

**ACE Sec. Corp. Home Equity Loan Trust, Series
2007-WM1 v DB Structured Prods., Inc.**

2014 NY Slip Op 32603(U)

September 25, 2014

Supreme Court, New York County

Docket Number: 650312/2013

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, INDEX NO. 650312/2013
SERIES 2007-WM1, by HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee,
Plaintiff,

-against- MOTION DATE _____

DB STRUCTURED PRODUCTS, INC.,
Defendant. MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to dismiss.

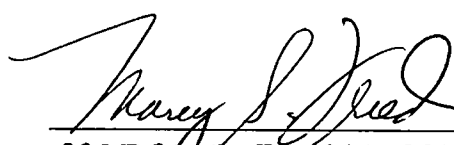
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____
Answering Affidavits — Exhibits _____ No (s). _____
Replying Affidavits _____ No (s). _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that defendant's motion to dismiss is decided in accordance with the attached decision/order, dated September 25, 2014.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9-25-14



MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate:.....Motion is: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

PRESENT: Hon. Marcy S. Friedman, JSC

ACE SECURITIES CORP. HOME EQUITY
 LOAN TRUST, SERIES 2007-WM1, by HSBC
 BANK USA, NATIONAL ASSOCIATION, as
 Trustee,

Index No.: 650312/2013

Plaintiff,

DECISION/ORDER

- against -

DB STRUCTURED PRODUCTS, INC.,

Defendant.

This residential mortgage backed securities (RMBS) action for breach of contract, known as a put-back action, arises out of the alleged failure of defendant DB Structured Products, Inc. (DBSP), the sponsor of the securitization, to repurchase defective loans from plaintiff Trustee. Defendant moves to dismiss the action. Except as discussed below, the 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 recent decisions in Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341 (Index No. 653390/12, June 26, 2014 [Nomura]) and in ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc. (Index No. 651936/2013, August 28, 2014 [ACE Series 2007-ASAP2]).

On the authority and reasoning relied on in the June 26, 2014 decision, the court holds that the relief available to plaintiff is limited by the sole remedy provisions in the Pooling and

Servicing Agreement (PSA) and the Mortgage Loan Purchase Agreement (MLPA) which govern the securitization at issue, and that the second cause of action for rescission and/or rescissory damages should be dismissed. (Nomura, 2014 WL 2890341, at * 10-11, 13-14.) Plaintiff's remedies for breach of the mortgage representations under the first and third causes of action 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 id. at * 7-8, 10-11.) As further held in Nomura Home Equity Loan Trust, Inc., Series 2006-2 v Nomura Credit & Capital, Inc., (Index No. 650337/13, July 18, 2014 [Nomura Series 2006-2]), even assuming arguendo that a contractual limitation on damages such as the sole remedy provision may be rendered unenforceable by willful misconduct or gross negligence, the allegations in the complaint fall far short of alleging the willful intent to harm the plaintiff, or the tortious conduct that smacks of intentional wrongdoing, which is necessary to obtain relief from such provision.

For the reasons set forth in ACE Series 2007-ASAP2, the court rejects defendant's showing at this juncture that claims based on liquidated loans should be dismissed on the ground that they are not subject to repurchase. The court also rejects defendant's contention that claims related to defective loans which were not the subject of its timely repurchase demands are not adequately pleaded. (Index No. 651936/2013, August 28, 2014, at 2-3, 9 [interpreting substantially similar MLPA and PSA terms]; see also Nomura, 2014 WL 2890341, at * 15-16.) As to the latter claims, the complaint alleges that plaintiff performed a forensic review of 2,310 of the 4,591 loans underlying the securitization, which found that 95 percent of the reviewed loans breached the mortgage representations. The complaint also alleges that DBSP discovered such widespread breaches through the due diligence it performed as sponsor. (Compl. ¶ 11.)

These allegations are sufficient to plead that DBSP's own discovery of breaches independently triggered defendant's repurchase obligation, pursuant to MLPA § 7 (a), of loans not specifically identified in the repurchase demands.

Plaintiff pleads a fourth cause of action for a declaratory judgment determining that DBSP must reimburse the Trustee for any expenses, including attorney's fees, incurred in enforcing the sponsor's obligations under the contracts. MLPA § 4 (d) provides: "Any expense reasonably incurred by or on behalf of the Purchaser or the Trustee in connection with enforcing any obligations of the Seller under this Agreement will be promptly reimbursed by the Seller." This provision for indemnification for the Trustee's expenses in enforcing the Seller's obligations does not expressly include attorneys' fees among the covered expenses. The court accordingly holds that 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. (See Hooper Assoc. v AGS Computers, 74 NY2d 487, 492 [1989]; Nomura Series 2006-2, Index No. 650337/13, July 18, 2014 at 3 [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 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. ¶ 102), and demands damages inconsistent with the terms of the repurchase protocol (see Compl. ¶ 106); and it is further

ORDERED that the second cause of action for rescission or rescissory damages is dismissed; and it is further

ORDERED that the branch of defendant's motion to dismiss the fourth cause of action is granted to the extent that it is

ADJUDGED and DECLARED that the expenses for which defendant is liable to indemnify plaintiff do not include attorney's fees incurred in the litigation of the instant action; and it is further

ORDERED that the branch of defendant's motion to dismiss the fourth cause of action to the extent that it seeks a declaration that defendant is otherwise liable to indemnify plaintiff for expenses is denied; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
September 25, 2014


MARCY FRIEDMAN, J.S.C.