142 A.D.3d 867, 38 N.Y.S.3d 26, 2016 N.Y. Slip Op. 06153

**1 Aristalia Benitez, Plaintiff,
v
United Homes of New York, LLC, et al., Defendants. U.S. Bank, National Association, Third-Party Plaintiff-Respondent, v ANM Funding, LLC, et al., Third-Party Defendants, and Lowenthal & Kofman et al., Third-Party Defendants-Appellants.

Supreme Court, Appellate Division, First Department, New York
1706, 309302/08, 83847/09
September 27, 2016

CITE TITLE AS: Benitez v United Homes of N.Y., LLC

HEADNOTE

Attorney and Client
Malpractice

Closing of Residential Real Estate Mortgage Loan—Departure from Standard of Care

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman and Brandon H. Weinstein of counsel), for appellants.
Moranu Karamouzis LLP, Rockville Centre (Siobhan E. Moran and Andrew P. Karamouzis of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about April 17, 2015, which, to the extent appealed from as limited by the briefs, granted defendant/third-party plaintiff U.S. Bank, National Association's (the bank) motion for partial summary judgment on the issue of liability on its legal malpractice claim against third-party defendants Lowenthal & Kofman and Jerald Weinberger (together the law firm), and denied the law firm's motion for summary judgment dismissing that claim, unanimously affirmed, without costs.

The bank made a prima facie showing that the law firm departed from the standard of care in connection with the closing of a residential real estate mortgage loan to plaintiff by, among other things, failing to advise that the subject property lacked a certificate of occupancy, failing to advise of the risk of funding the loan under these circumstances, and failing to confirm that plaintiff contributed 3% of her own funds toward closing, a condition of the loan (*see generally AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). The motion court properly considered the affidavit of the bank's legal expert concerning the duty of care an attorney owes to a mortgage-lender client (*see Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010], *appeal withdrawn* 16 NY3d 796 [2011]; *Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243 [1st Dept 2005]). The bank's closer, who was responsible for ensuring that the closing documents were in order, clearly had "knowledge of the facts" and therefore was qualified to submit an affidavit in support of the bank's summary judgment motion (CPLR 3212 [b]). The closer's lack of knowledge concerning the underwriting process is irrevelant to the legal malpractice claim.

In opposition, the law firm, which did not rebut the expert's opinion with an expert opinion of its own, failed to raise a triable issue of fact (*see Cosmetics Plus Group, Ltd. v Traub*, 105 AD3d 134, 141 [1st Dept 2013], *lv denied* 22 NY3d 855 [2013]).

We have considered the law firm's remaining arguments and *868 find them unavailing. Concur—Andrias, J.P., Richter, Gische and Kahn, JJ. **[Prior Case History: 2015 NY Slip Op 30794(U).]**

Copr. (C) 2017, Secretary of State, State of New York

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.

NEW YORK SUPREME COURT
PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------x

Aristalia Benitez

Index No.: 309302/08

Plaintiff,

-against-

United Home of New York LLC, G&I Development Corp., Richard Zimmerman, U.S. Bank NA, and Monroe Funding LLC

Defendants

----------x

U.S. Bank, National Association

Third Party Index No. 083847/09

Third-Party Plaintiff

Decision and Order

Howard H. Sherman
J.S.C.

-against-

ANM Funding, LLC, Moses Gross, Abe Klein, Joel Grunfeld, Israel Weinstock, ENP Consultants, LLC, Lowenthal & Kofman and Jerald Weinberger

Third-Party Defendants

----------x

Upon the foregoing papers the respective motions for summary judgment in the third-party action, consolidated for purposes of disposition, are decided in accordance herewith.

FACTS AND PROCEDURAL BACKGROUND

Aristalia Benitez ("Benitez") commenced the main action seeking money damages and declaratory relief in connection with a contract of sale and an "escrow agreement" executed at the closing on her purchase from United Homes of New York, LLC ("United Homes") and G & I Development Corp. ("G & I") of a newly constructed three-family house in Bronx County. In connection with that purchase, and upon the application of ANM Funding LLC ("ANM"), a mortgage broker licensed in the State of New York, Benitez had secured a $ 645,000.00 30-year residential mortgage loan from U.S. Bank, NA ("U.S. Bank").

In her complaint Benitez alleged breaches of the contract of sale as against United Homes and G & I, and a breach of the escrow agreement as against United Homes, G&I and Richard Zimmerman ("Zimmerman"), the seller's attorney. In addition, she alleged breaches of the mortgage agreements against U.S. Bank, and Monroe Funding LLC ("Monroe").

US Bank filed an answer asserting fourteen affirmative defenses and counterclaims and cross-claims alleging fraudulent conduct in *inter alia*, creating and providing to the bank a fictitious contract of sale, and in failing to advise the lender that as of the date of the closing, the premises lacked a certificate of occupancy. It was also alleged that plaintiff and co-defendants failed to disclose to the bank either the secondary financing

agreement, or the " escrow agreement" executed at the closing addressing the property's lack of a certificate of occupancy . [1]

Third-Party Action

U.S. Bank commenced a third-party action asserting claims in fraud ; aiding and abetting fraud; unjust enrichment; breach of contract, and indemnification against the mortgage broker, ANM Funding, LLC, and its principals , Moses Gross and Abe Klein, and manager, Joel Grunfeld, and Senior Mortgage Specialist, Israel Weinstock (collectively, "ANM Defendants"), and causes of action in fraud and negligent misrepresentation as against the appraiser , ENP Consultants, LLC ("ENP"), and claims of legal malpractice, fraud, negligent misrepresentation, breach of fiduciary duty , and negligence as against Lowenthal and Kofman, and Jerald Weinberger (collectively, "L & K Defendants "), the law firm and individual representing the bank at the March 6, 2008 closing.

Motions

1) U.S .Bank moves for awards of summary judgment on : 1) its claims of legal malpractice against the L&K Defendants and an award of damages thereon , and 2) its claims for breach of contract and indemnification as against the ANM Defendants , and an award of damages thereon, and 3) its claims of negligent misrepresentation as against

---

[1] The agreement noted that"sign offs" for plumbing , and electrical and construction work had not been completed, nor was a temporary certificate of occupancy issued, and by its terms, provided for the seller to make the mortgage payments "until the premises are physically ready to be occupied." The gravamen of Benitez's complaint was the seller's cessation of those payments despite the failure to complete construction.

ENP and an award of damages thereon, and an award 4) dismissing as asserted against it the counterclaims of the third-party defendants.

2) The ANM Defendants move for an award of summary judgment dismissing the third-party claims in their entirety.

3) L & K also moves for summary judgment dismissal of the third-party claims asserted against it.

1) U.S. Bank's motion is supported by excerpts of the testimony of Benitez, and that of third-party defendant Weinberger, and L& K's partners, Lowenthal and Kofman, as well as that of Gross, Klein, Grunfeld, and Weinstock ,and the appraiser, Eli Pavel , and defendant Zimmerman, and documentary evidence consisting of the 04/16/07 Mortgage Broker Agreement between U.S. Bank and ANM Funding ; the loan application ; the contact of sale; ENP's Appraisal Report; the Old Republic National Title Insurance Company title report for the property ; the 03/06/08 bargain and sale deed, and a 6 March 2008 letter on the letterhead of Zimmerman advising that he had "been informed by the seller... that the purchaser had wired $47,000.00 to the seller for the balance of the money ("Zimmerman letter ").

Ropog Affidavit

The motion is supported by the affidavit of Linda Ropog, U.S. Bank's Closing Manager , and the bank's "closer" for the subject mortgage, who attests in pertinent part,

that pursuant to the Mortgage Broker Agreement,[2] ANM submitted to the bank on behalf of its client, Benitiez, a Uniform Residential Loan Application that was signed and certified by its employee, Weinstock. Among the information contained in the application was the purchase price of the premises, i.e., $679,000.00; the prospective use of the premises as the primary residence of the applicant, and the lack of any subordinate financing in connection with the purchase. A contract of sale, as well as Eli Pavel's appraisal report for ENP, were also submitted in connection with the application. Ropog further attests that the bank requested substantiation of the projected rental income, in response to which, two lease agreements were forwarded for residential units in the subject three-family home, and one other for residential property said to be then owned by the prospective borrower.

Based upon the application as thus supported, U.S. Bank agreed to provide Benitiez with a $ 645,000.00 mortgage loan. For purposes of the transaction, including the closing, the bank was represented by L & K [Id. ¶¶ 11-12].

