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

PRESENT: JUSTICE DORIS LING-COHAN PART 36

Index Number : 600714/2007

DLJ MORTGAGE CAPITAL INC.

VS

FAIRMONT FUNDING LTD.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits (memo)	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, It is ordered that this motion to dismiss is decided in accordance with the attached memorandum decision.

FILED

FEB 04 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/28/08 JUSTICE DORIS LING-COHAN J.S.C.

JUSTICE [illegible] J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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DLJ MORTGAGE CAPITAL, INC.,
Plaintiff,

- against -

FAIRMONT FUNDING, LTD.,
Defendant.

----------X

Index No. 600714/07

Motion Seq. No.: 001

LING-COHAN, J.:

Defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) (based on documentary evidence) and (7) (failure to state a cause of action), and CPLR 3013 (lack of particularity in the pleading).

Plaintiff is in the business of buying mortgage loans and defendant is in the business of originating and selling such loans. Defendant sold mortgage loans to plaintiff. The parties' agreements obligate defendant to buy back mortgage loans under certain conditions. Plaintiff brought this action seeking damages for defendant's refusal to buy back some loans. Defendant contends that the agreements do not obligate it to repurchase the subject loans.

The parties made similar, but not identical, agreements, one in 2000 and one in 2006. Each agreement is entitled the Seller's Purchase, Warranties and Interim Servicing Agreement (hereinafter, Purchase Agreement in the singular). On the same date as the 2006 agreement, the parties made a third agreement in the form of a letter from plaintiff to defendant (Letter Agreement). The Letter Agreement modified the 2006 Purchase Agreement.

The first cause of action is for breach of contract. The second cause of action is for unjust enrichment. The third seeks legal fees and related costs, pursuant to an indemnification clause in the Purchase Agreement. Plaintiff demands damages of $19.5 million, the amount of the mortgage loans that defendant refused to repurchase. All of the mortgage loans except one are

referred to as Early Payment Default Loans. The other loan is referred to as the Representations Loan, because defendant allegedly breached representations and warranties pertaining to it. The balance owing on the Representations Loan is about $819,000.

Upon plaintiff becoming the owner of a mortgage loan, the mortgagor becomes responsible for sending the monthly payments on the mortgage to plaintiff. Section 3.05 of the Purchase Agreement, entitled "Repurchase of Mortgage Loans with Early Payment Defaults," provides that defendant will buy back a mortgage loan if, within three months of the closing date (the date that defendant sold plaintiff the mortgage loan), the mortgagor's payments to plaintiff become delinquent. Section 3.06, entitled "Purchase Price Protection," applies to mortgage loans with a purchase price (the price that plaintiff paid defendant) exceeding the balance that the mortgagor owes on the loan. If such a loan is repaid in full within three months of the closing date, defendant will pay plaintiff the difference between the purchase price and the balance.

The Letter Agreement states that the parties "now wish to amend the terms and conditions" of the Purchase Agreement (Notice of motion, Ex. D). "With respect to each Mortgage Loan originated by the Seller and identified by the Purchaser as a sub prime mortgage loan ... Sections 3.05 and 3.06 of the Purchase Agreement are each hereby deleted in their entirety, and replaced with the following ... " (*id.*).

The Letter Agreement repeats section 3.05 exactly as found in the Purchase Agreement, except that where the Purchase Agreement refers to mortgage loans, the Letter Agreement refers to sub prime mortgage loans. The Letter Agreement's version of section 3.06 differs from that in the Purchase Agreement, but for the purposes of this case, the difference is insignificant. The Letter Agreement's version of section 3.06 is also entitled "Purchase Price Protection." It provides that where the mortgagor pays off a sub prime mortgage loan during the first year after

the closing date, defendant shall reimburse plaintiff pursuant to a certain formula.

Many mortgagors made early payment defaults on their loans. Defendant refused plaintiff's request that defendant repurchase those Early Payment Default Loans. Both sides agree that none of the Early Payment Default Loans are sub prime mortgage loans. Defendant contends that the Letter Agreement changed the terms of the Purchase Agreement, so that defendant is obligated to repurchase sub prime mortgage loans and none others. That being the case, according to defendant, it is not obligated to repurchase the delinquent loans at issue here, as none of them are sub prime mortgage loans. In contrast, plaintiff claims that the Letter Agreement amends the Purchase Agreement in regard to sub prime mortgage loans only, and does not change defendant's responsibility towards non-sub prime mortgage loans. Plaintiff argues that the Letter Agreement served to make explicit the parties' agreement that defendant was responsible for repurchasing sub prime mortgage loans, in addition to other kinds.

Agreements are construed in accord with the parties' intentions, the "best evidence of what parties to a written agreement intend is what they say in their writing" (*Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002][internal citations omitted]). A writing that is clear will be enforced according to its plain meaning (*id.*). The Letter Agreement is clear. It deletes the subject sections in the Purchase Agreement and replaces them with respect to loans that are sub prime mortgage loans only. It does not delete and replace the sections in the Purchase Agreement dealing with loans that are not sub prime mortgage loans. The Letter Agreement does not eliminate defendant's obligations to repurchase non-sub prime mortgage loans.

Defendant contends that the breach of contract claim should be dismissed on the basis of inadequate pleading, pursuant to CPLR 3013, which provides that "a pleading shall be sufficiently particular to give the court and 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." According to defendant, the complaint is inadequate, as it fails to allege that the breaches of contract were material and that they adversely affected plaintiff.

Defendant points to section 3.03 in the Purchase Agreement, the section that defendant allegedly breached in regard to the Representations Loan. That section provides that defendant makes certain representations and warranties pertaining to the mortgage loans, and that if there is a breach of any representation or warranty that "materially and adversely affects" the value of a mortgage loan, and the breach is not corrected or cured by a certain date, defendant will repurchase the mortgage loan or substitute another loan for it (Notice of motion, Ex. B). Defendant also cites *Morgan Guar. Trust Co. of New York v Bay View Franchise Mtge. Acceptance Co.* (2002 WL 818082, *14, 2002 US Dist LEXIS 7572, *46-47 [SD NY, Apr. 30, 2002]) and *LaSalle Bank Natl. Assoc. v Citicorp Real Estate, Inc.* (2003 WL 21671812, *3, 2003 US Dist LEXIS 12043, *11-12 [SD NY, July 16, 2003]) to support its argument that a breach of contract claim must include an allegation of material and adverse effect.

Neither the cases, nor the contractual clause, stand for the proposition that a breach of contract plea must include allegations of materiality or adverse effect in order to withstand a CPLR 3211 pre-answer motion. The complaint need only include the essential terms of the parties' contract, including those specific provisions of the contract upon which liability is predicated (*see Sud v Sud,* 211 AD2d 423, 424 [1st Dept 1995]; *Caniglia v Chicago Tribune-New York News Syndicate, Inc.*, 204 AD2d 233, *234 [1st Dept 1994]). As for alleging adverse effect, it is sufficient if the complaint contains allegations from which injury attributable to breach may be inferred (*see CAE Indus. Ltd. v KPMG Peat Marwick,* 193 AD2d 470, 472-473 [1st Dept 1993]).

In regard to the Representations Loan, the complaint identifies the mortgagor, the amount owed, and the sections of the Purchase Agreement allegedly breached. In addition, plaintiff's opposing affidavit contains more information on the alleged misrepresentations. A plaintiff is allowed to supplement its pleading with an affidavit (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). The affidavit states that the misrepresentations alleged here are also alleged in another pending action that prior mortgagors of the Representations Loan brought against defendant. The affidavit attaches the complaint in the other action. Defendant is thus afforded information sufficient to satisfy the requirement in CPLR 3013. In addition, plaintiff adequately alleges that it was damaged by defendant's refusal to buy back the loan. The actual impact of the alleged misrepresentations, whether or not they materially and adversely affected the value of the Representations Loan, is a determination for the later stages of this case.

The complaint attaches a list of the Early Payment Default Loans which identifies the mortgagor, the location of the property, the date that the mortgagor stopped making payments, the date that plaintiff requested that defendant repurchase the loan, and the amount owed. The body of the complaint references the section in the Purchase Agreement allegedly breached. This information satisfies the requirements of CPLR 3013 in being particular enough to give defendant and the court notice of the occurrences to be proved.

Defendant's reason for dismissing the second cause of action for unjust enrichment is that it is not obligated to repurchase the Early Payment Default Loans. Insofar as this reason is based on defendant's interpretation of the parties' agreements, the argument is not tenable. However, since the claim duplicates the breach of contract claim, dismissal is warranted. The existence of a valid and enforceable written contract precludes recovery in quasi-contract for events arising out of the same subject matter (*PKO Television, Ltd. v Time Life Films, Inc.*, 169 AD2d 582, 583

[1st Dept 1991]). The unjust enrichment claim may be sustained when it is predicated on conduct not covered by the contract (*Sergeants Benevolent Assn. Annuity Fund v Renck,* 19 AD3d 107, 112 [1st Dept 2005]). In this case, no material distinction exists between the unjust enrichment and contract claims. Plaintiff's claims are based entirely on the agreements. As there is no allegation of conduct not covered by the parties' agreements, the unjust enrichment cause of action will be dismissed.

In the third cause of action, plaintiff seeks attorneys' fees and costs incurred in this action, based on Section 8.01 of the Purchase Agreement, entitled "Indemnification; Third Party Claims" (Notice of motion, Ex. B). Defendant argues that the indemnification provision applies only to claims brought by third parties against plaintiff, and does not apply to claims between defendant and plaintiff.

Unless authorized by agreement between the parties, by statute, or by court rule, attorneys' fees are generally not available as an item of damages (*Hooper Assoc., Ltd. v AGS Computers, Inc.,* 74 NY2d 487, 492 [1989]). Here, the parties have agreed to indemnify each other for counsel fees. The question is whether indemnification is limited to attorneys' fees incurred by plaintiff in actions involving third parties or whether it also includes those incurred in prosecuting a suit against defendant for claims under the parties' agreements.

When a party has no legal duty to indemnify, and in light of the rule that each party is responsible for its own attorneys' fees, a contract providing for indemnification will be strictly construed (*Hooper,* 74 NY2d at 491). The court will not find that a party should indemnify another, unless the intention to indemnify and the scope of the indemnification is clear from the language in the parties' agreement (*Fresh Del Monte Produce v Eastbrook Caribe A.V.V.,* 40 AD3d 415, 418 [1st Dept 2007]). An indemnification clause will be read in conjunction with all

the provisions in the agreement to avoid inconsistencies or an interpretation which would render another provision superfluous or without effect (*Hooper,* 74 NY2d at 492-93).

Sections of the indemnification clause are reproduced here. Each sentence is numbered to make this discussion easier to follow. The sentences are not numbered in the original.

The indemnification language at issue provides that: (1) defendant will indemnify plaintiff and hold it harmless against "any and all" claims, losses, damages, legal fees and related costs that plaintiff "may sustain in any way related to the failure of [defendant] to observe and perform its duties, obligations, covenants, and agreements to service the Mortgage Loans" (Notice of motion, Ex. B); (2) Defendant will "indemnify [plaintiff] and hold it harmless against any and all claims ... legal fees and related costs .. . that [plaintiff] may sustain in any way ... as a result of the breach of a representation or warranty" in Section 3.01 or Section 3.02 (*id.*); (3) "An indemnifying party hereunder shall immediately notify [plaintiff] if a claim is made by a third party with respect to this Agreement or a Mortgage Loan ..." (*id.*); (4) "An indemnifying party" will assume, provided plaintiff consents, "the defense of any such claim and pay all expenses in connection therewith" and shall follow plaintiff's instructions regarding "such claim" (*id.*); and (5) Plaintiff will reimburse "an indemnifying party hereunder for all amounts advanced by it pursuant to the two preceding sentences except when the claim relates to" defendant's failure to to perform its duties, defendant's breach of a representation or warranty, gross negligence, or misconduct (*id.*).

The preceding is contained in one paragraph. That paragraph plainly concerns defendant's indemnification of plaintiff. There is further indemnification language contained in sentence 6, concerning plaintiff's indemnification of defendant, , which begins a new paragraph. It provides that (6) plaintiff shall indemnify defendant and "hold it harmless against any and all"

claims, legal fees and related costs that defendant may sustain "in any way related to the negligent or improper servicing of the Mortgage Loans ..." (*id.*).

Sentences 3 through 5 are about third-party claims against plaintiff. Sentence 3 says so explicitly, and the requirements of notice, assumption of defense, and reimbursement in sentences 3, 4, and 5 would not make sense if those sentences referred to inter-party claims. Defendant contends that sentences 3 through 5 relate to sentences 1 and 2, so that the entire clause is about third-party claims. But there is a demarcation that begins with sentence 3. From then until the end of the paragraph, the clause refers to third-party claims. If sentences 1 and 2 were also about third-party claims, sentences 3 though 5 would not need to contain their particular references to third-party claims.

Sentence 5 explicitly states that plaintiff will reimburse defendant pursuant to the "two preceding sentences," which are sentences 3 and 4. Sentences 3 and 4 concern notice of third-party claims and the assumption of defense. If it were true that the entire clause was about third-party claims, the reference to "two preceding sentences" in sentence 5 would be meaningless and unnecessary. There would be no need to refer to only two preceding sentences because assumption of defense and notice of third-party claims would apply to the entire clause. Sentence 5 makes specific reference to sentences 3 and 4 because those three sentences concern third-party claims, and the other sentences do not.

In support of its argument, defendant cites to *Hooper* (74 NY2d at 492), which held that the parties' contract did not require the defendant to indemnify the plaintiff for attorneys' fees incurred in litigation between them. In that case, Article 9 (A) of the indemnification clause obligated the defendant to indemnify the plaintiff from any and all claims, including reasonable counsel fees arising out of, among other things, breach of warranty claims (*Hooper,* 74 NY2d at

492). Article 9 (D) then required plaintiff to notify defendant of any claim to which the indemnity in Article 9 (A) would apply, and further provided that defendant could assume the defense of any such claim (*id.*). From this language, the Court concluded:

> To extend the indemnification clause to require defendant to reimburse plaintiff for attorney's fees in the breach of contract action against defendant would render these provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties. Construing the indemnification clause as pertaining only to third party suits affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect

(*id.* at 492-493).

However, the indemnification clause in this case differs from that in *Hooper*. Here, the provision that the indemnifying party must notify plaintiff of a third-party claim does not refer back to the previous language that defendant will indemnify plaintiff for any and all claims.

In *Sagittarius Broadcasting Corp. v Evergreen Media Corp.* (243 AD2d 325, 326 [1st Dept 1997]), the Court disagreed with the defendant's argument that the contract only provided for indemnification in third-party actions. There, the language limiting indemnification to third-party actions appeared in the second portion of the indemnity clause. Distinguishing *Hooper* (74 NY2d at 492), the Court found that, if the first sentence also only applied to third-party actions, as the defendant argued, it would be "mere surplusage" (*Sagittarius,* 243 AD2d at 326; *see also Pfizer, Inc. v Stryker Corp.*, 348 F Supp 2d 131, 145-146 [SD NY 2004]; *Promuto v Waste Mgt., Inc.*, 44 F Supp 2d 628, 651 [SD NY 1999]). Such a reading would go against the principle that a contract should not be interpreted in a manner that would leave part of it without meaning or effect (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]).

In the context of parties being indemnified for their own negligence, broad indemnification clauses purporting to apply to "any and all liability" have been construed as

meaning what they say, by allowing them to cover "any and all" liability on the part of the person being indemnified (*Matter of New York City Asbestos Litigation,* 41 AD3d 299, 301 [1st Dept 2007], citing *Levine v Shell Oil Co.,* 28 NY2d 205, 211 [1971]). Given the broad language in the subject clause, it is appropriate to find that the first part, sentences 1 and 2, provides that defendant must indemnify plaintiff for inter-party litigation, and that plaintiff has a viable claim for attorneys' fees.

Based upon the above, it is

ORDERED that defendant's motion to dismiss the complaint is granted *only to the extent that* the second cause of action for unjust enrichment is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

Date: January 22, 2008

Hon. Doris Ling-Cohan, J.S.C.

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