

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BARBARA H. KAPNICK
J.S.C.

PART 39

Rights of Columbus

INDEX NO. 651442/11

- v -

Board of New York Mellon

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

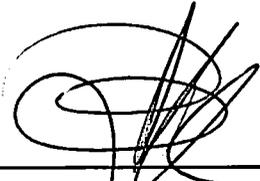
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/26/13



BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----X

KNIGHTS OF COLUMBUS,

Plaintiff,

-against-

THE BANK OF NEW YORK MELLON,

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION AND ORDER
Index No. 651442/11
Mot. Seq. 003

Defendant moves herein pursuant to CPLR 3211(a)(7) and 3211(a)(1) to dismiss the first, second, third, fourth, fifth and seventh causes of action in the Amended Complaint (the "Complaint"). Defendant further moves, pursuant to CPLR 3211(a)(4) and 2201, to stay the sixth cause of action.

Plaintiff Knights of Columbus (the "Knights") brings this action for an accounting and to recover damages based upon defendant The Bank of New York Mellon's ("BNYM") alleged violation of its duties as trustee of certain residential mortgage trusts held by BNYM for the benefit of the Knights and others.

The Knights is the world's largest Catholic family fraternal service organization whose mission is to render financial aid to sick, disabled and needy members. The Knights also donates substantial amounts of money to charity and operates a not-for-profit life insurance program to serve the organization's 1.8

million members, which includes annuity, disability and long-term care products. The Knights maintain an investment portfolio of \$17 billion. (Compl. ¶¶ 6-13.)

BNYM, formerly the Bank of New York, is the trustee of 530 residential mortgage-securitization trusts held for the benefit of investors, including the Knights. This action involves 18 specified trusts (the "Trusts"), in which the Knights invested. (Compl. ¶ 1.) The Trusts are primarily comprised of residential mortgage loans made by Countrywide Home Loans Inc. and/or its affiliates (collectively, "Countrywide"). (Compl. ¶ 17.)

The document providing for the establishment and administration of each Trust is called a "Pooling and Servicing Agreement" (the "PSA"). (Compl. ¶ 16.) Each Trust is governed by a separate PSA, which are all substantially identical. Under the terms of the PSAs, the mortgage loans were to be deposited into each Trust. (Compl. ¶ 18.) Borrowers were to make loan payments to the Trust through a "Master Servicer" for each Trust. The Master Servicer was to collect loan payments from borrowers, and transfer those payments, less allowable deductions, to the Trustee (i.e., BNYM), who was to distribute those payments to each Trust's beneficiaries, i.e. the Certificateholders, such as plaintiff.

Countrywide acted as the Master Servicer.¹ (Compl. ¶ 20.) In the case of foreclosure, Countrywide acted in the name of BNYM when it took action against borrowers. (Compl. ¶ 22.)

Beginning in 2008, as a result of the financial and housing market crisis, there were an unprecedented number of mortgage foreclosures. As a result of a number of factors, including improper lending and mortgage foreclosure practices by Countrywide, many of the mortgages resulted in losses for the investors, including the Knights. The Knights allege that BNYM exacerbated those losses by failing to properly carry out its duties as Trustee.

Specifically, the Knights allege that each PSA contained express terms for the delivery of the loan papers into the Trust. (Compl. ¶ 29.) The PSA specifically provides in Section 2.02 that the Trustee acknowledges receipt of the documents and provides for an "Initial Certification," in a form annexed thereto,² which states that the Trustee has received a mortgage note and an assignment, and that it had undertaken a "review and examination" of those documents. The Trustee was subsequently required to issue

¹ Countrywide Home Loans Servicing LP is now known as BAC Home Loans Servicing, LP. Bank of America acquired Countrywide in July 2008.

² (Ingber Aff., Ex. B at II-7; form annexed as Ex. F-1.)

a "Final Certification"³ within 90 days after the closing date, stating that it had received the original mortgage note, endorsed by Countrywide, or the originator of such mortgage loan, without recourse. (Compl. ¶ 32; Ingber Aff., Ex. B, form annexed as Ex. H-1-1). The PSA also provides that the Trustee was required to maintain possession of the mortgage file which contained the mortgage note and any assignments. (Compl. ¶ 34.)

The Knights allege that BNYM knowingly failed in its obligation to receive and hold the mortgage files as required under the PSA. (Compl. ¶ 36.) The Knights also allege that in numerous instances BNYM never received the mortgage papers and that the loan documents remained in Countrywide's possession. (Compl. ¶¶ 37-44.)

Further, the Knights contend that in October 2010, as a result of Countrywide's improper practices, including the practice of signing foreclosure papers in an assembly-line manner and swearing to personal knowledge of facts that the affiant had not even reviewed (known as "robo-signing"), the Attorney Generals in California, Florida, Connecticut, Illinois, Ohio and Colorado called for foreclosure moratoriums, and then New York Attorney General, now Governor Andrew Cuomo, began an investigation of the issue. Later that month, the Bank of America put its mortgage

³ (Ingber Aff., Ex. B., form annexed as Ex. H-1.)

foreclosures on hold while it reviewed its affidavits. Nonetheless, the Knights allege that the practice of robo-signing continued. (Compl. ¶¶ 60-74.)

The Knights contend that BNYM's failure to possess the complete mortgage files and properly executed assignments prevented, obstructed, delayed and/or increased the expense of otherwise proper foreclosures. (Compl. ¶ 75.) The Knights also allege that BNYM's failings gave rise to additional expenses associated with foreclosures. These expenses included, for example: (1) sanctions for misconduct in legal proceedings; (2) attorneys' fees and costs for filing a foreclosure complaint dismissed or delayed due to improper documentation; (3) attorneys' fees and costs of refileing or amending a foreclosure complaint or affidavit; (4) attorneys' and other professional fees related to defenses against government investigations and claims; (5) costs of evaluating servicing procedures to ensure compliance with the law; (6) the payment to borrowers and/or government entities of settlements, fines, penalties or judgments related to this issue; (7) increased costs of future foreclosures; and (8) carrying costs associated with delaying valid foreclosures such as additional costs imposed by Countrywide, including default-related services, and additional taxes. (Compl. ¶ 78.)

In addition, the Knights allege that BNYM's failure to receive and hold the mortgage papers in accordance with the PSAs has called into question the title on those properties which have been acquired through foreclosure, otherwise known as "real estate owned" ("REO") properties. As a result, investors, such as the Knights, have had to bear the carrying charges on such homes for a longer period of time, and the selling prices of those homes has decreased. (Compl. ¶ 87.)

The Knights have also pointed to other improper actions on the part of Countrywide which caused losses, such as illegal foreclosures on members of the armed services, which resulted in Countrywide paying \$20 million to resolve a lawsuit brought by the Department of Justice. (Compl. ¶ 92.)

The Knights further allege that Countrywide used "forced place insurance," whereby homeowners were forced to buy high-priced insurance from a Countrywide affiliate which raised struggling homeowners' debt loads, pushing them toward foreclosure, as well as high fees for default-related services. As to these services, the borrower in default would often lack sufficient funds to pay the Master Servicer. (Compl. ¶ 111.) Countrywide would, therefore, take its reimbursement for the default-related services from the amount recovered from the foreclosure sale of the home, which, of

course, reduced the amount to be distributed to each Trust's beneficiaries. (Compl. ¶ 112.) According to the Knights, BNYM had a duty to challenge these practices.

Based upon these allegations, the Knights allege the following causes of action: (1) breach of contract, (2) failure of consideration, (3) breach of fiduciary duty, (4) negligence/gross negligence/recklessness, (5) unfair trade practices, (6) an accounting and (7) attorneys' fees.

Discussion

On a motion to dismiss a complaint pursuant to CPLR 3211(a) (7) for failure to state a cause of action, the pleadings are afforded a liberal construction and the plaintiff is given "the benefit of every possible favorable inference." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (quoting *Leon v. Martinez*, 84 NY2d 83, 87 (1994)). Further, a motion to dismiss a complaint pursuant to CPLR 3211(a) (1) may be granted only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Id.* (quoting *Leon v. Martinez*, 84 NY2d at 88).

First Cause of Action

The Knights allege that "on the inception date of the PSA,

Defendant failed to perform its fundamental obligation to obtain the corpus of each Trust[,]" (Compl. ¶ 117) and "failed to perform its obligations concerning inventories of each Trust's corpus and assignments of each Trust's corpus." (Compl. ¶ 118). The Knights also assert that BNYM "covered up its failures by certifying that the Trust assets were maintained and safeguarded as required by certain transaction agreements." (Compl. ¶ 120.) Furthermore, the Knights contend that BNYM "witnessed the Master Servicer initiate and execute a scheme to cover up the failure to deliver the corpus of each Trust to Defendant[,]" (Compl. ¶ 121) and that "[t]he cover-up scheme included the act of filing thousands of false affidavits in the Courts throughout the country, very often in Defendant's name, which had the effect of denying due process of law to borrowers facing the loss of a home." (Compl. ¶ 122). The Knights allege that these breaches "greatly increased costs and risks to each Trust and thus damaged Plaintiff as a beneficiary . . . in an amount to be determined at trial." (Compl. ¶ 123.)

BNYM contends that the Knights' first cause of action for breach of contract must be dismissed on the grounds that: (1) the Complaint fails to specify the relevant contract provisions or the conduct that constituted the alleged breach; and (2) the allegations supporting this claim are expressly contradicted by the PSAs, which do not require BNYM to obtain or review the files, but

rather only to acknowledge receipt of whatever documents were provided to it by the Depositor, and to hold such documents in accordance with the PSA. BNYM points out that PSA § 2.02(a)⁴,

⁴ SECTION 2.02 Acceptance by Trustee of the Mortgage Loans.

(a) The Trustee acknowledges receipt of the documents identified in the Initial Certification in the form annexed hereto as Exhibit F-1 and declares that it holds and will hold such documents and the other documents delivered to it constituting the Mortgage Files, and that it holds or will hold such other assets as are included in the Trust Fund, in trust for the exclusive use and benefit of all present and future Certificateholders. The Trustee acknowledges that it will maintain possession of the Mortgage Notes in the State of California, unless otherwise permitted by the Rating Agencies.

The Trustee agrees to execute and deliver on the Closing Date to the Depositor, the Master Servicer and Countrywide . . . an Initial Certification in the form annexed hereto as Exhibit F -1. *Based on its review and examination, and only as to the documents identified in such Initial Certification, the Trustee acknowledges that such documents appear regular on their face and relate to such Initial Mortgage Loan. The Trustee shall be under no duty or obligation to inspect, review or examine said documents, instruments, certificates or other papers to determine that the same are genuine, enforceable or appropriate for the represented purpose or that they have actually been recorded in the real estate records or that they are other than what they purport to be on their face . . .*

Not later than 90 days after the Closing Date, the Trustee shall deliver to the Depositor, the Master Servicer and Countrywide . . . a Final Certification with respect to the Initial Mortgage Loans in the form annexed hereto as Exhibit H-1, with any applicable exceptions noted thereon. *If, in the course of such review, the Trustee finds any document constituting a part of a Mortgage File which does not meet the requirements of Section*

provides that BNYM has no duty to determine that the documents it reviews are genuine or enforceable and that PSA § 8.01⁵ provides

2.01, the Trustee shall list such as an exception in the Final Certification; provided, however that the Trustee shall not make any determination as to whether (i) any endorsement is sufficient to transfer all right, title and interest of the party so endorsing, as noteholder or assignee thereof, in and to that Mortgage Note or (ii) any assignment is in recordable form or is sufficient to effect the assignment of and transfer to the assignee thereof under the mortgage to which the assignment relates.

(emphasis added).

⁵ SECTION 8.01 Duties of Trustee

The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default that may have occurred, shall undertake to perform such duties and only such duties as are specifically set forth in this Agreement. In case an Event of Default has occurred and remains uncured, the Trustee shall exercise such of the rights and powers vested in it by this Agreement, and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs.

The Trustee, upon receipt of all resolutions, certificates, statements, opinions, reports, documents, orders or other instruments furnished to the Trustee that are specifically required to be furnished pursuant to any provision of this Agreement shall examine them to determine whether they are in the form required by this Agreement; provided, however, that the Trustee shall not be responsible for the accuracy or content of any such resolution, certificate, statement, opinion, report, document, order or other instrument.

No provision of this Agreement shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act or its own willful misconduct"

that BNYM shall examine furnished documents to determine whether they are in the form required by the agreement, but *shall not be responsible for their accuracy or content.*

The Knights, however, contend that BNYM had a contractual obligation to maintain possession of the mortgage notes, to complete mortgage assignments and provide certifications and notices of failures. Unlike the loan seller defendant in *LaSalle Bank Nat'l Assn. v. Capco Am. Securitization Corp.*, 2005 WL 3046292 (SDNY 2005), cited by BNYM, the Knights do not claim that BNYM had a duty to determine whether the documents were legally sufficient, but rather only a duty to obtain the files and hold them for the Trust.

In reply, BNYM emphasizes that delivery of the mortgage files was the Depositor's (*i.e.* Countrywide's), not the Trustee's duty, and thus the Trustee cannot be required to maintain or retain files that the Depositor never delivered to it, or to go out and obtain them.

The Court agrees that the Complaint fails to specify the relevant contract provisions that plaintiff is alleging were breached or the specific conduct underlying the allegations contained in paragraphs 117-122 of the Complaint. Accordingly, the

motion to dismiss the first cause of action is granted with leave to replead within thirty (30) days to more specifically allege what contract provisions were breached and what specific conduct on the part of BNYM constituted the alleged breach.

Second Cause of Action

The Knights' second cause of action is for failure of consideration and seeks a return of the sums invested in the Trusts, minus amounts received, and insulation against all future risks associated with defendant's breaches and other misconduct. As to this cause of action, the Knights allege that BNYM failed to perform the essential terms of the PSAs, and thus there was a failure of consideration.

BYNM claims that this cause of action is barred by Section 10.08 of the PSAs, which prevents any Certificateholder from seeking to obtain priority over any other Holder, and further asserts that the Certificates were issued on behalf of the Trusts and not by the Trustee acting in its personal capacity. BNYM also argues that rescission for lack of consideration is only available when the plaintiffs got nothing for their money. *Tams-Witmark Music Library v. New Opera Co.*, 298 NY 167, 173 (1948).

The Knights, however, argue that they seek rescission from the

wrongdoer, BNYM, not from the innocent Trusts, because BNYM executed and delivered the Certificates to the Depositor, without first receiving the mortgage files.

"Failure of consideration gives an aggrieved party the right to rescind a contract." *Sciuto v. Iannucci Food Corp.*, 219 AD2d 635, 635 (2d Dep't 1995). However, "[t]he remedy of rescission . . . lies in equity and is a matter of discretion." *Symphony Space v. Pergola Props.*, 88 NY2d 466, 485 (1996). Further, the equitable relief of rescission is to be invoked "only when there is lacking complete and adequate remedy at law and where the status quo may be substantially restored." *Rudman v. Cowles Communications*, 30 NY2d 1, 13 (1972). Where, as here, plaintiffs fail to allege that there is "lacking complete and adequate remedy at law," a cause of action seeking rescission will be dismissed. *Weinstein v. Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 643 (2d Dep't 2011).

Nor is this a case in which the *status quo* can be restored. The Knights seek rescission and a return of their investment, presumably from BNYM. BNYM is not, however, the owner of the Trusts; it is merely the Trustee. BNYM did not receive the funds from the Knights' purchase of their Certificates and any return of the amount of the Knights' investment does not in any way return

the parties to the *status quo*. This cause of action is, therefore, dismissed.

Third Cause of Action

In the third cause of action, the Knights allege that BNYM, as Trustee, owed the Knights a fiduciary duty, which it breached by, among other things, failing to acquire and safeguard Trust assets, failing to manage each Trust with the care and skill that a prudent person would use in the exercise of his or her own affairs, laboring under a conflict of interest and acting for its own benefit rather than for the benefit of the beneficiaries of each Trust, failing to provide prompt notice to other parties to the PSAs when it discovered breaches of representations and warranties, and failing to investigate and remedy numerous defaults by the Master Servicer. (Compl. ¶¶ 131-136.)

BNYM argues that this cause of action should be dismissed on the ground that, under New York Law, the rights and duties of a Trustee under a corporate indenture are defined exclusively by the terms of the agreement, here, the PSA, and that an ordinary fiduciary relationship does not exist. BNYM further notes that the Knights cannot point to any provision in the PSAs that places fiduciary obligations on the Trustee prior to an event of default.

It is well settled that an indenture trustee, such as BNYM, is unlike an ordinary trustee in that its duties are not controlled by the fiduciary relationship.⁶ By its terms, a trust indenture is “[a] document containing the terms and conditions governing a trustee’s conduct and the trust beneficiaries’ rights.” BLACKS LAW DICTIONARY 784-85 (8th ed. 2004). Under New York law:

[t]he duties of an indenture trustee can be limited to those set forth in the indenture and, as a result, the trustee does not owe the broad fiduciary duties of an ordinary trustee prior to an event of default, except that the trustee is at all times obligated to avoid conflicts of interest with the beneficiaries.

AMBAC Indem. Corp. v. Bankers Trust Co., 151 Misc 2d 334, 338-339 (Sup. Ct., NY Co. 1991) (holding that allegations that the trustee wrongfully appropriated to its own use funds from an account designated for bond redemption, charged excessive fees and paid them to itself in advance of payment of superior obligations, was sufficient to state a claim for breach of an indenture trustee’s fiduciary duty to not advance its own interests at the expense of bondholders, even prior to an event of default); see also *Ellington*

⁶ This Court has already found in the related Article 77 Proceeding pending before it, captioned *In the Matter of the Application of Bank of New York Mellon*, Index No. 651786/2011, that although BNYM is not a “full fledged fiduciary,” it nevertheless owes a fiduciary obligation to “refrain from engaging in conflicts of interest, to act with a singleness of purpose and to have a duty of loyalty to the Certificateholders.” (Tr. 159:16-160:11, Aug. 2, 2012.)

Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F Supp 2d 162 (SDNY 2011)).

Moreover, while an indenture trustee does owe a duty to perform its ministerial functions with due care, if this duty is breached the trustee will be subjected to tort liability. However, such action does not give rise to a cause of action for breach of fiduciary duties. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 NY3d 146, 157 (2008).

It is thus clear that to state a claim against an indenture trustee for breach of fiduciary duty prior to an event of default, plaintiff must specifically allege a failure to avoid conflicts of interest or that BNYM advanced its own interests at the expense of Certificateholders.

Here, plaintiff alleges that BNYM labored under a conflict of interest because BNYM defines itself as a "bank for banks," and has acknowledged that a "lion's share" of their business is dedicated to "helping other financial institutions around the world." (Compl. ¶ 8.) The Knights argue that as a result of this divided loyalty, after Bank of America took over all of Countrywide's repurchase liability and servicing obligations, BNYM disregarded its duty to avoid a conflict of interest with the investors in that

BNYM: (1) failed to provide Certificateholders with a report showing that Bank of America's servicing was in material non-compliance with the PSAs; (2) failed to inform the Knights of the settlement it was entering into with Bank of America on the Knights' behalf even though the Knights had the within action pending before this Court; and (3) failed in its obligation to acquire each Trust corpus.

These allegations, however, fail to allege that BNYM acted to advance its own interests at the expense of Certificateholders. Rather, they only allege that BNYM's dedication to helping Bank of America led it to fail to provide reports, to inform Certificateholders about settlement negotiations and to acquire the trust corpus. Moreover, the Knights fail to allege that BNYM personally benefitted from its actions, which has been held to be a necessary element to support a breach of fiduciary duty claim. *See, e.g., CFIP Master Fund, Ltd., v. Citibank, N.A.*, 738 F Supp 2d 450, 475 (SDNY 2010). Accordingly, the third cause of action for breach of fiduciary duty is dismissed.

Fourth Cause of Action

The Knights' fourth cause of action is for negligence/gross negligence/recklessness. In this cause of action, the Knights allege that BNYM owed various duties imposed upon it by common law,

including notifying them that BNYM had failed to perform its duties regarding the mortgage files; notifying the Knights that other parties to the PSA had failed to perform obligations regarding the mortgage files and the administration of the trusts; refraining from issuing certifications indicating that the mortgage files were maintained and/or safeguarded as required by certain transaction agreements; making inquiry as to the location and content of the mortgage files; ensuring that the assignments had been filled out properly and executed; and notifying the Knights that the Master Servicer was covering up BNYM's failure to receive, review, retain and process the mortgage files.

BNYM moves to dismiss this cause of action on the grounds that Section 8.01 of the PSAs, *supra* at 10-11, expressly negates all implied duties of the Trustee. In addition, Section 8.01(i) specifically provides that: "the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement" Moreover, BNYM contends that this cause of action is duplicative of plaintiff's first cause of action for breach of contract.

This Court has already noted above that "an indenture trustee owes a duty to perform its ministerial functions with due care, and if this duty is breached the trustee will be subjected to tort

liability." *AG Capital Funding Partners*, 11 NY3d at 157. This obligation is in addition to those obligations specified in the PSAs for which the Knights seek to recover damages for breach of contract. The Knights have, therefore, adequately set forth a cause of action for negligence.

Fifth Cause of Action

In the fifth cause of action, the Knights seek recovery for unfair trade practices under the Connecticut Unfair Trade Practices Act ("CUTPA"). (Conn Gen Stat Ann § 42-110b et seq.) CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." (Conn Gen Stat Ann § 42-110b (a)).

In analyzing whether a practice violates CUTPA, the Connecticut Supreme Court has

adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise . . . ; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers.

Edmands v. CUNO, Inc., 277 Conn. 425, 450, 892 A2d 938, 954 n.16

(Conn. 2006). To state a cause of action under CUTPA, a plaintiff must demonstrate that he or she has "suffer[ed] any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b." (Conn Gen Stat Ann § 42-110g (a); see also *Maguire v. Citicorp Retail Services, Inc.*, 147 F3d 232, 238 (2d Cir 1998).

Here, the Knights have alleged that BNYM either failed to perform those tasks which it agreed to do under the PSAs and/or that it did so in a negligent manner. While some breaches of contract may establish a claim under CUTPA, not every breach of contract constitutes a CUTPA violation. "In order for there to be a CUTPA violation, the breach must be accompanied by sufficient or substantial aggravating circumstances, which requires more than just a failure to perform." 12 Conn Prac., Unfair Trade Practices § 4.3. The Courts of Connecticut have held that a

simple contract breach is not sufficient to establish a violation of CUTPA, particularly where the count alleging CUTPA simply 'incorporates by reference the breach of contract claim and does not set forth how or in what respect the defendant's activities are either immoral, unethical, unscrupulous or offensive to public policy'

Boulevard Assocs. v. Sovereign Hotels, Inc., 72 F3d 1029, 1039 (2d Cir. 1995); see also *Chaspek Mfg. Corp. v. Tandet*, 1995 WL 447948, *12 (Conn. Super. Ct. 1995); *Aussenhandel v. Grant AirMass Corp.*, 2 Conn L Rptr 590, 1990 WL 283750 at *1 (Conn. Super. Ct. 1990).

BNYM's failure to receive and maintain the mortgage files as allegedly required under the PSAs does not rise to the level of being "immoral, unethical, unscrupulous or offensive to public policy." In this cause of action, the Knights have attempted to link allegations concerning Countrywide's misconduct with BNYM's alleged failure to properly carry out its duties as Trustee. The Knights cannot simply impute Countrywide's wrongdoing to BNYM. Moreover, the Knights argue that BNYM's failure to carry out its duties was a result of its desire to maximize profits by "helping" Bank of America. However, this allegation is factually unfounded, and given that the Knights' allegations of wrongdoing are against Countrywide, not Bank of America, their conclusory allegation of some sort of a conspiracy between the two cannot withstand the motion to dismiss. Accordingly, this cause of action is dismissed.

Seventh Cause of Action

As to the Knights' seventh cause of action for attorneys' fees, as a rule, "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v. AGS Computers*, 74 NY2d 487, 491 (1989). Here, there was no agreement between the parties providing for attorneys' fees. The Knights argue that attorneys' fees are recoverable for the CUTPA claim (Conn Stat Ann §42-110g [d]), but

that claim has been dismissed. Plaintiff also argues in a footnote that attorneys' fees are recoverable in an action for an accounting, but offers no support for this claim. Thus, this cause of action is dismissed.

Sixth Cause of Action

Finally, in their sixth cause of action, the Knights seek an accounting of (a) all costs, charges and expenses for which the Master Servicer has obtained or sought reimbursement from either the Trusts or from the proceeds of any foreclosure, payment, short sale, or other money received related to a loan in a Trust; (b) the practices of the Master Servicer related to foreclosures and REO Property; and (c) the actual size and nature of each Trust's corpus.

BNYM moves to stay this cause of action pending resolution of the Article 77 proceeding, in which it seeks judicial instructions and approval of a proposed settlement entered into by BNYM, in its capacity as Trustee of the 530 residential mortgage-securitization trusts, with Bank of America and Countrywide. That proposed settlement would settle all claims against Bank of America and Countrywide arising from the PSAs, including breaches of representations and warranties, as well as violations of prudent servicing obligations, in exchange for a payment into the Trusts in

the amount of \$8.5 billion. BNYM argues that approval of the proposed settlement in the Article 77 proceeding would obviate the need for an accounting, because the Settlement would release several categories of claims arising under the governing agreements, including those asserted by the Knights in support of its request for an accounting.

Since this Court is aware that the hearing on the Article 77 settlement is currently scheduled to commence on May 30, 2013, in the interests of judicial economy and efficiency this Court in its discretion will stay the accounting cause of action pending the outcome of the Article 77 proceeding.

Conclusion

Based upon the foregoing, the motion by defendant The Bank of New York Mellon to dismiss is granted as to the second, third, fifth and seventh causes of action. The first cause of action is dismissed with leave to replead, should plaintiff choose to do so, within 30 days of the date of this order.

That portion of the motion by defendant The Bank of New York Mellon to stay the sixth cause of action for an accounting is granted.

Plaintiff shall serve and file an Amended Complaint in accordance with the directives of this decision within 30 days. Defendant shall have 30 days to serve an answer or otherwise move with respect only to the repled breach of contract cause of action. Counsel shall appear for a conference in IA Part 39, 60 Centre Street, Room 208 on July 10, 2013 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: April 26, 2013



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.