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Wells Fargo Bank, N.A. v Erobobo
2013 NY Slip Op 50675(U)
Decided on April 29, 2013
Supreme Court, Kings County
Saitta, J.
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Decided on April 29, 2013

Supreme Court, Kings County

Wells Fargo Bank, N.A., as Trustee for ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, Plaintiff,

against

Rotimi Erobobo, THE CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, "JOHN DOE" AND "JANE DOE" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants of the premises being foreclosed herein, Defendants.

31648/2009

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Wayne P. Saitta, J.

Plaintiff, WELLS FARGO BANK, N.A., as Trustee for ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, (herein "Plaintiff"), moves this Court for an Order for summary judgment pursuant to CPLR 3212.

Upon reading the Notice of Motion by V.S. Vilkhu, Esq., Attorney for Plaintiff, WELLS [*2]FARGO BANK, N.A., as Trustee for ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, dated May 11th, 2010, together with the Attorney Affidavit of V.S. Vilkhu, Esq., dated May 11th, 2010, and all exhibits annexed thereto; the Memorandum of Law by V.S. Vilkhu, Esq., undated; the Affirmation in Opposition by Kenneth S. Pelsinger, Esq., Attorney for Defendant ROTIMI EROBOBO, dated November 19th, 2010; the Supplemental Affirmation in Opposition by Kenneth S. Pelsinger, Esq., dated August 3rd, 2011, and all exhibits annexed thereto; the Reply Affirmation of V.S. Vilkhu, Esq., dated January 24th, 2011, and all exhibits annexed thereto; the Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment by Kenneth S. Pelsinger, Esq., dated November 9th, 2011; the Pooling and Servicing Agreement of WELLS FARGO BANK, N.A., as Trustee for ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, dated October 1st, 2006; and after argument of counsel and due deliberation thereon, Plaintiff's motion is denied for the reasons set forth below.

FACTS

Plaintiff brings this action to foreclose on a mortgage, dated July 16, 2006, which secured a loan of $420,000 issued to the Defendant by Alliance Mortgage Banking Corp., ("Alliance"). On July 17, 2006, Alliance assigned the note and mortgage to Option One Mortgage Corporation, ("Option One"). Option One then assigned the note and mortgage to Plaintiff by assignment executed July 15, 2008. Plaintiff is the trustee for a securitized trust entitled ABFC 2006-OPT3 TRUST, ABFC, ASSET BACKED CERTIFICATES, SERIES 2006-OPT3, ("the Trust").

The Trust was formed as a vehicle for purchasing mortgage backed securities. The Trust is subject to the terms of a Pooling and Servicing Agreement, ("the PSA"). The PSA was signed by the Depositor, Asset Backed Funding Corporation ("ABFC"), by the Servicer, Option One, and by the Trustee, WELLS FARGO BANK, NA, and is dated October 1, 2006.The PSA set forth the manner in which mortgages would be purchased by the trust, as well as the duties of the trustee.

Section 2.01, subsection 1 of the PSA requires that transfer and assignment of mortgages must be effected by hand delivery, for deposit with the Trustee with the original note endorsed in blank.

Section 2.05 of the PSA requires that the Depositor transfer all right, title, interest in the mortgages to the Trustee, on behalf of the trust, as of the Closing Date. The Closing Date as provided in the PSA is November 14, 2006.

Option One assigned Defendant's mortgage loan to the Plaintiff, as the Trustee, on July 15, 2008, approximately eighteen months after the trust had closed.

Plaintiff commenced this action on December 10, 2009, and alleged that it possessed the Note with an allonge on the date that this foreclosure action was commenced. Defendant, pro se, filed an answer containing a general denial.

Plaintiff filed a motion for summary judgment on May 11, 2010. After Defendant answered, he obtained counsel and opposed Plaintiff's motion for summary judgment.

ARGUMENTS[*3]Plaintiff argues it is entitled to summary judgment to foreclose because it was in possession of the note and mortgage at the time the action was filed.

Defendant argues that Plaintiff is not in fact the owner or holder of the note because it obtained the note and mortgage after the trust had closed in violation of the terms of the PSA,

and therefore the acquisition of the note and mortgage is void. Defendant also argues that Plaintiff obtained the mortgage and note without an intervening assignment, in violation of the PSA.

Plaintiff argues that Defendant's claim that Plaintiff does not own the note and mortgage amounts to a standing argument, and because Defendant failed to raise standing in his answer as an affirmative defense or pre answer motion, he cannot do so now.

ANALYSIS

Defendant contested whether Plaintiff owns the mortgage and note by answering with a general denial of the facts alleged in the complaint, which included Plaintiff's allegation that it owns the note and mortgage.

Many decisions treat the question of whether the Plaintiff in a foreclosure action owns the note and mortgage as if it were a question of standing and governed by CPLR 3211(e). *Citigroup Global Markets Realty Corp. v. Randolph Bowling*, 25 Misc 3d 1244(A), 906 N.Y.S.2d 778 (Sup. Ct. Kings Cty 2009); *Federal Natl. Mtge. Assn. v. Youkelsone,* 303 AD2d 546, 546—547 (2d Dept 2003); *Nat'l Mtge. Consultants v. Elizaitis*, 23 AD3d 630, 631 (2d Dept 2005); *Wells Fargo Bank, N.A. v. Marchione,* 2009 NY Slip Op 7624, (2d Dept 2009).

However, Plaintiff's ownership of the note is not an issue of standing but an element of its cause of action which it must plead and prove.

The term "standing" has been applied to two legally distinct concepts. The first is legal capacity, or authority to sue. The second is whether a party has asserted a sufficient interest in the outcome of a dispute.

Standing and capacity to sue are related, but distinguishable legal concepts. Capacity requires an inquiry into the litigant's status, i.e., its "power to appear and bring its grievance before the court", while standing requires an inquiry into whether the litigant has "an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue." *Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo*, 42 AD3d 239, 242 (2d Dept 2007) (internal citations omitted). Both concepts can result in dismissal on a pre answer motion by the defendant and are waived if not raised in a timely manner.

*Id.*CPLR 3211(a)(3) provides that an action may be dismissed based on the grounds that the Plaintiff lacks the legal capacity to sue. It governs no other basis for dismissal.CPLR 3211(e) provides that a motion to dismiss pursuant to CPLR 3211(a)(3) is waived if not raised in a pre-answer motion or a responsive pleading.

There is a difference between the capacity to sue which gives the right to come into court, and possession of a cause of action which gives the right to relief. *Kittinger v Churchill Evangelistic Assn Inc., 239 AD 253, 267 NYS 719 (4th Dept 1933).* Incapacity to [*4]sue is not the same as insufficiency of facts to sue upon. *Ward v Petri,* 157 NY3d 301 (1898).

In the case of *Ohlstein v Hillcrest,* a defendant moved to dismiss a complaint in part based on lack of legal capacity to sue where plaintiff had assigned her stock. The Court denied that branch of the motion holding that even if plaintiff had assigned her stock, "the defect to be urged is that the complaint does not estate [sic] a cause of action in favor of the one who is suing, the alleged assignor - not that the plaintiff does not have the legal capacity to sue. Legal incapacity, as properly understood, generally envisages a defect in legal status, not lack of a cause of action in one who is sui juris." *Ohlstein v Hillcrest,* 24 Misc 2d 212, 214, 195 NYS2d 920, 922 (Sup Ct NY Co 1959).

The difference was articulated by the Court in the case of *Hebrew Home for Orphans v Freund,* 208 Misc. 658, 144 N.Y.S.2d 608 (Sup Ct Bx 1955). The plaintiff in that case sought a judgment declaring that an assignment of a mortgage it held was valid. The defendants moved to dismiss the complaint on the grounds that since the assignment was not accompanied by delivery of the bond and mortgage to plaintiff, plaintiff did not own the bond and mortgage and thus had no legal capacity to sue or standing to maintain the action. The Court denied the motion, stating:

The application to dismiss the complaint on the alleged ground that the plaintiff lacks legal capacity to sue rests upon a misapprehension of the meaning of the term. See *Gargiulo v. Gargiulo,* 207 Misc. 427, 137 N.Y.S.2d 886. Rule 107(2) of the Rules of Civil Practice relates to a plaintiff's right to come into Court, and not to his possessing a cause of action. Id at 660-661, 610.

The Court then quotes Kittinger v Churchill for the principle that,

"The provision for dismissal of the complaint where the plaintiff has not the capacity to sue (Rules of Civil Practice, rules 106, 107) has reference to some legal disability, such as infancy, or lunacy, or want of title in the plaintiff to the character in which he sues. There is a difference between capacity to sue, which gives the right to come into court, and possession of a cause of action, which gives the right to relief in court. *Ward v. Petrie,* 157 NY 301, 51 N.E. 1002; *Bank of Havana v. Magee,* 20 NY 355; *Ullman v. Cameron,* 186 NY 339, 78 N.E. 1074. The plaintiff is an individual suing as such. He is under no disability, and sues in no representative capacity. He is entitled to bring his suits before the court, and to cause a summons to be issued, the service of which upon the defendants brings the defendants into court. There is no lack of capacity to sue.'

Similarly here. By not receiving delivery of the bond and mortgage it may be urged that the plaintiff did not get title to them under the assignment—but that does not mean that it can be asserted that the plaintiff is not sui juris and therefore has no capacity to sue." Id at 661, 610-611.

The defense that Plaintiff herein does not own the note and mortgage is not one of standing based on lack of legal capacity pursuant to CPLR 3211(a)(3). [*5]

The other meaning of standing involves whether the party bringing the suit has a sufficient interest in the dispute. Some cases have held that in this context, standing is jurisdictional, reasoning that where there is no aggrieved party, there is no genuine controversy, and where there is no genuine controversy, there is no subject matter jurisdiction. *Stark v Goldberg,* 297 AD2d 203, 204(1st Dept 2002); *Axelrod v New York State Teachers' Retirement Sys.,* 154 AD2d 827, 828 (3rd Dept 1989).

However, the Second Department has held that the jurisdiction of the court to hear the controversy is not affected by whether the party pursuing the action is, in fact, a proper party. They have held that if not raised in the answer or pre-answer motion to dismiss, the defense that the a party lacks standing is waived. *Wells Fargo Bank Minnesota, Nat. Ass'n v. Perez*, 70 AD3d 817, 818, 894 N.Y.S.2d 509, 510 (2nd Dept 2010), *Countrywide Home Loans, Inc. v. Delphonse*, 64 AD3d 624, 625, 883 N.Y.S.2d 135 (2nd Dept 2009), *HSBC Bank, USA v. Dammond*, 59 AD3d 679, 680, 875 N.Y.S.2d 490 (2nd Dept 2009).

The issue of whether a Plaintiff owns the mortgage and note is a different question from

whether it has an interest in the dispute. Whether a party has a sufficient interest in the dispute is determined by the facts alleged in the complaint, not whether Plaintiff can prove the allegations. *Wall St. Associates v. Brodsky*, 257 AD2d 526, 684 N.Y.S.2d 244 (1st Dept 1999), *Kempf v. Magida*, 37 AD3d 763, 764, 832 N.Y.S.2d 47, 49 (2nd Dept 2007). For the purpose of determining whether a party has sufficient interest in the case the allegations are assumed to be true.

This issue is not analogous to the issue of whether citizens have standing to seek judicial intervention in response to what they believe to be governmental actions which would impair the rights of members of society, or a particular group of citizens, (e.g. *Schulz v. State*, 81 NY2d 336, 343, 615 N.E.2d 953, 954 (1993), or whether registered voters have standing to challenge the denial of the right to vote in a referendum pursuant to Section 11 of Article VII of the State Constitution, or whether commercial fishermen have standing to complain of the pollution of the waters from which they derive their living, see also *Leo v. Gen. Elec. Co.*, 145 AD2d 291, 294, 538 N.Y.S.2d 844, 847 (2nd Dept 1989). The issue of standing in these types of cases turn on whether the claimants have an interest sufficiently distinct from society in general.

Foreclosure actions implicate a concrete interest specific to a plaintiff, and the determination must be made as to whether it has been aggrieved and is therefore entitled to receive monetary damages for the alleged breach of the law.

The Plaintiff herein pled that it owns the note and mortgage and asserts the right to foreclose on the mortgage which it asserts is in default. If it is successful in proving its claims, then it is entitled to receive the proceeds of the sale of the mortgaged property.The objection that the Plaintiff in fact does not own the note and mortgage is not a defense based on a lack of standing.Here Defendant does not say insufficient facts were alleged. Defendant's argument is that the facts alleged are not true. It is not a question of whether the Plaintiff has alleged a sufficient interest in the dispute, but of whether Plaintiff can prove its prima facie case. [*6]

Unlike standing, denial of a Plaintiff's claim that it owns the note and mortgage is not an affirmative defense because it is a denial of an allegation in the complaint that is an element of Plaintiff's cause of action.

In a foreclosure case, the Plaintiff must plead and prove as part of its prima facie case that it owns the note and mortgage and has the right to foreclose. *Wells Fargo Bank, N.A.*, 80 AD3d 753, 915 N.Y.S.2d 569 (2d Dept 2011)*; Argent Mtge. Co., LLC v. Mentesana*, 79 AD3d 1079, 915 N.Y.S.2d 591 (2d Dept 2010); *Campaign v Barba*, 23 AD3d 327, 805 NYS2d 86 (2nd Dept 2005).Defendant herein filed a pro se answer containing a general denial, which is a denial of all of Plaintiff's allegations, including the allegation in paragraph 11 that it owns the note.

CPLR 3018(b) provides that an affirmative defense is any matter "which if not pleaded would be likely to take the adverse party by surprise" or "would raise issues of fact not appearing on the face of a prior pleading".

CPLR 3018(b) also lists some common affirmative defenses, although the list is not exhaustive. The list of affirmative defenses in CPLR 3018(b) are those which raise issues such as res judicata or statute of limitations which are based on facts not previously alleged in the pleadings.

Affirmative defenses are those which posit that the adverse party is not entitled to relief, by reason of excuse or exception, even assuming the truth of the allegations made in the complaint.

"The defendant has the burden of proof of affirmative defenses, which in effect assume the truth of the allegations of the complaint and present new matter in avoidance thereof." 57 NY Jur. 2d Evidence and Witnesses 165.

Defendant's general denial asserts that Plaintiff is not entitled to relief because the facts alleged in the complaint are not true.

In *Hoffstaedter v. Lichtenstein*, 203 App.Div. 494, 496, 196 N.Y.S. 577 (1st Dept 1922), the First Department held that the general denial put the allegations in the plaintiff's complaint in issue. In that case, the defendant executed a note in favor of the plaintiff as a promise to pay for certain goods. When plaintiff brought an action to recover on the note, the defendant answered with a general denial. It went on to state that "[i]t is elementary that under a general denial a defendant may disprove any fact which the plaintiff is required to prove to establish a prima facie cause of action." Id., at 578.

The Court of Appeals cited *Hoffstaedter v. Lichtenstein* in holding that a general denial puts in issue those matters already pled. *Munson v. New York Seed Imp. Co-op., Inc.*, 64 NY2d 985, 987, 478 N.E.2d 180, 181 (1985).The general denials contained in the answer enable defendant to controvert the facts upon which the plaintiff bases her right to recover. *Strook Plush Company v. Talcott*, 129 AD 14, 113 NYS 214 (2nd Dept 1908). A general denial is sufficient to challenge all of the allegations in a complaint. *Bodine v. White*, 98 NYS 232, 233 (App. Term 1906).The Second Department in *Gulati v. Gulati*, 60 AD3d 810, 811-12, 876 N.Y.S.2d 430, 432-33 (2nd Dept 2009), held it was that where a claim would not take the plaintiff by surprise and "does not raise issues of fact not [*7]appearing on the face of the complaint", a denial of the allegations in the plaintiff's complaint was sufficient. It held that where the plaintiff alleged as an element of her prima facie case that the defendant abandoned the marital residence without cause or provocation, and the defendant denied these allegations in his answer, defendant did not need to further allege abandonment as an affirmative defense.

The Fourth Department in *Stevens v. N. Lights Associates*, 229 AD2d 1001, 645 N.Y.S.2d 193, 194 (4th Dept 1996), found that a denial by defendant that it was in control of the premises where plaintiff fell did not need to be separately pled as a defense, as the denial of control did not raise any issue of fact which had not already been pled in the complaint. See also *Scully v. Wolff*, 56 Misc. 468, 107 N.Y.S. 181 (App. Term 1907), *Bodine v. White*, 98 N.Y.S. 232 (App. Term 1906).

In this case, Defendant's contesting Plaintiff's claim in the complaint that it owns the note and mortgage could not take the Plaintiff by surprise as a general denial contests Plaintiff's factual allegations in the complaint itself, and does not rely upon extrinsic facts.Since ownership of the note was pled in the complaint and is an element of the Plaintiff's cause of action, Defendant did not waive the defense that Plaintiff did not own the note, because he made a general denial to the factual allegations contained in the complaint.

In fact, the identity of the owner of the note and mortgage is information that is often in the exclusive possession of the party seeking to foreclose. Mortgages are routinely transferred through MERS, without being recorded. The notes underlying the mortgages, as negotiable instruments, are negotiated by mere delivery without a recorded assignment or notice to the borrower. A defendant has no method to reliably ascertain who in fact owns the note, within the narrow time frame allotted to file an answer. In light of these facts and the

fact that Defendant contested the factual allegations asserted in Plaintiff's pleading, Defendant's general denial is sufficient to contest whether Plaintiff owns the note and mortgage.

In response to Plaintiff's motion, Defendant contends that Plaintiff is not entitled to summary judgment as it does not own the note and mortgage, because the purported transfer to Plaintiff was void as it violated the terms of the PSA which governs acquisitions by the Trust.

The Plaintiff in this case is Trustee of an asset backed certificate trust. The trust acquires mortgages, pools them and then issues securities secured or backed by the mortgages it holds. The investors receive interest or principle, or both, from the mortgages assigned to those specific securities or obligations.

The manner in which the trust acquires the mortgages, issues the securities and pays the income from the mortgages to investors, is governed by the trust's pooling and servicing agreement (PSA).

The Plaintiff trust is organized as a Real Estate Mortgage Investment Conduit (REMIC). As a REMIC, the trust's investors receive significant tax benefits, but to receive those benefits, the trust must comply with the US Treasury regulations governing REMICS. [*8]26 USCA §860-D-1. The terms of the PSA require that the trust does not operate or take any action that would jeopardize its REMIC status. Section 9.01(f) of the PSA.

Article 9 of the PSA, section 9.01(b) provides that the closing date is designated as the "start up day" of each REMIC, and lists the closing date as November 14, 2006. Pursuant to 26 USCA §860-G-(b)(9), the "start up day" of a REMIC is the day upon which the REMIC issues all of its regular and residual interests.

The PSA specifically requires the Depositor to have transferred all of the interest in the mortgage notes to the Trustee on behalf of the trust as of the closing date. PSA Article II, Section 2.05 (iii).

Plaintiff asserts that the transfer of the note herein is void because the note was acquired after the closing date in violation of the terms of the PSA.

Mere recital of assignment, holding or receipt of an asset is insufficient to transfer an asset to a trust. The grantor must actually transfer the asset. EPTL §7-1.18.

The assignment of the note and the mortgage which affected the transfer was dated July 16, 2008, however, pursuant to the terms of the PSA the trust closed on November 14, 2006.

Section 9.02 of the PSA specifically prohibits the acquisition of any asset for a REMIC part of the fund after the closing date unless the party permitting the acquisition and the NIMS (net interest margin securities) Insurer have received an Opinion letter from counsel, at the party's expense, that the acceptance of the asset will not affect the REMIC's status. No such letter has been provided to show compliance with the requirements of the PSA.Plaintiff has provided no evidence that the trustee had authority to acquire the note and mortgage herein after the trust had closed.

Since the trustee acquired the subject note and mortgage after the closing date, the trustee's act in acquiring them exceeded its authority and violated the terms of the trust.The acquisition of a mortgage after 90 days is not a mere technicality but a material violation of the trust's terms, which jeopardizes the trust's REMIC status.

Section 9.01(f) of the PSA provides that neither the Trustee, the Servicer or Holder of the Certificates shall cause any REMIC formed under the PSA, by action or omission, to endanger the status of the REMIC or cause any imposition of tax upon the REMIC.

Since the trust was organized as a REMIC, the investors received certain tax benefits on the income that passed through the trust to them. Section 26 U.S.C.A. § 860D(a)(4) defines a REMIC as an entity that

as of the close of the 3rd month beginning after the startup day and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments.

Section 26 U.S.C.A. § 860G (a)(3)(i,ii) defines a qualified mortgage as [*9]

(A) any obligation (including any participation or certificate of beneficial ownership therein) which is principally secured by an interest in real property and which (I) is transferred to the REMIC on the startup day in exchange for regular or residual interests in the REMIC,

(ii) is purchased by the REMIC within the 3-month period beginning on the startup day if, except as provided in regulations, such purchase is pursuant to a fixed-price contract in effect on the startup day.

Thus to qualify for the REMIC tax benefits, the mortgages upon which the securities are based must be acquired by the Trust within three months of its start up date.

While section 26 U.S.C.A. § 860D(a)(4) permits a REMIC to contain some portion of non qualified mortgages, it is unclear how many unqualified mortgages are permitted without losing tax status. It is clear, however, that the late acquisition violates the terms of the PSA.

Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void.

Conveyance from the Depositor to the Trust

Defendant also argues that the Trustee violated the terms of the trust by acquiring the note directly from the sponsor's successor in interest rather than from the Depositor, ABFC, as required by the PSA.

In Article II, section 2.01 Conveyance of Mortgage Loans, the PSA requires that the Depositor deliver and deposit with the Trustee the original note, the original mortgage and an original assignment . The Trustee is then obligated to provide to the Depositor an acknowledgment of receipt of the assets before the closing date. PSA Article II, Section 2.01.

The rationale behind this requirement is to provide at least two intermediate levels of transfer to ensure the assets are protected from the possible bankruptcy by the originator which permits the security to be provided with the rating required for the securitization to be saleable. *Deconstructing the Black Magic of Securitized Trusts*, Roy D. Oppenheim Jacquelyn K. Trask-Rahn 41 Stetson L. Rev. 745 Stetson Law Review (Spring 2012).

Here the note and mortgage were purportedly assigned from Option One to the Plaintiff, without having been transferred to, and then from, the Depositor.

The assignment of the note and mortgage from Option One rather than from the Depositor ABFC violates section 2.01of the PSA which requires that the Depositor deliver to and deposit the original note, mortgage and assignments to the Trustee.

The assignment of the Defendant's note and mortgage, having not been assigned from the Depositor to the Trust, is therefore void as in being in contravention of the PSA.The evidence submitted by Defendant that the note was acquired after the closing date and that assignment was not made by the Depositor, is sufficient to raise questions [*10]of fact as to whether the Plaintiff owns the note and mortgage, and precludes granting Plaintiff summary judgment.

WHEREFORE, Plaintiff's motion for summary judgment is denied. This shall constitute the decision and Order of this Court.

E N T E R ,

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