

Thompson v Countrywide GP, Inc.

2014 NY Slip Op 32769(U)

October 21, 2014

Supreme Court, New York County

Docket Number: 159300/2012

Judge: Debra A. James

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(Thompson), was injured as a result of her exposure to lead paint. She asserts that Thompson's exposure occurred when they were present in a house located at 213 Valentine Lane, Yonkers, New York (house), in which they resided or regularly visited, from December 23, 2006 through at least March 2008.

The house had a mortgage, which among hundreds of thousands, was sold, assigned, and conveyed by Morgan Stanley, for the benefit of certificate holders, to Morgan Stanley ABS Capital Inc. Trust 2005-WMC3 (the Trust). Morgan Stanley established the Trust pursuant to a pooling and servicing agreement (Agreement), dated April 1, 2005, among Morgan Stanley, as the depositor, nonparty Wells Fargo Bank, National Association (Wells Fargo), as the trustee, Countrywide Home Loans Servicing, as the Trust's servicer, and codefendant WMC Mortgage Corp. (WMC), as the responsible party.

The mortgage was foreclosed upon, and the house was sold to the Trust, pursuant to a January 2007 judgment of foreclosure and sale. By referee's deed, issued in March 2007, the house was conveyed to Wells Fargo, on behalf of the Trust "located at c/o Countrywide Home Loans, Inc., 7105 Corporate Drive, PTX-C-35, Plano, Texas."

A holdover proceeding was commenced, by petition dated April 13, 2007, naming Wells Fargo, on behalf of the Trust, as the petitioner, against the premises' undertenants, including Thompson's grandmother, Pamela Palmer, and a Keishia Hall (Hall),

the individual who mortgaged and owned the house from December 2004 through its sale. Such petition lists Wells Fargo, on behalf of the Trust, as having the foregoing Plano, Texas address. When the house's occupants were ultimately evicted is not part of the record on the motion before this court.

However, by a "Notice and Demand for Discontinuance of a Condition Conducive to Lead Poisoning," dated August 6, 2007, to Wells Fargo, to the same Plano address, the Westchester County Department of Health, advised that, in response to a report of a child with an elevated blood lead level living at or frequently visiting the house, an investigation had been conducted, and laboratory testing had been performed, leading to the premises' designation as an area of high risk, requiring lead paint abatement. Wells Fargo was directed to contact the Department of Health to arrange for a review of its abatement plan. What ensued in that regard is not disclosed, except to the extent that the complaint in this action alleges that Thompson continued to be exposed to the premises' lead paint until at least March 2008.

Meanwhile, in 2007, Thompson's mother, Monique Palmer (Palmer) commenced an action in this courthouse, Bartley v UHAB et al., index # 115725/2007 (the Bartley action) against Wells Fargo, the Trust, and Hall on Thompson's behalf, along with the parents of another infant who resided on the premises and was allegedly injured by exposure to lead paint. That action also alleged that Thompson was lead poisoned between her July 2005

birth and August 2006, when she lived at or frequented her mother's Manhattan apartment, and named several defendants associated with that building.

In December 2012, Palmer commenced this action on Thompson's behalf, against the Countrywide defendants, Morgan Stanley, and WMC. The complaint, which mentions the Bartley action, alleges that, under the Agreement, Countrywide Home Loans Servicing, a Texas limited partnership, acted as the servicer, manager, managing agent, and/or agent for the care and maintenance of the premises, that Countrywide GP was Countrywide Home Loans Servicing's general partner and acted as the "general and operating partner of and for the defendants in maintaining properties including upon information and belief," the Valentine Lane property, and that Countrywide Home Loans was a Texas corporation.

The complaint sets forth one cause of action against the Countrywide defendants, alleging that the premises contained serious lead paint hazards, of which "the defendants" had actual and constructive notice and undertook to remediate. It further alleges that, under the Agreement, the Countrywide defendants were obliged to cause an environmental inspection of the premises and provide a written report of that inspection to the trustee, Wells Fargo, and to the depositor, Morgan Stanley. Additionally, plaintiff claims that "the defendant" knew or had reason to know that exposure to lead paint was harmful to children, had actual

or constructive knowledge that a child, under the age of seven, resided in an apartment within the house, negligently maintained the house, and failed to properly remediate the lead paint condition, thereby exposing Thompson to that condition, between December 2006 and at least March 2008, and causing her injury "during and throughout" the period of exposure.

The complaint's general allegations recite that Morgan Stanley had a collateral interest in the house. It is claimed that, under the Agreement, Morgan Stanley was the depositor of the house's mortgage. The complaint asserts a joint cause of action against Morgan Stanley and WMC, alleging that "the defendants" had actual and constructive notice of the house's lead paint hazards, "the defendant" had actual and/or constructive knowledge that a child under the age of seven resided in an apartment within the house, and that "the defendant" negligently maintained the house and failed to take adequate steps to correct the house's condition, thereby exposing Thompson to that condition and causing her injury throughout the exposure period.

Morgan Stanley moves for an order dismissing the action on the ground that the complaint fails to state a cause of action.¹ Specifically, Morgan Stanley asserts that premises liability,

¹ At oral argument, Morgan Stanley's counsel withdrew that portion of its motion which sought dismissal of the complaint on statute of limitations grounds.

arising out of a dangerous condition within the house, can only be imposed based on ownership, control, occupancy, or special use of the property. Morgan Stanley avers that, as the mortgage's depositor, it owed no duty to maintain the house and cannot be liable for a dangerous condition on the mortgaged house. As the depositor, Morgan Stanley asserts that its role was to acquire the loans, convey them to the Trust, and issue certificates to the Trust's owners. Further, Morgan Stanley contends that Thompson will be unable to establish that Morgan Stanley had actual or constructive notice of the house's lead paint condition. Morgan Stanley urges that the complaint's allegations regarding the negligent maintenance of the house, the failure to correct the hazard, and notice of the hazard and that a young child resided on the house are lacking in factual support, thereby, warranting the complaint's dismissal as to it.

Thompson opposes the motion. She asserts that Morgan Stanley's reliance on certain case law for the proposition that the complaint was inadequately pled, is misplaced because this is not a fraud case where pleading specificity is required. By her attorney, she also argues that case law upon which Morgan Stanley relies is inapposite as it pertained to a motion for summary judgment, rather than one to dismiss. She argues that even if this were a summary judgment motion, Morgan Stanley has failed to make any evidentiary showing.

Plaintiff recites the provisions of Agreement § 3.15, which

provides, in connection with a foreclosure, that if the servicer has actual notice of a hazard on the mortgaged property, or if the trustee otherwise asks for an environmental review or inspection of the mortgaged house from a qualified inspector, the servicer must obtain one. Since upon the inspection's completion, the servicer must promptly provide the trustee and the depositor with a copy of the inspection report, plaintiff contends that the Agreement supports her contention that Morgan Stanley's motion must be denied, since it tends to show that Morgan Stanley received notice of the hazard.

In reply, Morgan Stanley asserts that the balance of Agreement § 3.15 establishes that the duty of remedying any hazardous or toxic condition discovered on the mortgaged house was on the servicer, Countrywide Home Loans Servicing, not on the depositor, which merely had the duty, under limited circumstances, to reimburse the servicer. Thus, even if Morgan Stanley received a copy of the report, a fact which Thompson has not established, Morgan Stanley contends that it had no responsibility or ability to remedy the lead paint condition, as established by the documentary evidence, i.e., the Agreement, submitted by plaintiff. Furthermore, Morgan Stanley maintains that all claims, not just those sounding in fraud, must be supported by factual allegations.

