

ACE Sec. Corp. v DB Structured Prods., Inc.

2014 NY Slip Op 30927(U)

April 4, 2014

Supreme Court, New York County

Docket Number: 653394/2012

Judge: Eileen Bransten

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

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ACE SECURITIES CORP. HOME EQUITY LOAN
TRUST, SERIES 2006-HE4 (ACE 2006-HE4) by
HSBC Bank USA, National Association, as Trustee,

Plaintiff,

- against -

Index No. 653394/2012
Motion Date: 11/21/2013
Motion Seq. No.: 001

DB STRUCTURED PRODUCTS, INC.,

Defendant.

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BRANSTEN, J.

In this breach of contract action regarding mortgage-backed securities, Defendant DB Structured Products, Inc. (“DBSP”) moves to dismiss the Complaint of Plaintiff ACE Securities Corp. Home Equity Loan Trust, Series 2006-HE4 (the “Trust”) pursuant to CPLR 3211(a)(1), (a)(3), (a)(7) and (a)(8). Plaintiff opposes. For the reasons set forth below, Defendant’s motion is granted in part and denied in part

Background¹

DBSP was the sponsor of the residential mortgage securitization at issue here. (Compl. ¶¶ 38, 39.) As sponsor, DBSP purchased 3,826 mortgage loans from third-party originators, with an aggregate principal balance of \$702,462,276. (Compl. ¶¶ 40-41.)

¹ All facts in this section are undisputed, unless otherwise noted.

DBSP then resold these mortgage loans to the depositor. (Compl. ¶ 40.) The depositor purchased these loans pursuant to the Mortgage Loan Purchase Agreement (“MLPA”), dated September 28, 2006. (Compl. ¶ 40.) The depositor then assigned both the mortgage loans and its rights under the MLPA to the Trust, pursuant to the Pooling and Servicing Agreement (“PSA”). (Compl. ¶ 42.) HSBC Bank USA, National Association, was designated as the trustee (“Trustee”). (Compl. ¶ 21.)

The Federal Home Loan Mortgage Corporation (“Freddie Mac”) purchased certificates in the Trust, along with a “private Certificateholder,” for which Amherst Advisory & Management, LLC (“Amherst”) acts as manager. (Compl. ¶ 23.)

Section 6 of the MLPA contained various representations and warranties made by DBSP about the quality and characteristics of the mortgage loans that were sold to the Trust. (Compl. Ex. A at 7.) Amherst sent three notices to the Trustee that collectively alleged 912 loans breached various representations and warranties (“Amherst Breach Notices”). (Compl. ¶ 2.) Freddie Mac sent one notice alleging various loan breaches to the Trustee, relating to 187 mortgage loans. (Compl. ¶ 76.) In accordance with the Trustee’s duties under the PSA, the Trustee forwarded the breach notices to DBSP as it received them on May 17, June 12, June 13, and July 9, 2012 (“Breach Notices”). (Compl. ¶ 80.)

Together, the Breach Notices stated that out of 1,940 loans that certificateholders reviewed, 1,099 loans breached one or more of DBSP's representations and warranties. (Compl. ¶ 11.) The Breach Notices demanded that DBSP either cure the breaches or repurchase the defective mortgage loans, as required by the MLPA's sole remedy provision. (Affirmation of David Woll ("Woll Affirm") Exs. A at 1, B at 41, C at 83.)

On September 27, 2012, the Trustee filed a summons with notice alleging breaches as to 912 loans identified by Amherst ("Summons with Notice" or "SWN"). On March 4, 2013, the Trustee filed the Complaint, which alleged that 1,099 mortgage loans breached representations and warranties, supplementing the 912 loans in the Summons with Notice with those loans identified by Freddie Mac. (Compl. ¶¶ 23, 41.)

The Complaint asserts four causes of action against DBSP: (i) breach of contract seeking general damages not limited to repurchase, (ii) "fundamental" breach of contract seeking rescissory damages, (iii) breach of contract seeking specific performance of DBSP's repurchase obligations, and (iv) declaratory judgment for reimbursement of expenses in bringing suit to enforce DBSP's obligations.

I. 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.

II. Defendant's Motion to Dismiss

DBSP now moves to dismiss the Complaint. DBSP argues that the Trustee did not provide adequate pre-suit notice, that rescission is contractually barred by the sole-remedy provision, that liquidated loans cannot be repurchased, and that a declaratory judgment for reimbursement is unnecessary. Plaintiff opposes.

A. Adequate Notice Was Provided

DBSP argues that it did not receive the contractually required 90-day advance notice as to each loan addressed in the Complaint. DBSP contends that only the 912 mortgage loans identified in the Amherst Breach Notices survive dismissal because the Trustee did not comply with PSA Section 2.03 as to the remaining 187 loans. Plaintiff responds that the Summons with Notice sufficiently notified DBSP of potential claims relating to the 912 loans, as well as "all other Mortgage Loans with material and adverse breaches." *See* SWN ¶ 20.

The provision at issue, PSA Section 2.03, states

Upon discovery or receipt of notice of . . . a breach by the Sponsor of any representation, warranty or covenant under the Mortgage Loan Purchase Agreement . . . the Trustee shall promptly notify the Sponsor and the Servicer of such . . . breach and request that the Sponsor . . . cure such defect or breach within sixty (60) days from the date the Sponsor was notified of such . . . breach, and if the Sponsor does not . . . cure such defect or breach[,] . . . the Trustee shall enforce the obligations of the Sponsor under the

Mortgage Loan Purchase Agreement . . . to repurchase such Mortgage Loan . . . at the Purchase Price within ninety (90) days after the date on which the Sponsor was notified of such . . . breach, if and to the extent that the Sponsor is obligated to do so under the Mortgage Loan Purchase Agreement or Subsequent Mortgage Loan Purchase Agreement, as applicable.

See Am. Compl. Ex. B at 91-92.

Courts in New York have already interpreted materially similar contractual provisions. These courts have held that notice to the sponsor that a sample of loans breach representations and warranties provides sufficient notice for claims against the entire loan pool. See *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Products, Inc.*, 958 F. Supp. 2d 488, 497 (S.D.N.Y. July 24, 2013) (“DBSP’s obligation to repurchase would have been triggered upon its own discovery and does not require notice by Plaintiff”); *Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 11 CIV. 2375, 2011 WL 533556 at *7 (S.D.N.Y. Oct. 31, 2011) (“notification [to Flagstar] of pervasive breaches’ affecting . . . loans that were the subject of [breach notices] . . . rendered Flagstar constructively “aware”—or . . . on inquiry notice—of the substantial likelihood that these breaches extended beyond the [loans for which notice was given]”); *ACE Sec. Corp. v. DB Structured Products, Inc.*, 41 Misc. 3d 1229(A) at *2 (Sup. Ct. N.Y. County Nov. 21, 2013) (Kornreich, J.) (“[P]laintiff . . . [can pursue] claims for loans not specified in its demand letters It is commercially unreasonable to require plaintiff to effectively re-underwrite the balance of the trust”).

Here, Plaintiff complied with its notice obligations. Certificateholders analyzed several samples of loans from the Trust, which contained 3,826 loans. *See* Compl. ¶ 1. On June 13, 2013, the Trustee notified DBSP that 665 loans breached various representations and warranties. *See* Woll, Affirm. Ex. C at 84. The Trustee filed the Summons with Notice on September 27, 2012, one day before the statute of limitations deadline and more than ninety days after the June 13, 2013 notice. *See ACE Sec. Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522, 523 (1st Dep't 2013). Plaintiffs therefore complied with the condition precedent to suit and provided sufficient notice to DBSP before the statute of limitations deadline. *See ACE Sec. Corp.*, 112 A.D.3d at 523.

Beyond the Trustee's notice, the Complaint alleges that DBSP discovered the alleged breaches on its own when it performed due diligence prior to closing. *See* Compl. ¶ 12. Plaintiff argues that DBSP's repurchase obligations were triggered by DBSP's own discovery of various breaches, obviating the need for the Trustee to provide notice at all. This reasoning comports with prior holdings issued in New York. *See ACE Sec. Corp. v. DB Structured Products, Inc.*, 41 Misc. 3d 1229(A) at *2 (Sup. Ct. N.Y. County Nov. 21, 2013) (holding lack of loan-specific notice did not bar suit because plaintiff alleged that "DBSP . . . knew that the majority of the subject loans were nonconforming and failed to repurchase despite its 'discovery' of the nonconformance.").

DBSP argues that Plaintiff's allegation that it "discovered" the breaches at closing is conclusory and speculative, but this raises a factual contention not properly determined on a motion to dismiss. *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory.")

DBSP also argues that *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings*, No. 5140-CS, 2012 WL 3201139 (Del. Ch. June 22, 2012), shows that loan-specific averments should be required to defeat a motion to dismiss. As one court applying New York law already noted in distinguishing *Central Mortgage*, the Delaware court "made clear that it was applying a Delaware pleading standard that requires 'specific facts that make out a cause of action.'" *Ace Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.*, 13 CIV. 1869, 2014 WL 1116758 (S.D.N.Y. Mar. 20, 2014) (quoting *Central Mortgage Co.*, 2012 WL 3201139 at *13.

The CPLR requires only notice pleading, liberally construed, which puts an adversary on notice of the transactions and occurrences giving rise to a claim. *See* CPLR §§ 3013, 3026. The Complaint provided sufficient notice to DBSP by alleging that "at least 1,099" mortgage loans violated various representations and warranties. *See* Compl. ¶ 2.

For the reasons stated above, DBSP's motion to dismiss all loans beyond the 912 loans identified in the Trustee's Summons with Notice is denied.

B. *Liquidated Loans Are Not Dismissed*

As this Court has already held in *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 42 Misc.3d 1213(A) at *3 (Sup. Ct. N.Y. County Jan. 15, 2014), DBSP can be compelled to either specifically perform its obligation to repurchase loans or to pay damages equivalent to the cost of repurchase. Another court recently concurred, stating that "specific performance is an equitable remedy, and 'where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy.'" *Ace Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.*, 13 CIV. 1869, 2014 WL 1116758 (S.D.N.Y. Mar. 20, 2014) (quoting *Doyle v. Allstate Ins. Co.*, 1 N.Y.2d 439, 443 (1956)).

This holding is in accord with New York authority. See *Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Products, Inc.*, 958 F. Supp. 2d 488, 505 (S.D.N.Y. July 24, 2013) (refusing to dismiss claims related to liquidated loans because otherwise "DBSP [would have] the ability to frustrate the Trust's repurchase remedy by delaying or refusing to repurchase the breaching Mortgage Loans until the servicer had, in mitigation of the Trust's losses, foreclosed on them."); *Bank of New York*

Mellon v. WMC Mortgage, LLC, 41 Misc. 3d 1230(A) at *1 (Sup. Ct. N.Y. County Nov. 21, 2013) (“[N]o matter the basis for plaintiff’s put-back cause of action, it is a claim for an amount of money under the Repurchase Protocol for non-compliant loans Consequently, much of the parties’ dispute[,]. . . [such as] which loans qualify for repurchase (e.g. liquidated loans)—does not merit further discussion.”).

Accordingly, DBSP’s motion to dismiss causes of action arising out of any allegedly “liquidated loans” is denied.

C. *Repurchase, or Equivalent Damages, is Sole Remedy Available*

As the First Department held in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, neither rescission nor rescissory damages are available where the sole remedy clause is undoubtedly applicable to Plaintiff. 105 A.D.3d 412, 413 (1st Dep’t 2013) (“Here, rescission is not warranted. Plaintiff voluntarily gave up the right to seek rescission . . . [and] should not be permitted to utilize this very rarely used equitable tool to reclaim a right it voluntarily contracted away”).

Consequential damages are also barred by the sole remedy provision. Courts in New York have held that sole remedy clauses, like those at issue here, “preclude Plaintiff from recovering types of damages—such as consequential damages—beyond what would be commensurate with the sole remedy clause.” *Ace Sec. Corp. Home Equity Loan Trust*,

Series 2007-HE3 v. DB Structured Products, Inc., 13 CIV. 1869, 2014 WL 1116758, at *9 (S.D.N.Y. Mar. 20, 2014); *see also U.S. Bank Nat. Ass'n v. DLJ Mortg. Capital, Inc.*, 42 Misc.3d 1213(A) at *3 (Sup. Ct. N.Y. Cnty. Jan. 15, 2014) (“The language of the [sole remedy] provision is clear and bars the recovery of the [consequential] damages sought”).

DBSP’s motion to dismiss is granted to the extent that the Complaint seeks rescission, rescissory damages, compensatory damages, or consequential damages. Plaintiff’s mortgage loan-related recovery is limited to specific performance on loan repurchases or equivalent damages.

D. *Cause of Action Seeking Declaratory Judgment is Unnecessary*

Plaintiff’s fourth cause of action seeks a declaration that DBSP must reimburse the Trust for any reasonable expenses incurred in connection with enforcing DBSP’s obligations. Plaintiff argues that Section 4(d) of the MLPA requires DBSP to promptly reimburse the Trustee.

The Supreme Court “has a broad[] power to grant declaratory judgment It may decline to hear the matter if there are other adequate remedies available.”

Morgenthau v. Erlbaum, 59 N.Y.2d 143, 148 (1983). “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.*, 137 A.D.2d 50, 53 (1st Dep’t 1988).

Here, Plaintiff’s reimbursement claim arises from DBSP’s refusal to repay the Trust for its costs related to enforcing the repurchase obligations. This represents a standard breach of contract cause of action, and this Court declines to exercise its discretion to issue a declaratory judgment. *See Ace Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.*, 13 CIV. 1869, 2014 WL 1116758 (S.D.N.Y. Mar. 20, 2014) (“declaratory relief is unnecessary, and Plaintiff’s request for such relief is dismissed”); *Deutsche Alt-A Sec. Mortgage Loan Trust, Series 2006-OA1 v. DB Structured Products, Inc.*, 958 F. Supp. 2d 488, 507 (S.D.N.Y. July 24, 2013) (“Plaintiff’s request for declaratory judgment is duplicative of its other claims”).

Plaintiff’s fourth cause of action, seeking a declaratory judgment, is dismissed as unnecessary, given its breach of contract claim.

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

Conclusion

Accordingly, it is hereby

ORDERED that DBSP's motion to dismiss the complaint is GRANTED, in part, to the extent that the first and second and fourth causes of action are dismissed; and it is further

ORDERED that DBSP's motion to dismiss the Complaint is otherwise DENIED; and it is further

ORDERED that counsel for all parties are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on May 13, 2014, at 10:00 A.M.

This constitutes the decision and order of the court.

Dated: New York, New York

April 4, 2014

ENTER:


Hon. Eileen Bransten, J.S.C.