Park Royal I LLC v HSBC Bank USA, N.A.

2022 NY Slip Op 33501(U)

October 13, 2022

Supreme Court, New York County

Docket Number: Index No. 650933/2019

Judge: Margaret A. Chan

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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: COMMERCIAL DIVISION PART 49M

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PARK ROYAL I LLC, PARK ROYAL II LLC

Plaintiff,

- v -

HSBC BANK USA, N.A.,

Defendant.

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INDEX NO. 650933/2019

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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VRS HOLDINGS 2 LLC, RELIANCE STANDARD LIFE INSURANCE COMPANY

Plaintiff,

-against-

HSBC BANK USA, N.A., AS TRUSTEE (AND PREDECESSORS OR SUCCESSORS THERETO),

Defendant.

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INDEX NO. 657392/2017

MOTION DATE N/A

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents for action Index No. 650933/2019, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 106, 108, 109, 110; and

the following e-filed documents for action Index No. 657392/2017, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 101, 103, 104, 105

were read on these motions to/for REARGUMENT/RECONSIDERATION.

In these two actions arising out of defendant's alleged breaches of contractual, common law, and statutory duties as the trustee for three residential mortgage-backed securities (RMBS) trusts, defendant moves for an order granting it leave to reargue the court's decision and order dated May 25, 2022 (NYSCEF # 88 - the Original Decision) to the extent it denied the aspect of defendant's motions to dismiss the complaints for lack of standing.[1] Plaintiffs VRS Holding 2 LLC and Reliance Standard Life Insurance Company (VRS) and plaintiffs Park Royal I LLC and Park Royal II LLC (Park Royal) oppose the motions.

[1] These two motions to reargue are consolidated for disposition as the prior motions to dismiss were. Unless otherwise noted, the NYSCEF numbers in the text of the decision refer to the ones in Park Royal Action (Index No. 650933/2019).

On the prior motions to dismiss, defendant moved to dismiss plaintiffs' complaints for lack of standing, arguing that plaintiffs are "Certificate Owners" rather than "Certificateholders" and the former are contractually restrained from bringing actions directly (NYSCEF # 88 at 4). In this regard, Section 6.06(d) of the pooling and servicing agreements (PSAs), the negating clause, provides that "the rights of the respective Certificate Owners of such Certificates shall be exercised only through the Depository and the Depository Participants ...." (NYSCEF #s 27, 29, 31–PSA § 6.06[d]). Plaintiffs countered that their standing defect was cured since they obtained authorizations to sue from Cede & Co., the Depository and registered holder of the RMBS certificates (NYSCEF # 88 at 4). The issue presented in the prior motions was whether plaintiffs, as RMBS certificate owners, had cured their standing defect by obtaining Cede & Co.'s authorization after they commenced the actions. In support of its motions to dismiss, defendant argued that the authorizations were ineffectual because the PSAs do not specifically permit a registered holder to assign its right to sue and that plaintiffs' claims are time-barred because plaintiffs lacked standing when the actions were filed (NYSCEF # 37 at 7-8; NYSCEF # 61 at 2, 3 n 2).

In the Original Decision, the court denied the aspect of defendant's motions to dismiss the complaints for lack of standing and held that the post-filing authorizations from Cede & Co. cured plaintiffs' standing defect that is caused by the negating clause, even in the absence of a contractual provision expressly allowing such authorization (NYSCEF # 88 at 4-5, citing the following cases: *Springwell Nav. Corp. v Sanluis Corp., S.A.*, 81 AD3d 557 [1st Dept 2011]; *Cortlandt St. Recovery Corp. v Hellas Telecoms., S.A.R.L.*, 47 Misc 3d 544, 558-559 [Sup Ct, NY County 2014]; *Allan Applestein TTEE FBO D.C.A. v Province of Buenos Aires*, 415 F3d 242 [2d Cir 2005]; *Natl. Credit Union Admin. Bd. v U.S. Bank N.A.*, 439 F Supp 3d 275, 278-279 [SD NY 2020]; *Royal Park Invs. SA/NV v Deutsch Bank Natl. Trust Co.*, 2016 WL 439020, *2-3 [SD NY Feb. 3, 2016]). In addressing the statute of limitations issue raised by defendant, the court found that because the "standing defect is curable and in fact cured, the plaintiff[s'] status has changed and [their] action[s] [are] maintainable" (NYSCEF # 88 at 5, citing *Springwell*, 81 AD3d at 557). As for the cases cited by defendant holding that a plaintiff cannot rely on the relation-back theory to cure a lack of standing, the court found these cases distinguishable and inapplicable (*id.*, at 5-6).

On this motion to reargue, defendant asserts that the court misapprehended the law in denying the motions to dismiss by overlooking controlling case law holding that "an action commenced without standing is not validly commenced and must be dismissed because subsequent events that confer standing do not relate back to a complaint filed without standing" (NYSCEF # 101 at 1-2). Defendant also argues that the Original Decision "went on to decide an issue not briefed or argued by the parties: whether Plaintiffs' post-filing 'authorization'—more precisely,

assignments of the registered holder's contractual rights—relate back to the initial filing" (NYSCEF # 110 at 1). In opposition, plaintiffs argue that the court properly found that the defect in plaintiffs' "legal capacity" was cured by obtaining Cede & Co.'s authorizations subsequent to the commencement of the actions.[2]

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [quotation marks omitted]). A motion for reargument "is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971, 972 [1st Dept 1984] [internal quotation marks and citation omitted]). The determination to grant leave to reargue lies within the sound discretion of the court (*V. Veeraswamy Realty v Yenom Corp.*, 71 AD3d 874, 874 [2d Dept 2010]). However, reargument is not a proper vehicle to present new issues that could have been, but were not raised, on the prior motion or to afford an unsuccessful party successive opportunities to rehash arguments previously raised and considered (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009]; *Tounkara v Fernicola*, 63 AD3d 648, 649 [1st Dept 2009]; *Lee v Consol. Edison Co. of N.Y.*, 40 AD3d 481, 482 [1st Dept 2007]).