The Countrywide defendants move for an order, pursuant to

CPLR 3211 (a) (1) and (7), dismissing the complaint as to them. Their motion is supported only by a memorandum of law, and the affirmation of Daniel Waxman, of the law firm representing these defendants, who simply identifies copies of the complaint and the Agreement. The Countrywide defendants contend that, under the Agreement, Countrywide Home Loans Servicing acted merely as the servicer, not as the house' manager and/or managing agent, and that, because it was never responsible for maintaining the house, nor did it ever own, control or make special use of the house, it cannot be liable to Thompson. Such defendants further contend that neither Countrywide Home Loans nor Countrywide GP (at least on its own behalf)² was an Agreement signatory, and that Thompson has failed to allege any relationship between Countrywide Home Loans and either of the other two Countrywide defendants. They also point to the lack of any assertion that Countrywide Home Loans had any responsibility for servicing the mortgage loan.

Moreover, the Countrywide defendants contend that, because Thompson was neither a party to, nor a third-party beneficiary of, the Agreement, she lacks standing to sue for any breach of Countrywide Home Loans Servicing's obligation to conduct an environmental inspection and issue written reports to the trustee and depositor. The Countrywide defendants further argue that

² The copies of the Agreement provided on both motions contain a signature line indicating that Countrywide GP was to sign on behalf of Countrywide Home Loans Servicing.

Agreement § 3.15 applied only once Countrywide Home Loans Servicing had actual notice of the lead paint condition, but that the complaint, which baldly alleges that the defendants had actual notice of the lead paint hazard, is devoid of any facts substantiating actual notice.

Thompson asserts that, to the extent the Countrywide defendants rely on the copy of the Agreement they provided with their moving papers, their motion must be denied because that copy was not executed nor was it authenticated via an affidavit from one with knowledge, and is, thus, inadmissible. Moreover, because the Agreement does not specifically mention the Valentine Lane address, Thompson claims, in essence, that defendants have not established that the Agreement applies to the house's mortgage, and that therefore, the Agreement does not utterly refute the complaint's allegations.

Additionally, Thompson maintains that the complaint adequately pleads a cause of action against the Countrywide defendants, and that the evidence she has submitted demonstrates that "Countrywide" was the property's managing agent and "appears to have been in exclusive control of the subject property." Specifically, Thompson urges that, once the property was foreclosed upon, Wells Fargo became its owner and landlord on behalf of the Trust, as allegedly established by the referee's deed and by the holdover petition. Thompson notes that a Mary Sohlberg (Sohlberg) was deposed on behalf of Wells Fargo in the

Bartley action and asserts that Sohlberg's testimony demonstrates that Wells Fargo had no involvement in the maintenance or control of the property, and that it was "Countrywide" which exercised that control. Thompson contends that where a property's managing agent has complete and exclusive control of a building's operation and management, that agent can be held liable for nonfeasance and misfeasance. Finally, Thompson claims that the Countrywide defendants' motion is frivolous, thereby warranting the imposition of costs and attorneys' fees pursuant to Part 130-1.1 of the Rules of the Chief Administrator (22 NYCRR 130 et seq.)

In reply, the Countrywide defendants provide the affidavit of Matthew Stahlhut (Stahlhut), an officer of Bank of America, N.A. (BANA), the successor by merger to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, who asserts that BANA, as the servicer, maintains records for the subject loan, claims familiarity with the types of records maintained by BANA in connection with the loan, and professes to have personal knowledge of BANA's procedures for creating and maintaining such business records. Stahlhut contends that those records are made by people with personal knowledge of the information in them or from information provided by persons with personal knowledge, at or near the time of the occurrence of the matters set forth therein; that the records are kept in the ordinary course of BANA's regularly conducted business activities; and that it is

BANA's regular practice to make those records. Stahlhut asserts that the copy of the Agreement appended to his affidavit and to their attorney's affirmation are true and correct copies of the Agreement, which is mentioned in the complaint, and that BANA was unable to locate a fully executed copy of the Agreement.

The Countrywide defendants contend that Thompson's argument, that they cannot rely on the Agreement because it was not authenticated, lacks merit, not only because it is the type of document which qualifies as documentary evidence, but because many of the complaint's paragraphs refer to it. Further, these defendants claim that because a copy of the same unexecuted agreement was marked for identification on behalf of counsel for plaintiff (plaintiff's exhibit "one") at Sohlberg's deposition, and because plaintiff's counsel as well as other counsel questioned Sohlberg about this document, Sohlberg thereby authenticated the Agreement. The Countrywide defendants also assert that the cases relied upon by Thompson are inapposite because they relate to managing agents in complete and exclusive control of a property, not to a loan servicer. In this regard, these defendants urge that Sohlberg merely testified as to Countrywide's general duties as a servicer, none of which gave it complete and exclusive control over the house. The Countrywide defendants contend that mortgage servicers are not deemed to own or control the house. Finally, the Countrywide defendants assert that Thompson's request for sanctions is frivolous, and, under

the circumstances, warrants the imposition of sanctions against her.

On a motion to dismiss a complaint for failure to state a cause of action, "facts pleaded in the complaint must be taken as true and are accorded every favorable inference ... However, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration" Maas v Cornell Univ., 94 NY2d 87, 91 (1999) (internal quotation marks and citation omitted); Gertler v Goodgold, 107 AD2d 481, 485 (1st Dept 1985), *affd* 66 NY2d 946 (1985); see also Roberts v Pollack, 92 AD2d 440, 444 (1st Dept 1983) (court need not consider inherently incredible factual claims on a CPLR 3211 [a] [7] motion). When a party moves, pursuant to CPLR 3211 (a) (7), the court is "limit[ed] ... to an examination of the pleadings to determine whether they state a cause of action," even when the movant has submitted affidavits to support its defense. Migliano v Bally Total Fitness of Greater N.Y., Inc., 20 NY3d 342, 351 (2013). Statements in a pleading are required to be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action" (CPLR 3013).

When considering a motion, pursuant to CPLR 3211 (a) (7), the court can consider evidence which a plaintiff has submitted

to remedy a complaint's defects, since the salient issue on such an application "is whether the proponent of the pleading has a cause of action, not whether he has stated one." Leon v Martinez, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted). A claim is inadequately pled if the complaint lacks adequate factual averments. Stormes v United Water N.Y., Inc., 84 AD3d 1352, 1353-1354 (2d Dept 2011).

"A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be appropriately granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; see Norment v Interfaith Ctr. of N.Y., 98 AD3d 955, 955-956 [2d Dept 2012])." North Shore Towers Apts. Inc. v Three Towers Assoc., 104 AD3d 825, 827 (2d Dept 2013). Documents which are, in essence, indisputable constitute documentary evidence under the statute. Fontanetta v John Doe 1, 73 AD3d 78, 84-85 (2d Dept 2010). Such evidence "must be unambiguous and of undisputed authenticity" (*id.* at 86); i.e, it is required to be "essentially unassailable." Suchmacher v Manana Grocery, 73 AD3d 1017, 1017 (2d Dept 2010); Norment v Interfaith Ctr. of N.Y., 98 AD3d at 955. Deposition transcripts, affidavits, and trial testimony are not documentary evidence, but judicial records and instruments which reflect out-of-court transactions, for instance deeds and contracts, are documentary evidence. Fontanetta v John

Doe 1, 73 AD3d at 83-87; see also Tsimerman v Janoff, 40 AD3d 242 (1st Dept 2007).

A defendant cannot be held liable in tort unless it owed the injured plaintiff a duty of care. Suero-Sosa v Cardona, 112 AD3d 706, 707 (2d Dept 2013). Whether and to what extent a duty exists is a question of law. Alnashmi v Certified Analytical Group, Inc., 89 AD3d 10, 13 (2d Dept 2011). In general, tort liability for a dangerous condition on real property must be based on ownership, control, occupancy, or special use of such property. Suero-Sosa, 112 AD3d at 707; Gibbs v Port Auth. of N.Y., 17 AD3d 252, 254 (1st Dept 2005). Further, breach of a contractual duty, standing alone, will not, in general, suffice "to impose tort liability to noncontracting third parties upon the promisor." Church v Callanan Indus., 99 NY2d 104, 111 (2002).

There are, however, three exceptions to this rule. The first exception arises where the promisor, while discharging its contractual duties, either "creates an unreasonable risk of harm to others" or exacerbates a hazardous condition. Id. at 111. Under this exception, no liability is imposed on the promisor for mere nonfeasance or for the incomplete performance of its duty. Church v Callanan Indus., 99 NY2d at 112. Rather, the promisor

must affirmatively act by launching "a force or instrument of harm" Espinal v Melville Snow Contrs., 98 NY2d 136, 140 (2002) (internal quotation marks and citation omitted); Church v Callanan Indus., 99 NY2d at 111; Prenderville v International Serv. Sys., Inc., 10 AD3d 334, 337-338 (1st Dept 2004).

The second exception applies "where the plaintiff detrimentally relies on the continued performance of the contracting party's duties" Espinal v Melville Snow Contrs., 98 NY2d at 140. The third exception arises "where the contracting party has entirely displaced the other party's duty to maintain the house safely" Id.; Church v Callanan Indus., 99 NY2d at 112. Under this final exception, the promisor can be liable for nonfeasance if it is in complete and exclusive control of the house' operation and management. Howard v Alexandra Rest., 84 AD3d 498, 499 (1st Dept 2011); Keo v Kimball Brooklands Corp., 189 AD2d 679, 680 (1st Dept 1993); Jones v Park Realty, 168 AD2d 945 (4th Dept 1990), affd on the grounds stated by the App Div, 79 NY2d 795 (1991).

Morgan Stanley's motion for an order dismissing the action as to it is granted. While the pleading of a negligence cause of action is not subject to the specificity rules applicable, for example, to a fraud or misrepresentation cause of action (see

CPLR 3016), the rules pertaining generally to all causes of action apply. See CPLR 3013. Here, the cause of action asserted against Morgan Stanley and WMC does not specify the "precise tortious conduct charged" to either Morgan Stanley or WMC (Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co., 84 AD2d 736, 736 [1st Dept 1981]), and instead refers to an unnamed "defendant", lumping these two defendants together, without regard to their roles under the Agreement, which roles are duly noted in the complaint. Because "[a] defendant is entitled to notice of 'the material elements of each cause of action' (CPLR § 3013)," such allegations are deficient. Aetna Cas. & Sur. Co., 84 AD2d at 736. Moreover, the copy of the Agreement which Thompson has provided to oppose Morgan Stanley's motion, clearly demonstrates that it was simply the depositor, and that any obligation to eliminate the lead hazard, irrespective of any duty on the servicer's part to send a copy of an inspection report to Morgan Stanley and the trustee, was on the servicer, Countrywide Home Loans Servicing. Agreement § 3.15 ("[a]fter reviewing the environmental inspection report, the Servicer shall determine, consistent with Accepted Servicing Practices, how to proceed with respect to the Mortgaged Property ... [and] shall be reimbursed for any ... related environmental clean-up costs").

The complaint is devoid of any allegation that Morgan

Stanley owned, occupied, controlled, or made any special use of the house, or that plaintiff was a third-party beneficiary of the Agreement. Nor, does the complaint allege that Morgan Stanley caused or exacerbated a dangerous lead paint condition (contrast e.g. German v Bronx United in Leveraging Dollars, 258 AD2d 251, 252-253 [1st Dept 1999]; Prenderville v International Serv. Sys., Inc., 10 AD3d at 335 [in which the complaint pleaded that the defendants had created a dangerous condition]), that plaintiff detrimentally relied on the continued performance of Morgan Stanley's contractual duties, or that, under the Agreement's terms, Morgan Stanley was in exclusive control of the house. Since there are no allegations in the complaint from which a duty from Morgan Stanley to plaintiff can be inferred, the complaint must be, and hereby is, dismissed as to Morgan Stanley. Morgan Stanley's request for attorneys' fees is denied because it has not set forth any legal basis demonstrating its entitlement to such fees.

Turning to the Countrywide defendants' motion, their claim that Thompson has no standing to assert a breach of contract claim is irrelevant because she is asserting only a negligence cause of action. Thus, the principal issue is whether Thompson has pled facts demonstrating a duty of care owed to her by each of these defendants. The attempt to discern those duties from

the complaint's allegations is complicated by the same pleading deficiencies applicable to Morgan Stanley of plaintiff making assertions against an unspecified "defendant" and lumping the three Countrywide defendants together. See e.g. *id.*, ¶ 25 ("the defendants 'Countrywide'" had the duty, under the Agreement, to conduct an environmental inspection and issue a report).

Further, there is no claim that any of these defendants created or exacerbated the lead paint condition. Nevertheless, the complaint's allegations, when coupled with the copy of the purported Agreement provided by the Countrywide defendants, which appears to be identical to the copy provided by plaintiff in opposing Morgan Stanley's motion, and Sohlberg's deposition testimony, are adequate to state a cause of action against Countrywide Home Loans Servicing and Countrywide GP, and these two defendants may, if they are so advised, serve demands for bills of particulars to obtain amplifications of Thompson's allegations (see CPLR 3041).

As a threshold matter it should be noted that, here, where plaintiff's complaint repeatedly refers to the April 1, 2015 Agreement and avers that it included the Valentine Lane house, and where plaintiff's counsel opposed Morgan Stanley's motion by relying on a copy of that Agreement, it was inappropriate for plaintiff's counsel to, thereafter, urge that the Countrywide defendants failed to establish 1) the Agreement's authenticity

and 2) that the house were covered by the Agreement.

Nevertheless, the court does not, at this early, pre-answer stage of the litigation, determine the ultimate admissibility of the copies of the Agreement. It may be that, during discovery, the executed original will be found in the possession of one of the other parties to the Agreement, such as Morgan Stanley, Wells Fargo, or WMC, rendering resort to secondary evidence unnecessary. See Glatter v Borten, 233 AD2d 166, 168 (1st Dept 1996) (a substitute for the original document can be produced if proponent satisfactorily explains absence or unavailability of the original). It should also be noted that Sohlberg never testified as to the Agreement's authenticity. Indeed, she was neither involved in, nor privy to, the Agreement when it was created, and only viewed the Agreement in connection with the instant lawsuit.

Substantively, Article III of the Agreement, which relates to the servicing of the mortgage loan indicates, provides not merely that Countrywide Home Loans Servicing was to inspect and report on hazards of which it had actual notice, but that, in its capacity as servicer, it was fully empowered to take the steps needed to maximize the recovery of principal and interest on the mortgage notes, including by commencing foreclosure proceedings, acting alone, or through any subservicers it deemed necessary (Agreement, § 3.01 [a]). The Agreement also constituted a power

of attorney from the trustee to permit the servicer to carry out the duties it believed necessary. In addition, with respect to "REO Properties³ acquired for the account of the Trustee," the servicer was required to "manage, conserve, protect, and operate," any such property in the same way that it did so for its own foreclosed property and in the same manner that similar property in the same area as the REO Property was managed (Agreement, § 3.17 [b]). The servicer was entitled to withdraw funds needed for the proper maintenance, management, and operation of that property (Id., § 3.17[d]). During the Agreement's term, the servicer was to keep insurance in force covering its performance, and was liable to the trustee for servicing and administering the mortgage loan as set forth in the agreement, even if the servicer elected to use subservicers (Id., §§ 3.04, 3.13 [b]). The trustee, on the other hand, was only to perform those duties that were specifically set forth in the Agreement (Id., § 8.01). Further, "[t]he Trustee [had] no obligation with respect to any REO Dispositions" (Id., § 3.17 [b]). Under the foregoing terms set forth in the copies of the Agreements provided by both plaintiff's counsel and the Countrywide defendants, Countrywide Home Loans Servicing had

³ A REO property is defined as "[a] [m]ortgaged [p]roperty acquired by the [t]rust [f]und through foreclosure or deed-in-lieu of foreclosure in connection with a defaulted [m]ortgage [l]oan." Agreement, at 38.

exclusive control over the house's management and operation, at least once any rights that Thompson's grandmother had under any lease and Hall had as a property owner were cut off, as a result of the foreclosure proceeding, in which they were named defendants, and the sale.

That Countrywide Home Loans Servicing had exclusive control over the house' operation and management, is buttressed by Sohlberg's testimony, a copy of which was provided by Thompson, and which remedied any pleading deficiency in that regard. Sohlberg testified that Wells Fargo was headquartered in San Francisco and that she was not familiar with it having a Plano, Texas address. She further testified that Countrywide Home Loans Servicing's duties under the Agreement were collecting the payments from the mortgagors, making sure the properties were covered by insurance and that its taxes were paid, collecting delinquent and defaulted loans, managing the foreclosure process, and selling properties if they became REO. Wells Fargo's duties were essentially administrative and consisted primarily of making monthly distributions to the certificate holders. Sohlberg never visited the property, and Wells Fargo never had a key to it. Further, if a violation were issued for lead paint, for example, the servicer would be responsible, rather than Wells Fargo, which allegedly had no duty in that regard. Before the instant lawsuit, Sohlberg never learned of the lead paint violation.

When queried about the referee's deed conveying the property to Wells Fargo on behalf of the Trust, Sohlberg stated that it was unlikely that Wells Fargo would have had a file containing that document because Wells Fargo, as the trustee, did not deal at the loan level. Therefore, Wells Fargo would "rely" on Countrywide Home Loans Servicing to act on behalf of the Trust by servicing the loan, managing "the foreclosure process, and secur[ing] the REO." Wells Fargo did not participate in the decisions about whether to commence suits involving the house and was not kept informed of those suits. Sohlberg also testified that the holdover proceeding was commenced at the loan level by the servicer, which was something the servicer "would have to be involved in." Additionally, Sohlberg asserted that Wells Fargo had no duty to commence a holdover proceeding, that Countrywide Home Loans Servicing did not apprise Wells Fargo of the holdover proceeding, and that Wells Fargo was not involved in that proceeding. When asked if there was ever a time, under the Agreement, when Countrywide Home Loans Servicing was ever in default or was unable to perform, thereby requiring Wells Fargo to step in as the servicer, Sohlberg replied, "No." Also, if a tenant needed a repair, he or she would not contact Wells Fargo. Since the servicer was responsible for REO, the servicer had to procure liability insurance for the property.

Sohlberg asserted that Wells Fargo, as trustee, had no

obligation to monitor and oversee the servicer in its duties to maximize the value of the collateral/REO on behalf of the Trust. Sohlberg explained that Wells Fargo was, from a securitization standpoint, dealing with millions of loans and had only a handful of trustees, whom she asserted lacked the expertise and numbers to get involved at the loan level. For that reason, according to Sohlberg, the servicer was in place to handle the issues involved at that level. The trustee played no role in ensuring that the properties were "secure and properly maintained."

In light of Sohlberg's testimony, in which she denied that Wells Fargo had any role in the operation and management of the house, when coupled with the terms of the Agreement, the complaint's allegation that Countrywide Home Loans Servicing as the servicer was the properties' managing agent, whose general partner operated them (see Partnership Law § 24 [partnership liable for partner's wrongful act or omission in ordinary course of partnership business causing injury to person who is not a partner]), and the termination of Hall's ownership and any leasehold interests in the house, there are sufficient factual allegations that Countrywide Home Loans Servicing was in exclusive control of the house' management and operation, at least after the foreclosure and sale of the house. As for the Countrywide defendants' assertion that the complaint's allegation of actual notice of the lead paint hazard was conclusory, at this

early stage in the litigation, any pleading deficiency in that regard is supplied by the Westchester County Department of Health's notice sent to the Plano, Texas address is adequate, here, where Countrywide Home Loans Servicing was a Texas entity. In view of the foregoing and the complaint's allegation that Thompson's injury was caused, during her exposure to the lead paint hazard through March 2008, i.e., seven months after the notice's issuance, the branch of the Countrywide defendants' motion which seeks an order dismissing the action as to Countrywide Home Loans Servicing, is denied.

