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Attorneys for Plaintiff(s): Regina Manantan

BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

SOUTHERN BRANCH - HALL OF JUSTICE & RECORDS

REGINA MANANTAN,

Plaintiff(s),

VS.

WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY; U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR-IN-INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION AS TRUSTEE, SUCCESSOR BY MERGER TO LASALLE BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR MORGAN STANLEY MORTGAGE LOAN TRUST 2007-7AX; QUALITY LOAN SERVICE CORPORATION; MOAB, INVESTMENT GROUP, LLC; and DOES 1 through 50, Inclusive,

Defendant(s).

Case No.: CIV535902

PLAINTIFF REGINA MANANTAN'S OPPOSITION TO DEFENDANT'S "MOTION FOR RECONSIDERATION"

Hearing's:
Date : September 6, 2016
Time : 9:00 a.m.
Dept. : Law & Motion

[JURY TRIAL DEMANDED]

Complaint Filed: October 20, 2015
1st Amended Filed: February 1, 2016
2nd Amended Filed: May 6, 2016
Trial Date: Not Assigned

TO THE COURT, TO MOVING DEFENDANT WELLS FARGO BANK, N.A., D/B/A AMERICA'S SERVICING COMPANY, AND ITS COUNSEL OF RECORD:

Plaintiff, REGINA MANANTAN, hereby OPPOSES the Defendant's "Motion for Reconsideration" as follows:

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I.

THE DECISION IN *YHUDAI* IS EXTREMELY BAD LAW, THAT MISCHARACTERIZED *ERODOBO II,* UPON WHICH IT PURPORTED TO RELY

The instant "motion for reconsideration" is entirely grounded upon a recently published case, *Yhudai* v. *Impac Funding Corporation* (2016), slip opinion, published July 29, 2016. As of the date of the filing of the instant motion, which was August 9, 2016, the deadline for the bringing of a Request for Reconsideration had not even passed.

As will now be demonstrated, for whatever reason, the Court in *Yhudai, supra,* did not state the real reason why the Appellate Division in New York, in *Wells Fargo Bank, N.A.* v. *Erobobo,* (2015)127 A.D.3d 1176, 9 N.Y.S.3d 312 **(***"Erobobo II"*), reversed the trial court in (*"Erobobo I"*): the judicial-foreclosure defendant had **WAIVED**, at the trial level, the issue of the foreclosing party's lack of standing to foreclose:

> Even affording a liberal reading to Erobobo's pro se answer (*see Boothe v Weiss,* 107 AD2d 730 [1985]; *Haines v Kerner,* 404 US 519, 520-521 [1972]), there is no language in the answer from which it could be inferred that he sought to assert the defense of lack of standing. Nor did Erobobo raise this defense in a pre-answer motion to dismiss the complaint. Accordingly, 1178*1178 the defendant waived the defense of lack of standing (*see* CPLR 3211 [a] [3]; [e]; *Matter of Fossella v Dinkins,* 66 NY2d 162, 167-168 [1985]; *Bank of N.Y. Mellon Trust Co. v McCall,* 116 AD3d 993 [2014]; *Aames Funding Corp. v Houston,* 57 AD3d 808 [2008]; *Wells Fargo Bank Minn., N.A. v Mastropaolo,* 42 AD3d 239, 244 [2007]), and could not raise that defense for the first time in opposition to the plaintiff's motion for summary judgment (*see Wells Fargo Bank Minn., N.A. v Mastropaolo,* 42 AD3d at 240). In any event, Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA (*see Bank of N.Y. Mellon v Gales,* 116 AD3d 723, 725 [2014]; *Rajamin v Deutsche Bank Natl. Trust Co.,* 757 F3d 79, 86-87 [2d Cir 2014]).
>
> Erobobo's contention that the plaintiff is not a "holder in due course" of the note and mortgage, as that term is employed in the UCC, is raised for the first time on appeal, and is not properly before this Court for appellate review (*see Goldman & Assoc., LLP v Golden,* 115 AD3d 911, 912-913 [2014]; *Muniz v Mount Sinai Hosp. of Queens,* 91 AD3d 612, 618 [2012]).

127 A.D.3d 1176, at 1177-1178. A copy of this case is attached hereto, as Exhibit "A".

Having determined that the defendant waived the defense, there was no occasion to make a

final determination about the merits of the defense; the statement citing the *Bank of N. Y. Mellon* and *Rajaman* cases thus is mere *obiter dicta.*

Even were the New York Appellate Division's determination about the validity under the PSA valid, nonetheless it refused to reach the question about the validity of the transfer under the Uniform Commercial Code. Thus, the New York Appellate Division made no conclusive determination about whether or not the transfer of the loan in that case was valid, much less made a determination about whether such a putative invalid transfer would be "void" or instead "voidable."

For these reasons, the Court in *Yhudai* reached a decision that was judicially reckless: it mischaracterized the true holding of the case upon which it purported to rely. It is extremely bad law.

II.

THE BEHAVIOR BY WELLS FARGO IN THE ERDOBO II CASE, WHICH IT NOW CITES, JUDICIALLY ESTOPS IT NOW TO CONTEST THAT THE SUBJECT TRANSFER WAS INVALID UNDER THE UNIFORM COMMERCIAL CODE

The language quoted above from *Wells Fargo Bank, N.A.* v. *Erobobo* indicates that it advocated that the Appellate Division should not reach the merits of whether or not the transfer in the *Erobobo* case was valid under the Uniform Commercial Code. The failure to seek vindication *on the merits,* and *not on the basis of waiver,* of the transfer's validity under the Uniform Commercial Code is equivalent to a judicial admission, akin to the "admission through silence" through which so many criminal cases are successfully won.

California observes the law of Judicial Estoppel. Accordingly, applying that principle to moving Defendant's behavior in the New York Appellate Division, the trial court here should apply the principle of Judicial Estoppel, and deem WELLS FARGO, N.A., to have admitted that the subject transfer was unlawful under the UCC.

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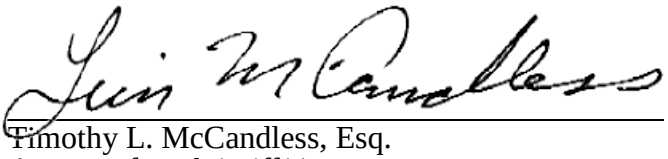
CONCLUSION

The Opinion by the Court of Appeal in *Yhudai*, *supra*, does not acknowledge that the case upon which it relied simply made no determination that is generally applicable to litigants; its decision was grounded upon the doctrine of WAIVER. Accordingly, the decision in *Yhudai* is bad law, and the trial court is justified to disregard it, for the reasons adduced above.

Respectfully submitted,

DATED: August 18, 2016

LAW OFFICES OF TIMOTHY L. MCCANDLESS



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MANANTAN *vs.* WELLS FARGO BANK, N.A.

Exhibit A

127 A.D.3d 1176 (2015)
9 N.Y.S.3d 312
2015 NY Slip Op 03522

WELLS FARGO BANK, N.A., as Trustee for ABFC 2006-OPT3 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2006-OPT3, Appellant, v. ROTIMI EROBOBO, Respondent, et al., Defendants.

2013-06986, Index No. 31648/09.

Appellate Division of the Supreme Court of New York, Second Department.

Decided April 29, 2015.

Balkin, J.P., Hall, Roman and Cohen, JJ., concur.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against the defendant Rotimi Erobobo is granted.

On July 17, 2006, Rotimi Erobobo executed a note to secure a loan from Alliance Mortgage Banking Corporation (hereinafter Alliance), to purchase real property located in Brooklyn. Erobobo gave a mortgage to Alliance to secure that debt, thus encumbering the subject premises. Wells Fargo Bank, N.A. (hereinafter the plaintiff), as trustee for ABFC 2006-OPT3, 1177*1177 ABFC Asset-Backed Certificates, Series 2006-OPT3 (hereinafter the trust), alleges that it was assigned the note and mortgage on July 18, 2008. Erobobo allegedly defaulted on the mortgage in September 2009, and, in December 2009, the plaintiff commenced this action against Erobobo, among others, to foreclose the mortgage. Erobobo's pro se answer contained a general denial of all allegations, and set forth no affirmative defenses. The plaintiff thereafter moved for summary judgment on the complaint, submitting the mortgage, the unpaid note, and evidence of Erobobo's default. In opposition, Erobobo, now represented by counsel, contended that the plaintiff lacked standing because the purported July 18, 2008, assignment of the note and mortgage to the plaintiff failed to comply with certain provisions of the pooling and servicing agreement (hereinafter the PSA) that governed acquisitions by the trust, and was thus void under New York law. The plaintiff replied that Erobobo waived his right to assert a defense based on lack of standing by not asserting that defense in his answer or in a pre-answer motion to dismiss the complaint, and that, in any event, Erobobo's contention was without merit.

The Supreme Court concluded that Erobobo's challenge to the plaintiff's possession, or its status as an assignee, of the note and mortgage did not implicate the defense of lack of standing, but merely disputed an element of the plaintiff's prima facie case, i.e., its contention that it possessed or was duly assigned the subject note and mortgage. On the merits, the court concluded that Erobobo raised a triable issue of fact as to whether the purported assignment of the note and mortgage to the plaintiff violated certain provisions of the PSA governing the trust, and was therefore void under EPTL 7-2.4. The plaintiff appeals. We reverse.

The plaintiff established its prima facie entitlement to judgment as a matter of law by producing the mortgage, the unpaid note, and evidence of the defendant's default (*see* *Deutsche Bank Natl. Trust Co. v Islar*, 122 AD3d 566, 567 [2014]; *Solomon v Burden*, 104 AD3d 839 [2013]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079 [2010]; *Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009]).

In opposition, Erobobo failed to raise a triable issue of fact. Even affording a liberal reading to Erobobo's pro se answer (*see* *Boothe v Weiss*, 107 AD2d 730 [1985]; *Haines v Kerner*, 404 US 519, 520-521 [1972]), there is no language in the answer from which it could be inferred that he sought to assert the defense of lack of standing. Nor did Erobobo raise this defense in a pre-answer motion to dismiss the complaint. Accordingly, 1178*1178 the defendant waived the defense of lack of standing (*see* CPLR 3211 [a] [3]; [e]; *Matter of* *Fossella v Dinkins*, 66 NY2d 162, 167-168 [1985]; *Bank of N.Y. Mellon Trust Co. v McCall*, 116 AD3d 993 [2014]; *Aames Funding Corp. v Houston*, 57 AD3d 808 [2008]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 244 [2007]), and could not raise that defense for the first time in opposition to the plaintiff's motion for summary judgment (*see* *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d at 240). In any event, Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA (*see* *Bank of N.Y. Mellon v Gales*, 116 AD3d 723, 725 [2014]; *Rajamin v Deutsche Bank Natl. Trust Co.*, 757 F3d 79, 86-87 [2d Cir 2014]).

Erobobo's contention that the plaintiff is not a "holder in due course" of the note and mortgage, as that term is employed in the UCC, is raised for the first time on appeal, and is not properly before this Court for appellate review (*see* *Goldman & Assoc., LLP v Golden*, 115 AD3d 911, 912-913 [2014]; *Muniz v Mount Sinai Hosp. of Queens*, 91 AD3d 612, 618 [2012]).

Accordingly, the Supreme Court should have granted that branch of the plaintiff's motion which was for summary judgment on the complaint insofar as asserted against Erobobo.

MANANTAN *vs.* WELLS FARGO BANK
SAN MATEO SUPERIOR COURT / Case No.: CIV535902

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is LAW OFFICES OF TIMOTHY L. MCCANDLESS, 26875 Calle Hermosa, Suite A, Capistrano Beach, California 92624.

On the date set forth below, I served the following document(s) described as:

- **PLAINTIFF REGINA MANANTAN'S OPPOSITION TO DEFENDANT'S "MOTION FOR RECONSIDERATION"**

On the interested parties in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

- **SEE ATTACHED SERVICE LIST**

☒ (MAIL) I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Capistrano Beach, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 18th, 2016, at Capistrano Beach, Orange County, California.

Timothy L. McCandless

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