

**Home Equity Mtge. Trust Series 2006-1 v DLJ Mtge.
Capital, Inc.**

2014 NY Slip Op 33714(U)

October 10, 2014

Supreme Court, New York County

Docket Number: 156016/12

Judge: Melvin L. Schweitzer

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 NEW YORK COUNTY

PRESENT: MELVIN L. SCHWETZTER
Justice

PART 45

Home Equity Mortgage Trust
Series 2006-11, et al.

INDEX NO. 156016/12

MOTION DATE _____

MOTION SEQ. NO. 015

DLI Mortgage Capital, Inc. and
Select Portfolio Servicing, Inc.

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *to renew and reargue and to reconsider is GRANTED, and on reconsideration the decision is MODIFIED per the attached Decision and Order*

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

Dated: Oct. 10, 2014

Melvin L. Schwetzer
JUL 15 2014 12:02 PM

- 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 45

-----X
HOME EQUITY MORTGAGE TRUST SERIES 2006-1, :
HOME EQUITY MORTGAGE TRUST 2006-3, and :
HOMEEQUITY MORTGAGE TRUST 2006-4, :

Plaintiffs, :

-against- :

DLJ MORTGAGE CAPITAL, INC., and SELECT :
PORTFOLIO SERVICING, INC., :

Defendants. :

Index No. 156016/2012

DECISION AND ORDER

Motion Sequence No. 015

-----X
HOME EQUITY MORTGAGE TRUST SERIES 2006-5, :
By U.S. BANK NATIONAL ASSOCIATION, solely in its :
Capacity as Trustee, :

Plaintiff, :

-against- :

DLJ MORTGAGE CAPITAL, INC., and SELECT :
PORTFOLIO SERVICING, INC., :

Defendants. :

Index No. 653787/2012

DECISION AND ORDER

Motion Sequence No. 013

-----X
MELVIN L. SCHWEITZER, J.:

By Decision and Order dated July 16, 2014, the court granted Home Equity's motions to compel (motion sequence nos. 008 and 010): the production of repurchase analyses done by DLJ¹ in response to Home Equity's demands for repurchase; and responses to Home Equity's interrogatories asking DLJ to identify by Bates-number: (1) all documents that constitute any

¹"Home Equity" refers collectively to plaintiffs Home Equity Mortgage Trust Series (HEMT) 2006-1, HEMT 2006-3, HEMT 2006-4, HEMT 2006-5, and U.S. Bank National Association (U.S. Bank), acting solely in its capacity as Trustee. "DLJ" refers collectively to defendants DLJ Mortgage Capital, Inc. (DLJ) and Select Portfolio Servicing, Inc.

part of a loan file, and (2) the guideline(s) applicable to each sample loan. DLJ now moves under CPLR 2221(e)(2) to renew its opposition to the motion to compel, based on “new facts not offered on the prior motion that would change the prior determination.” *Id.* DLJ also moves under CPLR 2221(d)(2) to reargue, claiming that the court “overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision.” *Id.* DLJ also requests that the court modify its July 16, 2014 Decision and Order to limit the scope of its application with respect to Select Portfolio Servicing, Inc. The facts are reviewed at length in the prior decision.

Discussion

The “new facts” raised by DLJ in support of renewal are statements made by opposing counsel after the parties had fully briefed the motion to compel. Opposing counsel stated in an affirmation opposing a motion to compel made by DLJ that, “Plaintiffs will prove their claims through the use of a testifying expert’s independent re-underwriting of the sample, without regard to investigations conducted prior to litigation.” HEMT 2006-1 (Doc. No. 500); HEMT 2006-5 (Doc. No. 309). DLJ characterizes this statement as an abandonment by Home Equity of the prior repurchase demands that triggered DLJ’s analyses. The court disagrees. Read in context, the pre-suit investigations referred to by Home Equity are those of its own underwriting vendor, and undertaken prior to filing the complaint.

DLJ argues as well that Home Equity’s reliance on sampling and expert analyses renders DLJ’s repurchase analyses irrelevant. After review of the parties’ Pooling and Servicing Agreement (PSA), the court finds that DLJ’s repurchase analyses are directly relevant to key elements of section 2.03 (f), which provides, in significant part,

[. . .] The Seller hereby covenants that within 120 days of the earlier of its discovery or its receipt of written notice from any party of a breach of any representation or warranty made by it pursuant to Section 2.03 (e) which materially and adversely affects the interests of the Certificateholders in any Mortgage Loan sold by the Seller to the Depositor, it shall cure such breach in all material respects, and if such breach is not so cured, shall, (i) if such 120-day period expires prior to the second anniversary of the Closing Date, remove such Mortgage Loan (a “Deleted Mortgage Loan”) from the Trust Fund and substitute in its place a Qualified Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section; or (ii) repurchase the affected Mortgage Loan from the Trustee at the Repurchase Price in the manner set forth below; [. . .]

Complaint, Exh. A. Home Equity is not limited to statistical sampling as evidence of pervasive breaches in the loan pool, and DLJ’s “discovery” of those breaches. DLJ’s repurchase analyses may shed light on, *inter alia*, DLJ’s underwriting practices, which could support plaintiff’s claims. *See e.g. Assured Guaranty Municipal Corp. v Flagstar Bank, FSB, et al.*, 920 F Supp 2d 475, 513-514 (SDNY 2013) (in judgment for plaintiff after trial, the court found that plaintiff’s repurchase demand made defendant aware of pervasive breaches in the loan pool).

DLJ’s argument based on privilege is more compelling. To the extent that the repurchase analyses include attorney-client privileged communications, or attorney work product, DLJ may withhold those documents, or redact where possible, and serve a privilege log of the responsive documents that are not being disclosed, and a copy of redacted documents, bate-stamped. The privilege log shall identify all redacted and completely withheld documents by bate-stamp numbers, dates, authors and recipients, and shall state the privileges being asserted.

The court also agrees that the prior Decision and Order should be modified as to defendant Select Portfolio Servicing, Inc. (SPS). At a conference with the court, held to discuss the issues raised by DLJ’s motion, Home Equity agreed to meet and confer with DLJ to revise its interrogatories directed to SPS.

Accordingly, it is

ORDERED that the motion to renew and reargue plaintiffs' motion to compel, and to reconsider the court's July 16, 2014 Decision and Order (D&O) is GRANTED; and it is further

ORDERED that on reconsideration, the July 16, 2014 D&O is MODIFIED as follows:

(i) DLJ may withhold from its responsive documents that include attorney-client privileged communications, or attorney work product, and serve a privilege log with non-privileged, and redacted responsive documents in compliance with this decision; and (iii) SPS shall respond to Home Equity's interrogatories to the extent stipulated by the parties; and it is further

ORDERED that as modified, the July 16, 2014 D&O remains in effect and controlling, and the stay is vacated.

Dated: October 10, 2014

ENTER:



J.S.C.
MELVIN L. SCHWEITZER