

**Bank of Am. v 57-63 Wadsworth Terrace Holding,  
LLC**

2009 NY Slip Op 32600(U)

November 2, 2009

Supreme Court, New York County

Docket Number: 601439/09

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

*Motion*

Index Number : 601439/2009

**BANK OF AMERICA**

VS.

**57-63 WADSWORTH TERRACE**

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

TO BE DECIDED

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**FILED**

NOV 06 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/2/09

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**WALTER B. TOLUB** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
BANK OF AMERICA, NATIONAL ASSOCIATION,  
SUCCESSOR IN INTEREST TO LASALLE BANK,  
NATIONAL ASSOCIATION, AS TRUSTEE FOR THE  
REGISTERED HOLDERS OF J.P. MORGAN CHASE  
COMMERCIAL MORTGAGE SECURITIES TRUST  
2007-LDP11 COMMERCIAL MORTGAGE PASS-THROUGH  
CERTIFICATES, SERIES 2007-LDP-11

Plaintiff,

Index No. 601439/09  
Mtn. Seq. 001

-against-

57-63 WADSWORTH TERRACE HOLDING, LLC  
261 WADSWORTH AVENUE HOLDING LLC,  
LEWIS BARBANEL and THE CITY OF NEW YORK,

Defendants.  
-----x

**FILED**  
NOV 06 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

**WALTER B. TOLUB, J.:**

This is Defendants motion to dismiss pursuant to CPLR §§  
3211[a][1] and [7]. Advantage Plastics, Inc., d/b/a Advantage  
Wholesale Supply's (Advantage) cross-motion is to intervene as a  
party defendant (CPLR § 1012[a][3]).

Facts

The facts of this case are largely undisputed. Defendants  
57-63 Wadsworth Terrace Holding LLC and 261 Wadsworth Avenue  
Holding LL (LLC Defendants) are the owners of two apartment  
buildings (Properties). Plaintiff claims that it is the trustee  
of the holder of certain mortgage loan securities secured by a  
mortgage on the Properties (Mortgage) (Ex. C of Complaint). The  
Mortgage secures a Consolidated, Amended and Restated Promissory  
Note (Note) (Ex. B of Complaint) dated May 31, 2007, in favor of  
Eurohypo in the amount of \$10,200,000.00 (Loan). The agreements

were recorded on July 17, 2007 with the Registrar of the City of New York.

On May 17, 2007, Eurohypo assigned the Note and the Mortgage, both dated May 31, 2007, to LaSalle Bank, National Association (LaSalle) (Assignment). The Assignment was recorded on June 23, 2008. Bank of America is LaSalle's successor in interest (Complaint ¶14). Bank of America claims that it is the holder of the Loan documents (Complaint ¶15).

Defendants do not dispute that they received the Loan proceeds. Plaintiff claims, and Defendants do not dispute, that Defendants have made no payments on the Loan since November 6, 2008.

Plaintiff commenced the instant action to foreclose the Mortgage for Defendants failure to make Loan payments<sup>1</sup>. By this pre-answer motion, Defendants seek to dismiss the action arguing: (1) Plaintiff does not own the Note and Mortgage; and (2) the Complaint fails to state a cause of action against defendant Lewis Barbanel.

The parties do not oppose Advantage's cross-motion to intervene and Advantage takes no position on the instant motion.

#### Discussion

A motion to dismiss a cause of action requires the court to

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<sup>1</sup>Defendants argue that Plaintiff violated RPAPL §1301. However, Plaintiff makes clear in its papers that it seeks to foreclose on the mortgage. As such, the Court does not discuss Defendants §1301 arguments.

decide whether one or more of the causes of action or defenses are meritorious (CPLR §3211; Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:01). On a motion to dismiss, the court assumes that the allegations are true and will not consider extrinsic evidence introduced to disprove the allegations (*Id.* §36:10).

"To establish a prima facie case in an action to foreclose on a mortgage, the plaintiff must establish the existence of a mortgage and the mortgage note, ownership of the mortgage, and the defendant's default in payment" (*Witelson v. Jamaica Estates Holding Corp.*, 40 AD3d 284 [1<sup>st</sup> Dept 2007]).

Defendants argue that Plaintiff is not the owner of the mortgage because the original Assignment took place prior to the Loan documents being formally executed.

"An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance" (Restatement [Second] of Contracts §317). Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. What is necessary for an assignment to be valid is that "the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by

the obligee" (Restatement (Second) Contracts §324).

Therefore, the question presented before this Court on the motion to dismiss is whether Eurohypo intended to assign its anticipated rights to Plaintiff.

Eurohypo's intentions were clear and raise no question of fact. Eurohypo's intentions were clear when, in anticipation of Defendants' Loan, Eurohypo representatives executed the Assignment on May 17, 2007 and all of the requisite Loan documents days later on May 31, 2007. Since Eurohypo had the requisite intent to assign the Mortgage, the Mortgage may be transferred by delivering the assignment to the assignee (Frye v. Rockefeller, 63 NY 268 [1875]).

It is unclear at this stage of the proceedings whether the Mortgage was actually delivered to the Plaintiff, however, Plaintiff claims it is in possession of the Loan documents in the Complaint. As such, this pre-answer motion to dismiss the Complaint must be and is denied.

As to Defendants contention that the Complaint fails to state a cause of action against defendant Mr. Barbanel, since it has been established that this is a foreclosure action, guarantors are proper parties to such actions (RPAPL §1313). Plaintiff states in its opposition papers that "[t]his present action might affect the interests in the mortgages Premises if he has an equity of redemption. Clearly, as a guarantor of the debt

secured by the mortgage, he has an interest in the outcome of this foreclosure action. Excluding him would be harmful to the Guarantor, and therefore, he was joined." (Plaintiff's Opp. Memo pp.9-10). Defendant Mr. Barbanel states that he "hereby waives any interest he might have in the Property" (Defendants Memo p.5) in an attempt to have the action dismissed as against him. However if Mr. Barbanel is dismissed from the action Plaintiff will have no recourse in pursuing a deficiency judgment if necessary. As such, Defendants' motion to dismiss the action against Defendant Mr. Barbanel is also denied.

The Court has considered Defendants remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that Defendants' motion to dismiss is denied in its entirety; and it is further

ORDERED that Advantage's cross-motion is granted and that Advantage Wholesale Supply be added as a party-defendant herein.

This memorandum opinion constitutes the decision and order of the Court.

Dated:

11/2/09

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HON. WALTER B. TOLUB, J.S.C.

**FILED**

NOV 06 2009

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COUNTY CLERK'S OFFICE