

**Deutsche Zentral-Genossenschaftsbank AG v UBS
AG**

2014 NY Slip Op 31019(U)

April 17, 2014

Supreme Court, New York County

Docket Number: 652575/2012

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

DEUTSCHE ZENTRAL-
GENOSSENSCHAFTSBANK AG, NEW YORK
BRANCH, d/b/a DZ BANK AG, NEW YORK
BRANCH,

Index No.: 652575/2012

Plaintiff(s),

DECISION/ORDER

- against -

UBS AG; UBS AMERICAS INC.; UBS REAL
ESTATE SECURITIES INC.; UBS SECURITIES
LLC; and MORTGAGE ASSET
SECURITIZATION TRANSACTIONS, INC.,
Defendant(s).

_____ x

This fraud action arises out of the purchase of residential mortgage backed securities (RMBS) by plaintiff Deutsche Zentral-Genossenschaftsbank AG (DZ Bank) from the UBS defendants. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), (7), and (8).

The issues in this action are largely the same as those recently decided by this court in RMBS cases brought by DZ Bank. As a threshold matter, defendants argue that the action is barred by the German statute of limitations. Plaintiff contends that the New York statute of limitations applies based on DZ Bank’s purchase of the certificates through a New York branch. For the reasons stated in Deutsche Zentral-Genossenschaftsbank AG v The Goldman Sachs Group, Inc., (Index No. 653134/2012, Mar. 11, 2014) and Deutsche Zentral-

Genossenschaftsbank AG v The Royal Bank of Scotland Group PLC, (Index No. 654569/2012, Mar. 25, 2014), the court holds that the New York branch, which is not separately incorporated, is not a “separate financial base” for purposes of establishing the place of injury. Rather, the place of injury is Germany, where DZ Bank is incorporated and the economic impact of the loss was sustained. The court further holds, also for the reasons stated in the above decisions and at greater length in HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289 (Mar. 3, 2014) (HSH Nordbank) and IKB Deutsche Industriebank AG v Credit Suisse Secs. (USA) LLC, 2014 WL 859355 (Mar. 3, 2014) (IKB), that defendants have not eliminated triable issues of fact as to whether the German statute of limitations is a bar to this action.

Defendants further move to dismiss the complaint for failure to state a cause of action. This court discussed the extensive legal authority on the sufficiency of substantially similar pleadings in Allstate Ins. Co. v Credit Suisse Secs. (USA) LLC, 2014 WL 432458 (Jan. 24, 2014), HSH Nordbank, and IKB. These cases considered fraud claims based, as here, on representations as to loan to value/combined loan to value, appraisals, owner occupancy, compliance with underwriting standards, credit ratings, and assignment of loans to the trusts. The allegations of the complaint in the instant action are substantially similar to the allegations considered in those cases, as are the arguments in support of and against dismissal of the pleaded causes of action. On the reasoning and authority cited there, the court holds that the allegations, other than those relating to the transfer of notes and mortgages to the trusts, adequately plead material misrepresentations that were made by defendants with knowledge of their falsity, and are therefore actionable. The court notes that the risk disclosures in the Offering Documents fall within the range of disclosures that have repeatedly been held ineffective to notify investors of

the systematic or wholesale abandonment of underwriting standards that plaintiff has alleged. As this court has also previously held, although an issue of fact exists as to the reasonableness of reliance by DZ Bank, a sophisticated investor, on defendants' representations, plaintiff's undisputed lack of access to the underlying loan files sufficiently supports the justifiable reliance element of the fraud claim at the pleading stage. (See HSH Nordbank, 2014 WL 841289 at *20-21.)

The court further holds, again for the reasons and on the authority cited in Allstate and HSH Nordbank, that the second cause of action for fraudulent concealment, the third cause of action for negligent misrepresentation, the fifth cause of action for rescission based on mutual mistake, and the claim for punitive damages should be dismissed.

This case also raises issues regarding the sufficiency of the pleadings against parent defendants, and personal jurisdiction over a parent defendant, which have not been previously addressed in this court's published decisions and will therefore be discussed at greater length here. First, defendants seek dismissal of the fraud and aiding and abetting causes of action against UBS AG and UBS Americas Inc., on the ground that they are parent entities and are not alleged to have had a specific role in the securitization process – whether as originator, sponsor, depositor, or underwriter. (See Ds.' Reply Memo. at 6.) Rather, the complaint alleges that these two entities dominated and controlled the other entities (see Complaint ¶¶ 43-48, 50, 54-55, 292-297), and that there was an overlap of high level employees, officers, or directors among UBS AG, UBS Americas, and the other entities. (Id., ¶ 44.) As to domination and control, the complaint contains the following more specific allegations: UBS AG established two of the entities, Mortgage Asset Securitization Transactions, Inc. and UBS Real Estate Securities Inc.,

for the sole purpose of facilitating its RMBS securitization business, and the entities have no significant assets of their own (id., ¶ 43); “[t]he perceived separateness of [the defendant UBS entities] was, at least in terms of management and operations, a complete fiction” (id., ¶ 44); and UBS AG used its domination and control “to perpetrate the fraud alleged here.” (Id., ¶ 45.)

The fraud claim against UBS AG and UBS Americas is based on the allegation that the issuer defendants “prepared the Offering Materials under the dominion and control of UBS AG and UBS Americas . . . , and the statements therein are therefore attributable to” the parent entities. (Id., ¶ 264.) As review of the other above-cited allegations as to domination and control shows, they purport to plead an alter ego theory of liability against UBS AG and UBS Americas, although they do not invoke the theory by name.

In order to establish an alter ego (or veil piercing) claim, a plaintiff must “establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene.” (ABN AMRO Bank, N.V. v MBIA Inc., 17 NY3d 208, 229 [2011] [quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 142 [1993].) Put another way, the plaintiff must show that “(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury.” (Id. at 141.) In order to plead an alter ego claim, however, it is insufficient for a plaintiff to allege merely that a corporate parent “directed and dominated” its subsidiary. As this Department has recently held, when the complaint fails to plead the additional elements of self-dealing, commingling of funds, lack of corporate formalities, or undercapitalization, it “should be dismissed for failing to state a

cause of action.” (Morpheus Cap. Advisors LLC v UBS AG, 105 AD3d 145, 153 [1st Dept 2013].) Here, as the complaint wholly fails to allege these additional elements, the fraud claim is not stated against UBS AG and UBS Americas. (See id.)

The court reaches a different result as to the aiding and abetting cause of action against these defendants. It is well settled that in order to plead a claim for aiding and abetting fraud “the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud.” (Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co., 64 AD3d 472, 476 [1st Dept 2009], lv denied 13 NY3d 709.) A claim of aiding and abetting fraud must be pleaded with particularity. (DDJ Mgt. LLC v Rhone Group LLC., 78 AD3d 442, 443 [1st Dept 2010].) Allegations in support of each of the elements of the claim, including actual knowledge, must be pleaded. (See Kaufman v Cohen, 307 AD2d 113, 125 [1st Dept 2003].) However, this requirement “should not be so strictly interpreted” at the pleading stage “as to prevent an otherwise valid” fraud claim from being maintained, where concrete facts are peculiarly within the knowledge of the opposing party and discovery may be necessary to support the claim. (Pludeman v Northern Leasing Sys., Inc., 10 NY3d 486, 491 [2008].) Actual knowledge may therefore be “inferred from the surrounding circumstances.” (DDJ Mgt., 78 AD3d at 443.)

As held in HSH Nordbank (2014 WL 841289 at *22), a complaint alleging aiding and abetting fraud may be sustained even where the case for the corporate defendants’ knowledge of and participation in the fraud is a purely circumstantial one drawn from the reasonable inferences arising from the various corporate defendants’ shared high level personnel and their

responsibilities, and from the interrelationship of the corporations. (See generally Pludeman, 10 NY3d at 493 [upholding fraud complaint against corporate officers where the scheme gave rise to a “reasonable inference . . . that the officers, as individuals and in the key positions they held, knew of and/or were involved in the fraud.”]; Polonetsky v Better Homes Depot, Inc., 97 NY2d 46 [2001]; DDJ Mgt., 78 AD3d at 444 [denying motion to dismiss fraud claim against various corporate defendants, including defendant that allegedly controlled other defendants, where complaint pleaded that defendants had common directors or agents, and controlling defendant did not produce documentation “which affirmatively dissociate[d] it” from other defendants].)

The complaint adequately pleads aiding and abetting with respect to UBS AG and UBS Americas, based on the allegations as to the substantial overlap in high-level personnel among these parent entities and the defendant corporations that had specific roles in the securitization process, and also based on the allegations regarding the parent defendants’ domination and control. Although the branch of the motion to dismiss the aiding and abetting claim against UBS AG and UBS Americas will be denied, limited discovery should be conducted at an early stage of the discovery process on these defendants’ actual knowledge and domination and control of the other defendant entities, and on the involvement in the securitizations of defendants’ shared high-level officers or employees. After such discovery is conducted, any request by UBS AG and UBS Americas for further relief may be addressed at a future conference.

Defendants’ motion also seeks dismissal of the fraud and aiding and abetting claims against UBS Securities LLC. The complaint pleads that this defendant, the lead or co-lead underwriter for the securitizations at issue, reviewed the statements in the offering materials, knew of their falsity, and “delivered them to Plaintiff.” (Complaint, ¶¶ 49, 265.) This allegation

is sufficient, for pleading purposes, to support the claims against UBS Securities LLC.

Finally, UBS AG contends that this court lacks personal jurisdiction over it. UBS AG is incorporated in and has its principal place of business in Switzerland. (Complaint, ¶ 25.) It argues that in order to establish personal jurisdiction over it, plaintiff must plead facts to demonstrate that UBS AG exerts such pervasive control over the subsidiary defendants doing business in New York that they are “mere departments” of UBS AG. (Ds.’ Memo. In Support at 31.) Plaintiff counters that the maintenance of a branch in New York satisfies the requirements for general jurisdiction and, in the alternative, that the court has specific jurisdiction over UBS AG based on its commission of tortious acts (aiding and abetting), pursuant to CPLR 302 (a) (2) and (3). (See Complaint, ¶ 30; Transcript of Oral Argument at 52-53.)

In claiming lack of personal jurisdiction, UBS AG in effect addresses only whether the court has general jurisdiction pursuant to CPLR 301, as opposed to specific jurisdiction pursuant to CPLR 302, and only whether general jurisdiction exists based on the “mere department” doctrine. While the mere department doctrine has provided a basis for general jurisdiction (see Delagi v Volkswagenwerk AG of Wolfsburg, Germany, 29 NY2d 426, 432 [1972]), courts have historically also found general jurisdiction under a “doing business” doctrine, which considers whether the defendant corporation’s activities in the state were sufficiently substantial as to render it subject to suit even on claims that did not arise from those activities. (See Daimler AG v Bauman, ___ US ___, 134 S Ct 746 [2014]; Arroyo v The Mountain School, 68 AD3d 603, 604 [1st Dept 2009].) Maintenance of a bank branch in New York has been held sufficient to confer general jurisdiction under the doing business doctrine. (Trabucco v Intesa Sanpaolo, S.P.A., 695 F Supp 2d 98, 105 [SD NY 2010] [holding that doing business jurisdiction existed

over parent corporation that maintained branch office in New York]; see also JW Oilfield Equip., LLC v Commerzbank AG, 764 F Supp 2d 587, 592 [SD NY 2011] [noting that jurisdiction was conceded based on maintenance of branch in New York]; Bryant v Finnish Natl. Airline, 15 NY2d 426 [1965].) Based on the authority in effect at the time UBS AG's motion to dismiss was briefed and argued, UBS AG's maintenance of a branch in New York would have been sufficient to support general jurisdiction over it.

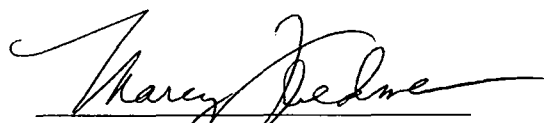
The court notes, however, that Daimler significantly narrows the parameters for the exercise of general personal jurisdiction, and calls into question the validity of the doing business doctrine (134 S Ct at 763) and, arguably also, the mere department doctrine. Daimler was decided after the motion was briefed and heard, and defendant has not brought the case to the court's attention or argued its effect. As noted above, moreover, in claiming lack of personal jurisdiction, UBS AG did not address plaintiffs' assertion that specific jurisdiction exists pursuant to CPLR 302, although such jurisdiction was expressly pleaded. On the record as briefed, the court accordingly holds that the motion to dismiss for lack of personal jurisdiction should be denied.

It is accordingly hereby ORDERED that the motion of defendants UBS AG, UBS Americas Inc., UBS Real Estate Securities Inc., UBS Securities LLC, and Mortgage Asset Securitization Transactions, Inc. to dismiss the complaint is granted to the extent that: The first cause of action for fraud is dismissed in its entirety only as to defendants UBS AG and UBS Americas Inc., and as to all other defendants only to the extent that it is based on alleged misrepresentations regarding transfer of notes and mortgages to the trusts. The second cause of

action for fraudulent concealment, the third cause of action for negligent misrepresentation, the fifth cause of action for rescission based on mutual mistake, and the claim for punitive damages are dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York
April 17, 2014



MARCY FRIEDMAN, J.S.C.