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

U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-3 (HEAT 2007-3),	
Plaintiff,	Index No. 651563/13
-against-	DECISION AND ORDER
DLJ MORTGAGE CAPITAL, INC.,	Motion Sequence No. 001
Defendant.	

MELVIN L. SCHWEITZER, J.:

This is defendant's motion to dismiss the complaint on grounds of Statute of Limitations, the sole-remedy provision of a Pooling and Servicing Agreement and the narrowly limited indemnification provisions of that Agreement.

Facts

The facts are as taken from the complaint.

DLJ Mortgage Capital, Inc. (DLJ) created a securitization trust (the Trust) that issued securities (Certificates) backed by mortgage loans that DLJ sold to the Trust (the Mortgage Loans or Loans). The trustee of the Trust (the Trustee) brings this action to enforce its contractual rights against DLJ on behalf of investors in the Trust.

In this securitization, DLJ aggregated an initial pool of 2,674 Mortgage Loans, and on May 1, 2007 (the Closing Date), transferred the bulk of those Loans to its affiliate, Credit Suisse First Boston Mortgage Securities Corp. (Credit Suisse), pursuant to an assignment and assumption agreement (AAA). Credit Suisse then deposited the Mortgage Loans into the Trust pursuant to the terms of a Pooling and Servicing Agreement (PSA), which was not fully executed

by all of the parties until the Closing Date. The Trust then issued the Certificates, which were sold to Certificateholders for nearly $500 million, the proceeds of which were conveyed to DLJ.

DLJ purchased the Loans pooled in the Trust from third-party originators, which underwrote and originated the Loans. DLJ represented in the PSA, among other things, that each "Mortgage Loan complies with all the terms, conditions and requirements of the originator's underwriting standards in effect at the time of origination of such Mortgage Loan." Because the Trustee and the Certificateholders lacked access to the underlying Loan files before the Closing and thus could not conduct due diligence on the Loans, in order to protect the Trustee and the investment of the Certificateholders, DLJ guaranteed the quality of the Loans by, among other things: (a) making specific Representations and Warranties (R&Ws) regarding the characteristics of each Loan; and (b) assuming the risk of breaching loans in the Trust, by agreeing to cure or repurchase any breaching loans.

The PSA expressly identifies remedies available to the Trustee, including the repurchase of breaching loans, if the R&Ws are breached with respect to any Loan. These remedies, set forth in Section 2.03 of the PSA, reflect DLJ's bargained-for assumption of the risk of breaching loans. DLJ assumed this risk because: (a) the Certificateholders did not have access to the underlying loan files when they made their investments, and (b) the quality of the Loans – the sole source of the Trust's income – was critical to the Certificateholders. Under the R&W provisions, DLJ contracted to repurchase breaching loans upon notice and failure to cure. Absent DLJ's R&Ws and its express and unequivocal undertaking to repurchase breaching loans, this securitization would have closed, if at all, on substantially different economic terms.

Plaintiff seeks to invoke all of its contractual and legal remedies for the pervasive and materially adverse breaches of the R&Ws that have been uncovered by a pre-suit forensic re-underwriting of certain Loans, as well as those additional breaches that inevitably will be revealed during discovery. This forensic analysis of approximately 1,102 Loans, undertaken at the initiative of a Certificateholder, reveals that DLJ violated its R&Ws with respect to approximately 99 percent of the Loans reviewed. These breaches were itemized in a letter that the Trustee sent to DLJ (the Repurchase Demand). Despite plaintiff's request that DLJ cure the itemized breaches or repurchase the identified breaching loans, DLJ has not repurchased a single breaching loan.

This action was commenced by the filing of the summons and complaint on April 30, 2013.

Procedural History

The Amended Complaint alleges that the Federal Housing Finance Agency (FHFA), the Conservator of Freddie Mac and Fannie Mae, is a Certificateholder in the HEAT 2007-3 Trust, among others. FHFA was created in July 2008 pursuant to the Housing and Economic Recovery Act of 2008 to oversee Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. Between September 2005 and November 2007, Fannie Mae and Freddie Mac purchased over $14.1 billion in residential mortgage-backed securities from 43 securitizations sponsored or underwritten by Credit Suisse.

In September 2011, FHFA filed suit in federal court against DLJ and Credit Suisse relating to this Transaction, among others. FHFA's federal suit claimed that the mortgage loans

had not complied with the applicable underwriting guidelines. The Trustee is not a party to that litigation.

On October 19, 2012, U.S. Bank sent DLJ a repurchase demand relating to 1,090 loans in HEAT 2007-3. On January 17, 2013, DLJ sent a response to U.S. Bank notifying U.S. Bank that DLJ was in the process of reviewing the October 19, 2012 demand relating to HEAT 2007-3 and three other securitizations. The letter also requested that U.S. Bank provide DLJ with loan files for the loans subject to the October 19 repurchase demands.

On April 30, 2013, the Trust filed a summons and complaint with this court. The Summons and Complaint identified the Trust as the Plaintiff: "Home Equity Asset Trust, Series 2007-3 (HEAT 2007-3)." On August 28, 2013, Plaintiff served the Amended Complaint on DLJ. The Amended Complaint reflects the Plaintiff is U.S. Bank National Association, as Trustee of the HEAT 2007-3 Trust. *Id.*

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).

Statute of Limitations

DLJ argues that the Trust's contract claims, filed on April 30, 2013, 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.

DLJ argues that the 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 – April 1, 2007; and (b) the sixth anniversary of April 1, 2007 lapsed before the summons and notice was filed on April 30, 2013. The Trust contends 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.

The Trust argues 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 Trust contends 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 2013 and thus the 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 Trust contends that even if the claims accrued on a PSA date it would be the date the contract was executed – the Closing Date, or May 1, 2007 – not the pre-execution "as of" date it was deemed executed and made effective (April 1, 2007) 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 Trust argues a contract did not exist in fact prior to May 1, 2007 and the Trust could not have sued on the R&Ws between April 1, 2007 and May 1, 2007. 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 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 May 1, 2007.

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.

Damages

The Trust alleges that DLJ is in breach of its R&Ws and its cure and repurchase obligations. The Trust specifically seeks compensatory, consequential, rescissory, and/or equitable damages in connection with its claims for breach of DLJ's R&Ws.

DLJ argues that under the sole-remedy provision in Section 2.03 of the PSA, the Trust is precluded from seeking any remedy other than the cure or repurchase of defective Loans. DLJ says that the Trust cannot avoid the contract by alleging breach of the PSA's cure or repurchase obligation by DLJ because this remedy was established to deal with the very type of Loan-level breaches the Trust now alleges.

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

Third, the Trust abandoned any claim to rescission or rescissory damages by suing to enforce the PSA. *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 PSA clearly provides that the sole remedy for breach of a R&W made pursuant to the PSA is the repurchase or cure of defective Loans, and that the Trust may not recover damages for such breach, this does not preclude the Trust from recovering damages for DLJ's breach of its cure or repurchase obligation. The parties underscored this in

Section 2.03 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 Trust 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. The court will not read into the contract a provision limiting the Trust relief to an order of specific performance. The PSA could easily have been drafted this way, but it was not. The court will not seek to divine an intent of the parties to read damages out of the contract in this respect.

To be clear, the court is holding that a remedy of damages is available with respect to breach of the cure and repurchase obligation relating to Loans for which notice has been given. The holding is not meant to be read to imply that a breach of the cure and repurchase obligation eliminates the sole remedy provision for breach of R&Ws in the future.

As to rescissory damages, the court 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 Trust's arguments supporting an award of rescissory damages are unavailing because they do not seek rescission and also because there is an available alternative remedy.

DLJ argues that because the Trust is seeking to enforce the PSA, it cannot simultaneously seek to rescind the same agreement. Despite the Trust's 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 Trust is 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).[1] Here, rescission was not sought and therefore rescissory damages are unavailable.

That the Trust has 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 Trust a viable remedy that it is seeking to enforce in this action. Further, the Trust may seek damages for breach of the cure or repurchase obligation.

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

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.

Finally, plaintiff's third cause of action should be dismissed to the extent that it seeks reimbursement of the Trustee and the Certificateholders for expenses incurred in bringing this suit, including attorneys' fees. Indemnification is warranted only where the plaintiff can show

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[1] 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").

that the defendant intended to indemnify the plaintiff and that intention "can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." *Margolin v N.Y. Life Ins. Co.*, 32 NY2d 149, 153 (1973) (citation omitted). New York courts do not award indemnification absent the "unmistakably clear" intention of the parties. *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989); *see also MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 39 Misc 3d 1220 (a), 2013 WL 1845588, at *14 (Sup Ct NY Cnty 2013) (dismissing claim for indemnification that did not meet *Hooper's* "strict standard"); *Morgan Stanley Mortg. Capital*, 2013 WL 4488367, at *9 (citing *Hooper* in dismissing indemnification claim).

There is no such "unmistakably clear" language here. On the contrary, the language of Section 2.03 expressly specifies that only the Trustee and the Servicer are entitled to indemnification – the Certificateholders are not. And while Section 2.03 allows for reimbursement of the Trustee, it is narrowly limited to out-of-pocket expenses incurred by the Trustee in connection with enforcement of the repurchase protocol. *Id.* Section 2.03 does not speak to reimbursement of the Trustee for attorneys' fees or expenses incurred in bringing a lawsuit against DLJ seeking monetary damages, including rescissory damages. *Id.* Because indemnification provisions are "'strictly construed' under New York law, 'so as not to read into them any obligations the parties never intended to assume.'" Section 2.03 is properly read to give the Trustee a right to "out-of-pocket expenses" only and nothing more. *Assured v Flagstar*, 2011 WL 5335566, at *5 (quoting *Hayes v Kleinewefers & Lembo Corp.*, 921 F.2d 453, 456 (2d Cir 1990)) (rejecting plaintiff's claim for indemnification) (other citation omitted). Section 2.03 and the sole remedy provision demonstrate that the parties never intended the PSA to provide

indemnification for the Certificateholders, or to reward the Trustee with attorneys' fees if it seeks to bypass the loan-by-loan repurchase protocol through litigation. Plaintiff's third cause of action must be dismissed to the extent it seeks reimbursement of the Certificateholders' expenses and attorneys' fees or expenses and attorneys' fees incurred by the Trustee, other than those out-of-pocket expenses incurred by the Trustee in connection with the repurchase protocol.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied as to the statute of limitations and granted as to damages other than compensatory damages for breach of the repurchase protocol and granted as to indemnity.

Dated: April 21, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER