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 its capacity as Trustee of the ASSET BACKED SECURITIES CORPORATION HOME EQUITY LOAN TRUST, SERIES AMQ 2006-HE7 (ABSHE 2006-HE7),

Plaintiff,

– against –

DLJ MORTGAGE CAPITAL, INC. and AMERIQUEST MORTGAGE COMPANY,

Defendants.

Index No.: 654147/2012

DECISION/ORDER

This is a residential mortgage-backed securities (RMBS) breach of contract action, known as a put-back action, in which defendant DLJ Mortgage Capital, Inc. (DLJ or Sponsor) purchased mortgage loans from defendant Ameriquest Mortgage Company (Ameriquest), the originator of the loans, and conveyed the loans to Asset Backed Securities Corporation Home Equity Loan Trust Series AMQ 2006-HE7 (Trust), which issued securities (certificates) backed by the loans. In a series of agreements, discussed more fully below, Ameriquest made representations and warranties about the mortgage loans, and agreed to a repurchase protocol with respect to loans whose value was materially and adversely affected by breaches of the representations and warranties. In addition, DLJ agreed to serve as what is referred to in the RMBS litigation as a "backstop" to Ameriquest – that is, it agreed that if Ameriquest were "unable" to comply with its obligations to cure or repurchase loans that breached representations and warranties, DLJ would do so. (Pooling and Servicing Agreement § 2.03 [a] [i].)

The Trustee's amended complaint asserts two causes of action against defendants for breach of contract based on Ameriquest's alleged breaches of its representations and warranties, the first seeking specific performance of defendants' repurchase obligation and the second seeking other remedies including compensatory, consequential, and rescissionary damages. The complaint does not assert an independent claim against DLJ for DLJ's breaches of its own representations and warranties.

DLJ moves to dismiss the action pursuant to CPLR 3211 (a) (1), (3), (5), (7), and (8) [1] on the grounds, among others, that it is barred by the statute of limitations and by the failure of plaintiff U.S. Bank National Association (Trustee) to serve timely repurchase demands on Ameriquest and thus to comply with an asserted condition precedent to commencement of the action.[2]

Several agreements are relevant to the parties' dispute on this motion, including: a Mortgage Loan Purchase and Interim Servicing Agreement (MLPA) between DLJ, as Purchaser, and Ameriquest, as Originator and Seller of the loans, dated October 23, 2006; a Reconstitution Agreement (RA) by Ameriquest in favor of DLJ, the Trustee and the Depositor, dated November

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[1] DLJ withdrew the branch of its motion based on plaintiff's standing after the filing of an amended complaint, which clarified that the action was brought by the Trustee on behalf of the Trust, and not by the Trust itself. (D.'s Memo. In Reply at 15 n 7.)

Although DLJ cites CPLR 3211 (a) (8) as a ground for the motion, DLJ does not in fact argue that the complaint should be dismissed for lack of personal jurisdiction.

This motion was initially briefed before the Appellate Division decision in ACE Secs. Corp. v DB Structured Prods., Inc. (112 AD3d 522 [1st Dept 2013], lv granted 23 NY3d 906 [2014].) Given the importance of the ACE decision, the court authorized supplemental briefing on the impact of the decision and accepted two supplemental submissions. An initial brief is referred to as a "Memo." A first supplemental brief is "Supp. Memo." A second is "Second Supp. Memo."

[2] Ameriquest failed to timely appear or answer after service of the summons with notice, but appeared to oppose DLJ's motion for a default judgment, and cross-moved for leave to file a late answer. By decision on the record dated August 14, 2014, and order dated October 3, 2014, this court granted the Trustee's motion for a default judgment against Ameriquest and denied Ameriquest's cross-motion. In a separate decision and order of the same date as the instant decision and order, this court has granted leave to reargue and, upon reargument, vacated Ameriquest's default and granted leave to Ameriquest to answer the amended complaint.

30, 2006; and a Pooling and Servicing Agreement (PSA) between DLJ and the Trustee and others, dated "as of" November 1, 2006, and with a Closing Date of November 30, 2006.

Pursuant to the MLPA, Ameriquest made a series of representations and warranties to DLJ concerning the quality of the pooled mortgage loans. (MLPA § 7.03.) As is typical in an RMBS securitization, cure and repurchase obligations constitute the sole remedy for breach of the representations and warranties concerning the mortgage loans.[3] The repurchase protocol, set forth in MLPA § 7.04, provides:

> "Within 90 days of the earlier of either discovery by or notice to the Company [Ameriquest] of any breach of a representation or warranty which materially and adversely affects the value of a Mortgage Loan or the Mortgage Loans, the Company shall use its best efforts promptly to cure such breach in all material respects and, if such breach cannot be cured, the Company shall, at the Purchaser's [DLJ's] option, repurchase such Mortgage Loan at the Repurchase Price."

On the closing date of the securitization, Ameriquest entered into the RA, by which it made the representations and warranties contained in Schedule B, "to and for the benefit of" the Trustee, the Sponsor, and the Depositor "as of the 'Reconstitution Date,'" which is defined as November 30, 2006. (RA § 2; Whereas Clause.) The RA further provides that the MLPA provisions governing Ameriquest's cure and repurchase obligations continue and shall also apply to breaches of the representations and warranties made under the RA. (RA § 3.) The representations and warranties in Schedule B are virtually identical to those made in the MLPA.

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[3] The court has discussed such repurchase protocols in a number of decisions, including Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, Natl. Assn. v Nomura Credit & Capital, Inc. (2014 WL 2890341, * 2 [Index No. 653390/2012, June 26, 2014] [Nomura]); ACE Secs. Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Prods., Inc. (2014 WL 4785503, * 3-4 [Index No. 651936/2013, August 28, 2014] [ACE Series 2007-ASAP2]); and U.S. Bank Nat. Assoc., solely in its capacity as Trustee of the CSMC Asset-Backed Trust 2007-NC1 v DLJ Mtge. Capital, Inc. (2015 WL 298642, * 1 [Index No. 652699/2013, January 16, 2015].)

By order of the Administrative Judge of the Court, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this court alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities." The court's docket therefore includes a substantial number of RMBS cases.

Pursuant to the PSA, the Trust was created to hold the 4,534 mortgage loans at issue. (PSA § 2.01, Am. Compl. ¶ 1.) PSA § 2.03 (a) (i) sets forth DLJ's backstop obligations, providing, in pertinent part, as follows:

> "Upon discovery by any of the parties hereto or receipt of notice by a Responsible Officer in the Corporate Trust Office of the Trustee . . . of the breach by the Originator [Ameriquest] of any representation, warranty or covenant under the Mortgage Loan Purchase Agreement or the Reconstitution Agreement in respect of any Mortgage Loan that materially adversely affects the value of such Mortgage Loan or the Certificateholders . . . , the party discovering such breach shall notify a Responsible Officer in the Corporate Trust Office of the Trustee and the Trustee shall promptly notify the Seller [DLJ] and Servicer of such . . . breach and cause the Originator to . . . cure such . . . breach within 90 days from the date the Originator was notified of such . . . breach . . . . If the Originator does not . . . cure such . . . breach in all material respects during such period, the Trustee shall enforce the obligations of the Originator under the Mortgage Loan Purchase Agreement and the Reconstitution Agreement to repurchase such Mortgage Loan from the Trust Fund at the Purchase Price, to the extent that the Originator is obligated to do so under the Mortgage Loan Purchase Agreement and the Reconstitution Agreement. In the event that an Originator shall be unable to cure the applicable breach or repurchase a related Mortgage Loan in accordance with the preceding sentence, the Seller shall do so."

On March 28, 2012, the Trustee sent a notice to DLJ (notice or repurchase demand), notifying DLJ of breaches of representations and warranties regarding 1,124 loans and demanding cure or repurchase of the loans. (Am. Compl. ¶¶ 7, 9.) These loans were identified as a result of a forensic review of a sample of 1,337 loans in the securitization. (Id.) The action was commenced by the filing of a summons with notice on November 29, 2012. It is undisputed that the Trustee did not notify Ameriquest of breaches prior to the commencement of the action. The Trustee sent a repurchase demand to Ameriquest, identifying the same 1,124 loans, on December 20, 2012. (Id. ¶ 9.) The complaint was filed on May 7, 2013, and the amended complaint was filed on July 3, 2013.

