

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ELLICOTT LOFTS II, LLC, *et al.*,

Plaintiffs,

v.

WELLS FARGO, N.A., *et al.*,

Defendants.

Case No.: 1:21-cv-00057

NOTICE OF REMOVAL

Removed from:

Supreme Court of the State of New York,
Erie County, Index No. 816554/2020

TO: Clerk of the U.S. District Court for the Western District of New York:

PLEASE TAKE NOTICE THAT Defendant CWCapital Asset Management, LLC, *as Special Servicer* (“CWCAM” and, collectively with the other named defendants, “Defendants”), hereby removes to this Court the state court action described herein, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1447. Pursuant to 28 U.S.C. § 1446(d) and this Court’s Local Rules, copies of this Notice of Removal are being served on all parties at the addresses listed in Plaintiffs’ state court complaint and are being filed in the Supreme Court of the State of New York, Erie County.

INTRODUCTION

1. On December 31, 2020, Plaintiffs Ellicott Lofts II, LLC (“Ellicott Lofts”) and Rocco R. Termini (“Termini”) (collectively, “Plaintiffs”) filed the complaint (the “Complaint”) in the Supreme Court of the State of New York, Erie County, styled as *Ellicott Lofts II, LLC, et al. v. Wells Fargo, N.A., et al.*, Index No. 816554/2020 (the “State Court Action”).

2. The State Court Action concerns a commercial loan made in the initial amount of \$5,550,000 to Ellicott Lofts in December of 2012 (the “Loan”), evidenced by a promissory note and other documents and secured by a mortgage on property owned by Ellicott Lofts in downtown Buffalo, New York (the “Property”). Compl. ¶ 1; exhibits thereto. Plaintiffs have raised a series of allegations against the named Defendants in connection with the Loan, including that Defendants

“incorrectly determined” that Ellicott Lofts was in default on the Loan, and have “wrongfully assessed over \$800,000 of default interest, fees, penalties and other charges which are continuing to accrue.”

Id. ¶ 2. Plaintiffs further claim that Defendants have breached the terms of the documents governing the Loan and the covenants of good faith and fair dealing, have frustrated the purpose of the Loan, and that “the doctrine of impossibility prevents Defendants from declaring [Ellicott Lofts] in default.” *Id.* ¶ 3.

3. Plaintiffs seek injunctive, declaratory, and equitable relief against Defendants, including an order “enjoining Defendants from continuously assessing interest at the default rate, together with fees, penalties and associated costs and from commencing foreclosure, judicially or non-judicially, proceedings as threatened by Defendants.” *Id.* ¶ 83.

4. On January 4, 2021, the state court conducted an initial conference and entered an order “temporarily restrain[ing] and enjoin[ing]” Defendants “from assessing any further interest at the default rate, together with fees, penalties, and associated costs and from commencing foreclosure proceedings, judicial or non-judicial, against the Property,” pending a hearing on Plaintiffs’ request for a preliminary injunction. No further proceedings have occurred in the State Court Action.

5. Plaintiffs’ allegations are denied, and it is further denied that the Defendants are properly named as parties, with the exception of those facts necessary for removal of this action on diversity of citizenship grounds, as discussed herein.

6. Pursuant to Local Rule 81(a)(1), a completed civil cover sheet is attached hereto as Exhibit 1. Pursuant to Local Rule 81(a)(3), an index of all documents filed in the State Court Action is attached hereto as Exhibit 2, and separately tabbed copies of all documents and proceedings to date in the State Court Action are attached hereto as Exhibits 3-26.

BASIS FOR REMOVAL

I. Removal is Proper Because This Court Has Subject Matter Jurisdiction Pursuant to 28 U.S.C. §§ 1332 and 1441(b).

7. Pursuant to 28 U.S.C. § 1332, this Court has jurisdiction over this action because it is between citizens of different states, and the amount in controversy is greater than \$75,000, exclusive of interest and costs. Therefore, this action could have originally been filed in this Court and is now properly removed to this Court.

a. There is Complete Diversity of Citizenship Among the Parties.

8. Plaintiffs Ellicott Lofts and Termini are both citizens of the State of New York. Generally, “[a]n individual’s citizenship, within the meaning of the diversity statute, is determined by his domicile[.]” *Van Buskirk v. United Grp. of Cos., Inc.*, 935 F.3d 49, 53 (2d Cir. 2019) (internal quotation marks omitted). Here, the Complaint specifically alleges that Termini “was and is at all times herein relevant . . . a resident of the County of Erie [New York].” Compl. ¶ 5.

9. Because Ellicott Lofts is a limited liability company, it “takes the citizenship of all of its members.” *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 615 (2d Cir. 2019). The Complaint does not plead the place(s) of citizenship of the members of Ellicott Lofts. Upon information and belief, Ellicott Lofts is a citizen of the State of New York. The Loan Agreement (Exhibit B to Compl.; Exhibit 5 hereto) includes an organization chart for Ellicott Lofts. That chart identifies only two members: New Ellicott Lofts, Inc. and Ellicott Lofts, III, LLC. The citizenship of those member entities is as follows:

- New Ellicott Lofts, Inc. – Pursuant to 28 U.S.C. § 1332(c)(1), “a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business.” Upon information and belief, New Ellicott Lofts, Inc. is incorporated in the State of New York and also has its principal place of business in New York. *See* Decl. ¶ 4 and Exhibit B thereto (New York Secretary of State report, listing New

Ellicott Lofts, Inc. as a New York corporation, with a Principal Executive Office address of 489 Ellicott Street, Buffalo, New York, 14203).¹

- Ellicott Lofts, III, LLC – Like Ellicott Lofts, the citizenship of Ellicott Lofts, III, LLC is determined by the citizenship of its members. The organizational chart identifies three members of Ellicott Lofts, III, LLC: David M. Burke; Daniel D. Conley; and Rocco R. Termini. As set forth above, Termini is a citizen of New York. Upon information and belief, Burke and Conley are also citizens of New York. *See* Decl. ¶¶ 5-6 and Exhibits C-D thereto (Erie County, New York Real Property Information reports showing David M. Burke’s address as 6046 Old Lakeside Road, Lake View, New York, 14085 and Daniel D. Conley’s address as 565 Wendt Road, Angola, New York, 14006). Accordingly, because all of its members are citizens of New York, Ellicott Lofts, III, LLC is a citizen of New York.

Because both of its members are citizens of the State of New York, Ellicott Lofts is also a citizen of the State of New York for purposes of diversity of citizenship.

10. Defendants are a limited liability company (CWCAM) and three national banking associations named in their representative capacities for the Morgan Stanley Bank of America Merrill Lynch Trust 2012-C8: Wells Fargo Bank N.A., which is named as Wells Fargo N.A.² in the Complaint (“Wells Fargo”), US Bank N.A. (“US Bank”), and Bank of America, N.A. (“Bank of America”). As a limited liability company, Defendant CWCAM’s citizenship is the same as that of its members. Defendant CWCAM is a limited liability company organized under the laws of Delaware. *See* Decl. ¶ 3 and Exhibit A thereto (Delaware Secretary of State report). CWCAM’s only member is CW Financial Services, LLC, a Delaware limited liability company. *Id.* CWCAM, through the members of its parent LLC, is a citizen of Delaware and the Cayman Islands. *Id.*

11. In *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006), the Supreme Court held that, for federal diversity purposes, a national banking association is a citizen of the state where its main office is located as set forth in its articles of association. *See Wachovia Bank*, 546 U.S. at 307 (citing 28

¹ Citations herein to the “Decl.” refer to the Declaration of Gregory A. Cross in Support of Notice of Removal filed contemporaneously with this Notice and Exhibits A-G thereto.

² Undersigned counsel are not aware of any entity named “Wells Fargo, N.A.” and assume, for purposes of this removal, that Plaintiffs intend to sue Wells Fargo Bank, N.A.

U.S.C. § 1348). Wells Fargo designates in its Articles of Association that the City of Sioux Falls, County of Minnehaha, State of South Dakota is the location of its main office. *See* Decl. ¶ 7 and Exhibit E thereto. Wells Fargo, therefore, is a citizen of South Dakota for federal diversity purposes.

12. Defendant US Bank designates in its Amended and Restated Articles of Association that the City of Cincinnati, County of Hamilton, State of Ohio is the location of its main office. *See* Decl. ¶ 8 and Exhibit F thereto. US Bank, therefore, is a citizen of Ohio for federal diversity purposes.

13. Defendant Bank of America designates in its Articles of Association that the City of Charlotte, County of Mecklenburg, State of North Carolina is the location of its main office. *See* Decl. ¶ 9 and Exhibit G thereto. Bank of America, therefore, is a citizen of North Carolina for federal diversity purposes.

14. Hence, there is complete diversity between the Plaintiffs and the Defendants in this case, and this Court has subject matter jurisdiction under 28 U.S.C. § 1332. In addition, no defendant is a citizen of the state in which this action is brought.

b. The Amount in Controversy Requirement is Satisfied.

15. To determine the amount in controversy, courts look first to the plaintiff's state court petition. The "party invoking the jurisdiction of the federal court has the burden of proving that it appears to a reasonable probability that the claim is in excess of the statutory jurisdictional amount." *Scherer v. The Equitable Life Assurance Soc'y of the United States*, 347 F.3d 394, 398 (2d Cir. 2003). There is a rebuttable presumption that the face of the complaint is a good-faith representation of the "actual amount in controversy," and "[t]o overcome the face-of-the-complaint presumption, the party opposing jurisdiction must show to a legal certainty that the amount recoverable does not meet the jurisdictional threshold." *Id.* (internal quotation marks and citations omitted).

16. The amount in controversy meets the jurisdictional requirements, as Plaintiffs are seeking to permanently enjoin Defendants from recovering at least \$800,000 in interest and fees, plus unstated other amounts. For example, Plaintiffs allege that Wells Fargo's September 11, 2020 statement to Ellicott Lofts listed \$432,482 in penalties and fees and that "[t]he default interest combined with the other fees and late charges totaled \$823,376.92." Compl. ¶ 55. Plaintiffs allege that CWCAM requested payment of "outstanding alleged fees, penalties and default interest totaling over \$800,000." *Id.* ¶ 57. Plaintiffs also contend that "on November 20, 2020 CWCAM's counsel sent Plaintiffs' counsel a 'Demand Notice,' along with a 'Bring Current Statement' seeking \$818,740.09 in default interest, penalties, and fees." *Id.* ¶ 65. Plaintiffs claim that, "[i]f Defendants' egregious conduct is not enjoined immediately and permanently, they will be unjustly enriched by seeking nearly \$1,000,000 (and continuing to accrue)" *Id.* ¶ 72.

17. While Plaintiffs' Complaint does not expressly seek a money judgment against the Plaintiffs for stated sum of money damages, it is apparent from the face of the Complaint that the amount in controversy is well in excess of \$75,000, exclusive of interest and costs. "Where no amount is specified, this fact alone does not bar a finding that the jurisdictional amount has been met." *MBIA Ins. Corp. v. Royal Bank of Canada*, 706 F. Supp. 2d 380, 390 (S.D.N.Y. 2009) (quoting *Burr ex rel. Burr v. Toyota Motor Credit Co.*, 478 F. Supp. 2d 432, 438 (S.D.N.Y. 2006)). "[I]n such a case, a defendant asserting removability must show 'that it appears to a reasonable probability that the claim is in excess of the statutory jurisdictional amount.'" *Id.* at 391 (quoting *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 216 F.3d 291, 296 (2d Cir. 2000)). As the Plaintiffs seek a judgment that they not be required to pay Defendants sums owed in excess of \$800,000, and seek an injunction preventing the collection of those sums, it is clear from the Complaint the amount in controversy is in excess of the statutory amount.

II. Defendants Have Satisfied the Procedural Requirements for Removal.

18. Plaintiff filed the Complaint in the Supreme Court of the State of New York, Erie County on December 31, 2020. As far as undersigned counsel are aware, and as of the filing of this Notice of Removal, Plaintiffs have not served any of the Defendants. Accordingly, this Notice of Removal is timely filed. *See* 28 U.S.C. § 1446(b)(1) (“The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based”).

19. This action is being removed “to the district court of the United States for the district and division embracing the place where such action is pending,” pursuant to 28 U.S.C. § 1441(a). The United States District Court for the Western District of New York embraces Erie County, New York. 28 U.S.C. § 112(d).

20. Additionally, Plaintiffs and Defendants are subject to personal jurisdiction in New York. As set forth above, all Plaintiffs are citizens of the State of New York. All Defendants conduct business and maintain offices in the State of New York.

21. No previous application has been made for the removal requested herein.

Preservation of Rights and Defenses

22. All rights are reserved, including, but not limited to, defenses and objections as to venue and personal jurisdiction and the right to move for dismissal of the Complaint for, *e.g.*, failure to state a claim for relief and failure to sue the appropriate parties. The filing of this Notice of Removal is subject to, and without waiver of, any such defenses and objections.

23. CWCAM also reserves the right to amend or supplement this Notice of Removal.

WHEREFORE, Defendant CWCAM respectfully gives notice that the above-captioned civil action pending in the Supreme Court of the State of New York, Erie County is removed to this Court, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1447.

Dated: New York, New York
January 13, 2021

VENABLE LLP

By: /s/ Nicholas M. Reiter

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*Attorneys for Defendant
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As Special Servicer*

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2021, the foregoing Notice of Removal, and all exhibits thereto, were filed via this Court's electronic filing system and that copies of same were served upon all parties via overnight mail at the addresses listed in the Complaint:

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Defendants

Dated: January 13, 2021

/s/ Nicholas M. Reiter
Nicholas M. Reiter