UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
OAKWOOD HOMES CORPORATION, et al.,	)	Case No. 02-13396 (PJW)
	)	
	)	Jointly Administered
Debtors.	)	

MEMORANDUM OPINION

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Dated: September 22, 2004

WALSH, J.

This opinion is with respect to the motion for summary judgment (Doc. # 3535) filed by Oakwood Homes Corporation et al. ("Debtors") in response to the request (Doc. # 1991) by David L. Babson and Company ("Babson") for the allowance and payment of an administrative expense claim. For the reasons set forth below, the Court will deny the motion.

BACKGROUND

The business arrangement background is as follows:

The Debtors design, manufacture, sell and finance modular homes. Their operations are financed through the sale of asset pools (consisting of retail installment sales contracts and/or mortgage loans), which are contributed and held in trust. The trust then issues certificates representing interests in the pooled assets. A servicer collects payments due under the pooled assets and remits the payments to the trustee, whereby the trustee distributes the proper allocation amounts to the certificate holders.

The relevant particulars are as follows:

On May 1, 2001, Debtor Oakwood Mortgage Investors, Inc. ("OMI"), Debtor Oakwood Acceptance Corporation ("OAC") and The

Chase Manhattan Bank[1] ("Trustee") entered into a Pooling and Service Agreement ("PSA"). According to the terms in the PSA, OMI transferred pooled assets to the Trustee and certificates were issued. The certificates were comprised of eleven classes, including four senior classes (A-1, A-2, A-3 and A-4), for a total principal amount of $170,116,000. OAC, as the servicer, was responsible for collecting the installment payments and remitting to the Trustee the amounts due for distribution on specified distribution dates. OAC was required to prepare a remittance report that set forth the amounts collected, amounts available for distribution, and allocation of those amounts among the classes of certificates. On the appropriate distribution date, the Trustee was obligated to distribute the available proceeds as per OAC's instructions.

According to the PSA, principal payments were to be made to the holders of Class A certificates prior to distributions to other classes of holders. In the event there was not sufficient cash to satisfy the principal payments, a shortfall was created. The shortfall would accumulate and any amount not satisfied would carry over until the next distribution date. When cash became available it was originally paid on a sequential basis, whereby

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[1]JPMorgan Chase Bank is now successor in interest to The Chase Manhattan Bank.

payment was to be made to Class A-1 certificates until their shortfall was satisfied and then payment could be made to Class A-2 until their shortfall was zero, and then so on, through the Class A certificates.

Babson is the authorized agent for the beneficial owners of 82% of the Class A-2 certificates. In September 2002, Babson, through its agent, inquired of OAC as to whether that scheme would be changed to a pro rata distribution.[2] Babson's agent claims that it was told by an officer of OAC and OMI, that distribution would remain sequential, with the Class A-2 holders next in line (since the A-1 shortfall was 90% satisfied).

Shortly thereafter, OAC changed the distribution to pro rata, whereby distribution would be made to each of the Class A holders based on the shortfall carryover amounts. As a result, Babson asserts that Class A-2 holders failed to receive cash that they allege they were entitled to under the sequential payment scheme. OAC acknowledged that the prior sequential allocation was a "mistake."

On November 15, 2002, the Debtors filed voluntary petitions for relief in this Court, under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et. seq. On December 12, 2002, this Court entered an order permitting OAC to assume the PSA

[2]Debtors contest whether it actually was an agent of Babson who contacted OAC.

and assign the PSA to Oakwood Servicing Holdings Co., LLC ("OSHC"). OSHC entered into a subservicing agreement, whereby all duties under the PSA were subcontracted back to OAC.

DISCUSSION

Babson is seeking the allowance and payment of an administrative expense in the amount of for $4,000,000. Babson claims that the PSA requires sequential payment and, in the alternative, if it requires pro rata distribution, it asserts that it was damaged by the failure to receive those payments from the beginning. By the motion for summary judgment Debtors argue that Babson lacks standing because its request is barred by the no-action clause in the PSA.

The PSA states in section 11.03 of the Standard Terms, which are incorporated by reference:[3]

> No Certificateholder shall have any right by virtue of any provision of the Pooling and Servicing Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to the Pooling and Service Agreement, unless such Holder previously shall have given to the Trustee a written notice of default . . . and unless also the Holders of Certificates entitled to at least 25% of the Voting Rights allocated to the Certificates . . . .

First, Debtors argue that Babson never provided written

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[3] According to section 1 of the PSA, "the Standard Terms are and shall be a part of this Pooling and Servicing Agreement to the same extent as if set forth herein in full."

notice of default to the Trustee, and therefore failed to comply with the PSA. This fact is not disputed by Babson. Second, Debtors claim that Babson did not own the required 25% of the voting rights. According to section 17 of the PSA:

> The Voting Rights applicable to the Certificates shall be allocated . . . 98% to the other Certificates [including Class A-2] in proportion with their respective Certificate Principal Balance. . . .

Babson owns 82% of the A-2 Certificates, whereby the A-2 certificates make up 24% of the "other Certificates." Based on these figures, Debtors calculated Babson's voting rights to be 19%, therefore not possessing the required 25% of the total voting rights pursuant to section 11.03. Babson does not dispute this calculation.

Babson instead argues that the no-action clause does not apply to its request. Babson cites several authorities in support of that argument. Babson's position in its motion papers is inconsistent on what it is that it seeks to recover. In its original request, Babson states: "This request arises from the Debtors' postpetition breach of contract, misrepresentations and other tortious conduct." (Doc. # 1991, p.1.) For its damages, Babson asserts: "The change in allocation from sequential to pro-rata by Debtors has caused a significant deterioration in the credit quality of the [Babson] certificates, resulting in an aggregate loss of value to the [Babson] certificates estimated at

approximately $4,000,000." (Doc. # 1991, p. 11.) However, in its opposition to the summary judgment motion, Babson states that its claim is "in the nature of an action for payment of principal and interest under the certificates." (Doc. # 3650, p. 2.) Babson has acknowledged in its opposition that the "purported error resulted in approximately $635,000.00 underpayment to the Class A-2 certificates." (Doc. # 3650 at 5.) It has, however, requested the allowance of a $4,000,000 administrative expense. It seems clear, therefore, that Babson is not suing for principal and interest payments; instead, it is seeking to recover damages allegedly resulting from OAC's mistake. Presumably, there are two elements to the mistake: what OAC told Babson's agent in September 2002 and what OAC advised the Trustee regarding how distributions should be made.

Babson's request does not satisfy the requirements of section 11.03 of the Standard Terms. However, an exception to a no-action clause in an indenture may be found where the cause of action is against the trustee. For example, in Feldbaum v. McCrory Corp., although the court enforced the no-action clause, it stated:

> I do not mean to imply that courts will apply no-action clauses to bar claims where misconduct by the trustee is alleged. For the same reason that equity has long recognized that, in some circumstances, corporate shareholders will be excused from making a demand to sue upon corporate directors, but will be permitted to sue in the corporation's name themselves, bondholders will be excused

> from compliance with a no-action provision where they allege specific facts which if true establish that the trustee itself has breached its duty under the indenture or is incapable of disinterestedly performing that duty.

No. 11866, 1992 WL 119095, at *7 (Del. Ch. June 1, 1992)(citing Cruden v. Bank of N.Y., No. 85 Civ. 4170, 1990 WL 131350, at *7 (S.D.N.Y. Sept. 4, 1990); see also Cruden, 957 F.2d 961, 968 (2d Cir. 1992) (finding that the no-action clause did not apply to the trustee in action brought by the debenture holder against the trustee); Metro. West Asset Mgmt., LLC v. Magnus Funding, Ltd., No. 03 Civ. 5539, 2004 WL 1444868, at *5 (S.D.N.Y. June 25, 2004).

Babson is not asserting a claim against the Trustee, but rather against OAC. Nevertheless, if Babson sued the Trustee, OAC may have liability exposure by reason of its relationship with the Trustee. Although the Trustee makes the distributions, they are based on instructions from OAC. According to section 3.01 of the Standard Terms: "The Servicer agrees to service the Assets for and on behalf of the Trustee and its successors and assigns, and otherwise to perform and carry out the duties, responsibilities and obligations that are to be performed and carried out by the Servicer under the Pooling and Servicing Agreement." Here, OAC is acting in the nature of an agent for the Trustee. OAC, as the servicer, is responsible for performing tasks on behalf of the Trustee, including the collections and determinations of allocation of distributions to certificate holders.

As a result, the "mistake" by OAC may be attributable to the Trustee and any liability of the Trustee may be the liability of OAC. Therefore, I believe Babson asserts a claim similar to

that articulated by the court in Feldbaum v. McCrory Corp., which is not barred by the no-action clause.

As to OAC's ultimate liability, I note what may be several obstacles to Babson's success. Section 6.05 of the Standard Terms limits the liability of the servicer and states in relevant part:

> Neither OMI, the Servicer nor any of the directors, officers, employees or agents of any of OMI or the Servicer shall be under any liability to the Trust or the Certificateholders and all such Persons shall be held harmless for any action taken or for refraining from the taking of any action in good faith pursuant to the Pooling and Servicing Agreement, or for errors in judgment; provided, however, that this provision shall not protect any such Person against . . . any liability which would otherwise be imposed by reason of willful misfeasance, bad faith or gross negligence in the performance of duties . . . .

Additionally, Babson argues that it continued to hold the certificates based on a representation made to it by OAC. I do not believe that Babson and OAC are in privity, so that there is some question whether Babson's reliance was justified. Section 6.01 explains that "OMI and the Servicer each shall be liable in accordance with the terms of the Pooling and Servicing Agreement only to the extent of the obligations specifically imposed by the Pooling and Servicing Agreement and undertaken hereunder by OMI or the Servicer, respectively."

Whether the Trustee is an indispensable party to Babson's request, or whether Babson's request must be made first to the Trustee, or whether Babson's claim sounds in contract or tort, or whether Babson's request constitutes an administrative expense claim I make no rulings at this time. For purposes of the summary judgment motion, I simply conclude that Babson asserts a claim that is not barred by the no-action clause of the PSA.

CONCLUSION

For the reasons set forth above, the Court will deny the Debtors' motion for summary judgment.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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ORDER

For the reasons set forth in the Court's Memorandum Opinion of this date, the Debtors' motion for summary judgment (Doc. # 3535) is **DENIED**.

Peter J. Walsh
United States Bankruptcy Judge

Dated: September 22, 2004