

Melville v Bank of N.Y. Mellon, N.A.

2015 NY Slip Op 30402(U)

March 11, 2015

Supreme Court, New York County

Docket Number: 155908/2014

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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DANIEL P. MELVILLE & MARY R. MELVILLE,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON, N.A. F/K/A
THE BANK OF NEW YORK AS TRUSTEE FOR
CHASE MORTGAGE FINANCE TRUST SERIES
2007-S6,

Defendants.
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DECISION AND
ORDER

Index No.155908/2014

HON. ANIL C. SINGH, J.

In this action for accounting and breach of fiduciary duty, Defendant moves to dismiss Plaintiffs' claim pursuant to CPLR §§ 3211(a) (1), 3211(a) (7), and 3211(c).

Plaintiffs, Daniel P. Melville and Mary R. Melville, are homeowners of a property in Washington State. Defendants, The Bank of New York Mellon, N.A. ("BNY Mellon"), serve as Trustee for Chase Mortgage Finance Trust Series 2007-6 (the "Trust"). In the instant action, Plaintiffs allege that BNY Mellon was involved in the securitization of their mortgage for investment purposes and as a result are due accounting on any and all profits due to them as owners of the property. Plaintiffs also allege that they were in a partnership, or alternatively an agency relationship with BNY Mellon as a result of the securitization of their mortgage and BNY Mellon breached the fiduciary duty due to them as a result of their relationship.

Plaintiffs own real property located at 11019 E Upriver Drive in Spokane, Washington. On December 19, 2007, Plaintiffs executed a Note in the amount of \$189,805.00 in favor of Cherry Creek Mortgage Co., Inc. (the "Note"). The Note was

secured by a Deed of Trust on the property at the aforementioned address. Plaintiffs allege that after a series of transfers, first to Chase Home Finance LLC, then to Chase Mortgage Finance Corporation, and finally to Chase Mortgage Finance Trust Series 2007-S6, their loan became securitized and sold to investors for profit through the Trust. Plaintiffs claim that the suspected securitization of their mortgage created a partnership or agency relationship with BNY Mellon and they are entitled to an accounting of profits received from the securitization. Additionally, Plaintiffs allege that the relationship with BNY Mellon established a fiduciary duty due to the Plaintiffs, and BNY Mellon breached this duty. Defendants contend that the Plaintiffs' mortgage was assigned directly to JPMorgan Chase Bank, National Association ("JP Morgan"), as holder of the Note and servicer of the accompanying loan.

A party may move to dismiss causes of action asserted them on the grounds that a defense is founded upon documentary evidence or the pleading fails to state a cause of action. CPLR § 3211(a)(1); CPLR § 3211(a)(7). "On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference." Simkin v. Blank, 19 NY3d 46, 52 (2012). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence" are not granted this liberal consideration. Id.

No Partnership Existed Between Plaintiffs and Defendant

First, Plaintiffs claim that a partnership was created between them and BNY Mellon as a result of the alleged securitization of their mortgage for profit. "A partnership is an association of two or more persons to carry on as co-owners a business for profit."

N.Y. P'ship Law § 10(1). In the absence of a written partnership agreement between the parties, a court may determine a partnership existed from the "conduct, intention, and relationship between the parties." Community Capital Bank v Fischer & Yanowitz, 47 AD3d 667, 668 (2d Dept 2008). A key element in proving a partnership existed is a promise or undertaking by both parties to share profits and fulfill any losses. Id. Plaintiffs fail to state any facts that show that they intended to establish a partnership relationship with BNY Mellon, nor that the parties were unaware of any partnership at the inception of the alleged partnership. There is also no indication from the Plaintiffs that there was any promise or action taken between the two parties to share profits or help fulfill any losses. Plaintiffs' sole support for the alleged partnership creation is based on the securitization. Plaintiffs thus fail to effectively prove a partnership existed between them and BNY Mellon.

No Agency Relationship Existed Between Plaintiffs and Defendant

Plaintiffs also do not state facts sufficient to establish an agency relationship existed between them and BNY Mellon. An agency relationship is established by the "consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act" Art Fin. Partners, LLC v Christie's Inc., 58 AD3d 469, 471 (1st Dept 2009). Plaintiffs allege no facts that show that they established any control over BNY Mellon or allowed BNY Mellon to act on their behalf in any securitization of their mortgage. Again, the fact that Plaintiffs state they had no knowledge of the alleged securitization and any relationship with BNY Mellon undermines their argument that BNY Mellon was an agent acting on their behalf. As a result, Plaintiff fails to establish an agency relationship with BNY Mellon.

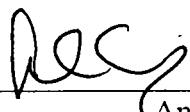
Plaintiffs have failed to establish a partnership or agency relationship with BNY Mellon, either of which they allege would have entitled them to a fiduciary duty from BNY Mellon and accounting and profits from the alleged securitization of their mortgage. As there is no partnership or agency relationship, BNY Mellon did not owe, nor could it breach, a fiduciary duty to the Plaintiffs and the Plaintiffs are not entitled to any accounting.

Additionally, Plaintiffs and Defendant dispute the fact that the Plaintiffs' mortgage was securitized. Whether or not the mortgage was securitized is irrelevant in the instant case as securitization would not create the requisite relationships between the Plaintiffs and Defendant to warrant an accounting or a fiduciary duty.

Accordingly it is,

ORDERED that the defendant's motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendants, as taxed by the Clerk.

Date: March 11, 2015
New York, New York



Anil C. Singh