

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

HSBC BANK, USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR THE ACE SECURITIES
CORPORATION HOME EQUITY LOAN TRUST,
SERIES 2005-AG1, ASSET BACKED PASS-
THROUGH CERTIFICATES

CASE NO. 09-5696-CI-13

Plaintiff,

v.

ANNABEL E. MONTGOMERY, et al,

Defendant(s).

**DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AMENDED ANSWER/MOTION
TO EFFECUATE DISMISSAL**

COMES NOW, the Defendant ANNABEL E. MONTGOMERY (hereinafter "Defendant"), by and through undersigned counsel MATTHEW D. WEIDNER, and respectfully motions this Court to STRIKE PLAINTIFF'S AMENDED ANSWER AND EFFECUATE DISMISSAL, pursuant to Rules 1.140(f) and 1.420(b) Fla. R. Civ. Pro. and this Court's ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, and in support thereof states:

1. On or about January 12, 2010 this Court issued its ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (hereinafter "Order"). A copy of the Order is attached hereto as "Exhibit A".

2. The Order states in paragraph nine (9) that "[b]ecause the Plaintiff failed to plead capacity, the Defendant's Motion to Dismiss is GRANTED and the case is dismissed without prejudice **except that the Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint** to address the matters raised within the Defendant's Motion to

Dismiss.” *Bold emphasis added.* While the docket reflects that an Amended Complaint was filed, this complaint was not served upon counsel for Defendant and Defendant has not responded to this complaint if it was indeed filed.

3. Fla. R. Civ. Pro. 1.140(f) provides that “[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.”

4. Fla. R. Civ. Pro. 1.420(b) provides, in pertinent part, that “[a]ny party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with these rules or any order of court.” *Bold emphasis added.*

5. Here, while the Plaintiff may have filed an Amended Complaint, this Amended Complaint was filed on or about March 25, 2010. The purported Amended Complaint, then, was filed some two and a half months after this Court’s Order and well after the deadline for filing had expired. Therefore, the Plaintiff has failed to comply with an order of this Court.

6. As such, the instant litigation has been dismissed without prejudice pursuant to the express mandate of the January 12, 2010 Order. Should the Plaintiff desire to proceed, it must re-file its complaint under a different case number and re-serve the Defendant.

WHEREFORE, because the Plaintiff has failed to file an amended complaint with the Court within the prescribed period of time and pursuant to the January 12, 2010 Court Order, the Defendant respectfully requests that the Court strike the Plaintiff’s Amended Complaint, grant dismissal, award attorney’s fees to the Defendant, and grant any other relief the court may deem appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 9th day of August, 2010 to KATHERINE BENNINGER, Florida Default Law Group, P.L., P.O. Box 25018, Tampa, FL 33622-5018.

By: 

MATTHEW D. WEIDNER
Attorney for Defendant
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 0185957

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AS TRUSTEE FOR THE ACE SECURITIES CORPORATION
HOME EQUITY LOAN TRUST, SERIES 2005-AG1, ASSET
BACKED PASS THROUGH CERTIFICATES

PLAINTIFF

CASE NO. 52-2009-CA-005696x

V.

ANNABEL E. MONTGOMERY, ET. AL.
DEFENDANT

09-5296-A-13

FILED
2010 JAN 12 PM 4:41
KENT BURKE
CLERK OF PINELLAS COUNTY

ORDER

THIS MATTER, having come on consideration from the Defendant's Motion to Dismiss, filed by counsel for Defendant Matthew Weidner, this Court having reviewed the pleadings filed in this matter and accepted argument of counsel, it is hereby,

ORDERED AND ADJUDGED that:

1. In its Motion to Dismiss, counsel for Defendant noted that the only identification of the Plaintiff appears in the caption of the Complaint and the first paragraph where the Plaintiff is identified simply as, "HSBC BANK, USA, NATIONAL ASSOCIATION AS TRUSTEE FOR THE ACE SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES 2005-AG1, ASSET BACKED PASS-THROUGH CERTIFICATES".

The Plaintiff's name is not set off or specified within the body of the Complaint or in any other pleading nor is any description provided to explain the legal nature or registered agent or address of the named Plaintiff.

