

COMMERCIAL DIVISION UPDATE

Expert Analysis

Standing to Bring Claims Related to Loan Assignments

On a subject that has been attracting much judicial attention, New York County Commercial Division Justice Bernard J. Fried recently held in *Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp.*,¹ that an assignee of a loan had standing to bring both tort and contract claims related to the loan documents. As this decision elucidates, language assigning “all rights and interests” in a loan can transfer to the assignee the right to bring both contract and tort claims, particularly where the assignment assigned claims “related to” the loan documents. In addition, this and other decisions teach that the assignee’s payment of full value to the assignor does not extinguish the assigned claims by eliminating the damage element of the causes of action assigned. In contrast, in the mortgage foreclosure context, the focus of the standing issue frequently turns on the timing of the assignment and the actual interest the assignor had in the mortgage at the time of assignment.

The ‘Stewardship’ Decision

The *Stewardship* case finds its origins in a 2007 loan in the amount of \$40 million made by the original lender, Acorn, to R. Esmerian Inc. (REI), and a 2008 loan in the amount of \$13.5 million that Acorn made to Vassal Jewels LLC.² As part of the loan transactions, Acorn required both borrowers to pledge security, with the collateral pledged having minimum appraised values based on the loan amounts.³ Accordingly, REI and Vassal employed two appraisers to value the collateral, which included art collections, antiques and jewels.⁴ The appraisers allegedly valued the collateral at “well in excess” of the required amounts, thus satisfying the loan agreements’ appraisal requirements.⁵

Thereafter, Acorn assigned its rights and interests in the loans, the pledged collateral and all related documents to the plaintiffs, but remained the servicer of the loans (prior assignments).⁶ In February 2008, Acorn gave REI notice that it was in default under its loan, and in January 2009 Acorn gave a similar notice to Vassal on its loan, both notices accelerating the loans.⁷ When neither REI nor Vassal made payment, Acorn took possession of the pledged collateral.⁸ Acorn then had the collateral appraised for purposes



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of auction and liquidation, and these new appraisals concluded that the collateral values were “considerably lower” than the values given by the borrowers’ appraisers. As a consequence, the assignees of the loans brought suit against one of the appraisers and its principal alleging fraud, negligent misrepresentation, professional negligence, breach of contract and breach of General Business Law Section 239-c.⁹

Apparently, no notice of the prior assignments was given to the borrowers, which arguably was required by the terms of the loan agreements to make them effective. In an effort to cure this apparent defect, before the plaintiffs commenced this action, Acorn again assigned to the plaintiffs “its rights and interest in the loans, the pledged collateral, and all claims and causes of action related thereto” (2009 assignment).¹⁰

The scope of claims assigned, and even whether those claims survive the assignment, will usually be determined by the specific language in the assignment itself.

The defendants moved to dismiss the complaint, arguing that both the prior assignments and the 2009 assignment were ineffective to assign or transfer the causes of action asserted by the plaintiffs.¹¹ The defendants presented several arguments supporting their positions, relying principally on the New York Court of Appeals decision in *State of California Public Employees Retirement Sys. v. Shearman & Sterling* (hereinafter *Calpers*).¹²

The defendants first argued that the language of the prior assignments was insufficient to assign the causes of action asserted because, “Acorn assigned only its interests and rights in the loan and under the relevant documents,” and the claims asserted arose outside of those documents.¹³ Distinguishing *Calpers*, the court rejected this argument based on the specific language in the prior assignments providing that the assignor

transfers its rights under “each document and instrument related to the foregoing...”¹⁴ The court found that the appraisals were “related to” the loan documents, as they were a condition to the loan funding, and, therefore, causes of action arising from the appraisals were effectively assigned.¹⁵

The 2009 assignments contained assignment language broader than in the prior assignments.¹⁶ To attempt to invalidate the 2009 assignments, the defendants argued that by 2009 the assignees had paid Acorn the full face value of the loans. As such, they argued Acorn had no damages and, because damage is an essential element of the claims asserted, Acorn had no causes of action left to assign.¹⁷ In rejecting this argument, the court focused on the following provisions in the loan agreements:

none of the written reports...certificates or other written information...furnished by or on behalf of Borrower and Guarantor to Lender in connection with the negotiation of the Loan Documents or delivered hereunder... contains any material misstatement of fact....

