

DANIEL M. HERRIGAN
IN THE COURT OF COMMON PLEAS

2009 JAN 26 AM 11:42 SUMMIT COUNTY, OHIO

SUMMIT COUNTY
CLERK OF COURTS

The Bank of New York Mellon, as

Successor Trustee under NovaStar

Mortgage Funding Trust, Series 2006-2

% Saxon Mortgage Services, Inc.

Plaintiff

vs.

Kathleen M. Stout.

Defendant

CASE NO. CV-2008-09-6768

JUDGE: LYNNE S. CALLAHAN

SECOND

BRIEF IN SUPPORT OF

MOTION TO DISMISS

PURSUANT TO

OHIO CIVIL RULE 12 (B) (6)

AND

OHIO CIVIL RULE 19(A)(2)(b)

NOW COMES, Defendant, Kathleen M. Stout, by and through counsel in response to Plaintiff's Amended Complaint and in support of her Motion to Dismiss says as follows:

1. PLAINTIFF IS AN UNREGISTERED FOREIGN BUSINESS TRUST OR FOREIGN REAL ESTATE INVESTMENT TRUST AND HAS NO AUTHORITY TO FILE SUIT IN THE COURTS OF THE STATE OF OHIO UNTIL SO REGISTERED.
2. PLAINTIFF WAS NOT THE OWNER OF THE ADJUSTABLE RATE NOTE, WHICH IS THE SUBJECT OF THIS LITIGATION, AT THE TIME SUIT WAS FILED. THUS, PLAINTIFF DID NOT HAVE STANDING TO SUE WHEN THE COMPLAINT WAS FILED.
3. PLAINTIFF IS NOT IN COMPLIANCE WITH LOCAL RULES WITH RESPECT TO ITS CERTIFICATE OF READINESS.

BACKGROUND

Plaintiff's Complaint in Foreclosure was served October 6, 2008. Defendant filed a Leave to Plead October 15, 2008 and then filed a Motion to Dismiss pursuant to Ohio Civ. Rul 12 (B)(6) and Ohio Civ. Rul 19 (A)(2)(b) on November 12, 2008.

On November 24, 2008, prior to a ruling on the Motion to Dismiss, Plaintiff filed a Motion to File a Supplemental Pleading (Plaintiff's Motion). Plaintiff's Motion stated that it would include "the endorsed promissory note" The Court granted Plaintiff's Motion and an Amended Complaint was personally served on Defense counsel on January 6, 2009. Accordingly, Defendant hereby renews its Motion to Dismiss.

PLAINTIFF IS AN UNREGISTERED FOREIGN BUSINESS TRUST OR FOREIGN REAL ESTATE INVESTMENT TRUST AND HAS NO AUTHORITY TO FILE SUIT IN THE COURTS OF THE STATE OF OHIO UNTIL IT OBTAINS SUCH AUTHORITY BY FILING WITH THE SECRETARY OF STATE.

Defendant states that plaintiff lacks the capacity to maintain an action in the State of Ohio as it has failed obtain appropriate authorization from the Secretary of the State of Ohio to transact business.

Specifically, NovaStar Mortgage Funding Trust, Series 2006-2 (NovaStar Trust), Plaintiff has failed to file as a "foreign business trust" pursuant to Ohio Revised Code Sec. 1746.04 or as a "foreign real estate investment trust" pursuant to Ohio Rev. Code Sec. 1747.03. It is not known from the pleadings filed in which category NovaStar Trust is included so both requirements are set forth below.

"Business trusts" are subject to, among others, the following statutes:

1746.04 Filing with secretary of state before transacting business.

(A) Except as set forth in section 1746.03 of the Revised Code, before transacting business in this state, a business trust shall file in the office of the secretary of state, on forms prescribed by the secretary of state, a report containing the following information:

- (1) A list of the names and addresses of its trustees;
- (2) The address of its principal office;
- (3) In the case of a foreign business trust, the address of its principal office within this state, if any;

...Such report shall have attached as an exhibit an executed copy of the trust instrument or a true and correct copy of it, certified to be such by a

trustee before an official authorized to administer oaths or by a public official in another state in whose office an executed copy is on file.

... (D) The trust instrument and other information filed in the office of the secretary of state are matters of public record, and persons dealing with a business trust are charged with constructive notice of the contents of any such instrument or information by reason of such filing.

(E) A copy of a trust instrument or other information filed in the office of the secretary of state shall be accepted as prima-facie evidence of the existence of the instrument or other information and of its contents, and conclusive evidence of the existence of such record. [emphasis added]

Ohio Rev. Code Sec. 1746.04

1746.17 Validity of contracts or titles not affected by violation.

(A) The transaction of business in this state by a business trust in violation of this chapter does not affect the validity of any contract with such trust, or the validity of the title to any estate or interest in real or personal property taken, held, or disposed of by such trust. No business trust that has transacted business in violation of this chapter, nor any persons acting on its behalf, shall maintain any action in any court of this state until it has fully complied with this chapter and further paid to the secretary of state a forfeiture of one thousand dollars. [emphasis added]

(B) Full compliance with this section prior to the bringing of an action to recover a forfeiture under section 1746.16 of the Revised Code constitutes a bar to such action.

Ohio Rev. Code Sec. 1746.17

Similarly "Real estate investment trusts" are subject to, among others, the following statutes:

1747.03 Filing with secretary of state before transacting business.

(A) Before transacting real estate business in this state, a real estate investment trust shall file the following report in the office of the secretary of state, on forms prescribed by the secretary of state:

(1) An executed copy of the trust instrument or a true and correct copy of it, certified to be such by a trustee before an official authorized to administer oaths or by a public official in another state in whose office an executed copy is on file;

(2) A list of the names and addresses of its trustees;

(3) The address of its principal office;

(4) In the case of a foreign real estate investment trust, the address of its principal office within this state, if any;

(5) The business name of the trust;

(6) The name and address within this state of a designated agent upon whom process against the trust may be served;

(7) The irrevocable consent of the trust to service of process on its designated agent and to service of process upon the secretary of state if, without the registration of another agent with the secretary of state, its designated agent has died, resigned, lost authority, dissolved, become disqualified, or has removed from this state, or if its designated agent cannot, with due diligence, be found;

(8) Not more than ninety days after the occurrence of any event causing any filing made pursuant to divisions (A)(2) to (6) of this section, or any previous filing made pursuant to this division, to be inaccurate or incomplete, all information necessary to maintain the accuracy and completeness of such filing.

(B) For filings under this section, the secretary of state shall charge and collect the fee specified in division (T) of section 111.16 of the Revised Code, except for filings under division (A)(8) of this section pertaining solely to division (A)(6) of this section, for which the secretary of state shall charge and collect the fee specified in division (R) of section 111.16 of the Revised Code.

(C) All persons shall be given the opportunity to acquire knowledge of the contents of the trust instrument and other information filed in the office of the secretary of state, but no person dealing with a real estate investment trust shall be charged with constructive notice of the contents of any such instrument or information by reason of such filing.

(D) A copy of a trust instrument or other information filed in the office of the secretary of state is prima-facie evidence of the existence of the instrument or other information and of its contents, and is conclusive evidence of the existence of such record. [emphasis added]

Ohio Rev. Code Sec 1747.03

1747.12 Violation effects.

(A) The failure of any real estate investment trust to be authorized to transact real estate business in this state does not affect the validity of any contract with such trust, or the validity of the title to any estate or interest in real property taken, held, or disposed of by such trust. No real estate investment trust that should have been so authorized, nor any persons on its behalf shall maintain any action in any court of this state until it has

obtained such authority by filing with the secretary of state as required by division (B) or (C) of this section, paying the fee associated with the filing, and further paying to the secretary of state a forfeiture of one thousand dollars.

(B) If such real estate investment trust has not been previously authorized to transact real estate business in this state or if its authority has been surrendered, it shall make the filings specified in divisions (A)(1) to (7) of section 1747.03 of the Revised Code and pay the specified fee for the filing. ... [emphasis added]

Ohio Rev. Code Sec 1747.12

Whether a "business trust" or a "real estate investment trust" NovaStar Mortgage Funding Trust, Series 2006-2 should have filed with the Secretary of the State of Ohio for permission to do business in the state of Ohio. Until appropriately filed, and until appropriate fees are paid, NovaStar Trust lacks the capacity to maintain an action in the Courts of Ohio. **1746.17 (A). 1747.12 (A).**

Without compliance by NovaStar Trust, Defendant and others who may desire or have a need to know the contents of the NovaStar Trust trust agreement are without the benefits contemplated by the statutes providing disclosure of the terms of the foreign business trust or foreign real estate investment trust. Furthermore, the statutes prohibit NovaStar Trust from maintaining an action in the courts of Ohio. Without the appropriate registration and filing NovaStar Mortgage Funding Trust, Series 2006-2 lacks standing to sue in the courts of Ohio.

Case law on registration of foreign trusts is not plentiful. However, the filing requirement for "foreign trusts" is similar to the requirement that "foreign corporations" file with the Secretary of State.

P.K. Springfield, Inc. v. Hogan (1993), holds that the failure "to have an Ohio license is a defense to any action maintained by that corporation." 86 Ohio App.3d at 770. In general, the failure of a corporation to have an Ohio license is a defense to any action maintained by that corporation. Therefore, adverse parties may move to dismiss the action, or, in the absence of such a motion, the trial court may dismiss the action on its own motion. However, this defense may be waived if not raised at the appropriate time. See Allstate Financial Corp. v. Westfield Serv. Mgt. Co. (1989); State ex rel. Bri-Den Co., Inc. v. Union Scioto Schools Bd. of Edn. (Mar. 7, 1990), Ross App. No. 1543, unreported, 1990 WL 34363

P.K. Springfield, Inc. v. Hogan (1993), 86 Ohio App.3d 764

"Elements of standing are an indispensable part of a plaintiff's case." Kiraly v Francis A. Bonanno, Inc. (Oct. 29 1997) Summit App. No. 18250 (affirming Civ. R. 12[B][6] dismissal of complaint for plaintiff's lack of capacity to sue.)

The trust documents that are required for filing with the Secretary of State should set forth the powers of the Trustee so that affected parties may determine whether the Trust's actions are authorized. In addition the trust documents may provide information regarding Saxon Mortgage Services, Inc.(Saxon) which name appears in the caption and on a recently filed case document. No explanation has been offered describing Saxon's interest, authority or role in this litigation but it has executed critical documents assigning interest in the Adjustable Rate Note in this case. **(Amended Complaint, Exhibit-Allonge to Note)**

If, as is the common practice in the industry, Saxon is the loan servicer, then Saxon most likely paid for and would assert it is entitled to late fees and other fees from the Mortgage and Adjustable Rate Note which are the subject of this action. If such an interest exists Saxon is a necessary party to the action. It's authority to act on behalf of Plaintiff however has not been established or explained.

PLAINTIFF WAS NOT THE OWNER OF THE ADJUSTABLE RATE NOTE, WHICH IS THE SUBJECT OF THIS LITIGATION, AT THE TIME SUIT WAS FILED. THUS, PLAINTIFF DID NOT HAVE STANDING TO SUE WHEN THE COMPLAINT WAS FILED.

In addition to Plaintiff's failure to obtain authorization to do business in the State of Ohio, documentation provided by Plaintiff with the Amended Complaint demonstrates that when the action was commenced Plaintiff is was not a real party in interest with respect to the Adjustable Rate Note which carries the right to demand payment. Based on the Allonge to Note file by Plaintiff as part of the Amended Complaint, Plaintiff was not the holder of when the complaint was filed. **(Amended Complaint, Exhibit-Allonge to Note)**

The Complaint alleges that "Plaintiff is due upon the Note principal in the amount of \$166,055.09..." However, the Adjustable Rate Note was not in the name of the Plaintiff and no assignment of the Adjustable Rate Note to the Plaintiff was provided with the Complaint. The assignment that accompanied the original Complaint only conveys an interest in the Mortgage. For Plaintiff to have had standing upon commencement of the litigation the Allonge to Note would have to predate the Complaint. It does not. The Complaint commencing the action was filed September 26, 2008 the Allonge to Note is date December 15, 2008 almost three months later. Furthermore, the Allonge to Note introduces another entity to the litigation whose role is unclear, Saxon Mortgage Services, Inc.

The definitions section of the Mortgage clearly identifies that the Adjustable Rate Note is a separate instrument. Thus, the Adjustable Rate Note presumably remained in the name of NovaStar Mortgage Inc. a Virginia Corporation, as set forth in the original pleadings filed by Plaintiff. The initial records provided by Plaintiff appeared to identify NovaStar Mortgage Inc. as the real party in interest, but NovaStar Mortgage Inc. was not then and is not now a party to the action. Now, Saxon Mortgage Services, Inc. appears in the chain of title documents and appears to have conveyed part of NovaStar Mortgage, Inc's interest to Plaintiff. There is no foundation showing Saxon's connection to the parties it purportedly represents and on whose behalf it has acted. Obligations under the Adjustable Rate Note were solely to NovaStar Mortgage, Inc. As of the commencement of this case they remained there. The interest in the Adjustable Rate Note has apparently been partially assigned to Plaintiff and it would appear partially assigned to Saxon to whom Defendant has been making payments.

Rule 19 requires that persons who have an interest as an "assignor" be joined. **Ohio Civ. Rul. 19 (A)(3)**. It also requires that a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. **Ohio Civ. Rul 19 (A)(2)(a) and (b)**.

Without Plaintiff accounting for all interests, legal and equitable, Defendant is subject to future litigation from owners of those interests not joined, inconsistent obligations among all owners and the lack of a final judgment affording complete relief to all those who have or may claim an interest in the property, note and mortgage which is the subject of this action. This same concern also appears to be covered by this Court's requirements that are now part of the Summit County Local Rules mandating a Certificate of Readiness. **(Summit County Local Rule 11.01)**

Since, Saxon is the assignor of the Adjustable Rate Note and may claim an interest it should be joined as a necessary party. If NovaStar Mortgage, Inc. has retained any interest it too should be joined.

Midland Funding, L.L.C.-MFL v. Halberg-Weiss, 2007-Ohio-3241, includes a discussion regarding a foreclosure case where the real party in interest did not have an interest at the inception of the litigation. The Court held that the case must be dismissed.

'Under Ohio law, "if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action." State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 77, 1998-Ohio-0275; Civ.R. 17(A). The "real party in interest" is one who is directly benefited or injured by the outcome of the case. Shealy v. Campbell (1985), Ohio St.3d 23, 24. The purpose of this rule is so the defendant can avail himself of evidence and defenses that the defendant has against the real

party in interest, to assure the defendant of the finality of the judgment, and to protect the defendant against another suit brought by the real party at interest on the same matter. Id. at 24-25. When an action is prosecuted in the name of the real party in interest, and that party is awarded judgment, the party against whom the judgment is awarded is protected from the possibility of multiple judgments against him. See Oda v. Davis (1992), Ohio App.3d 555. Myers v. Evergreen Land Dev., Ltd., 2008-Ohio-1062, 7th District Court of Appeals of Ohio, Mahoning County.’

Midland Funding, L.L.C.-MFL v. Halberg-Weiss, 2007-Ohio-3241

In this case it appears that initially NovaStar Mortgage, Inc. was the entity that had all rights under the Adjustable Rate Note. The Note was assigned, by allonge, to NovaStar Mortgage Funding Trust, Series 2006-2 which now appears to be a real party in interest. However, Defendant states that Saxon claimed the right to payments and payments were made to Saxon. Accordingly, Saxon would appear to have a financial interest in the Mortgage and Adjustable Rate Note and to be a necessary party.

PLAINTIFF IS NOT IN COMPLIANCE WITH LOCAL RULES REGARDING ITS
CERTIFICATE OF READINESS.

Similar to the requirement outlined above regarding standing the Summit County Local Rules states that the Certificate of Readiness requires that assignments “bear a date prior to the filing of the complaint. (**Summit County Local Rule 11.01 –Certificate of Readiness, See paragraphs 8**) In addition the Certificate of Readiness should contain all necessary supporting documents establishing separate chains of ownership (**Summit County Local Rule 11.01 –Certificate of Readiness, See paragraphs 6**).

The role or interest for Saxon Mortgage Services, Inc. is not clear from the pleadings. If Saxon has purchased the rights to receive payments from the Mortgagor or other rights that derive from payment of the mortgage then those “separate rights of ownership” and necessary supporting documents are required to be attached to the complaint. (**Summit County Local Rule 11.01 –Certificate of Readiness, See paragraphs 6**) It would appear that the intent of the Civil Rules and Local Rules is to account for all right, title and interest in and to the Mortgage and Adjustable Rate Note. To do otherwise will leave Defendant subject to future claims from any interests, not included in this action, that have been severed from the original conveyance by Defendant to NovaStar Mortgage, Inc.

SUMMARY

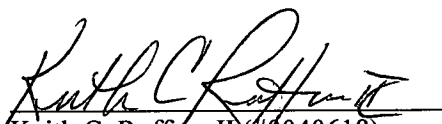
In summary, Plaintiff has not filed properly with the Secretary of the State of Ohio and no trust instrument is filed with the state informing the public or those doing business with or with an interest in the terms thereof have the benefit of the information contemplated by the statute to be made available to the appropriate persons and the public.

Secondly, Plaintiff has not demonstrated that it had standing as the owner of the Adjustable Rate Note at the time the Complaint was filed. In fact the documents attached to the pleadings indicate to the contrary. Accordingly, unless other parties are joined or the case is dismissed Defendant is potentially subject to the possibility of multiple judgments.

Finally, Plaintiff has failed to identify and provide supporting documentation required by the Local Rules of Summit County Common Pleas Court.

For the foregoing reasons Defendant Stout, respectfully requests that this action be dismissed and that Plaintiff be ordered to file the appropriate documentation with the Secretary of the State of Ohio and provide supporting documentation for all interests in either the Mortgage or the Adjustable Rate Note in the event it re-files in this matter.

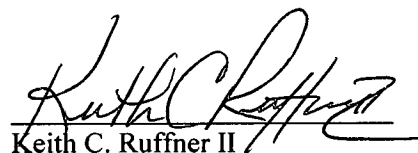
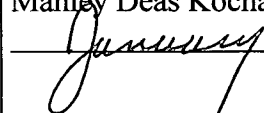
Respectfully submitted,



Keith C. Ruffner II (#0040618)
Attorney for Defendants
209 S. Main St., Suite 201
Akron, Ohio 44308-1319
(330) 535-7174

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by regular U. S. Mail to David B. Bokor, Manley Deas Kochalski LLC, P.O 165028, Columbus, Ohio 43216-5028 this 24th day of January, 2009.



Keith C. Ruffner II