Hudacko v Bank of America
2013 NY Slip Op 32129(U)
September 5, 2013
Supreme Court, New York County
Docket Number: 154342/12
Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

EDWARD A. HUDACKO and CHRISTINE M. HUDACKO,

Plaintiffs,

INDEX NO. 154342/12

-against-

MOTION SEQ. NO. 001

BANK OF AMERICA, N.A., WELLS FARGO BANK, N.A., and JOHN DOES 1-10, representing any REMIC trusts, depositors, investors, servicers, special servicers, master servicers, banks or other lenders claiming ownership or possession of a promissory note in the principal amount of $488,000, dated December 2, 2004, signed by Edward A. Hudacko and Christine M. Hudacko,

Defendants.

The following papers were read on the motion by defendant to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☒ Yes ☐ No

Motion Sequences 001 and 002 are consolidated for purposes of disposition.

In this commercial action, defendants Wells Fargo Bank, N.A. (Wells Fargo) (motion sequence number 001) and Bank of America, N.A. (BOA) (motion sequence number 002), submit pre-answer motions to dismiss, pursuant to CPLR 327(a), on the ground of forum non conveniens. Edward A. Hudacko (Edward Hudacko) and Christine M. Hudacko (Christine Hudacko) (collectively, plaintiffs) are in opposition to the respective motions, and cross-move to amend the complaint.

BACKGROUND

BOA is a national banking association doing business in New York, with its main office in Charlotte, North Carolina. Plaintiffs are residents of California. On December 2, 2004, plaintiffs entered into a mortgage loan with Wells Fargo, as lender, which has offices in New York, in the amount of $488,000.00. They executed a mortgage note for that loan (the Note), and secured it by a deed of trust (the Deed of Trust) on real property located at 3030 Clinton Avenue, Richmond, California (the Property), where plaintiffs reside.

Plaintiffs commenced this action by filing a summons and complaint on or about July 6, 2012. Plaintiffs allege that, around late 2008, Edward Hudacko was laid off and there was a =reduction in the earnings of Christine Hudacko. These financial problems led to difficulties making the monthly mortgage payments of $2,847.84. According to the complaint, plaintiffs are unable to make payments on the Note as it is currently written, and they sought a loan modification agreement from Wells Fargo, but defendants offered only temporary modifications, not permanent ones. Plaintiffs allege that, at one point, defendants told plaintiffs to stop making payments on the Note and Deed of Trust as a condition to obtaining a loan modification.

As alleged in the complaint, this is an action to determine whether any of the defendants is the owner, and in possession, of the Note. According to the complaint, the last known physical location of the Note is New York, New York, where the Note, together with about 2000 other notes and mortgages signed from homeowners-mortgagors from all over the United States, was assigned, pursuant to New York law and a pooling and servicing agreement, and physically delivered to underwriters in New York. Plaintiffs allege that these notes were physically turned over to a New York Real Estate Mortgage Investment Conduit (REMIC) trust for holding under a pooling and servicing agreement, which states that it is governed by New York law. According to the complaint, the notes were held in trust in New York by the

underwriters and a New York trustee. Because of the securitization process, including the possibility of unrelated assignments of, borrowing against and pledging of the note by Wall Street financial institutions, plaintiffs are not sure who owns the Note. Plaintiffs contend that most of the witnesses needed to determine the owner of the Note are in New York.

The complaint contains four causes of action. In the first cause of action, plaintiffs allege that defendants do not own the Note and Deed of Trust and cannot prove ownership through chain of title; that the defendants have no enforceable interest in the Note or Deed of Trust; that the documents upon which Wells Fargo is basing its attempts to collect Note payments from plaintiff are not valid; and that Wells Fargo is enjoined permanently from offering, selling, transferring any actual or alleged interests in the Note or Deed of Trust. Also in the first cause of action, plaintiffs seek a declaratory judgment and allege that they are damaged in the amount of $270,000 ($260,000, plus $10,000 in legal fees), because they made payments to defendants or defendants' predecessors, who do not own the Note.

In the second cause of action, plaintiffs allege that defendants engaged in fraud for demanding and collecting monthly Note payments from plaintiffs under false pretenses. Starting in January 2005 and continuing into the present, Wells Fargo sent bills and collected payments knowing that it was not the rightful owner in possession of the original Note, and thus was not entitled to collect the payments.

In the third cause of action, plaintiffs set forth a breach of contract claim, alleging that defendants have insurance, which covers them for any decline in the value of plaintiffs' property, and is payable only if the plaintiffs lose their property through a foreclosure auction or short sale. This insurance, according to plaintiffs, is the motivation for defendants to refuse to enter into loan modification agreements with qualified homeowners because defendants would only receive payments for their losses, if the property is sold.

According to the complaint, the plaintiffs are having trouble with the monthly interest-

only payments of $2,847.84. The present value of the property is about $240,000, but the amount defendants claim plaintiffs owe on the note is more than $422,507. Plaintiffs allege that, because the attorney general of the 50 states have an agreement with BOA and Wells Fargo, the defendants are obligated to lower plaintiffs' principal by $125,000.00. Plaintiffs maintain that they would be able to pay the restructured note, but because of the conflict of interest, defendants are unwilling to negotiate.

In the fourth cause of action, plaintiffs allege that defendants' conduct is a violation of New York General Business Law § 349.

Wells Fargo and BOA now move to dismiss this action pursuant to CPLR 327(a), based on the doctrine of forum non conveniens. Wells Fargo and BOA argue that New York is not the proper forum for plaintiffs' claims on the grounds that (1) the plaintiffs are domiciled in California; (2) the execution of the mortgage loan took place in California; and (3) the Deed of Trust states that it is to be governed by "the law of the jurisdiction in which the Property is located" (BOA's memorandum of law at 5, quoting Aff. of Rabinowitz, exhibit 2, ¶ 16). Further, defendants argue that there is no reason to believe that relevant witnesses or documents are in this jurisdiction. They argue that plaintiffs' allegations, that the Note is located in New York, and that it was subject to a pooling and servicing agreement located in New York, are conclusory.

Plaintiffs oppose this motion and argue that plaintiffs' causes of action are based upon assignments of the Note and mortgage that took place in New York and, under New York law and the pooling and servicing agreement, the validity of those assignments is to be determined under New York law. Plaintiffs argue that this is a "financial services" action and not a "local action" for another state (plaintiffs' memorandum of law in opposition at 7).

Plaintiffs also cross-move to amend the complaint, and attach a proposed amended complaint, which has two basic changes. First, plaintiffs added "extensive 'venue allegations' supporting the claimed venue in New York, New York, including the public policy of the New

York Legislature set forth in the legislative history for enactment in 1984 of New York General Obligations Law Sections 5-1401 and 5-1402" (*id.* at 8). Plaintiffs argue that the legislative memorandum, authored by State Senator John J. Marchi, is a legislative directive to the New York courts to keep commercial transactions involving more than $250,000 in New York, even if they have no relationship to New York, because the financial services industry in New York needs a New York court system to provide consistency in the application of New York law. Secondly, the amended complaint eliminates "what could be thought of as 'local' causes of action based on any law other than New York law" (*id.* at 8).

Plaintiffs' proposed amended complaint seeks to drop the fourth cause of action, the alleged violation of New York General Business Law § 349, and add a new fourth cause of action for reformation of the Note. This cause of action alleges that the Note should be amended to reflect: (1) the present value of the property as the principal; (2) the present interest rate for comparable residential homes: 3.5%; and (3) the period of the loan should be 30 years. In addition, the proposed amended complaint deletes references to the Deed of Trust and adds allegations for punitive damages.

DISCUSSION

Motion to Amend the Complaint

CPLR 3025(b) dictates that leave of court for amendments to the pleadings "shall be freely given." The proponent of a motion to amend the complaint, need not establish the merit of the new allegations.

> "Motions for leave to amend pleadings should be freely granted (CPLR 3025[b]), absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit ..." (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499-500 [1st Dept 2010] [internal citations omitted]).

Defendants, in opposing plaintiffs' motion to amend, argue that the amendments are devoid of merit. Defendants take issue with the allegations in the amended complaint that "[t]he issues to be decided do not include title to Plaintiffs' property" and that the only issue in this action is "securitization" (defendants' reply memorandum in support at 5). It is defendants' position that plaintiffs' allegations raise issues concerning the title to the property in California by addressing the Deed of Trust and the associated Note. Further, according to defendants, the proposed amendment to add an allegation for reformation of the loan, reflects plaintiffs' interest in a loan modification. Defendants argue that plaintiffs have offered no basis for this amendment.

Defendants further argue that plaintiffs' reference to the legislative memorandum is misplaced because the memorandum argues that the contracting parties' choice of law provisions should be upheld to promote freedom of contract and certainty, while, here, the subject Deed of Trust contains a choice of law clause invoking California, and not New York, law.

The Court finds that plaintiffs' proposed fourth cause of action, for reformation of the loan, is vague and conclusory and does not plead either mutual mistake or fraud, as required in an action for reformation (*ABA Consulting, LLC v Liffey Van Lines, Inc.*, 67 AD3d 401, 403 [1st Dept 2009]). Furthermore, plaintiffs' proposed paragraphs concerning venue are unnecessary as the complaint need not elaborate upon venue when the plaintiffs have the opportunity to make these same arguments in their opposition to the defendants' motion to dismiss. In fact, these allegations concerning venue are duplicative of the arguments plaintiffs have set forth in their opposition papers. Plaintiffs proposed amendment for punitive damages on the third cause of action is dismissed for the same reasons, as it is likewise devoid of merit (*Walker v Sheldon*, 10 NY2d 401, 404 [1961] ["[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and

reprehensible motives... ."]). For these reasons, the Court denies plaintiffs' motion to amend the complaint.

Motion to Dismiss pursuant to CPLR 327(a)

The doctrine of forum non conveniens, as codified in CPLR 327(a), provides that the court may dismiss an action when it "finds that in the interest of substantial justice the action should be heard in another forum . . . ." The defendant has the burden to establish the applicability of the doctrine by demonstrating what private and public interest factors weigh against accepting the litigation (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984] *cert denied* 469 US 1108 [1985]).

> "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. No one factor is controlling" (*id.* at 479 [citations omitted]).

Thus, where the claims lack a substantial nexus with New York, it is a burden for the New York courts to maintain the action (*Shin-Etsu Chemical Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2004]). In other words, there must be some factual connection between the dispute and New York (*id.* at 176).

Further, in *Ziska v Bank of Am., N.A.* (99 AD3d 602 [1st Dept 2012]), in which the facts were similar to those here, the Court held that the securitization of the mortgage documents in New York was not enough to create a nexus to our courts. In *Ziska*, the plaintiffs, California homeowners, commenced an action against, among others, Bank of America, N.A., which allegedly had a second mortgage on plaintiffs' real property in California and Bank of Mellon, N.A., a trustee created under New York law, REMIC, which allegedly acquired the deed of trust and mortgage to the plaintiffs' real property in California. Like the plaintiffs here, the *Ziska* plaintiffs, who were having trouble satisfying mortgage payments on their home in California,

sought a loan modification from the defendants that was not provided, and then brought the action against the defendant banks, who were no longer in physical possession of the deed of trust or the mortgage note, with respect to the plaintiffs' home, due to the securitization and assignment of those documents.

In *Ziska*, the plaintiffs sought damages for, among other things: (1) the defendants' failure to offer the plaintiffs a loan modification; (2) the defendants' lack of standing to demand or receive mortgage payments from the plaintiffs for their failure to own the original note and mortgage; (3) breach of contract for securitizing the plaintiffs' notes and mortgages; and (4) fraud for collecting monthly mortgage payments under false pretenses because the defendants did not have physical possession of the real property documents. The plaintiffs also sought to quiet title to the property because they owned the real property and the lender did not have any proof that it owned the original note.

The First Department held that the allegations that "defendants may have business locations in New York, and that plaintiffs' note and deed of trust were eventually securitized by a New York trust, are insufficient to create a 'factual connection between New York and the dispute'" (*id.* at 603 [internal citation omitted]).

Plaintiffs argue here that this action is unlike *Ziska*, and, therefore, the precedent does not apply. In their memorandum of law, plaintiffs assert that, because of the venue allegations in their complaint, including the references to the Marchi legislative memorandum, the public policy that New York courts accept commercial cases in excess of $250,000 that have no contacts in New York, and the witnesses and documents concerning the securitization of the Note are in New York, this action is unlike *Ziska* and should remain here.

Plaintiffs, however, reside in California and the Note and deed of trust are secured by real property located in California. The documents were executed in California and the Deed of Trust is governed by federal and California law. Similar to the allegations in *Ziska*, plaintiffs

allege that they want the Note in order to negotiate a modification of the terms of the Note. In fact, every allegation in this action flows from that transaction, the creation of the mortgage. The damages sought all relate to the Note, the Deed of Trust and the parties' interest in the real property. Further, plaintiffs' allegations concerning the assignment of the Note in New York and its inclusion in a REMIC trust in New York, which is unidentified, are conclusory, provide no ground for the Court to find that there are relevant witnesses or documents in this jurisdiction, and are insufficient to create a substantial nexus in New York. Witnesses to an initial assignment or sale of the Note by the Lender are just as likely to be found in California.

Moreover, even if the Court were to accept the allegations that defendants are present in New York, and that the Note and Deed of Trust were securitized by a pooling and servicing agreement executed in New York, these are all "insufficient to create a 'factual connection between New York and the dispute'" *(Brunelle v Federal Nat. Mtge. Assn.*, 2012 WL 5815729, *1 [Sup Court, NY County 2012], quoting *Ziska*, 99 AD3d at 603). In the absence of a substantial nexus, it would be a burden on this Court to maintain this action.

CONCLUSION

In accordance with the foregoing, it is

ORDERED that the cross-motion of plaintiffs seeking to amend the complaint is denied; and it is further,

ORDERED that defendant Wells Fargo Bank, N.A.'s motion (motion sequence no. 001) to dismiss the complaint pursuant to CPLR 327(a) is granted and the complaint is dismissed as asserted against it with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further,

ORDERED that defendant Bank of America, N.A.'s motion (motion sequence no. 002) to dismiss the complaint pursuant to CPLR 327(a) is granted and the complaint is dismissed as against it with costs and disbursements to said defendant as taxed by the Clerk of the Court;

and it is further,

ORDERED that counsel for Bank of America, N.A. is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: Sept. 5, 2013

PAUL WOOTEN J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**