The loan agreements further provide that: representations and warranties made by any Obligor in any Loan Document and in the certificates or other instruments delivered in connection with...any Loan Document shall be considered to have been relied upon by Lender and shall survive the execution and delivery of each Loan Document...so long as the principal or any accrued interest... under any Loan Document is outstanding and unpaid.¹⁸

The court found that, because the appraisals were representations or statements made by the defendants “on behalf of the borrowers” as a condition to the loans, those representations survived as long as the loan amount remained outstanding and unpaid.¹⁹ Thus, according to this language, “because the Loans were undisputedly outstanding and unpaid at the time of the assignments,” the causes of action were still assignable to plaintiffs, despite the fact that plaintiffs had paid Acorn in full, in exchange for which they presumably received the assignments.²⁰ In addition, the court noted that Acorn did in fact have other damages as servicer for the loans.

Other Decisions

Other Commercial Division decisions have applied similar principles in determining the effectiveness and scope of loan assignments. For example, in *Wilmington Trust Co. v. Burger King Corp.*, Justice Charles E. Ramos of the New

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York County Commercial Division held that the plaintiff did not have standing to bring a tortious interference claim because it had broadly assigned its claims to the defendant in exchange for a payment of \$3.2 million.²¹ In that case, the assignment language stated that assignor:

sells, negotiates, assigns, endorses, transfers, grants, conveys and delivers unto [assignee] all of [assignor]'s right, title, interest and benefit to, in and under the Loans, the Notes and the Loan Documents and all sums payable thereunder, including without limitation, all indebtedness, documents, collateral, security, rights, benefits, indemnities and claim related thereto.²²

The court found that the plaintiff, as assignor, retained no interest in the loans, including the right to bring claims against the assignee.²³ On a related point, Justice Emily Pines of the Suffolk County Commercial Division recently held that, when a lender merges into another financial institution, the merged institution has standing to bring claims on instruments in favor of the predecessor lender, notwithstanding its failure to show an actual assignment of the instruments, because, pursuant to Banking Law Section 602, after a merger the successor is considered the same legal entity as the predecessor.²⁴

In addition, in a case relied upon by the *Stewardship* court, the First Department decided in *North Fork Bank v. Cohen & Krassner* that the assignee of mortgages had standing to bring a fraud claim against a defendant law firm that allegedly had misrepresented to the original lender (the assignor) the borrower's authority to enter into the mortgage transaction.²⁵ The court specifically found that the original lender, who was also a plaintiff, had no standing to bring a fraud claim because it had assigned "all its right, title, and interest in and to [the] mortgage" for full value prior to institution of [the] action.²⁶ In addition, similar to the findings in *Stewardship* and *Wilmington Trust*, full payment to the assignor by the assignee did not eliminate the assignee's right to bring such claims.

Variation

In all the decisions discussed above, the assignors transferred their rights in the loans prior to an action being commenced. In the mortgage foreclosure context, a recurring problem has been that assignments, even if facially effective, are frequently made after an action is commenced or made by an assignor who has no interest in the mortgage being foreclosed.

In *New Century Mortgage Corp. v. Durden*, Kings County Commercial Division Justice Carolyn E. Demarest explained the requirements for assigning a note and mortgage so as to give the assignee standing to foreclose.²⁷ In that case, the mortgage had "been assigned numerous times, apparently as a mortgage backed security."²⁸ On March 7, 2007, New Century commenced a mortgage foreclosure action.²⁹ Prior to the commencement of the foreclosure action, the mortgage had been assigned to another entity by the nominee of record, Mortgage Electronic Registration Systems Inc. (MERS).³⁰

Subsequently, on March 11, 2007, MERS assigned the mortgage to New Century, apparently backdating the effective date of assignment to March 5, 2007.³¹ The court held

that "an assignment's language purporting to give it retroactive effect prior to the date of commencement of the action is insufficient to establish the plaintiff's requisite standing."³² In addition, the court emphasized that the language of the assignment was not as important as the assignor having an interest in the mortgage at the time of assignment, stating:

It is well settled that [n]o particular words are necessary to effect an assignment; it is only required that there be a perfected transaction between the assignor and assignee, intended by those parties to vest in the assignee a present right in the things assigned. In order for an assignment to be valid, the assignor must be divested of all control over the thing assigned.³³

The court dismissed the lender's action due to lack of standing. Because MERS had assigned the mortgage to another party prior to its March 11 assignment to the plaintiff, at the time of assignment MERS had no interest in the mortgage to assign to the plaintiff.³⁴

The 'Stewardship' decision and others teach that the assignee's payment of full value to the assignor does not extinguish the assigned claims by eliminating the damage element of the causes of action assigned.

Similarly, the Second Department held that a bank lacked standing to bring a foreclosure action because the execution of the assignment of the mortgage took place after commencement of the action.³⁵ In so doing, the court clarified that an assignment must be effective prior to filing suit, not just prior to serving the summons and complaint.³⁶ The court rejected the lender's argument that the assignment applied retroactively because "[i]f an assignment is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical delivery of the note and mortgage was, in fact, previously effectuated."³⁷

Conclusion

As the above discussion indicates, the scope of claims assigned, and even whether those claims survive the assignment, will usually be determined by the specific language in the assignment itself. In the case of mortgage assignments, however, critical to the determination of standing is whether the mortgage had been assigned to the plaintiff prior to commencement of the foreclosure action, and whether the assignor had rights in the mortgage at the time of the assignment.

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1. No. 600634/2010, 31 Misc.3d 1223(A), 2011 WL 1744217, at *1 (N.Y. Co. May 4, 2011).

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.

9. Id.

10. Id. at *2.

11. Id. at *2.

12. 95 N.Y.2d 427, 718 N.Y.S.2d 256 (2000) (finding that the "Assignment refers only to rights and interests under the loan documents...and does not refer to [and was not written to refer to] the overall loan transaction.... The assignment did not include a cause of action arising outside the loan documents themselves").

13. Defendants' Reply Memorandum of Law in Further Support of Their Motion to Dismiss the Amended Complaint, at 6-7 (Sept. 2, 2010).

14. *Stewardship*, 2011 WL 1744217, at *2.

15. Id.

16. The 2009 assignment assigned "any and all claims, causes of action...that Assignor ever had or now has against any and all parties related in any manner whatsoever to Assignor's loan to Borrower..." Id. at *3.

17. Defendants' Motion to Dismiss the Amended Complaint, at 12 (July 9, 2010).

18. *Stewardship*, 2011 WL 1744217, at *3.

19. Id. at *4.

20. Id.

21. No. 111719/04, 2005 WL 3199301, at *1, *5 (N.Y. Co. Nov. 10, 2005) (Ramos, J.).

22. Id. at *2.

23. Id. at *5. The court also relied upon an agreement between plaintiff assignor and defendant assignee releasing each other from liability as to certain claims. Id.

24. *Capitol One, N.A. v. Alarm Warehouse LLC*, No. 37900-2010, 2011 WL 1601572, at *1-2 (Suffolk Co. April 29, 2011) (Pines, J.).

25. 44 A.D.3d 375, 375, 843 N.Y.S.2d 575, 575 (1st Dept. 2007).

26. Id.

27. No. 7967/07, 2009 WL 264134, at *1 (Kings Co. Feb. 2, 2009) (Demarest, J.).

28. Id.

29. Id.

30. Id.

31. Id.

32. Id. at *2.

33. Id. at *3 (citing *In re Stralem*, 303 A.D.2d 120, 122-23, 758 N.Y.S.2d 345, 347 (2d Dept. 2003)).

34. Id. at *3.

35. *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 887 N.Y.S.2d 615 (2d Dept. 2009).

36. Id. at 208, 887 N.Y.S.2d at 617-18.

37. Id. at 210 (citing *LaSalle Bank Nat'l Ass'n.*, 59 A.D.3d 911, 875 N.Y.S.2d 595 (3d Dept. 2009)).