Applying this standard, the court finds that defendant has failed to show that this court overlooked, misapprehended the relevant facts, or misapplied the law so as to warrant a grant of reargument. Defendant tries to frame the issue as a different one that is not present in this action: when plaintiff's lack of standing is inherently *incurable*, whether a subsequent assignment that conferred standing can relate back to the moment plaintiff commenced the actions. The cases relied on by defendant, which are not previously cited, are inapposite since unlike here, the plaintiffs in those cases were asserting claims even though they lack beneficial or legal interest in such claims and thus the lack of standing was simply not curable (*Rizack v Signature Bank, N.A.*, 169 AD3d 612, 613 [1st Dept 2019] ["Plaintiff's lack of standing at the commencement of this action was *not cured* by this subsequent assignment of the claim" since "plaintiff did not possess or have any legal rights to the IRA agreement claim when he filed the original complaint"] [emphasis added];

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[2] In their opposition to the motions to reargue, plaintiffs argue for the first time that the issue concerns their lack of "capacity to sue," rather than lack of "jurisprudential standing," the latter of which defendant argues in this motion in using the term "standing." In this regard, while it is noted that the First Department has employed the terms "capacity" and "standing" interchangeably in this precise context (*Springwell*, 81 AD3d at 558; *see also Diverse Partners*, 2017 WL 4119649, *5, *2 n3 [noting that the issue concerns "contractual standing" in this context]), the court will not extend the discussion on this reargument motion since plaintiffs have not once made that distinction or even used the word "capacity" in the prior motion.

Goldberg v Camp Mikan-Recro, 42 NY2d 1029 [1977] [the decedent's father lacked standing to bring a wrongful death claim for "the infant's personal injuries"]). In contrast, here, because plaintiffs are the beneficial owners of the certificates whose lack of standing was based solely on the negating clause in the PSAs, the defect in their standing has been found to be curable.

Defendant also incorrectly relies on a line of condition precedent cases (*see e.g. UMB Bank N.A. as Trustee v Neiman Marcus Group, Inc.*, 68 Misc 3d 977, 983 [Sup Ct, NY County 2020]; *S. Wine & Spirits of Am., Inc. v Impact Envtl, Eng'g, PLLC*, 80 AD3d 505, 505 [1st Dept 2011]).[3] As the court found in the Original Decision, those cases concern situations where the lack of standing has been found incurable such as when plaintiffs failed to fulfill "a condition precedent to plaintiffs' right to bring any legal action" (*S. Wine & Spirits*, 80 AD3d at 505). It is settled that a plaintiff's lack of standing when it fails to satisfy the pre-suit condition cannot be cured, so that any post-filing satisfaction of that condition cannot relate back (*see Phoenix Light SF Ltd. v Deutsche Bank Natl. Trust Co.*, 585 F Supp 3d 540, 568 [SD NY 2022] [reasoning that a plaintiff cannot cure such failure to comply since "the subsequent satisfaction of the condition precedent cannot relate back because the inherent nature of a condition precedent to bringing suit is that it actually precedes the action"] [internal quotation marks and citation omitted]). The standing problem with the failure to satisfy a condition precedent to litigation is that plaintiff lacks a cause upon which to sue, and thus no legally cognizable remedy is available when plaintiff files the lawsuit. But this is not the case here.

As emphasized in the Original Decision, Cede & Co., as a street name, has only book entry interest but no actual interest in those RMBS, while plaintiffs are the real party in interest as beneficial owners (NYSCEF # 88, citing *Diverse Partners, LP v AgriBank, FCB*, 2017 WL 4119649, *5 [SD NY, Sept. 14, 2017]). Given that section 6.06(d) of the PSAs provides that certificate owners can exercise their rights through the depository, the provision negates their ability to directly bring an action (PSA § 6.06[d]). This defect in standing, caused by a negating clause, does not eliminate plaintiffs' cognizable stake in this action or the court's jurisdiction to hear it. As such, the standing defect is curable and could be cured retroactively by obtaining the registered holders' authorization to sue (*Springwell*, 81 AD3d at 558 [with the authorization, "plaintiff's status has changed, and its prior lack of capacity has been cured"]; *Cortlandt*, 47 Misc 3d at 558-559 ["[i]f a party that lacked standing under such an indenture subsequently obtains authorization to sue from a registered holder, its lack of standing is cured"]; *see also Bank of N.Y. v Bearingpoint, Inc.*, 13 Misc 3d 1209[A] [Sup Ct, NY County 2006]

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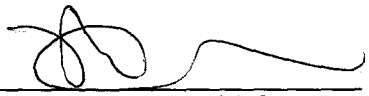
[3] Defendant's reliance on *MacKay Shields LLC v Sea Containers, Ltd.*, 300 AD2d 165 [1st Dept 2002] is also misplaced. As pointed out by the *Applestein* court on this precise issue, *MacKay* "do[es] not involve beneficial owners obtaining authorization to sue from the registered holders, and [is] thus inapplicable" (415 F3d at 246).

["[n]otably, the filing by the beneficial Holders has now been retroactively ratified by the registered Holder," citing *Applestein*, 145 F3d 242]).

Based on the foregoing, it is

ORDERED that defendant's motion for reargument is denied.



10/13/2022
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE