SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 4

NASSAU COUNTY

LILA MILLER,

Plaintiff,

-against-

MOTION SEQ. NO.: 001,
MOTION DATE: 10/2/10

PETER J. DAWSON, BMG ADVISORY SERVICES, LTD., BRASH MANAGEMENT GROUP, LTD., ETHAN THOMAS CO., INC., CUSTOM CAPITAL CORPORATION, PHH MORTGAGE CORPORATION, TAXX PLUS SERVICES, LTD., LISA DAWSON, MIKE LAUCELLA, and IDA D'ANGELO A/K/A IDA MAYER,

INDEX NO.:13770/07

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Supplemental Affirmation.....2
Memorandum of Law.....3
Affidavit in Opposition.....4
Reply Affirmation.....5

Motion pursuant to CPLR 3211[a][[1],[7] by the defendant PHH Mortgage Corporation for an order dismissing the complaint insofar as asserted against it, converted to CPLR 3212, as further described in *Hennessy, et., al., v Dawson, et., al.*

As detailed in this Court's orders issued in connection with the related actions in *Hennessy, et., al., v Dawson, et., al; Frawley v. Dawson, et., al.*, [decided herewith], the subject action arises out of an alleged "ponzi scheme" perpetrated by codefendant Peter J. Dawson, a former investment advisor who was arrested in December of 2006 and later pleaded guilty to stealing over $7 million which his clients had entrusted to him (Cmplt., ¶¶ 12-22; 47-50).

In sum, Dawson counseled certain clients to surrender life insurance policies and annuities and then transfer the proceeds to him for investment purposes (Dawson Plea

Allocution Affidavit ["Plea"], ¶¶ 102-107; Dawson [March 2008] Dep., 56-57). Dawson advised other clients to apply for refinance and/or "cash out" home equity loans and to similarly turn over the loan proceeds to him (Cmplt.,¶¶ 62-65; Dawson [March 2008] Dep., 94-95). As part of the strategy, Dawson also assumed the duty of making his clients' monthly mortgage payments. At the closings, loan funds were in certain cases, wired by lenders directly to so-called "disbursement" accounts maintained at First National Bank by entities owned by Dawson, including in particular, BMG Advisory Services, LTD ["BMG"], and/or Brash Management Group, LTD ["Brash"]. In other cases, the clients themsleves endorsed the proceeds checks they received, over to the same Dawson entities.

The underlying premise, common to all the actions, is that the mortgage loans and other investment transactions constituted a scheme over which Dawson presided with the knowing aid and assistance of various lenders, brokers and insurance companies. The various plaintiffs further allege that the defendants breached an independently existing tort duty of care by making improvident and unreasonable loans which they did not qualify for, and which were allegedly predicated upon false or inaccurate client income data (Cmplt., ¶¶ 28-29, 31, 64-65, 76, 113; Miller [Nov 29, 2007] Aff., ¶¶, 2-3, 4 [Sept. 29, 2008] Aff., ¶¶ 7-8).

Insofar as relevant here, In March of 2005, the plaintiff Lila Miller obtained a $300,000.00, 30-year conventional, fixed-rate "stated income" loan from the codefendant lender, PHH Mortgage Corporation ["PHH"]. The PHH loan provided for monthly payments of $1822.44 and an annual interest rate of 6.125% rate and was secured by a mortgage encumbering Miller's previously mortgage-free Wantagh, New York residence (Miller Cmplt., ¶¶ 20; 40-2; PHH Exhs., "A"-"C", "K").

The PHH loan was brokered by Michael Laucella of Custom Capital Corporation ["Custom Capital"] – a long-time Dawson acquaintance who had served time for federal securities and financial crimes prior to his association with Custom Capital (Laucella [Dec 2007] Dep.,17-43-44; Dawson [March 2008] Dep., 183-187) (*see, Hennessy v Dawson, et., al.*, decided herewith]).

According to Dawson, Laucella himself completed portions of Miller's application, and entered an inaccurate monthly income of $8,000.00 in order to induce PHH to make the loan (Dawson [April 18, 2008 Miller] Dep., 144-147). Miller contends that at the time she signed her loan application, her income was $81,597.00 in 2002;

$18,594.00 in 2003 and $3,815.00 in 2005 (Miller [Nov] Aff., ¶¶ 3-4). She claims that she never "complet[ed] any loan application that showed [she] * * * earned $8,000.00 per month" (Miller [Nov 29, 2007] Aff., ¶ 2).

At the March, 5, 2005 closing, PHH was represented by its settlement agent and counsel, codefendant Ida D'Angelo & Associates, P.C. ["D'Angelo"], who some days later issued a loan proceeds check to Miller from her firm's "mortgage closing account" in the net sum of $264,517.71 – a check which Miller claims to have received a few days after the closing (Miller [Nov. 2007] Aff., ¶¶ 6-5). A number of disbursements had been made at closing and deducted from the gross loan amount, including the sum of $16,022.00 attributable to certain existing tax liens, which were disclosed on Miller's signed HUD-1 statement (Dawson [April 18, 2008] Dep., at 155; 169; Miller [Nov. 2007] Aff., ¶¶ 6-5).

After she received the check, Miller endorsed the instrument over to Dawson, who deposited it into one of his companies' client disbursement accounts on or about March 10, 2005 (Cmplt., ¶¶ 39, 41).

Approximately one year after the closing, Miller received a check in the sum of $8,100.00 from Dawson, which check (bearing the notation "tax escrow") was drawn on the disbursement account of co-defendant Brash (L. Miller Aff., ¶ 6). In July of 2006, some 16 months post-closing, the plaintiff received yet another check in the sum of $16,022.00, drawn on the mortgage closing account of codefendant D'Angelo (L Miller, Aff., ¶¶ 8-12; Exh., "F"). According to Miller, D'Angelo told her that the check represented a refund of certain closing costs charged to her which were now being returned (L. Miller Aff., ¶ 10 *see*, Dawson [April 18, 2008 Miller] Dep., 161).

Notably, in the March 3, 2005 HUD-1 settlement statement – signed by both D'Angelo and Miller – there is a specific entry under the "Disbursements to Others" category, for federal "income taxes" in the sum of $16,022.00 (PHH Exh., "D"). The credit report prepared in connection with the loan also notes two outstanding federal tax liens which together amount to the above-noted escrow total (PHH Exh., "F", at 4 *see also*, Gladston Reply Aff., Exh., "S" ¶ 20).

Dawson recalled in his testimony that the outstanding tax lien was ultimately paid at some unspecified point, but that despite his supplying Ms. D'Angelo with documentation allegedly establishing payment of the tax lien, he allegedly experienced difficulty in persuading D'Angelo to release the escrowed amounts (Dawson [April18, 2008 Miller] Dep., 156; 159; 165-169; 171).

Eventually, Dawson himself advanced Miller the sum of $8,100.00 in April of 2006 as an accommodation and because of D'Angelo's alleged delay – although D'Angelo later issued her own refund check payable to Miller in July of 2006. In March of 2007, D'Angelo pleaded guilty in the Supreme Court, Kings County, to one count of falsifying business records in the first degree arising out of an unrelated, so-called "straw" buyer scheme intended to defraud lending banks (*see*, violation of Penal Law § 175.10) – a class "E" felony. D'Angelo was subsequently disbarred by the Appellate Division, Second Department (*see, In re D'Angelo*, 53 AD3d 29).

In December of 2006, Dawson's scheme unraveled and he was arrested in Nassau County, after which he agreed to plead guilty to, *inter alia*, grand larceny in the second degree (involving some 53 victims and covering thefts between January 2005 and December 2006). In exchange, Dawson received a sentence commitment from the Court of 5 to 15 years, together with restitution of some $7.7 million. Dawson also promised "full and complete cooperation in any civil actions" commenced by his victims as a result of his thefts (Plea Agreement, ¶¶ 2-3, 6).

In his December 2007 plea allocution affidavit, Dawson described in some detail how the scheme operated and attributed his wrongdoing in part to: (1) an increasingly serious Xanax addiction; (2) a bi-polar psychological disorder; and (3) the alleged neglect and laxity of the involved financial institutions, brokers and attorneys, who – according to Dawson – allowed the scheme to prosper by failing to intervene and/or supervise him properly and/or "realize how sick * * * [he] was" (Plea Aff., ¶¶ 34-35, 93-95; 144; Dawson Dep., 18, 22-30).

In 2007, the plaintiff Miller commenced the within action as against, *inter alia*, Dawson, D'Angelo, Custom Capital and PHH, alleging in a verified complaint containing twelve separately captioned causes of action. Among other things the complaint includes: (1) state law claims grounded on conversion, negligence, fraud, breach of fiduciary duty, aiding and abetting fraud/fiduciary duty and violation of General Business Law § 349; and (2) federal claims based on the "Truth in Lending Act" ["TILA"](15 U.S.C. §1601, *et., seq*); and the Real Estate Settlement Procedures Act ["RESPA"](12 U.S.C. § 2601, *et., seq*).

PHH in particular, is named as a defendant in connection only with the fourth, seventh, and ninth through twelfth causes of action, which set forth claims sounding in aiding and abetting fraud/breach of fiduciary duty, and negligence – as well as claimed violations TILA, RESPA and General Business Law § 349).

Although PHH's motion was originally submitted as one pursuant to CPLR 3211[a][7], the parties have stipulated and agreed that the application shall now be considered as one for summary judgment pursuant to CPLR 3212.

Given the foregoing unusual procedural modification and upon reviewing the parties' respective submissions, the Court agrees that PHH's has demonstrated its *prima facie* entitlement to judgment as a matter of law dismissing the fraud and fiduciary duty causes of action in the complaint.

It is settled that the typical relationship between a lender and borrower is contractual in nature and does not give rise to any fiduciary obligations (*Dobroshi v. Bank of America, N.A.*, 65 AD3d 882, 884; *River Glen Associates, Ltd. v. Merrill Lynch Credit Corp.*, 295 AD2d 274, 275.

Here, the evidence submitted does not establish why the contractual relationship which existed between the plaintiff, as borrower, and PHH, as lender, would give rise to the fiduciary-type relationships which the plaintiff claims existed. Specifically, there is proof that the parties themselves charted a course involving "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19-20 [2005]; *Northeast General Corp. v. Wellington Advertising, Inc.*, 82 NY2d 158, 161 [1993]). The fact "that a defendant may have had superior knowledge of the particular type of * * * products involved does not, without more, create a fiduciary relationship" (*RNK Capital LLC v. Natsource LLC*, 76 AD3d 840, 841-842; *Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167).

With respect to the aiding and abetting claims (seventh cause of action), the complaint alleges in unelaborated fashion, and upon information and belief, that PHH had knowledge of, or assisted Dawson in perpetrating the ponzi scheme (Cmplt., ¶¶ 27-28, 30,74-78; Pltff's Brief at 27-30). The available evidence, however, belies the assertion that issues of fact exist as to whether PHH possessed the requisite, actual knowledge of Dawson's fraud, and then knowingly provided substantial assistance in furtherance of his misconduct (*see generally, Decana Inc. v. Contogouris,*55 AD3d 325, 326; *Skilled Investors, Inc. v. Bank Julius Baer & Co., Inc.*, 62.

Nor does the evidence suggest that PHH breached a duty of inquiry to the plaintiff by ignoring "facts * * * indicating [a] misappropriation" or that it possessed "notice or knowledge that a diversion is intended or being executed" (*Matter of Knox*, 64 NY2d 434,

438 [1985]; *Grace v. CornExchange Bank, Trust Co.*, 287 NY 94, 107 [1941]; (*see,* discussion in *Hennessy v Dawson et., al.* [decided herewith]).

