

Lehman Bros. Holding, Inc. v Wall St. Mtge. Bankers, Ltd.
2013 NY Slip Op 33116(U)
December 10, 2013
Supreme Court, New York County
Docket Number: 603021/2009
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 603021/2009
LEHMAN BROTHERS HOLDINGS
vs
WALL STREET MORTGAGE
Sequence Number : 006
RENEW

INDEX NO. _____
MOTION DATE 11/22/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 103-112

Answering Affidavits — Exhibits _____ No(s) 116-123

Replying Affidavits _____ No(s) _____

Upon the foregoing papers, It is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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

Dated: 12/10/13

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
LEHMAN BROTHERS HOLDINGS, INC.,

Index No.: 603021/2009

Plaintiff,

DECISION & ORDER

-against-

WALL STREET MORTGAGE BANKERS, LTD.,
d/b/a, POWER EXPRESS,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Motion Sequence Numbers 006 and 007 are consolidated for disposition.

Defendant Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express (Wall Street) moves for renewal of the court's order dated November 15, 2012 (the SJ Order), in which the court granted summary judgment on liability to plaintiff Lehman Brothers Holdings, Inc. (Lehman) and referred the calculation of damages to a Special Referee. Seq. 006. Lehman moves to confirm the report of Special Referee Ira Gammernan (the Report) entered on August 7, 2013 (Dkt. 124). Seq. 007. Defendant's motion is denied and plaintiff's motion is granted for the reasons that follow.

The court assumes familiarity with the facts of this case, which are set forth in the SJ Order. In short, in this mortgage put-back action, Lehman sought to compel Wall Street to repurchase two non-compliant loans. Wall Street conceded liability on one of the loans and the court granted summary judgment in Lehman's favor on the other. Damages were referred to Referee Gammernan, hearings were held before him, and the Report was issued setting forth the

total repurchase amount for both loans. Wall Street now seeks to avoid some or all of its liability on one of the loans due to supposed newly discovered evidence of a non-party loan servicer's negligent prosecution of a foreclosure action.¹ Simply put, Wall Street argues that the servicer's conduct in causing the foreclosure action to be dismissed constitutes failure to mitigate. Wall Street also challenges Referee Gammernan's damages findings.

Pursuant to CPLR 2221(e), "A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination,' and shall contain reasonable justification for the failure to present such facts on the prior motion.'" *Queens Unit Venture, LLC v Tyson Court Owners Corp.*, 2013 WL 6096782 (1st Dept 2013). However, a renewal motion is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." *Id.*, quoting *Sobin v Tylutki*, 59 AD3d 701, 702 (2d Dept 2009). "The motion should be denied if the movant fails to proffer a reasonable excuse for not presenting the allegedly new facts on the initial motions." *Illinois Nat'l. Ins. Co. v Zurich Am. Ins. Co.*, 107 AD3d 608, 609-10 (1st Dept 2013).

Wall Street does not demonstrate its inability to have apprised the court of any relevant fact before November 15, 2012, the date of the SJ Order. The subject foreclosure proceeding was dismissed on September 21, 2012, approximately two months before. Moreover, the failure to prosecute the foreclosure should have been apparent long before the summary judgment motion was ever filed, since the foreclosure proceeding was originally commenced in 2008, before the instant case even began. At this late stage, the court will not consider facts that

¹ Wall Street also attempts to relitigate the issue of whether proper notice was given, but such issue could have been raised on the summary judgment motion. In any event, as the court held in the SJ Order, the October 29, 2007 letter is a valid repurchase demand.

should have been raised long ago.² Indeed, the issues raised by Wall Street's new counsel,³ who did not join the case until April 2013, appear to be an attempt to redo the efforts of prior counsel. This is impermissible.

Nonetheless, Wall Street's arguments are baseless. Wall Street misconstrues the nature of a put-back damages claim. When the seller fails to comply with a repurchase protocol, damages are not limited to the technical buyback of the loan. Indeed, in many cases, there is no "loan" to be bought back, as it may have been foreclosed or liquidated. Yet, in such cases, New York courts consistently have held that the purchaser may still recoup monetary damages in the amount set forth in the repurchase protocol. *See ACE Secs. Corp. v DB Structured Prods., Inc.*, 41 Misc3d 1229(A), at *1-2 (Sup Ct, NY County Nov. 21, 2013) (collecting cases). The repurchase money is a refund for the purchase price of the loan. Consequently, that there may no longer be an enforceable loan is not Lehman's problem. Rather, where, as here, a non-complaint loan was sold, the seller bears the risk of default. That such risk came to fruition after Wall Street illegally refused Lehman's repurchase demand is a further risk assumed by Wall Street by virtue of its breaches.

Finally, nothing in the record before Referee Gammernan supports Wall Street's opposition to the Report. The Report was based on the sound analysis of Lehman's experts and

² The court disregards Wall Street's improper late filing of an unsworn "affirmation" of a fact witness (Dkt. 140), which, in any event, merely seeks to rehash issues that could have been raised on the original motion. Dkt. 140 is hereby stricken from the record.

³ Such issues also include the erroneous contention that Lehman lacks title to the loans. This argument is based on either ignorance or misrepresentations about the process by which a servicer acquires legal authority to act on behalf of a lender. There is no doubt that Lehman has standing to maintain its claims and that the servicer cannot bring a put-back claim.

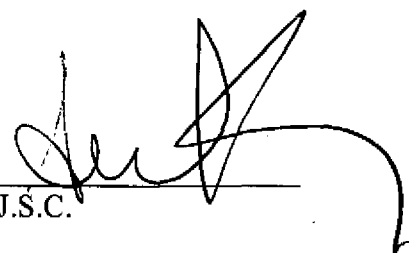
the proper rejection of the analysis of Wall Street's expert. The report, therefore, is confirmed. Accordingly, it is

ORDERED that the motion by defendant Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express to renew the November 15, 2012 order is denied; and it is further

ORDERED that the motion by plaintiff Lehman Brothers Holdings, Inc. to confirm the report of Special Referee Ira Gammernan entered on August 7, 2013 is granted, the report is confirmed, and the Clerk is directed to enter judgment in favor of said plaintiff and against defendant Wall Street Mortgage Bankers, Ltd., d/b/a, Power Express in the amount of \$5,272,212.89 plus 9% statutory interest from August 7, 2013 to the date judgment is entered.

Dated: December 10, 2013

ENTER:



J.S.C.