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

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

U.S. BANK NATIONAL ASSOCIATION, solely in the capacity as Trustee of the J.P. MORGAN ALTERNATIVE LOAN TRUST 2007-A2 (JPALT 2007-A2),

Plaintiff,

– against –

GREENPOINT MORTGAGE FUNDING, INC.,

Defendant.

Index No.: 651954/2013

DECISION/ORDER

This residential mortgage backed securities (RMBS) action for breach of contract, commonly known as a put-back action, arises out of the failure of originator GreenPoint Mortgage Funding, Inc. (GreenPoint) to repurchase allegedly defective mortgage loans from plaintiff Trustee. Defendant moves to dismiss the complaint pursuant to 3211 (a) (1), (5), and (7).

This motion raises a number of issues that this court has previously decided on substantially similar pleadings and governing agreements in the RMBS litigation. The principal issue on this motion that the court has not previously addressed concerns the effect on the statute of limitations of a provision which purports to specify the conditions for accrual of the breach of contract cause of action.

GreenPoint originated 418 of the 4109 mortgage loans in the securitization at issue. Pursuant to the Mortgage Loan Sale Agreement (MLSA), dated August 1, 2005, GreenPoint sold

the mortgage loans to the Sponsor, J.P. Morgan Mortgage Acquisition Corp. (Compl., ¶ 17.) GreenPoint made a series of representations and warranties to the Sponsor concerning the quality of the loans. (MLSA §§ 7.01, 7.02.)

As is typical in an RMBS securitization, the MLSA contains a remedial section which includes a "sole remedy" provision, specifying that "the obligations of the Seller [GreenPoint] or the Servicer, as applicable, . . . to cure, repurchase or substitute for a defective Mortgage Loan and/or to indemnify the Purchaser [Sponsor] constitute the sole remedies of the Purchaser respecting a breach of the representations and warranties" made by the Seller in other sections of the MLSA. (MLSA § 7.03.)

The repurchase protocol set forth in MLSA § 7.03 provides, in pertinent part:

> "Upon discovery by the Seller [GreenPoint], the Servicer or the Purchaser [Sponsor] of a breach of any of the foregoing representations and warranties which materially and adversely affects the value of the Mortgage Loans . . . , the party discovering such breach shall give prompt written notice to the others.
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> . . .
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> Within sixty (60) days of the earlier of either discovery by or notice to either the Seller or the Servicer (such period, the 'Cure Period') of any breach of a representation or warranty which materially and adversely affects the value of a Mortgage Loan . . . , the Seller or the Servicer, as the case may be, shall use its best efforts promptly to cure such breach in all material respects and, if such breach cannot be cured, the Seller shall repurchase such Mortgage Loan or Mortgage Loans at the Repurchase Price."

MLSA § 7.03 also contains an accrual provision, which states:

> "Any cause of action against the Seller [GreenPoint] or the Servicer, as applicable, relating to or arising out of the breach of any representations and warranties made in Subsection 7.01 or 7.02 shall accrue upon (i) discovery of such breach by the Purchaser [Sponsor] or notice thereof by the Seller or the Servicer to Purchaser, (ii) failure by the Seller or the Servicer, as applicable, to cure such breach, repurchase such Mortgage Loan as specified above, substitute a Substitute Mortgage Loan for such Mortgage Loan as specified above and/or indemnify the Purchaser and (iii)

> demand upon the Seller or the Servicer, as applicable, by the Purchaser for compliance with the terms of this Agreement."

On the closing date of the securitization, May 31, 2007, GreenPoint entered into a Reconstitution Agreement (RA), by which it made the representations and warranties set forth in MLSA § 7.01 "to and for the benefit of" the Trustee, the Sponsor, the Depositor, and the Master Servicer as of May 31, 2007. (RA § 2.) The RA further provided that the MLSA provisions governing GreenPoint's cure and repurchase obligations continue and shall apply to breaches of the representations and warranties made under the RA. (RA § 3.) The Sponsor's rights under the MLSA were also assigned on the closing date to the Depositor, and ultimately to the Trustee, through an Assignment, Assumption and Recognition Agreement and a Pooling and Servicing Agreement.

The Trustee alleges that a review of a sample of the loans revealed extensive breaches of GreenPoint's representations and warranties. It specifically identifies as defective at least 166 loans, or nearly 40% of the loans that GreenPoint sold. (Compl., ¶ 2.) The Trustee further pleads that GreenPoint knew of or likely discovered such "widespread" breaches through its role as originator, and by means of the due diligence and post-closing reviews or audits it conducted. (Compl., ¶¶ 52-55.)

It is undisputed that the Trustee did not notify GreenPoint of breaches prior to the commencement of this action by the filing of a summons with notice on May 31, 2013. At the request of the Trustee, the Securities Administrator sent notices to GreenPoint on June 13, August 27, and November 4, 2013, identifying breaching loans and demanding repurchase (repurchase demands). (Compl., ¶¶ 62-64; Defendant's Memorandum in Support at 10.) The complaint was filed on November 6, 2013.

GreenPoint contends that the action is time-barred because the Trustee failed to comply with a condition precedent to suit, in that it failed to provide repurchase demands and to wait for the cure period to elapse, prior to the commencement of the action or the passage of the statute of limitations. It further contends that the allegations of the complaint as to GreenPoint's "likely discovery" of breaches are insufficient to plead that GreenPoint's repurchase obligation under the MLSA was triggered independently by its own discovery and without any repurchase demand.

The Trustee contends that the complaint adequately pleads that GreenPoint's own discovery triggered its repurchase obligations. In the alternative, the Trustee contends that if a repurchase demand is a condition precedent to maintenance of this action, any failure to serve a timely demand can be corrected because the action was commenced within six years of Greenpoint's alleged breaches of representations and warranties. The Trustee also argues that the statute of limitations has not passed under the accrual provision of the MLSA. On its reading of that provision, the Trustee's cause of action against GreenPoint does not accrue – that is, no breach of the MLSA occurs – until 1) the Purchaser of the Mortgage Loans (or, ultimately, the Trustee) discovers or is notified of the breach of the representations and warranties, 2) the Seller fails to cure the breach, and 3) the Purchaser (or Trustee) makes demand upon the Seller for cure.

Under New York law, a statute of limitations "begins to run when a cause of action accrues." (Eli-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399, 402 [1993].) The six year statute of limitations for breach of contract, CPLR 213 (2), "accrues at the time of the breach," even if the plaintiff does not have "knowledge of the occurrence of the wrong" or does not suffer damages until a later date. (Id. at 402-403 [internal quotation marks and citations omitted].) Pursuant to CPLR 206 (a), "where a demand is necessary to entitle a person to

commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete . . . ." CPLR 206 (a) applies, however, to procedural demands, not substantive demands. (Continental Cas. Co. v Stronghold Ins. Co., Ltd., 77 F3d 16, 21 [2d Cir 1996] [applying New York law]; Solomon R. Guggenheim Found. v Lubell, 77 NY2d 311, 319-320 [1991]; State of New York v Seventh Regiment Fund, Inc., 98 NY2d 249, 261, n 7 [2002].) A substantive demand will be found where the demand is an "essential element of the plaintiff's cause of action . . ." – that is, where the breach of contract does not occur, and the plaintiff therefore has no entitlement to recovery, until the demand is made and refused. (Continental Cas. Co., 77 F3d at 21.)

Bailment and replevin cases present classic examples of substantive demands. (See Ganley v Troy City Natl. Bank, 98 NY 487, 494-95 [1885] [cause of action for breach of bailment contract does not accrue until demand is made for delivery of property and refused]; Guggenheim Found., 77 NY2d at 317-319 [replevin cause of action against good faith purchaser of stolen property does not accrue until demand by true owner for return of property and refusal].)

In cases involving contracts, analysis of the contractual demand provisions is required in order to determine whether the demand is substantive. (Compare Continental Cas. Co., 77 F3d at 21 [holding that plaintiff insured's demand "in the form of notice to the reinsurers of actual losses on the underlying insurance policies, [was] an essential element of [plaintiff's] claims," and that "reinsurers were not in 'breach' of their contract to indemnify until they rejected the demand (or until a reasonable time for paying the losses elapsed)"] with Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770-772 [2012] [holding that insurance policies by their terms did not condition insurer's entitlement to retroactive

adjustments upon the making of a demand, and that the cause of action for such adjustments therefore accrued when the insurer had the legal right to payment, not when it actually made the demand for payment].)[1]

In ACE Securities Corp. v DB Structured Products, Inc. (112 AD3d 522 [2013], lv granted 23 NY3d 906) (ACE), a case involving an RMBS securitization in which the governing agreements provided for a repurchase protocol substantially similar to that at issue here, this Department rejected the claim that a cause of action for breach of representations and warranties accrues only after a repurchase demand is made and refused. Put another way, this Department effectively rejected the claim that a demand for repurchase is a substantive element of the cause of action for breach of contract. The ACE agreements did not include a provision which by its terms purported to specify the conditions for accrual of the cause of action. Like the other above-cited provisions of MLSA § 7.03, the ACE agreements did, however, provide for the sponsor to cure or repurchase defective loans upon the sponsor's own discovery or upon notice to the sponsor of breaches of the representations and warranties with respect to the loans.[2] The

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[1] In another context, the Court of Appeals has explained that "when the right to final payment is subject to a condition, the obligation to pay arises and the cause of action accrues, only when the condition has been fulfilled." (Kassner & Co. v City of New York, 46 NY2d 544, 550 [1979] [holding that under terms of municipal contract in which plaintiff performed work for City, plaintiff's right to final payment was "conditioned upon completion of [an] audit"].)

[2] In ACE, the Pooling and Servicing Agreement (PSA) required the trustee to notify the sponsor in order to trigger the sponsor's obligation to cure or repurchase. It thus provided: "Upon discovery or receipt of notice of . . . a breach by the Sponsor of any representation, warranty or covenant under the Mortgage Loan Purchase Agreement in respect of any Mortgage Loan that materially and adversely affects the value of such Mortgage Loan . . . , the Trustee shall promptly notify the Sponsor and the Servicer of such . . . breach and request that the Sponsor . . . cure such . . . breach within sixty (60) days from the date the Sponsor was notified . . . , and if the Sponsor does not . . . cure such . . . breach in all material respects during such period, the Trustee shall enforce the obligations of the Sponsor under the Mortgage Loan Purchase Agreement to repurchase such Mortgage Loan . . . within ninety (90) days after the date on which the Sponsor was notified of such . . . breach, if and to the extent that the Sponsor is obligated to do so under the Mortgage Loan Purchase Agreement." (PSA § 2.03[a].)

However, under the Mortgage Loan Purchase Agreement (MLPA), the sponsor's repurchase obligation was triggered by either its own discovery of breaches or by notice to it: "Upon discovery by the Sponsor, the Purchaser or any assignee . . . of a breach of any of the representations and warranties . . . that materially and adversely affects the value of any Mortgage Loan . . . , the party discovering such breach shall give prompt written notice to the Sponsor. Within sixty (60) days of its discovery or its receipt of notice of . . . any such breach . . . , the Sponsor

ACE Court held that the plaintiff failed to comply with a condition precedent to commencement of the action in that it filed the summons with notice before the time to cure or repurchase had elapsed pursuant the plaintiff's pre-suit repurchase demand. (Id. at 523.) However, the Court's central holding was that "the claims accrued on the closing date of the MLPA . . . , when any breach of the representations and warranties contained therein occurred," and that "the motion court erred in finding that plaintiff's claims did not accrue until defendant either failed to timely cure or repurchase a defective mortgage loan." (Id. at 522.) Under ACE, then, the cause of action accrues upon the making of the false representations and warranties, and not upon the making of, or expiration of time to comply with, the repurchase demand.

In its recent decision in U.S. Bank Natl. Assoc. v DLJ Mortgage Capital, Inc. (121 AD3d 535, 535 [2014]), this Department adhered to its holding in ACE that "[i]f a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract." The Court expressly declined to overrule ACE and to hold "that a mortgage seller's failure to cure or replace a nonconforming loan is a separate breach of the agreement that triggers the limitations period anew." (Id.)[3]

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promptly shall . . . cure such . . . breach in all material respects or . . . the Sponsor shall, within ninety (90) days of its discovery or receipt of notice . . . , repurchase the affected Mortgage Loan at the Purchase Price . . . ." (MLPA § 7[a].)

As previously held by this court in ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc. (2014 WL 4785503, * 4 [Index No. 651936/2013, August 28, 2014] [ACE Series 2007-ASAP2]), these provisions should be read together, and authorize an action for breach of the representations and warranties regarding the mortgage loans to be maintained based upon the service of a repurchase demand as a condition precedent to commencement of the action, or on the seller's independent discovery of breaches of the representations and warranties, or on both. (In the same decision, this court also stated that according to the ACE plaintiff's appellate brief, the PSA alone provided that the repurchase obligation arose upon either the sponsor's own discovery of breaches or upon notice to it. [Id. at * 2 n 2.] However, as the above quotations from the ACE PSA and MLPA show, it is the PSA and MLPA together, or the assignment of the depositor's rights under the MLPA against the sponsor to the trustee, which establish that the sponsor's repurchase obligation was triggered upon the sponsor's discovery or notice to it.)

[3] Following ACE, this court has repeatedly dismissed RMBS breach of contract causes of action based on allegedly independent breaches of repurchase obligations, rather than on the underlying breaches of the representations and warranties regarding the characteristics of the mortgage loans. (See e.g. Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, Natl. Assn. v Nomura Credit & Capital, Inc., 2014

Here, as in ACE, the repurchase protocol is part of the sole remedy provision, which defines and limits plaintiff's remedies for any breach of the mortgage representations and warranties. Defendant's failure to remedy an underlying breach by refusing to cure or repurchase a defective loan does not constitute an independent breach of the governing agreement. Nor is the repurchase demand an element of the cause of action, as it merely seeks a remedy for the underlying breach which, under ACE, occurred when a false representation was made. As of the closing date, plaintiff's right to notify defendant of any breaching loans, and to demand compliance with the repurchase provision, was therefore complete. (See CPLR 206 [a].)

The accrual provision cannot serve to delay the accrual of the breach of contract cause of action for purposes of the statute of limitations. As held by the Court of Appeals in Kassner & Co. v City of New York, if an "agreement to waive or extend the Statute of Limitations is made at the inception of liability it is unenforceable because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative." (46 NY2d at 551 [internal citations and quotation marks omitted].) Statutes of limitations "express[] a societal interest or public policy of giving repose to human affairs." (Id. at 550 [internal quotation marks and citations omitted].) Thus, although parties may contract to shorten an applicable statute of limitations, an agreement made prior to the accrual of a cause of action "to extend the period as provided by statute or to postpone the time from which the period of limitation is to be computed" conflicts with public policy and will not be enforced. (Id. at 551 [emphasis in original, internal quotation marks and citations omitted].)

WL 2890341, * 6-7 [Index No. 653390/2012, June 26, 2014] [Nomura]; ACE 2007-ASAP2, 2014 WL 4785503; Morgan Stanley Mtge. Loan Trust 2006-13ARX, by US Bank Natl. Assoc. v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 4829638 [Index No. 653429/2012, Sept. 25, 2014] [MSM 2006-13ARX].)

The accrual provision in MLSA § 7.03 by its terms specifies conditions that must be met before any cause of action "accrue[s]" for breach of representations and warranties regarding the mortgage loans. It is an unambiguous expression of the parties' intent to delay accrual of a cause of action "arising out of the breach of any representations and warranties" until plaintiff discovers or is notified of the breach, defendant fails to cure, and plaintiff makes demand upon defendant for compliance. This accrual provision, which itself references an underlying breach, cannot redefine the elements of a claim for that breach. To enforce the provision would be to ignore the ACE holding that the cause of action for breach of the representations and warranties accrues when the underlying breach occurs – i.e., when the representations and warranties are made – and not when the repurchase demand is made and refused. (See Lehman XS Trust, Series 2006-4N v GreenPoint Mtge. Funding, Inc., 991 F Supp 2d 472 [SD NY 2014] [Scheindlin, J.] [dismissing as time-barred RMBS put-back action filed more than six years after representations were made, and refusing to enforce substantially similar accrual provision under New York law]; accord Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 2014 WL 3819356 [SD NY Aug. 4, 2014] [Crotty, J.]; Lehman XS Trust, Series 2006-GP2 v GreenPoint Mtge. Funding, Inc., 2014 WL 1301944, * 3 [SD NY Mar. 31, 2014] [Carter, J.] [same].)[4]

This action was commenced by the filing of the summons with notice. (CPLR 304 [a]; Jones v Bill, 10 NY3d 550, 554 [2008].) The Trustee's claim accrued on May 31, 2007, the date of the RA in which GreenPoint made its representations and warranties to the Trustee. The summons with notice was timely filed on May 31, 2013, the last day of the limitation period.

[4] To the extent that these decisions hold that the accrual provision imposes a demand requirement as a procedural condition precedent (see e.g. Lehman XS Trust, Series 2006-4N, 991 F Supp 2d at 479), this court does not concur. The stated purpose of the provision is to define the accrual of the cause of action. For the reasons stated above, the provision is unenforceable. Moreover, as is typical of agreements governing RMBS securitizations, the remedial section of the MLSA sets forth a comprehensive repurchase protocol (quoted supra at 2), which specifies all of the requirements for notice to the Seller of breaches of representations and warranties, and details the time periods for cure or repurchase.

