Home Equity Mtge. Trust Series 2006-1 v DLJ Mtge. Capital, Inc.
2014 NY Slip Op 30081(U)
January 10, 2014
Sup Ct, New York County
Docket Number: 156016/12
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

HOME EQUITY MORTGAGE TRUST SERIES 2006-1 et al

- v -

DLJ MORTGAGE CAPITAL, INC. et al

INDEX NO. 156016/12

MOTION DATE

MOTION SEQ. NO. 002

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 by defendant to dismiss the complaint is DENIED in part and GRANTED in part per the attached Decision and Order.

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

Dated: January 10, 2014

MELVIN L. SCHWEITZER J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST SERIES 2006-3, and HOME EQUITY MORTGAGE TRUST SERIES 2006-4,	:	Index No. 156016/12
Plaintiffs,	:	DECISION AND ORDER
-against-	:	Motion Sequence No. 002
DLJ MORTGAGE CAPITAL, INC. and SELECT PORTFOLIO SERVICING, INC.,	:	
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

Home Equity Mortgage Trust Series 2006-1 (HEMT 2006-1 Trust), Home Equity Mortgage Trust Series 2006-3 (HEMT 2006-3 Trust), and Home Equity Mortgage Trust Series 2006-4 (HEMT 2006-4 Trust) (Trusts), acting by U.S. Bank National Association, solely in its capacity as trustee of the Trusts (Trustee), have filed a complaint alleging breach of contract and unjust enrichment claims against DLJ Mortgage Capital, Inc. (DLJ) arising out of three residential mortgage-backed securitization transactions. DLJ has moved to dismiss the complaint and to strike certain of its allegations.

Facts

The facts are as alleged in the complaint.

The Trusts are three New York common law trusts that collectively purchased more than 23,000 mortgage loans (Loans) from DLJ as a part of the securitization transactions. The Trusts were created to hold and own the Loans that DLJ securitized and in which it sold interests to Certificateholders. The creation of each Trust was accomplished as follows. First, DLJ acquired

the Loans from third-party originators. Second, it transferred those Loans to a special-purpose entity called the Depositor, Credit Suisse First Boston Mortgage Securities Corp. (CS Corp.), via a contract called the Assignment and Assumption Agreement. Finally, the Depositor in turn assigned the Loans to the Trusts through Pooling and Servicing Agreements (PSAs) which created the Trusts. The parties to the PSAs were DLJ as Seller; CS Corp. as Depositor; U.S. Bank National Association as Trustee; and Select Portfolio Servicing, Inc. (SPS) as Servicer (for the HEMT 2006-3 and HEMT 2006-4 Trusts) and Special Servicer (for the HEMT 2006-1 Trust). SPS is an affiliate of DLJ under common control by Credit Suisse (USA), Inc. In the PSAs, DLJ made more than twenty representations and warranties (R&Ws) about the credit quality and legal compliance of each of the Loans.

The PSAs were executed on their closing dates; namely, February 28, 2006 (HEMT 2006-1 Trust), June 30, 2006 (HEMT 2006-3 Trust), and August 30, 2006 (HEMT 2006-4 Trust). Prior to the closing dates, the Depositor (and DLJ) had not sold the Loans to the Trusts, nor had the parties agreed to any of the terms in the PSAs.

DLJ's R&Ws include that:

> The Loans complied with all the terms, conditions and requirements of the originators' underwriting standards in effect at the time of origination of the Loans.
>
> The information set forth in the Mortgage Loan Schedule (MLS) – a sheet of loan data attached to the PSAs – was complete, true and accurate in all material respects.
>
> No Loan had a combined loan-to-value ration (CLTV) of more than 100%.
>
> Each Loan complied in all material respects with applicable local, state and federal laws.

Under each PSA, DLJ promised to cure every Loan materially and adversely breaching any of the R&Ws or else repurchase those Loans within 120 days of the earlier of its discovery or its receipt of written notice of the breach from any party.

In December 2011, the Trustee notified DLJ that an automated valuation model (or AVM), had been used to test the accuracy of the R&Ws with respect to more than 1,600 Loans in the Trusts (the AVM Review). Used in the mortgage industry, an AVM considers objective criteria such as the condition of a property and sale prices of comparable properties in the same locale as the subject property to determine an objective and reliable historical market value of the property in question. The AVM Review analyzed whether the properties' values supported R&Ws that were made based on certain assumptions about those values. For example, the Trusts' MLS contained representations about CLTV ratios for every Loan, as well as the total amount of the Loan. DLJ represented that all information on the MLS was complete, true and correct in all material respects. If the AVM Review derived a value for a given property that was 10% lower than the value stated on the MLS, it found a breach of DLJ's R&Ws that the MLS was true and correct, among other R&Ws, with respect to the Loan collateralized by that property. On December 7, 2011, the Trustee put DLJ on notice of at least 1,169 unique breaching Loans (the First Repurchase Letter).

A forensic investigation of the Loans' origination files was then undertaken. The origination files are critical to assessing the full set of DLJ's R&Ws and are kept by the Servicers of the Trusts. As noted, one of those Servicers is SPS. Thus, SPS was and is in possession of the documents that establish its affiliate's repurchase liabilities. SPS allegedly refused to permit the Trustee to bring a sufficient number of underwriters to SPS's offices to review origination

files, allowed the Trustee one week only to review those files in spite of the significant undertaking involved, and advised that if the Trustee were to review the loan files at all, it would not be allowed to make any copies of the documents.

The Trusts ultimately received a subset of the origination files from the Trusts' other Servicers and conducted a "re-underwriting" of them – *i.e.* examined them anew for compliance with the R&Ws (the Re-Underwriting Review). Instrumental to the underwriting of a loan file are the underwriting documents known as "guidelines." These are the credit rules that each originator of the Loans purported to follow in executing a Loan, and are linked to DLJ's R&W that the Loans complied with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of their origination. DLJ refused the Trustee's requests for the underwriting guidelines underlying its R&Ws. Further, DLJ at one point asserted that the Trustee lacked contractual authority to enforce DLJ's R&Ws.

The Re-Underwriting Review examined the origination files using guidelines materially similar to the applicable originators' guidelines and with so-called "loan approvals" in the files themselves, which indicated the names and dates of the guidelines used by the Loans' originators and revealed some of the particular guidelines used by them. Of the 806 Loans re-underwritten by the Trusts, 796 breached one or more of the R&Ws.

The Trustee identified these breaching Loans to DLJ on April 27, 2012 in the "Second Repurchase Letter" and on August 22, 2012 in the "Third Repurchase Letter." The Trustee heard no response from DLJ with respect to the Second Repurchase Letter for 120 days – *i.e.* the entire period allotted under the PSA for DLJ to cure or repurchase a breaching Loan. On the 120th day, DLJ wrote to the Trustee and stated that it would neither cure nor repurchase the Loans identified

in the Second Repurchase Letter "unless and until" the Trustee furnished DLJ with the Loans' origination files. DLJ added that despite its prior requests to the Trustee, it had not received those files. DLJ neither cured nor repurchased any of the Loans identified in this letter.

DLJ's response to the Third Repurchase Letter was to write the Trustee on October 19, 2012 and assert that it never received that letter.[1] When the Trustee wrote to correct DLJ's error on November 2, 2012 and request that DLJ confirm receipt, DLJ never responded.

On February 22, 2012, DLJ, Credit Suisse (USA), Inc., Credit Suisse Securities (USA) LLC, and the Trustee signed a tolling agreement, tolling the statute of limitations for all claims the Trusts may have concerning the HEMT 2006-1, 2006-3, and 2006-4 transactions. The tolling agreement was signed on February 28, 2012, seven days before the sixth anniversary of the date on which the earliest of the PSAs, HEMT 2006-1 Trust's PSA, was executed. DLJ terminated the tolling agreement effective August 26, 2012.

On August 31, 2012, the Trusts commenced this lawsuit by filing a summons with notice on behalf of all of the Trusts. The Trusts argue that because the tolling agreement was effective seven days before the sixth anniversary of the date on which the HEMT 2006-1 Trust's PSA was executed, the Trust's claims were filed within six years of the execution of that contract, subtracting tolled days. The Trusts similarly allege the HEMTR 2006-3 and 2006-4 Trusts' claims were filed within six years of the execution of their PSAs because, subtracting tolled days, the sixth anniversaries fell on January 2, 2013 (HEMT 2006-3) and March 4, 2013 (HEMT 2006-4).

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[1]That was incorrect. DLJ concedes in its motion to dismiss the complaint that DLJ received the letter on August 22, 2012.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

Standing

DLJ argues that the complaint must be dismissed in its entirety because the Trusts, as opposed to the Trustee, are the actual plaintiffs bringing suit and a Trust does not have the requisite standing to sue to enforce the PSA. It argues that because the Trustee is not a plaintiff in the action, the Trust cannot assert claims on its behalf.

Recently, this issue was correctly and succinctly addressed in *Mastr Adjustable Rate Mortgages Trust 2006-0A2, Mastr Adjustable Rate Mortgages Trust 2007-1, and Mastr Adjustable Rate Mortgages Trust 2007-3 v UBS Real Estate Securities Inc.*, 2013 U.S. Dist. LEXIS 15532. The court said:

> "UBS's first ground for dismissal is that the Trusts, which appear in the caption as plaintiffs, may not sue to enforce the provisions of the PSAs, unlike the Trustee. However, this concern is sufficiently addressed by the introductory paragraph of the Complaint: 'Plaintiffs . . . acting through U.S. Bank National Association, solely in its capacity as Trustee [ ] for the Transactions . . . alleges as follows.' Compl. 1. While the caption identifies only the Trusts as Plaintiffs, it is '[t]he substance of the pleadings, not the caption, that determines the identity of the parties.' *Mateo v JetBlue Airways Corp.*, 847 F Supp 2d 383, 384 (EDNY 2012) (citations omitted). Here, the Complaint leaves no doubt that the Trusts' rights are being enforced by the Trustee. *See E.E.O.C. v Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Local 580*, 139 F Supp 2d 512, 525 (SDNY 2001)."

The reasoning of this decision is clearly applicable as the introductory paragraph of the complaint reads:

> "Plaintiffs . . . (collectively, the "Trusts") acting by U.S. Bank National Association, solely in its capacity as Trustee . . . hereby allege as follows:"

DLJ's motion to dismiss is denied with respect to standing.

Statute of Limitations

DLJ argues that (1) the HEMT 2006-1 Trust's contract claims, filed on August 31, 2012, are untimely because the six-year statute of limitations began to run on a contractual "as of" date before its contract with DLJ was executed; and (2) the HEMT 2006-3 and 2006-4 Trusts' contract claims should be dismissed because they were filed prior to the close of DLJ's 120-day period to cure or repurchase the applicable Loans and are now time-barred.

HEMT 2006-1 Trust

DLJ argues that the HEMT 2006-1 Trust's contract claims were not filed within New York's six-year statute of limitations period because (a) if the R&Ws were breached at all, that occurred on what DLJ terms the PSA's "as of" date – February 1, 2006; and (b) the sixth anniversary of February 1, 2006 lapsed 21 days prior to the signing of the tolling agreement. The Trusts contend this is wrong saying first, the breach triggering accrual of the Trusts' claims occurred when DLJ failed to comply with its obligation to cure or repurchase defective Loans identified in the Repurchase Letters and second, even if the triggering breach were linked to a PSA date, that would be the date when the contract was executed and closed. As noted, the tolling agreement was signed on February 22, 2012 – seven days before the sixth anniversary of the date of execution and closing of the PSA.

The Trusts argue that under New York law, where a party's contractual obligation to cure defects in its performance continues for the life of the agreement, a claim for breach of that obligation accrues upon the failure to cure, not upon some earlier date. *See Bulova Watch Co., Inc. v Celotex Corp.*, 46 NY2d 606 (NY 1979). In *Bulova*, the question presented was the timeliness of contract claims against a roofing material supplier who both guaranteed the quality

of its roofing and promised to repair defective roofing for a period of 20 years from the date of sale. *Id.* at 603. The New York Court of Appeals held that "a cause of action accrues upon each breach of that undertaking which occurs within the 20-year period and [ ] the Statute of Limitations runs after six years from the date when the particular breach for which any such suit is brought has taken place." *Id.* The *Bulova* plaintiff's claims were timely more than six years after defendant's sale of roofing material because the defendant's failure to repair was an independent breach. *Id.*

The Trusts contend that DLJ's promises are no different: it made R&Ws about the Loans and promised to cure or repurchase Loans that breach them. They say the PSA does not limit this remedy to a specific number of years in the life of a Loan. For the Loans identified in the Repurchase Letters, DLJ's failure to cure or repurchase began in 2012 and thus the HEMT 2006-1 Trust's claims are timely. *See also Lehman Bros. Holdings, Inc. v Nat'l Bank of Ark*, 2012 U.S. Dist. LEXIS 87265, at *12-13 (E.D. Ark. June 25, 2012) (holding that plaintiff's loan repurchase claim accrued when the defendant breached its obligation to repurchase the loans).

Further, the Trusts contend that even if the HEMT 2006-1 Trusts' claims accrued on a PSA date it would be the date the contract was executed – the Closing Date, or February 28, 2006 – not the pre-execution "as of" date it was deemed executed and made effective (February 1, 2006) identified by DLJ. They say it is hornbook contract law that a contract claim cannot possibly accrue before there is a contract in the first place. *See Yatter v William Morris Agency, Inc.*, 256 AD2d 260, 261 (1st Dept 1998).

The Trusts point out the R&Ws were, in fact, expressly made operative "as of" February 28, 2006 the same day that the PSA was signed. They argue a contract did not exist in fact prior to February 28, 2006 and the HEMT 2006-1 Trust could not have sued on the R&Ws between February 12, 2006 and February 28, 2006. They say the "as of" date relied on by DLJ has nothing to do with when the contract was executed, much less with when the relevant R&Ws became effective: the "as of" date was the date chosen by the parties for measuring the aggregate principal balance and price of the Loans for a deal that actually was executed on February 28, 2006.

The court rejects DLJ's argument that the statute of limitations with respect to the Trusts' contract claims runs from a date earlier than the date of execution of the PSA. A contract claim cannot possibly accrue before the contract is executed. The Trusts could not have brought suit for breach of the R&Ws prior to February 28, 2006.

In *Ace Securities Corp. v DB Structured Prods., Inc.*, Index No. 650980/2012 (1st Dept 2013), the court held that claims in a similar financing arrangement accrued on the closing date of the purchase agreement, which was the date when any breach of the representations and warranties occurred. It held the motion court had erred in finding the claims did not accrue until the defendant either failed to timely cure or repurchase a defective mortgage loan. While this decision impacts one of the Trusts arguments, it does not alter the court's decision.

DLJ's motion to dismiss is denied with respect to the statute of limitations.

HEMT 2006-3 and 2006-4 Trusts

DLJ moves to dismiss the HEMT 2006-3 and 2006-4 Trusts' claims because they were purportedly filed before DLJ failed to cure or repurchase Loans from those Trusts at the close of

the contractually-provided 120-day repurchase window and thus before they had accrued. DLJ's argument fails for several independent reasons.

First, the Trustee delivered to DLJ the Third Repurchase Letter containing breaches of Loans from these Trusts on August 22, 2012. At the latest, then, DLJ's 120-day repurchase window closed on December 20, 2012 – more than one month before the complaint was filed on January 29, 2013. DLJ cites no authority for the proposition that a ripe claim in the operative pleading (the complaint) must be dismissed simply because it may have been unripe at the time a now-superseded summons with notice was filed.

Second, DLJ contends the complaint should be dismissed because the summons with notice was filed as a "ploy" to toll the statute of limitations. This makes no chronological sense. The summons with notice was filed on August 31, 2012. Since the six-year statute of limitations accrued when the PSAs were executed, the statute of limitations runs for these two Trusts on January 2, 2013 (HEMT 2006-3) and March 4, 2013 (HEMT 2006-4). The summons with notice was securely in place before the most conservative statute of limitations periods ran (January 2, 2013 and March 4, 2013) and after DLJ's 120-day period to repurchase the Loans closed (December 20, 2012). It is unclear what DLJ means when it argues that the August 31, 2012 filing of the summons with notice was a "ploy" to toll the statute of limitations if the limitations deadlines for the Trusts would not run for many months and the summons with notice was in place after DLJ's 120-day period and before those limitation deadlines.

DLJ's motion to dismiss is denied with respect to the statute of limitations.

Anticipatory Breach

The Trusts allege DLJ's anticipatory breach of its duty to cure and repurchase Loans. The Trusts ask the court to grant them damages as to all other Loans breaching DLJ's representations and warranties, i.e. as to Loans for which the Trustee has not made any cure or repurchase demands.

The complaint alleges that DLJ (1) informed the Trusts that not even the Trustee is authorized to enforce the R & Ws; (2) refused to supply the Trustee with the guidelines used to test the accuracy of its R & Ws; (3) claimed it did not have to comply with the cure or repurchase process "unless and until" it was supplied with Loan files from the Trustee, and failed even to make such a request until the final day of the cure period; and (4) refused to acknowledge whether it even received the Trustee's Third Repurchase Letter.

Under New York common law, "[a] party's repudiation, or anticipatory breach, of its future obligations under a bilateral contract . . . may take the form either of a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach," or "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Merrill Lynch Int'l v XL Capital Assurance INC.*, 564 F Supp 2d 298 (SDNY 2008)[quoting *Computer Possibilities Unlimited, Inc. v Mobil Oil Corp.*, 301 A.D.2d 70 . . . (1st Dept 2002)(quoting Restatement (Second) of Contracts §250…)].

None of the Trusts' allegations can be read as such a statement, or positing such an affirmative act. The first reflects an oral negotiating position by DLJ's counsel, and the second and third are tactical actions by DLJ, whether or not in compliance with the terms of the PSAs,

taken in reference *only* to the circumstances of the cure or repurchase process with respect to the Loans at issue here. They are not predictive of future total breach. The fourth, which again has on it the broad thumb print of DLJ's counsel, is of no analytic moment.

DLJ's motion to dismiss is granted with respect to anticipatory breach.

APPRAISAL VALUE

DLJ contends the Trusts' claims should be dismissed, insofar as they are based on alleged misstatements in appraisal values and loan-to-value ratios, because the PSAs provide that LTV ratios and the appraised values on which they are based are opinions, not statements of an absolute true value. DLJ argues that the PSAs define both "Appraised Value" and "Combined Loan-to-Value Ratio as follows. The term "Combined Loan-to-Value Ratio" means:

> With respect to any Mortgage Loan and as of any date of determination, the fraction (expressed as a percentage) the numerator of which is the sum of (i) original principal balance of the related Mortgage Loan at such date of determination and (ii) the unpaid principal balance of the related First Mortgage Loan as of either the date of origination of that Mortgage Loan or the date of origination of the related First Mortgage Loan and the denominator of which is the most recent Appraised Value of the related Mortgaged Property.

The term "Appraised Value" means "[t]he amount set forth in an appraisal of the related Mortgage Loan as the value of the Mortgaged Property." The Appraised Value of a property on which CLTV is calculated, therefore, is the value set forth in the most recent appraisal of the property.

DLJ posits, citing *Tsereteli v Residential Asset Securitization Trust 2006-A8*, 692 F. Supp 2d 387, 393 (SDNY 2010) and *N.J. Carpenters Health Fund v Novastar Mortg., Inc.*, No. 08 Civ 5310(DAB), 2011 WL 1338195, at *11 n.9 (SDNY Mar. 31, 2011), that because

appraisals are opinions, not statements of fact, the Trusts have not alleged a cognizable misrepresentation. DLJ contends the Trusts do not allege (and have no basis to allege) that the LTVs and CLTVs on the Loans were inaccurately reported or did not in fact comply with the relevant PSAs.

The Trusts respond that DLJ confuses the standards for bringing fraud and federal securities act claims, where the distinction between an opinion and statement of fact stems from the elements of those causes of action, with contract claims being brought here. They point out that here DLJ represented that no Loan had a "combined loan-to-value ratio of more than 100%," not that no Loan had a CLTV over 100% assuming the accuracy of appraisers' opinion. Further, they say appraisals are actionable where they do not represent the appraiser's true belief as to the value of the property. *See e.g. Fed. Hous. Fin. Agency v UBS Americas, Inc.*, 858 F Supp 2d 306, 326 (SDNY 2012). They point to the complaint which alleges that (1) originators did not follow their guidelines in making Loans that exceeded CLTV ceilings due to inflated appraisals; (2) DLJ understood that its originators were widely disregarding their underwriting rules, which included conducting proper appraisals; and (3) DLJ's CLTV R&Ws deviated significantly from plaintiffs' AVM results.

They note that although DLJ moves to dismiss all claims based on CLTVs, many of the Trusts' CLTV claims are not based on flawed appraisals. For example, Loans were issued at CLTVs above the ratio permitted under the originators' guidelines, even assuming the accuracy of the appraisal in the ratio's denominator. In this respect, they say DLJ made other R&Ws that do not turn on the PSAs' definition of "Appraised Value"; namely, that all Loans were originated according to the requirements of the originators' guidelines. Thus, when an inflated appraised

property value that led to a CLTV higher than that allowed under the originators' guidelines, there was a breach of DLJ's R&W that the guidelines requirements were followed, not just DLJ's R&W that no Loan had a combined loan-to-value ratio of more than 100%.

The court finds the Trusts' primary position compelling. DLJ made R&Ws which are allegedly wrong. The R&Ws were not qualified by the concept of "opinion" relevant in federal securities law claims. The Trusts additional positions are also correct.

DLJ's motion to dismiss is denied with respect to appraisal value.

Damages

The Trusts allege that DLJ is in breach of its R&Ws and its cure and repurchase obligations. The Trusts specifically seek compensatory, consequential, rescissory, and/or equitable damages in connection with their claims for breach of DLJ's R&Ws. They also request such further relief as may be just and proper in connection with each of their causes of action.

DLJ argues that under the sole-remedy provision in Section 2.03(g) of the PSAs (Section 2.03(f) for the HEMT 2006-4 Trust), the Trusts are precluded from seeking any remedy other than the cure or repurchase of defective Loans. DLJ says that the Trusts cannot avoid the contract by alleging breach of the PSAs' cure or repurchase obligation by DLJ because this remedy was established to deal with the very type of Loan-level breaches the Trusts now allege.

DLJ asserts the Trusts claim for consequential damages must be dismissed for the independent reason that under New York law, damages for lost profits are not available when the contract itself does not provide for their recovery and "no factual issue [is] otherwise raised" as to whether the parties intended that they would be able to recover damages due to lost profits.

Brody Truck Rental, Inc. v Country Wide Ins. Co., 277 AD2d 125 (1st Dept 2000). DLJ says the sole-remedy provision shows that the parties did not agree to consequential damages.

DLJ argues the Trusts are specifically barred from seeking rescissory damages for a number of reasons. First, rescission and rescissory damages are available only when a party "lacks a complete and adequate remedy at law and where the status quo may be substantially restored." *Alper v Seavey*, 78 NYS2d 564, 566 (1st Dept 2004) (internal quotation marks omitted).

Second, the Trusts are not entitled to rescissory damages because the complaint does not seek rescission. Without a viable claim for rescission, the Trusts are limited, at most, to contract damages. *Raymond Weil, S.A. v Theron*, 585 F Supp 2d 473, 488 (SDNY 2008).

Third, the Trusts abandoned any claim to rescission or rescissory damages by suing to enforce the PSAs. *Clearview Concrete Prods. Corp. v Charles Gherardi, Inc.*, 453 NYS2d 750, 754 (party abandoned right to rescind when "it accepted the benefits of the contract and thereby affirmed it"); *see also Bernstein v Cooke*, 478 NYS2d 294, 298 (1st Dept 1984) ("One elects either to continue with the contract fraudulently induced or to rescind it. If one elects to continue with it, one accepts all the burdens contained in the contract as well as the benefits.").

The court holds that while the PSAs clearly provide that the sole remedy for breach of a R&W made pursuant to Section 2.03 (f) or (g) of the PSA is the repurchase or cure of defective Loans, and that the Trusts may not recover damages for such breach, this does not preclude the Trusts from recovering damages for DLJ's breach of its cure or repurchase obligation. The parties underscored this in the last sentence of Section 2.03 (f) or (g) by providing for an

"*obligation* under this Agreement . . . to cure, repurchase or substitute any Mortgage Loan. . . ." (emphasis added) This obligation is independent and unqualified.

It follows that the Trusts must be permitted to petition the court for all remedies available at law or in equity arising from breach of the cure or repurchase obligation. These include an order of specific performance and damages.[2] The court will not read into the contract a provision limiting the Trusts relief to an order of specific performance. The PSA's could easily have been drafted this way, but they were not. The court will not seek to divine an intent of the parties to read damages out of the contract in this respect.

The court holds that with respect to consequential damages DLJ's position is correct. The SPAs do not provide for their recovery and there is no factual issue raised as to whether the parties intended that they would be able to recover damages due to lost profits. The arguments the Trusts make for consequential damages are unavailing.

As to rescissory damages, the court again agrees with DLJ's position. Like consequential damages, rescission is a "rarely used equitable tool." *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 (1st Dept 2013). Rescissory damages are generally available only where rescission is impracticable and there are no alternative legal remedies. See *MBIA Ins. Corp.*, 105 AD3d at 413 (1st Dept 2013); *Alper v Seavey*, 9 AD3d 263, 264 (1st Dept 2004). The Trusts' arguments supporting an award of rescissory damages are unavailing because they do not seek rescission and also because there is an available alternative remedy.

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[2] The Trusts have petitioned for an order of specific performance with respect to the cure or repurchase obligation in paragraph (a) of the complaints prayer for relief. In the prayer for relief, the Trusts have not specifically sought damages arising out of such breach, as opposed to damages arising from breach of the R&Ws. They have requested an award of such further relief as may be just and proper in paragraph (15) of the prayer for relief, and the court finds this sufficient with respect to petitioning for damages for breach of the cure or repurchase obligation. Paragraph 12.5 of the complaint can also be read to request damages for breach of the cure or repurchase obligation.

DLJ argues that because the Trusts are seeking to enforce the PSA, it cannot simultaneously seek to rescind the same agreement. Despite the Trusts' adamant averments that they have claimed their rights to rescind the PSA, but are seeking rescissory damages instead because rescission is impracticable, the pleadings show that the Trusts are not seeking rescission; they seek enforcement of the PSA. An award of rescissory damages is an alternative remedy in cases where rescission itself is not viable. See *MBIA Ins. Corp.*, 105 AD3d at 413 (holding that granting a motion for summary judgment awarding rescissory damages was inappropriate because rescission was not warranted).[3] Here, rescission was not sought and therefore rescissory damages are unavailable.

That the Trusts have an alternative remedy to protect their contractual rights also supports a denial of rescissory damages. As previously discussed, Section 2.03 of the PSA offers the cure or repurchase obligation as the sole remedy for any breach of R&Ws. The agreement itself offers the Trusts a viable remedy that they are seeking to enforce in this action. Further, the Trusts may seek damages for breach of the cure or repurchase obligation.

DLJ's motion to dismiss is granted with respect to compensatory damages for breach of the DLJ's R&Ws.

DLJ's motion to dismiss is denied with respect to compensatory damages for breach of the cure or repurchase obligation.

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[3] Although the court in *MBIA Ins. Corp.* found that rescissory damages were legally unavailable because the plaintiff had previously given up its right to seek rescission, the court also recognized that the plaintiff did not actually seek rescission. *MBIA Ins. Corp.*, 105 AD3d at 413 ("Plaintiff should not be permitted to utilize this very rarely used equitable tool . . . to reclaim a right it voluntarily contracted away or to obtain relief it never actually requested").

DLJ's motion to dismiss is granted with respect to consequential and rescissory damages for breach of DLJ's R&Ws and the cure or repurchase obligation.

Declaratory Judgment

Under First Department precedent, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records, Inc. v Capitol Records, Inc.*, 529 NYS2d 279, 281 (1st Dept 1988); *see also Artech Info Sys., L.L.C. v Tee*, 280 AD2d 117, 125 (1st Dept 2001). A declaratory judgment would find that DLJ breached Loan-level R&Ws. The Trusts' first and second causes of action for breach of contract relating to breach of the R&Ws depend entirely on this identical premise. Declaratory judgment claims must be dismissed when they duplicate plaintiffs' breach of contract claim. *See James v Alderton Dock Yards*, 256 NY 298, 305 (1931); *Singer Asset Fin. Co. v Melvin*, 822 NYS2d 68, 71 (1st Dept 2006).

DLJ's motion to dismiss is granted with respect to declaratory judgment.

Unjust Enrichment and Alleged Irrelevant Allegations

DLJ moves to dismiss the Trusts' claim that DLJ was unjustly enriched when it entered into secret settlements with Loan originators, received cash payments from them for "early-payment defaults," failed to notify the Trusts of breached R&Ws or pay those settlement moneys to the Trusts, and was thereby enriched at the Trusts' expense. It argues that this claim impermissibly arises from the same subject matter that is governed by the PSAs.

To plead unjust enrichment, the Trusts must allege (1) DLJ was enriched; (2) at the expense of the Trusts; (3) and equity and good conscience militates against permitting DLJ to retain what the Trusts seek to recover. *See e.g. Paramount Film Distrib. Corp. v State of*

New York, 30 NY2d 415, 421 (NY 1972). The complaint alleges that DLJ discovered that Loans were defectively underwritten, entered into undisclosed settlements with originators, and failed to return those recoveries to the Trusts which own the Loans DLJ recovered on.

DLJ takes the position that its contracts with originators are not incorporated into the PSAs, do not cover the same R&Ws, and therefore that any of DLJ's undisclosed settlements have no bearing on the Trusts' contract claims. Its argument that unjust enrichment claims may not be brought for events arising out of subject matter governed by the parties' agreements is wrong. The Trusts are entitled to plead alternative and inconsistent causes of action and to seek alternative forms of relief: *if* the PSAs strictly require DLJ to transmit its settlement recoveries to the Trusts, the Trusts' contract claims will control; *if*, as DLJ argues, the PSAs do *not* cover the same R&Ws through which DLJ secretly settled with originators, the Trusts' unjust enrichment claim is not precluded for covering the same "subject matter" as the contract claims. *See e.g. Air Atlanta Aero Eng'g Ltd. v SP Aircraft Owner I, LLC*, 637 F Supp 2d 185, 195 (SDNY 2009) ("Courts have permitted pleading in the alternative in the face of a written agreement . . . when there is a dispute as to the agreement's validity or enforceability).

Similarly, DLJ's motion to strike allegations concerning DLJ's secret settlement practices is based on the inapposite principle that scandalous and prejudicial material may be stricken. *Gerseta Corp. v Silk Ass'n of Am.*, 220 AD 302, 305, 222 NYS 7, 10 (1st Dept 1027) ("Motions to strike out parts of a pleading . . . are not favored by the court. Where, under any possible circumstances, evidence of the facts pleaded in the allegations sought to be stricken out have any bearing on the subject-matter of the litigation, the motion will be denied.") The complaint alleges that DLJ entered into a number of undisclosed settlements with loan originators – and

failed to return those moneys to the trusts – and ties these allegations directly to the unjust enrichment claim, as well as the Trusts' cure or repurchase claims.

DLJ's motion to dismiss is denied with respect to unjust enrichment and the striking of allegations. Accordingly, it is hereby

ORDERED that DLJ's motion to dismiss is denied with respect to (i) standing, (ii) the statute of limitations, (iii) appraisal value, (iv) compensatory damages for breach of the cure or repurchase obligation, and (v) the striking of allegations; and it is further

ORDERED that DLJ's motion to dismiss is granted with respect to (i) anticipatory breach, (ii) compensatory damages for breach of R&Ws, (iii) consequential and recissory damages for breach of R&Ws and the cure or repurchase obligation, and (iv) declaratory judgment.

Dated: January 10, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER