

Law Deb. Trust Co. of N.Y. v DLJ Mtge. Capital, Inc.
2015 NY Slip Op 32362(U)
April 8, 2015
Supreme Court, New York County
Docket Number: 651958/2013
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN
Justice

PART 60

LAW DEBENTURE TRUST COMPANY OF NEW YORK,
solely in its capacity as Separate Trustee of the ASSET
BACKED SECURITIES CORPORATION HOME EQUITY
LOAN TRUST SERIES AMQ 2007-HE2 (ABSHE 2007-HE2),

INDEX NO. 651958/2013

-against-

MOTION DATE _____

DLJ MORTGAGE CAPITAL, 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 DLJ Mortgage Capital, Inc.'s motion to dismiss is decided in accordance with the attached decision/order, dated April 8, 2015.

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

Dated: 4-8-15



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: IAS PART 60

-----X

LAW DEBENTURE TRUST COMPANY
OF NEW YORK, solely in its capacity as
Separate Trustee of the ASSET BACKED
SECURITIES CORPORATION HOME
EQUITY LOAN TRUST SERIES AMQ
2007-HE2 (ABSHE 2007-HE2),

Plaintiff,

Index No. 651958/13

-against-

DLJ MORTGAGE CAPITAL, INC.,

Defendant.

-----X

FRIEDMAN, J:

This is a residential mortgage-backed securities (RMBS) breach of contract action in which defendant DLJ Mortgage Capital, Inc. (DLJ or Seller) purchased mortgage loans from nonparty Argent Mortgage Company, LLC (Argent), the originator of the loans, and conveyed the loans to Asset Backed Securities Corporation Home Equity Loan Trust Series AMQ 2007-HE2 (Trust), which issued securities (certificates) backed by the loans. In a series of agreements which are discussed more fully below, DLJ and Argent each made representations and warranties about the mortgage loans, and each agreed to a repurchase protocol with respect to loans whose value was materially adversely affected by breaches of the representations and warranties. In addition, DLJ agreed to serve in what is colloquially referred to in the RMBS litigation as a “backstop” to Argent; that is, it agreed that if Argent were “unable” to comply with its obligations to cure or repurchase loans which breached representations and warranties, DLJ would do so. (Pooling and Servicing Agreement § 2.03 [a] [i] [Ansbro Aff., Ex. 4].)

The complaint asserts a cause of action against DLJ for breach of contract based on its own alleged breaches of representations and warranties and, in its capacity as backstop, based on Argent's alleged breaches. The complaint also asserts a cause of action for breach of the implied covenant of good faith and fair dealing. DLJ moves to dismiss the action pursuant to CPLR 3211 (a) (1), (5) and (7) on the grounds, among others, that it is barred by the statute of limitations and by plaintiff's failure to serve timely repurchase demands and thus to comply with asserted conditions precedent to commencement of the action.

Several agreements are relevant to the parties' dispute on this motion, including: two "Mortgage Loan Purchase and Interim Servicing Agreements," dated March 23 and April 27, 2007, between DLJ, as Purchaser, and Argent, as Originator and Seller (MLPAs [Kaminsky Aff., Exs. B, C]); a "Pooling and Servicing Agreement," dated May 1, 2007 and having a closing date of May 31, 2007, between DLJ and the Trustee and others (PSA [Ansbro Aff., Ex. 4]); and a "Reconstitution Agreement," dated May 31, 2007, by Argent in favor of DLJ, the Trustee, and the Depositor (RA [Ansbro Aff., Ex. 5].)

Argent made a series of representations and warranties regarding the mortgage loans in the MLPA, as of the Closing Date of the MLPA (March 23, 2007), each Reconstitution Date (May 31, 2007), or such other date as provided in the MLPA. (MLPA § 7.05 [a].) In the Reconstitution Agreement, dated May 31, 2007, Argent made the representations and warranties in Schedule B for the benefit of the Trustee and others as of the Reconstitution Date, which was defined as May 31, 2007, or as of such earlier date defined in Schedule B. (RA § 2; Whereas Clause.) DLJ made its own representations and warranties in the PSA as of the Closing Date (May 31, 2007), or as of such other date provided in the PSA. (PSA § 2.05 [b].)

Section 7.06 of the MLPA,¹ the repurchase protocol applicable to breach of representations and warranties regarding the mortgage loans by Argent, as originator, provides in pertinent part:

“Within 90 days of the earlier of either discovery by or notice to the Company [Argent] 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 . . . and, if such breach cannot be cured, the Company shall, at the Purchaser’s option, repurchase such Mortgage Loan at the Repurchase Price.”

Section 2.03 (a) (i) of the PSA 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 [Argent] of any representation, warranty or covenant under the [MLPA] 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 the 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 [MLPA] 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 [MLPA] and the Reconstitution Agreement. In the event that an Originator [Argent] shall be unable to cure the applicable breach or repurchase a related Mortgage Loan in accordance with the preceding sentence, the Seller [DLJ] shall do so. . . . It is understood and agreed that the obligation of the Originator or the Seller, as applicable, to cure or to repurchase (or to substitute for) any Mortgage Loan . . . as to which such a breach has occurred and is continuing shall constitute the sole remedy respecting such . . . breach available to the Trustee on behalf of the Certificateholders.”

¹ All quotes are to March 23, 2007 MLPA, as there is no claim that the substantive provisions of the two MLPAs differ in any material respect.

Section 2.03 (a) (ii) of the PSA is a substantially similar provision pertaining to DLJ's breaches of its own representations and warranties. This section provides in pertinent part:

“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 any breach by the Seller [DLJ] of any representation, warranty or covenant made by the Seller in Section 2.05 (b)(vii) or (viii) 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 and the Servicer of such breach and cause the Seller to cure such breach within 90 days from the date the Seller was notified of such breach. If the Seller fails to cure such breach in all material respects during such period, the Seller shall repurchase such Mortgage Loan from the Trust Fund at the Purchase Price.”

This provision further states that DLJ's “obligation . . . to cure or repurchase (or to substitute for) any Mortgage Loan as to which such a breach has occurred and is continuing shall constitute the sole remedy respecting such breach available to the Trustee on behalf of the Certificateholders.”

As alleged in the complaint, by letter dated April 4, 2013 (notice or repurchase demand), Wells Fargo Bank, N.A. (Wells Fargo), as “Trustee,” notified DLJ of breaches of the representations and warranties regarding the mortgage loans. (Complaint, ¶ 56.) Wells Fargo commenced this action by filing a summons with notice on May 31, 2013. (NYSCEF Doc. No. 1.) Plaintiff, as Separate Trustee, filed an amended summons on September 26, 2013. (NYSCEF Doc. No. 2.) By letter dated November 1, 2013 (second notice or repurchase demand), plaintiff notified DLJ of additional breaches. (Complaint, ¶ 58.) Plaintiff filed the complaint on November 4, 2013. (NYSCEF Doc. No. 5.)²

² Wells Fargo Bank, N.A. is the Trustee of the Trust. (Complaint, ¶ 1 n 1.) By order dated July 24, 2013, the District Court for the Fourth Judicial District of the State of Minnesota authorized Wells Fargo to appoint Law Debenture Trust Company of New York as “separate trustee.” (Order, ¶¶ 4, 7 [a] [Kaminsky Aff., Ex. D].) This

In support of its motion to dismiss the complaint, DLJ argues that the Trustee's claims are time barred because the complaint was filed more than six years after May 1, 2007 – the “as of” date of the PSA. DLJ further argues that that complaint must be dismissed for failure to comply with conditions precedent to suit against DLJ both for its obligations as backstop to Argent and for its own breaches of representations and warranties regarding the mortgage loans. (D.'s Memo. In Supp. at 1-2.) The Trustee contends that the complaint is timely because it was filed within six years of the closing date of the PSA. The Trustee also argues that the action is timely under an “accrual provision” in each MLPA. As to the conditions precedent, the Trustee argues that notice to Argent would have been “futile” because Argent is no longer in business. The Trustee also argues that it was not obligated to give notice to DLJ because DLJ was aware of the breaches based upon its own discovery, and failed to provide notice to any other party or to “fulfill its self-triggering repurchase obligations.” (P.'s Memo. In Opp. at 3-4.)

Discussion

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, contrary to DLJ's contention, Argent's representations and warranties

appointment afforded Law Debenture Trust Company of New York all of Wells Fargo's trustee powers, including the right to enforce claims for breach of contract on behalf of the Trust and its certificateholders. (Id., ¶ 7 [d].)

were made when they were restated in favor of the Trustee in the Reconstitution Agreement, and not on the earlier date of the MLPA. DLJ's own representations were made as of the May 31, 2007 closing date of the PSA, and the action was timely commenced against DLJ on May 31, 2013, when Wells Fargo Bank, N.A. filed the summons with notice, within six years of that date.

The court rejects the Trustee's alternative contention that the backstop claims against DLJ are governed by the MLPA rather than the PSA, and are timely under an accrual provision in the MLPA. More particularly, the Trustee contends that upon Argent's inability to cure, DLJ steps into the shoes of Argent or is "substituted for" Argent for purposes of the MLPA's repurchase protocol. (P.'s Memo. In Opp. at 9.) In claiming that DLJ is substituted for Argent, the Trustee relies on the provision in PSA § 2.03 (a) (i) that "[i]n 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 preceding sentence requires the Originator to repurchase a breaching loan "to the extent that the Originator is obligated to do so under the Mortgage Loan Purchase Agreement and the Reconstitution Agreement." The two sentences, read together, make clear that the Originator's obligation exists to the extent provided by those two agreements, and that DLJ's obligation, if the Originator is unable to cure, is no greater than the Originator's obligation. The PSA does not provide, or suggest, that upon the Originator's inability to comply with its obligation, DLJ steps into the Originator's shoes under the MLPA. Moreover, such a construction would read out the remaining provisions of § 2.03 (a) (i), which set forth in detail the protocols for DLJ to assume Argent's repurchase obligation. It would thus violate the well-settled principle of contract interpretation that all provisions of an agreement must be given meaning where possible. (See Beal Savings Bank v Sommer, 8 NY3d 318, 324 [2007]; Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave., 1 AD3d 65, 70 [1st Dept

2003].) The Trustee's contention that DLJ is substituted for Argent under the MLPA also ignores that, under section 6 of the RA, DLJ is authorized to transfer its rights to enforce the MLPA to the Trustee.

As the court holds that DLJ's backstop obligations are governed by PSA § 2.03 (a) (i) rather than the MLPA, the court also rejects plaintiff's contention that an "accrual provision" set forth in MLPA § 7.06, but not in the PSA, governs the accrual of plaintiff's cause of action. This provision, which specifies the conditions on which a cause of action for breach of a representation or warranty regarding a mortgage loan accrues, provides that a cause of action against Argent accrues upon (i) discovery by DLJ or notice by Argent to DLJ of a breach of specified representations or warranties, (ii) failure by Argent to cure the breach or repurchase the breaching loan, and demand upon Argent by DLJ for compliance with the repurchase obligation.³ For the reasons and on the authority discussed 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]), such a provision cannot serve to extend the statute of limitations for a cause of action for breach of representations and warranties which, under the Appellate Division

³ Section 7.06 of the MLPA provides:

"Any cause of action against the Company [Argent], the Guarantor or the Interim Servicer, as applicable, relating to or arising out of the breach of any representations and warranties made in Subsections 7.01, 7.03, 7.04 or 7.05, as applicable, shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser [DLJ] or notice thereof by the Company [Argent] or the Interim Servicer, as applicable, to the Purchaser, (ii) failure by the Company or the Interim Servicer, as applicable, to cure such breach or repurchase such Mortgage Loan as specified above, and (iii) demand upon the Company, the Guarantor or the Interim Servicer, as applicable, by the Purchaser for compliance with the relevant provisions of this Agreement."

decision in ACE (112 AD3d at 523), accrues when the representations and warranties are made, not when the repurchase demand is made and refused.⁴

Condition Precedent

Having held that the action is timely, the court turns to the issue of whether PSA § 2.03 (a) imposes conditions precedent to commencement of this action. In U.S. Bank National Assn. (ABSHE 2006-HE7) v DLJ Mtge. Capital, Inc. (U.S. Bank) (2015 WL 1331628 [Index No. 654147/12, Mar. 24, 2015]), this court recently held that a backstop provision, which was virtually identical to that at issue, expressly conditioned DLJ's repurchase obligation on notice by the Trustee both to DLJ, as Seller, and to the Originator (there, Ameriquest, an affiliate of Argent). The provision there, like that here, expressly required the Trustee to notify DLJ of breaches of representations and warranties, even where DLJ independently discovered the breaches. It also expressly required notification to the Originator of such breaches and enforcement by the Trustee of the Originator's repurchase obligations. (Id. at * 9-10.) The decision distinguished between repurchase protocols, like the backstop provision, under which the obligation to repurchase is triggered by notice, and those under which the repurchase obligation is independently triggered by the seller's own discovery of breaches. (Id. at * 10-11.) In view of the express requirement in the PSA backstop provision that notice must be provided to DLJ and the Originator, the decision held that the backstop provision imposed a condition precedent to suit against DLJ and the Originator. (Id. at * 10.)⁵

⁴ As the action was timely commenced, the court need not determine the Trustee's alternative argument that the action is timely under the "extender provision" of the Housing and Economic Recovery Act (HERA). (P.'s Memo. In Opp. at 8.) The court, however, notes persuasive authority that 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," as "[t]he FHFA is not a party to this case." (Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 2014 WL 3819356, *5 [SD NY 2014].)

⁵ In U.S. Bank, unlike the instant action, the Originator was also a party. The fact that Argent is not named as a party to the instant action does not change the result.

The Trustee argues that notice to Argent is not a condition precedent to suit against DLJ on its backstop obligation because Argent had an independent obligation to cure or repurchase loans upon its own discovery of breaches pursuant to MLPA § 7.06. (P.'s Memo. In Opp. at 13.) This court rejected that argument in U.S. Bank, reasoning that any independent obligation that the originator might have cannot excuse service of a repurchase demand upon it, precisely because PSA § 2.03 (a) (i) conditions DLJ's backstop obligation on prior notice to the originator. (2015 WL 1331268, at * 11.) Further, based on its reading of the unambiguous terms of PSA § 2.03 (a) (i), the court rejected the argument, which the Trustee also makes here, that the sole condition precedent to suit against DLJ on its backstop obligation is the originator's inability to perform. (P.'s Memo. In Opp. at 13; 2015 WL 1331268, at * 9.)

The court adheres to, and incorporates, the reasoning of U.S. Bank here.⁶ The court thus holds that PSA § 2.03 (a) (i) imposes a condition precedent to suit against DLJ on its backstop obligation. As PSA § 2.03 (a) (ii), the repurchase protocol for DLJ's breaches of its own representations and warranties, is identical to § 2.03 (a) (i), it also imposes a condition precedent to suit against DLJ for its own breaches.

⁶ In holding that the PSA imposes a condition precedent to suit against DLJ in its capacity as backstop, the court rejects the Trustee's argument, raised for the first time at the oral argument of the motion, that the backstop provision constitutes a "guaranty of payment or performance" under section 3-416 (3) of the Uniform Commercial Code (UCC), thereby entitling plaintiff "to pursue the guarantor directly." (Oral Argument Tr. at 25.) Even if this argument is considered, given that it was not properly raised, it is without merit.

Article 3 of the UCC expressly excludes "investment securities" and, instead, applies to negotiable instruments. (UCC § 3-103 [1] and Official Comment 1 ["This Article is restricted to commercial paper – that is to say, to drafts, checks, certificates of deposit and notes as defined in Section 3-104(2)," which pertains to the form of negotiable instruments].) The PSA is not a negotiable instrument, as it does not "contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer. . . ." (UCC § 3-104 [1] [b].) Accordingly, UCC § 3-416 (3) is inapplicable. (Kosich v Catskill Millennium Tech., Inc., 97 AD3d 1003, 1005 [3d Dept 2012] [holding UCC § 3-416 inapplicable where "unsigned note was not a negotiable instrument"].) The Trustee's argument that PSA § 2.03 (a) (i) is a guaranty of payment also ignores the express terms of that provision requiring notice to the originator prior to enforcement of the backstop obligation against DLJ.

The court further holds that the Trustee failed to comply with these conditions precedent. It is undisputed that the Trustee did not make a repurchase demand on Argent, and thus did not provide notice to or seek to enforce Argent's repurchase obligation before commencing this action against DLJ on its backstop obligation. Nor did the Trustee make a timely repurchase demand on DLJ prior to commencing this action against it for its own breaches of representations and warranties. Although the Trustee made a repurchase demand on DLJ by letter dated April 4, 2013, the Trustee commenced this action on May 31, 2013, before the 90 day repurchase period had elapsed. As in ACE (112 AD3d at 523), the Trustee thus failed to comply with the condition precedent. For the reasons and on the authority set forth in U.S. Bank, the lapse of the repurchase period by the time the complaint was filed on November 4, 2013 did not correct the defect caused by commencement of the action prior to compliance with the condition precedent. (2015 WL 1331268, at * 11.)

The Trustee further contends that the failure to comply with the conditions precedent to suit is excusable based on Argent's inability to perform and on DLJ's repudiation of its repurchase obligation. These claims were made and rejected in U.S. Bank on substantially similar allegations. The court refers to U.S. Bank for a more extensive discussion of the legal standards governing excuse for failure to comply with a condition precedent. In brief, as discussed in U.S. Bank, the circumstances in which compliance with a condition precedent may be excused as futile are generally analyzed under the doctrines of impossibility of performance or of repudiation or anticipatory breach. (2015 WL 1331268, at * 11-14 [and authorities cited therein].) Under the former doctrine, compliance with a condition precedent may be excused where the party demanding compliance with the condition has caused its failure. Under the repudiation doctrine, such compliance may be excused where a party to a contract makes a

statement indicating that it will commit a total breach or undertakes “a voluntary affirmative act which renders the [party] unable or apparently unable to perform without such a breach.” (*Id.* at * 12, quoting Norcon Power Partners, L.P. v Niagara Mohawk Power Corp., 92 NY2d 458, 462-463 [1998] [internal quotation marks and citations omitted].)

Here, as to the failure to make a repurchase demand upon Argent, the Trustee argues that such demand “would have been futile since, as alleged in the Complaint, Argent was no longer doing business or otherwise able to fulfill its obligations to cure or repurchase breaching loans.” (P.’s Memo. In Opp. at 10, n 11.) The complaint alleges that by the time the Trustee learned of the breaches “upon information and belief, Argent was no longer doing business and was therefore unable to perform its cure or repurchase obligation.” (Complaint, ¶ 2.) It further alleges, upon information and belief, that “Argent is no longer doing business, as certain of its assets were sold to Citigroup Financial Products Inc. . . . on or about September 1, 2007, at the same time ACC, Argent’s parent company, announced that it was closing.” (*Id.*, ¶ 26.) In U.S. Bank, the Trustee similarly argued that its service of a timely repurchase demand on Ameriquest, Argent’s affiliate, would have been futile and that its failure to comply with this condition precedent was therefore excusable. There, the complaint alleged, also on information and belief, that Ameriquest was unable to cure or repurchase because it “is no longer doing business.” (2015 WL 1331268, at * 13.) The Trustee also claimed in its brief that Ameriquest was “insolvent” (*id.*), and submitted news reports, dated September 1, 2007, stating that Ameriquest “is closing” and that Citigroup Inc. had agreed to purchase its assets or the assets of its parent, ACC. (*Id.* at * 14.)

As discussed in U.S. Bank, the claim of futility based on the originator’s “closing” appears to be based on a dictionary definition of futility as “uselessness,” rather than on the legal

standard for futility, which requires satisfaction of the elements of impossibility of performance or of repudiation or anticipatory breach of contract. (2015 WL 1331268, at * 13.) Moreover, the Trustee does not claim that it could not have achieved any recovery from Argent notwithstanding its closing. As held on similar, if not stronger allegations, the complaint fails to plead allegations which, if proved, would establish an excuse for failure to comply with the condition precedent to suit against DLJ on its backstop obligation, based on Argent's inability to perform. (*Id.* at * 15.)

As to the Trustee's further claim that DLJ's repudiation of its repurchase obligation excused it from serving a timely repurchase demand directly on DLJ, the complaint alleges that DLJ "repudiated its obligations and the parties' agreements in their entirety, and frustrated the entire purpose of the parties' agreements," by transferring "to the Trust a large number of loans that lacked represented characteristics" and by then "refus[ing] to cure a single breach or repurchase even a single breaching Mortgage Loan." (Complaint, ¶ 81.) In opposing the motion to dismiss, plaintiff argues that "it would have been futile to wait any period of time before bringing suit," because "DLJ repudiated its contractual obligations by failing to notify the other parties of the breaches of which it had long been aware and failing to cure or repurchase breaching loans on its own initiative." (P.'s Memo. In Opp. at 10.) More particularly, the Trustee claims that DLJ discovered Argent's breach but failed to provide notice of such breaches to the Trustee as required by PSA § 2.03 (a) (i), and that DLJ failed to repurchase breaching loans on both its own discovery and notice from the Trustee of breaches. (*Id.* at 15; Complaint, ¶¶ 2, 32, 50, 80, 82, 89.)

The Trustee fails to allege any unequivocal words or deeds by DLJ that rise to the level of a repudiation of contract.⁷ The complaint does not allege any "statement" by DLJ "indicating

⁷ The cases cited by the Trustee are not to the contrary. Interestingly, although the Trustees in the instant action and in U.S. Bank are represented by different counsel, both Trustees cite the same three cases – only one of which is

that [DLJ] will commit a breach” or any “voluntary affirmative act” that rendered DLJ “unable or apparently unable to perform without such a breach.” (See Norcon Power Partners, 92 NY2d at 462-463.) Indeed, as noted above, the complaint alleges that the Trustee notified DLJ of breaches on April 4, 2013, as it was required to do under PSA § 2.03 (a), but then commenced this action on May 31, 2013, prior to the expiration of the 90-day cure or repurchase period. The complaint does not claim that DLJ, by its statements or affirmative acts, stated that it would not comply with the demand. On the contrary, the Trustee commenced the instant action before the time for compliance had elapsed.⁸

As also explained in U.S. Bank, 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 562, 568 [Sup Ct, NY County 2013].) 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 held that the failure to comply with a repurchase demand is not an independent breach of contract. (Id.) Similarly, this court has previously held that a sponsor’s failure to notify the trustee of breaching loans is not an independent breach of the PSA. Rather, non-compliance with the repurchase protocol, a remedy, does not give rise to an independent

appellate – and do not discuss the extensive body of New York law governing excuse of conditions precedent. (See 2015 WL 1331268, at * 11-14 [discussing the legal standards for excuse, and the Trustee’s cases].)

⁸ By letter dated July 3, 2013, DLJ responded to plaintiff’s April 4, 2013 demand, requesting loan files for the loans identified in that demand. (Ansbro Aff., Ex. 8.) While this letter was dated within 90 days of plaintiff’s demand, the court makes no determination as to whether the letter satisfied DLJ’s obligations under PSA § 2.03 (a).

breach of contract by the sponsor, or expand the remedies available against the sponsor under the contract. (See Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 4829638, * 2 [Index No. 653429/12, 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. 652699/13, Jan. 15, 2015].) The court accordingly concludes that the Trustee fails to plead allegations which, if proved, would establish an excuse for failure to comply with the condition precedent to suit against DLJ based on repudiation.

The complaint will therefore be dismissed based on the Trustee's failure to comply with conditions precedent to suit against DLJ on both its backstop obligation and its repurchase obligation for its own alleged breaches of representations and warranties. The dismissal will, however, be without prejudice. For the reasons and on the authority discussed at length in U.S. Bank (2015 WL 1331268, * 7-8), the court finds that a bona fide issue exists as to whether, having timely commenced the instant action against DLJ, the Trustee is entitled to commence a new action under CPLR 205 (a), the savings clause. That issue should be decided on a fully developed record in the event such action is commenced.

The court makes no finding as to whether CPLR 205 (a) is available to the Trustee for its direct claims against DLJ, its claims against DLJ in DLJ's capacity as backstop, or both. These claims involve different considerations, as repurchase notices were served prior to commencement of the instant action on DLJ but not on Argent, and the instant action was timely commenced against DLJ, but no action was brought against Argent for breaches of its representations and warranties. These factual differences present difficult, and perhaps novel, issues as to which claims would be timely under CPLR 205 (a).

Remaining Claims

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 DLJ's pervasive breaches of the representations and warranties, its awareness of the breaches, and its failure to 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'"].)

An independent ground also exists for dismissal of the breach of contract cause of action to that extent that it seeks rescissory damages. As held in this court's prior decisions, the sole remedy provision limits plaintiff's remedies for breach of the representations and warranties to specific performance of the repurchase protocol or damages consistent with its terms. (US Bank, 2015 WL 1331268, at * 15; U.S. Bank Natl. Assn., as Trustee of the J.P. Morgan Alternative Loan Trust 2007-A2 v Greenpoint Mtge. Funding, Inc., 2015 WL 915444, * 8 [Index No. 651954, Mar. 3 2015]; Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341, * 2 [Index No. 653390/12, June 26, 2014].)

Finally, the Trustee's claim for attorney's fees is based upon language in the PSA's definition of "Purchase Price" which, as held in a decision that considered the identical language, is insufficient to support the claim. (ACE Secs. Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503, *7 [Index No. 651935/13, Aug. 28, 2014] [and authorities cited therein].)

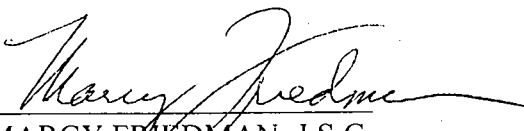
Accordingly, it is hereby ORDERED that the motion of defendant DLJ Mortgage Capital, Inc. (DLJ) to dismiss this action is granted to the following extent: The first cause of action for breach of contract is dismissed with prejudice to the extent that it seeks rescissory or other damages inconsistent with the terms of the repurchase protocol and demands reimbursement of attorney's fees; and said cause of action is otherwise dismissed without prejudice; and it is further

ORDERED that the second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed with prejudice; and it is further

ORDERED that the Clerk shall enter judgment in favor of DLJ 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 8, 2015


MARCY FRIEDMAN, J.S.C.