

**Financial Guaranty Ins. Co. v Credit Suisse Sec.
(USA) LLC**

2015 NY Slip Op 31451(U)

August 3, 2015

Supreme Court, New York County

Docket Number: 651178/2013

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.

_____ x
FINANCIAL GUARANTY INSURANCE
COMPANY,

Plaintiff,

– against –

Index No.: 651178/2013

DECISION/ORDER

CREDIT SUISSE SECURITIES (USA) LLC
and DLJ MORTGAGE CAPITAL, INC.,

Defendants.

_____ x

This is an action for fraud and breach of contract brought by Financial Guaranty Insurance Company (FGIC), a monoline insurer that issued a financial guaranty insurance policy guaranteeing certain payments on two classes of residential mortgage-backed securities (RMBS). Defendant DLJ Mortgage Capital, Inc. (DLJ) was the sponsor of the securitization, and Credit Suisse Securities (USA) LLC (CS Securities) was allegedly the lead underwriter. Defendants (collectively Credit Suisse) move to dismiss various claims in the complaint, pursuant to CPLR 3211 (a) (1), (3), (5), (7), and (8).¹

The complaint pleads five causes of action. The first, against both defendants,² alleges that Credit Suisse fraudulently induced FGIC to issue the policy by making materially false statements and concealing material facts regarding Credit Suisse’s business practices and the loans underlying the securitization. (Compl. ¶ 150.) The remaining causes of action are pleaded only against DLJ. The second alleges that DLJ breached “Transaction Warranties and Loan

¹ Although Credit Suisse cites CPLR 3211 (a) (3) and (8), it does not seek dismissal for lack of standing or lack of jurisdiction.

² The complaint defines Credit Suisse as both DLJ and CS Securities. (Compl. Opening Paragraph.)

Warranties.” (Id. 160.) The third alleges that DLJ breached the operative agreements by refusing to cure or repurchase underlying loans (i.e., Group 2 Loans) that breached Loan Warranties or were “infected by fraud at the time of origination. . . .” (Id. ¶ 165.) The fourth alleges that DLJ’s “willful and pervasive breaches of the Transaction Warranties and Loan Warranties” and repudiation of repurchase protocols constitute a “material breach of the Insurance Agreement.” (Id. ¶¶ 169-170.) The fifth alleges that DLJ breached provisions of the insurance agreement requiring it to reimburse FGIC for payments made under the policy as a result of DLJ’s failure to comply with its repurchase obligations. This cause of action also seeks attorney’s fees. (Id. ¶ 173-174.)

The parties agree that the breach of contract claims are governed by two agreements. The first is a “Loan Purchase Agreement” (LPA), dated April 28, 2006, under which DLJ as sponsor sold the loans to an affiliated purchaser (depositor). The indenture trustee and the trust that was to issue the securities were also parties to the Agreement. FGIC was not a party but was named as “an express third-party beneficiary,” with the right to enforce the Agreement. (LPA § 9.) The second is an “Insurance and Indemnity Agreement” (Insurance Agreement), dated as of April 28, 2006, to which FGIC, DLJ, the depositor, the issuing trust, the indenture trustee, and the servicer were parties. This Agreement afforded FGIC certain additional rights and remedies which are discussed further below.³

Statute of Limitations and Particularity of Pleading⁴

³ The parties do not claim that the terms of either the trust indenture or the policy, or of any agreements other than the LPA and Insurance Agreement, are relevant to the resolution of the issues on this motion.

⁴ This motion raises a number of issues that have been decided in the context of the RMBS Litigation by New York appellate Courts and by this court in prior decisions. Issues that have previously been decided on substantially similar pleadings and governing agreements will not be discussed at length here.

As a threshold matter, the court rejects defendants' contention that the statute of limitations bars the breach of contract claims alleging breaches of representations and warranties about the underlying mortgage loans. In ACE Securities Corp. v DB Structured Products, Inc. (2015 WL 3616244, *2 [June 11, 2015] [ACE], affg 112 AD3d 522 [1st Dept 2013]), the Court of Appeals recently affirmed that a cause of action for breaches of representations and warranties accrues at the time of execution of the agreement in which the representations and warranties were made (there, a Pooling and Servicing Agreement). The Court also held that a sponsor's refusal to repurchase allegedly defective mortgage loans pursuant to a contractual repurchase protocol does not give rise to a separate cause of action for breach of contract. (Id.) Rather, "[t]he cure or repurchase obligation is an alternative remedy, or recourse" for breaches of representations and warranties concerning the quality of mortgage loans. (Id. at *7.)⁵ As the Court further held, the sponsor's failure to cure or repurchase "was not a substantive condition precedent that deferred accrual" of the claim (there, the Trust's claim). (Id. at *9.)

Here, the representations and warranties regarding the underlying mortgage loans were made on April 28, 2006, the date of execution of the LPA and Insurance Agreement. As defendants acknowledge, the parties entered into a tolling agreement prior to the six-year anniversary of the execution date, and this action was brought on April 2, 2013, one day prior to the expiration of the tolling period. (Defs.' Memo. In Supp. at 10.)

In arguing that the statute of limitations is a bar to this action, defendants rely on FGIC's failure to serve a timely repurchase demand prior to the commencement of the action for all but a small number of the loans underlying the securitization. (Id. at 11.) This contention is

⁵ In describing the repurchase obligation as an "alternative remedy," the Court explained that this remedy is alternative to an action against the sponsor for breach of the representations and warranties. (2015 WL 3616244, at *7.)

unpersuasive. The repurchase protocol set forth in LPA § 2 (d) requires the sponsor to cure or repurchase “[u]pon discovery by Sponsor or upon notice from Purchaser, the Issuer, a Servicer, the Owner Trustee, the Indenture Trustee, the Insurer or any Custodian . . . of a breach of any representation or warranty set forth in Exhibit B . . . pursuant to Section 2(b) [of the LPA] with respect to any Loan that materially and adversely affects the interests of the Securityholders, the Insurer or of Purchaser in such Loan” Exhibit B and Section 2 (b) set forth representations and warranties regarding the characteristics and quality of individual loans.

As this court has previously held in cases involving substantially similar governing agreements, service of a repurchase demand is not a condition precedent to maintenance of the action, where the sponsor’s repurchase obligation under the agreement is triggered either by a repurchase demand or, as here, by the sponsor’s own discovery of breaches of representations and warranties regarding the mortgage loans. (See e.g. U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 2015 WL 298642, *1 [Sup Ct, NY County Jan. 16, 2015]; ACE Secs. Corp., Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503, *2-3 [Sup Ct, NY County Aug. 28, 2014] [ACE Series 2007-ASAP2]; Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., 2014 WL 2890341, *15 [Sup Ct, NY County June 26, 2014] [Nomura].)

The complaint in this action alleges Credit Suisse’s discovery of pervasive breaches regarding the loans (see Compl. ¶ 20), based on Credit Suisse’s due diligence in acquiring the loans, including its own re-underwriting of the loans it purchased (id. ¶ 58-61); its “quality-control operations” (id. ¶ 68); and the due diligence of its third-party provider, Clayton Holdings, LLC (id. ¶ 56). Although the complaint does not specifically identify each of the allegedly breaching loans, the complaint also alleges that widespread or pervasive breaches were

confirmed by FGIC's loan-level analysis. (Compl. ¶¶ 109-124.) On the reasoning of and authorities cited in its prior decisions, the court holds that these allegations are sufficient to support a reasonable inference that Credit Suisse discovered widespread breaches, and thus to support FGIC's breach of contract claim at the pleading stage. (ACE Series 2007-ASAP2, 2014 WL 4785503, at *5-6; Nomura, 2014 WL 2890341, at *17.) FGIC will, of course, bear the ultimate burden of proving whether and to what extent Credit Suisse discovered the breaches.

The court will accordingly deny the branch of the motion to dismiss the breach of contract claims based on the statute of limitations or for failure to plead breaches of representations and warranties with sufficient particularity.

Repurchase Protocols

The third cause of action alleges that DLJ breached the repurchase protocol set forth in LPA § 2 (d), which FGIC denominates the "General Repurchase Protocol." This cause of action also alleges that DLJ breached a repurchase protocol set forth in Insurance Agreement § 2.02 (p), which FGIC denominates the "Fraud Repurchase Protocol." (Compl. ¶¶ 95-98; 165.) Defendants argue that § 2.02 (p) does not establish an independent repurchase protocol, and that a breach of contract cause of action is not maintainable based on breaches of either of the asserted repurchase protocols, as opposed to breaches of representations and warranties regarding the underlying mortgage loans. (Defs.' Memo. In Supp. at 13-14; Defs.' Reply at 5-7.)

The court rejects FIGC's contention that the Insurance Agreement establishes a repurchase protocol separate from the LPA § 2 (d) repurchase protocol, and "creates an ongoing contractual obligation of Credit Suisse that is triggered whenever it is 'determined' that fraud was committed in connection with the origination of a loan." (Pl.'s Memo. In Opp. at 6-7, 17-18.) Insurance Agreement § 2.02 (p) provides in pertinent part: "For so long as the Policy is in

effect, in the event that it is determined that fraud was committed in the origination of any Group 2 Loan, the Sponsor shall be deemed to have breached one or more of the mortgage loan representations and warranties referred to in Section 2(b) of the [LPA] [i.e., the Loan Warranties], and the Sponsor shall be obligated to repurchase such Group 2 Loan”

Insurance Agreement § 2.02 (p) specifically refers to breaches of representations and warranties regarding the loans, which are set forth in LPA § 2 (b) and for which LPA § 2 (d) provides a remedy in the form of the repurchase protocol. By specifying that fraud in the origination of Group 2 Loans “shall be deemed” to breach the LPA § 2 (b) representations and warranties and that the sponsor shall be obligated to repurchase such breaching Group 2 Loans, Insurance Agreement § 2.02 (p) clarifies the circumstances under which the LPA § 2 (d) repurchase protocol is available. Indeed, FGIC itself pleads in the complaint that where there is fraud in the origination of a loan, § 2.02 (p) eliminates the requirement of LPA § 2 (d) that FGIC prove, as a condition of repurchase, that its interests in the loan were materially and adversely affected. (See Compl. ¶ 98.) Section 2.02 (p) therefore does not establish an independent repurchase protocol.

Even if the provision were construed as a separate repurchase protocol, it, like the LPA § 2 (d) repurchase protocol, is a “remedy” for breaches that is “dependent on, and indeed derivative of, [the sponsor’s] representations and warranties, which did not survive the closing and were breached, if at all, on that date.” (ACE, 2015 WL 3616244, at *7.)

Finally, the court is unpersuaded by FGIC’s contention that Insurance Agreement § 2.02 (p) imposes an obligation on DLJ to repurchase loans “[f]or so long as the Policy is in effect.” (Pl.’s Memo. In Opp. at 17-18.) This argument reads out the language of § 2.02 (p) contemplating repurchase of loans as to which representations and warranties have been

breached – i.e., the language that the sponsor will be deemed to have breached representations and warranties where there is fraud in the origination of the loans, and that the sponsor shall repurchase “such” loans. Put another way, like the repurchase obligation at issue in ACE, § 2.02 (p) does not establish a separate repurchase obligation for the life of the policy, “breach of which does not arise until some future date.” It cannot reasonably be viewed “as a distinct promise of future performance,” precisely because “[i]t [is] dependent on, and indeed derivative of, [the sponsor’s] representations and warranties, which did not survive the closing and were breached, if at all, on that date.” (ACE, 2015 WL 3616244, at *6-7.)

Sole Remedy

The LPA § 2 (d) repurchase protocol includes a sole remedy provision (paragraph 5) that does not list FGIC as Insurer among the parties that are bound by that provision. The sole remedy provision states: “It is understood and agreed that the obligation of Sponsor to cure any breach, or to repurchase or substitute for, any Loan as to which such a breach has occurred and is continuing shall constitute the sole remedy respecting such breach available to Purchaser, the related Servicer, the Issuer, the Certificateholders (or the Owner Trustee on behalf of the Certificateholders) and the Noteholders (or the Indenture Trustee on behalf of the Noteholders) against Sponsor.”

The Appellate Division of this Department has held that an insurer’s remedies are not limited by the sole remedy provision set forth in a repurchase protocol in a transaction agreement (i.e., pooling and servicing agreement [PSA] or mortgage loan purchase agreement [MLPA]), where the agreement governs the insurer’s remedies against an RMBS sponsor for breaches of representations and warranties, but the insurer is not listed among the parties bound by the sole remedy provision. (Assured Guar. Mun. Corp. v DLJ Mtge. Capital, Inc., 117 AD3d 450, 450-

451 [1st Dept 2014] [holding that failure to include the certificate insurer “among those governed by the contract provision can only be construed as an intentional exclusion of that party from its application”]; accord Ambac Assur. Corp. v EMC Mtge. LLC, 121 AD3d 514, 519 [1st Dept 2014].) In these cases, the insurer was not also a party to an insurance agreement that provided additional remedies to the insurer. In the instant action, where a separate Insurance Agreement does exist, the potentially applicable provisions of the Insurance Agreement must also be considered in order to determine the scope of FGIC’s remedies for breaches of representations and warranties regarding the mortgage loans. (See generally Brax Capital Group, LLC v WinWin Gaming, Inc., 83 AD3d 591, 592 [1st Dept 2011] [under settled precepts of contract interpretation, contemporaneous documents governing the same transaction should be read together]; Gulf Ins. Co. v Transatlantic Reins. Co., 69 AD3d 71, 81 [1st Dept 2009] [same].)

The relevant provisions of the Insurance Agreement, like the LPA, evidence the intent to exclude FGIC from the LPA § 2 (d) sole remedy provision. Insurance Agreement § 2.01 (n) expressly incorporates the sponsor’s representations in the LPA regarding the mortgage loans. By its terms, however, the Insurance Agreement does not incorporate the LPA sole remedy provision, and does not include a separate sole remedy provision.

With an important exception for loan-level breaches of representations and warranties (discussed infra at 11-13), the Insurance Agreement also affords FGIC broad enforcement rights to bring any available action at law or in equity to collect amounts due upon the occurrence of defined Events of Default. Under § 5.02 (a) these rights include, but are not limited to, the right to “exercise any rights and remedies under the Loan Purchase Agreement,” which would, in turn, include the right to repurchase (§ 5.02 [a] [v]). Section 5.02 (a) (vi) expressly provides that upon the occurrence of an Event of Default, the Insurer may “take whatever action at law or in equity

as may appear necessary or desirable in its judgment to collect the amounts, if any, then due under this Insurance Agreement or any other Operative Document or to enforce performance and observance of any obligation, agreement or covenant of the Sponsor, the Depositor or the Issuing Entity under this Insurance Agreement or any other Operative Documents.” Section 5.02 (b) of the Insurance Agreement confirms that the insurer’s rights under the Agreement are not exclusive, stating: “Unless otherwise expressly provided, no remedy herein conferred or reserved is intended to be exclusive of any other available remedy, but each remedy shall be cumulative and shall be in addition to other remedies given under this Insurance Agreement, the Indenture, any other Operative Document or existing at law or in equity.”

The LPA § 2 (d) sole remedy provision thus excludes FGIC from the list of bound parties, and the Insurance Agreement consistently provides FGIC with broad cumulative remedies for Events of Default, without referencing the sole remedy provision. The above provisions of the LPA and Insurance Agreement, read together, support the conclusion that FGIC’s remedies are not limited to the repurchase protocol. (See Syncora Guar. Inc. v EMC Mtge. Corp., 2011 WL 1135007, *5-6 [SD NY Mar. 25, 2011] [Crotty, J.] [Syncora/EMC] [holding that monoline insurer of RMBS securitization was not limited to MLPA sole remedy provision, where that provision did not list insurer among the parties bound by it, and where insurance agreement provided broad remedies at law and equity for defined Events of Default]; Assured Guar. Corp. v EMC Mtge., LLC, 2013 WL 1442177, *4 [Sup Ct, NY County Apr. 4, 2013] [Ramos, J.] [Assured Guar./EMC] [holding that insurer was bound by MLPA sole remedy provision, and distinguishing Syncora on ground that MLPA named insurer in list of parties subject to that provision, and insurance agreement “specifically provide[d] that [insurer’s] remedies in the event of a breach of a Loan Warranty [were] ‘limited’ to the remedy (i.e. the

Repurchase Protocol) of the MLPA”]; see also MBIA Ins. Corp. v Countrywide Home Loans, Inc., 2013 WL 1845588, *8-10 [Sup Ct, NY County Apr. 29, 2013] [Bransten, J.]

Significantly, the Insurance Agreement not only provides broad remedies for defined Events of Default, but also contains a provision which, consistent with FGIC’s exclusion from the LPA § 2 (d) sole remedy provision, specifically provides FGIC with an additional remedy for payments made under the policy in connection with mortgage loans as to which the sponsor breached representations or warranties. Section § 3.03 (b) of the Insurance Agreement provides: “Anything herein or in any Operative Document to the contrary notwithstanding, the Insurer shall be entitled to full reimbursement from the Sponsor for (i) any payment made under the Policy arising as a result of the Sponsor’s failure to substitute for or deposit an amount in respect of any defective Mortgage Loan as required pursuant to Section 2(d) of the Loan Purchase Agreement, together with interest. . . .” Credit Suisse does not dispute that this provision affords FGIC a remedy separate from that set forth in the sole remedy provision, and does not move to dismiss FGIC’s claim in the fifth cause of action for breach of Insurance Agreement § 3.03 (b).

The court accordingly holds that FGIC’s remedies are not limited to the LPA § 2 (d) repurchase protocol. The court, however, rejects FGIC’s further contention that its remedies for breaches of loan-level representations and warranties are unlimited, and that it may pursue any action available at law or in equity for such breaches.

In claiming that it has an independent cause of action for breach of the LPA § 2 (d) repurchase protocol, FGIC asserts that the repurchase protocol is a “covenant” that has been incorporated in the Insurance Agreement, and that the Insurance Agreement defines a material breach of a covenant as an Event of Default. More particularly, FGIC relies on Insurance Agreement § 5.01 (d), which defines as an Event of Default “[a]ny failure on the part of the

Sponsor [or other named entities] duly to observe or perform in any material respect any other of the covenants or agreements on the part of the Sponsor [or other named entities] contained in this Insurance Agreement which continues unremedied” for 30 days after the date notice of such failure has been given to the sponsor. FGIC then claims that the repurchase protocol was incorporated by Insurance Agreement § 2.02 (l), which provides that the Sponsor “agrees that the Insurer shall have all rights provided to the Insurer in the Operative Documents” (here, the LPA); that the Insurer “shall constitute a third-party beneficiary” with respect to the rights in the Operative Documents; and that the sponsor “hereby incorporates and restates its representations, warranties and covenants as set forth therein for the benefit of the Insurer.” (Pl.’s Memo. In Opp. at 13-15.)

In response, Credit Suisse relies on Insurance Agreement § 5.01 (a), which specifically excludes breaches of loan-level representations and warranties from Events of Default for which FGIC may bring any action available at law or in equity. This section defines an Event of Default as: “Any representation or warranty made by the Sponsor (other than representations and warranties relating to the individual Mortgage Loans) . . . hereunder or under the Operative Documents, [which] shall prove to be untrue or incorrect in any respect which is material to the rights and interests of the Insurer” Credit Suisse contends that even if the repurchase protocol is a covenant, § 5.01 (d) cannot avoid the specific exclusion of loan-level breaches of representations and warranties from the Events of Default by treating the failure to repurchase the affected loans as a breach of “any other of the covenants.” (Defs.’ Reply Memo. at 5-7.)

FGIC’s argument is unpersuasive. As discussed above, the Court of Appeals’ recent decision in ACE leaves no doubt that a repurchase protocol, in an RMBS loan transaction document similar to LPA § 2 (d), is a “remedy” for the sponsor’s breaches of representations and

warranties regarding the underlying mortgage loans. The Court thus rejected the Trustee's contention that "the repurchase obligation [was] a distinct and continuing obligation that [the Sponsor] breached each time it refused to cure or repurchase a non-conforming loan." (2015 WL 3616244, at *6.)

ACE did not consider whether the parties to a separate agreement insuring the RMBS securitization consented to treat the repurchase protocol as a distinct obligation that is actionable if breached. The Court's holding strongly suggests, however, that a repurchase protocol in a loan transaction agreement is not an independent promise or "covenant" that can have been incorporated in an insurance agreement by a provision like § 2.02 (l) under which the sponsor incorporates "covenants" from the loan transaction agreement.

Even assuming that the LPA § 2 (d) repurchase protocol is a covenant that is incorporated in the Insurance Agreement, the Insurance Agreement otherwise restricts FGIC's remedies in a manner that is inconsistent with recognition of breach of the repurchase protocol as an Event of Default. The repurchase protocol requires repurchase of loans as to which the sponsor has materially breached representations or warranties. As discussed above, Insurance Agreement § 5.01 (a) expressly excludes breaches of "representations and warranties relating to the individual Mortgage Loans" from the definition of Event of Default for which the Insurer may bring any action at law or in equity. To hold that FGIC may maintain an action for damages for breach of the repurchase protocol under § 5.01 (d), as a breach of "any other of the covenants," would render meaningless the exclusion from § 5.01 (a) of breaches of representations and warranties relating to individual mortgage loans. Such a reading would violate the principle that in interpreting a contract, the court must consider "the reasonable expectation of the parties" and "must interpret a contract so as to give meaning to all its terms." (Greater New York Mut. Ins.

Co. v Mutual Marine Off., Inc., 3 AD3d 44 [1st Dept 2003] [internal quotation marks and citation omitted]; accord Bruckmann, Rosser, Sherrill & Co., L.P. v Marsh USA, Inc., 87 AD3d 65, 71 [1st Dept 2011] [internal quotation marks and citation omitted].)

In providing for FGIC's right to bring any available action at law or in equity for Events of Default, the Insurance Agreement evidences the parties' intent to afford FGIC broader rights than its rights to invoke the repurchase protocol as a third-party beneficiary under the LPA. This is not, however, a case in which the Insurance Agreement contains "no indication that the parties intended to limit [the Insurer's] rights or remedies in any way." (Compare Syncora/EMC, 2011 WL 1135007, at *5 [SD NY]; AMBAC Assur. Corp. v First Franklin Fin. Corp., 2013 WL 3779636, *10 [Sup Ct, NY County July 18, 2013] [Schweitzer, J.] [Ambac/First Franklin].)⁶ On the contrary, such an indication is manifested in the Insurance Agreement by the carve-out from § 5.01 (a) of loan-level breaches of representations and warranties.

In sum, the court holds that FGIC's remedy for breaches of representations and

⁶ In Syncora/EMC, the MLPA, like the LPA here, contained a provision specifying that the repurchase protocol was the sole remedy for breaches of loan-level representations and warranties, but did not include the insurer among the parties bound by the sole remedy provision. The insurance agreement, like that here, contained a provision authorizing the insurer to bring any action at law or in equity to collect amounts due, upon the occurrence of an Event of Default. The Court held that the insurer's remedy was not limited to the repurchase protocol. Syncora/EMC is distinguishable, as it does not appear from the opinion that breaches of loan-level representations and warranties were excluded, as they are here, from the definition of Event of Default.

In Ambac/First Franklin, the insurance agreement authorized the insurer to bring any available legal or equitable action upon an Event of Default. The insurer argued that an action for breach of the repurchase protocol in the mortgage loan purchase agreement was permissible under a § 5.01 (b), which was virtually identical to that here and defined Event of Default as failure of the sponsor "to pay when due any amount payable by the Sponsor . . . hereunder. . . ." (2013 WL 3779636, at *9.) The court held that § 5.01 (b) encompassed breach of the repurchase protocol. There is no indication in the opinion that breaches of loan-level representations and warranties were excluded from the definition of Event of Default.

FGIC does not rely on § 5.01 (b) in arguing that its remedies include an action for breach of the repurchase protocol. In this court's opinion, however, §§ 5.01 (b) and 5.01 (d) are similarly ineffective to authorize such an action, as a contrary reading of these sections would render meaningless the § 5.01 (a) exclusion for breaches of loan-level representations and warranties. In addition, other provisions of the Insurance Agreement expressly impose obligations on the sponsor to pay amounts due to the Insurer. (See e.g. §§ 3.03 (a) and (b) [providing for reimbursement by the Sponsor to the Insurer of amounts paid by the Insurer under the policy].) Section 5.01 (b), read with such provisions, affords FGIC a remedy for breach of these other obligations.

warranties regarding mortgage loans is not limited by the LPA § 2 (d) sole remedy provision to the repurchase protocol set forth in that section. It also includes the reimbursement remedy provided in Insurance Law § 3.03 (b), but does not include unlimited legal and equitable remedies provided for Events of Default by Insurance Agreement § 5.02 (a) (vi). For the reasons stated and on the authorities cited in its prior decisions in RMBS breach of contract cases involving similar repurchase protocols, the court further holds that the LPA § 2 (d) repurchase protocol provides damages remedies consistent with its terms where repurchase is not available. (See e.g. Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2015 WL 4038760, *6 [Sup Ct, NY County July 1, 2015]; Nomura, 2014 WL 2890341, at *7-8.)

Transaction Warranties

FGIC claims that it is entitled to relief under Insurance Agreement § 5.02 (a) (vi) based on breaches of Transaction Warranties as opposed to Loan Warranties – i.e., representations and warranties regarding individual mortgage loans. The Transaction Warranties on which FGIC relies are set forth in Insurance Agreement §§ 2.01 (g), (j) and (k) and relate to financial statements, accuracy of information, and compliance with securities laws, respectively. (See Compl. ¶ 89.)⁷

⁷ Section 2.01 of the Insurance Agreement includes the following Transaction Warranties, among others:

“(g) Financial Statements. The Financial Statements of the Sponsor, copies of which have been furnished to the Insurer, (i) are, as of the dates and for the periods referred to therein, complete and correct in all material respects, (ii) present fairly the financial condition and results of operations of the Sponsor as of the dates and for the periods indicated and (iii) have been prepared in accordance with generally accepted accounting principles Neither the Sponsor nor the Depositor is subject to any contingent liabilities or commitments that individually or in the aggregate, have a material possibility of causing a Material Adverse Change in respect of the Sponsor or the Depositor.”

“(j) Accuracy of Information. Neither the Operative Documents . . . nor other material information relating to the Mortgage Loans or the operations of the Sponsor . . . furnished to the Insurer in writing or in electronic form by the Sponsor or the Depositor in connection with the Transaction, including, without limitation, the electronic tape containing statistical data with respect to the Mortgage Loans . . . contains any statement of a material fact which was untrue or misleading in any material respect when made. . . .”

The warranty regarding accuracy of information provides that none of the operative documents or other material information furnished to FGIC “relating to the Mortgage Loans or the operations of the Sponsor . . . contains any statement of a material fact which was untrue or misleading in any material respect when made.” In claiming a breach of this warranty, FGIC contends that Credit Suisse misrepresented “the nature of its mortgage-loan operations to FGIC (e.g., its due-diligence, quality-control, and loan-repurchase policies and procedures.” (Pl.’s Memo. In Opp. at 18 [emphasis supplied].) FGIC pleads that “while representing to [FGIC and others] that it was engaged in a securitization business built upon sound business policies and practices, Credit Suisse systematically departed from such policies and practices, thereby inflating its own profits on the basis of fraudulent securitizations and the concealment of an avalanche of defective loans.” (Compl. ¶ 40.) The more specific allegations of the complaint that FGIC cites in support of this claim include Credit Suisse’s alleged re-underwriting in order to confirm the accuracy of valuations of the properties (Compl. ¶¶ 58-61); Credit Suisse’s misrepresentations as to the guidelines used in originating the loans, including its representation that Group 2 Loans were generally written according to Credit Suisse’s underwriting guidelines and not merely according to the originators’ guidelines (*id.* ¶ 62-66); and Credit Suisse’s misrepresentations as to monitoring of the loans for compliance with warranties. (*Id.* ¶¶ 68-72.)

These allegations do not provide a basis for a distinct, transaction-level claim. The allegations address Credit Suisse’s underwriting practices and the accuracy of its representations

“(k) Compliance With Securities Laws. The offer and sale of the Securities complies in all material respects with all requirements of law, including all registration requirements of applicable securities laws. Without limiting the foregoing, the Offering Document (excluding Underwriter Information and the Insurer Information) does not contain any untrue statement of a material fact and does not omit to state a material fact necessary to make the statements made therein, in light of the circumstances under which they were made, not misleading The offer and sale of the Securities has not been and will not be in violation of the Securities Act or any other federal or state securities laws.”

as to the quality and characteristics of the individual mortgage loans. FGIC's characterization of the allegations as relating to its "operations," or as establishing a systematic departure from sound business practices, cannot transform what are loan-level allegations into transactional allegations or serve to circumvent restrictions on remedies available under the Insurance Agreement for breaches of representations and warranties as to individual loans. This Department rejected a virtually identical claim in Ambac Assurance Corp. v EMC Mortgage LLC (121 AD3d 514 [1st Dept 2014] [Ambac/EMC], affg 2013 WL 2919062 [Sup Ct, NY County June 13, 2013 [Ramos, J.]]. There, the monoline insurer argued that the repurchase protocol, which was the sole remedy for breaches of representations regarding individual loans, was inapplicable to a transaction-level warranty that the offering materials describing the mortgage loans as a whole "did not include untrue statements of material fact." (Id. at 515.) The Court reasoned that this asserted transaction-level warranty "largely relate[d] to, and overlap[ped] with" the loan-level warranties. (Id. at 518 [internal quotation marks omitted]; see also Assured Guar./EMC, 2013 WL 1442177, at *5 [earlier holding, also by Ramos, J., that purported transaction warranties "largely relate[d] to, and overlap[ped] with, the Loan Warranties" that were specifically made subject to the repurchase protocol]; but see AMBAC/First Franklin, 2013 WL 3779636, at *12 [holding, prior to the Appellate Division decision in Ambac/EMC (cited directly above), that allegations that the originator abandoned underwriting guidelines and ceased operating its business in a prudent fashion were sufficient to plead breach of a transaction warranty that operative documents contained no untrue statement, and did not "relate to the loan pool, but, rather, the business operations plan used by [originator] in assembling many loan pools"].)⁸

⁸ In Nomura (2014 WL 2890341, at *11), an RMBS breach of contract case, the MLPA included a repurchase protocol with a sole remedy provision that was applicable to alleged breaches of representations about mortgage

FGIC also fails to state a claim for breach of a transaction warranty based on its allegations as to the inaccuracy of Credit Suisse's representations as to its financial information. Although the complaint pleads that Credit Suisse's 2006 financial statement over-reported gains and was therefore misleading (Compl. ¶ 39), the Insurance Agreement contains representations only about the accuracy of financial statements as of December 31, 2005. (See Insurance Agreement §§ 2.01 [g]; 1.01 [Definition of Financial Statements].) Nor can FGIC state a claim for breach of the transaction warranty as to financial information based on the speculative, conclusory allegation that Credit Suisse failed to report to securitization participants "contingent liability" as a result of its abandonment of sound securitization practices. (See Compl. ¶ 39.)

FGIC's final claim is that Credit Suisse breached a transaction warranty based on its untrue statements in the offering documents as to compliance with the securities laws. As FGIC acknowledges, the allegations in support of this claim involve alleged misrepresentations as to loan characteristics. (See Pl.'s Memo. In Opp. at 19.) These allegations therefore also relate to and overlap with the loan-level representations.

Plaintiff's breach of contract causes of action will therefore be dismissed to the extent that they are based on Transaction Warranties.

Claims Based on Appraisals

Defendants move to dismiss the fraud claim only to the extent that it alleges misrepresentations as to loan to value ratios based on inaccurate appraisals, which defendants contend are inactionable statements of opinion. They also seek dismissal of the breach of

loans, as well as a provision stating that it did not contain any untrue statement of material fact. The remedies for breach of the latter provision were not limited to the repurchase protocol. The trustee argued that alleged pervasive breaches of the representations regarding the mortgage loans violated the no untrue statement provision. This court rejected this claim, holding that the trustee could not be permitted to circumvent the sole remedy provision by recasting the alleged breaches of loan-level representations as breaches of the no untrue statement provision.

contract cause of action to the extent that it is based on the appraisal allegations. This court has previously held that such representations are actionable where, as here, the complaint alleges that Automated Valuation Models have shown that sampled loans had a value materially lower than the appraised value, and thus pleads facts that call into question the factual bases for the appraisals. (Compl. ¶¶ 117-18; See e.g. HSH Nordbank AG v Barclays Bank PLC (2014 WL 841289, *18 [Sup Ct, NY County Mar. 3, 2014] [fraud claim]; Nomura, 2014 WL 2890341, at *17 [breach of contract]; Allstate Ins. Co. Credit Suisse Secs. [USA] LLC, 2014 WL 432458, *10 [Sup Ct, NY County Jan. 24, 2014] [fraud claim].)

Damages

Credit Suisse seeks to dismiss various of FGIC's damages claims, including its fifth cause of action for reimbursement, under Insurance Agreement § 3.03 (c), for attorneys' fees and expenses incurred in enforcing its rights under the governing agreements. (Compl. ¶ 172-175.)⁹ Citing Hooper Associates, Ltd. v AGS Computers, Inc. (74 NY2d 487, 492 [1989]), a case which sets forth the standards for recognition of indemnification claims for intra-party litigation, Credit Suisse contends that § 3.03 (c) does not cover such claims. (Defs.' Memo. In Supp. at 22-23.) Section 3.03, entitled "Reimbursement Obligation," provides in sub-section (c) for the sponsor's payment to the insurer of all fees and expenses, including reasonable attorney's fees, "in connection with (i) the enforcement, defense or preservation of any rights in respect of any of the Operative Documents, including defending, monitoring or participating in any litigation or proceeding . . . relating to any of the Operative Documents, any party to any of the Operative Documents (in its capacity as such a party) or the Transaction" In contrast, section 3.04 of

⁹ The fifth cause of action also pleads a claim under Insurance Agreement § 3.03 (b) for reimbursement to FGIC for any payment made under the policy as a result of the sponsor's failure to substitute for or deposit an amount in respect of any defective mortgage loan. As noted above, Credit Suisse does not move to dismiss this claim.

the Insurance Agreement, entitled “Indemnification,” provides that the sponsor and other specified parties shall indemnify the insurer from and against all claims, losses, costs and expenses, including reasonable attorney’s fees, “arising out of or relating to the transactions contemplated by the Operative Documents by reason of,” among other things, “(iv) the breach by the Sponsor . . . of any representation, warranty or covenant under any of the Operative Documents” Courts that have considered virtually identical provisions have held that the indemnification provision covers legal fees incurred in third-party actions, while the reimbursement provision evidences a clear intent to cover legal fees incurred in intra-party enforcement actions, like that at issue. (See e.g. Syncora Guar. Inc. v EMC Mtge. LLC, 2013 WL 4533591, *5 [Sup Ct, NY County Aug. 21, 2013] [Ramos, J.]; Assured Guar./EMC, 2013 WL 1442177, *6 [Ramos, J.]; see also Assured Guar. Mun. Corp. v Flagstar Bank, FSB, 920 F Supp 2d 475, 516 [SD NY 2013] [Rakoff, J.]) This court agrees with these decisions.

Credit Suisse also seeks to dismiss FGIC’s fourth cause of action. This cause of action does not specifically request rescission or rescissory damages, but does seek “monetary relief sufficient to place [FGIC] in the position it would be in had it not entered into the Insurance Agreement and issued its irrevocable Policy.” (Compl. ¶¶ 21, 147-148.) As the policy was irrevocable, rescissory damages are unavailable. (MBIA Ins. Corp. v Countrywide Home Loans, Inc., 105 AD3d 412, 413 [1st Dept 2013]; Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2015 WL 3490753, *8 [Sup Ct, NY County June 2, 2015] [this court’s prior decision dismissing a monoline insurer’s claim for rescissory damages on the same ground].)

FGIC’s claim for punitive damages claim is maintainable at this juncture based on the pleading of the fraud claim, for the reasons previously stated by this court. (HSH Nordbank AG, 2014 WL 841289, at *21.)


It is accordingly hereby ORDERED as follows:

The motion of defendants DLJ Mortgage Capital, Inc. and Credit Suisse Securities (USA) LLC is granted to the following extent: The second cause of action (breach of warranties) is dismissed with prejudice to the extent based on Transaction Warranties, and to the extent it seeks damages inconsistent with the sole remedy provision of LPA § 2 (d). The third cause of action (breach and frustration of repurchase protocols) is dismissed in its entirety with prejudice. The fourth cause of action (material breach of the insurance agreement) is dismissed in its entirety with prejudice; and it is further

ORDERED that the branch of the motion to strike allegedly prejudicial allegations as to other lawsuits is denied without prejudice to a motion in limine at the time of trial.

This constitutes the decision and order of the court.

Dated: New York, New York
August 3, 2015


MARCYS. FRIEDMAN, J.S.C.