

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST DEPARTMENT

Great Ajax Operating Partnership L.P. v. PCG REO Holdings, LLC

2021 NY Slip Op 01324 (N.Y. Ct. App. 2021) · No. Index No. 651940/17; Appeal No. 13275; Case No. 2020-02999 · Decided March 4, 2021

SUMMARY

The New York Appellate Division, First Department unanimously affirmed the dismissal of Great Ajax Operating Partnership L.P.'s complaint and the award of attorneys' fees to defendants. The court held that claims concerning a New Jersey mortgage loan were barred by judicial estoppel, while claims involving the transfer of New York REO properties were properly dismissed because the deeds were delivered within a reasonable time and the alleged damages were unsubstantiated and contractually barred. The court also affirmed dismissal of duplicative fraud, implied-covenant, and negligence claims.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, First Department
WRITING FOR THE COURT	Per Curiam; Renwick, J.P.; Kennedy, J.; Scarpulla, J.; Shulman, J.
JURISDICTION	New York
DECIDED	March 4, 2021
DOCKET	Index No. 651940/17; Appeal No. 13275; Case No. 2020-02999
DISPOSITION	affirmed
PROCEDURAL POSTURE	Plaintiff appealed from an order granting defendants' motion for summary judgment dismissing the complaint and awarding attorneys' fees.
STANDARD OF REVIEW	Review of an order granting summary judgment; the court applied the summary judgment standard and determined that defendants were entitled to judgment as a matter of law.
PRECEDENTIAL VALUE	published opinion
PARTIES	Great Ajax Operating Partnership L.P. v. PCG REO Holdings, LLC, et al.

TOPICS

breach of contract

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether plaintiff's claims arising from the sale of the New Jersey mortgage loan were barred by judicial estoppel.
2. Whether defendants breached the contract by delivering deeds for five New York REO properties within a reasonable time under the circumstances.
3. Whether plaintiff's fraud claim was duplicative of its breach-of-contract claim.
4. Whether plaintiff's damages claims were unsubstantiated and barred by the contract's exclusion of indirect damages.
5. Whether the implied-covenant and negligence claims were duplicative of the contract claims.
6. Whether evidence submitted without affidavit could support a party's position on summary judgment.

HOLDINGS

1. The claims were properly dismissed because plaintiff had procured a judgment in its favor in New Jersey by taking positions inconsistent with those asserted in this action.
2. The breach-of-contract claim was properly dismissed because defendants delivered the deeds within a reasonable time under the circumstances.
3. The fraud cause of action was properly dismissed as duplicative of the breach-of-contract claim.
4. Plaintiff's damages claim was properly rejected because the alleged damages were unsupported by documentation and constituted indirect damages barred by the contract.
5. The claims alleging breach of the implied covenant of good faith and fair dealing and negligence were properly dismissed as duplicative of the contract claims.
6. There is no requirement that evidence be submitted by affidavit to prevail on a motion for summary judgment.

KEY QUOTATIONS

*“there is no requirement that evidence be submitted by affidavit to prevail on a motion for summary judgment” (at *1)*

*“Transfer of title is accomplished . . . by the delivery of an executed deed” (at *1)*

FACTUAL BACKGROUND

The dispute concerned the sale of a mortgage loan secured by New Jersey property and the transfer of five New York real estate owned properties. Plaintiff had previously taken an inconsistent position in New Jersey litigation concerning ownership and validity of a \$185,000 note and mortgage and the filing of a satisfaction of mortgage. In the New York property transaction, defendants delivered deeds within a reasonable time, and plaintiff later requested replacement deeds to avoid additional recording-related fees. Plaintiff also alleged that defendants failed to resolve recording issues and sought damages that were unsupported by documentation and barred as indirect damages under the contract.

PROCEDURAL HISTORY

Supreme Court, New York County, granted defendants' motion for summary judgment dismissing the complaint and for attorneys' fees. The Appellate Division, First Department unanimously affirmed the order with costs.

DISPOSITION

affirmed

CASES CITED

- Muniz v Bacchus, 282 AD2d 387, 388 [1st Dept 2001]
- Alvarez v Prospect Hosp., 68 NY2d 320, 325 [1986]
- Kalikow 78/79 Co. v State of New York, 174 AD2d 7, 11 [1st Dept 1992], appeal dismissed 79 NY2d 1040 [1992]
- Savasta v 470 Newport Assoc., 82 NY2d 763, 765 [1993]
- Manhattan Life Ins. Co. v Continental Ins. Co., 33 NY2d 370, 372 [1974]
- J.E. Morgan Knitting Mills v Reeves Bros., 243 AD2d 422, 423 [1st Dept 1997]
- Lodato v Greyhawk N. Am., LLC, 39 AD3d 494, 495-496 [2d Dept 2007]
- Home Boys Shopping Network v Lloyd's N.Y. Ins. Co., 237 AD2d 164 [1st Dept 1997]
- S.A.B. Enters. v Village of Athens, 164 AD2d 558, 564 [3d Dept 1991]
- Biotronik A.G. v Conor Medsystems Ireland, Ltd., 22 NY3d 799, 807-808 [2014]
- Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y., 10 NY3d 187, 192 [2008]
- MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept 2011]
- Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 711 [2018]
- ABL Advisor LLC v Peck, 147 AD3d 689, 691 [1st Dept 2017]

OPINION

PER CURIAM.

Great Ajax Operating Partnership L.P. v PCG REO Holdings, LLC (2021 NY Slip Op 01324)
Great Ajax Operating Partnership L.P. v PCG REO Holdings, LLC 2021 NY Slip Op 01324
Decided on March 04, 2021 Appellate Division, First Department Published by New York State

Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: March 04, 2021 Before: Renwick, J.P., Kennedy, Scarpulla, Shulman, JJ. Index No. 651940/17 Appeal No. 13275 Case No. 2020-02999 [*1]Great Ajax Operating Partnership L.P., Plaintiff-Appellant, vPCG REO Holdings, LLC, et al., Defendants-Respondents. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, White Plains (Robert A. Spolzino of counsel), for appellant.

Blank Rome LLP, New York (Timothy W. Salter of counsel), for respondents. Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 26, 2020, which granted defendants' motion for summary judgment dismissing the complaint and for attorneys' fees, unanimously affirmed, with costs. Initially, we note that "there is no requirement that evidence be submitted by affidavit to prevail on a motion for summary judgment" (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]).

Plaintiff's claims arising from the sale of the mortgage loan secured by a property in New Jersey were properly dismissed as barred by judicial estoppel. Plaintiff "procured a judgment in its favor as a result of the inconsistent position[s] taken" before a New Jersey court, where it argued that it owned the \$185,000 note and mortgage that listed the incorrect address due to a scrivener's error, the note and mortgage were valid, and a satisfaction of mortgage was incorrectly filed (*Kalikow 78/79 Co. v State of New York*, 174 AD2d 7, 11 [1st Dept 1992], appeal dismissed 79 NY2d 1040 [1992]).

The breach of contract cause of action arising from the transfer of five real estate owned (REO) properties in New York was properly dismissed because defendants delivered deeds for those properties within a reasonable time under the circumstances (*Savasta v 470 Newport Assoc.*, 82 NY2d 763, 765 [1993]; see also *Manhattan Life Ins. Co. v Continental Ins. Co.*, 33 NY2d 370, 372 [1974] ["Transfer of title is accomplished... by the delivery of an executed deed"]).

Nothing in the record shows that the deeds originally provided were invalid or that plaintiff attempted, but was unable, to record them. Rather, plaintiff requested new deeds specifically to avoid paying additional fees to cover the months during which it did not seek to record them.

The cause of action for fraud, arising from defendants' alleged representations that they would provide new deeds and resolve issues with recording them, as required by § 4.04(c) of the contract, was correctly dismissed as duplicative of the contract claim (see *J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422, 423 [1st Dept 1997]). Plaintiff's proffered damages, based on defendants' alleged failure to transfer title to the properties for almost two years while resolving issues with recording the deeds, are unsubstantiated by any documentation (see e.g. *Lodato v*

Greyhawk N. Am., LLC, 39 AD3d 494, 495-496 [2d Dept 2007]; Home Boys Shopping Network v Lloyd's N.Y.

Ins. Co., 237 AD2d 164 [1st Dept 1997]; S.A.B. Enters. v Village of Athens, 164 AD2d 558, 564 [3d Dept 1991]). Moreover, the proffered damages constitute indirect damages for which the contract bars recovery (see Biotronik A.G. v Conor Medsystems Ireland, Ltd., 22 NY3d 799, 807-808 [2014]; Bi-Economy Mkt., Inc. v Harleystown Ins. Co. of N.Y., 10 NY3d 187, 192 [2008]).

The causes of action alleging breach of the implied covenant of good faith and fair dealing were properly dismissed as duplicative [*2] of the contract claims (see MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 297 [1st Dept 2011]).

The cause of action for negligence was also properly dismissed as duplicative (see Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704, 711 [2018]; ABL Advisor LLC v Peck, 147 AD3d 689, 691 [1st Dept 2017]).

We have considered plaintiff's remaining contentions and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: March 4, 2021