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**Mortgages -- Capacity to sue -- Where plaintiff has failed to plead or specify in what capacity it brings suit and failed to define or identify nature of its legal entity, plaintiff has not pled capacity to sue -- Capacity to sue may be raised by motion to dismiss where defect appears on face of complaint -- Case dismissed without prejudice**

**WACHOVIA** MORTGAGE, FSB F/K/A WORLD SAVINGS BANK, Plaintiff, v. ANNE MATAACCHIERO, Defendant. Circuit Court, 6th Judicial Circuit in and for Pinellas County. Case No. 08-16936-CI-13. December 15, 2009. Anthony Rondolino, Judge. Counsel: Brianna Finch. Matthew Weidner.

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 who appeared before the Court, 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, "**Wachovia** Mortgage, FSB, F.K.A., World Savings Bank". 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 of the entity or to define what the initials "FSB" stand for.
2. Counsel for Defendant, in its Supplemental Memoranda in Support of 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 extent required to show the jurisdiction of the court. . . . When a party desires to raise an issue asto 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 pled that it has the capacity to maintain suit before this Court.
4. "Capacity to sue" is an absence or 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 claimed the Plaintiff was both a Federal Savings Bank and not required to register with the Secretary of State in order to establish capacity and that it was a foreign corporation and exempt from registration pursuant to Florida

Statute 607.1501. The inconsistent allegations made in Plaintiff's response are not facts that have been plead and such facts must be plead so that Defendant may respond to them through a responsive pleading.

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. 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.

10. 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.

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