Ropog further attests that at the closing, Benitez signed a Note agreeing to repay the principal sum plus interest at an annual rate of 6.5 %, in monthly payments of $ 4,076.84 commencing on 05/01/08, and the mortgage whereby she agreed to the terms of the security instrument. Benitez also signed both an Affidavit of Occupancy and a Buyer Acceptance Statement. Also at closing, Weinberger and L& K prepared and signed

[2] The referenced documents are tendered as exhibits to Ropog's affidavit.

the HUD-1 Settlement Statement [Id. ¶¶ 13-17].

Ropog asserts that only in the course of discovery in the main action by which Benitez was seeking to enforce the terms of the "escrow agreement " , did the bank first became aware not only of that agreement, but of inaccurate , misleading, and/or false information contained in the application, and the referenced closing documents, i.e.,a "rider" to the sales contact confirming that the property was without a certificate of occupancy; that the actual sales price of the property reflected in the contract signed by Benitez and G. & I, was $ *739,000.00,* and that at closing, Benitez had taken a second mortgage loan with Monroe in the amount of $20,100.00 , the purchaser thereby having provided none of her own funds at closing. Finally, Ropog asserts that the bank also then became aware that the appraisal by ENP had mis-described the property as "existing" though it was then "under construction" , and as "occupied" , though it was "vacant" , and as "not" requiring repairs , despite lacking a certificate of occupancy.

Ropog attests that had the bank been aware before or at closing , of the "escrow agreement " , or of the other contact of sale, or that a certificate of occupancy had yet to be issued, it would not have provided the mortgage loan to Benitez [Id. ¶¶ 19-22].

Claims Against L& K Defendants

U.S Bank argues that it is entitled to summary judgment on its legal malpractice claim as it has established as a matter of law that its counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed and exercised by members of the

legal community in the area of real estate loan transactions by : 1) failing to advise the bank that the premises lacked a certificate of occupancy ; 2) failing to disclose to the bank that Benitez had entered into a "side" agreement concerning the non-conforming status of the premises; 3) failing to ascertain that contrary to the bank's explicit closing conditions, and the information certified as true and correct on the HUD-1 Statement , Benitez provided none of her own funds at closing, and 4) failing to supervise the paralegal who appeared for the bank at closing.

This branch of the motion is supported by the affidavit of its legal expert , Abraham B. Krieger, Esq. , ("Krieger") who opines upon a review of the record, that in representing U.S. Bank in the Benitez transaction , L & K failed to exercise the ordinary degree of care and skill commonly possessed by an attorney in the areas of residential real estate loan transactions with respect to each of the above alleged departures .

Concerning the first, and in light of Weinberger's testimony that he was aware of the fact, Krieger opines that K & L breached its duty by failing to advise U.S. Bank that no Certificate of Occupancy had been issued for the premises as of the date of closing, though they have been required for buildings constructed in New York city since 1938, and are considered a "significant factor and consideration in residential real estate transactions ..." [Affidavit of Abraham Krieger ¶ 9],and in failing to proceed to close the transaction without imparting this significant information to his client, and advising the lender of the risks attendant upon closing without the Certificate of Occupancy, and by so doing,

permitting the client to make an informed decision as to whether or not to proceed with the mortgage loan.

With respect to the second departure, Krieger opines that an attorney exercising the ordinary skill and knowledge possessed of counsel in the subject area, upon seeing the $10,000.00 check from the seller to the seller's attorney, would have made inquiry about the reason for the escrow check, and would have discovered that the payment was contemplated in connection with an "escrow agreement" addressed to the issue of the lack of a certificate of occupancy at the time of the closing.

Krieger opines that an attorney exercising the ordinary skill commonly possessed by an attorney practicing in the area of real estate loan transactions, who was aware of the client's instructions concerning the percentage of purchase payment required to be made by the borrower, would not have relied on the "Zimmerman letter "[3], alone to confirm the purchaser's compliance with this precondition. It is maintained that despite the obvious discrepancy between $ 42,002.26, representing 3 % of the purchase price, and the $ 47,000.00 amount referenced in the letter as having been wire- transferred, and the letter's designation of the property as being located in Brooklyn, and the clear differences between the letter's signature and Zimmerman's signature on the 03/06/08 deed, K & L

[3] Zimmerman testified that the letter was not written on his letterhead, nor did it contain his signature, and he denied that he had prepared it to be presented at the closing [ZIMMERMAN EBT: 31-32], while Benitez testified that she paid no funds in connection with the closing, believing that the costs were "included in the price of the house." [BENITEZ EBT: 113]. She made only one payment in connection with the purchase, a $5,000.00 deposit made when she signed the contract of sale [Id. 160].

made no further inquiry, and required no proof of the transfer , signing and submitting a HUD-1 statement certifying that Benitez had paid $ 42,002.26 to the seller.

Krieger opines that L & K breached its duty of care by failing to supervise its paralegal at all in connection with the closing , with no attorney performing any final "sign off" prior to the time the closing was completed and the mortgage loan funds disbursed, and that the negligence of the L & K defendants in its representation of the bank was the proximate cause of the bank's damages in connection with the Benitez transaction because the mortgage loan never would have closed under these circumstances.

L & K Defendants' Motion

The third-party defendants seek an order awarding summary judgment dismissal of all of U.S. Bank's third-party claims asserted against them.

The L& K defendants argue that the legal malpractice claim must fail as it cannot be proved that the L&K defendants breached a duty to U.S. Bank as the evidence clearly demonstrates that counsel followed the bank's closing instructions, and the bank alleges no breach of any of the specific terms of those detailed instructions. [4]

With respect to the first departure, defendants argue that those instructions include no statement requiring a certificate of occupancy to close a loan, or directing that the borrower obtain such a certificate, despite the fact that twenty-two documents were "checked" from the Instruction's preprinted list of Required Documents.

[4] The Mortgage Loan Closing Instructions are tendered as Exhibit F.

In addition, the L & K defendants contend that U.S. Bank was aware that a certificate of occupancy had not been obtained prior to closing as Weinberger testified that the title report indicating this status as well as the fact that the property was under construction was provided to Ropog before the scheduling of the closing , which in her testimony, Ropog acknowledged.

Concerning the allegation of negligent preparation and submission of the HUD -1 Statement, third-party defendants argue that Weinberger was provided with a letter purportedly from the seller's attorney, confirming a wire transfer of the down payment, and, as such , had a reasonable basis to include the down payment in the HUD statement. It is also argued that the statement is not an affirmative representation by Weinberger as the settlement agent, "but merely a recapitulation of how the receipt and disbursement of funds . . . . was represented to [him] " , and that it was " outside the purview of the lender's attorney to determine whether or not the borrower provided the cash amount set forth . . . .[in] the HUD - 1," it being the obligation of the seller's attorney to see that the amount due is paid.

With respect to the alleged departures devolving from the execution of the escrow and the secondary financing agreement, it is argued that there is no evidence to support an allegation that any of the L & K defendants were aware of the agreement before or during the course of the closing, or is there any evidence to raise an issue of fact that Weinberger was present during the course of its negotiation and /or execution, or evidence

that knowledge of the purchaser's secondary financing agreement was imparted to L& K.

The L&K defendants argue that U.S. Bank has failed to proffer admissible evidence clearly demonstrating actual and ascertainable damages arising out of the Benitez transaction.

With respect to the remaining claims asserted, the L& K defendants argue that the fraud cause of action fails as a matter of law as U.S. Bank cannot produce evidence that its counsel had prior knowledge of either the escrow agreement, or the secondary financing . Nor , it is argued, has the bank produced any evidence that L & K acted with intent to defraud the bank, or was aware of, or participated in any "scheme" with the third-party co- defendants.

Third-party defendants argue that the claims for negligent misrepresentation , and breach of fiduciary duty , and for negligence should be dismissed as they arise from the same transactions underlying the malpractice claim, and are merely a redundant pleading of that claim.

Claims Against ANM

U.S. Bank contends that the record demonstrates as a matter of law that ANM Funding violated the Mortgage Broker Agreement by the terms of which it was required to provide to the bank complete , accurate , and genuine information in connection with the loan application, when it submitted an application , appraisal, and purported leases

containing inaccurate information , and failed to inform the bank that the property lacked any Certificate of Occupancy .

The misstatements and material omissions incorporated within the loan application and supporting documentation are asserted to include the " true" contract of sale signed by Benitez reflecting the actual $ 739,000 sale price, and incorporating a rider addressed to the status of the premises as lacking a certificate of occupancy; the failure to disclose the secondary financing; two residential leases with Benitez as landlord for apartments within the premises, and one lease with Benitez as landlord /owner of another property not in fact, owned by the prospective mortgagee; the borrower certification of the loan application as dated 02/19/08 [5]; the ENP appraisal describing the property as "existing" and not under construction and as "occupied" , and not vacant.

With respect to the status of the property at closing, U.S. Bank argues that the record demonstrates as a matter of law that on the day before closing, ANM Funding received a fax advising that the premises lacked a certificate of occupancy , but failed immediately to advise the bank of such "additional material information relating to the Applicant " in violation of Section 6 of the Broker Agreement.

U.S. Bank argues that it has been demonstrated dispositively that it was damaged by ANM's misrepresentations as it would not have authorized a mortgage loan that is now in default , and it is entitled to recover from ANM attorneys' fees, and other costs

[5] Benitez testified that she signed the loan application at closing.

associated with this litigation as ANM is contractually obligated to indemnify and hold the bank harmless for all loss, damages , costs and expenses [Mortgage Broker Agreement Section 13(a)].

U.S. Bank N.A. Mortgage Broker Agreement

The agreement between U.S. Bank and ANM Funding provided in pertinent part the following.

6. Additional Services for Broker

a) When applicable, immediately communicate to U.S. Bank the Applicant's cancellation for the Mortgage Loan and the reasons for the cancellation .

b) Verify all information on the Application.

c) Broker will immediately advise U.S. Bank of any additional material information relating to the Applicant that the Broker may obtain after submitting the application and prior to the closing.

7. Broker Representations and Warranties Regarding Mortgage Loans Offered to U. S. Bank

With respect to each Mortgage Loan offered to U. S. Bank under this Agreement, Broker represents and warrants the following :

a) Each document provided to U.S. Bank by Broker is complete, accurate and genuine, including any and all signatures and initials on said documents. Each document provided to U.S. Bank was generated and/or obtained by Broker or Broker's bona fide employees, and was not obtained nor generated by another party.

• • • •

c) To the best of the Broker's knowledge, there is no adverse information or documentation concerning the Applicant or the Mortgaged Property other than those , if any, reflected in the documentation provided by Broker to U.S. Bank .

• • • •

(f) To the best of the Broker's knowledge, there are no conditions present which could adversely affect the Mortgaged Property , including but not limited to , the presence of an Environmental Hazard.

• • • •

(h) No error, omission, misrepresentation , negligence, fraud or similar occurrence in connection with the Application has taken place on the part of any person including, without limitation, the Applicant , the Broker , any builder or developer, or any other party involved with the Application and Underwriting Package.

An event of default by the Broker is defined in subsection (d) of Paragraph 17 as follows.

(i) Any misstatement or omission of material fact with respect to a Mortgage Loan Application discovered by U.S. Bank . . .or disclosed to U.S. Bank . . . by inspection . . . .

(ii) The breach of any representation and warranties made by Broker to U.S. Bank pursuant to this Agreement.

(iii) A breach by Broker in the performance of any covenants or obligations under this Agreement .

(iv) Any material fraud, misrepresentation, or act of omission with respect to the information submitted on a particular Application is determined to exist by U.S. Bank or another investor , and Broker knew , or in the exercise of reasonable diligence , should have known of the false or fraudulent information. This includes, but is not limited to , any misrepresentation of income, funds on deposit, employment or

occupancy status.

ANM Defendants' Motion

Defendants move for an award of summary judgment dismissing all third-party claims in their entirety with prejudice .

With respect to the fraud cause of action, defendants argue that it is not distinct from the breach of contract claim, and as the bank cannot demonstrate a breach of a separate non-contractual duty or special damages not recoverable as contract damages, the claim must fail.

In addition, on the merits, it is maintained that there is no evidence to support the claim, as the bank has failed to demonstrate that the contract price was not $ 679,000.00, or that the ANM defendants , who were not present at the closing, were aware of any secondary financing in connection with the purchase, or that they took any affirmative steps to mislead the bank concerning the property's lack of a certificate of occupancy. As such, the ANM defendants argue , the claims of fraud and aiding an abetting are disproved as a matter of law.

It is argued that the breach of contract and unjust enrichment claims also fail as there is no evidence to support the assertion that the $ 679,000 .00 contract for sale was not the true contract, or that any of the ANM defendants knew of the secondary financing and intentionally failed to disclose it to the bank, or provided any false information concerning the mortgage application . The ANM defendants contend that the punitive damages claim

must also be dismissed in light of the lack of such evidence.

Claims Against E.N.P.

Defendant third-party plaintiff maintains that the record demonstrates as a matter of law its claim for negligent misrepresentation .

Among the inaccurate statements in the 02/25/08 appraiser's report leading the bank to believe that the property "was an existing resale"and not under construction , was the designation of same as "existing" rather than the alternative option, "under construction", and a statement that the property was "occupied" , though vacant, and the omission in the appraiser's description of the then extensive outstanding repairs, which had prevented the issuance of a certificate of occupancy, and according to plaintiff's description , included the lack of heating and electrical units, as well as hot water. The bank maintains that ENP knew that the bank would rely on the appraisal in connection with the mortgage application, and the bank , in fact, it relied on the inaccuracies and omissions to make an assessment that the premises was ready to be immediately occupied by the borrower and her tenants, and ENP knew that the bank would rely on the appraisal in connection with the mortgage application.

In opposition, ENP argues that there was no privity of contract with the third-party plaintiff, and it had no knowledge of any involvement of U.S. Bank at the time of the appraisal . In addition, ENP contends that it never made any material misrepresentations to any party of interest in this action, the report containing "possible typographical errors."

Discussion and Conclusions

It is by now 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 , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey,* 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs,* 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad,* 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart,* 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324,

501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *reargden.* 10 N.Y.3d 885).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

L& K Defendants

It is settled that to sustain a cause of action for legal malpractice, a plaintiff must show that the attorney failed to exercise the ordinary skill and knowledge commonly possessed by a member of the legal profession, and such negligence was a proximate cause of the plaintiff's losses, as well as proof of such actual damages. To establish proximate cause, the plaintiff is required to demonstrate that "but for" the attorney's negligence, plaintiff would have prevailed in the underlying matter or would not have sustained any ascertainable damages (see, Reibman v. Senie, 302 A.D.2d 290, 756 N.Y.S.2d 164 [1st Dep't 2003]; Brooks v. Lewin, 21 A.D.3d 731,734, 800 N.Y.S.2d 695 [1st Dept. 2005]).

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that the defendant/third-party plaintiff has met its prima facie burden to prove that in representing U.S. Bank in the Benitez mortgage transaction, L & K failed to exercise that degree of care, skill, and diligence commonly exercised by an attorney

practicing in the area of real estate loan transactions, and "but for" this negligence the bank would not have sustained losses , including those associated with the foreclosure of the mortgaged property.

L & K offers no probative evidence to raise a material issue of fact that the duty of reasonable care it owed to its client would include not only pre-closing notice that the premises lacked a certificate of occupancy, but advice as to the legal ramifications of proceeding to a closing under circumstances that would include the inability of the borrower and her prospective tenants to take immediate occupancy as contemplated by the terms of the mortgage application. Arguments attempting to define , and more to the point, circumscribe the requisite duty of reasonable care by reference to the bank's' closing instructions" are unavailing , as is any unsupported contention that L& K's duty of care to notify and to advise was in anyway suspended by its belief that , prior to the closing the bank was in possession of a document indicating that the certificate of occupancy had yet to be issued. It here undisputed that a certificate of occupancy search report was conducted prior to closing, and the L&K defendants were aware of its results, yet took no affirmative steps to advise their client , and/or consult with the bank concerning the legal consequences of proceeding to close on a property lacking a certificate of occupancy. No material issue of fact is here presented as to these facts , or as to whether this constituted a departure from the requisite duty of care.

U.S. Bank also demonstrates as a matter of law L & K's departure in failing to make inquiry to discover the escrow agreement between the seller and buyer pertaining to the lack of the certificate of occupancy. No issue of fact is raised to rebut the bank's showing that an attorney exercising the ordinary skill and knowledge possessed by counsel practicing in the area of real estate mortgage transactions in the circumstances presented here , including knowledge of the property's non-conforming status, and the firm's issuance of a check to Zimmerman "as attorney" , presumably for deposit in an escrow account, would have inquired as to the purpose of the check .

Moreover, defendant also makes its prima facie case with respect to the failure to investigate the bona fides of the "Zimmerman letter" and confirm that Benitez, as required, had made payment of 3 % of the purchase price prior to closing. Again, the discrepancy between that amount and the sum purported to have been received by wire transfer, as well as the designation of the wrong county for the property, and the disparity in the "Zimmerman" signature evidenced by the deed that was readily available, prompted , at the least a duty of inquiry to confirm by documentary proof that Benitez had made the down payment required by counsel's client as a precondition for the loan. L&K offers no evidence to rebut this showing of a departure .

The bank also demonstrates as a matter of law that in connection with their representation of the lender at the Benitez closing, L & K's failure to supervise their

paralegal in any meaningful fashion by pre-closing instructions , and/ or by oversight at anytime during the course of the closing . In opposition , L & K fails to come forward with probative proof of the supervision of the employee assigned to the closing.

U.S. demonstrates as a matter of law that "but for " each and all of the above departures, it would have been readily ascertainable by the lender that the preconditions for financing had not been met, and the mortgage loan, which was in default within months of its commencement, would not have been finalized.

In light of the above, that branch of the bank's motion is granted to the extent of awarding summary judgment on the issue of liability on the claim of legal malpractice as against the L& K defendants, and the matter set down for an assessment of damages.

It is the further finding of this court that L&K's motion for summary judgment be granted to the extent of dismissing as duplicative, the claims of negligent representation, breach of fiduciary duty, and negligence , as these claims arise from the same facts as the legal malpractice claim and seek damages that may be recovered on that cause of action.

Finally, as afforded all favorable inferences in favor of the non-moving party, it is the finding of this court that in view of Benitez's testimony at her July 20, 2009 deposition that the bank's attorney was present during the course of the entire closing, it is unresolved here whether the L & K defendants were aware of the contemporaneous execution of the Monroe Funding loan documents, and despite this knowledge, prepared , and signed the

settlement statement omitting this fact. Issues of fact requiring the assessment of credibility preclude an award of dispositive relief on the fraud claim.

ANM Defendants

With respect to the claim for breach of the mortgage broker's agreement's express warranties of the completeness and accuracy of the application, and supporting information , including the contract of sale, and the appraisal and leases for residential units within the three-family home, it is settled that the

> critical question in an action for breach of express warranties is not whether the buyer believed in the truth of the warranted information, but whether it believed it was purchasing the seller's promise as to its truth. This view of "reliance" i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties, reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled. The right to indemnification depends only on establishing that the warranty was breached.
>
> CBS. Inc. v. Ziff-Davis Pub. Co., 75 N.Y.2d 496, 503 , 553 N.E.2d 997 [1990]

It is here undisputed that the agreement between U.S. Bank , and ANM Funding, as mortgage broker, was in effect at the time of the Benitez mortgage transaction, and as relied upon as part of this controlling agreement, ANM represented and warranted that the application and supporting information provided on behalf of Benitez, was complete, accurate, and genuine.

It is the finding of this court that U.S. Bank has demonstrated as a matter of law that ANM's warranty to the bank in connection with the Benitez mortgage loan transaction was breached as the bank was provided with an inaccurate sales contract as signed by Benitez in connection with the application while the "real contract which is the one that has the price $ 739, 000 which is the only contract . . ever signed" by the purchaser [BENITEZ EBT : 69:21-23], and an application purportedly signed by Benitez, [6] omitting the secondary financing agreement, and supporting documents consisting of two leases for residential apartments within the three-family home never executed by the purchaser [Id. 142-143], as well as an appraisal containing significant misinformation as to the ability of the purchaser and her tenants to immediately take possession of the property. Moreover, for purposes of the clear obligation to "immediately advise U.S. Bank " of any additional material information relating to the applicant that ANM obtained after submitting the application, there is here no issue of fact that prior to the closing, ANM was aware that the property lacked a certificate of occupancy, and failed to advise the bank. It is the further finding of this court that U.S. Bank sustained damages as a result of these contractual breaches including the costs associated with the mortgage default.

In opposition , the ANM defendants come forward with no probative evidence to raise an issue of fact that the Benitez application as supplemented by the supporting information was complete , accurate and genuine .

[6]Benitez testified that she saw the application for the first time at the closing [EBT: 240].

As such, the motion of the third-party plaintiff is granted to the extent of awarding partial summary judgment on liability on the breach of contract claim and indemnification claims and the matter set down for an assessment of damages.

With respect to the fraud claims alleged, it is the finding of this court that though stemming from the same circumstances as the contractual breach claim , to the extent that it is predicated upon a misrepresentation of present facts, and therefore involving a separate breach of duty, it may be maintained (see, MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287, 293, 928 N.Y.S.2d 229 [1st Dept. 2011]). In light of the ANM defendants' clear denial of knowledge of the execution and transmittal of the leases, Among the unresolved questions here for purposes of this claim, are issues of fact as to how leases acknowledged by the ANM defendants to have been requested by the bank to support the application, the execution of which Benitez denies, were received by the bank.

E.N.P. Defendants

A claim for negligent representation requires proof 1) of 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) of plaintiff's reasonable reliance on that information (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180, 944 N.E.2d 1104, 919 N.Y.S.2d 465 [2011], quoting J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d

144, 148, 863 N.E.2d 585, 831 N.Y.S.2d 364 [2007]; see also, North Star Contr. Corp. v. MTA Capital Constr. Co., 120 A.D.3d 1066, 993 N.Y.S.2d 11 [1st Dept. 2014]).

It is ENP's contention that the first prerequisite is not met here, as there was no privity between the appraiser and U.S. Bank. However, in the context of a financing party plaintiff and an appraiser, it has been held that "if it were known that it was within the contemplation of the appraiser and the owner when they contracted for the appraiser that a financing party would rely upon it and be persuaded by it, then, since those whose conduct was to be governed would be a 'fixed, definable and contemplated group' the appraiser would have assumed a duty of care for the benefit of those in the group.'" Chemical Bank v. National Union Fire Ins. Co. of Pennsylvania, 74 A.D.2d 786, 787 [1st Dept. 1980], quoting *White v. Guarente*, 43 NY2d 356, 362 [1977].

Upon review of record here, it is the finding of this court that having been retained for appraisal services by an entity it knew to be a mortgage broker in connection with residential premises of the designated "borrower" Benitez, with the appraiser acknowledging that the report "probably" was to be forwarded to a financial institution and used for purposes of applying for a mortgage [PAVEL EBT: 43-44;121-123], ENP had an awareness that the appraisal was to be used for the particular purpose of an application to a financial institution for a mortgage loan.

While dismissed by ENP as "typographical", the mis-descriptions of the appraised property as "existing" and "occupied" and the omission from the report of the need for substantial work to be performed to complete construction , are significant errors pertaining in large measure, to the ability of the borrower and her prospective tenants to assume immediate occupancy of the premises. It is not here disputed that as of the date of the commencement of Benitez's action in November 2008, eight months after the closing, a temporary certificate of occupancy had not yet been issued.

It is also unrebutted here that U.S. Bank relied on the inaccurate information in the appraisal report in furtherance of Benitez's successful loan application.

Upon this showing , and in the absence of probative proof to raise an issue of fact to dispute the misrepresentations, the motion is granted to the extent of awarding summary judgment on the issue of liability in favor of the third-party plaintiff with respect to the negligent misrepresentation claim and setting the matter down for an assessment of damages.

Accordingly, it is

ORDERED that the motion of the defendant/third-party plaintiff be and hereby is granted to the extent of awarding partial summary judgment on the issues of liability on its claim for legal malpractice as against the L&K Defendants and on its claims for breach of contract and indemnification as against the ANM Defendants , and on its

claims of negligent misrepresentation as against ENP and it is further

ORDERED that upon proof of service of a copy of this decision and order upon the third-party defendants this matter be set down for an assessment of damages , and it is further

ORDERED that the motion of the L&K defendants for summary judgment be and hereby is granted to the extent of awarding partial summary judgment dismissing as asserted against them the third-party claims of negligent representation, breach of fiduciary duty, and negligence , and it is further

ORDERED that the motion of the ANM defendants for an award of summary judgment be and hereby is denied.

This constitutes the decision and order of this court.

Dated: April 8, 2015

Howard H. Sherman