

**U.S. Bank Natl. Assoc. v DLJ Mtge. Capital, Inc.**

2015 NY Slip Op 30084(U)

January 16, 2015

Supreme Court, New York County

Docket Number: 652699/2013

Judge: Marcy 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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U.S. BANK NATIONAL ASSOCIATION, solely  
in its capacity as Trustee of the CSMC ASSET-  
BACKED TRUST 2007-NC1 (CSMC 2007-NC1),

Index No.: 652699/2013

*Plaintiff,*

DECISION/ORDER

– against –

DLJ MORTGAGE CAPITAL, INC.,

*Defendant.*

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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) (1) and (7).

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 its recent RMBS decisions, to which the court adheres and refers for a full discussion of the applicable authorities.

In brief, the principal issue on the motion to dismiss is the adequacy of plaintiff's pleading of notice of breaches of representations and warranties regarding the loans. It is undisputed that the Trustee delivered at least one timely repurchase demand to DLJ, dated August 15, 2012, identifying defects in 1684 loans, more than half of the 3051 mortgage loans included in the securitization. (Defendant's Memo. in Support at 4, 7.) DLJ moves to dismiss the Trustee's claims for breach of mortgage representations as to loans not identified in this

demand, contending that the complaint does not sufficiently plead DLJ's own discovery of defects in these loans.

The Amended and Restated Pooling and Servicing Agreement at issue (PSA § 2.03) imposes a repurchase obligation upon the sponsor within a specified number of 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” which materially and adversely affects the value of any loan. In cases involving substantially similar provisions in the governing agreements, this court has held that the sponsor's own discovery of breaches is an independent trigger of its obligation to cure or repurchase. (ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc., 2014 WL 4785503 [Index No. 651936/2013, August 28, 2014] [ACE].) The court has further held that the allegations of the sponsor's discovery are adequate at the pleading stage to support the plaintiff's claims, where they include allegations of discovery of widespread or pervasive breaches based on the sponsor's due diligence efforts. (Id. at \* 5 [citing similar or other allegations which may support pleading of discovery]; see e.g. Complaint, ¶¶ 46-49 [alleging sponsor's due diligence prior to purchase of loans from originator at auction].) Here, moreover, the repurchase demand alleged extensive breaches of the sampled loans and, as previously held, would independently support plaintiff's claims at the pleading stage. (See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, Natl. Assn. v Nomura Credit & Capital, Inc., 2014 WL 2890341, \* 16 [Index No. 653390/2012, June 26, 2014] [Nomura]; Morgan Stanley Mtge. Loan Trust 2007-2AX (MSM 2007-2AX), by US Bank Nat. Assoc. v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 6669698, \* 2-3 [Index No. 650339/2013, Nov. 24, 2014].) The court accordingly holds that plaintiff has adequately pleaded claims as to the loans not specifically identified in the breach notice.

The court also adheres to the reasoning of its prior decisions in resolving the remaining branches of defendant's motion to dismiss. PSA § 2.03, the sole remedy provision, limits plaintiff's remedies for breach of the mortgage representations to specific performance of the repurchase protocol or to damages consistent with its terms. (See Nomura, 2014 WL 2890341 at \* 7-8, 10-11.) In light of ACE Securities Corp. v DB Structured Products, Inc. (112 AD3d 522 [1<sup>st</sup> Dept 2013], lv granted 23 NY3d 906), plaintiff's breach of contract cause of action is not maintainable based on the claims that DLJ's alleged failure to notify the Trustee of breaching loans and its alleged failure to repurchase the loans constitute breaches of contract independent of the alleged breaches of representations and warranties. (U.S. Bank Nat. Assoc. v DLJ Mtge. Capital, Inc., 121 AD3d 535 [1st Dept 2014]; see also Morgan Stanley Mtge. Loan Trust 2006-13ARX, by US Bank Nat. Assoc. v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 4829638, \* 2 [Index No. 653429/2012, Sept. 25, 2014].) 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' agreement, which provide for reimbursement of the Trustee's reasonable out of pocket expenses, but do not expressly include attorney's fees among the covered expenses. (PSA § 2.03; see Nomura Home Equity Loan Trust, Inc. v Nomura Credit & Capital, Inc., Index No. 650337/13, July 18, 2014.) Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is based on allegations identical to those underlying the first cause of action for breach of contract, and should therefore be dismissed as duplicative. (ACE, 2014 WL 4785503 at \* 6.)


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 1) alleges that breaches of defendant's repurchase obligations or obligations to notify constitute independent breaches of contract, 2) demands rescissory or other damages inconsistent with the terms of the repurchase protocol, and 3) seeks reimbursement of plaintiff's attorney's fees or the certificateholders' expenses; and it is further

ORDERED that the second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York  
January 16, 2015

  
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MARCY FRIEDMAN, J.S.C.