Saco I Trust 2006-5 v EMC Mtge. LLC
2014 NY Slip Op 31432(U)
May 29, 2014
Sup Ct, New York County
Docket Number: 651820/2012
Judge: Eileen Bransten

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

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SACO I TRUST 2006-5, issuer of the SACO I TRUST 2006-5 MORTGAGE-BACKED CERTIFICATES, SERIES 2006-5, SACO I TRUST 2006-6, issuer of the SACO I TRUST 2006-6 MORTGAGE-BACKED CERTIFICATES, SERIES 2006-6, SACO I TRUST 2006-3, issuer of the SACO I TRUST 2006-3 MORTGAGE-BACKED CERTIFICATES, SERIES 2006-3, and SACO I TRUST 2007-2, issuer of the SACO I TRUST 2007-2 MORTGAGE-BACKED CERTIFICATES, SERIES 2007-2,

Plaintiffs,

-against-

EMC MORTGAGE LLC, JPMORGAN CHASE BANK, N.A., and JPMORGAN CHASE &CO.,

Defendants.

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Index No. 651820/2012
Motion Date: 4/7/2014
Motion Seq. No.: 002

BRANSTEN, J.

This action concerns certificates issued by four residential mortgage-backed securities ("RMBS") trusts created and sponsored by Defendant EMC Mortgage LLC ("EMC"). At the direction of certain certificateholders of these four trusts ("Trusts"), U.S. Bank National Association ("U.S. Bank" or "Plaintiff") asserts breach of contract, unjust enrichment, and declaratory judgment claims against Defendants EMC, JPMorgan Chase Bank, N.A. ("Chase"), and JPMorgan Chase & Co. ("JPMC").

This matter comes before the Court on Defendants' motion to dismiss the Second Amended Complaint ("Complaint") pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiff opposes the motion. For the reasons that follow, Defendants' motion is granted in part and denied in part.

I. Background

Plaintiff's claims stem from four securitizations sponsored by EMC – SACO I Trust 2006-3 ("2006-3 Trust"), SACO I Trust 2006-5, ("2006-5 Trust"), SACO I Trust 2006-6 ("2006-6 Trust"), and SACO I Trust 2007-2 ("2007-2 Trust"). To form these four securitizations, EMC bought more than 42,000 mortgage loans ("Mortgage Loans") from third party originators. (Compl. ¶ 22.) EMC then sold the Mortgage Loans to the Depositor, non-party Bear Stearns Asset Backed Securities I LLC, pursuant to Mortgage Loan Purchase Agreements ("MLPAs").[1] *Id.* The Depositor in turn conveyed the Mortgage Loans and assigned its rights under the MLPAs to the Trusts, pursuant to

[1] The MLPAs for the four securitizations were dated April 28, 2006 (the 2006-5 Trust), May 30, 2006 (the 2006-Trust), February 28, 2006 (the 2006-3 Trust), and February 28, 2007 (the 2007-2 Trust). Each of the MLPAs were attached to the Second Amended Complaint. *See* Compl. Exs. A, B, C & D.

Pooling and Service Agreements ("PSA").[2] *Id.* ¶ 23. The Trusts then issued Certificates backed by the Mortgage Loans to investors. *Id.* ¶ 24.

In addition to its role as sponsor of the securitizations, Defendant EMC acted as the Servicer/Master Servicer for the Trusts following the issuance of the Certificates. *Id.* ¶ 25. As of April 1, 2011, Defendant JP Morgan Chase Bank, N.A. ("Chase") took over the role and responsibilities of Servicer/Master Servicer from EMC. *Id.*

In the MLPAs, EMC made certain representations and warranties regarding the characteristics of the Mortgage Loans, including that the Mortgage Loans met certain quality standards and complied with underwriting practices and applicable legal requirements. *Id.* ¶¶ 29-30. EMC restated these representations in the PSAs, in addition to, among other things, offering specific data points about each of the Mortgage Loans. *Id.* ¶¶ 29, 32.

In the event that any of the Mortgage Loans breached these representations and warranties, and such breach "materially and adversely affect[ed] the interests of the Certificateholders in any Mortgage Loan," each Trusts' PSA required that EMC cure the breaching loan or repurchase it from the Trust within 90 days of discovery. *See* PSA § 2.03(d) (2006-5 Trust; 2006-6 Trust; 2007-2 Trust); PSA § 2.03(c) (2006-3 Trust).

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[2] The PSAs for the four securitizations were dated April 1, 2006 for the 2006-5 Trust, May 1, 2006 for the 2006-6 Trust, February 1, 2006 for the 2006-3 Trust, and February 1, 2007 for the 2007-2 Trust. *See* Compl. Exs. E, F, G & H.

Plaintiff alleges that it performed a review of the Mortgage Loans "in response to the dramatic losses suffered by the Trusts." (Compl. ¶ 41.) This "reunderwriting" review examined whether the Mortgage Loans complied with the representations and warranties made by EMC. *Id.* Plaintiff's initial review of 1,443 Mortgage Loans purportedly revealed a breach rate of over 90%. *Id.* ¶ 42. Plaintiff's subsequent review of additional batches of loans from the four Trusts allegedly revealed a similar breach rate. *Id.* ¶ 52. From October 12, 2011 to September 17, 2013, Plaintiff sent EMC 18 notices with respect to nearly 5,000 breaching loans across the Trusts. *Id.* ¶ 164. To date, Plaintiff maintains that EMC has repurchased 162 of these Mortgage Loans. *See* Pl.'s Opp. Br. at 7. On October 16, 2013, Defendants allegedly informed the Trusts that they would not respond to new repurchase requests. *Id.*

Plaintiff commenced the instant action on May 25, 2012 with the filing of a summons with notice. A complaint followed on October 15, 2012. Presently before the Court is Plaintiff's Second Amended Complaint (or "Complaint"), which was filed on September 18, 2013. This Complaint asserts six claims, labeled by Plaintiff as: (1) "breach of contract: repurchase obligation"; (2) "anticipatory breach of contract: repurchase obligation"; (3) "declaratory judgment: repurchase obligation"; (4) "breach of contract: reimbursement obligations to the Trustee and/or Master Servicer"; (5) "unjust

enrichment: undisclosed settlements with originators"; and, (6) "breach of contract: failure to notify." Each claim is alleged against all three Defendants.

II. Discussion

Defendants now bring the instant motion, seeking dismissal of the following portions of the Complaint: (1) all claims brought against JPMC and Chase; (2) Plaintiff's breach of contract claims, to the extent they seek damages beyond the "sole remedy" or purport to sue on loans for which Defendants believe that improper notice has been given; and, (3) Plaintiff's unjust enrichment, declaratory judgment, reimbursement, and "breach of contract: failure to notify" claims in their entirety. In addition, following the submission of briefing on this motion, Defendants requested the opportunity to provide supplemental briefing in light of the First Department's recent decision in *ACE Securities Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522 (1st Dep't 2013). In this supplemental briefing, Defendants additionally contend that *ACE* bars claims concerning Mortgage Loans submitted for repurchase after the statute of limitations period expired.[3] Each of these arguments will be examined below.

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[3] Plaintiff submitted opposition to Defendants' supplemental briefing on March 12, 2014.

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. *Claims Asserted Against JPMC and Chase*

Defendants JPMC and Chase first seek dismissal of all counts asserted against them on the grounds that the Complaint alleges no breaching conduct by either party. Plaintiff opposes, arguing that it states alter ego and successor liability claims as to both.

Defendants are correct that the Complaint offers only sparse allegations as to either entity. With regard to JPMC, the Complaint simply alleges that JPMC is "a Delaware financial holding company with a principal place of business in New York, New York" and that Defendants EMC and Chase are "wholly-owned subsidiar[ies] of JPMC." (Compl. ¶¶ 16, 18.) As for Chase, the Complaint asserts that it is "EMC's affiliate" and is "solely owned by JPMC." *Id.* ¶¶ 12, 16. In addition, the Complaint states that Chase "succeeded EMC as Servicer/Master Servicer" and "acquired all or substantially all of EMC's assets and succeeded to EMC's business on April 1, 2011." *Id.* ¶¶ 12, 16; *see also id.* ¶ 25. This is the sum total of Plaintiff's allegations as to either Chase or JPMC.

Neither set of allegations is sufficient, in and of itself, to sustain Plaintiff's alter ego claims against JPMC and Chase. The corporate relationship between EMC, Chase,

and JPMC is not enough to set forth liability. *See Hartej Corp. v. Pepsico World Trading Co.*, 255 A.D.2d 233, 233 (1st Dep't 1998) ("The complaint is totally devoid of factual, or even conclusory, allegations tending to show defendant parent's liability for the subject transactions.") Instead, to pierce the corporate veil "it must be established that (1) the owners [of a corporation] 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." *Morris v. N.Y. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

As the First Department has held, "when a complaint fails to plead that the parent company engaged in self-dealing, commingled funds, or lacked corporate formalities, a complaint seeking to pierce the corporate veil should be dismissed for failing to state a cause of action." *Morpheus Capital Advisors LLC v. UBS AG*, 105 A.D.3d 145, 153 (1st Dep't 2013) (affirming dismissal of alter ego claim). The Complaint's limited allegations as to Chase and JPMC fail to make such a pleading. While Plaintiff attempts to bolster its claim with new factual allegations in its briefing regarding EMC's capitalization and reserves, Plaintiff cannot amend the Complaint through an opposition brief. *See MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc.*, 29 Misc.3d 1215(A), at *5 (Sup. Ct. N.Y. Cnty. 2010) (Fried, J.). Thus, based on the Complaint, and giving Plaintiff

all favorable inferences, Plaintiff's alter ego claims against JPMC and Chase are insufficiently stated.

Moreover, Plaintiff's bare allegations fail to state a successor liability claim against either JPMC or Chase. Again, neither the corporate relationship between EMC, Chase, and JPMC nor the statement that Chase acquired "all or substantially all of EMC's assets and succeeded to EMC's business" suffice in and of themselves to state a successor liability claim. "As a general rule, a corporation that purchases the assets of another corporation is not responsible for the breaches of the seller corporation." *Kretzmer v. Firesafe Prod. Corp.*, 24 A.D.3d 158, 158 (1st Dep't 2005). There are four exceptions to this general rule: (1) the successor "expressly or impliedly assumed the predecessor's ... liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." *Id.* However, there are no facts alleged in the Complaint to support any of these exceptions. Accordingly, Plaintiff's successor liability claims against JPMC and Chase are dismissed. *See Worldcom Network Serv., Inc. v. Polar Commc'n Corp.*, 278 A.D.2d 182, 182 (1st Dep't 2000) ("Although plaintiff seeks to impose liability upon ETS, Inc. by reason of ETS's purported status as successor to the liabilities of defendant Polar Communications

Corporation, plaintiff has failed to allege facts that would support its successor liability claim.").

Finally, the Complaint fails to seek damages or any relief from Defendant Chase. While Plaintiff contends that Chase may be held directly liable "for its own servicing breaches" and its failure to notify Plaintiff of breaches of representations and warranties, Plaintiff only seeks damages from EMC for this claim. *See* Compl. ¶¶ 218-19 ("The Trusts have been damaged by EMC's breaches. EMC must specifically perform its obligations under the PSA ... EMC must also pay the Trusts damages caused by EMC's failure to notify the Master Servicer, Trustee and other PSA parties of breaches of EMC's representations and warranties in the Mortgage Loans."). Accordingly, in the absence of allegations regarding damages from Chase, Plaintiff's mere allegations of breach cannot sustain its breach of contract claim. *See Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988) ("In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint ...").

Plaintiff's claims against JPMC and Chase therefore are dismissed without prejudice.

C. *Remedies Available to Plaintiff*

Defendants next seek dismissal of Plaintiff's requests for consequential and rescissory damages for EMC's alleged contractual breaches, contending that Plaintiff's damages are limited to the "sole remedy" provided in the PSAs.

The "sole remedy" provision, found at Section 2.03 of each securitization's PSA, provides in relevant part:

> It is understood and agreed that the obligation under this Agreement of EMC to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedies against EMC (in its capacity as Sponsor) respecting such breach available to the Certificateholders, the Depositor or the Trustee.

See PSA § 2.03(d) (2006-5 Trust; 2006-6 Trust; 207-2 Trust); PSA § 2.03(c) (2006-3 Trust).[4]

The language of this provision is clear and bars recovery by Plaintiff for remedies beyond EMC's contractual obligation to "cure, repurchase, or replace any Mortgage Loan." However, as the parties both agree, this limitation does not leave without any remedy for breaching Mortgage Loans. To the extent that Plaintiff can demonstrate breaches, the parties state that PSA provides that Plaintiff is entitled to "repurchase of the

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[4] While worded slightly differently in each agreement, the "sole remedy" provision in the 2006-5 Trust PSA is representative of the provision as it applies to each securitization.

Defective Loans or damages in the amount of the repurchase price – no more, no less." *See* Pl.'s Opp. Br. at 12; Defs.' Reply Br. at 7-8 (same). The Court concurs.

This reading of the "sole remedy" provision is consistent with the approach taken by this Court and others when presented with similar "sole remedy" language. *See, e.g., U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 42 Misc.3d 1213(A), at *3 (Sup. Ct. N.Y. Cnty. 2013) ("However, the sole remedy contractual language agreed upon by the parties is not vitiated because DLJ allegedly breached its obligation to perform the remedy therein. Instead, the remedy in that instance is to direct DLJ's performance of its repurchase obligation. Where a loan cannot be repurchased because, for example, it is no longer in the Trust, the remedy is an award of damages equal to the repurchase amount, consistent with the sole remedy provision."); *ACE Securities Corp. Home Equity Loan Trust, Series 2007-HE v. DB Structured Prods., Inc.*, – F.Supp.2d –, 2014 WL 1116758, at *8 (S.D.N.Y. March 20, 2014) (concluding that sole remedy provisions "limit Plaintiff to seeking an order of specific performance compelling DBSP to repurchase loans" but "permitting money damages where repurchase is or may be impossible"); *see also Resolution Trust Corp. v. Key Fin. Servs., Inc.*, 280 F.3d 12, 18 (1st Cir. 2002) (affirming enforcement of a sole remedy provision and ruling that defendant pay "damages equal to the repurchase amount" for loans no longer in the Trust as that amount "represents what

[defendant] would have paid Home Owners had it repurchased the loans when it was supposed to have done so ...").

Further, even if not barred under the "sole remedy" provision, Plaintiff's claims for consequential and rescissory damages nonetheless fail. Consequential damages are "rarely awarded" and are permitted only where the contract conveys that the parties intended consequential damages to be recoverable in the event of breach. *See Home Equity Mortg. Trust Series 2006-5 v. DLJ Mortg. Capital, Inc.*, No. 653787/2012, 2013 WL 5314331, at *6 (Sup. Ct. N.Y. Cnty. Sept. 18, 2013). Here, Plaintiff points to no language and makes no argument that such damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Brody Truck Rental v. Country Wide Ins. Co.*, 277 A.D.2d 125 (1st Dep't 2000). The Court likewise finds no such language. Thus, Plaintiff's claim for consequential damages merits dismissal.

Plaintiff's claim for rescissory damages also fails. As the First Department noted in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 413 (1st Dep't 2013), rescission is a "very rarely used equitable tool." Indeed, the First Department explained that rescissory damages are only applicable where rescission is impracticable and no alternative legal remedies are availing. *Id.*; *see also Alper v. Seavey*, 9 A.D.3d 263, 264 (1st Dep't 2004) ("Generally, rescission is available where a party

lacks a "complete and adequate remedy at law and where the status quo may be substantially restored."). While Plaintiff maintains that rescission would be impracticable, Plaintiff's claim for rescissory damages lacks merit, since Plaintiff has an alternative remedy – repurchase. Notwithstanding Plaintiff's "pervasive breach" arguments, the sole remedy provision agreed to by the parties limits the Trust's remedies to repurchase.

D. *Contractually Required Notice*

EMC next contends that Plaintiff cannot bring suit on Mortgage Loans for which it failed to give notice as required by the PSA. EMC contends that the repurchase remedy cannot be triggered by Plaintiff's breach notices, which referenced statistical sampling of the pools and requested repurchase of all breaching loans.

Section 2.03 of the relevant PSAs provides that "[u]pon discovery by any of the parties hereto of a breach of a representation or warranty set forth in the Mortgage Loan Purchase Agreement with respect to the Mortgage Loans ... the party discovering such breach shall give prompt written notice thereof to the other parties." Plaintiff submitted breach notices to EMC on October 12, 2011 and November 22, 2011 for loans in each of the Trusts at issue in this case. *See* Affirmation of Erica P. Taggert in Support of Plaintiffs' Opp. to Defs.' Supp. Mem. of Law Ex. B & C. These notices requested

repurchase of "the breaching loans from the Trust pursuant to Section 2.03 of the PSA, including through litigation, if necessary, starting with the loans" itemized later in the letter. *Id.* Ex. C at 2. These requests provided prompt written notice to EMC. While EMC seeks to impose a more stringent notice requirement upon Plaintiff, this is beyond what the contract language requires.

EMC nonetheless relies upon *U.S. Bank, Nat'l Ass'n. v. Countrywide Home Loans, Inc.*, 2013 WL 2356295, at *4 (Sup. Ct. N.Y. Cnty. May 29, 2013) for the proposition that Plaintiff's allegations of "pervasive breaches" in its breach notices failed to provide adequate notice. The *U.S. Bank v. Countrywide* decision, however, is inapplicable to the facts of this case. In that case, plaintiff-trustee sought repurchase of all loans in a trust – not simply loans in breach – based on an alleged violation of a single representation and warranty in the parties' Purchase and Servicing Agreement. *Id.* at *4. That representation and warranty, found at Section 7.01(ix) of the contract, provided that no written statements issued in connection with the Purchase and Servicing Agreement "or in connection with the transaction contemplated" contained any untrue statements of material fact. *Id.* The plaintiff-trustee argued that this representation and warranty was breached simply by defendant's "pervasive breach" of the other representations and warranties in the contract. The Court rejected this claim, stating that there was no language in the contract from which to conclude that plaintiff's invocation of "pervasive

breach" alleged breach of Section 7.01(ix). Further, the representations that the plaintiff-trustee claimed were "pervasively breached" contained a "sole remedy" provision, limiting the trust's recovery to repurchase or damages in the amount of repurchase. Thus, the Court held that the plaintiff-trustee could not circumvent this "sole remedy" provision by alleging that the breaches in the aggregate amounted to a breach of Section 7.01(ix), which required pool-wide repurchase. The Court's ruling in that instance turned on the language of the contract at issue and the specific representation allegedly breached.[5]

Here, Plaintiff does not allege breach of a provision like Section 7.01(ix), nor does it seek repurchase of all loans in the Trusts. Thus, since the provisions purportedly breached and the relief sought are different, EMC's *U.S. Bank v. Countrywide* analogy falls flat.

Finally, it bears noting that the PSAs for each of the Trusts provide that the repurchase requirement is triggered "[u]pon discovery *by any of the parties hereto* of a breach of representation or warranty." *See* PSA § 2.03(d) (2006-5 Trust; 2006-6 Trust; 2007-2 Trust); PSA § 2.03(c) (2006-3 Trust) (emphasis added). Within "90 days of the

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[5] The plaintiff-trustee in *U.S. Bank v. Countrywide* offered a similar theory in its second amended complaint, which was similarly rejected by the Court. *See U.S. Bank Nat'l Ass'n v. Countrywide Home Loans, Inc.*, 2014 WL 617548, at *5 (Sup. Ct. N.Y. Cnty. Feb. 13, 2014) ("Plaintiff's repleaded claim therefore simply parrots its dismissed "pervasive breach" theory. Accordingly, regardless of the number of documents repeating the alleged misrepresentations, the breach asserted in Count One is simply a "pervasive breach" of the Mortgage Representations. Count One is once again dismissed."). EMC likewise cites to this decision in support of its argument.

discovery" of such a breach, EMC was required to cure, substitute, or repurchase the breaching loan. *Id.* Under the language of this provision, the onus was not simply on Plaintiff to provide notice of breaches to EMC in order to begin the repurchase process. Instead, EMC's discovery of breaching loans likewise could trigger repurchase. Plaintiff alleges in the Complaint that EMC discovered breaching Mortgage Loans when conducting post-closing audit and quality control reviews but failed to notify the Trusts. *See* Compl. ¶¶ 12, 166. In addition, the Complaint states that EMC discovered breaches of its representations and warranties when performing loan modifications for the Mortgage Loans. *Id.* ¶ 168. Taking Plaintiff's allegations as true on this motion to dismiss, these events provided the contractual notice necessary to trigger EMC's obligation to repurchase breaching loans.

E. *Statute of Limitations*

EMC next presents a statute of limitations argument, contending that breach notices sent after the limitations period expired are time-barred. EMC cites to the First Department's decision in *ACE Securities Corp. v. DB Structured Prods., Inc.*, 112 A.D.3d 522 (1st Dep't 2013), in which the court deemed an action time-barred where the plaintiff-certificateholders first filed breach notices shortly before the statute of limitations expired on their breach of contract claim. In *ACE*, the First Department held that the contractual

"60- and 90-day periods for cure and repurchase had not yet elapsed" by the last day of the limitations period and therefore plaintiff's "failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity." *Id.* at 522.

Here, there is an important distinction that renders EMC's analogy to *ACE* inapt. Plaintiff filed submitted breach notices to EMC on October 12, 2011 and November 22, 2011 for loans in each of the Trusts at issue in this case. *See* Affirmation of Erica P. Taggert in Support of Plaintiffs' Opp. to Defs.' Supp. Mem. of Law Ex. B & C. These notices, submitted over a year before the expiration of the limitations period for each of the Trusts, requested repurchase of "the breaching loans from the Trust pursuant to Section 2.03 of the PSA, including through litigation, if necessary, starting with the loans" itemized later in the letter. *Id.* Ex. C at 2. Therefore, in this case, Plaintiff submitted a request for repurchase of all breaching Mortgage Loans well before the statute of limitations period expired, and certainly more than the 90 days required by the PSAs.

Moreover, when Plaintiff commenced the instant action, it requested repurchase of all defective loans in the Trusts.[6] Such notice and pleading was timely as to all breaching

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[6] The action filed on November 8, 2012 under Index No. 653871/2012 sought repurchase of all defective Mortgage Loans in the 2006-3 Trust. This 2006-3 Trust action was consolidated under the instant index number with the action requesting breach of all defective loans in the 2006-5 Trust, which was timely commenced on May 25, 2012. The allegations regarding the 2007-2 and 2006-6 Trusts were added in Plaintiff's First Amended Complaint, filed on January 9, 2013, within the limitations period for both Trusts.

Mortgage Loans in the Trusts, and, as discussed, *supra*, sufficient under CPLR § 3013. Accordingly, Plaintiff's argument that *ACE* bars claims about loans identified in breach notices sent after the limitations period expired is unavailing, since Plaintiff sufficiently alleged breach as to each defective Mortgage Loan in the Trusts within the limitations period.

F. *Unjust Enrichment Claim*

Plaintiff's unjust enrichment claim alleges that EMC entered into settlements with the loan originators from whom breaching Mortgage Loans were purchased for the securitization. (Compl. ¶¶ 209-211.) Since these settlement funds allegedly were not passed on to the Trusts, Plaintiffs contends that EMC must disgorge all such recoveries and turn them over to the Trusts. *Id.* ¶ 212.

EMC contends that this claim should be dismissed, since the PSAs govern the subject matter of Plaintiff's claim. In support, EMC cites to this Court's decision in *Metropolitan Suburban Bus Authority v. County of Nassau*, 40 Misc.3d 1233(A), at *4 (Sup. Ct. N.Y. Cnty. 2013), which dismissed an unjust enrichment claim as precluded by the parties' contract. However, in contrast to *Metropolitan Suburban Bus Authority*, Defendants here point to no provision of the PSA concerning the conduct alleged by Plaintiff. The PSAs address EMC's repurchase obligations for breaching Mortgage

Loans. Nothing in the PSAs speaks to EMC's retention of separate settlements with third-party originators for the same loans.

As pleaded, Plaintiff's unjust enrichment claim alleges that EMC took for itself monies that were owed to the Trust for Mortgage Loans found by EMC to be in breach of representations and warranties. Such allegations are not governed by the PSAs and are thus not precluded.

G. *Declaratory Judgment Claim*

In Count Three of the Complaint, Plaintiff seeks a declaration that EMC is required to repurchase any Mortgage Loans that breach representations and warranties, as well as return to the Trusts any recovery received from originators on breaching loans. There is no basis for such a declaratory judgment against EMC, since Plaintiff's first claim for breach of contract and fifth claim for unjust enrichment afford Plaintiff an adequate remedy for this claim. *See Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 358 (1st Dep't 2006) ("[P]laintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action."); *Artech Info. Sys., L.L.C. v. Tee*, 280 A.D.2d 117, 125 (1st Dep't 2001) ("There is no basis for a declaratory judgment against [defendant] since the first cause of action for breach of contract affords [plaintiff] an adequate remedy."). Accordingly, Plaintiff's declaratory judgment claim is dismissed.

H. *Reimbursement Claim*

Defendants next seek dismissal of Plaintiff's claims for reimbursement of expenses incurred in enforcing the Trusts' remedies for EMC's representation and warranty breaches.

Plaintiff grounds its reimbursement claim in Section 2.03(d) of the PSA, which provides that EMC "shall promptly reimburse the Master Servicer and the Trustee for any expenses reasonably incurred by the Master Servicer or the Trustee in respect of enforcing the remedies for such breach." *See* Compl. Ex. E, F, & H.[7] While Plaintiff contends that the plain language of this provision encompasses attorney's fees, such an intent is not "unmistakably clear from the language of the promise." *Mount Vernon City School Dist. v. Nova Casualty Co.*, 19 N.Y.3d 28, 39 (2012) (citing *Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 492 (1989)).

"Under the general rule, attorney's fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule." *Hooper*, 74 N.Y.2d at 491. Where there is no such duty to pay attorney's fees, "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." *Id.* For a reimbursement clause, such as the one at issue

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[7] For the 2006-3 Trust PSA, this provision is found at Section 2.03(c). *See* Compl. Ex. G.

here, to cover claims between the contracting parties rather than third party actions, the language of the provision must be "unmistakably clear" and "exclusively or unequivocally" reflect that the parties intended for payment of costs arising out of litigation between the parties. *Id.* 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.").

The provision at issue here "falls short of satisfying [*Hooper*'s] exacting standard." *Gotham Partners, L.P.*, 76 A.D.3d at 206. Section 2.03(d) does not contain language clearly permitting Plaintiff to recover costs incurred in a suit against EMC 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. While Plaintiff contends that *Hooper* is inapplicable since it considered an indemnification clause instead of a reimbursement clause, this semantic difference is of no material import. Instead, the issue is whether the parties' contract may be read to have assumed an obligation contrary to the general rule regarding non-payment of attorneys' fees. Here,

the Court concludes that the instant language does not unequivocally reflect such an intent. Accordingly, EMC's motion to dismiss Plaintiff's reimbursement claim is granted.[8]

I. *Failure to Notify Claim*

Plaintiff's "breach of contract: failure to notify" claim alleges that EMC breached Section 2.03(d) of the PSAs in its capacity as Servicer to the Trusts by failing to give prompt written notice to the other PSA parties of its discovery of breaches and warranties.

While EMC contends that this claim is redundant of Plaintiff's failure to repurchase cause of action, the instant claim asserts wrongdoing by EMC in a different role – as Servicer rather than as Sponsor to the securitizations. Section 2.03 of the PSAs require that the Servicer, as a party to the PSAs, give prompt written notice to the other PSA parties upon discovery of a breaching Mortgage Loan. The Complaint alleges that EMC failed to do so, in breach of its obligations. *See* Compl. ¶¶ 217-218 ("EMC knew that Mortgage Loans breached its representations and warranties, but failed to notify the PSA parties. EMC's failure to notify breached its obligations under §2.03 of the PSAs. EMC's breaches are material and adverse to the value of the Mortgage Loans and to the interests of the Certificateholders. The Trusts have been damaged by EMC's breaches.

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[8] EMC also sought dismissal of Plaintiff's indemnification claim, but Plaintiff's opposition briefing made no arguments in response. Accordingly, EMC's motion is granted.

EMC must specifically perform its obligations under the PSAs and give prompt written notice to the PSA parties of breaches EMC is aware of in EMC's representations and warranties.") This is sufficient to state a breach of contract claim against EMC as servicer.

Moreover, Plaintiff's claim is not barred by the "sole remedy" provision of the PSAs. As discussed above, this provision limits EMC's obligations with respect to breaching loans to an obligation to cure, repurchase, or replace. This limitation, however, applies only to EMC in its capacity as Sponsor (under the 2006-3 PSA) or as Seller (under the 2006-5, 2006-6, and 2007-2 PSAs). *See* Compl. Exs. E, F, G & H. Here, Plaintiff asserts its claim against EMC in its separate Servicer role.

Although the "sole remedy" provision may not be applicable to the instant claim, EMC is correct that Plaintiff's damages for this claim are limited to repurchase or damages in the amount of the repurchase price. The thrust of Plaintiff's claim is that EMC as Servicer became aware of breaches of representations and warranties, which upon prompt notice to EMC, in its capacity as Seller, should have triggered EMC the Seller's obligation to repurchase. Thus, EMC the Servicer's failure to notify damaged the Trusts by not effectuating this repurchase trigger. The remedy for such a breach would be repurchase, or damages in the amount of repurchase.

III. Conclusion

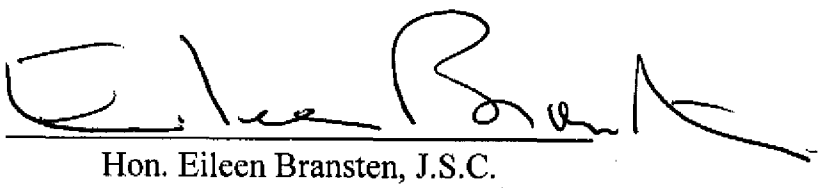
Accordingly, it is

ORDERED that Defendants EMC Mortgage LLC ("EMC"), JPMorgan Chase Bank, N.A. ("Chase"), and JPMorgan Chase & Co. ("JPMC")'s motion to dismiss is granted in part and denied in part; and it is further

ORDERED that Defendants EMC Mortgage LLC is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: New York, New York
May 29, 2014

ENTER



Hon. Eileen Bransten, J.S.C.