

**Greenwich Fin. Servs. Distressed Mtge. Fund 3, LLC  
v 7 ci blfnk ]XY Fin. 7 cfd"**

2010 NY Slip Op 33803(U)

October 7, 2010

Supreme Court, New York County

Docket Number: 650474/08

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**  
J.S.C.

PART 39

Index Number : 650474/2008  
**GREENWICH FINANCIAL SERVICES**  
 vs.  
**COUNTRYWIDE FINANCIAL**  
 SEQUENCE NUMBER : 002  
 DISMISS ACTION

650474/08

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

is 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

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

NYS SUPREME COURT  
 RECEIVED  
 OCT 08 2010  
 MOTION SUPPORT OFFICE

Dated: 10/7/10

**BARBARA R. KAPNICK** J.S.C.  
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 : IA PART 39**

-----x  
GREENWICH FINANCIAL SERVICES DISTRESSED  
MORTGAGE FUND 3, LLC, and QED LLC, on  
behalf of themselves and all other  
persons similarly situated,

Plaintiffs,

**DECISION/ORDER**  
Index No. 650474/08  
Motion Seq. No. 002

-against-

COUNTRYWIDE FINANCIAL CORPORATION,  
COUNTRYWIDE HOME LOANS, INC. and  
COUNTRYWIDE HOME LOANS SERVICING LP,

Defendants.

-----x  
**BARBARA R. KAPNICK, J.:**

Plaintiffs Greenwich Financial Services Distressed Mortgage Fund 3, LLC, and QED LLC bring this action, on behalf of themselves and all other persons similarly situated, seeking a declaratory judgment that, under the Pooling and Servicing Agreements ("PSAs")<sup>1</sup>

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<sup>1</sup> Plaintiffs furnish three different PSAs, (two submitted as exhibits to the Complaint and one additional in connection with the opposition to this motion), namely: (a) the Pooling and Servicing Agreement dated as of June 1, 2006, among CWABS, Inc. (Depositor), Countrywide Home Loans, Inc. (Seller), Park Monaco Inc. (Seller), Park Sienna LLC (Seller), Countrywide Home Loans Servicing LP (Master Servicer), and The Bank of New York (Trustee); (b) the Pooling and Servicing Agreement dated as of February 1, 2006, among CWMBBS, Inc. (Depositor), Countrywide Home Loans, Inc. (Seller), Park Granada LLC (Seller), Park Monaco Inc. (Seller), Park Sienna LLC (Seller), Countrywide Home Loans Servicing LP (Master Servicer), and The Bank of New York (Trustee); and (c) the Pooling and Servicing Agreement dated as of April 1, 2007, among CWABS, Inc. (Depositor), Countrywide Home Loans, Inc. (Seller), Park Monaco Inc. (Seller), Park Sienna LLC (Seller), Countrywide Home Loans Servicing LP (Master Servicer), The Bank of New York (Trustee), and The Bank of New York Trust Company, N.A. (Co-Trustee).

that govern the administration of the mortgage loans sold by the defendants<sup>2</sup> in two series of securitizations, known as the CWL and CWALT series, to the trusts that issued the securities owned by plaintiffs - and under the allegedly substantially identical agreements that govern the 373 other trusts that issued the securities owned or held by other members of the plaintiffs' class - defendants Countrywide Home Loans or Countrywide Servicing are required to purchase any mortgage loan on which defendant Countrywide Financial has agreed to reduce the payments pursuant to a Multistate Settlement Term Sheet dated October 6, 2008, settling claims of predatory lending brought against it by the Attorneys General of California, Illinois, and several other States.<sup>3</sup>

Plaintiffs also seek a declaration that the price at which Countrywide Home Loans or Countrywide Servicing must purchase every modified loan is not less than 100 percent of the unpaid principal balance of, and any accrued interest on, that loan immediately before modification, and that plaintiffs are allowed to recover attorneys' fees from the opponents of the class, pursuant to CPLR § 909.

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<sup>2</sup> The defendants in this action are Countrywide Financial Corporation ("Countrywide Financial") and its two wholly owned subsidiaries Countrywide Home Loans, Inc. ("Countrywide Home Loans") and Countrywide Home Loans Servicing LP ("Countrywide Servicing").

<sup>3</sup> According to plaintiffs, Countrywide Financial has agreed to reduce payments due on hundreds of thousands of mortgage loans by a total of up to \$8.4 billion.

Plaintiffs assert that if the trusts are forced to absorb the reduction in payments on the mortgage loans, the value of the securities that those trusts sold to investors will decline.

