

**Deutsche Bank Natl. Trust v Flagstar Capital Mkts.
Corp.**

2015 NY Slip Op 31787(U)

April 13, 2015

Supreme Court, New York County

Docket Number: 653048/2013

Judge: Marcy S. Friedman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely
in its capacity as Trustee of the HARBORVIEW MORTGAGE
LOAN TRUST 2007-7, INDEX NO. 653048/2013

-against- MOTION DATE _____

FLAGSTAR CAPITAL MARKETS CORPORATION and
QUICKEN LOANS, INC. MOTION SEQ. NO. 001

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____
Answering Affidavits — Exhibits _____ No (s). _____
Replying Affidavits _____ No (s). _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that

Upon the foregoing papers, it is ORDERED that defendant Quicken Loans, Inc.'s motion to dismiss is granted in accordance with the attached decision/order, dated April 13, 2015.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4-13-2015


MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate:.....Motion is: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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

_____ x

DEUTSCHE BANK NATIONAL TRUST
 COMPANY, solely in its capacity as Trustee of the
 HARBORVIEW MORTGAGE LOAN TRUST
 2007-7,

Index No.: 653048/2013

DECISION/ORDER

Plaintiff,

– against –

FLAGSTAR CAPITAL MARKETS
 CORPORATION and QUICKEN LOANS, INC.,

Defendants.

_____ x

This residential mortgage backed securities (RMBS) breach of contract action, known as a put-back action, is brought by plaintiff Trustee, Deutsche Bank National Trust Company (Trustee), against defendant-originator Quicken Loans, Inc. (Quicken), based on Quicken's alleged breaches of representations and warranties regarding the mortgage loans.¹ Quicken moves to dismiss the Trustee's complaint pursuant to CPLR 3211 (a) (1), (5), and (7).

The dispositive issue on this motion is the timeliness of the action under New York's six year statute of limitations for breach of contract. Quicken argues that the statute of limitations bars all of the Trustee's claims regarding all of the loans at issue. By agreement dated June 1, 2006 and entitled Second Amended Restated Mortgage Loan Purchase and Warranties

¹ This action was discontinued as against Flagstar Capital Markets Corporation by notice of voluntary discontinuance dated November 13, 2013.

Agreement (MLPWA), Quicken, as Seller, agreed to sell mortgage loans to Morgan Stanley Mortgage Capital Inc. (Morgan Stanley), as Purchaser. In this agreement, Quicken made representations and warranties to the Purchaser regarding the loan characteristics of each mortgage loan as of the date of the MLPWA and as of the “Closing Date” for each loan. (See MLPWA §§ 9.01, 9.02.) Closing Date is defined as “The date or dates on which the Purchaser from time to time shall purchase, and the Seller from time to time shall sell, the Mortgage Loans listed on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package.” (*Id.*, § 1 Definitions). Morgan Stanley’s rights and remedies as Purchaser were subsequently assigned to the Depositor, and ultimately to the Trustee, under the Assignment and Recognition Agreement and the Pooling and Servicing Agreement, both dated October 2, 2007. The action was commenced by filing of the summons with notice on August 30, 2013.

In moving to dismiss, Quicken contends that it sold the loans at issue to Morgan Stanley in several groups, and that the Closing Date for the sale of each package of loans occurred between December 2006 and May 2007. (D.’s Memo. In Supp. at 3.) It further contends that because this action was brought on August 30, 2013, more than six years after the Closing Dates, the claims are barred by New York’s six year statute of limitations for breach of contract.

The Trustee does not dispute that Quicken’s representations and warranties under the MLPWA were made effective as of the Closing Date for the sale of the loans. The Trustee also does not contend that Quicken made, or restated, the representations and warranties in any subsequent agreement. Rather, the Trustee argued in its opposition brief and at oral argument that the documentary evidence submitted by Quicken Loans did not eliminate factual issues as to the Closing Date of the loans. (P.’s Memo. In Opp. at 3-4, Transcript at 29-32.)

In support of the motion, Quicken attached two “exemplar” Purchase Price and Terms Letters (PPTLs), setting forth the terms of the sale of loans pursuant to the MLWPA. (Sidman Aff., Ex. 3, D.’s Memo. in Supp. at 3.) As the Trustee correctly argued, the letter agreements did not set forth an outside date for the closing of each sale. The PPTL, dated May 14, 2007, provided:

“The Mortgage Loans will be conveyed by the Seller to the Purchaser pursuant to an Assignment and Conveyance, to be dated as of the Closing Date . . . , a copy of the final Mortgage Loan Schedule which will be attached thereto;

....

1. Settlement Schedule

The Mortgage Loans shall be sold and settled by the Seller to the Purchaser on May 30, 2007, or such other date as is mutually agreeable to the Seller and Purchaser (the ‘Closing Date’).”

On its reply, Quicken submitted four additional PPTLs, along with the corresponding Assignment and Conveyance for each PPTL. (Supplemental Sidman Aff., Exs. 2, 3.) The Assignment and Conveyance agreements state the actual Closing Date, and provide that Quicken “does hereby sell, transfer, assign, set over and convey” the loans. Each of the six Assignment and Conveyance Agreements annexed a list of the mortgage loans included in the package being transferred. The last of the Assignment and Conveyance agreements was dated May 31, 2007. (Id., Ex. 3-6.)

As this documentary evidence was submitted for the first time on the reply, the court afforded plaintiff a sur-reply.² By letter dated December 15, 2014, submitted in lieu of a sur-

² Ordinarily, the court does not consider new arguments or evidence submitted for the first time on a reply to which the opponent of the motion did not have the opportunity to respond. (See McDonald v Edelman & Edelman, P.C., 118 AD3d 562, 562 [1st Dept 2014].) However, where the evidence is submitted in response to the opposition, it may be considered. (Anderson v Beth Israel Med. Ctr., 31 AD3d 284, 288 [1st Dept 2006].) Here, whether the evidence is characterized as new evidence or responsive evidence, the opportunity for a sur-reply has eliminated any prejudice to plaintiff. (Matter of Kennelly v Mobius Realty Holdings LLC, 33 AD3d 380, 381 [1st Dept 2006].)

reply, plaintiff acknowledged that after a review of the “exhibits as well as additional information presently available to the Trustee, the Trustee does not, at this time, challenge Quicken’s factual assertion concerning the sale dates” of the mortgage loans at issue in this action. (Rosenbaum letter, Docket # 48.)

The final Closing Date for the sale of the mortgage loans is now undisputed. Following ACE Securities Corp. v DB Structured Products, Inc. (112 AD3d 522 [1st Dept 2013], lv granted 23 NY3d 906 [ACE]), this court holds that any breach of Quicken’s representations and warranties under the MLWPA occurred on or before that date, May 31, 2007, more than six years prior to the commencement of the action. The action is accordingly untimely under New York’s six year statute of limitations for breach of contract. (CPLR 213 [2].)

The Trustee nevertheless argues that the claims are timely under four theories. First, the Trustee contends that the cause of action accrues under an “Accrual Clause” in the MLWPA, rather than at the time the representations and warranties were made. (P.’s Memo. In Opp. at 8.) Section 9.03 of the MLWPA provides:

“Any cause of action against the Seller relating to or arising out of the breach of any representations and warranties made in Subsections 9.01 and 9.02 shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure such breach, substitute a Qualified Substitute Mortgage Loan or repurchase such Mortgage Loan as specified above and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement.”

The Accrual Clause here does not differ in any material respect from that considered in this court’s recent decision in U.S. Bank Natl. Assn. v Greenpoint Mtge. Funding, Inc. (2015 WL 915444, * 4-6 [Index No. 651954/13, Mar. 3, 2015]). For the reasons and on the authority discussed in Greenpoint, such a provision cannot serve to extend the statute of limitations for a

cause of action for breach of representations and warranties which, under this Department's decision in ACE (112 AD3d at 522), accrues when the representations and warranties are made, not when the repurchase demand is made and refused. (See Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 2014 WL 3819356 [SD NY Aug. 4, 2014] [Crotty, J.] [dismissing as time-barred RMBS put-back action between the same parties filed more than six years after Quicken's representations were made and the loans were sold pursuant to PPTLs, and refusing to enforce a virtually identical accrual provision].)

The Trustee further contends that Quicken breached its obligation under MLWPA § 9.03 to notify the Trustee of Quicken's own discovery of breaches of the representations and warranties, and that the dates of Quicken's discovery cannot be resolved on a motion to dismiss. (P.'s Memo. In Opp. at 1.) Consistent with this Department's holding in ACE that the failure to comply with a repurchase demand is not an independent breach of contract, this court has previously held that a seller's failure to notify the trustee of breaching loans is also not an independent breach of contract. Rather, non-compliance with the notice requirement under the repurchase protocol, a remedial provision, does not give rise to an independent breach of contract by the seller, or expand the remedies available against the seller under the contract. (See Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 4829638, * 2 [Index No. 653429/2012, Sept. 25, 2014]; U.S. Bank Natl. Assn., as Trustee of CSMC Asset-Backed Trust 2007-NC1 v DLJ Mtge. Capital, Inc., 2015 WL 298642, * 2 [Index No. 652699/2013, Jan. 15, 2015].)

The Trustee also argues that the action is timely under the federal Housing and Economic Recovery Act of 2008 (HERA), which extends the limitations period for certain actions brought by the Federal Housing Finance Agency (FHFA). (P.'s Memo. In Opp. at 18.) As a federal

court has persuasively held, the HERA “provision extending the statute of limitations for actions ‘brought by the [FHFA] as conservator or receiver,’ see 12 U.S.C. § 4617 (b) (12), does not apply,” in a put-back action brought by the Trustee of an RMBS securitization as “[t]he FHFA is not a party to this case.”³ (Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 2014 WL 3819356 at *5 [holding that even where directing certificateholder FHFA originally filed the action, and the Trustee was later substituted as plaintiff, HERA could not apply to extend the statute of limitations].)

Finally, the Trustee contends that Quicken is equitably estopped from asserting the statute of limitations as a defense to this action. The doctrine of equitable estoppel, an “extraordinary remedy” (Pahlad v Brustman, 33 AD3d 518, 519 [1st Dept 2006], affd 8 NY3d 901 [2007]), provides that a defendant may be estopped from pleading the statute of limitations where the plaintiff was induced by fraud, misrepresentation, or deception to refrain from filing a timely action. (Ross v Louise Wise Servs., Inc., 8 NY3d 478, 491 [2007]; Simcuski v Sacli, 44 NY2d 442, 448-449 [1978].) This “remedy is only applicable in circumstances where there is evidence that plaintiff was lulled into inaction by defendant in order to allow the statute of limitations to lapse.” (East Midtown Plaza Hous. Co. v City of New York, 218 AD2d 628, 628 [1st Dept 1995]; accord Neil v City of New York, 95 AD3d 608, 609 [1st Dept 2012].)

Rather, the Trustee asserts that Quicken had an obligation to notify the Trustee upon its discovery of breaches, and Quicken’s silence “despite its knowledge of pervasive breaches throughout the loan pool induced the Trustee into believing that no breaches existed. (P.’s Memo. In Opp. at 16.) The complaint alleges that Quicken deliberately failed to notify the Trustee of defects in the mortgages in an attempt to run out the statute of limitations (Compl. ¶¶

³ Although the complaint pleads that the FHFA is a certificateholder and instructed the Trustee to pursue this litigation, the action is not “brought” by the FHFA, which is non-party. (Compl. ¶¶78-79.)

101-102), but does not in fact plead that this failure induced the Trustee to believe that there were no breaches. In any event, the complaint does not plead an affirmative act or omission that dissuaded or prevented the Trustee from bringing suit. Nor does the complaint plead that the Trustee could not have learned of the breaches absent notice from Quicken.⁴ The Trustee cannot invoke the protection of equitable estoppel because it fails to allege that Quicken's silence prevented it from discovering any defects in the loans. (See Matter of Residential Capital, LLC v HSBC Mtge. Corp. (USA), 524 BR 563, 588-589 [Bankr. SD NY 2015] [declining to apply equitable estoppel based on defendants' failure to notify plaintiff of defective mortgage loans in an RMBS transaction].)

The Trustee's second cause of action for breach of the implied covenant of good faith and fair dealing is subject to dismissal on the independent ground that it is duplicative of the breach of contract cause of action. The two causes of action are based on the same allegations as to Quicken's pervasive breaches of the representations and warranties, its awareness of the breaches, and its failure to notify the Trustee or repurchase the defective loans. (See Netologic, Inc. v Goldman Sachs Group, Inc., 110 AD3d 433, 433-434 [1st Dept 2013] [dismissing claim for breach of implied covenant of good faith and fair dealing as duplicative of contract claims, where both claims "'arise from the same facts and seek the identical damages for each alleged breach'"].)

As the court has concluded that the entire complaint is barred by the statute of limitations, it does not reach the remaining grounds for dismissal advanced by defendants. (See TMG-II v Price Waterhouse & Co., 175 AD2d 21, 22 [1st Dept 1991], lv denied 79 NY2d 752 [1992].)


⁴ The court notes that information regarding the breaches of the representation and warranties underlying this action was publicly available at least as early as September 2011, when the FHFA filed a securities fraud action alleging defects in the same loans at issue here. (See Sidman Aff. in Support, Ex. 4.)

Accordingly, it is hereby ORDERED that the motion of defendant Quicken Loans Inc. (Quicken) to dismiss this action is granted to the extent of dismissing with prejudice the first cause of action for breach of contract and the second cause of action for breach of the implied covenant of good faith and fair dealing; and it is further

ORDERED that the Clerk shall enter judgment in favor of Quicken in accordance with this order, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of a bill of costs.

This constitutes the decision and order of the court.

Dated: New York, New York
April 13, 2015



MARCY FRIEDMAN, J.S.C.