

**Sutherland v. Remax, 22405/07**  
**Decided: August 7, 2008**

Justice Leonard B. Austin

NASSAU COUNTY  
Supreme Court

Counsel for Plaintiff: Howard L. Sherman, Esq.

Counsel for Defendant

(for Wells Fargo Bank NA)

Lowenstein Sandler PC

**Justice Austin**

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Defendant, Wells Fargo, Bank N.A. ("Wells Fargo"), moves to dismiss the complaint of Plaintiff, Lucha Sutherland ("Sutherland"), pursuant to CPLR 3211(a)(7) and CPLR 3016(b).

**BACKGROUND**

Sutherland purchased a home in Valley Stream on February 23, 2007. To purchase the home, Sutherland obtained a mortgage loan in the amount of \$450,000 from Wells Fargo. The real estate broker for the purchase was Defendant REMAX 2000 ("Remax"). The mortgage broker was Defendant, ASK Realty Inc. ("ASK"). Sutherland still owns and resides in the Valley Stream residence.

Prior to February 23, 2007, Sutherland contacted Remax for the purpose of purchasing a home in Nassau County. Sutherland was shown the house she ultimately purchased in Valley Stream, NY ("House") by an agent of Remax. Sutherland alleges that Remax informed her that it could assist her in obtaining a mortgage rate of 6 percent to purchase the house.

At the time, Sutherland was employed by Time Warner Cable, earning approximately \$48,000.00 a year. Sutherland's income after taxes was less

than \$3,500.00 a month. Sutherland alleges that in applying for a mortgage loan through Remax, she disclosed the amount of her income and provided pay stubs as proof of her income.

Sutherland worked solely through Remax in obtaining a mortgage loan and had no contact with ASK or Wells Fargo. However, Plaintiff alleges that ASK represented to Wells Fargo that Sutherland's income was in excess of her actual income. Furthermore, Plaintiff alleges that Remax and ASK were agents of Wells Fargo and that Wells Fargo took no steps to verify Sutherland's income and did not provide her with any disclosures regarding her interest rate or monthly payment.

Sutherland alleges, that Remax inaccurately reported her income on the loan application. Sutherland denies receiving a copy of the loan application. Sutherland first learned that the interest rate for the loan was 8.875 percent not the promised 6 percent at the time of closing. Furthermore her monthly payments including escrows for taxes and insurance totaled \$4,061.88. According to the complaint, Sutherland notified Remax that she could not close because the monthly costs exceeded her net income. In response, a Remax agent informed her that she could refinance her loan within ninety (90) days, and would receive the contemplated 6 percent interest rate.

The complaint alleges ten causes of action; seven of which are directed solely against Wells Fargo. Those causes of action include (1) predatory lending; (2) conspiracy to commit fraud; (3) common law fraud; (4) violation of the Truth in Lending Act 15 U.S.C. Â§1601 et seq. and its regulations contained in Federal Reserve Board Regulation Z, 12 C.F.R. Â§226; (5) violation of the Federal Real Estate Settlement Procedures Act, 12 U.S.C. Â§2601 et seq.; (6) violation of the Deceptive Business Practices Act in General Business Law ("GBL") Â§349; and (7) a claim for liquidated damages under Banking Law Â§598

Wells Fargo now moves to dismiss the claim pursuant to CPLR 3211(a)(7) and 3016(b). Sutherland's opposition to this motion focuses entirely on the fourth cause of action for predatory lending.

## **DISCUSSION**

The legal standard on a motion to dismiss for failure to state a cause of action is that the allegations in the complaint must be assumed to be true

and the court is to "accord the plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 86 (1994). However, "such an assumption must fail where there are conclusory allegations lacking factual support." *Elsky v. KM Ins. Brokers*, 139 A.D.2d 691 (2nd Dept. 1988). In addition, where affidavits have been submitted regarding a motion to dismiss, the court may consider allegations set forth in the affidavits to remedy any deficiencies within the pleading. See *Nonnan v. City of New York*, 9 N.Y.3d 825 (2007).

#### A. Predatory Lending - 4th Cause of Action

Sutherland did not state which predatory lending statute was allegedly violated, but does reference *DLJ Mortgage Capital, Inc. v. Smith*, 2007 Slip Op. 32745 (U), 2007 N.Y. Misc. LEXIS 8988 (Sup. Ct. Queens Co. 2007). *DLJ Mortgage* involved a cause of action for predatory lending based upon Banking Law Â§6-L. In order for a mortgage to fall within the threshold limits of Â§6-L, the mortgage must be considered a "high-cost home loan" and the amount of the loan may not exceed \$300,000. Furthermore, a claim for predatory lending must be dismissed where the allegations "are nothing more than a rehash of her fraud allegations" and where the plaintiff is "well aware of her own financial circumstances at the time she entered into [an] agreement." *Frank v. North American Foreclosure Solutions*, 12 Misc. 3d 1191(A) (Sup. Ct. Queens Co. 2006).

Sutherland has conceded that the value of the mortgage was \$450,000. Therefore, no claim may be brought under Banking Law Â§6-L. In addition, Sutherland's complaint makes allegations "upon information and belief" regarding Wells Fargo's behavior. These allegations are nothing more than a restatement of the allegations regarding her claim for fraud. Sutherland also fails to provide any additional non-conclusory allegations to substantiate a claim that Wells Fargo's conduct constituted predatory lending practices.

Because Sutherland's mortgage is over the threshold limit for a "high-cost home loan" and she has failed to state additional allegations beyond those constituting her claim for fraud and because she was aware at the time that she signed the loan application that she could not afford to pay for the loan, the cause of action for predatory lending must be dismissed.

#### B. Conspiracy to Commit Fraud - 5th Cause of Action

New York does not recognize a separate cause of action for conspiracy to commit fraud. See, *Health Delivery Sys. v. Scheinman*, 42 A.D.2d 566 (2nd Dept. 1973). Therefore, the cause of action must be dismissed.

### C. Common Law Fraud - 6th Cause of Action

To establish a cause of action for common law fraud, the plaintiff must plead the following elements: (1) a false representation of material fact, (2) with intent to defraud, (3) reasonable reliance on the misrepresentation and (4) causation of damages to the plaintiff. *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 N.Y.2d 403 (1958); *Okon v. Walsh*, 28 A.D.3d 529 (2nd Dept. 2006).

CPLR 3016(b) provides that an action for fraud must be pled "with particularity, including specific dates and items, if necessary and insofar as practicable." Conclusory allegations of fraud will not be sufficient. *Dumas v. Fiorito*, 13 A.D.3d 332 (2nd Dept. 2004); and *Sargiss v. Magarelli*, 50 A.D.3d 1117 (2nd Dept. 2008). However, it is sufficient to plead facts that would allow a reasonable inference of the alleged fraud. *Pludeman v. Northern Leasing Sys. Inc.*, 10 N.Y.3d 486 (2008)

Sutherland's complaint does not plead any specific allegations relating to the necessary elements for a cause of action against Wells Fargo for fraud. Sutherland's complaint alleges that ASK submitted information to Wells Fargo that was inaccurate. However, the complaint fails to allege any facts that if true would establish that Wells Fargo was aware of the inaccuracy. Therefore, even if all the allegations were proven, Wells Fargo was unaware of the inaccurate information.

Furthermore, Sutherland alleges that ASK and/or Remax were agents of Wells Fargo in the capacity of processors of loan information for Wells Fargo. In order to establish liability through an agency theory:

It must be established that the entity consent[ed] to a fiduciary relationship resulting from another's consent to allow the [entity] to act on the other's behalf and subject to the other's control. The agent is a[n] [entity] who acts for or in the place of the principal by authority from the principal.

N.Y. Jur. 2d, *Agency and Independent Contractors*, Â§1 (1998), citing *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142 (2nd Dept. 1993). Thus, a

claim for fraud against Wells Fargo must stand on its own.

Sutherland's allegation that Wells Fargo is liable under an agency theory is conclusory and not supported by any further allegations beyond seeking to establish a course of dealings between Wells Fargo, ASK and Remax. A course of dealings is insufficient to demonstrate that Wells Fargo controlled either Remax or ASK as a principal.

In addition, pursuant to CPLR 3016(b), a plaintiff must plead any claim for fraud with particularity,. *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43 (1999); and *Sargiss v. Magarelli*, 50 A.D.3d 1117 (2nd Dept. 2008). The intention of this rule has been said to "deter unfounded claims." *Sergeants Benev. Ass'n Annuity Fund v. Renck*, 19 A.D.3d 107 (1st Dept. 2005). In light of the difficulty of pleading the specific details of fraud, the Court of Appeals has held that it is sufficient to plead facts that would allow a fact-finder to make a reasonable inference of fraud. *Pludeman v. Northern Leasing Sys. Inc.*, *supra* at 493.

Sutherland's complaint makes only conclusory allegations regarding the claim for fraud. There is no indication of any actual misrepresentations, who made them or when they were made. Thus, the fraud claim should be dismissed. *Wint v. ABN AMRO Mtge Group, Inc.*, 19 A.D.3d 588, 589 (2nd Dept. 2005) (affirming dismissal of fraud claim for "fail[ing] to plead fraud with sufficient specificity" and "fail[ing] to allege any material misrepresentation by the defendant").

In addition, Sutherland concedes that a misrepresentation must be made to induce the other party to rely on it. However, Sutherland has failed to plead any allegations from which it could be inferred that Wells Fargo made any representation to her at all, let alone with the intent to induce an her to act in a detrimental manner. Wells Fargo agreed to grant a loan based upon the information provided to it. Sutherland instead relies on an allegation that Wells Fargo did not take any steps to confirm her income or ability to pay the mortgage it was approving. Even if such an allegation were taken as being true, it would not demonstrate the requisite intent to induce an action. See, *Demov, Morris, Levin & Shein v. Glantz*, 53 N.Y.2d 553 (1981); and *Kaufman v. State*, 18 A.D.3d 504 (2nd Dept. 2005) (dismissing fraud claim for failing to demonstrate any misrepresentations made with the intent to induce an action).

Finally, Sutherland's complaint does not allege any damages. The complaint does not indicate the current status of the mortgage loan, whether there is currently a default or what payments have been made. It is necessary that Sutherland plead "specific false representations upon which she relied or how those misrepresentations caused her any injury . . . ." *Glassman v. Zoref*, 291 A.D.2d 430 (2nd Dept. 2002). She has failed to do so.

The cause of action for common law fraud should be dismissed because Sutherland has failed to allege the necessary elements for a cause of action for fraud, failed to plead fraud with the necessary specificity under CPLR 3016(b), failed to plead the requisite intent of the misrepresentation and failed to plead damages.

#### D. Deceptive Business Practices - GBL Â§349 - 9th Cause of Action

To establish a cause of action for deceptive business practices under GBL Â§349, a plaintiff must allege: (1) a deceptive consumer-oriented act or practice which is misleading in a material respect, and (2) injury resulting from such act. *Andre Strishak & Assocs., P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608 (2nd Dept. 2002). "In determining whether a representation or omission is a deceptive act, the test is whether such act is 'likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Id.* at 609 quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20 (1995).

Sutherland has not alleged misrepresentations and fraudulent acts by Wells Fargo. She has only generally referred to the Defendants as a group in making generalized allegations of false advertising. Sutherland has not specified any specific acts of false advertising by or on behalf of Wells Fargo. In addition, Sutherland has not alleged sufficient facts to demonstrate sustained damages. There are no allegations that Sutherland observed or was influenced by any advertisements by Wells Fargo, nor are there allegations of what misrepresentations Wells Fargo actually made that could be likely to mislead a reasonable customer.

Therefore, because no allegations are made that, if true, would demonstrate an act or practice that is misleading, and because there are no allegations that such acts or practices were the cause of Sutherland's alleged damages, the cause of action for deceptive business practices must be dismissed. See, *Gale v. International Business Machines Corp.*, 9 A.D.3d 446 (2nd Dept. 2004)

(dismissing a deceptive business practices cause of action for failing to allege specific misrepresentations which caused the plaintiff to be misled and suffer damages as a result).

#### E. Violation of The Federal Truth in Lending Act Â§1638 - 7th Cause of Action

The Truth in Lending Act was enacted to "avoid the uninformed use of credit", and to "assure the meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. Â§1601.

A claim seeking rescission or damages under 15 U.S.C. Â§1638 for failing to disclose information to a plaintiff before the close of a mortgage loan transaction requires that the party seeking rescission notify the lender of the intent to rescind. Then the party must return the principal of the loan to the lender. 15 U.S.C. Â§1635(b). In addition, Â§1635(b) requires that the creditor/lender have twenty (20) days to respond to the rescission notice before the claim is filed in court. *Id.*

Rescission is an equitable doctrine. The court may condition rescission relief on whether the loan principal was returned to the lender. *Berkeley Fed. Bank & Trust, FSB v. Siegel*, 247 A.D.2d 498 (2nd Dept. 1998). In addition, in order to recover damages under Â§1638, the plaintiff "must establish a causal connection between the inaccurate disclosures and [her] injury by demonstrating that [she] relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere." *Vickers v. Home Fed. Sav. & Loan Ass'n of East Rochester*, 62 A.D.2d 1171 (4th Dept. 1978).

Sutherland neither alleges that she notified Wells Fargo of her demand to rescind the loan, nor are there any allegations that she provided such notice prior to filing this action. Sutherland also has failed to allege that any amount of the principal of the loan was returned to Wells Fargo as a basis for rescinding the loan. Furthermore, Sutherland has not made any allegations indicating a connection between inaccurate disclosures and her alleged damages.

Sutherland's only allegation that she has been damaged lies in her allegation that she was promised that she could obtain or refinance her mortgage at the promised, lower 6 percent interest. Sutherland alleges that, at the closing,

she was aware of the interest rate on the loan she signed and accepted the loan anyway. Therefore, the damages alleged to be caused in this action have no connection with any alleged failure by Wells Fargo to disclose information under Â§1638.

The claim for violation of Â§1638 of the Federal Truth in Lending Act must be dismissed because Sutherland failed to notify Wells Fargo of her intention to rescind prior to filing her claim, failed to return the principal of the loan to Wells Fargo to rescind the loan and because she has failed to allege any facts that if true would establish a causal connection between her alleged damages and any alleged failure to disclose by Wells Fargo.

#### F. Violation of Anti-Kickback Provision in Â§2607(a) of the Real Estate Settlement Procedures Act - 8th Cause of Action

Section 2607(a) of the Federal Real Estate Settlement Procedures Act ("RESPA"), states that:

No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.

In order for a claim to be brought under Â§2607(a), the plaintiff must plead specific facts relating to the improper activity. Conclusory allegations will not be sufficient to establish a cause of action "under RESPA . . . or that [the lender] engaged in predatory or discriminatory lending practices." *Aurora Loan Services v. Grant*, 17 Misc. 3d 1102(A) (Sup. Ct. Kings Co. 2007). Sutherland failed to plead facts showing that Wells Fargo illegally shared fees with a third party. Rather, she pled generally that the Defendants violated Â§2607(a) without alleging the manner in which it was violated, to whom the money was given or received from or the basis for the allegations.

The cause of action for violation of Â§2607(a) must be dismissed because the complaint fails to allege specific facts that would show that Wells Fargo shared fees with any third party. Therefore, because Sutherland has failed to plead facts showing illegal sharing of fees, this action must be dismissed.

#### G. Liquidated Damages - 10th Cause of Action

Because Sutherland failed to plead any valid cause of action against Wells Fargo, she is not entitled to "liquidated damages" or "quadruple damages" pursuant to Banking Law Â§598. Additionally, liquidated damages is a remedy and not a cause of action. Therefore, a claim for liquidated damages should be dismissed. See, *Glassman v. Zoref*, supra (dismissing Banking Law Â§598 damages claim when mortgagor "failed to demonstrate the existence of a cause of action to recover damages for fraud.").

Accordingly, it is,

ORDERED, that the motion of Defendant Wells Fargo Bank to dismiss the complaint as to it is granted; and it is further

ORDERED, that the remaining claims against the Defendants Remax and ASK are severed and continued; and it is further

ORDERED, that counsel for the remaining parties shall appear for a preliminary conference on September 23, 2008 at 9:30 a.m.

This constitutes the decision and Order of this Court.