

**IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA**

WELLS FARGO NA., AS TRUSTEE FOR GPMFT 2006-AR3,

Plaintiff,

vs.

CASE NO: 1234567

JOHN DOE, ET AL,

Defendant.

_____ /

MOTION TO DISMISS FOR LACK OF CAPACITY

Comes now the Defendant, JOHN DOE and for his motion to dismiss, states:

A. Facts:

The only identification of the Plaintiff appears in the caption of the complaint. The name of the Plaintiff 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. Nowhere in the body of the Plaintiff's complaint does it assert the basis for its entity-existence or explain in any way the form of the entity that presents itself before the court. A cursory check of the State of Florida Division of Corporations web site www.sunbiz.org demonstrates that no entity named Wells Fargo NA exists as a registered company in the State of Florida.

B. Law:

Florida Rules of Civil Procedure, § 1.120(a) was derived from Federal Rule of Civil Procedure § 9(a). The issue of capacity to sue may be raised by motion to dismiss where the defect appears on the face of the complaint. Herschel California Fruit Products Co. v. Hunt Foods, 111 F. Supp. 603 (1975), quoting Coburn v. Coleman, 75 F. Supp. 107 (1974); Klebanow v. New York Produce Exchange, 344 F.2D 294 (2nd Cir., 1965). 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. Corp. v. Sunset Amoco West, Inc., 669 So.2d 300 (Fla. 3d D.C.A. 1996) ; Plumbers Loc. U.N. 519, Miami, Fla. v. Service Plbg. Co., Inc. 401 F.Supp. 1008 (S.D. Fla., 1975); and see Sun Valley Homeowners Inc., v. American Land Lease, Inc., 927 So.2d 259 (Fla. App. 2d Dist. 2006); Shaw v. Stuckman, 105 Nev. 128 (1989).

Florida Rules of Civil Procedure, § 1.120(a) states:

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. The initial pleading served on behalf of a minor party shall specifically aver the age of the minor party. When a party desires 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.

Florida Rules of Civil Procedure, § 1.110(b)

Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, must state a cause of action and shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it,

"Capacity to sue" is an absence or a 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 that a party have a 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)

Florida Statutes, Chapter 607.0501 and 607.1507 provide that a foreign corporation may not maintain any action in Florida until the corporation complies with the applicable registration provisions that require maintenance in Florida of an office and registered agent; while Florida Statutes Chapter 865.09 provides that if a business fails to register a fictitious name, the business may not maintain any action, suit or proceeding in any court in Florida until the registration requirements are complied with.

C. *Argument:*

Plaintiff is a company and an alleged trust - "Wells Fargo NA". However, it is not registered with the State of Florida, with the Division of Corporations, nor has it alleged whether it has registered or alleged that it is exempt from registration with the State of Florida as a trust pursuant to Florida Statutes § 660, et. seq. Inconsistent allegations exist such that Plaintiff's capacity is clearly at issue.

WHEREFORE, Defendant requests the Court to dismiss the complaint for lack of capacity, lack of compliance with F.S. 660, Trust Registration. In the alternative the Defendant will consent to the Plaintiff amending its complaint to address the issues pled herein.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was sent on March _____, 2010 via

U.S. Mail to:

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