

Min Capital Corp. Retirement Trust v Pavlin
2011 NY Slip Op 32242(U)
August 9, 2011
Supreme Court, Suffolk County
Docket Number: 10-9372
Judge: W. Gerard Asher
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SHORT FORM ORDER

INDEX No. 10-9372

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-28-11
ADJ. DATE 5-17-11
Mot. Seq. #001 - MotD

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MIN CAPITAL CORP RETIREMENT TRUST,
Plaintiff,

- against -

JED PAVLIN, CAROLINE PAVLIN, DEUTSCHE
BANK NATIONAL TRUST COMPANY AS
TRUSTEE WAMU 2005-AR; JP MORGAN
CHASE BANK NATIONAL ASSOCIATION as
Successor in Interest to WASHINGTON MUTUAL
BANK F.A., ROCHELLE BRYSON; ANTHONY
PERGOLA, FORD MOTOR CREDIT COMPANY
DBA VOLVO CAR FIN NO AMERICA and ALL
COUNTY ABSTRACT,
Defendants.

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FRANKFORT & KOLTUN
Attorney for Plaintiff
2061 Deer Park Avenue
Deer Park, New York 11729

MARTIN SILVER, P.C.
Attorney for Defendants Pavlin
330 Motor Parkway
Hauppauge, New York 11758

MULHOLLAND & KNAPP, LLP
Attorney for Defendants Deutsche Bank &
WaMu Mortgage
Lexington Avenue, 27th Floor
New York, New York 10022-4503

CULLEN & DYKMAN LLP
Attorney for Defendant JP Morgan Chase
100 Quentin Roosevelt Boulevard
Garden City, New York 11530

ATTONITO & RING
Attorney for Defendant Pergola
59 Landing Avenue, Suite 4
Smithtown, New York 11787

KEVIN G. McMORROW, ESQ.
Attorney for Defendant All County Abstract
45 Hill Park Avenue
Great Neck, New York 11021

ROCHELLE BRYSON, ProSe
20 West Drive
Bay Shore, New York 11706



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Upon the following papers numbered 1 to 48 read on this motion to dismiss or for leave to amend answer ; Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers _____ ; Answering Affidavits and supporting papers 17- 23; 24 - 27 ; Replying Affidavits and supporting papers 28-32 ; Other 33-34; 35- 39; 40 - 41; 42 - 48 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the defendant JPMorgan Chase Bank, National Association, for an order pursuant to CPLR 3211 (a)(7) dismissing the complaint and the cross claims of the defendant Deutsche Bank National Trust Company as Trustee WAMU 2005-AR as against it or, in the alternative, for an order pursuant to CPLR 3025 for leave to amend its answer is determined herein.

The defendants Jed Pavlin and Caroline Pavlin (the Pavlins) obtained a loan from the plaintiff on February 16, 2003 in the sum of \$175,000.00 and executed a mortgage (the Min Capital mortgage) in the plaintiff's favor on their premises in Seaview, New York. The Min Capital mortgage was filed in the Suffolk County Clerk's Office on July 30, 2003. The defendants Pavlin next obtained a loan from Washington Mutual Bank, F.A. on February 22, 2005 in the sum of \$465,000.00 and executed a mortgage (the Washington Mutual mortgage) in favor of Washington Mutual Bank, F.A. on the same property. The Washington Mutual mortgage was filed in the Suffolk County Clerk's Office on March 8, 2005. Subsequently, on April 7, 2005, a subordination agreement was filed in the Suffolk County Clerk's Office. Said agreement was purportedly signed on February 28, 2005 by Robert Friedman (Friedman), as Trustee of the plaintiff, and procured by the defendant All County Abstract (All County). It subordinated the Min Capital mortgage to the Washington Mutual mortgage so that the Min Capital mortgage became the second lien on the subject property.

