

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL
CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA**

THE BANK OF NEW YORK MELLON F/K/A)
THE BANK OF NEW YORK, AS TRUSTEE)
FOR THE CERTIFICATEHOLDERS CWABS,)
INC., ASSET-BACKED CERTIFICATES,)
SERIES 2006-13,)

Plaintiff,)

vs.)

GINA E. FAULK, et al.)

Defendants.)

CASE NO. 10-338-CA

ORDER ON RECOMMENDED ORDER

THIS CAUSE came on upon the foregoing Recommended Order of the General Magistrate, Antonio J. Perez-Benitoa, and plaintiff's exception to magistrate's recommended report, regarding defendant's Motion To Dismiss Or In The Alternative For A More Definite Statement and the undersigned, having considered the findings, exceptions and recommendation therein contained, it is thereupon **ORDERED AND ADJUDGED:**

1. That plaintiff's exception to magistrate's recommended report is denied.
2. That the Recommended Order of the General Magistrate dated April 21 and attached hereto as "Exhibit A" be and the same is ratified and approved.
3. That the parties herein are ordered to abide by all the findings and recommendations contained in the Recommended Order of the General Magistrate, and the court hereby adopts each and every finding and recommendation contained therein as the Order of this Court.

DONE AND ORDERED in Chambers at Naples, Collier County, Florida, this 14 day of June, 2011.

By: Simonaro
The Honorable Daniel R. Monaco
Circuit Court Judge, Twentieth Judicial Circuit

Conformed copies to:
✓ JAMES D. CULLINLEY
✓ Jessica Serrano, Esq.
✓ Peter Huy, Esq.

In Court
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SERIES 2006-13,)

) CASE NO. 10-338-CA

) Plaintiff,)

) vs.)

) GINA E. FAULK, et al.)

) Defendants.)
_____)

REPORT AND RECOMMENDATIONS OF THE MAGISTRATE

Issues Presented: **DEFENDANT’S MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR A MORE DEFINITE STATEMENT**

ATTENDANCE:

_____ Plaintiff

 X Attorney For Plaintiff

_____ Defendant

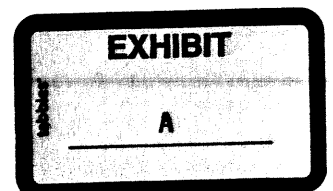
 X Attorney For Defendant

_____ Court Reporter

 X Clerk of Court

Address of Reporter if any: _____

This cause has come on to be heard before the Magistrate, on March 31, 2011 pursuant to the Defendant’s Motion To Dismiss Or In The Alternative For A More Definite Statement. The Magistrate has jurisdiction pursuant to Florida Rules of Civil Procedure, 1.490, et seq. This Court being otherwise advised, the following Findings of Fact and Conclusions of Law are made:



FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The order of referral was signed by the Honorable Cynthia A. Pivacek on March 2, 2011.
2. While the court file does not contain a notice of hearing, counsel present at hearing indicated that plaintiff's counsel had prepared the notice of hearing and it was served on all parties by U.S. mail on February 18, 2011.
3. The three-page promissory note attached to the complaint names America's Wholesale Lender as owner of the note.
4. While there is no endorsement on the note attached to the complaint and generally exhibits control over the allegations in the complaint, BAC-Funding Consortium Inc. v. Jean-Jacques, 28 So. 3d 836 (Fla. 2d DCA), plaintiff's counsel has represented to the court that she is in possession of the fourth page of the note, which includes a blank endorsement.
5. Plaintiff's counsel further represented to the court that the fourth page of the note with the blank endorsement would be filed with the court within five days.
6. On the issue of capacity, the only identification of plaintiff appears in the caption of the complaint.
7. 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 of the entity.
8. Florida Rules of Civil Procedure 1.120(a) Pleading Specific Matters provides:
 - (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 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.

9. Further, Florida Rules of Civil Procedure 1.110(b) requires that a complaint include a "short and plain statement of the grounds upon which the court's jurisdiction depends..."

10. 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, plaintiff has not plead that it has the capacity to maintain suit before this court.

11. "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. 4th DCA 1982).

12. Defendant's counsel represented to the court that he could not find a Florida district court opinion which addresses the issue of capacity to sue, but submitted to the court federal court opinions interpreting Federal Rule of Civil Procedure 9(a) from which Florida Rule of Civil Procedure Rule 1.120(a) is derived.

13. While the court did not consider the federal court opinions, defendant's counsel also provided the court with a copy of Judge Rondolino's December 15, 2009 order in Wachovia Mortgage, FSB f/k/a World Savings Bank v. Maticchiero, Sixth Judicial Circuit in and for Pinellas County, Florida, case number 08-16936-CI-13, on the same issue, which the court finds persuasive.

14. 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 (2d Cir. 1965).

15. 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. 3d DCA 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. 2d DCA 2006); Shaw v. Stutchman, 105 Nev. 128 (1989).

RECOMMENDED ORDER OF THE MAGISTRATE

Based upon the above-stated Findings of Fact and Conclusions of Law, the Magistrate submits the following Recommended Order for the approval of the Court:

1. Defendant's motion to dismiss is granted in part and denied in part.
2. Based on the representation of plaintiff's counsel that the fourth page of the promissory note, that includes a blank endorsement, is in the possession of plaintiff's counsel and would be filed within five days, defendant's motion to dismiss as to inconsistencies between the promissory note attached to the complaint and plaintiff's allegations of ownership of the note is denied without prejudice. Plaintiff shall file the fourth page of the note within five days of the order adopting this report and recommendations.
3. As to the issue of capacity, defendant's motion to dismiss is granted with leave to amend.
4. Plaintiff shall have twenty days from the order adopting this report and recommendations to file an amended complaint to address the capacity issues raised in defendant's motion to dismiss.

5. Within fifteen (15) days from the date that this Recommended Order is sent to the persons set forth below, either party may file an exception to this Recommended Order pursuant to Rule 1.490(h) of the Florida Rules Civil Procedure and the procedures set forth in said Rule. This 15 days includes a 10 day period allowed for parties to file such exceptions and a 5-day-mail period. After 15 days, the Circuit Court will execute an Order Adopting this Recommended Order and said Order shall be final at that time.

Dated: 4/21, 2011.

By: [Signature]
The Honorable Antonio J. Perez-Benitoa
Magistrate, Twentieth Judicial Circuit

Conformed copies to:

Jessica Serrano, Esq.
Peter Huy, Esq.