DLJ's principal contentions on this motion are that the action is barred by the statute of limitations and by the Trustee's failure to comply with conditions precedent to suit. As to the statute of limitations, DLJ contends that the Trustee acquired the right to sue, pursuant to the PSA repurchase protocol, on the effective or "as of" date of the PSA (November 1, 2006), and that the action is untimely because it was not commenced against DLJ and Ameriquest until November 29, 2012, more than six years later. Put another way, DLJ contends that the "as of" date of the PSA, rather than the later execution and closing date, controls accrual of the claim. (D.'s Memo. In Support at 9-10.) Alternatively, DLJ contends that Ameriquest's representations and warranties were made on the date of the MLPA (October 23, 2006), that the cause of action against Ameriquest accrued on that date, and that the action was untimely as against Ameriquest because it was commenced more than six years after the accrual date. DLJ further contends that the Trustee cannot assert claims against DLJ unless it has asserted timely claims against Ameriquest, "the primary obligor under the PSA." (D.'s Reply Memo. at 7.) According to DLJ, its backstop obligations arise only if the Trustee first seeks recovery from Ameriquest and, having allowed the statute of limitations to run against Ameriquest, the Trustee can no longer proceed against DLJ. (D.'s Second Supp. Memo. at 1.) DLJ claims that the obligation to enforce Ameriquest's repurchase obligations is a condition precedent to suit against DLJ, and this action is time-barred as a result of the Trustee's failure to satisfy the condition precedent within the statute of limitations for commencement of the action.

In response, the Trustee contends that its claims could not have accrued against either defendant before November 30, 2006, the Reconstitution Date under the RA and the Closing Date of the PSA. (P.'s Memo. In Opp. at 3-4.) The Trustee contends that its claims against Ameriquest are timely because Ameriquest not only made representations and warranties in the MLPA, but restated them in the RA for the benefit of the Trust, as of the Reconstitution and

Closing Dates. As the Trustee further argues, the Trust did not exist until the Closing Date, and the Trustee therefore could not have brought suit before then against Ameriquest or DLJ. (P.'s Supp. Memo. at 2-3.)

As to the asserted bar based on the condition precedent, DLJ contends that the Trustee failed to comply with a condition precedent to suit against DLJ, in that it sent no repurchase demand to Ameriquest prior to commencement of the action or the passage of the statute of limitations, rendering the summons with notice a "nullity." (D.'s Memo. In Support at 11-12; D.'s Reply at 6-7; D.'s Supp. Memo. In Support at 4.) The Trustee counters that service of a repurchase demand on Ameriquest is not a condition precedent to maintenance of this action, and that the only condition to DLJ's repurchase obligation is Ameriquest's inability to provide the repurchase remedy. (P.'s Memo. In Opp. at 12-13; P.'s Supp. Memo. In Opp. at 4.) In the alternative, the Trustee contends that if a repurchase demand on Ameriquest is a condition precedent to maintenance of an action against DLJ, the condition was either satisfied by the December 20, 2012 demand that was served more than 90 days before the filing of the amended complaint, or is excused as futile. (P.'s Supp. Memo. In Opp. at 4-5.)

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235

[1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88.)

Statute of Limitations

In ACE Secs. Corp. v DB Structured Prods., Inc. (112 AD3d 522 [1st Dept 2013], lv granted 23 NY3d 906 [2014] [ACE]), an RMBS breach of contract action against a sponsor under a repurchase protocol, this Department held that a claim based on breach of representations and warranties regarding the mortgage loans accrues on the date the representations and warranties are made, and not when the sponsor fails to comply with a repurchase demand. This Department has also held that the claim accrues on the closing date, not the "as of" date, of the PSA. (U.S. Bank N.A. v DLJ Mtge. Capital, Inc., 121 AD3d 535, 535 [1st Dept 2014].)

Here, similarly, the Trustee's claim against Ameriquest accrued on the Reconstitution Date of the RA, when Ameriquest, as Originator, made its representations and warranties directly to the Trustee (see RA § 2), and not on the earlier date of the MLPA, when Ameriquest, as Originator, made representations to DLJ, as Sponsor. (See MLPA § 7.04.) The claim against Ameriquest is therefore timely.

The claim against DLJ is also timely. DLJ did not agree to undertake its backstop obligation until it entered into the PSA. DLJ therefore cannot have breached its obligation prior to the closing date of the PSA, at the earliest. This action was timely commenced because brought against DLJ within six years of the closing date.

In holding that the claims are timely, the court rejects DLJ's apparent contention that the Trustee "steps into DLJ's shoes" and is limited to enforcing Ameriquest's representations and warranties under the MLPA. (See Oral Argument Transcript at 8.) The RA contemplates DLJ's assignment to the Depositor and the Trustee of its repurchase rights against Ameriquest under the MLPA for breaches of the representations and warranties made by Ameriquest in the MLPA. RA § 6 thus provides:

> "As an inducement to [Depositor] and the Trust to purchase the Mortgage Loans, the Company [Ameriquest] . . . consents to the transfer to [Depositor] and from [Depositor] to the Trust of all of [DLJ's] rights against [Ameriquest] . . . to the enforcement or exercise of any right or remedy against [Ameriquest] pursuant to the Mortgage Loan Purchase Agreement, including, without limitation, the remedies specified in Section 7.04 [the repurchase protocol]."

