

<b>Nomura Asset Acceptance Corp. v Nomura Credit &amp; Capital, Inc.</b>
2014 NY Slip Op 33609(U)
July 18, 2014
Supreme Court, New York County
Docket Number: 652614/2012
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 Friedman, J.S.C.

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NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2,  
by HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee,

Index No.: 652614/2012

DECISION/ORDER

*Plaintiff,*

– against –

NOMURA CREDIT & CAPITAL, INC.,

*Defendant.*

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This residential mortgage backed securities (RMBS) action for breach of contract arises out of the failure of Nomura Credit & Capital, Inc. (Nomura) to repurchase allegedly defective loans from Nomura Asset Acceptance Corporation, Mortgage Pass-Through Certificates, Series 2006-AF2 Trust (Trust). 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 related action, 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).

On the authority and reasoning relied on in the June 26, 2014 decision, the court holds that the first cause of action for damages for breach of contract, and the third cause of action for specific performance of the repurchase protocol, are adequately pleaded to the extent that they

are based on Nomura's alleged breaches of the Mortgage Representations. The second cause of action seeking rescissory damages will, however, be dismissed. (2014 WL 2890341 at \* 10-11, 13-14.)

As this court has previously held, concurring with the weight of authority in RMBS repurchase actions, the relief available to plaintiff is limited by the sole remedy provision (Pooling and Servicing Agreement [PSA] § 2.03 [d] and Mortgage Loan Purchase Agreement [MLPA] § 9 [a], [c]) to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms. (See 2014 WL 2890341 at \* 7, 10-11.) Here, plaintiff apparently argues that the sole remedy provision is unenforceable because defendant willfully or with gross negligence included numerous defective loans in the pool and failed to repurchase such loans on demand. (See P.'s Memo. In Opp. at 9.) On this record, however, plaintiff fails to submit legal authority which demonstrates that the sole remedy provision at issue is the type of exculpatory clause that is rendered unenforceable by willful conduct or gross negligence. (See Ace Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Prods., Inc., 2014 WL 1116758, \* 9-10 [SD NY Mar. 20, 2014] [Nathan, J.] [noting that authorities holding certain exculpatory clauses unenforceable arguably extend New York Court of Appeals holdings well beyond "clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum"].) In any event, the allegations of the complaint (see e.g. ¶ 17) fall far short of alleging the "willful inten[t] to inflict harm on [the] plaintiff" or the tortious conduct that "smack[s] of intentional wrongdoing," which is necessary to obtain relief from a contractual limitation on liability or damages. (See Metropolitan Life Ins. Co. v Noble Lowndes Intl., Inc., 84 NY2d 430, 438 [1994], rearg denied 84 NY2d 1008 [quoting Sommer v Federal Signal Corp., 79 NY2d 540, 554 [1992]].)

In the instant action, plaintiff also pleads a fourth cause of action for a declaratory judgment determining that Nomura must reimburse the Trustee for any expenses, including attorneys' fees, incurred in enforcing Nomura's obligations under the contracts. Section 2.03 (d) of the PSA provides: "The Sponsor shall promptly reimburse the Trustee for any expenses reasonably incurred by the Trustee in respect of enforcing the remedies for such breach." MLPA § 4 (e) similarly 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."

It is well settled that "[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." (Hooper Assoc. v AGS Computers, 74 NY2d 487, 492 [1989].) The contractual provision must "exclusively and unequivocally" reflect an intention that the defendant pay the costs arising out of litigation between the parties. (Id.) Here, the PSA and MLPA contain other provisions providing for indemnification of different parties that expressly include indemnification for attorney's fees. (See e.g. PSA §§ 7.03, 7.04.) In contrast, the PSA and MLPA provisions providing for indemnification for the Trustee's expenses in enforcing the Seller's obligations do not expressly include attorney's 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. (SACO I Trust 2006-5 v EMC Mtge. LLC, 2014 WL 2451356, \* 6 [Sup Ct NY County May 29, 2014] [Bransten, J.] [dismissing Trustee's claim for reimbursement of attorneys' fees and expenses in

connection with an RMBS repurchase suit, based on similar PSA provision]; U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2014 WL 1621046, \* 6-7 [Sup Ct NY County Apr. 21, 2014] [Schweitzer, J.]; see generally 546-552 W. 146<sup>th</sup> St. LLC v Arfa, 99 AD3d 117, 122 [1<sup>st</sup> Dept 2012].)

The court makes no determination as to plaintiff's further claim that it is entitled to expenses incurred by the certificateholders in connection with defendant's alleged breaches, as this issue has not been adequately briefed on this record.

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

ORDERED that the second cause of action 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

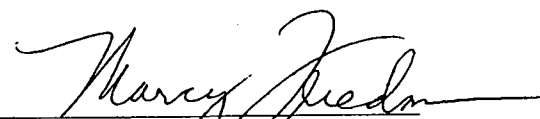
ADJUDGED and DECLARED that the expenses for which defendant is liable to indemnify plaintiff do not include attorney's fees incurred in the litigation of the instant action; and it is further

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, including expenses incurred by certificateholders, 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  
July 18, 2014

  
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MARCY FRIEDMAN, J.S.C.