

<b>Bayerische Landesbank v Barclays Bank PLC</b>
2014 NY Slip Op 32001(U)
July 28, 2014
Sup Ct, NY County
Docket Number: 652697/2012
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

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BAYERISCHE LANDESBANK;  
BAYERISCHE LANDESBANK, NEW  
YORK BRANCH,  
  
*Plaintiffs,*

Index No.: 652697/2012

- against -

DECISION/ORDER

BARCLAYS BANK PLC; BARCLAYS  
CAPITAL INC.; SUTTON FUNDING LLC;  
BCAP LLC; SECURITIZED ASSET BACKED  
RECEIVABLES LLC; CARRINGTON  
HOLDING COMPANY, LLC; CARRINGTON  
CAPITAL MANAGEMENT LLC;  
CARRINGTON SECURITIES, LP; STANWICH  
ASSET ACCEPTANCE COMPANY, LLC,  
  
*Defendants.*

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This fraud action arises out of the purchase of residential mortgage backed securities (RMBS) by Bayerische Landesbank (Bayerische) from the Barclays and Carrington defendants. Defendants move to dismiss the complaint pursuant to CPLR 3211 (a), on the grounds that it is barred by the German statute of limitations and fails to state a cause of action.

The complaint alleges a first cause of action against all defendants for fraud, a second against all defendants for fraudulent concealment, a third against Barclays Capital Inc. (the underwriter defendant) for aiding and abetting fraud, a fourth against all defendants for negligent misrepresentation, and a fifth for rescission against the underwriter defendant. The complaint also seeks punitive damages.

Plaintiffs purchased seven certificates between August 2006 and February 2007. This action was commenced on August 3, 2012.

As a threshold matter, defendants argue that the action is barred by the German statute of limitations. Plaintiffs contend that the New York statute of limitations applies based on Bayerische'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]) (Deutsche Zentral [Goldman]) and Deutsche Zentral-Genossenschaftsbank AG v UBS AG (2014 WL 1495632 [Apr. 17, 2014]) (Deutsche Zentral [UBS]), 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 Bayerische is incorporated and the economic impact of the loss was sustained.<sup>1</sup> The German statute of limitations would be a bar to the action if plaintiffs had, or should in the absence of gross negligence have had, knowledge of their claims by December 31, 2008. The court has previously held on a substantially similar record that triable issues of fact exist as to whether the action is barred by the German statute of limitations. The affidavits of the parties' experts – here, Professor Mansel for plaintiffs and Professor Schneider for defendants – do not sufficiently address the issues regarding application of the German gross negligence standard that this court noted in its prior decisions, including HSH Nordbank AG v Barclays Bank PLC, (2014 WL 841289 [Mar. 3, 2014]) (HSH Nordbank) and Deutsche Zentral [Goldman].

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<sup>1</sup>The court concurs with defendants' assertion that Bayerische Landesbank, New York Branch lacks standing as a separate plaintiff (Defendants' Memorandum of Law at 7), as it is merely a branch which "is not separately incorporated, has no legal identity separate from Bayerische Landesbank, and therefore has no standing to assert a claim . . . independent of Bayerische's claim." (Bayerische Landesbank, New York Branch v Aladdin Capital Mgt. LLC, 692 F3d 42, 51 [2d Cir 2012].) Defendant's motion to dismiss the claims of the New York branch should be granted. However, this holding has little practical effect on the case, as the claims of the branch are identical to those of Bayerische Landesbank. The German bank is a proper plaintiff. Thus, the claims of Bayerische Landesbank and Bayerische Landesbank, New York Branch will be treated as one and the same.

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]) (Allstate), HSH Nordbank, and IKB Deutsche Industriebank AG v Credit Suisse Secs. (USA) LLC (2014 WL 859355 [Mar. 3, 2014]) (IKB). These cases considered fraud claims based, as here, on representations as to loan to value ratios and appraised values for the underlying loans, owner occupancy of the mortgaged properties, loan originators' compliance with underwriting standards, credit ratings, and assignment of the loans to the trusts. The allegations of the complaint in the instant action and the arguments in support of and against dismissal of the pleaded causes of action do not differ in any material respect from those considered in the prior decisions.

On the above authority and reasoning, the court holds that the allegations of the complaint adequately plead actionable material misrepresentations that support the fraud cause of action. The fraud cause of action will, however, be dismissed to the extent based on allegations regarding the transfer of notes and mortgages to the trusts. (See HSH Nordbank, 2014 WL 841289 at \* 12-14.) In addition, for the reasons set forth by this court in Deutsche Zentral [UBS] the fraud claim will be dismissed as against parent defendants, Carrington Holding Company, LLC and Carrington Capital Management LLC, as they had no specific role in the securitization process – whether as originator, sponsor, depositor, or underwriter. The fraud claim is in effect based on an alter ego theory which is not adequately pleaded. (See Deutsche Zentral [UBS], 2014 WL 1495632 at \* 2.) The motion to dismiss the aiding and abetting fraud claim against the underwriter defendant will be denied for the reasons stated in Deutsche Zentral [UBS]. (2014 WL 1495632 at \* 4.)

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 fourth cause of action for negligent misrepresentation, and the fifth cause of action for rescission should be dismissed; and the request for dismissal of the punitive damages should be denied.

It is accordingly hereby ORDERED that the motion of defendants Barclays Bank PLC, Barclays Capital Inc., Sutton Funding LLC, BCAP LLC, Securitized Asset Backed Receivables LLC, Carrington Holding Company, LLC, Carrington Capital Management LLC, Carrington Securities, LP, and Stanwich Asset Acceptance Company, LLC 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 Carrington Holding Company, LLC and Carrington Capital Management LLC, 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 fourth cause of action for negligent misrepresentation, and the fifth cause of action for rescission based on mutual mistake are dismissed. Each cause of action asserted by plaintiff Bayerische Landesbank, New York Branch is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 28, 2014

  
MARCY FRIEDMAN, J.S.C.