

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

PRESENT: BARBARA R. KAPNICK
Justice

PART 39

WALNUT PLACE LLC

INDEX NO.

650497/11

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

COUNTRYWIDE

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**

Dated: 3/28/12

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

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WALNUT PLACE LLC, WALNUT PLACE II LLC,
WALNUT PLACE III LLC, WALNUT PLACE IV
LLC, WALNUT PLACE V LLC, WALNUT PLACE VI
LLC, WALNUT PLACE VII LLC, WALNUT PLACE
VIII LLC, WALNUT PLACE IX LLC, WALNUT
PLACE X LLC, and WALNUT PLACE XI LLC,
derivatively on behalf of Alternative
Loan Trust 2006-OA10 and Alternative
Loan Trust 2006-OA3,

Plaintiffs,

-against-

COUNTRYWIDE HOME LOANS, INC., PARK
GRANADA LLC, PARK MONACO INC., PARK
SIENNA LLC, and BANK OF AMERICA
CORPORATION,

Defendants,

and

THE BANK OF NEW YORK MELLON, in its
capacity as Trustee of Alternative
Loan Trust 2006-OA10 and Alternative
Loan Trust 2006-OA3,

Nominal Defendant.

-----x
BARBARA R. KAPNICK, J.:

Plaintiffs¹ holders of certificates issued by two
securitization trusts named Alternative Loan Trust 2006-OA10
("CWALT 2006-OA10") and Alternative Loan Trust 2006-OA3 ("CWALT

¹ Plaintiffs in this action include eleven entities named
Walnut Place LLC, Walnut Place II LLC, Walnut Place III LLC,
Walnut Place IV LLC, Walnut Place V LLC, Walnut Place VI LLC,
Walnut Place VII LLC, Walnut Place VIII LLC, Walnut Place IX LLC,
Walnut Place X LLC, and Walnut Place XI LLC.

2006-OA3"), bring this derivative action on behalf of the trusts against defendants Countrywide Home Loans, Inc. ("Countrywide"), Park Granada LLC, Park Monaco Inc., Park Sienna LLC (collectively, the "Countrywide defendants"), and Bank of America Corporation for breach of the Pooling and Servicing Agreements (the "PSAs")² that govern the administration of the residential mortgage loans sold by the Countrywide defendants to those trusts.³

Specifically, plaintiffs claim that they investigated a portion of the loans in the trusts that were delinquent or had been defaulted by borrowers, and discovered that Countrywide, which originated the loans, made false representations and warranties in the PSAs about the characteristics and credit quality of those loans, materially and adversely affecting the interests of

² Plaintiffs submit the CWALT 2006-OA10 PSA dated as of June 1, 2006, among CWALT, Inc. (Depositor), Countrywide Home Loans, Inc. (Seller), Park Granada LLC (Seller), Park Monaco Inc. (Seller), Park Sienna LLC (Seller), Countrywide Home Loans Servicing LP (Master Servicer), and The Bank of New York (Trustee); and the CWALT 2006-OA3 PSA dated as of March 1, 2006, among CWALT, Inc. (Depositor), Countrywide Home Loans, Inc. (Seller), Park Granada LLC (Seller), Park Monaco, Inc. (Seller), Park Sienna, LLC (Seller), Countrywide Home Loans Servicing LP (Master Servicer), and The Bank of New York (Trustee). Plaintiffs are not parties to either PSA; rather, they are third-party beneficiaries of those agreements.

³ According to plaintiffs, defendant Bank of America Corporation, which is not a party to the PSAs, is liable for the claims alleged as a successor to the Countrywide defendants.

plaintiffs who were supposed to be repaid, with interest, from the cash flow generated by the loans.⁴

Plaintiffs allege that by letter dated August 3, 2010, they informed nominal defendant Bank of New York Mellon, which is the Trustee for both trusts, of the misrepresentations discovered in relation to the loans in the CWALT 2006-OA10 trust, and demanded that it require the Countrywide defendants, pursuant to Section 2.03(c) of the PSA, to repurchase 1,432 allegedly noncompliant loans identified in an appendix to the letter.⁵ (*Compl.*, Ex 5.) On the same date, plaintiffs also sent a letter informing the Trustee of the breach of representations and warranties relating to delinquent loans in the CWALT 2006-OA3 trust, and demanding that it request the Countrywide defendants, pursuant to Section 2.03(c) of

⁴ The certificates held by plaintiffs are, in effect, mortgage-backed securities issued by common-law trusts governed by New York law. See Section 10.03 in both PSAs.

⁵ Section 2.03(c) of the CWALT 2006-OA10 PSA provides, in relevant part, that each of the Countrywide defendants "covenants that within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty with respect to a Mortgage Loan sold by it pursuant to Section 2.03(a) that materially and adversely affects the interests of the Certificateholders in that Mortgage Loan, it shall cure such breach in all material respects, and if such breach is not so cured, shall ... repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee at the Purchase Price ..." (*Compl.*, Ex. 1.)

that trust's PSA, to repurchase 536 of those loans.⁶ (*Compl.*, Ex 11.) Plaintiffs further allege that by letter dated August 31, 2010, the Trustee sent to the defendants (and others) the written notice of breach of warranties and representations as to each trust. (*Compl.*, ¶¶80, 139.)

Since the Countrywide defendants failed to repurchase the loans at issue within the 90-day period set forth in Section 2.03(c), plaintiffs sent the Trustee a letter dated December 21, 2010, in which they represented that, together with other holders of certificates in the CWALT 2006-OA10 trust, they owned 25% or more of the voting rights in that trust and directed that the Trustee file suit against the Countrywide defendants within sixty days. (*Compl.*, Ex 6.) In that letter, plaintiffs also offered to indemnify the Trustee against the costs, expenses, and liabilities resulting from instituting litigation in relation to the PSA. (*Id.*) In response to the demand, plaintiffs allege that on February 18, 2011, they received a letter from the Trustee stating that "it need[ed] additional time to evaluate this matter." (*Compl.*, ¶87.)

⁶ In their moving papers, defendants contend that the letters of August 3, 2010, submitted to this Court in a redacted form, were sent by a hedge fund called The Baupost Group LLC, a certificateholder that later assigned the certificates to the plaintiffs here. Defendants point out that the Walnut Place entities were formed shortly before the Trustee received a demand to sue in a letter dated December 21, 2010, discussed below. (Defendants' Brief at 7-8.)

In a similar letter dated January 28, 2011, plaintiffs directed that the Trustee commence an action against the Countrywide defendants with respect to the breaches relating to the loans in the CWALT 2006-OA3 trust, and offered indemnification. (Compl., Ex 12.) Plaintiffs allege that on April 5, 2011, they received a response from the Trustee stating that it needed more time to evaluate the matter because plaintiffs' demand letter "raise[d] ... legal, contractual and practical issues ... that BNY Mellon, in its capacity as trustee, must in good faith consider." (Compl., ¶146.)

Thereafter, plaintiffs commenced this action by filing a Complaint on February 23, 2011, alleging breach of contract in relation to the CWALT 2006-OA10 PSA. The Complaint was amended on April 12, 2011, to include allegations as to the breach of the CWALT 2006-OA3 PSA.

Subsequently, on June 29, 2011, the Trustee filed a petition with this Court, pursuant to CPLR 7701, titled *In the Matter of the Application of Bank of New York Mellon*, Index No. 651786/2011, seeking judicial instructions and approval of a proposed settlement that covers plaintiffs' two trusts and another 528 similar trusts, and requires defendants to pay \$8.5 billion into the trusts to

settle claims of breach of representations and warranties in the PSAs that govern the trusts.⁷

Defendants now move for an Order, pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), dismissing the Complaint on the grounds that plaintiffs have failed to allege an Event of Default under Section 10.08 of the PSAs, which would constitute an exception to the no-action clause and, even if that section did not apply here, they have failed to satisfy the pleading requirements for bringing a derivative action.

Section 10.08 of the PSAs, which the parties refer to as the "no-action" clause, is entitled "Limitation on Rights of Certificateholders" and provides, in relevant part, that:

No Certificateholder shall have any right by virtue or by availing itself of any provisions of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof, as provided in this Agreement, and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates shall also have made written request to the Trustee to institute such action, suit or proceeding in

⁷ That case was removed by plaintiffs to the Federal Court on August 26, 2011 under the Class Action Fairness Act of 2005. A decision denying remand of the action to this Court (see *Bank of New York Mellon v. Walnut Place LLC*, 2011 WL 4953907 [SDNY Oct 19, 2011]), was recently reversed by the Court of Appeals for the Second Circuit, which ruled that the action belongs in State Court. See *BlackRock Financial Management Inc. v. Segregated Account of Ambac Assur. Corp.*, 2012 WL 611401(2d Cir. Feb 27, 2012).

its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby, and the Trustee, for 60 days after its receipt of such notice, request and offer of indemnity shall have neglected or refused to institute any such action, suit or proceeding; it being understood and intended, and being expressly covenanted by each Certificateholder with every other Certificateholder and the Trustee, that no one or more Holders of Certificates shall have any right in any manner whatever by virtue or by availing itself or themselves of any provisions of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of the Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder or to enforce any right under this Agreement, except in the manner provided in this Agreement and for the common benefit of all Certificateholders.

Defendants contend that plaintiffs' action is barred by Section 10.08 which limits the right of certificateholders to sue for breach of the PSAs to claims alleging an Event of Default, provided the other prerequisites are satisfied. Under the PSAs, an "Event of Default" is defined as a specified failure of the Master Servicer to perform its servicing duties.⁸ Defendants explain that the representations and warranties complained of were made by Countrywide to the Depositor, the Master Servicer, and the Trustee

⁸ Both PSAs provide that the Master Servicer performs the tasks of collecting principal and interest payments from the underlying mortgages, and paying those monies to the trusts. Section 7.01 of the PSAs lays out six types of failures by the Master Servicer which may give rise to an Event of Default. Countrywide Home Loans Servicing LP (now known as BAC Home Loans Servicing LP), which is not a party to this action, is the Master Servicer in both PSAs.

before any servicing obligations arose under the PSAs.⁹ Thus, defendants contend that plaintiffs are not permitted to bring their claims because they have not alleged any failure by the Master Servicer.

Defendants argue that their interpretation of Section 10.08, as barring suits by certificateholders except where an event of default is alleged, is consistent with the purpose of no-action clauses which is to "prevent[] individual bondholders from pursuing an individual course of action and thus harassing their common debtor and jeopardizing the fund provided for the common benefit," *Batchelder v. Council Grove Water Co.*, 131 NY 42, 46 (1892), "deter individual debenture holders from bringing independent law suits which are more effectively brought by the indenture trustee," *Feder v. Union Carbide Corp.*, 141 AD2d 799, 800 (2d Dep't 1988), and "protect against the risk of strike suits," *Feldbaum v. McCrory Corporation*, 1992 WL 119095 at *6 (Del Ch June 2, 1992).

Defendants then argue that any claim brought by certificateholders must satisfy Section 10.08 or else it is barred,

⁹ Defendants further explain that the other Countrywide defendants only made the representation that they had good title to the loans before selling them to the trust, but are bound like Countrywide by Section 2.03(c) of the PSAs to repurchase the loans if there is notice of a breach of the representations and warranties.

relying on the case of *Sterling Federal Bank, F.S.B. v. DLJ Mortgage Capital, Inc.*, 2010 WL 3324705 at *4 (ND Ill, Aug 20, 2010), in which the Court applied New York law to interpret a substantially similar no-action clause and held that, given the breath of the provision restricting "any suit or proceeding in equity or in law upon or under or with respect to [the PSAs]," the clause could not be read "to apply only to claims ... seeking damages caused by Events of Default."

Further, defendants point out that each PSA expressly conveys to the Trustee the right to require the repurchase of the loans once the trusts are created.¹⁰ Thus, defendants contend that right belongs to the Trustee and not the plaintiffs, who, as stated in Section 10.08, do not have any right to control the operation and management of the trusts.¹¹

Next, defendants contend that even if the no-action clause did not apply, plaintiffs have not satisfied the pleading requirements for bringing a derivative action. Defendants rely on the case of

¹⁰ See PSAs 2.01(b) and 2.04.

¹¹ In addition, defendants argue that plaintiffs have not complied with Section 10.08 because they failed to allege sufficient voting rights to bring this suit under either trust. However, plaintiffs contend that the 25% voting rights requirement applies only to the demand to sue and offer of indemnity, and, as such, was satisfied.

Velez v. Feinstein, 87 AD2d 309, 315 (1st Dep't 1982), where the Court held that:

[i]n an action brought by a beneficiary on behalf of a trust, the beneficiary must show why he has the right to exercise the power, which the law and the trust agreement in the first instance confide in the trustees, to bring a suit on behalf of the trust. This will normally require either a showing of a demand on the trustees to bring the suit, and of a refusal so unjustifiable as to constitute an abuse of the trustee's discretion, or a showing that suit should be brought and that because of the trustees' conflict of interest, or some other reason, it is futile to make such a demand.

Defendants argue that plaintiffs have not alleged that the Trustee's refusal to sue was so unjustifiable as to constitute an abuse of discretion because the trustee merely stated that it needed additional time to evaluate the matter brought to its attention by plaintiffs.

In opposition, plaintiffs concede that the claims alleged do not fall under the "Events of Default" provision in the PSAs, as they are leveled against the sellers of the mortgages, *i.e.*, the Countrywide defendants, and not the Master Servicer. Relying heavily on the decision in *Greenwich Financial Services Distressed Mortgage Fund 3, LLC v. Countrywide Financial Corp.*, Index No. 650474/2008 (Sup Ct, NY Co, Oct. 7, 2010), in which this Court dismissed a purported class action for failure to comply with a nearly identical no-action clause, plaintiffs contend that they are

not barred from bringing this lawsuit because they have fully complied with Section 10.08, in that they have (1) joined with a group of investors that together had more than 25% of the voting rights in each trust at the time of the demand; (2) made a written demand on the Trustee to file suit; (3) offered proper indemnity to the Trustee; and (4) waited more than 60 days to bring this action after sending the demand letters.

Plaintiffs contend that giving notice of an Event of Default is not a necessary condition for suing to enforce the PSAs, and should be read out of Section 10.08 when an action is not based on a default by the Master Servicer. Plaintiffs also argue that jurisprudence from Federal and State courts supports the position that they should be excused from complying with conditions in a no-action clause that are impossible to satisfy.

However, plaintiffs' reliance on *Greenwich* is misplaced. In that case, this Court considered defendants' contention that the plaintiffs had failed to allege an Event of Default, as required by the no-action clause. Then, in rejecting plaintiffs' argument that they were not subject to the no-action clause because they were suing for the benefit of all certificateholders, this Court emphasized that plaintiffs had also failed to comply with the other procedural requirements of Section 10.08.

Equally unavailing are the cases cited by plaintiffs for the proposition that compliance with a condition should be excused if adherence to it is impossible. Those cases address the objective factual impossibility of meeting certain requirements, and not, as here, the failure to assert a claim conceptually based on an Event of Default, as required by the PSAs. See, e.g., *Sterling Federal Bank, F.S.B. v. Credit Suisse First Boston Corp.*, 2008 WL 4924926 at *11, 14 (ND Ill Nov 14, 2008) (excusing plaintiffs from complying with the 25% voting rights and demand requirements where the trustee allegedly failed to respond to plaintiffs' requests for information regarding other certificateholders); *Campbell v. Hudson & Manhattan R. Co.*, 227 AD 731, 736 (1st Dep't 1951) (failure to allege a request by 25% of bondholders was excused because it was impossible to locate them).

Alternatively, plaintiffs contend that Section 10.08 must be satisfied only where certificateholders sue under an Event of Default, while it does not apply to other claims they might bring. In support of this argument, plaintiffs rely on the case of *Metropolitan West Asset Management, LLC v. Mangus Funding Ltd.*, 2004 WL 1444868 at *4-5 (SDNY 2004), where the plaintiffs, who were holders of certain notes, sought damages from the trustee and investment manager not "as a result of an uncured Event of

Default," but for the alleged "mismanagement of the trust collateral [which had been liquidated] and a failure to safeguard plaintiffs' rights." The Court held that the no-action clause, which was similar to the one at issue here, did not prevent plaintiffs from bringing their claims. However, the Court expressly stated that the clause was inapplicable because the alleged trustee's wrongdoing was a central issue in that case.

Similarly, in *Howe v. Bank of New York Mellon*, 783 F Supp 2d 466, 473-74 (SDNY 2011), another case cited by plaintiffs where the no-action clause required notice of an Event of Default, the Court held that it "will not presume that the parties intended to limit the noteholders' rights to sue on claims arising out of the Trustee allegedly taking extra-contractual action or breaching its fiduciary duties to the noteholders."

The reasoning in these cases is consistent with the holding in *Feldbaum v. McCrory Corporation*, *supra*, 1992 WL 119095 at *6-7, in which the Court, applying New York law, upheld a no-action clause providing that securityholders must give notice of an Event of Default, on the grounds that "if the trustee is capable of satisfying its obligations, then any claim that can be enforced by the trustee on behalf of all bonds ... is subject to the terms of a no-action clause." The Court then specified that it would not

apply a no-action clause "to bar claims where misconduct by the trustee is alleged." *Id.* at *7.

Unlike those cases, here there is no allegation of misconduct or breach by the Trustee in the administration of the trusts. Thus, the cases cited by plaintiffs do not support a reading of Section 10.08 as inapplicable to claims for breach of the representations and warranties made by Countrywide to, among others, the Trustee itself.

Next, plaintiffs contend that even if Section 10.08 did not apply, they were permitted to bring this action derivatively because the Trustee's refusal to sue was unreasonable given the information discovered during plaintiffs' investigation into the delinquent loans. Alternatively, plaintiffs argue for the first time that the Trustee has a conflict of interest because its fee, which is linked to the principal balance of the loans in the trusts, would be reduced if the Countrywide defendants were required to repurchase the loans at issue. As such, plaintiffs contend that they were not required to make a demand since it would have been futile.

In reply, defendants cite to the case of *Tomczak v. Trepel*, 283 AD2d 229, 230 (1st Dep't 2001), where the Court required that

the complaint set forth "why the Board refused to take action." Defendants contend that plaintiffs failed to properly plead that the Trustee refused to act, and that its response that it needed more time to evaluate the information submitted is neither a refusal nor an unreasonable request.

Further, defendants point out that nowhere in the Complaint do plaintiffs allege that the Trustee had a conflict of interest which would render the making of a demand futile. See *Rosenberg v. Home Box Office*, 2006 WL 5436822 (Sup Ct, NY Co), aff'd 33 AD3d 550 (1st Dep't 2006), (holding that "plaintiff may not amend his complaint to add a new legal theory via statements in a memorandum of law in opposition to a pending dispositive motion"). In any event, defendants argue that the amounts of compensation involved if Countrywide were forced to repurchase the loans are too small to create a conflict.

Here, plaintiffs' conclusory allegations that the Trustee refused to sue are belied by their own assertions in the Complaint that the Trustee asked for additional time to investigate the matter. Moreover, the Trustee did, in fact, act upon plaintiffs' complaints, as demonstrated by the settlement agreement reached with the defendants and submitted to this Court in the proceeding filed under CPLR 7701. That settlement includes the claims at

issue here. The Trustee was informed in August 2010 that approximately 2,000 loans were noncompliant. Plaintiffs' filing of this lawsuit only a few days after receiving the Trustees's response in February 2011, asking for more time to evaluate this complex matter before bringing an action, was premature under the circumstances.

Accordingly, defendants' motion to dismiss is granted and the Complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Date: March 28, 2012



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.