As the motion is denied as to Countrywide Home Loans Servicing, a limited partnership, the branch of that motion pertaining to Countrywide GP must also be denied, since it is that limited partnership's general partner and since the complaint alleges that Countrywide GP acted as the operating partner of Countrywide Home Loans Servicing in maintaining the house. See also Partnership Law § 26 (a) (1) (partner jointly and severally liable for everything chargeable to partnership under section 24); id. § 98 (in a limited partnership, general partners have, with some exceptions, all liabilities of partners in a partnership without limited partners).

This leaves the branch of the Countrywide defendants' motion relating to Countrywide Home Loans. The complaint is devoid of any allegations specific to this defendant which gives rise to a

duty of care owing to Thompson. This deficiency is not remedied by either the copies of the Agreement or Sohlberg's testimony. Presumably this entity was sued because the referee's deed, which indicated that it should be returned to a Bay Shore law firm, stated that it was between the referee and Wells Fargo on behalf of the Trust located at c/o Countrywide Home Loans, Inc. at the Plano, Texas address and because the holdover petition, without mentioning Countrywide Home Loans, was commenced by that same law firm, ostensibly for Wells Fargo on behalf of the Trust listed as having that same Plano address. Neither factor is sufficient to state a duty of care owed by Countrywide Home Loans to Thompson. There are no factual allegations in the complaint or on this motion indicating that Countrywide Home Loans, Inc. completely dominated Countrywide Home Loans Servicing's general partner, Countrywide GP, Inc., in the transaction attacked, such as in the alleged failure to remediate the lead paint hazard, after receipt of notice, and that such domination caused the breach of a duty of care toward Thompson with resultant injury. Cf. Cobalt Partners, L.P. v GSC Capital Corp., 97 AD3d 35, 40 (1st Dept 2012); see also Ward v Cross County Multiplex Cinemas, Inc., 62 AD3d 466, 466-467 (1st Dept 2009). Therefore, the branch of the Countrywide defendants' motion which seeks an order dismissing the action as to Countrywide Home Loans is granted and the action is dismissed as to it.

To the extent that Thompson and the Countrywide defendants seek sanctions against each other, such applications are denied, because none of these parties' actions were frivolous within the meaning of 22 NYCRR 130-1.1 (a), since they "did not manifest the extreme behavior that courts have traditionally found to merit such sanctions." Hunts Point Term. Produce Coop. Assn., Inc. v New York City Economic Dev. Corp., 54 AD3d 296, 296 (1st Dept 2008).

Accordingly, it is

ORDERED that the applications of plaintiff and Countrywide GP, Inc., Countrywide Home Loans Servicing LP, and Countrywide Home Loans, Inc. for sanctions is denied; and it is further

ORDERED that the motion of Morgan Stanley ABS Capital 1, Inc. (motion sequence number 001) to dismiss the complaint is granted and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion (motion sequence number 003) of Countrywide GP, Inc., Countrywide Home Loans Servicing LP, and Countrywide Home Loans, Inc. to dismiss the complaint is denied

as to defendants Countrywide GP, Inc. and Countrywide Home Loans Servicing LP, but is granted and the complaint is dismissed in its entirety as against Countrywide Home Loans, Inc., with costs and disbursements to Countrywide Home Loans, Inc., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Countrywide Home Loans, Inc.; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that Countrywide GP, Inc. and Countrywide Home Loans Servicing LP are each directed to serve an answer in accordance with CPLR § 3211(f); and it is further

ORDERED that the parties shall appear in IAS Part 59, 71 Thomas Street, Room 103, New York, New York for a preliminary conference on December 2, 2014, 9:30 AM.

Dated: October 21, 2014

ENTER:


DEBRA A. JAMES J.S.C.