

3/31/2014

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

-----X  
SANDRA KRIZ.,

Plaintiff,

-against-

**DECISION / ORDER**

Index No. 8219/2005

WALTER LOAKNAUTH, et als.,

Defendants  
-----X

The following papers numbered 1 to 5 read on the below motions noticed on November 1, 2013 and duly submitted on the Part IA15 Motion calendar of **December 17, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Def. Notice of Motion, Exhibits	1,2
Pl.'s Aff. in Opp., Exhibits	3,4
Def.'s Aff. in Reply	5

Upon the foregoing papers, the defendant Country Wide Home Loans, Inc. ("Countrywide") moves to dismiss the complaint of the plaintiff Sandra Kriz ("Plaintiff"), pursuant to CPLR 3211(a)(1) and (a)(7), on the grounds that her cause of action is barred by the doctrine of judicial estoppel. Plaintiff opposes the motion.

**I. Background**

This matter arises out of an allegedly fraudulent real estate transfer. In 1984, Plaintiff and co-plaintiff Ramnand Sooknan, her brother, along with her then-husband Walter Loaknauth ("Loaknauth") and Ramnarine Sooknan were all co-owners of property located at 737 Cranford Avenue, Bronx, New York (the "Property"). In 1987, Ramnarine Sooknan deeded his interest in the Property to Plaintiff, Loaknauth, and Ramnand Sooknan. In or around 2000, Plaintiff deeded her interest in the Property to Loaknauth. In or around 2002, Ramnand Sooknan deeded his interest in the Property to Loaknauth, making Loaknauth the Property's sole owner. Movant Countrywide asserts that its mortgage is a consolidated mortgage that combines a gap mortgage with Countrywide for \$50,000 on October 20, 2006 with a prior mortgage with a principal amount of \$400,000 held by Encore Credit Corporation.

In this 2005 action, the Plaintiff seeks complete ownership of the Property based on an allegation that the 2000 deed (deeding her interest to Loaknauth) was forged by Loaknauth. Plaintiff alleges that she should obtain Loaknauth's interest, claiming that she was granted his interest in the Property pursuant to their 1992 divorce decree. Plaintiff also seeks any rental income generated by the Property.

Countrywide argues that Plaintiff's complaint must be dismissed because she is judicially estopped as a matter of law from claiming an ownership interest in the Property, by virtue of her filings with the United State Bankruptcy Court for the Middle District of Florida in 2004. In her Chapter 7 Bankruptcy petition, Plaintiff represented that she had no interest in any real property assets. Countrywide contends that this is a judicial admission that is binding upon her in the present action. Plaintiff also failed to claim any rental income in her Bankruptcy petition, despite testifying at deposition that the property was a rental property. Plaintiff acknowledged in her 2011 deposition that she had no title to the Property and did not list the Property as an asset in her bankruptcy petition because at that time, she knew that her husband had "taken her name off" of the deed. Countrywide therefore argues that Plaintiff must be estopped from claiming ownership of the property since she admitted in her Bankruptcy petition that she had no real property. (*Festinger v. Edrich*, 32 A.D.3d 412 [2<sup>nd</sup> Dept. 2006]). Also, the failure to list an asset in a bankruptcy petition bars a future claim on that asset (*D&L Holdings LLC v. RCG Goldman Co.*, 287 A.D.2d 65 [1<sup>st</sup> Dept. 2001]).

Plaintiff opposes the motion with an affirmation of counsel. Plaintiff does not dispute that she failed to list the Property as an asset in her 2004 bankruptcy proceeding, but contends that there was no intent to deceive the court since her interest in the property was "contingent at best." Plaintiff argues that the cases cited by Countrywide are distinguishable in that they involve situations where the plaintiff had acted with the intent to mislead the judiciary.

## II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118

[1<sup>st</sup> Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1<sup>st</sup> Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1<sup>st</sup> Dept. 1997])[on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR 3026*). The court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory”(*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading’s four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1<sup>st</sup> Dept. 1992]).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR 3211 (a)(7)* may properly be negated by affidavits and documentary evidence (*CPLR 3211[a][1]*, *Wilhelmnia Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1<sup>st</sup> Dept. 2005]). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.*, citing *Leon v. Martinez*, *supra.*) Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint (*Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 [2<sup>nd</sup> Dept. 2001]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR 3211(a)(7)* (*Ackerman v. Vertical Club Corp.*, 94 A.D.2d 665 [1<sup>st</sup> Dept. 1983]).

### III. Applicable Law and Analysis

The doctrine of judicial estoppel is intended to preclude a party who assumed a certain position in a prior legal proceeding and who secured a judgment or court ruling in his or her

favor from assuming a contrary position in another action simply because his or her interests have changed (*D&L Holdings LLC v. RCG Goldman Co.*, 287 A.D.2d 65 [1<sup>st</sup> Dept. 2001]). This doctrine has been invoked in the bankruptcy context to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy (*Kunica v. St. Jean Financial, Inc.*, 233 B.R.46 [S.D.N.Y. 1999][internal citations omitted]; *Cafferty v. Thompson*, 223 A.D.2d 99 [3<sup>rd</sup> Dept. 1996]; *Koch v. National Basketball Ass'n, Inc.*, 245 A.D.2d 230 [1<sup>st</sup> Dept. 1997]).

Here, Plaintiff's complaint seeking certain interests in the subject Property must be dismissed, since the position taken in the instant action is inconsistent with Plaintiff's position taken at her prior bankruptcy proceeding. In the summons and complaint, Plaintiff claims that the Countrywide mortgage encumbering the property is invalid because the mortgagor, defendant Walter Loaknauth, forged Plaintiff's signature on a 2000 deed transferring it from Plaintiff to Loaknauth. Plaintiff claims that she, not Loaknauth, is the rightful owner of the Property, since (1) she and Loaknauth obtained the Property by virtue of 1984 deed, (2) Plaintiff obtained Loaknauth's interest in the Property by virtue of a 1992 divorce settlement and subsequent order, and (3) since the 2000 deed purportedly transferring Plaintiff's interest in the Property from Plaintiff to Loaknauth was a forgery and therefore invalid (*see* Complaint, First Cause of Action). Plaintiff also seeks rental income generated by the Property since June 22, 2000, "the date upon which the aforesaid fraudulent deed was executed." (*Id.*, Third Cause of Action). At her 2004 Chapter 7 bankruptcy proceeding, however, Plaintiff represented *inter alia* that she had no legal, equitable, or future interest in any real property. She subsequently obtained a bankruptcy discharge. Plaintiff executed her bankruptcy petition on June 3, 2004. She verified the summons and complaint in this matter on November 15, 2004. At her deposition, Plaintiff testified that she did not list the Property as an asset in the bankruptcy petition because she had "spoken to an attorney" and had "already found out that [her] name [had] been taken off of the house" and she had informed the attorney who prepared her petition. Still, the petition includes no indication of a potential claim against the Property.

In opposition to the motion, Plaintiff submits an affirmation of counsel. Counsel argues that, as evidenced by her deposition testimony, Plaintiff had no intent to deceive at the time of

her bankruptcy filing, since at that time, “her claim to said property was contingent at best.” In distinguishing the cases cited by Country Wide, Plaintiff argues that unlike in those matters, there is no evidence that Plaintiff “intended to mislead or misrepresent any of the facts relating to her potential claim to property which she was not in title.”

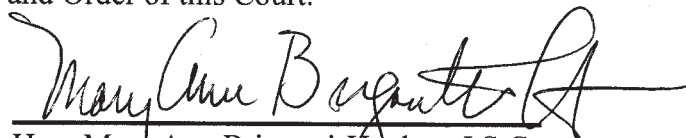
However, even if Plaintiff only had a contingent claim to the Property at the time of her bankruptcy petition, she was obligated to disclose such a potential claim and her failure to do so bars the instant action. It makes no difference that Plaintiff had no intent to mislead or deceive. Neither ignorance of the law nor inadvertent mistake excuses a plaintiff’s failure to list such a claim as a potential asset in a bankruptcy petition ( *see Hutchinson v. Chana Weller, DDS, PLLC.*, 93 A.D.3d 509 [1<sup>st</sup> Dept. 2012][internal citations omitted][analyzing in the context of a dismissal motion for lack of standing], citing *Dynamics Corp. of Am. v. Marine Midland Bank-NY*, 69 N.Y.2d 191, 196-197 [1987]). Here, given Plaintiff’s deposition testimony as well as the temporal proximity between her bankruptcy petition and verifying the instant summons and complaint, it is clear that Plaintiff was aware of a possible cause of action relating to the real property at the time of her bankruptcy proceeding. It is Plaintiff’s knowledge of the facts giving rise to the claims, rather than knowledge of his or her legal right, that is decisive (*Cafferty v. Thompson, supra.*, citing *Dynamics Corp., supra.*).

Accordingly, the documentary evidence which the defendant submitted in support of its motion has established that the plaintiff is judicially estopped from claiming an equitable interest in the Property as well as rental income based on an alleged fraudulent transfer of the deed in 2000, since this part of her cause of action was predicated upon facts which were admittedly known or should have been known to the Plaintiff before filing her bankruptcy petition on or about June 3, 2004, yet were not disclosed. Plaintiff failed to rebut the defendants’ prima facie showing. Accordingly, Countrywide’s motion to dismiss pursuant to CPLR 3211(a)(1) is granted, and the complaint is dismissed.

This constitutes the Decision and Order of this Court.

Dated:

3/17/14

  
Hon. Mary Ann Brigantti-Hughes, J.S.C.