2. Counsel for Defendant, in support of its Motion to Dismiss, cited Florida Rules of Civil Procedure Rule 1.120(a) Pleading Specific Matters which provides that:

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued, the authority of a party to sue or be sued in a representative capacity, or the legal existence of an organized association of persons that is made a party, except to the

EXHIBIT "A"

extent required to show the jurisdiction of the court....When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

3. Counsel for Defendant also cited Florida Rules of Civil Procedure Rule 1.110(b) which requires that a Complaint include a "short and plain statement of the grounds upon which the court's jurisdiction depends..." Counsel for Defendant asserted that by failing to plead or specify in what capacity the Plaintiff brings suit and by failing to define or identify in any way the nature of its legal entity, the Plaintiff has not plead that it has the capacity to maintain suit before this Court.

4. "Capacity to sue" is an absence of legal disability which would deprive a party of the right to come into court. 59 Am.Jur.2d *Parties* § 31 (1971). This is in contrast to "standing" which requires an entity have sufficient interest in the outcome of litigation to warrant the court's consideration of its position. Keehn v. Joseph C. Mackey and Co., 420 So.2d 398 (Fla.App. 4 Dist. 1982).

5. Counsel for Plaintiff introduced a Response to Defendant's Motion to Dismiss in which it alleged that it had standing, but the Response failed to respond or address in any way the arguments related to capacity presented by Defendant.

6. Counsel for Defendant represented to the Court that his research revealed few Florida Court opinions which address the issue of capacity to sue, but urged this Court to consider Federal Court opinions interpreting Federal Rule of Civil Procedure 9(a) from which Florida Rule of Civil Procedure Rule 1.120(a) is derived.

7. The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. Hershel California Fruit Products Co. v. Hunt Foods

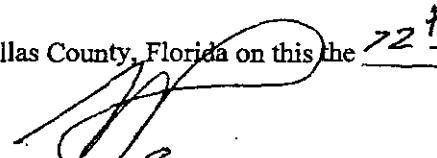
111 F. Supp. 603 (1975), quoting Coburn v. Coleman 75 F. Supp. 107 (1974); Klebano v. New York Produce Exchange, 344 F.2d (2nd Cir. 1965).

8. Failure to raise the issue of a Plaintiff's capacity by a specific negative averment has been held to constitute a waiver of that defense. McDonough Equip. v. Sunset Amoco West, 669 So.2d 300 (Fla.App. 3 Dist. 1996); Plumbers Loc. U.N. 519; Miami Fla. v. Serv. Plbg., 401 F. Supp. 1008 (1975); and see Sun Val. American Land Lease, 927 So.2d 259 (Fla.App. 2 Dist. 2006); Shaw v. Stutchman, 105 Nev. 128 (1989).

9. Because the Plaintiff failed to plead capacity, the Defendant's Motion to Dismiss is GRANTED and the case is dismissed without prejudice except that the Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint to address the matters raised within the Defendant's Motion to Dismiss.

9. If the Plaintiff Amends its Complaint the Defendant shall have twenty (20) days from the date of receipt of Amended Complaint to file its responsive pleading.

DONE AND ORDERED in chambers, Pinellas County, Florida on this the 22th day of January, 2010 by



Hon. Anthony Rondolino

cc: Katherine Benninger, Esq.
Matthew Weidner, Esq.

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Defendant(s).

FILED
ST. PETERSBURG BRANCH
2010 AUG 11 PM 4:53
KEN BURKE
CLERK OF CIRCUIT COURT


ORDER OF DISMISSAL

THIS MATTER, having come on consideration from the DEFENDANT'S MOTION TO
EFFECTUATE DISMISSAL, submitted by counsel for Defendant Matthew D. Weidner, Esq.,
this Court, having reviewed and after accepting the arguments of counsel, it is hereby,

ORDERED AND ADJUDGED that:

- 1. This action is dismissed without prejudice.

Done and ordered this 11 day of August, 2010 in chambers in St. Petersburg, Pinellas
County, Florida.


Hon. Anthony Rondolino, Circuit Judge

Copies furnished to:
KATHERINE BENNINGER, Esq.
MATTHEW D. WEIDNER, Esq.