

**Home Equity Asset Trust 2007-2 (HEAT 2007-2) v  
DLJ Mtge. Capital, Inc.**

2014 NY Slip Op 32568(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 651174/2013

Judge: Marcy S. Friedman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Marcy Friedman, J.S.C.

\_\_\_\_\_  
HOME EQUITY ASSET TRUST 2007-2 (HEAT  
2007-2), by U.S. BANK NATIONAL  
ASSOCIATION, solely in its capacity as Trustee,

Index No.: 651174/2013

*Plaintiff,*

DECISION/ORDER

– against –

DLJ MORTGAGE CAPITAL, INC.,

*Defendant.*

\_\_\_\_\_  
x

This residential mortgage backed securities (RMBS) action for breach of contract, known as a put-back action, arises out of the failure of sponsor DLJ Mortgage Capital, Inc. (DLJ) to repurchase allegedly defective loans from plaintiff Trustee. Defendant moves to dismiss the complaint pursuant to 3211 (a). Except as discussed below, this action is based on substantially similar pleadings and raises issues that do not differ in any material respect from those determined by this court in a recent decision in Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, Natl. Assn. v Nomura Credit & Capital, Inc., (2014 WL 2890341, Index No. 653390/2012, June 26, 2014 [Nomura]).

On the authority and reasoning relied on in the June 26, 2014 decision, the court holds that that the relief available to plaintiff is limited by the sole remedy provisions in the Pooling and Servicing Agreement (PSA), which governs the securitization at issue. Pursuant to PSA § 2.03, plaintiff’s remedies for breach of the mortgage representations are limited to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent

with its terms – i.e. damages in the amount of the defined Purchase Price. (See 2014 WL 2890341 at \* 7-8, 10-11.) Plaintiff’s claims for rescissory and consequential damages should be dismissed. (Id. at \* 13-14.)

As further held in Nomura, the cause of action for breach of contract accrued on the date the representations and warranties were made, the closing date of the PSA, and not on its “as of” date. (Id. at \* 5-6.) This action was timely commenced by summons with notice filed on April 2, 2013, within six years of the closing date, April 2, 2007.

For the reasons set forth in Nomura (2014 WL 2890341, at \* 15-16) and in ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc. (2014 WL 4785503, at \* 4-6, Index No. 651936/2013, August 28, 2014), the court rejects defendant’s showing at this juncture that claims related to defective loans which were not the subject of its timely repurchase demands are not adequately pleaded. Under PSA § 2.03, DLJ’s own discovery of breaching loans triggers its repurchase obligation, independent of any breach notices from the plaintiff. It is undisputed that the Trustee served four timely repurchase demands on DLJ, identifying a total of 1,166 loans as defective, from among the pool of 6,326 loans in the securitization, and demanding repurchase of “every loan that did not comply with a representation or warranty.” (Compl. ¶¶ 2, 8, Jacobsen Aff., Ex. 7.) The complaint alleges that plaintiff conducted a forensic review on a sample of 1,574 loans in the pool, and found that approximately 74% of the loans breached DLJ’s representations and warranties. (Id. ¶ 6.) The complaint pleads that as sponsor, DLJ discovered breaches when it performed due diligence on the loans, prior to acquiring them for the securitization. (Id. at ¶ 59.) Plaintiff further alleges that DLJ was put on notice of the breaches in the loan pool no later than September 2011, when the Federal Housing Finance Agency (FHFA) filed a securities law action against DLJ in U.S.

District Court. The FHFA complaint alleged, with respect to the securitization at issue here, that a forensic review of a sample of the loans showed that specified percentages of loans did not comply with applicable underwriting guidelines, and that stated owner occupancy rates and loan to value ratios were inaccurate. (*Id.* at ¶¶ 58, 60.) Under these circumstances, plaintiff's allegations are sufficient to support a reasonable inference that defendant discovered widespread breaches of loans that gave rise to its repurchase obligation.

Defendant further moves to dismiss the third cause of action for indemnification of attorney's fees, costs, and expenses. The parties' intent to indemnify plaintiff for its attorney's fees in litigating this action is not unmistakably clear from the terms of the parties' agreements. PSA § 2.03 (d) provides: "The Seller shall promptly reimburse the related Servicer and the Trustee for any actual out-of-pocket expenses reasonably incurred by the related Servicer and the Trustee in respect of enforcing" the repurchase remedy. The agreement does not expressly include attorney's fees among the covered expenses; nor does it provide for reimbursement of expenses incurred by certificateholders. (See *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]; *Nomura Home Equity Loan Trust*, Index No. 650337/13, July 18, 2014 [and authorities cited therein].)

It is accordingly hereby ORDERED that defendant's motion to dismiss the complaint is granted to the following extent:

It is ORDERED that the first cause of action is dismissed only to the extent that it alleges that breaches of defendant's repurchase obligations constitute independent breaches of contract (see Compl. ¶ 75 [referring to breach of repurchase obligation]); and it is further

ORDERED that the second cause of action for breach of contract is dismissed only to the extent that it alleges that breaches of defendant's repurchase obligations constitute independent

breaches of contract (see Compl. ¶ 91), and that it demands rescissory or other damages inconsistent with the terms of the repurchase protocol; and it is further

ORDERED the third cause of action for indemnification is dismissed to the extent that it seeks reimbursement of plaintiff's attorney's fees or the certificateholders' expenses.

This constitutes the decision and order of the court.

Dated: New York, New York  
October 1, 2014

  
\_\_\_\_\_  
MARCY FRIEDMAN, J.S.C.