However, Ameriquest restates its representations and warranties in the RA, and the RA expressly makes the repurchase protocol of the MLPA applicable to the restated representations and warranties. RA § 3 (a) thus also provides:

> "The provisions of the Mortgage Loan Purchase Agreement regarding the Company's [Ameriquest's] obligations to cure or repurchase any Mortgage Loan as a result of a breach of a representation and warranty shall also apply to any breach of the respective representations and warranties made by the Company in Schedule B hereto . . . ."

(Emphasis supplied.)

DLJ submits no authority that assignment of its repurchase rights under the MLPA to the Depositor, and ultimately the Trustee, negates the separate right of the Trustee to enforce the RA. On the contrary, to hold that the Trustee cannot seek relief for breaches of the representations and warranties restated in the RA would be to read such restatement out of the RA, and to violate the settled precept of contract interpretation that "[a] reading of the contract should not render any portion meaningless." (See Beal Savings Bank v Sommer, 8 NY3d 318, 324 [2007].)

The court also rejects DLJ's contention that the action is time-barred based on the Trustee's failure to comply with a condition precedent before the statute of limitations passed. As noted above (supra at 4), the Trustee did not serve Ameriquest with a timely repurchase demand – i.e., a demand as to which the time to comply had expired – prior to commencement of the action by filing of the summons with notice on November 29, 2012, the day before the statute of limitations ran. DLJ contends that the Trustee's claims against Ameriquest are therefore time-barred in their entirety. Although the Trustee served DLJ with a timely repurchase demand before commencement of the action, DLJ contends that the Trustee's claims against DLJ are also time-barred because the Trustee failed to serve a repurchase demand on Ameriquest within the limitation period. (D.'s Supp. Memo. at 4; D.'s Second Supp. Memo. at 6.)

Assuming arguendo that the Trustee was obligated to serve a repurchase demand or demands on either DLJ or Ameriquest as a condition precedent to commencement of the action – an issue discussed further below – this court does not find that non-compliance with such condition precedent renders the action untimely on the facts of this case. CPLR 205 (a), a savings clause, provides in pertinent part:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction . . . , a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action . . . ."

It has long been held that "a dismissal arising from the failure of a condition precedent to the right to bring suit is not a 'final judgment upon the merits' for purposes of CPLR 205 (a)." (Carrick v Central Gen. Hosp., 51 NY2d 242, 251 [1980], characterizing Buchholz v United States Fire Ins. Co., 265 AD 467 [1943], affd on other grounds 293 NY 82 [1944].) More

recently, this Department has held that where the original complaint is timely filed and a condition precedent has not been complied with, a new action may be filed pursuant to CPLR 205 (a), provided that the original action was dismissed on grounds permitted by the savings clause. (Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PPLC, 104 AD3d 613, 613 [2013] [holding that action could be refiled under CPLR 205 (a), where plaintiff failed to comply with condition precedent – namely, submission of expert certification prior to commencement of professional malpractice action – the court reasoning that "[t]he dismissal of the prior action for plaintiffs' failure to comply with a condition precedent was not a judgment on the merits"][4]; see also Alouette Fashions, Inc. v Consolidated Edison Co. of New York, Inc., 119 AD2d 481, 486 [1st Dept 1986], affd for reasons stated below 69 NY 2d 787 [1987] [authorizing filing of new action pursuant to CPLR 205 (a), after compliance with statutory condition precedent].)

DLJ unpersuasively asserts that ACE dismissed the action "as time barred -- precisely because the action had been commenced before the full cure and repurchase periods had run." (D.'s Second Supp. Memo. at 8.) In ACE, the action was commenced by certificate holders before the time to cure under the repurchase demands had elapsed. The Court held that "[t]he certificate holders' failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity." (112 AD3d at 523, citing Southern Wine & Spirits of Am.,

[4] On the motion to dismiss the original action, the same Court held that the dismissal of the action was appropriate because the plaintiff had not complied with the condition precedent prior to the service of the original complaint. The Court held that the CPLR 203 (f) relation-back doctrine, under which "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed . . . ," was ineffective "to cure the defective initial complaint." (Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC, 80 AD3d 505, 505 [1st Dept 2011].) Although the Court did not explicitly so state, it thus appears that the condition precedent had been complied with between the time of the service of the original complaint and the time of service of the amended complaint. (Id. at 505-506.)

Inc. v Impact Envtl. Eng'g, PLLC, 80 AD3d 505, supra [discussed at n 4].)[5] The Court also held that "the certificate holders lacked standing to commence the action on behalf of the trust." (Id.) Distinguishing cases in which the original and substituted plaintiffs were affiliated, the Court further held that the "substitution of the trustee as plaintiff [does not] permit us to deem timely filed the trustee's complaint." (Id.) The ACE decision thus did not state, or hold, that the failure to comply with the condition precedent of service of a repurchase demand rendered the action "untimely." Nor, in this court's opinion, would such a holding be consistent with the authority under CPLR 205 (a) cited above.

Condition Precedent

Having held that the action was timely commenced against both DLJ and Ameriquest, the court turns to the issue of whether it must be dismissed on the separate ground that the Trustee failed to comply with a condition precedent.

The repurchase protocol set forth in PSA § 2.03 (a) (i), establishing DLJ's backstop obligation, materially differs from the repurchase protocols set forth in numerous RMBS governing agreements considered by this court, under which either a repurchase demand or a seller's own discovery of breaching loans may give rise to the seller's duty to repurchase.[6] In contrast, the PSA repurchase protocol here expressly requires the Trustee to notify DLJ of breaches of representations and warranties, even where DLJ independently discovers the

[5] It is noted that the Court of Appeals has criticized the use of the term "nullity" to characterize an action which has been properly dismissed, but may be recommenced pursuant to CPLR 205 (a). In George v Mt. Sinai Hosp., 47 NY2d 170 [1979], an action brought by an administrator pursuant to CPLR 205 (a) after the dismissal of a prior action commenced by a deceased plaintiff, the Court rejected the defendant's argument that "the prior action was a 'nullity' rather than an action, and thus there was in fact no prior action." (Id. at 175.) The Court reasoned that "the relation-back provisions of CPLR 203 are dependent on the existence of a valid pre-existing action," but that CPLR 205 (a) permits commencement of a new action where "the prior action was defective and so had to be dismissed" but where the prior action otherwise complied with the requirements of CPLR 205 (a), including timely commencement. (Id. at 179-180.)

[6] See cases cited at n 3, supra.

breaches. It also expressly requires notification to Ameriquest of such breaches and enforcement by the Trustee of Ameriquest's repurchase obligations.

The first sentence of the repurchase protocol provides that ". . . the party discovering such breach shall notify . . . the Trustee and the Trustee shall promptly notify the Seller [DLJ] and the Servicer of such . . . breach and cause the Originator [Ameriquest] to . . . cure such . . . breach within 90 days from the date the Originator was notified of such . . . breach . . . ." (PSA § 2.03 [a] [i].) (Emphasis supplied.) The provision further states that if Ameriquest does not cure the breach "during such period, the Trustee shall enforce the obligations of the Originator under the [MLPA] and the [RA] to repurchase . . . . In the event that an Originator shall be unable to cure the applicable breach or repurchase a related Mortgage Loan in accordance with the preceding sentence, the Seller shall do so."

The Trustee contends that the only condition precedent to suit against DLJ is "Ameriquest's inability to perform." (P.'s Supp. Memo. In Opp. at 4.) This contention effectively ignores the clause in the final sentence of above-quoted provision of PSA § 2.03 (a) (i), which conditions the seller's obligation to repurchase on the originator being "unable to cure . . . or repurchase . . . in accordance with the preceding sentence." (Emphasis supplied.) The preceding sentence requires the Trustee to enforce Ameriquest's obligation if it fails to cure within "such period," referring to the period "within 90 days from the date the Originator was notified of such . . . breach."

As the backstop provision expressly conditions DLJ's repurchase obligation on notice to both DLJ, as Seller, and Ameriquest, as Originator, it imposes conditions precedent to suit. (See e.g. ACE Series 2007-ASAP2, 2014 WL 4785503, at * 2-3 [this court's prior decision holding that repurchase demand was not a condition precedent, where Seller's own discovery of breaches was an independent trigger of its obligation to cure or repurchase under the repurchase protocol];

Nomura, 2014 WL 2890341, at * 15 [this court's prior decision distinguishing between repurchase protocols under which the obligation to cure is triggered by notice and those under which it is triggered by Seller's own discovery of breaches] [and authorities cited therein]; Wells Fargo Bank N.A. v Sovereign Bank, N.A., 2014 WL 4412397, * 7-8 [SD NY Sept. 8, 2014] [Buchwald, J.] [in commercial mortgage-backed securities case, distinguishing repurchase obligations that arise upon discovery or notice, and finding repurchase demand a condition precedent to suit based on materially similar PSA terms]; Bank of New York Mellon Trust Co., Natl. Assoc. v Morgan Stanley Mtge. Capital, Inc., 2013 WL 3146824, * 17 [SD NY June 19, 2013] [McMahon, J.] [same].)

The parties to the PSA were commercially sophisticated entities that knew how to establish a repurchase protocol that was not conditioned on notice from the Trustee, but under which the duty to repurchase was triggered either by the seller's discovery of breaches regarding the mortgage loans or by notice from the Trustee. They in fact did so in the MLPA repurchase protocol governing the Trustee's direct suit against Ameriquest.[7] They did not do so in the PSA backstop provision. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (Greenfield v Phillies Records, Inc., 98 NY2d 562, 569-570 [2002].)

The Trustee argues that notice to Ameriquest was not a condition precedent to Ameriquest's repurchase obligation because MLPA § 7.04 imposed an "independent obligation [upon Ameriquest] to . . . repurchase defective loans triggered by its own discovery of breaches."

[7] MLPA § 7.04 provides that Ameriquest shall cure or repurchase breaching mortgage loans "[w]ithin 90 days of the earlier of either discovery by or notice to the Company [Ameriquest] . . . ." As noted above (supra at 3), the terms of the MLPA apply to the Trustee's claim against Ameriquest brought under the RA. (See ACE Series 2007-ASAP2, 2014 WL 4785503, at * 4-5 [discussing authorities upholding a trustee's maintenance of RMBS breach of contract claims at the pleading stage, based on allegations as to the seller's discovery of breaches of representations and warranties].)

(P.'s Supp. Memo. In Opp. at 4.) The Trustee's apparent further contention that notice to Ameriquest was therefore not a condition precedent to suit against DLJ is without merit. Any independent obligation that Ameriquest may have does not excuse service of a repurchase demand on Ameriquest, precisely because PSA § 2.03 (a) (i) expressly conditions DLJ's backstop obligation on prior notice to Ameriquest.

As it is undisputed that the Trustee provided DLJ but not Ameriquest with a timely repurchase demand prior to the commencement of the action, the court holds that the Trustee failed to comply with a condition precedent to suit against DLJ, rendering the summons with notice defective. (See ACE, 112 AD3d at 523.) Contrary to the Trustee's contention, its failure to satisfy the condition precedent was not cured by its December 20, 2012 repurchase demand on Ameriquest, and the subsequent filing of an amended complaint after the cure period had passed. As discussed above (supra at 10), the relation-back doctrine based on CPLR 203 (f) is not available to correct the defect caused by commencement of the action prior to compliance with the condition precedent. (See Southern Wine & Spirits, 80 AD3d at 505-506.)

Finally, the court holds that the Trustee fails to plead allegations which, if proved, would be sufficient to support its claim that its failure to serve a timely repurchase demand on Ameriquest is excusable. The circumstances in which compliance with a condition precedent may be excused are generally analyzed under the doctrines of impossibility of performance or anticipatory breach.

Under the former, it has long been held that performance of a condition precedent may be excused where the party demanding compliance with the condition has caused its failure. (Kooleraire Serv. & Installation Corp. v Board of Educ. of City of New York, 28 NY2d 101, 106 [1971] ["[A] party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition"]; Amies v

Wesnofske, 255 NY 156, 163 [1931] ["[A] party cannot insist upon a condition precedent, when its non-performance has been caused by himself. It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it" (internal quotation marks and citations omitted)]; Walnut Place LLC v Countrywide Home Loans, Inc., 96 AD3d 684 [1st Dept 2012] ["The 'prevention/impossibility' doctrine . . . only applies, where . . . nonperformance of a condition precedent was caused by the party insisting that the condition be satisfied"].)

In the context of the doctrine of anticipatory breach or repudiation, "(o)nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent." (Allbrand Discount Liqs. v Times Sq. Stores Corp., 60 AD2d 568, 568 [2d Dept 1977], lv denied 44 NY2d 642 [1978].)[8] In explaining "anticipatory repudiation," the Court of Appeals has stated:

> "A repudiation can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.
>
> That switch in performance expectation and burden is readily available, applied and justified when a breaching party's words or deeds are unequivocal."

(Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, 462-463 [1998] [internal quotation marks and citations omitted]; accord Jacobs Private Equity, LLC v 450 Park LLC, 22 AD3d 347, 347 [1st Dept 2005], lv denied 6 NY3d 703 [2006] [holding that complaint failed to state a cause of action for "repudiation/anticipatory breach of contract because it

[8] The terms anticipatory breach and repudiation are sometimes used interchangeably. As this Department has explained, a contract may, for example, "come[] to an end . . . by declaration of an anticipatory breach as a result of its repudiation." (Rachmani Corp. v 9 E. 96th St. Apt. Corp., 211 AD2d 262, 267 [1st Dept 1995].)

contain[ed] no allegation of a definite and final communication by defendant . . . of its intention to forgo its obligations" under the contract].)

The doctrines are interrelated, as a repudiation of a contract can cause the failure of a condition precedent. (See RSB Bedford Assoc. LLC v Ricky's Williamsburg, Inc., 112 AD3d 526, 527 [1st Dept 2013] [holding that defendants could not claim that act by plaintiff – there, closing on purchase of building – was a condition precedent to plaintiff's recovery because defendants' "repudiation" of the agreement caused plaintiff's failure to close, and "a party causing the failure of a condition is not permitted [to] assert it as a defense"]; Restatement [Second] of Contracts § 255 ["Where a party's repudiation contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused"].)

The amended complaint alleges, upon information and belief, that "Ameriquest is no longer doing business and is unable to cure or repurchase Defective Loans in accordance with the PSA." (Am. Compl. ¶ 4.) The amended complaint further pleads both defendants' repudiation of their repurchase obligations, as follows: "Defendants' refusal to repurchase the Defective Loans in the Trust – in the face of clear evidence of breaches identified by the Trustee and presented to Ameriquest and DLJ – demonstrates that Defendants have repudiated their Repurchase Obligation." (Id. ¶ 62.)

In claiming an excuse for non-performance of the condition precedent based on futility, the Trustee focuses primarily on the asserted inability of Ameriquest to perform. To the extent that the Trustee also claims futility as a result of DLJ's failure to repurchase defective loans in response to its repurchase demand, that claim is without merit. In ACE, the trial court held that the plaintiffs' "failure to wait the requisite time to bring suit [i.e., to serve a timely repurchase demand before commencement of the action] is irrelevant given [the Sponsor's] repudiation of its repurchase obligations under the PSA." (40 Misc 3d at 568.) The Appellate Division held

that the plaintiffs' "failure to comply with a condition precedent to commencing suit rendered their summons with notice a nullity." (112 AD3d at 231.) Although the Appellate Division did not expressly address the Trustee's repudiation claim, it thus implicitly rejected it. The court must do so here as well. Moreover, ACE holds that the failure to comply with a repurchase demand is not an independent breach of contract. (Id.)

In arguing futility premised on Ameriquest's inability to perform, the Trustee relies on the allegation in the complaint that Ameriquest is no longer doing business and on its assertion in its brief, but not the complaint, that Ameriquest "undeniably was insolvent." It argues that "because Ameriquest undeniably was insolvent and no longer in business at the time the Trustee was notified of breaches, any demand on Ameriquest would have been futile." (P.'s Supp. Memo. In Opp. at 4.) The Trustee thus appears to base its claim on the dictionary definition of futility as "uselessness." (See Merriam-Webster Online Dictionary, http://merriam-webster.com/dictionary/futility.) This definition, however, does not meet the legal standard for futility which, as discussed above, requires satisfaction of the elements of impossibility of performance or of anticipatory breach or repudiation of contract.

The authorities cited by the Trustee are not to the contrary. Notwithstanding the extensive body of New York appellate law applying these doctrines, the Trustee cites three cases, only one appellate. They all, however, characterize performance of conditions precedent as "futile" in the context of applying the impossibility of performance or repudiation doctrines. (See Allbrand Discount Liqs., 60 AD2d at 568 [upholding trial court's finding that defendant-lessor "anticipatorily breached" lease when it would not allow plaintiff-lessee to take possession without renegotiation, and that lessee's failure to apply for a liquor license was "excusable" because "[o]nce it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent"]; 55 Eckford

Realty LLC v Bank of East Asia (U.S.A.) N.A., 2011 NY Slip Op 50904 [U], 2011 WL 1944205, * 10 [Sup Ct, Kings County] [holding that plaintiff-borrower's failure to obtain various insurance policies was excused by defendant-lender's own failure to complete due diligence and obtain necessary appraisal, the court reasoning that compliance with a condition precedent will be excused if "futile," and further stating: "Where, as here, a party to a contract has both repudiated the agreement and purported to terminate it, without justification, then the other party need no longer satisfy the conditions that might otherwise be required of it"] [internal quotation marks and citation omitted]; Irving Trust Co. v Nationwide Leisure Corp., 95 FRD 51, 74 [SD NY 1982] [citing Restatement (Second) of Contracts § 255 as support for statement that compliance with condition precedent may be excused if it would be a "gesture in futility"].)

In asserting that its failure to serve the repurchase demand on Ameriquest should be excused, the Trustee does not claim that defendants' asserted repudiation of contractual duties hindered or prevented it from complying with the notice requirement. Nor does the Trustee claim that Ameriquest made an unequivocal statement that it would not comply with its repurchase obligation. Significantly, although the Trustee bases its claim of futility on its assertions that Ameriquest has closed down and is insolvent, the Trustee has never sought to amend the complaint to plead Ameriquest's insolvency, and does not claim that Ameriquest has filed for bankruptcy.

Moreover, although evidence may be submitted in opposition to a motion to dismiss "to preserve inartfully pleaded, but potentially meritorious, claims" (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 635 [1976]), the evidence submitted by the Trustee fails to support a claim that Ameriquest undertook affirmative acts amounting to an unequivocal communication to the Trustee that Ameriquest would repudiate its repurchase obligation. More particularly, the Trustee submits a Reuters release and a newspaper article, both dated September 1, 2007, stating

that Ameriquest "is closing" and had made the decision to close all of its retail branches in May 2006; that Citigroup Inc. had agreed to purchase the assets of Ameriquest or its parent ACC Capital Holdings; and that ACC "is preparing the orderly wind down of its retail mortgage business." (Torres Aff. In Opp., Exs. 1, 2.)

Contrary to the Trustee's contention (P.'s Memo. In Opp. at 1 n 2), these news reports are not the proper subject of judicial notice. (See CPLR 4511.) Even if the reports are treated as evidence, they show, if anything, that Ameriquest had closed all of its retail branches well before the closing date of the securitization at issue on November 30, 2006. Having negotiated DLJ's backstop obligation against this background, including the requirement that it serve a repurchase demand on Ameriquest before proceeding against DLJ (see PSA § 2.03 [a] [i]), the Trustee cannot now be heard to claim that Ameriquest's closing rendered its failure to serve the demand on Ameriquest excusable. Further, the Trustee does not argue that it could not have achieved some recovery from Ameriquest during the winding down process referred to in the news reports. Finally, the Trustee argues that the futility of service of the demand is evidenced not only by the fact that Ameriquest "is no longer in business," but also "by its default in this action." (P.'s Second Supp. Memo. In Opp. at 7.) Ameriquest did, however, subsequently appear to oppose the Trustee's motion for entry of a default judgment and to seek leave to file a late answer, which has now been granted. (See supra at 2 n 2.)

Viewing the allegations of the complaint in the light most favorable to the Trustee, and considering the evidence submitted by it on this motion, the court holds that the Trustee fails as a matter of law to plead allegations which, if proved, would establish an excuse for its failure to comply with the condition precedent to suit against DLJ based on Ameriquest's inability to perform. The complaint will accordingly be dismissed without prejudice. For the reasons discussed above (supra at 9-11), the court finds that a bona fide issue exists as to whether the

Trustee is entitled to commence a new action under the savings clause, CPLR 205 (a). That issue should be decided on a fully developed record in the event such action is commenced.

The court further holds that an independent ground for dismissal of the second cause of action exists, to the extent that this cause of action seeks rescissory or consequential damages. The court adheres to its reasoning in prior decisions that the sole remedy provision limits plaintiff's remedies for breach of the representations and warranties to specific performance of the repurchase protocol or to damages consistent with its terms. (U.S. Bank Natl. Assn., solely in the capacity as Trustee of the J.P. Morgan Alternative Loan Trust 2007-A2 v Greenpoint Mtge. Funding, Inc., 2015 WL 915444, * 8 [Index No. 651954/13 Mar. 3, 2015]; Nomura, 2014 WL 2890341, at * 7-8, 10-11.) As leave to file a new complaint has been granted, the new complaint should seek damages consistent with this decision.

Accordingly, it is hereby ORDERED that the motion of defendant DLJ Mortgage Capital, Inc. (DLJ) to dismiss this action is granted to the extent that the Clerk is directed to enter judgment in favor of defendant DLJ dismissing this action without prejudice, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that all other claims are severed and shall continue.

Dated: New York, New York
March 24, 2015

MARCY FRIEDMAN, J.S.C.