Defendants now move for an Order, pursuant to CPLR 3211(a) (1) and (a) (7), dismissing the Complaint on the grounds that plaintiffs have failed to comply with any of the procedural requirements for bringing an action as set forth in § 10.08 of the PSA, and that under the plain terms of the PSA, Countrywide cannot be required to repurchase the modified mortgages.

Section 10.08 of the PSAs, Limitation on Rights of Certificateholders, and referred to by the parties as the "no-action" clause, provides, in relevant part, that:

No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as hereinbefore provided, the Holders of Certificates evidencing not less than 25% of the Voting Rights shall also have made written request to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity shall have neglected or refused to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted

by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement, except in the manner herein provided and for the common benefit of all Certificateholders.

Plaintiffs contend that § 10.08 applies only to actions in which the plaintiff requests relief which could give one certificateholder an unfair advantage over other certificateholders, and to actions that allege an "Event of Default" by the Master Servicer. Plaintiffs also argue that this clause does not apply because any further demand on the Trustee to protect the rights of the certificateholders would be futile.

Plaintiffs argue that they are not bound by the procedural requirements of § 10.08 because: (1) the declaratory judgment sought in this action will apply equally to all certificateholders in the plaintiff class, and, therefore, will not "affect, disturb, or prejudice" the rights of any individual certificateholder or permit any one certificateholder to gain priority or preference over any other certificateholder; and (2) this action does not allege an "Event of Default" as defined in § 7.01 of the PSA, which contemplates failures by the Master Servicer to perform certain

acts, and does not include a failure by the Seller to repurchase the modified mortgage loans as plaintiffs allege here.<sup>4</sup>

Defendants contend that § 10.08, in fact, already requires that any litigation brought under the PSA be on behalf of all certificateholders, where it provides that it is "expressly covenanted by each Certificateholder with every other Certificateholder..., that no one or more Holders of Certificates shall have any right...to enforce any right under this Agreement, except in the manner herein provided in this Agreement and for the common benefit of all Certificateholders."

Moreover, defendants argue that § 10.08 does not provide for a class action exception in the event a group of certificateholders asserts that its action is aimed at advancing the common interests of all certificateholders.<sup>5</sup>

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<sup>4</sup> Section 7.01 of the PSA provides, in relevant part: "Event of Default," wherever used herein, means any one of the following events:

(i) any failure by the Master Servicer to deposit ... any payment required to be made under the terms of this Agreement...; or

(ii) any failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement...

<sup>5</sup> Defendants further contend that even if plaintiffs had the capacity to sue for declaratory relief, PSA § 3.01 unambiguously authorizes Countrywide to engage in loss-mitigation modifications and does not require that loans modified for that purpose be repurchased.

Further they assert that § 3.11 of the PSA governs only loan modifications that are "in lieu of refinancing" (i.e., modifications Countrywide's lending affiliates make when borrowers indicate they are prepared to refinance their loans

Thus, defendants argue, the failure complained of by plaintiffs requires a written notice to the Trustee and compliance with the other requirements of § 10.08.<sup>6</sup>

At oral argument held on the record on April 8, 2010, plaintiffs argued that at the time the Complaint was filed, they owned certificates in one trust which was governed by "one form" of the PSA, but have now purchased certificates in a trust that is governed by "the other form" of the PSA.

Nonetheless, this Court is not persuaded that plaintiffs can escape the procedural requirements of § 10.08 by purporting to sue for the benefit of all certificateholders where the broad language of that clause, which is substantially identical in all of the PSAs provided, including the one attached as an Exhibit to defendants' papers, expressly prevents certificateholders from bringing "any suit, action or proceeding in equity or at law upon or under or

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elsewhere) and requires Countrywide, as the Master Servicer, to repurchase those modified loans.

<sup>6</sup> Plaintiffs contend that the demand requirement should be excused as futile because, immediately after filing the Complaint, they served on the Trustee a request that it join in this action and the Trustee refused to do so. Defendants, however, contend that plaintiffs never presented the Trustee with a proper demand prior to commencing this action, stating that they represented 25% of the certificateholders and offering the Trustee proper indemnity.

with respect to this Agreement, (underlining supplied)" unless they have aggregated with 25 percent of the certificateholders, made a demand on the Trustee, offered the Trustee proper indemnity, and waited 60 days for the Trustee to commence a lawsuit.

Since plaintiffs have not complied with any of the requirements set forth in § 10.08, which they had agreed to when they purchased the certificates, they are barred from bringing this action.

Accordingly, defendants' motion is granted and the Complaint is dismissed.

The Clerk is directed to enter Judgment accordingly.

This constitutes the decision and order of this Court.

Dated: October 7, 2010

  
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Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**