The evidence relevant to Dawson's investment *modus operandi* establishes that the various plaintiffs – including Miller – entered into the loan transactions from the outset with the express objective of transferring the loan proceeds to Dawson in conformity with his previously disclosed, investment plan (*see,* Cmplt.,¶¶ 13, 39-41). The fact that such a borrower elects to transfer loan proceeds to an ostensibly faithful investment advisor, and does so voluntarily as part of preconceived investment plan, does not – absent evidence not present here – create an affirmative duty of inquiry or establish that the lender was therefore complicit in Dawson's crimes (*Matter of Knox, supra*; *see also, In re Agape Litigation, supra*, 681 F.Supp.2d at 363-364 *cf., Home Sav. of America, FSB v. Amoros, supra*).

Notably, upon the facts presented here, a bank is not "accountable for the ways in which its customers manage their accounts" (*Diamore Realty Corp. v. Stern*, 50 AD3d 621, 622; *Century Business Credit Corp. v. North Fork Bank*, 246 AD2d 395, 396) or duty-bound "to monitor funds held in trust by a fiduciary so as to safeguard them from misappropriation" – even with respect to funds held in accounts "maintained at * * * its [own] branches * * *" (*Diamore Realty Corp. v. Stern, supra,* 50 AD3d 621; *Bischoff v. Yorkville Bank, supra*; *Lerner v. Fleet Bank, N.A., supra cf., Euba v. Euba,* 78 AD3d 761, 762-763; *Harris v. Adejumo*, 36 AD3d 855, 856).

Apart from the foregoing – and in contrast to most cases where a duty of inquiry by a bank was held to exist – PHH was not a depository bank which maintained accounts at the time they were allegedly plundered by a faithless fiduciary or trustee (*Bischoff v. Yorkville Bank, supra,* 218 N.Y 106, 113; *Home Sav. of America, FSB v. Amoros, supra,* 233 AD2d 35). Rather, PHH was a lender which instead, dispensed funds to its borrower (*see, Lerner v. Fleet Bank, N.A., supra*, 459 F.3d at 286). The plaintiff has not established that, upon the facts alleged here, a non-depository lending bank is duty-bound to oversee and/or monitor the manner in which its borrowers elect to utilize funds which they have been received as their own property at a loan closing (*see, Hennessy v Dawson, et. al.*, [decided herewith]).

The assertion that the $8,000.00 per month income amount set forth in her signed, PHH loan application was a forgery, even if true, does not establish that PHH was a party to that alleged fraud or that it knowingly assisted with what was subsequently revealed to

be Dawson's criminal conduct. In the absence of *scienter* – not established here – "the mere fact that a defendant's otherwise lawful activities may have assisted another in pursuit of guileful objectives is not a sufficient basis for a finding that he or she conspired to defraud" (*LeFebvre v. New York Life Ins. and Annuity Corp.*, 214 AD2d 911, 913).

The plaintiff's contentions relating to the post-closing, $16,022,00 refund check the plaintiff received from Ida D'Angelo – on which she bases virtually all her claims against PHH – are speculative and conjectural insofar as they relate to PHH's purported "aiding and abetting" liability. More specifically, and on the record before the Court, the refund check sent to her by D'Angelo does not raise an inference of impropriety or constitute evidence supporting the claim that PHH thereby aided and abetted the criminal wrongdoing and fraud later committed by Dawson. Nor has the plaintiff submitted evidence, other than conjecture, supporting her attorney's contention, that the refund check shows that PHH charged undisclosed fees to facilitate a so-called mortgage rate "buy down" (Pltff's Brief at 6, 10; Cmplt.,¶¶ 91-98). Rather, the evidentiary record indicates that there were admittedly existing tax liens at the time the loan closed, which were disclosed and which appeared on the plaintiff's signed HUD-1 statement and credit report; that certain funds were escrowed in light of those tax liens; and that, according to Dawson – who recalled the escrow matter – the escrowed funds were later returned to the plaintiff after the liens were "paid" at some unspecified point in time (Dawson [April 18, 2008] Dep., at 159-160).

The fact that the escrow was later refunded does not demonstrate that it was impermissibly retained at the closing; that it was not disclosed, or that PHH must therefore have provided a "larger mortgage in order to cover inflated closing costs" (*e.g.*, Pltff's Br., at 9-10). There are no evidentiary facts set forth by the plaintiff which establish that the tax liens did not exist and/or that it was improper to escrow amounts at the closing pending the discharge of those liens.

It is settled in this respect that "'averments merely stating conclusions, of fact or of law, are insufficient'" to "'defeat summary judgment'" (*Banco Popular North America v. Victory Taxi Management, Inc.*, 1 NY3d 381, 384 [2004], *quoting from*, *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Accordingly the, fourth (fiduciary duty) and seventh (aiding and abetting fraud/breach of fiduciary duty) causes of action are dismissed.

However, upon favorably construing the ninth, negligence cause of action – and at least pending further discovery – the Court agrees that for those reasons set forth in the

related, *Frawley* and *Hennessy* actions, PHH has failed to establish that an independent tort duty of care did *not* arise out of the parties' relationships, *i.e.*, a duty of care relative to the manner in which, *inter alia*, the loans were originated, underwritten, processed and extended (*Miller* [Sept. 29, 2008] Aff., ¶¶ 7-9; Cmplt., ¶¶ 28, 31, 64-65, 84-88; 113)(*see generally, AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 11 NY3d at 159; *Sommer v. Federal Signal Corp.*, *supra*; *Camp Kennybrook Inc. v. Kuller*, 214 AD2d 264; *Sacher v. Beacon Associates Management Corp.*, ___Misc.3d___, 2010 WL 1881951 at 13 [Supreme Court, Nassau County 2010]; *see,* detailed discussion in *Hennessy v Dawson, et., al.,* [decided herewith]).

The tenth, eleventh and twelfth causes of action respectively advance claims predicated on the "Truth in Lending Act" ["TILA"](15 U.S.C. §1601, *et., seq*); the Real Estate Settlement Procedures Act ["RESPA"](12 USC § 2601 *et., seq*); and General Business Law § 349). With respect to TILA, PHH claims – and the Court agrees – that any TILA claim is time-barred pursuant to the one-year limitations period prescribed by 15 USC § 1640[e]. More specifically, the record establishes that the plaintiff's TILA cause of action accrued no later than March of 2005, when the plaintiff entered into the within "closed-end credit mortgage" transaction (*see, e.g., McAnaney v. Astoria Financial Corp.*, ___F.Supp.2d___, 2008 WL 222524, at 4-5 [E.D.N.Y. 2008]; *Douce v. Banco Popular North America,* ____F.Supp.2d,___, 2006 WL 2627966, at 8-9 [S.D.N.Y. 2006]. Inasmuch as the plaintiff failed to commence the within action until over two years thereafter in August of 2007, her TILA claims are now time-barred (*Cardiello v. The Money Store,* 29 Fed.Appx. 780, 781 [2nd Cir. 2002]. The plaintiff's contention that PHH should be equitably estopped from interposing the applicable limitations period is lacking in merit, since her estoppel claims rely on Dawson's misconduct – not assertions that PHH engaged in some affirmative and deceptive misconduct. Moreover, the "nondisclosure of fees later charged," "does not, by itself, justify equitable tolling of the TILA limitations period" (*McAnaney v. Astoria Financial Corp.*, *supra*; *Zamito v. Patrick Pontiac, Inc.*, *supra.*

The plaintiff's eleventh cause of action alleges that PHH violated RESPA in that: the defendants failed to disclose the closing costs "in any of the documents [it] provided"; failed to supply forms clearly itemizing the closing costs charged, or the nature "of the settlement process of the loan" which was subject to unspecified "high costs" flowing from the defendant's unspecified "abusive" practices; and lastly, failed to respond to plaintiff's inquiries regarding the servicing of her loan (Cmplt., ¶¶ 104-105).

The documentary evidence submitted by PHH, however, belies the claim that no disclosures were made or that no itemized forms were provided to the plaintiff. Nor has the plaintiff established that PHH engaged in identified abusive practices, or that it declined to respond to plaintiff's loan servicing inquiries, since PHH has argued – without dispute from the plaintiff – that no qualified written requests were ever made (Pltff's Brief at 13-15; Def's Brief at 25). The additional claims advanced with respect to this cause of action in the plaintiff's opposing brief are vague and circular (Pltff's Br., at 13-15). The plaintiff's unsubstantiated assertion to the effect that she personally believes that there has been "improper and undisclosed sharing of fees and illegal payments" does not constitute proof in admissible form supporting the denial of the PHH's motion for summary judgment (Pltff's Brief at 14-15).

Lastly, the plaintiff's twelfth cause of action alleges that the subject loan refinance was a consumer-oriented transaction within the meaning of GBL § 349 and that the defendants – who are collectively listed as a group – jointly or together made various misleading and deceptive statements (Cmplt., ¶¶ 111-112).

Although General Business Law § 349 generally prohibits "[d]eceptive acts and practices in the conduct of any business, trade or commerce" having "a broader impact on consumers at large" (*see generally, Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20, 24 [1995]; *Sentlowitz v. Cardinal Development, LLC, supra,* 63 AD3d at 1138-1139; *Ballas v. Virgin Media, Inc.*, 60 AD3d 712), the Court agrees that the complaint, even as amplified by the plaintiff's opposing submissions, fails to establish the existence of an actionable deceptive practice committed by PHH (*Vandermulen v. Fidelity Nat. Title Ins. Co.,* 63 AD3d 1044;)

Although the plaintiff's brief primarily relies again on the theory that the closing costs or PHH's disclosures must have been deceptive because the escrowed tax lien was later refunded by D'Angelo (Pltff's Brief at 18-29), the plaintiff has not disputed that the tax lien existed, nor provided any specific evidentiary material demonstrating that the funds were improperly or irregularly escrowed by PHH. Nor has she shown that the subsequently issued refund was indicative of impropriety committed by PHH in particular.

The remaining claims of deceptive conduct set forth in the twelfth cause of action are inapposite as applied to PHH, since they implicate the allegedly fraudulent promises made by Dawson in perpetrating the mortgage investment scheme, *i.e.*, the claims with respect to how the funds would be used after the loan closed and the nature of the

"returns" the plaintiff would supposedly be receiving on her investments (*see*, *Niles v. Residential Funding Co., LLC*, *supra*) (Cmplt., ¶¶ 111).

That branch of PHH's motion which is to strike the plaintiffs' punitive damages demand is **denied** at this juncture with leave to renew upon the conduct of further discovery (*see*, *Sherry Associates v. Sherry-Netherland, Inc.*, 273 AD2d 14, 15; *O'Brien v. Jack LaLanne Fitness Centers, Inc.*, 237 AD2d 587). Significantly "[p]unitive damages are allowable in tort cases," even absent intentionally harmful conduct, "so long as the very high threshold of moral culpability is satisfied" (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]; *Rey v. Park View Nursing Home, Inc.*, 262 AD2d 624, 627). The Court notes that discovery at this juncture has been limited, with the various banks, most brokers and the plaintiff, not having as yet submitted to depositions (*Rodriguez v. DeStefano*, 72 AD3d 926; *Metichecchia v. Palmeri*, 23 AD3d 894, 895).

The Court has considered parties' remaining contentions and concludes they do not warrant the granting of relief in excess of that awarded above.

Accordingly it is,

ORDERED that the motion by defendant PHH Mortgage Corporation for an order dismissing the complaint insofar as asserted against it, is **granted** except with respect to the ninth cause of action sounding in negligence.

All counsel or pro-se parties remaining after this and the other two, Frawley and Hennessy decisions shall appear in the part for a compliance conference on June 28, 2011. Appearance must be by someone with knowledge and authority.

This constitutes the Order of the Court.

Dated: May 20, 2011

J.S.C.

ENTERED

JUN 22 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE