

**LaSalle Bank National Association v Nomura Asset
Capital Corporation**

2004 NY Slip Op 30218(U)

March 23, 2004

Supreme Court, New York County

Docket Number: 0603339/2003

Judge: Richard B. Lowe

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

PRESENT: JUSTICE RICHARD B. LOWE, III

PART 56

Justice

LASALLE BANK NATIONAL ASSOCIATION
(FKA LASALLE National Bank), as Trustee
for the Certificateholders of Asset
Securitization Corporation Commercial
Mortgage Pass-through certificates series
1997-05

- v -
Nomura Asset Capital Corp.
and Asset Securitization Corp.

INDEX NO. 603339/03
MOTION DATE 01/06/04
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

FILED
MAR 29 2004
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAR 23 2004

JUSTICE RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----X
LASALLE BANK NATIONAL ASSOCIATION
(f/k/a LASALLE NATIONAL BANK), as Trustee
for the Certificateholders of ASSET SECURITIZATION
CORPORATION COMMERCIAL MORTGAGES
PASS-THROUGH CERTIFICATES SERIES 1997-D5,

Index No. 603339/03

Plaintiff,

-against-

NOMURA ASSET CAPITAL CORPORATION
and ASSET SECURITIZATION CORPORATION,

Defendants.
-----X

Richard B. Lowe, III, J.:

Defendants Nomura Asset Capital Corporation (Nornura) and Asset Securitization Corporation (ASC) move, pursuant to CPLR 3013 and CPLR 3211(a)(1) and (a)(7), to dismiss the complaint due to: failure to allege claims with requisite particularity, defenses arising from documentary evidence, and failure to state a claim upon which relief can be granted.

BACKGROUND

Plaintiff LaSalle ~~Bank~~ National Association (f/k/a LaSalle National Bank) (LaSalle), a national banking association appointed as Trustee for the Certificateholders of Asset Securitization Corporation Commercial Mortgage Pass-Through Certificates, Series 1997-D5 (Trust), brings this action against defendants Nomura and ASC, both Delaware corporations, for breach of certain contractual representations, warranties and obligations. This action involves a Commercial Mortgage Backed Securities transaction, “which packages loans for sale to a special purpose Trust that qualifies as a pass-through entity for tax purposes.” Amiana Stovall Affidavit in Support (Stovall Affidavit), Tab 1 ¶ 10.

The Relevant Agreements

On October 24, 1997, Nomura sold and conveyed all title, rights, and obligations relating to 155 commercial mortgage loans (totaling approximately \$1.8 billion) to ASC pursuant to a

Mortgage Loan Purchase and Sale Agreement (MLPSA). See Stovall Affidavit, Tab 3. **ASC**, on the same day, then transferred the above mortgage loans to LaSalle, to be held in trust for the benefit of the certificateholders under the terms of a Pooling and Servicing Agreement (PSA). See id., Tab 2, **Ex. A**. The PSA provided a Master Servicer and a Special Servicer for the Trust.¹ **ORIX** Capital Markets, L.L.C. (**Orix**) is the successor-in-interest of the Special Servicer.

This action arose from Nomura's alleged breach of several representations and warranties set forth in the MLPSA regarding the mortgage loans, and the underwriting and origination process, and **ASC**'s alleged breach of its confirmation of Nomura's representations and warranties in the PSA. See Stovall Affidavit, Tab 1 ¶ 19. Pursuant to the PSA, **ASC** confirmed that "Nomura's representations and warranties set forth in the MLPSA were true as of October 24, 1997" and "the representations and warranties survived delivery of the Mortgage Loans and files to the Trustee, and inured to the benefit of the Certificateholders, the Trustee and the Servicers." Id.

Pursuant to MLPSA § 3, upon notice of a breach of its representation and warranties, Nomura was to cure the breach or repurchase the mortgage loan within ninety days. See id., Tab 1 ¶ 20. Pursuant to the PSA § 2.03(d), upon notice of a breach of the **MLPSA**, **ASC** was to either cure the breach or repurchase the mortgage loan within ninety days thereafter. See id.

Alleged Notice of Breaches

LaSalle claims that, by letter dated July 24, 2003, **Orix** submitted written notice to Nomura and **ASC** regarding numerous breaches of representations and warranties, as required by MLPSA § 3(a) and **PSA** § 2.03(d). See Stovall Affidavit, Tab 1 ¶ 29. LaSalle alleges that, pursuant to MLPSA § 3(b), **Orix** demanded that Nomura and **ASC** repurchase the mortgage loans

¹The Master Servicer's duties involve "collection activities, escrow management and similar day-to-day servicing operations." Stovall Affidavit, Tab 1 ¶ 18. The Special Servicer's duties "relate to Mortgage Loans where events of default or collateral instability have occurred." Id.

* 4]
or cure the breaches within ninety days of the July 24,2003 letter. See id. LaSalle also asserts that, pursuant to PSA § 2.03(e), **Orix** demanded that Nomura and **ASC** deliver:

all loan origination documentation generated by or at the request or for the benefit of **ASC**, Nomura, or their respective correspondent loan originators (if any), existing on or at any time before October 24, 1997 and relating in any way to the loans in Special Servicing. . . . [and] evidence of [Nomura and ASC's] compliance with their obligations in Paragraph 1 of the MLPSA with respect to all other loans (i.e., those loans not yet in Special Servicing).

Stovall Affidavit, Tab 1 ¶ 26.² It is undisputed that Nornura and **ASC** failed to provide these requested documents.

Present Action

In October 2003, LaSalle brought this action, asserting that: (1) Nomura breached various representations and warranties in the MLPSA relating to the mortgage loans and the underwriting process; (2) Nomura and **ASC** breached their obligations in the MLPSA and PSA to create, maintain and/or deliver the underlying origination and underwriting documents to the Trust; and (3) **ASC** breached representations **and** warranties regarding the truth of Nomura's representations and warranties. Stovall Affidavit, Tab 1 ¶¶ 4, 6, 31-44. LaSalle claims that despite notice and demand, Nomura and ASC refuse to cure the breaches or to repurchase the mortgage loans **as** required by the contracts. See id., Tab 1 ¶ 5.

LaSalle alleges in the complaint that the defendants' breached certain representations and warranties in the **MLPSA and** PSA with respect to 10 properties (out of the pool of 155 mortgage loans):

- (1) #37 - Super Kmart - San Antonia = alleged exposure/loss of \$10,689,589.00;
- (2) #42 - Builders Square - Daytona = alleged exposure/loss of \$10,210,198.00;
- (3) #47 - Builders Square - El Paso = alleged exposure/loss of \$5,807,086.00;
- (4) #50 - Builders Square - **San** Antonio = alleged exposure/loss of \$6,130,997.00;

²MLPSA § 1 provides that "[Nomura] hereby agrees, to deliver to [LaSalle] all documents, instruments and agreements required to be delivered by [ASCI to the Custodian on behalf of [LaSalle] under the [PSA] and such other documents, instruments and agreements as [ASCI or [LaSalle] shall reasonable request." Stovall Affidavit, Tab 3 at 2.

- (5) #64 - Lancers Center = alleged exposure/loss of \$5,879,978.00;
- (6) #105 - Banzhoff Mobile Home Park = alleged exposure/loss of \$3,838,974.00;
- (7) #107 - San Jacinto Plaza = alleged exposure/loss of \$2,897,854.00;
- (8) #120 - Best Western - Old Hickory Inn = alleged exposure/loss of \$2,525,162.00;
- (9) #138 - Knights Inn - Bridgeville = alleged exposure/loss of \$1,410,746.00; **and**
- (10) #154 - Los Arcos Apartments = alleged exposure/loss of \$747,678.00.

The alleged potential liability for the above ten properties is \$50,138,262.00. LaSalle claims that it suspects additional breaches as to the remaining 145 mortgage loans, however, its abilities to evaluate the remaining 145 mortgage loans “and/or Nomura’s and ASC’s performance of their obligations, or lack thereof, are profoundly hindered by the lack of complete loan origination and underwriting files and documents.” Stovall Affidavit, Tab 1 ¶ 23. LaSalle asserts that the defendants are obligated under **MLPSA** and **PSA** to provide the requested underlying documents, but have denied access.

Present Motion

Nomura and ASC move, pursuant to CPLR 3013 and CPLR 3211(a)(1), (a)(7), to dismiss the complaint asserting: (1) LaSalle fails to allege its claims with requisite particularity; (2) such claims are barred by defenses arising from documentary evidence; and (3) LaSalle fails to state a claim upon which relief can be granted.

DISCUSSION

At the outset, the defendants argue that the complaint should be considered in two parts for this motion to dismiss: (1) LaSalle’s causes of action based on the **10** mortgage loans specified in the complaint; and (2) LaSalle’s claims based on the remaining 145 mortgage loans not specified in the complaint.

Claims Based On The 10 Mortgage Loans Specified In The Complaint

CPLR 3211(a)(7)

On a motion to dismiss the complaint, pursuant to CPLR 3211(a)(7), “for failure to state a cause of action . . . , the complaint must be construed in the light most favorable to the plaintiff,

* 6]

and all factual allegations must be accepted as true.” Davis v CCF Capital Corn., 277 AD2d 342 (2d Dept 2000) (citations omitted). “However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference.” Morris v Morris, 306 AD2d 449, 451 (2d Dept 2003) (citations omitted). “[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” Id. (citations omitted).

Pursuant to CPLR 3211(a)(7), the defendants move to dismiss LaSalle’s claim that they breached MLPSA § 2(b)(xli) with respect to the loans secured by credit leases (Loan #37: Super K-Mart - San Antonio, Loan #42: Builders Square - Daytona, Loan #47: Builders Square-El Paso, and Loan #50: Builders Square - San Antonio). MLPSA § 2(b)(xli)(F) represents that,

The Tenant cannot terminate the Credit Lease for any reason, prior to payment in full of or the payment of funds sufficient to pay in full: (a) the principal balance of the loan; (b) all accrued and unpaid interest on the loan; and (c) any other sums due and payable under the loan, as of the termination date, except for a default by the Landlord under the Credit Lease[.]

Stovall Affidavit, Tab 3 at 16. LaSalle alleges in the complaint that the representation in MLPSA § 2(b)(xli)(F) was false because K-Mart (credit tenant) “terminated” its leases in bankruptcy.³

The defendants assert that: (1) LaSalle lacks standing to bring such a claim; and (2) upon

³In the complaint, LaSalle alleges that:

The MLPSA states that a credit tenant cannot terminate the credit lease without paying the loan in full, except upon the default of the landlord/borrower. There is no exception for a lease termination in the event of the tenant’s bankruptcy. Therefore, there is a default of the following loans because the credit leases have been terminated: Loan #37: Super K-Mart - San Antonio, Loan #42: Builders Square - Daytona, Loan #47: Builders Square-El Paso, and Loan #50: Builders Square - San Antonio.

Stovall Affidavit, Tab 1 ¶ 21(f). In support, LaSalle cites the decision by the Bankruptcy Court in K-Mart’s bankruptcy case, In re K-Mart Corp., No. 02-BO2474 (Bankr ND Ill Nov. 26, 2003) (see Michael F. Wurst Affidavit in Opposition [Wurst Affidavit], **Ex. 4**), stating that LaSalle could file claims for “damages arising from the termination of the lease of each property listed on the Exhibits hereto,” which include the subject credit leases.

bankruptcy, K-Mart's leases were "breached," rather than terminated. The defendants allege that the Trustee lacks standing because the respective loans were covered by **an** Originator Purchase Agreement (in which Nomura acquired the loans from another entity before selling them to **ASC** through the **MLPSA**), and that the applicable language of **PSA § 2.03(i)** only allows the Servicer the right to enforce the defendants' obligations under section 2.03. See Defendants' Mem. of Law in Support at 25 n 15; Defendants' Mem. of Law in Further Support at 15 n 19. LaSalle asserts that section 2.03(i) merely provides **an** additional remedy against the Originator if Nomura and **ASC** fail to fulfill their obligations, and that section 2.03(i) contemplates that the Trustee will sue Nomura and **ASC** before any action is taken against the Originator. See Plaintiffs Mem. of Law in Opposition at 25 n **23**. **PSA 2.03(i)** provides that:

If for any reason the Mortgage Loan Seller or the Depositor fails to fulfill its obligations under this Section **2.03** with respect to any Mortgage Loan, the Servicer shall use reasonable efforts in enforcing any obligation of the Originator to cure or repurchase such Mortgage Loan under the terms of the related Originator Purchase Agreement.

Stovall Affidavit, Tab 2, **Ex. A** at 77. The court finds that the language of **PSA § 2.03(i)** does not conclusively **and** expressly prohibit the Trustee **from** bringing a claim against the defendants' with respect to these loans.

The defendants next assert that **MLPSA § 2(b)(xli)** makes no representation that the lease cannot be "breached" and that, upon filing for bankruptcy protection as debtor-in-possession, K-Mart's rejection of the subject leases constituted a "breach" of the lease, rather than a "termination" of the lease. On this motion, the court refrains from deciding whether or not the credit tenants actually terminated their leases in bankruptcy; rather, construing the complaint in the light most favorable to the plaintiff and accepting all factual allegations as true, the present issue to be determined is whether the leases could be terminated in bankruptcy, thereby stating a cause of action for breach of representation and warranty pursuant to the **MLPSA** and the **PSA**.

In accordance with 11 USC § 365(g)(1), rejection is treated as a “breach,” of the lease (allegedly effective at the time the Chapter 11 petition was filed), rather than a complete termination of the lease. See B.N. Realty Assocs. v Lichtenstein, 238 BR 249,255 (SD NY 1999); In re Andover Toes, Inc., 231 BR 521, 544 (Bankr Ct, SD NY 1999)(“[w]hen, as [the debtor-in-possession] did here, a debtor rejects an unexpired lease, the breach is deemed to occur at the time the bankruptcy petition was filed, 11 USC § 365 [g][1], and the result of the breach is to give the landlord a general unsecured claim for damages cause by that rejection”) (citations omitted); In re Lavigne, 114 F3d 379,386-87 (2d Cir 1997). However, the effect of a breach under section 365(g)(1) is to permit the creditor to seek a claim under 11 USC § 502(b)(6), which awards the creditor “damages resulting from the termination of a lease of real property.” See In re Andover Togs, Inc., 231 BR at 544 (“[a] landlord can claim any and all unpaid amounts due it under the lease as of the petition date However, because commercial leases are typically of long-term duration, which could lead to an astronomical calculation of damages engendered by a lease’s premature termination, Congress capped the maximum amount that a landlord can claim as damages caused by a debtor’s rejection of a lease by means of section 502[b][6]”). Section 502(b)(6) suggests that, upon rejection, the subject commercial leases could have been terminated to collect damages. See In re Emple Knitting Mills, Inc., 123 BR 688, 691 (Bankr Ct, D ME 1991) (explaining that once lease is rejected, “the lessor has the choice of (1) not terminating the lease and seeking payment of future rents from ‘the tenant’ or from my person or entity that has guaranteed the debtor’s lease obligations; or (2) to terminate the lease and file a claim in the bankruptcy estate for damages, which claim will be subject to the § 502[b][6] limitation”).

The court finds questions of fact regarding the particular circumstances subsequent to the rejection which may have terminated the subject leases, for example, whether the property was

* 9]
surrendered. Therefore, defendants' motion to dismiss the claims asserting breach of MLPSA § 2(b)(xli), with respect to Loan #37: Super K-Mart - San Antonio, Loan #42: Builders Square - Daytona, Loan #47: Builders Square-El Paso, and Loan #50: Builders Square - San Antonio, is denied.

In addition, the defendants move to dismiss LaSalle's claims for breach of the covenant of good faith and fair dealing, alleging these claims are duplicative of LaSalle's breach of contract claims. "In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 153 (2002) (citations omitted).

This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.' While the duties of good faith and fair dealing do not imply obligations 'inconsistent with other terms of the contractual relationship,' they do encompass 'any promises which a reasonable person in the position of the promisee would be justified in understanding were included.'

Id. (Citations omitted).

The court finds that LaSalle's allegations that the defendants breached implied covenants of good faith and fair dealing are alleged as part of its breach of contract cause of action in Count I and not alleged as a separate cause of action (see Stovall Affidavit, Tab 1 ¶¶ 35, 38, 42).

Therefore, such allegations sufficiently state a cause of action for breach of contract and should not be dismissed. See 511 West 232nd Owners Corn., 98 NY2d at 154; 1-10 Indus. Assocs., LLC v Trim Corp. of America, 297 AD2d 630, 631 (2d Dept 2002).

CPLR 3013

CPLR 3013 requires that plaintiffs' allegations be "sufficiently particular to give the court and the parties notice of the transactions, occurrences or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." A cause of action will be properly dismissed if the allegations pertinent thereto are "too vague and conclusory

to give proper notice of the transactions and occurrences intended to be proved.” Lynch v Upper Crust, Inc., 294 AD2d 237,238 (1st Dept 2002).

The defendants argue that LaSalle fails to identify any damages, pursuant to CPLR 3013, except as to 8 of the 155 mortgage loans it purports to bring suit on. The defendants claim that, under **MLPSA § 3(b)**, Nomura is required to cure or repurchase a mortgage loan only if the breach of representation and warranty relating to the loan materially and adversely affects the loan’s value or the Certificateholders’ interests. The defendants argue that only 8 of the specified 10 mortgage loans fall under **MLPSA § 3(b)**, because they are in default, at **risk** of imminent default, or previously liquidated.

The court finds that LaSalle adequately pleads damages for breaches of representations and warranties based on its allegations that defendants failed to cure or to repurchase the 10 mortgage loans as provided for in the contracts. The defendants fail to conclusively prove that their obligation to cure or repurchase certain loans relies on whether the loans are in default, **risk** of imminent default, or previously liquidated.

CPLR 3211(a)(1)

“Where documentary evidence definitively contradicts the plaintiffs factual allegations and conclusively disposes of the plaintiffs claim, dismissal pursuant to CPLR 3211(a)(1) is warranted.” Berardino v Ochlan, 2 AD3d 556,770 NYS2d 75, 76 (2d Dept 2003). Here, the defendants make numerous arguments to dismiss, pursuant to CPLR 3211(a)(1), asserting that the documentary evidence contradicts the alleged breaches of representations, warranties **and** obligations.

First, the defendants assert that the documentary evidence flatly contradicts LaSalle’s allegations that the defendants breached **MLPSA § 2(b)(xlv)** and **PSA § 2.01** by failing to deliver complete mortgage loan files to LaSalle. **MLPSA § 2(b)(xlv)** states that “[t]he Mortgage File that

is being conveyed to the Trustee is complete.” Stovall Affidavit, Tab 3 at 18. The relevant paragraph of **PSA § 2.01** provides that “[a]ll original documents relating to the Mortgage Loans which are not delivered to the Custodian are and shall be held by the Depositor, the Trustee or the Servicer, as the case may be, in trust for the benefit of the Certificateholders.” Id., Tab 2, **Ex. A** at 69.

The defendants claim that they already submitted the mortgage files that they were obligated to **turn** over, and had no contractual obligation to create, maintain and deliver complete origination files, which Orix demanded on LaSalle’s behalf. The defendants allege that, on October 22, 2002, LaSalle determined that the mortgage files were complete and cleared the pool of loans (Series 1997-D5) of any exceptions, as evidenced by an e-mail written by LaSalle personnel. See Stovall Affidavit, Tab 5. The e-mail regarding “NIM 97 **D5** (1002/155),” stated:

This pool is 100% cleared of exceptions. Attached is an updated report and it shows no exceptions. You may also use this email **as** confirmation that the pool is cleared.

Id.

The court finds that the October 22, 2002 e-mail constitutes documentary evidence that the mortgage files were complete. However, section 1 of the **MLPSA**, which requires the defendants to provide other documents, instruments and agreements **as** “reasonably requested” by the Trustee, could also apply to the documents requested by LaSalle. The court finds that, whether LaSalle reasonably requested the complete set of the origination and underwriting files, pursuant to **MLPSA § 1**, is a question to be resolved by a trier of facts.

The defendants argue that, even assuming they had some further obligation to produce documents: (1) LaSalle failed to give “prompt notice” to the defendants as required by the **PSA**,⁴

⁴Pursuant to **PSA § 2.02** (see Stovall Affidavit, Tab 2, **Ex. A** at 69-70), LaSalle **was** required to inspect each mortgage file within 45 days after the later of (a) LaSalle’s receipt of such **mortgage** file or (b) execution and delivery of **the PSA**, to ascertain that all documents referred to in section **2.01** were received, executed, **appear** to be what they purport to be, and that such documents relate to **the** mortgage loan identified; **if**, after the review, documents constituting **part** of the mortgage **file** were not executed, received or failed to conform, LaSalle needed to

and instead waited over two years after it received the mortgage files; (2) the June and July 2003 letter? ~~from~~ Orix failed to comply with PSA § 2.03(e), to specifically identify the breach of representation and ~~warranty~~ prompting the demand; (3) “[a]t no time did LaSalle, or Orix, ever demand the production of ‘origination and underwriting files and documents’ relating to *all* the Mortgage Loans in the pool” (Defendants’ Mem. of Law in Further **Support** at 10 n 11); and (4) “LaSalle never made any document demand pursuant to MLPSA § 1” (*Id.* at 10 n 12).

The court finds that more than one inference can be drawn from the circumstances as to the amount of the time LaSalle had to notify the defendants, especially considering that: (1) pursuant to sections 2.03(d) and 2.03(e) of the PSA, the prompt notice clock started running when LaSalle discovered defendants’ breaches; and (2) it is unclear when LaSalle first became aware of defendants’ alleged breaches with respect to some or all the loans. See Morgan Guaranty Trust Co. of New York v Bay View Franchise Mtge. Acceptance Co., 2002 WL 818082, at *5 (SD **NY** Apr. 30, 2002); Greacen v Poehlman, 191 **NY** 493,498 (1908) (“[w]hat is reasonable is sometimes a question of law, and at others a question of fact. When it depends upon an inference from peculiar, numerous or complicated circumstances it is usually a question of fact.”) (citations omitted); B/R Sales Co. v Krantor Corp., 226 AD2d 328 (2d Dept 1996). The question of

“promptly so notify [ASCI and [Nomura] by providing a written report, setting forth for each affected Mortgage Loan, with particularity, the nature of the defective or missing document.”

Pursuant to PSA § 2.03(d), “[u]pon discovery” of a breach of representation and warranty set forth in section 2.03(b)(vi) or that any loan fail to constitute a Qualified Mortgage, the Trustee should give “prompt notice thereof to the Depositor and the Depositor shall correct such condition or repurchase or cause [Nomura] to repurchase such Mortgage Loan at the Repurchase Price within 90 days of discovery of such failure . . .” *Id.* at 75.

Pursuant to PSA § 2.03(e), “[u]pon discovery” of a breach of representation and warranty by Nomura in the MLPSA with respect to any mortgage loan, “or that any document required to be included in the Mortgage File does not conform to the requirements of Section 2.01, Trustee “shall give prompt notice thereof to” ASC, who is obligated to either cure the breach or repurchase the mortgage loan within ninety days of receipt of the notice of breach as provided in the MLPSA. *Id.* at 76.

⁵ The defendants, here, are referring to: (1) the June 6, 2003 letter, previously mentioned, in which Orix demanded that the defendants repurchase four loans secured by a credit lease, because a credit lease for each loan was rejected in bankruptcy; (2) a July 7, 2003 letter in which Orix demanded that the defendants produce fifty separate categories of documents regarding every loan in special servicing; and (3) the July 24, 2003 letter previously mentioned.

whether LaSalle gave “prompt notice” to the defendants as required by the **PSA** or whether notice was given “within a reasonable time,” remains a question of fact to be resolved at trial. See Morgan Guar. Trust Co. of New York, 2002 WL 8 18082, at *5; Gladstein v Manhattan Swiss Embroidery Co., 183 N Y S 16, 17 (App Term, 1st Dept 1920).

In addition, the court finds that the July 7, 2003 letter to the defendants, referring to paragraph 1 of the MLPSA and PSA §§ 2.01 & 3.26, states that **Orix**, as special servicer, demands that Nomura and **ASC** deliver within five business days:

all loan origination documentation [] generated by or at the request or for the benefit of **ASC**, [Nomura], or their respective correspondent loan originators (if any), existing on or at any time before October 24, 1997 and relating in any way to the loans in Special Servicing as of the date hereof.[] [Orix] further demands that **ASC** and [Nomura] provide CapMark and [Orix] with evidence of compliance with the obligations of **ASC** and [Nomura] as set forth in Paragraph 1 of the **MLPA** with respect to all other loans (*i.e.* those loans not yet in Special Servicing).

Stovall Affidavit, Tab 2, **Ex. C**. This letter specifically requests evidence of the defendants’ compliance with the obligations set forth in **MLPSA § 1**, regarding delivery of “all documents, instruments and agreements required to be delivered by [ASCI to the Custodian on behalf of [LaSalle] under the [PSA] and such other documents, instruments and agreements as [ASCI or [LaSalle] shall reasonable request.” In addition, **MLPSA § 1** does not include any obligation to specifically identify the breach of representation or warranty prompting a document demand.

Second, the defendants argue that the documentary evidence shows that LaSalle incorrectly asserts breach of representations and warranties contained in **MLPSA § 2(b)(xix)**,⁶ due to the loan-to-value ratio (LTV) of the mortgage loans allegedly exceeding normal standards. The defendants claim that based on Standard & Poor’s Manual for U.S. CMBS Legal and Structured Finance Criteria (S&P Manual), the LTV is not a relevant measure in underwriting the risks

⁶MLPSA § 2(b)(xix) states that “(A) With respect to each Mortgage Loan originated by the Seller, no fraudulent acts were committed by the Seller during the origination process of such Mortgage Loan and the origination, servicing and collection of each Mortgage Loan is in all respects legal, proper and prudent in accordance with customary industry standards and (B) with respect to each Mortgage Loan originated by Bloomfield, CSFB or Bostonia, to the best of the Seller’s knowledge [the same]”

associated with credit lease loans (#37-Super Kmart-San Antonio, #42-Builders Square-Daytona, #47-Builders Square-El Paso, and #50-Builders Square-San Antonio) because a credit lease loan is based on the lease, not on the underlying property. The court finds that the **S&P** Manual cited by the defendants does not suffice as conclusive documentary evidence, and that questions of fact remain as to the relevance of LTV with regard to credit lease loans.

Third, the defendants claim that the documentary evidence contradicts LaSalle's allegation that the defendants breached the representation contained in **MLPSA § 2(b)(xix)** as to loan #120-Best Western-Old Hickory **Inn**, because a conflict existed when the borrower took on both a mortgage loan and a mezzanine loan.' The court finds that the defendants fail to provide any documentary evidence definitively contradicting LaSalle's allegations.

Fourth, the defendants assert that LaSalle makes a bare legal conclusion, unsupported by documentary evidence, that the defendants breached the representation in **MLPSA § 2(b)(xix)** with respect to mortgage loan #64 -Lancer's Center. In the complaint, LaSalle alleges that "the loan originator ignored warning signs that the property's anchor tenant, Wal-Mart, would eventually vacate the premises." Stovall Affidavit, Tab 1 at 8. LaSalle asserts that "despite representations by the borrower in the Lancers Center loan documents that tenant leases included provisions requiring continuous operations and non-competition, the Wal-Mart lease did not have either the required continuous operations provision or the required covenant prohibiting relocation

⁷The defendants assert no conflict existed since the mezzanine loan was cancelled before the mortgage loan was conveyed to LaSalle and no outstanding debt existed other than the mortgage loan. See Defendants' Mem. of Law in Support at 21; Stovall Affidavit, Tab 11. In fact, the defendants allege that the proceeds of the **mezzanine** loan were contributed to the capital of the borrower and the LTV ratio was **76%**. See id.

In opposition, **LaSalle** argues that the Special Servicer's files do not contain the documents defendants produced and refer to in support of this motion, but that the Special Servicer's files do contain three balance sheets regarding loan #120 (dated after the Trust closing) allegedly showing the mezzanine loan not as equity but as long-term liability. See Plaintiff's Mem. of Law in Opposition. at 19; Wurst Affidavit, ¶ 4 & Ex.3. In response, the defendants assert that the balance sheets cited by LaSalle refer to the mezzanine loan as "preferred equity" or as an "equity loan," meaning no distributions can be made on the preferred equity until all payments have been made under the mortgage loan documents, and therefore no conflict or breach of any representation or warranty arose. LaSalle further argues that, if the mezzanine loan was converted into equity, it should have been in the equity part of the balance sheet rather than the liability section of the balance sheet.

in a competing market.” Id., Tab 1 at 8, 9. Wal-Mart was free to leave and start at a competing location, which it ultimately did within two years of the closing of the loan.

The defendants argue that LaSalle has no factual basis for its claim due to its failure to identify any information or warning signs of falsity concerning the borrowers or properties, which was available and ignored by the defendants. However, the defendants fail to provide any documentary evidence definitively contradicting LaSalle’s allegations, and accepting LaSalle’s factual allegations as true, the court finds LaSalle properly states a cause of action.

Fifth, the defendants assert that documentary evidence contradicts LaSalle’s allegation that the defendants breached **MLPSA § 2(b)(xxxiii)(A)** with respect to Loan #107: San Jacinto Plaza, Loan #120: Best Western-Old Hickory Inn, and Loan #138: Knights Inn-Bridgeville, allegedly because the borrowers’ organizational documents failed to include specific restrictions showing each borrowing entity was a single-purpose entity (SPE). **MLPSA § 2(b)(xxxiii)(A)** states that:

Each Borrower of a Mortgage Loan is an entity whose organizational documents provide that it is, and at least so long as the Mortgage **Loan** is outstanding will continue to be, a single-purpose entity. (For this purpose, “single purpose entity” shall mean a person, other than an individual, which is formed or organized solely for the purpose of owning and operating a single property, does not engage in any business unrelated to such property and its financing, does not have any assets other than those related to its interest in the property or its financing, or any indebtedness other than as permitted by the related Mortgage or the other Mortgage Loan Documents, has its own books and records and accounts separate and apart from any other person, and holds itself out as being a legal entity, separate and apart from any other person)[.]

Stovall Affidavit, Tab 3 at 11. LaSalle alleges that although the defendants’ documents may show that the borrowers’ organizational documents satisfy some of the requirements for SPEs, the documents submitted fail to show compliance with all the requirements of the SPE representation and warranty, e.g., that the entity has no other assets other than those related to its interest in the property or its financing. See Plaintiffs Mem. of Law in Opposition at 20, 21. Defendants assert

that the language of **MLPSA § 2(b)(xxxiii)(A)** fails to require that the formation documents “contain verbatim the ‘specific restrictions’ that generally define an SPE.” Defendants’ Mem. of Law in Support at **24**.

The court finds that LaSalle’s assertion, that the terms of **MLPSA § 2(b)(xxxiii)(A)** suggest that the borrower’s organizational documents must satisfy all the requirements of the SPE representation and warranty, is not definitively contradicted by defendants’ documentary evidence to dispose of LaSalle’s claim of breach of representation and warranty. Defendants’ motion to dismiss the subject breach of representation and warranty claims is denied.

Claims Based On The Remaining 145 Mortgage Loans

As stated above, the complaint sufficiently states a cause of action for breach of representations, warranties and obligations with respect to the 10 loans specified in the complaint. However, as to any claims regarding the remaining **145** mortgage loans, the court finds that the complaint fails to “set forth the nature of the contractual obligation alleged to have been violated,” and “the nature of the claimed breach.” Sebro Packaging Corn. v S.T.S. Indus. Inc., **93** AD2d 785 (1st Dept 1983). Claims with respect to the 145 mortgage loans fail to state a cause of action under CPLR **3211(a)(7)**, and violate the requirements set forth in CPLR **3013**, “that statements in a pleading shall be sufficiently particular to give notice of the transactions intended to be proved” Id. Such assumptions of breach devoid of facts will not survive on a motion to dismiss. Therefore, defendants’ motion to dismiss is granted with respect to claims regarding the remaining **145** mortgage loans.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint by defendants Nomura Asset Capital Corporation and **Asset** Securitization Corporation is granted, to the extent that, plaintiff LaSalle **Bank** National Association’s causes of action relate to the 145 mortgage loans not specified in the

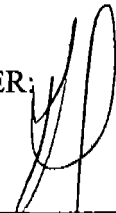
complaint; and it is further

ORDERED that defendants' motion to dismiss the complaint is otherwise denied; and it is further

ORDERED that the defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: New York, New York
March 21, 2004

ENTER:



J.S.C.

FILED
MAR 29 2004
COUNTY CLERK'S OFFICE
NEW YORK