky, made by Kaminsky for the purpose of inducing plaintiff to rely upon it nor does it allege plaintiff justifiably relied on any misrepresentation or material omission. Moreover, none of the allegations asserted in the fourth cause of action are supported by factual assertions containing the details constituting the alleged wrong, as required by CPLR § 3016(b).

To the extent plaintiff is alleging in the fourth cause of action that Kaminsky has violated the Code of Professional Responsibility and disciplinary rules, such a claim fails to state a cause of action. Under New York Law, there is no private right of action against an attorney for a violation of the Code of Professional Responsibility. *See Kantor v. Bernstein*, 225 A.D.2d 500, 501-502 (1st Dept 1996); *Schwartz v. Olshan Grundman Frome & Rosenzweig*, 302 A.D.2d 193, 199 (1st Dept 2003); *Weintraub v. Phillips Nizer Benjamin Krim & Ballon*, 172 A.D.2d 254 (1st

Dept 1991). Moreover, plaintiff has failed to specify any particular provision of the Code of Professional Responsibility which has been violated in its complaint.

This court also finds that the fifth cause of action for aiding and abetting fraud and the sixth cause of action for conspiracy to commit fraud, which are asserted against all defendants, must be dismissed on the ground that plaintiff has not stated any viable cause of action for fraud. A plaintiff alleging a claim for aiding and abetting fraud “ must allege the existence of the underlying fraud, actual knowledge and substantial assistance.” *Oster v. Kirschner*, 77 A.D.3d 51, 55 (1st Dept 2010). Similarly, where a plaintiff alleges a conspiracy to defraud, the complaint must allege sufficient facts from which it can be inferred that the defendants participated in a fraudulent scheme. *High Tides, LLC v. DeMichele*, 88 A.D.3d 954, 960 (2nd Dept 2011). In the present case, as previously discussed in this decision, plaintiff has failed to adequately plead an underlying fraud claim. Although the amended complaint makes repeated reference to the fraud set forth above, nowhere in the amended complaint does plaintiff allege the elements of a cause of action for fraud—she does not describe the misrepresentations or omissions that she claims are fraudulent. Although she makes a conclusory assertion that the property was fraudulently transferred from her, she fails to allege with any specificity why the sale of the Building by her was fraudulent. As laid out in her own original complaint and in court documents relating to the foreclosure action against her, of which the court can take judicial notice and consider on a motion to dismiss, it is clear that plaintiff only sold the Building after a foreclosure action was brought against her based on her inability to pay the mortgage, after she was given an opportunity by the court to refinance which she did not accomplish and after the mortgagor had brought a motion for summary judgment in the foreclosure action. Under these circumstances, she has

failed to sufficiently allege how her sale of the property to a third party which allowed her to pay off the mortgage and avoid the foreclosure, was fraudulent.

Pursuant to CPLR 3211 (c), the court is converting defendants' motion to dismiss the first and second cause of action for legal malpractice to a motion for summary judgment dismissing these causes of action and giving the parties an opportunity to submit additional briefing on the summary judgment motion. The parties should confer and reach agreement on a briefing schedule for the summary judgment papers and inform the court of such schedule and submit courtesy working copies to the court of such papers. The court notes, however, that to the extent plaintiff relies on any alleged representations made by her attorneys to support her malpractice claims, these same allegations cannot be the basis for her fraud claim as any such fraud claim would be duplicative of the malpractice claim. *See Sage Realty Corp. v. Proskauer Rose, LLP*, 251 A.D.2d 35, 39 (1st Dept 1998).

Finally, the request by the Purchaser's counsel for leave to disburse to the Purchaser the \$166,152 being held in escrow pursuant to the so ordered stipulation is granted and the request by plaintiff's attorney to disburse to plaintiff the \$368,474.03 being held in escrow by him is denied. Pursuant to the previous stipulation between the parties, the proceeds of the sale from the Building after the payment of the outstanding mortgage and various other expenses, were transferred from Leslie Sultan, Esq. to plaintiff's counsel in the amount of \$368,474.03 and to the Purchaser's counsel in the amount of \$166,152. This \$166,152 consisted of the \$100,000 escrow deposit made at closing by plaintiff to secure the plaintiff's vacatur from the Building and an additional \$66,152 that represented the security deposit from the commercial tenant of the Building. The closing statement provided that the security deposit credit would be held in

escrow for six months from the date of the closing to see if the security deposit is an amount lesser than \$66,152 and that if the seller is unable to obtain an estoppel letter, the escrow would be paid over to the Purchaser. Pursuant to the escrow agreement, the plaintiff agreed to pay the Purchaser \$5,000 in use and occupancy per month in the event she failed to vacate. As more than twenty months have now elapsed from the date of the escrow agreement, the Purchaser is entitled to the full \$100,000 being held in escrow for use and occupancy based on her failure to vacate. Additionally, the Purchaser is also entitled to the security deposit for the commercial tenant of \$66,152 because more than six months have passed since the closing and plaintiff has not produced an estoppel certificate stating that the security was less. The argument by plaintiff that the security deposit should be returned to her because the commercial tenant vacated the premises is without basis. Initially, it is contrary to the terms of the closing statement which explicitly provides that the security deposit will be turned over to the Purchaser within six months after the closing unless plaintiff produced an estoppel certificate. Moreover, GOL § 7-105 provides that when a property is transferred, the security is to be transferred to the new owner of the property.

The court finds, however, that plaintiff is not entitled to a release of the proceeds of the sale of the Building being held in escrow for her until there is a final determination of her claim for rescission of the sale of the Building, including any appeal she may take of this court's determination dismissing her claim for rescission. As long as she is asserting a claim for rescission of the sale of the Building, the proceeds of the sale should be held in escrow which is exactly what the parties stipulated to in their stipulation providing that the funds would not be disbursed to her until further order of the court or plaintiff withdraws with prejudice her cause of

action for rescission.

Based on the foregoing, the third, fourth, fifth and sixth causes of action are dismissed; the motion to dismiss the first and second causes of action are hereby converted to motions for summary judgment with the parties being given an opportunity to further brief the summary judgment motion; the Purchaser's counsel is granted leave to disburse the \$166,152 it is holding in escrow for the Purchaser and the request by the plaintiff's attorney to disburse the funds he is holding in escrow for the plaintiff is denied at the present time without prejudice to a subsequent application when the rescission claim is resolved. The foregoing constitutes the decision and order of the court.

Dated: 2/23/15

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.