Ocwen Loan Servicing, LLC v Ohio Pub. Empls. Retirement Sys.
2014 NY Slip Op 30469(U)
February 18, 2014
Supreme Court, New York County
Docket Number: 654586/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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OCWEN LOAN SERVICING, LLC, *on behalf of itself and Bank of New York Mellon Corporation, Trustee for ABFS Mortgage Loan Trust 2002-3*,

Plaintiff,

- *against* -

OHIO PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Defendant.

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Index No.: 654586/2012
Motion Date: 12/18/2013
Motion Seq.: 001, 002,003

EILEEN BRANSTEN, J.

In this action, Plaintiff Ocwen Loan Servicing, LLC ("Ocwen") seeks the return of overpayments made to Defendant Ohio Public Employees Retirements System ("OPERS"), a certificateholder of a mortgage-backed security. In Motion Sequence 001, Ocwen moves to dismiss OPERS's four counterclaims and its defense of lack of personal jurisdiction, and OPERS opposes. In Motion Sequence 002, OPERS moves for summary judgment dismissing the Complaint in its entirety, and Ocwen opposes. In Motion Sequence 003, Ocwen seeks to supplement the record on OPERS's summary judgment motion, asking the Court to take judicial notice of a Bankruptcy Court decision and to consider a newly executed power of attorney, which OPERS opposes. For the reasons set forth below, Ocwen's Motion Sequence 001 is granted, OPERS's Motion Sequence 002 is denied, and Ocwen's Motion Sequence 003 is granted.

Background

This case arises out of Defendant OPERS's investment in the ABFS 2002-3 Mortgage Loan Trust (the "Trust"). (Compl. ¶ 1.) The Trust was created on September 1, 2002 by Credit Suisse First Boston Mortgage Securities Corp., with American Business Credit, Inc. ("ABC") serving as servicer, and JPMorgan Chase Bank serving as trustee, according to the Trust's Pooling and Servicing Agreement (the "Original PSA").[1] (Compl. ¶ 7.) The Trust consisted of roughly $370,000,000 of home equity loans and was beneficially owned by five classes of certificateholders. (Compl. ¶ 8.)

OPERS purchased a certificate on April 20, 2005. (Affidavit of Paul Greff ("Greff Aff.") ¶ 2.) OPERS's certificate was a class "M-1" certificate, the second class in the payment waterfall. (Affidavit of Jeffrey Meade ("Meade Aff.") ¶¶ 4, 13.)

In 2005, ABC, the Trust's servicer, declared bankruptcy along with its parent organization, American Business Financial Services, Inc. (Meade Aff. ¶ 6.) On April 4, 2005, the United States Bankruptcy Court for the District of Delaware approved the sale of ABC's servicing rights in eighteen different real-estate related trusts, including the servicing rights for the Trust (the "Bankruptcy Order"). *In re Am. Bus. Fin. Servs., Inc.*,

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[1] The Bank of New York Mellon succeeded JPMorgan Chase Bank as trustee at some point prior to October 27, 2009. *See* Meade Aff. Ex. E. Although the exact timing of the change is unclear based upon the parties' submissions, it is unimportant for purposes of the instant motions and both entities will be referred to as "Trustee."

No. 05-10203-MFW (Bankr. D. Del. filed April 4, 2005; Affirmation of Joel Miller in Support of Motion to Supplement Record ("Miller Suppl. Affirm.") Ex. B at 1, 63.

ABC sold its servicing rights to Ocwen Federal Bank FSB pursuant to the Amended Purchase Agreement, and Ocwen Federal Bank FSB assumed the servicing rights to the Trust pursuant to the Amended Pooling and Servicing Agreement ("Amended PSA"). (Miller Suppl. Affirm. Ex. B at 1-3.) On June 30, 2005, Ocwen Federal Bank FSB transferred its rights as servicer under the Amended PSA to Plaintiff Ocwen. (Letter to the Court of Joel Miller, Dec. 17, 2013, Exs. A, B.)

As servicer, Ocwen is charged with administering the mortgages that compose the Trust and collecting all monies associated therewith. (Meade Aff. ¶ 10.) In addition, Ocwen calculates the amount of interest and principal that each class of certificateholder should receive and deposits those funds into an account maintained by the Trustee. (Meade Aff. ¶ 11.) Ocwen then generates a report on how the Trustee should disburse payments, and the Trustee disburses payment to each certificateholder according to the report. (Meade Aff. ¶ 12.)

In January 2007, Ocwen made an error in the model that it used to calculate the waterfall distribution payments to certificateholders. (Meade Aff. ¶ 17.) The error resulted in overpayments to class M-1 certificateholders and underpayments to class M-2 and class B certificateholders. (Meade Aff. ¶ 17.) OPERS, as a class M-1

certificateholder, received $4,782,739.28 in overpayments. (Compl. ¶ 14.) The overpayments continued monthly until a certificateholder notified Ocwen of the calculation error in August 2009. (Meade Aff. ¶ 17.)

Ocwen and the Trustee provide Ocwen's raw data and payment calculations on the Trustee's investor website. (Meade Aff. ¶ 14.) Using this data, the miscalculations and overpayments were brought to Ocwen's attention by a certificateholder. (Meade Aff. ¶ 16.) Ocwen notified the Trustee in September 2009, and on October 27, 2009, Ocwen published a notice to the certificateholders describing the error on the Trustee's website. (Meade Aff. ¶ 18.) Ocwen alleges that the Trustee informed Ocwen that the Depository Trust Company, which maintains the list of certificateholders, would seek reimbursement for overpayments paid between November 2008 and August 2009, but no earlier. (Meade Aff. ¶¶ 12, 19.) Ocwen also alleges that the Trustee has tasked Ocwen with recovering the overpayments that occurred between January 2007 until October 2008. (Meade Aff. ¶ 19.)

OPERS sold its certificate on August 20, 2009, just before the miscalculations were discovered. (Compl. ¶ 16.) OPERS alleges that due to Ocwen's miscalculation, its received a lower sale price than it otherwise would have. (Am. Answer ¶ 82.) OPERS also alleges that it had no knowledge of the overpayments until Ocwen notified OPERS directly on May 19, 2011. (Am. Answer ¶ 20).

OPERS has rejected Ocwen's request for a return of the $4,782,739.27 in overpayments that were erroneously made to OPERS between January 2007 and October 2008. (Compl. ¶ 21). On December 29, 2012, Ocwen filed the Complaint asserting three causes of action: (i) unjust enrichment, (ii) money had and received, and (iii) recovery of payment made under mistake of fact. On February 19, 2013, OPERS filed its Amended Answer with Counterclaims, asserting four claims against Ocwen: (i) breach of express warranties, (ii) negligence, (iii) gross negligence, and (iv) indemnification.

The Court will first consider Ocwen's motion to dismiss OPERS's counterclaims and personal jurisdiction defense. The Court will then analyze Ocwen's motion to supplement the record on summary judgment. Finally, the Court will consider OPERS's summary judgment motion.

I. Ocwen's Motion to Dismiss Counterclaims and Defense (Mot. Seq. 001)

Ocwen moves to dismiss the OPERS's counterclaims pursuant to CPLR 3211, on the grounds that the Amended PSA precludes OPERS's warranty, negligence and indemnification claims, and that OPERS has failed to plead facts sufficient to establish Ocwen's gross negligence. Ocwen also moves for dismissal of OPERS's personal jurisdiction defense on the grounds that it was waived by OPERS asserting counterclaims unrelated to the causes of action in the Complaint.

As an initial matter, OPERS argues that Ocwen's motion should be denied because the notice of motion was procedurally improper. OPERS argues that the notice of motion did not identify a specific subsection of CPLR 3211, and therefore failed to state the grounds upon which relief is sought as required by CPLR 2214(a). However, as the Third Department has noted, "[t]here is no need to cite the specific subdivision pursuant to which relief is sought when the motion papers apprise one of the actual grounds for the application." *Schenectady Int'l. v. Emps. Ins. Of Wausau*, 245 A.D.2d 754, 754 (3d Dep't 1997); *see also HCE Assocs. v. 3000 Watermill Lane Realty Corp.*, 173 A.D.2d 774, 774-75 (2d Dep't 1991).

Ocwen's Memorandum of Law clearly cites CPLR 3211 and states that the Amended PSA serves as grounds for dismissal of the breach of warranty, negligence, and indemnification claims. Ocwen's Memorandum of Law also states that the Amended Answer fails to plead facts sufficient to state a claim for gross negligence or the affirmative defense of lack of personal jurisdiction. Therefore, this Court will not elevate form over substance, and finds that Ocwen's motion is procedurally proper.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most

favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Breach of Express Warranties*

Ocwen first moves to dismiss OPERS's cause of action for breach of express warranties. OPERS's counterclaim alleges that "Ocwen, as Servicer of the ABFS Trust, expressly warranted that no statement, report, or other document furnished by Ocwen pursuant to the PSA . . . contains any untrue statement of fact." *See* Am. Answer ¶ 66. Further, OPERS alleges that "Ocwen breached its duties . . . when it made erroneous calculations," and Ocwen thereby proximately caused OPERS's damages because OPERS reasonably relied on Ocwen's miscalculations in selling its certificate at a significant loss. *See* Am. Answer ¶¶ 67, 71.

Ocwen's motion to dismiss OPERS's claim for breach of warranties is premised on the language of the Amended PSA. Ocwen argues that it was not a party to the Original PSA and that it did not assume the warranties identified by OPERS when it signed the Amended PSA. Therefore, according to Ocwen, the breach of warranty claim must be dismissed under the terms of the Amended PSA.

In its opposition to dismissal, OPERS primarily argues that the Amended PSA is not effective. OPERS contends that questions of fact surrounding the Amended PSA preclude this Court from considering it on a motion to dismiss. Such alleged questions of fact include whether the Amended PSA was signed, what its final terms are, and whether it was amended properly as required by the terms of the Original PSA. OPERS argues

that until such questions of fact are resolved through discovery, this Court should refer only to the Original PSA.

First, the Amended PSA is properly before this Court as documentary evidence pursuant to CPLR 3211(a)(1). *See CIBC Bank & Trust Co. (Cayman) Ltd. v. Credit Lyonnais*, 270 A.D.2d 138, 139 (1st Dep't 2000) (relying on contract language as documentary evidence to dismiss complaint). On supplemental submissions permitted by this Court, Ocwen submitted the signature pages for the Amended PSA. *See* Letter to the Court of Joel Miller, Nov. 26, 2013, Ex. 3.

Further, the Bankruptcy Order that amended the Original PSA specifically states that the Amended PSA complies with the various sections identified by OPERS as required to amend the Original PSA.[2] For example, the Bankruptcy Order states that an opinion from outside counsel shall be delivered in accordance with section 11.03. *See* Miller Suppl. Affirm. Ex. B at 4. In addition, the Bankruptcy Order also addresses the certificateholder consents and states that they will not be required. Any doubt that these court orders were complied with was removed by the Bankruptcy Court's later opinion, in which it stated that "Ocwen and the Debtor executed a Servicing Rights Transfer

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[2] This Court may properly take judicial notice of the Bankruptcy Order. *See, e.g.*, *Marcinak v. General Motors Corp.*, 285 A.D.2d 387, 387 (1st Dep't 2001) (taking judicial notice of bankruptcy order rendering cause of action moot and dismissing complaint).

Agreement . . . on or about April 13, 2005, and a Servicing Agreement on May 1, 2005. *See In re Am. Bus. Fin. Servs., Inc.*, 362 B.R. 149, 154 (Bankr. D. Del. 2007).

Second, any claim against Ocwen must be premised upon the Amended PSA. OPERS does not argue that Ocwen was a party to the Original PSA, and the Bankruptcy Order states that "under no circumstances shall [Ocwen] be deemed a successor of or to [ABC]." *See* Miller Suppl. Affirm. Ex. B at 17. Further, the Bankruptcy Order specifically provides that the "Debtors transfer of the Sale Assets to the Purchaser . . . will vest the Purchaser with all right, title, and interest . . . free and clear of all liens, claims, interests, encumbrances, rights of offset, recoupment and defenses other than the Assumed Obligations." *See* Miller Suppl. Affirm. Ex. B at 6. OPERS does not contend that the warranties were "Assumed Obligations." Therefore, pursuant to the Bankruptcy Order, any claim against Ocwen must be based upon the Amended PSA.

Having established that any claim must be brought against Ocwen based upon the Amended PSA, the Court now turns to an analysis of the Amended PSA. While OPERS does not name a specific section under which it seeks to enforce the warranties, the language that OPERS uses mirrors Section 3.01(f) of the Amended PSA. *See* Meade Aff. Ex. B at 45. However, the warranties made in Section 3.01(f) were solely those of the "Prior Servicer," ABC. *See* Meade Aff. Ex. B at 43. It is Section 3.04, not Section 3.01, that contains warranties made by Ocwen as the new servicer. *See* Meade Aff. Ex. B at

49. Section 3.04 does not contain any language similar to the warranties as stated by OPERS. *See* Meade Aff. Ex. B at 49.

OPERS has failed to identify any warranty made by Ocwen that has been breached. Therefore, based upon the Amended PSA and the Bankruptcy Order, OPERS's first cause of action is dismissed with prejudice.

C. *Negligence*

OPERS's second cause of action asserts a cause of action for negligence against Ocwen. OPERS alleges that "Ocwen, as Servicer of the ABFS Trust, owed a duty to OPERS as Certificateholder, to exercise reasonable care . . . in carrying out its duties as Servicer." *See* Am. Answer ¶ 74. OPERS avers that Ocwen was negligent in fulfilling its duties as Servicer under the Amended PSA.

1. *Amended PSA Precludes Negligence Claim*

Ocwen argues that Section 11.01 of the Amended PSA contains a limitation of liability provision precluding any negligence claims. *See* Meade Aff. Ex. B at 104. Section 11.01 states that "None of the Depositor, Servicer, [or other entities,] shall be under any liability to . . . Certificateholders for any action taken . . . in good faith, or errors in judgment . . . ." *See* Meade Aff. Ex. B at 104. OPERS argues that because other

provisions of the Amended PSA provide Ocwen with discretion in certain of its tasks as servicer, this limited liability provision only applies to Ocwen's discretionary actions.

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. *See, e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Courts may not fashion a new contract for the parties under the guise of interpreting the writing. *See, e.g., Tonking v. Port. Auth. of N.Y. & N.J.*, 3 N.Y.3d 486, 490 (2004) (holding that a court may not "rewrite the contract and supply a specific obligation the parties themselves did not spell out"); *Flag Wharf, Inc. v. Merrill Lynch Capital Corp.*, 40 A.D.3d 506, 507 (1st Dep't 2007) ("Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities"). An agreement is ambiguous where it is, on its face, susceptible to two or more interpretations. *See Nappy*, 40 A.D.3d at 826.

Here, Section 11.01 of the Amended PSA is unambiguous. The Servicer, Ocwen, shall not be liable for any action taken in good faith or for errors in judgment. The plain language of the Amended PSA extends the protection of Section 11.01 to all actions taken in good faith, regardless of discretion. OPERS provides no reason to read into the contract that "only discretionary actions" are protected by the limited-liability provision. There is simply no support for that assertion in the Amended PSA.

2. *No Duty Owed Outside of Amended PSA*

OPERS argues that Ocwen owed a legal duty independent of the Amended PSA. OPERS alleges that a duty owed outside of the Amended PSA would be outside the scope of the liability limitation. OPERS argues that it detrimentally relied upon Ocwen's calculations and therefore can state a claim in tort against Ocwen.

OPERS's negligence claim fails as duplicative of the breach of contract claim. OPERS's negligence claim cannot stand because OPERS is a party to the Amended PSA, and a party to a contract is precluded from suing in tort for breach of contractual duties. OPERS is clearly a party of the Amended PSA based upon Section 11.10 states that the Amended PSA "shall inure to the benefit of and be binding upon . . . Certificateholders and their respective successors and permitted assigns." *See* Meade Aff. Ex. B at 107. Further, OPERS's cause of action for breach of warranties made in the Amended PSA and cause of action for indemnification are made pursuant to provisions of the Amended PSA.

Courts do not permit parties to a contract to sue for both breach of contractual duties and negligence in performing contractual duties. *See Sebastian Holdings, Inc. v. Deutsche Bank, AG.*, 108 A.D.3d 433, 433 (1st Dep't 2013) ("the parallel negligence claim . . . was properly dismissed as duplicative of the contract claims . . . . [There was no] showing that the defendant was subject to duties beyond the roughly thirteen written

agreements between the parties."); *see also Rector v. Calamus Grp.*, 17 A.D.3d 960, 962 (3d Dep't 2005) (holding plaintiff bound by limitation of liability provision despite being non-signatory). OPERS's negligence claim unmistakably refers to Ocwen's duties as servicer. *See* Am. Answer ¶ 74 ("Ocwen, as Servicer of the ABFS Trust, owed a duty to OPERS as Certificateholder, to exercise reasonable care . . . *in carrying out its duties as Servicer*.") (emphasis added).

The various cases cited by OPERS regarding duties independent of a contract involve non-parties to those contracts. *See Espinal v. Melville Snow Contractors*, 98 N.Y.2d 136 (2002); *Securities Investor Protection Corp. v. BDO Seidman L.L.P.*, 95 N.Y.2d 702 (2001); *White v. Guarente*, 43 N.Y.2d 356 (1977). As OPERS is a party to the Amended PSA, these cases are inapposite. Further, as there is no set of facts that would show that OPERS was not a party to the Amended PSA, OPERS's cause of action for negligence is dismissed with prejudice.

D. *Gross Negligence*

OPERS's third counterclaim alleges that, "[u]pon information and belief, Ocwen acted wilfully, wantonly, or at the very least, recklessly in the performance of its duties as Servicer of the ABFS Trust because it knew, or should have known, that the repeated and

systemic erroneous statements and calculations . . . would compromise the value of the certificate." *See* Am. Answer ¶ 88.

For the same reasons as stated above in dismissing OPERS's negligence claim, Ocwen did not owe OPERS any duty independent of the Amended PSA. Accordingly, OPERS's gross negligence claim is also dismissed with prejudice. *See Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478, 479 (1st Dep't 2010) ("The motion court also correctly dismissed the gross negligence claim . . . since claims based on negligent or grossly negligent performance of a contract are not cognizable and plaintiff does not allege a breach of a duty independent of the contract.") (internal citations omitted).

E. *Indemnification*

OPERS's final cause of action alleges that "Ocwen, as Servicer of the ABFS Trust, expressly agreed . . . to indemnify and hold each Certificateholder, including OPERS, harmless against any . . . legal fees . . . sustained in any way related to the failure of Ocwen, as Servicer, to perform its contractual duties as set forth in the PSA and Amended PSA." *See* Am. Answer ¶ 94.

Ocwen argues that the Amended PSA does not require it to provide any indemnification. Ocwen contends that the Court of Appeals, in *Hooper Associates v. AGS Computers*, 74 N.Y.2d 487, 492 (1989), held that a contractual indemnification

clause must unequivocally state that parties to a contract will indemnify each other. Ocwen argues that the Amended PSA clearly refers to third-party indemnification, and therefore does not provide a right to reimbursement between parties to the contract.

The indemnification clause at issue here is Section 5.19 of the Amended PSA, which states:

> Section 5.19 Indemnification; Third Party Claims. (a) The Servicer agrees to indemnify . . . each Certificateholder [] against any and all claims, losses, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that . . . any Certificateholder may sustain in any way related to the failure of the Servicer to perform its duties and service the Mortgage Loans in compliance with the terms of this Agreement . . . . Each indemnified party and the Servicer shall immediately notify the other indemnified parties if such claim relating to the Servicer is made by a third party with respect to this Agreement, and the Servicer shall assume the defense of any such claim and pay all expenses in connection therewith, including reasonable counsel fees, and promptly pay, discharge and satisfy any judgment or decree which may be entered against . . . a Certificateholder in respect of such claim.

See Meade Aff. Ex. B at 69.

While it is reasonable to read Section 5.19(a) to infer that inter-party claims are allowed, New York sets a higher standard. The Court of Appeals has stated that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assoc. Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989).

In order for the Amended PSA's indemnification clause to cover claims between the contracting parties rather than third party actions, the language of the indemnification provision must be "unmistakably clear" and "exclusively or unequivocally" reflect that the parties intended for indemnification of costs arising out of litigation between the parties. *Hooper Assoc. Ltd.*, 74 N.Y.2d at 492; *see also Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 206 (1st Dep't 2010) (stating that under *Hooper*, "for an indemnification clause to cover claims between the contracting parties rather than third party claims, its language must unequivocally reflect that intent.").

OPERS argues that the first sentence can be read to apply to inter-party claims because the second sentence refers to third-party claims. OPERS cites *Sagittarius Broadcasting Corp. v. Evergreen Media Corp.*, 243 A.D.2d 325, 326 (1st Dep't 1997), for the contention that the first sentence must refer to inter-party claims. OPERS argues that the second sentence's reference to third-party actions would render the first sentence "mere surplusage were it only applicable . . . to third-party actions." *See Sagittarius* 243 A.D.2d at 326.

However, the provision at issue here "falls short of satisfying [*Hooper*'s] exacting standard." *Gotham Partners, L.P.*, 76 A.D.3d at 206. In *Gotham Partners*, as here, the indemnification clause contained a broad opening clause as well as a second clause that referred specifically to third-party claims. *Gotham Partners, L.P.*, 76 A.D.3d at 204

("Section 7.10 . . . (a) [Defendant] agrees to indemnify . . . [Plaintiff] from and against any and all liabilities . . . . (b) If a third party commences any action . . . [Defendant] shall, at its own expense, defend any action [for] which [Plaintiff] is entitled to indemnification . . ."). The *Gotham Partners* court held that "[t]he quoted provision at issue here is simply not so unequivocally referable to a breach of contract claim [between the parties]." *Gotham Partners, L.P.*, 76 A.D.3d at 208.

Here, Section 5.19(a) of the Amended PSA does not contain language clearly permitting a Certificateholder to be indemnified by the Servicer and does not "exclusively or unequivocally refer[] to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff" for the expenses incurred in bringing this litigation. *Hooper Assoc. Ltd.*, 74 N.Y.2d at 492. To the extent that *Sagittarius* compels a different result, this Court declines to follow the 1997 ruling in *Sagittarius* and instead follows the logic of the 2010 ruling in *Gotham Partners*. Accordingly, Ocwen's motion to dismiss OPERS's claim for indemnification is granted with prejudice.

F. *Personal Jurisdiction*

Ocwen next moves to dismiss OPERS defense if lack of personal jurisdiction. Ocwen contends that OPERS has waived its jurisdictional defense by asserting counterclaims that are unrelated to Ocwen's primary claims. OPERS argues that further

discovery is needed before dismissing the personal jurisdiction defense and that its counterclaims are related to Ocwen's Complaint because they arise out of the Amended PSA and Ocwen's erroneous calculations.

The Court of Appeals has held that defendants waive their personal jurisdiction defense when they assert counterclaims unrelated to the transaction at issue in plaintiff's primary claim. *See Textile Tech. Exch. v. Davis*, 81 N.Y.2d 56, 59 (1993). The *Textile* Court held that "a counterclaim will only be 'related' . . . when such counterclaim could potentially be barred under principles of collateral estoppel– . . . where the issues in the plaintiffs' claims are potentially identical and decisive of issues raised in the counterclaims." *See Textile Tech. Exch.*, 81 N.Y.2d at 59. The Court of Appeals held that the counterclaims at issue in *Textile Tech* were unrelated because they referred to a transaction different than the transaction described in the complaint, and so collateral estoppel would not have applied. *See Textile Tech. Exch.*, 81 N.Y.2d at 59.

Based upon *Textile*, OPERS argues that "[t]he espoused legal theories are irrelevant so long as the claims arise out of the same events." *See* Defendant's Memorandum of Law in Opposition ("Def.'s Br.") at 17. However, this argument ignores the *Textile* court's holding that counterclaims are only related if they meet the threshold of collateral estoppel. *See Textile Tech. Exch.*, 81 N.Y.2d at 59. Asserting claims arising out of different transactions is only one subset of unrelated claims. *See ROL Realty Co.*

LLC v. Gordon, 29 Misc.3d 139(A) (App. Term 1st Dep't Nov. 29, 2010) (finding claims for intentional infliction of emotional distress, negligence, harassment, discrimination and overcharge unrelated to residence holdover proceeding).

The standard for collateral estoppel is well established: (i) identical issues must be necessarily decided in a prior action and be decisive in the current action, and (ii) the party to be precluded had a full and fair opportunity to contest the prior determination. *See, e.g., D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664 (1990). If an issue would be decisive in both actions between parties, then the counterclaims will be related, otherwise they will be unrelated. *See Textile Tech. Exch.*, 81 N.Y.2d at 59.

Here, Ocwen's three causes of action are (i) unjust enrichment, (ii) money had and received, and (iii) recovery of payment made under mistake of fact. The Court of Appeals has stated that these three causes of action are essentially the same rule, but "ha[ve] been denominated as one for money had and received, unjust enrichment or restitution, or upon a theory of quasi contract." *Banque Worms v. BankAmerica Intl.*, 77 N.Y.2d 362, 366 (1991).

The rule in New York, as stated in *Banque Worms*, is that "money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." *Banque Worms*, 77

N.Y.2d at 366-67. The sole element of Ocwen's various causes of action is thus whether a mistaken payment was made, but subject to the affirmative defense of whether the payee changed position based upon the payment to its detriment. *See Nat'l Bank of Canada v. Artex Indus., Inc.*, 627 F.Supp. 610, 615 (S.D.N.Y. 1986) (applying New York law).

As described above, OPERS asserts a counterclaim for negligence. This Court fails to see the identical issues that would be dispositive of both Ocwen's restitution claims and OPERS's negligence claim. This conclusion is especially pertinent as the Court of Appeals has stated that restitution must be made "however negligent the party paying may have been in making the mistake." *Banque Worms*, 77 N.Y.2d at 366. Further, the affirmative defense of detrimental reliance relies solely on OPERS's behavior and not on Ocwen's alleged negligence.

Whether OPERS's was worse off than if it had never received the payment requires an inquiry only into OPERS's conduct. Ocwen's conduct, whether negligent or not, is entirely irrelevant to an inquiry into OPERS's reliance on the payments to OPERS's detriment. Accordingly, OPERS's counterclaim for negligence is not a related to Ocwen's causes of action, and OPERS has waived its personal jurisdiction defense.

II. Ocwen's Motion to Supplement the Record (Mot. Seq. 003)

In Motion Sequence 003, Plaintiff Ocwen seeks to supplement the record on OPERS's motion for summary judgment. Specifically, Ocwen requests that this Court consider the newly-created Limited Power of Attorney ("POA") and that it consider the Bankruptcy Order. The Trustee executed the POA on October 1, 2013, appointing Ocwen as its agent "to prosecute and enforce all rights . . . under the Servicing Agreement." *See* Affirmation of Joel Miller in Support of Motion Seq. 003 Ex. A.

As noted above, the Court is entitled to take judicial notice of the Bankruptcy Order. *See, e.g., Marcinak v. General Motors Corp.*, 285 A.D.2d 387, 387 (1st Dep't 2001) (taking judicial notice of bankruptcy order rendering cause of action moot and dismissing complaint).

Regarding the POA, the First Department recently clarified the limited nature of supplemental submissions on motions for summary judgment in *Ostrov v. Rozbruch*, 91 A.D.3d 147 (1st Dep't 2012). *Ostrov* emphasized the importance of CPLR 2214's time constraints, and advised that "[s]upplemental affirmations . . . should sparingly be used to clarify limited issues, and should not be utilized as a matter of course." *Ostrov*, 91 A.D.3d at 155. The *Ostrov* Court noted that supplemental submissions should be "limited in scope and temporal duration" and that the opposition must be given an opportunity to respond. *See Ostrov* 91 A.D.3d at 154.

Ostrov highlighted three instances in which supplemental affirmations would be appropriate, two of which are inapplicable here. The pertinent example provided by the *Ostrov* court is *Ashton v. D.O.C.S. Continuum Med. Group*, 68 A.D.3d 613 (1st Dep't 2009). In *Ashton*, the First Department approved of supplemental affirmations regarding an issue previously raised, limiting the supplement to that issue, and providing the opposition a chance to respond. *Ashton*, 68 A.D.3d at 614.

Here, Ocwen's motion to supplement the record seeks to have this Court consider the POA dated October 1, 2013, by which the Trustee granted Ocwen the right to bring suit in the Trustee's stead. *See* Miller Suppl. Affirm. Ex. A. As in *Ashton*, the supplemental submission here refers to an issue previously raised, limited in scope, and the opposition was provided an opportunity to respond. The supplemental submission refers only to the issue of standing and was first addressed at the outset of the instant suit, in Ocwen's Complaint, as Ocwen sued on behalf of the Trustee. *See* Compl. ¶ 1. OPERS also raised the issue of standing as a defense in its Answer. *See* Am. Answer ¶ 36.

Finally, OPERS was permitted an opportunity to address the POA and its effect. *See* Memorandum of Law in Opposition to Motion to Supplement the Record 2-10. Therefore, OPERS would not be prejudiced by reference to the supplemental materials. In addition, the interests of judicial economy further prompt this Court to grant the motion

to supplement the record in order to obviate the need for a motion to renew. Accordingly, Ocwen's motion to supplement the record on summary judgment is granted.

III. OPERS's Motion for Summary Judgment (Mot. Seq. 002)

OPERS advances two bases for its pre-note of issue, pre-discovery summary judgment motion. First, OPERS argues that Ocwen lacks standing to assert its three causes of action, and that the Trustee is the proper plaintiff. Second, OPERS contends that Ocwen has failed to state a claim upon which relief can be granted based upon the "Mistake of Fact" doctrine.

A. *Summary Judgment Standard*

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When

deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

B. *Ocwen Has Standing*

Ocwen contends that it has standing independent of the Trustee pursuant to the Amended PSA's Section 11.01(b). OPERS argues that Ocwen lacks standing to sue, either on behalf of itself or the Trustee, because the Amended PSA does not provide Ocwen with a standing to sue a certificateholder and restricts the Trustee's right to appoint Ocwen as its agent.

1. *Ocwen Has Standing Independent of Trustee*

Ocwen contends it has independent standing to sue under the Amended PSA pursuant to Section 11.01(b), which states,

> The Servicer shall not be under any obligation to appear in, prosecute or defend any legal action that is not related to its duties hereunder; *provided however*, that the Servicer in its discretion may undertake any such action that it may deem necessary or desirable in respect of this Agreement and the rights and duties of the parties hereto and interest of the Trustee and the Certificateholders hereunder.

See Meade Aff. Ex. B at 104 (emphasis in original). Ocwen contends that the instant suit is "related to its duties hereunder," and further that this suit is "any such action that it may deem necessary or desirable." Therefore, Ocwen argues, it has standing pursuant to the Amended PSA.

OPERS contends that various other provisions of the Amended PSA show that Ocwen, as servicer, does not have standing to sue. OPERS cites Sections 9.01, 9.02(a)(viii), 9.13 and 9.14 of the Amended PSA in support of its contention. First, Section 9.01 states that if an "Event of Default" occurs, the Trustee must exercise its powers under the Amended PSA. *See* Meade Aff. Ex. B at 91. Second, Section 9.02(a)(viii) authorizes the Trustee to exercise its powers through agents. *See* Meade Aff. Ex. B at 94.

Third, Section 9.13 states that the Trustee may enforce claims under the Amended PSA without possessing a certificate. *See* Meade Aff. Ex. B at 98. Finally, Section 9.14 provides that in case of an "Event of Default or other default by the Servicer . . . shall occur and be continuing, the Trustee, in its discretion . . . may proceed . . . [to bring] a suit." *See* Meade Aff. Ex. B at 98.

OPERS contends that these provisions specifically allocate to the Trustee the sole right to initiate a lawsuit arising out of the servicer's malfeasance. OPERS further argues

that these specific provisions should control over the more general provision cited by Ocwen.

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. *See, e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Courts must "giv[e] practical interpretation to the language employed [in contracts] and the parties' reasonable expectations." *112 W. 34th St. Assocs., LLC v. 112-1400 Trade Props. LLC*, 95 A.D.3d 529, 531 (1st Dep't 2012).

Section 11.01(b) of the Amended PSA grants broad authority to Ocwen bring suit "in its discretion." *See* Meade Aff. Ex. B at 104. The various provisions cited by OPERS are inapposite because they do not limit or remove the broad discretion granted to Ocwen. It is true, as OPERS argues, that specific clauses will control over general clauses. *See, e.g., Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner a.s.*, 243 A.D.2d 1, 8 (1st Dep't 1998). However, the clauses cited by OPERS are not specific to the servicer's right to sue. Nor do the clauses cited by OPERS restrict the right to sue to the Trustee. The provisions cited by OPERS are either permissive, using "may," instead of "shall" or "must," or are irrelevant to the instant case as neither party argues there has been an "Event of Default."

OPERS also cites *Assured Guar. Mun. Corp. v. UBS Real Estate Secs., Inc.*, No. 12-CV-1579(HB), 2012 WL 3525613 (S.D.N.Y. Aug. 15, 2012), for the proposition that

non-trustees lack standing to enforce a contract when the contract reserves enforcement power to the trustee. Yet *Assured* is readily distinguishable from the instant action. The contract in *Assured* contained a provision that specifically required the certificateholder to notify the trustee of any warranty breaches, and then required the trustee to take action. *Assured Guar. Mun. Corp.*, 2012 WL 3525613 at *4. The Court did not broadly hold, as OPERS suggests, that any non-trustee was precluded from bringing suit.

This Court holds that the Amended PSA grants Ocwen standing to bring the instant suit, and does not reach the issue of whether Ocwen has authority to sue on behalf of the Trustee.

C. *Mistake of Fact Doctrine*

OPERS argues that it is entitled to pre-discovery summary judgment under the "Mistake of Fact" doctrine. The "Mistake of Fact" doctrine states that money mistakenly paid may be recovered, unless the payment caused a defendant to change its position such that requiring repayment would be unjust. *See Banque Worms v. BankAmerica Int'l*, 77 N.Y.2d 362, 366 (1991). OPERS argues that it detrimentally relied on Ocwen's overpayments and Ocwen is therefore barred from recovery.

As an initial matter, OPERS has failed to submit a Rule 19-a statement in accordance with the Commercial Division Rules. OPERS has therefore failed to put forth proof in admissible form in support of its motion and this Court may deny the motion on that ground

alone. *See Moonstone Judge, LLC v. Shainwald*, 38 A.D.3d 215, 216 (1st Dep't 2007). Were this Court to consider OPERS's factual averments made in either of the Affidavits of Paul Greff, the Court would still find the motion lacking. *See* Greff Aff. 1-2; Reply Affidavit of Paul Greff 1-2.

The primary questions to be determined are (i) whether OPERS relied on the various overpayments to its detriment, and (ii) whether requiring repayment would be unjust. *See Banque Worms*, 77 N.Y.2d at 366 (1991). OPERS contends that its reinvestment of the overpayments and sale of the certificate constitute reliance. OPERS further contends that the sale price of its certificate would have been higher but for the overpayments.

Ocwen contends that issues of fact abound regarding OPERS's reliance, OPERS's detriment, and the balancing of the equities inherent in determining detrimental reliance. This Court finds Ocwen's stance more persuasive. *See Dicocco v. Capital Area Cmty. Health Plan, Inc.*, 135 A.D.2d 308, 310 (3d Dep't 1988) (denying summary judgment with questions of fact existing around detrimental reliance issue). Significant factual issues surround the extent to which OPERS justifiably relied upon Ocwen's factor miscalculation, and the extent to which OPERS's certificate sale price was adversely affected by the miscalculation. As described in the Meade Affidavit, there are a multitude of factors that influence securities pricing, and OPERS sold its certificate during a time of financial turbulence. *See* Meade Aff. ¶ 32. Accordingly, OPERS's motion for summary judgment is denied.

The Court has considered OPERS's remaining arguments and considers them to be without merit. Ocwen's remaining arguments are rendered moot.

(Order of the Court appears on the next page.)

CONCLUSION

Accordingly, it is hereby

ORDERED that Plaintiff Ocwen's motion to dismiss all four of Defendant's counterclaims and personal jurisdiction defense is GRANTED and the Defendant's four counterclaims and Personal Jurisdiction defense are dismissed with prejudice, with costs and disbursements to Ocwen as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Ocwen; and it is further

ORDERED that the action is severed as to OPERS's counterclaims, and Ocwen's Complaint against OPERS is continued; and it is further

(Order of the Court continues on the next page.)

ORDERED that Defendant OPERS's motion for summary judgment is DENIED in its entirely; and it is further

ORDERED that Plaintiff's motion to supplement the record on summary judgment is GRANTED; and it is further

ORDERED that counsel are directed to appear for a status conference on March 18, 2014 at 10:00 a.m., 60 Centre St., Room 442, New York, NY 10007.

This constitutes the decision and order of the court.

Dated: New York, New York

February 18, 2014

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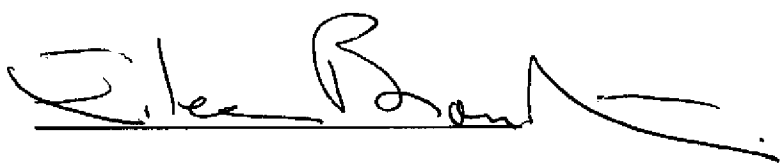

Hon. Eileen Bransten, J.S.C.