The repurchase demands, as noted above, were all delivered after the commencement of the action by summons with notice, though prior to the filing of the complaint. As this court has previously held, if service of a repurchase demand were a condition precedent to commencement of the action, none of the repurchase demands here would have complied with the condition precedent before filing of the summons with notice because, as in ACE, the repurchase period "had not yet elapsed." (ACE Series 2007-ASAP2, 2014 WL 4785503, at * 2 [quoting ACE, 112 AD3d at 231].) However, where, as here, the governing agreement provides that defendant's own discovery of breaches independently gives rise to its repurchase obligation, a put-back action may be maintained based on allegations of defendant's discovery. (ACE Series 2007-ASAP2, 2014 WL 4785503, at * 4-6 [and authorities cited therein].)[5] While plaintiff will have the ultimate burden of proving whether and to what extent defendant discovered the breaches, at the pleading stage plaintiff sufficiently alleges defendant's discovery based on its involvement as an originator and its due diligence. (Id.)

Defendant further moves to dismiss plaintiff's claim for reimbursement of its expenses and attorney's fees. The indemnification clause of MLSA § 7.03 provides, in pertinent part:

> "[T]he Seller or the Servicer shall indemnify the Purchaser and hold it harmless against any out-of-pocket losses, penalties, fines, forfeitures, reasonable and necessary legal fees (including (without limitation) legal fees incurred in connection with the enforcement of the Seller's indemnification obligation under this Subsection 7.03) and related costs, judgments, and other costs and expenses

[5] ACE is not the contrary. As this court previously noted, ACE did not hold that service of a repurchase demand is a condition precedent where the sponsor's repurchase obligation under the operative contracts is triggered either by a repurchase demand or by the sponsor's own discovery of breaches of representations and warranties regarding the loans, and where the complaint alleges that the sponsor's own discovery was the trigger. As further noted, based on review of the ACE plaintiff's appellate brief, the ACE plaintiff itself argued that its cause of action accrued not at the time the representations and warranties were made but, rather, when the defendant breached its allegedly independent obligation to repurchase the loans in response to the plaintiff's repurchase demand. (ACE 2007-ASAP2, 2014 WL 4785503, at * 2 [quoting ACE plaintiff's appellate brief that the "Trustee is not entitled to sue" until the trustee demands repurchase and the seller refuses to do so].)

> resulting from any claim, demand, defense or assertion that is based on or grounded upon, or resulting from, a breach of the Seller or the Servicer, as applicable, [of] representations and warranties contained in this Agreement."

It is well settled that a promise by a party to a contract to indemnify the other for attorney's fees in litigation between themselves is contrary to the general rule that the parties bear their own attorney's fees. Thus, a 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 Assocs. v AGS Computers, 74 NY2d 487, 492 [1989].) In other words, "for an indemnification clause to cover claims between the contracting parties rather than third-party claims, its language must unequivocally reflect that intent." (Gotham Partners, L.P. v High River Ltd. Partnership, 76 AD3d 203, 206 [1st Dept 2010], lv denied 17 NY3d 713 [2011].)

Certain items for which MLSA § 7.03 provides indemnification – e.g., fines and penalties – plainly relate to third-party claims. The remaining items do not unequivocally refer to a suit between the parties. The Trustee contends that the express inclusion of an item for legal fees resulting from "enforcement of the Seller's indemnification obligation" is evidence of the intent to cover intra-party claims. This item could, however, apply to GreenPoint's refusal to indemnify for legal fees incurred in connection with third-party claims, such as borrower defenses to mortgage foreclosure proceedings, and not solely in connection with an action brought by the Trustee against GreenPoint. (See Oscar Gruss & Son, Inc. v Hollander, 337 F3d 186, 200 [2d Cir 2003].) All of the items for which indemnification is provided "are susceptible to third-party claims . . . . None are exclusively or unequivocally referable to claims between the parties themselves . . . ." (Hooper, 74 NY2d at 492.) As the provision therefore fails to meet the strict standard of Hooper for coverage of intra-party claims, the court will grant the branch of

defendant's motion to dismiss the Trustee's claim for indemnification of its legal fees in this action.

In resolving the remaining branches of defendant's motion to dismiss, the court adheres to the reasoning of its prior decisions construing substantially similar agreements governing RMBS securitizations. MLSA § 7.03, 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.) 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 Series 2007-ASAP2, 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 constitute independent breaches of contract, 2) demands rescissory or other damages inconsistent with the terms of the repurchase protocol, and 3) demands reimbursement of attorneys' fees, costs, and other related 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
March 3, 2015

MARCY FRIEDMAN, J.S.C.