The plaintiff commenced this action pursuant to Article 15 of the Real Property Actions and Proceedings Law to set aside the subordination agreement as false, fraudulent and void, alleging that the plaintiff never agreed to its terms and that Friedman did not execute it or even know the notary, Rochelle Bryson (Bryson), who notarized it. The plaintiff indicates in its complaint that JP Morgan Chase Bank National Association, sued herein as JP Morgan Chase Bank National Association as Successor in Interest to Washington Mutual Bank formerly known as Washington Mutual Bank, F.A. (Chase), is named as a defendant in the action based on its status as the successor in interest to Washington Mutual Bank, formerly known as Washington Mutual Bank, F.A., the originator of the Washington Mutual mortgage, and alleges that the Washington Mutual mortgage is the beneficiary of the fraudulent subordination agreement. The plaintiff also indicates in its complaint that Deutsche Bank National Trust Company as Trustee WAMU 2005-AR (Deutsche Bank) is named as a defendant as it is the current holder of the Washington Mutual mortgage. By its first cause of action against all the defendants, the plaintiff seeks to expunge the subordination agreement from public records and to reinstate the Min Capital mortgage to the position of first lien on the subject property. In its second cause of action against the Pavlins, Deutsche Bank, Chase, Bryson, and All County, the plaintiff alleges that the defendants willingly and intentionally participated in or engaged in acts of fraud for which the plaintiff is entitled to damages. In its third cause of action against the Pavlins, Deutsche Bank, Chase, Bryson, and All County, the plaintiff alleges that the defendants breached a fiduciary duty to the plaintiff for which the plaintiff is entitled to compensatory damages. Deutsche Bank asserted cross claims in its answer against its codefendants for indemnification and contribution.

Chase now moves to dismiss the complaint as against it, as well as the cross claims of Deutsche

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Bank, on the ground that it is not a proper party to this action inasmuch as it has never held any interest in the Washington Mutual mortgage and was not involved in the transactions concerning the subordination agreement.

By affidavit dated January 27, 2011, Charles Herndon (Herndon), a Vice President of Chase explains that in April 2005 the subject Washington Mutual mortgage was sold and assigned to WaMu Securities and was grouped with other assets in a mortgage pool entitled WaMu Mortgage Pass-Through Certificates, Series 2005-AR6 (the WaMu 2005-AR6 Trust) pursuant to a Mortgage Loan Purchase and Sale Agreement. He also states that in that same month, the assets of said trust including the subject Washington Mutual mortgage were conveyed to Deutsche Bank pursuant to a Pooling and Servicing Agreement between WaMu Securities, Deutsche Bank, and Deutsche Bank National Trust Company Delaware (pooling and servicing agreement). Herndon further states that Chase executed an assignment of mortgage dated July 23, 2009 confirming the assignment of the Washington Mutual mortgage to Deutsche Bank. Herndon indicates in his affidavit dated April 8, 2011 that pursuant to a Purchase and Assumption Agreement dated September 25, 2008, Chase acquired the servicing rights and obligations of a corporation that was servicing the Washington Mutual mortgage for Deutsche Bank. Chase argues that the pooling and servicing agreement was also an assignment of mortgages, including the subject Washington Mutual mortgage, and that the July 23, 2009 assignment was merely a confirmation of the 2005 assignment, when Chase had no involvement with Washington Mutual, and that the 2009 assignment in no way establishes that Chase ever held an interest in the mortgage.

The plaintiff opposes the motion to dismiss contending that the involvement of Washington Mutual, and possibly Chase, in the transactions concerning the subordination agreement are difficult to delineate at this juncture prior to discovery proceedings. The plaintiff propounds possible involvement by submitting copies of two subordination agreements purportedly executed by the plaintiff's trustee, Friedman, one from the Suffolk County Clerk's file with Friedman's name printed under his purported signature and notarized in New York by Bryson, and another provided from the loan origination files of Chase which is undated, lacks any printed name under Friedman's purported signature, and is witnessed by Bryson and notarized in Florida by Lawrence Donald Kohn. By his affidavit dated February 2, 2011, Friedman specifically denies executing either document or any personal knowledge of Bryson.

Deutsche Bank opposes the motion to dismiss on the ground that Chase, having assumed Washington Mutual's mortgage servicing obligations, would be liable to Deutsche Bank to repurchase the Washington Mutual mortgage pursuant to the Purchase and Assumption Agreement in the event that the subordination agreement was determined to be invalid.

In reply, Mr. Herndon states in his April 8, 2011 affidavit that Chase merely held the loan origination file, that contained the second version of the subordination agreement, in Chase's capacity as the loan servicer for the Washington Mutual mortgage.

On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; *Thomas v Lasalle Bank N. A.*, 79 AD3d 1015,

1017, 913 NYS2d 742 [2d Dept 2010]; *Scoyni v Chabowski*, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; *Lucia v Goldman*, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see *Leon v Martinez*, 84 NY2d at 88; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635–636, 389 NYS2d 314 [1976]; *DaCosta v Trade-Winds Envtl. Restoration, Inc.*, 61 AD3d 627, 628, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (see *Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]; *Thomas v Lasalle Bank N. A.*, 79 AD3d at 1017; *Scoyni v Chabowski*, 72 AD3d at 793; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]).

A principal is liable for the fraudulent acts of his agent committed within the scope of his authority, and if the agent acted outside the scope of his authority, the principal is nevertheless liable if he later ratifies the fraudulent acts and retains the benefits derived from them (see *Adler v Helman*, 169 AD2d 925, 926, 564 NYS2d 828 [3d Dept 1991]; *Chase Manhattan Bank N.A. v Perla*, 65 AD2d 207, 211, 411 NYS2d 66 [4th Dept 1978]). “When an agent abandons the object of his agency and acts for himself, by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and, to that extent, ceases to act as agent” (*Credit Alliance Corp. v Sheridan Theatre Co.*, 241 NY 216, 220, 149 NE 837 [1925]; see *Adler v Helman*, 169 AD2d at 926).

“A mortgagee’s interest in the property is protected unless it has notice of a previous fraud affecting the title of its grantor” (*Thomas v LaSalle Bank N.A.*, 79 AD3d at 1017; see Real Property Law § 266; *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, ___ NYS2d ___, 2011 NY Slip Op 05671 [NYAD 2 Dept Jun 28, 2011]). “[A] mortgagee is under a duty to make an inquiry where it is aware of facts ‘that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue’” (*Stracham v Bresnick*, 76 AD3d 1009, 1010, 908 NYS2d 95 [2d Dept 2010], quoting *LaSalle Bank N. A. v Ally*, 39 AD3d 597, 600, 835 NYS2d 264 [2d Dept 2007]; see *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, ___ NYS2d ___, 2011 NY Slip Op 05671 [NYAD 2 Dept Jun 28, 2011]; *Thomas v LaSalle Bank N.A.*, 79 AD3d at 1017). “A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value” (*Thomas v LaSalle Bank N.A.*, 79 AD3d at 1017 quoting *Booth v Ameriquet Mte. Co.*, 63 AD3d 769, 769, 881 NYS2d 152 [2d Dept 2009]; see *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, ___ NYS2d ___, 2011 NY Slip Op 05671 [NYAD 2 Dept Jun 28, 2011]).

Here, the existence of a subordination agreement in the loan origination file held by Chase, an agreement quite different in form from the one filed with the Suffolk County Clerk, supports a cause of action by the plaintiff that Washington Mutual as holder of an allegedly fraudulent subordination agreement at the very least benefitted from the agreement, which rendered the Washington Mutual mortgage the first lien on the property, at the expense of the plaintiff, and that Chase, as successor in interest to Washington Mutual and subsequent holder of the agreement and loan servicer of the Washington Mutual mortgage, also similarly benefitted from the alleged fraud (see *Velazquez v Decaudin*, 49 AD3d 712, 854 NYS2d 163 [2d Dept 2008]; see also *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, ___ NYS2d ___, 2011 NY Slip Op 05671 [NYAD 2 Dept Jun 28, 2011]). As the

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plaintiff argues, it is unclear at this juncture, prior to any discovery proceedings, how the second version of the subordination agreement came to be in the Washington Mutual loan origination file and whether any employees or agents of Washington Mutual were involved in the procurement of either subordination agreement (*see Marcus Dairy, Inc. v Jacene Realty Corp.*, 245 AD2d 493, 666 NYS2d 31 [2d Dept 1997]). Therefore, the request by Chase for dismissal of the complaint and the cross claims of Deutsche Bank as against it for failure to state a cause of action is denied.

In the alternative, Chase seeks leave to amend its answer to add affirmative defenses and to restate the answer and cross claims more clearly. Chase submits a complete copy of its proposed answer but only the first and last pages of its original answer. The Court cannot determine which portion of the original answer is being amended by the proposed amended answer without a complete copy of the original answer. Therefore, the request for leave to amend is denied without prejudice to interposition of a new motion upon proper papers, including a copy of this order and complete copies of the original answer and the proposed amended answer.

Dated: AUGUST 9, 2011

W. Gerald Asher
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION