SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

LARRY H. WILLIAMSON,

Plaintiff,

INDEX NO. 153581/12

-against-

MOTION SEQ. NO. 001

BANK OF AMERICA, N.A., JPMORGAN CHASE BANK, N.A., and JOHN DOES 1-10, representing any REMIC trusts, servicers, special servicers, master servicers, banks or other lenders claiming ownership of a promissory note in the amount of $1,387,500 dated April 18, 2007 and signed by Larry Williamson,

Defendants.

The following papers, numbered 1-7 were considered on this motion to dismiss for forum non conveniens:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4
Cross-Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

Plaintiff Larry Williamson (Williamson) commenced this declaratory judgment action against defendants Bank of America, N.A. (Bank of America), JPMorgan Chase Bank, N.A. (JPMorgan), and John Does 1-10, alleging that defendants have no enforceable interest in a note under a deed of trust.

BACKGROUND

On April 18, 2007, plaintiff Williamson entered into a note in the amount of $1,387,500 (Note), and a deed of trust (Deed of Trust), for property located at 2675 Gibraltar Road, Santa Barbara, California 93105 ("Property"). The Deed of Trust was recorded in the County of Santa Barbara on April 25, 2007, and plaintiff Williamson, a non-domiciliary of New York, resides in the Property in California.

In April 2012, plaintiff Williamson stopped making payments on the Note, and filed this action in

New York County on June 11, 2012, seeking a declaratory judgment against defendants. Plaintiff Williamson served an amended complaint, on July 5, 2012, asserting five causes of action for: (1) a declaratory judgment against defendants; (2) fraud on the basis that defendants engaged in the collection of monthly payments on the Note under false pretenses; (3) breach of contract resulting from defendants' failure to modify the loan by reducing the principal and interest rate; (4) violation of New York General Business Law § 349 for deceptive practices; and (5) anticipatory breach of contract, as defendants failed to reduce the Note by $125,000, pursuant to defendants' settlement agreement with 50 State Attorney Generals. According to the Amended Complaint, defendant JPMorgan is the most recent owner of the Note, defendant Bank of America is the most recent servicer of the loan, and defendants John Does 1-10 are additional Real Estate Mortgage Investment Conduit (REMIC) trusts, servicers, special servicers, master servicers, banks and other lenders claiming ownership on the Note.

Thereafter, defendant Bank of America filed this instant pre-answer motion to dismiss, pursuant to CPLR 327(a) and 3211(a)(7), on the grounds of *forum non conveniens* and dismissing the Fourth cause of action for failure to state a cause of action.

DISCUSSION

CPLR 327(a) provides:

> When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

The factors to be considered on a forum non conveniens motion are: (1) the residency of the parties; (2) the availability of an alternative forum in which the other party may bring suit; (3) whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction; (4) the location of a majority of the witnesses; (5) the burden on the New York courts; (6) the potential hardship to the movant if the case is kept in New York; and (7) whether the applicable law is that of a foreign

jurisdiction. *See Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). No one factor has been held controlling. Rather, the determination is in the sound discretion of the court, based upon all the facts and circumstances of the case at hand. *Id.*

Defendant Bank of America contends that the factors to be weighed favor dismissal of this action. Defendant Bank of America asserts that there is no nexus to New York, as plaintiff resides in California, the Property which is at issue is located in California, the transaction occurred in California in that the Note and the Deed of Trust were signed in California, and the Deed of Trust is governed by California law. Thus, defendant Bank of America argues that dismissal, pursuant to CPLR 327, is warranted here, and the action should be re-commenced in California.

Plaintiff Williamson opposes this motion, based primarily on the fact that "[p]laintiff's mortgage, [] was, upon information and belief, securitized, repackaged and sold to investors through a process consummated...in New York". Person Affirmation in Opposition, ¶ 9. Plaintiff Williamson also contends, without personal knowledge, merely upon information and belief, that "the Pooling and Servicing Agreement ('PSA') for the REMIC Trust that allegedly owns the Note and Mortgage was made and crafted" in New York. *Id.* at ¶ 4. Plaintiff Williamson argues, *in a conclusory fashion and without any support*, that the REMIC Trust and PSA have replaced the Note and the Mortgage as the controlling documents with respect to the Property, which is located in California. Further, plaintiff Williamson argues that defendant Bank of America does business in, and is located within, New York. Thus, according to plaintiff Williamson, the New York courts have "a greater interest in this transaction than the Santa Barbara County court in California, because there is a 'substantial nexus' between New York County and...[p]laintiff's causes of action". *Id.* at ¶13. Finally, plaintiff Williamson argues that, [a]s a result of the secretive nature of Defendants' securitization process and various assignments of the Note, Plaintiff Williamson is not now in possession of the Pooling and Servicing Agreement believed to govern the New York trust that owns...[the] Note." *Id.* at ¶24. As such, plaintiff proffers a PSA, which is

allegedly customary to the securitization industry rather than the actual PSA that owns the Note, and, thus, is inapplicable here.

The motion to dismiss is granted. Here, the instant motion is a pre-answer motion to dismiss, such that no discovery has taken place, no note of issue has not been filed, and plaintiff Williamson's causes of action are not time-barred. Most of the above listed factors favor dismissing this case on *forum non conveniens* grounds, as California is the more appropriate forum. Furthermore, it is telling that plaintiff Williamson did not, and could not, dispute the many factors that are in favor of this action being pursued in California. Instead, plaintiff Williamson could only argue, and then only upon information and belief, that New York is the appropriate forum as the Note was allegedly securitized in New York.

Defendant Bank of America has demonstrated that factors weigh *heavily* in favor of dismissing this action, as there is no real connection to New York, and California is the more appropriate forum. Although plaintiff Williamson is correct in arguing that defendant Bank of America does business in New York and maintains an office in New York, it is undisputed that defendant Bank of America also does business in California. The Court notes that dismissal is not required to be denied based solely on the fact that one party is indeed a New York resident, as specifically stated in CPLR 327(a). It is further undisputed that plaintiff resides in California, the Property is located in California, the Note and Deed of Trust was signed in California, and California law governs. Significantly, the Deed of Trust clearly and explicitly states that "[t]his Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located." Berger Affirmation, Exh. 2, Deed of Trust, ¶ 16. Thus, the underlying facts of this action arose in California, not in New York. All of these factors favor dismissal of this action.

Moreover, the Deed of Trust specifically states that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to the Borrower. A sale might result in a change in the entity (known as the 'Loan Servicer') that collects

Periodic Payments due under the Note and this Security Instrument". *Id.* at ¶ 20. Thus, defendant Bank of America did not breach the contract or commit fraud, as alleged in the complaint, by securitizing the Note and Deed of Trust. In fact, courts have consistently found that securitization of a mortgage loan does not provide a mortgagor with a cause of action. *See Rodenhurst v Bank of America*, 773 F.Supp2d 866, 898-899 (D. Haw 2011).

Finally, as this case bears no relationship to New York, the New York courts would be heavily burdened in retaining this complex case through trial, especially in light of the fact that there is an alternative, more appropriate forum available. "[E]ven though there be no prohibition, statutory or otherwise, against maintaining a particular action in this State, our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972). Based on the above, the motion to dismiss is granted. Thus, the remainder of the parties' arguments need not be addressed.

Accordingly, it is

ORDERED that defendant Bank of America's motion to dismiss on the grounds of *forum non conveniens* is granted and this action is dismissed in its entirety, without prejudice to plaintiff Williamson commencing an action in California; and it is further

ORDERED that within 30 days of entry of this order, defendant Bank of America shall serve a copy of this order with notice of entry upon all parties.

Dated: 10/11/13

DORIS LING-COHAN, J.S.C.

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