| **Commerzbank AG London Branch v UBS AG** |
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| 2015 NY Slip Op 31051(U) |
| June 17, 2015 |
| Supreme Court, New York County |
| Docket Number: 654464/2013 |
| 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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COMMERZBANK AG LONDON BRANCH,

*Plaintiff,*

– against –

UBS AG, et al.,

*Defendants.*

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Index No.: 654464/2013

DECISION/ORDER

This fraud action arises out of the assignment to plaintiff Commerzbank AG London Branch (Commerzbank) of residential mortgage backed securities certificates (RMBS) that were purchased by four investment companies from defendants. Defendants, the securitizers and sellers of the RMBS, fall into 12 groups, each involving a different bank and its affiliates. By order dated December 10, 2014, the court granted leave to defendants to serve a joint general issues motion to dismiss the complaint. Defendants now move to dismiss, pursuant to CPLR 3211 (a) (5), on the ground that the complaint is barred in its entirety by the statute of limitations.

The first through third causes of action of the complaint are based on allegations, which are substantially similar to those generally pleaded in RMBS fraud actions, that defendants made fraudulent misrepresentations or omissions regarding the quality or characteristics of the mortgage loans underlying the securitizations, including representations or omissions as to compliance with underwriting standards, loan to value ratios, and owner occupancy rates. The fourth through seventh causes of action allege LIBOR-based fraud claims.

At the oral argument of the motion to dismiss on May 27, 2015, plaintiff requested leave

to withdraw certain allegations pertaining to its LIBOR claims. The parties subsequently agreed to plaintiff's service of an amended complaint clarifying the basis of the LIBOR-based causes of action, without prejudice to defendants' right to bring a general issues motion to dismiss the amended complaint. (Transcript of conference call, June 3, 2015.) The branch of the motion addressed to the LIBOR-based fraud claims is therefore deemed withdrawn without prejudice to renewal. The remainder of this decision is addressed to the loan quality fraud claims.

Commerzbank's assignors purchased $1.9 billion in RMBS, consisting of 222 certificates in 146 separate offerings, in the period between February 23, 2005 and July 27, 2007. (See Compl. Ex. 1, Defendants' Memo. In Support at 2.) This action was commenced by filing of a Summons With Notice on December 26, 2013. A Supplemental Summons With Notice, referring for the first time to the LIBOR claims, was filed against the Credit Suisse defendants on May 9, 2014. The Complaint was filed against all defendants on May 20, 2014.

CPLR 213 (8) provides that the time within which a fraud action must be commenced "shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it." Here, the fraud accrued at the time of the purchase of the certificates. As the latest purchase occurred more than six years prior to the commencement of the action, the action is barred under the accrual standard. As this court has repeatedly held in determining motions to dismiss RMBS actions based on the bar of the statute of limitations, the action therefore will not be timely unless it survives under the two-year discovery rule. (See e.g. IKB Intl. S.A. v Morgan Stanley, 2014 WL 5471650 [Index No. 653964/12, Oct. 28, 2014] [IKB/Morgan Stanley].)

In so holding, the court rejects plaintiff's claim that the causes of action accrued not at the time of purchase of the certificates but at the time the certificates began to sustain actual losses. Plaintiff correctly contends that "a tort cause of action cannot accrue until an injury is sustained,"

and that "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993].) Plaintiff, however, advances the further argument that the fraud causes of action at issue did not accrue until "loss causation began" – an event which, according to plaintiff, did not occur until the certificates began to sustain losses in 2008, "when the inadequate credit cushions protecting the Certificates from principal losses began to erode and their credit ratings collapsed to 'junk'." (P.'s Memo. In Opp. at 2-3.)

This argument is both novel and unpersuasive. It is unsupported by legal authority and, indeed, has not been raised in opposition to any of the numerous motions before this court to dismiss RMBS actions on statute of limitations grounds. Plaintiff fails to cite any case that holds that a fraud claim accrues at the time that post-investment losses are sustained. Appellate authority expressly holds, to the contrary, that the claim accrues on the date of purchase of the securities – i.e., the date the plaintiff "completed the act that the alleged fraudulent statements had induced." (Prichard v 164 Ludlow Corp., 49 AD3d 408, 408 [1st Dept 2008]; Carbon Capital Mgt., LLC v American Express Co., 88 AD3d 933, 939 [2d Dept 2011] [stating that a fraud cause of action cannot accrue until injury may be alleged, and finding that the cause of action accrued at the time of plaintiff's entry into a loan contract, "at which point his reliance on [defendant's] representations would have given rise to his alleged injuries."]. See also Continental Cas. Co. v PricewaterhouseCoopers, LLP, 15 NY3d 264, 271 [2010] [Under the general rule, "the actual loss sustained as a direct result of fraud that induces an investment is the 'difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain'"] [internal citation

omitted].)[1]

The court further holds that the fraud claims at issue are barred under the two-year discovery rule. It is undisputed that all of the certificates in question were downgraded by August 2009, and all but one were downgraded by that date to junk status. It is also undisputed that prior to December 26, 2011 (the date two years before commencement of the action), there was extensive publicly available information regarding the poor quality and performance of the loans underlying RMBS securitizations. This information included media reports dating back to 2007 and 2008; the filing of a report in January 2011 by the Financial Crisis Inquiry Commission; and the widespread filing of lawsuits alleging similar claims against various of the defendants and originators. Defendants assert, and plaintiff does not contest, that by December 2011, investors had commenced such lawsuits involving 105 of the 146 offerings at issue here. (Ds.' Memo. In Support at 4, App. 2.) These lawsuits included Commerzbank's own filing in February 2011 of an action against Morgan Stanley. (Ds.' Memo. In Support at 10, Ex. J [Compl. in Abu Dhabi Commercial Bank v Morgan Stanley & Co, 08 Civ 07508 [SD NY 2011].)

In determining motions to dismiss on statutes of limitations grounds in RMBS actions involving substantially similar pleadings, this court has repeatedly held that the plaintiffs could with reasonable diligence have discovered the fraud prior to 2011, based on the downgrades of various certificates and on substantially similar publicly available information. (See e.g. IKB/Morgan Stanley, 2014 WL 5471650, at * 4 [fraud discoverable prior to November 16, 2009]; Deutsche Zentral-Genossenschaftsbank AG, New York Branch v Morgan Stanley, Index No. 654035/2012, Decision on the Record, June 10, 2014 [fraud discoverable prior to November

[1] Nothing herein shall be construed as holding that "after-date-of-investment losses" are not recoverable in an action for damages based on fraud in the inducement. (See Continental Cas. Co. v PricewaterhouseCoopers, LLP, 15 NY3d at 272 [Read, J., dissenting].)

21, 2010]; Deutsche Zentral-Genossenschaftsbank AG v Credit Suisse, Index No., 650967/2013, Decision on the Record, May 1, 2014 [fraud discoverable prior to January 19, 2010]; see also HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289 [Mar. 3, 2014] [citing authorities granting motions to dismiss RMBS cases on statute of limitations grounds based on evidence of noncompliance with underwriting standards by key originators and decline in value of certificates].)

In claiming that the action is timely under the two year discovery rule, plaintiff asserts that it was unable to discover the fraud with respect to the particular certificates at issue until it performed its own forensic loan level analysis in 2012. (P.'s Memo. In Opp. at 24.) As plaintiff acknowledges, however (id. at 25), forensic loan level analysis was available in 2010 and 2011. Plaintiff simply misapprehends New York law in arguing that it had no "duty of inquiry" under the discovery rule, and that the two-year period to commence the action ran only from the time plaintiff actually "possessed" information from which an inference of the fraud could be drawn. (Id. at 22-23.) It is well settled that the courts apply an inquiry notice standard in determining whether a fraud could have been discovered with reasonable diligence under CPLR 213 (8). As the Appellate Division has explained: "'[W]here the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him.'" (Gutkin v Siegal, 85 AD3d 687, 687 [1st Dept 2011], quoting Higgins v Crouse, 147 NY 411, 416 [1895]; accord CIFG Assur. N. Am., Inc. v Credit Suisse Secs. (USA) LLC, 128 AD3d 607 [1st Dept 2015].)

Here, a duty of inquiry was unquestionably triggered long prior to December 2011, by the downgrades of the certificates and the publicly available information as to the litigations against

the various defendants and originators based on the alleged defectiveness of the loans underlying the securitizations.

In view of this holding, the court need not reach defendants' argument that the German statute of limitations is a bar to the loan quality claims involving the certificates assigned to plaintiff by Eurohypo AG New York Branch. (Ds' Memo. In Support at 19 n19.)

It is accordingly hereby ORDERED that the first, second and third causes of action of the complaint are dismissed with prejudice; and it is further

ORDERED that the branch of the motion to dismiss the fourth through seventh causes of action is deemed withdrawn without prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
June 17, 2015

MARCY FRIEDMAN, J.S.C.