

**U.S. Bank Natl. v DLJ Mtge. Capital, Inc.**

2015 NY Slip Op 32875(U)

October 8, 2015

Supreme Court, New York County

Docket Number: 650369/2013

Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN Justice

PART 3

U.S. BANK NATIONAL

INDEX NO. 650369/2013

- v -

MOTION DATE 09/01/2015

DLJ MORTGAGE CAPITAL, INC.

MOTION SEQ. NO. 008

Table with 2 columns: Document type and No(s). Rows include Notice of Motion/Order to Show Cause - Affidavits - Exhibits (1), Answering Affidavits - Exhibits (2), Replying Affidavits (3), and Cross Motion (No).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

DATED: 10/8/2015

Eileen Bransten signature and name: EILEEN BRANSTEN, J.S.C.

- 1. CHECK ONE : [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

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U.S. BANK NATIONAL ASSOCIATION, solely in  
its capacity as Trustee of the HOME EQUITY ASSET  
TRUST 2007-1 (HEAT 2007-1)

Plaintiff,

-against-

DLJ MORTGAGE CAPITAL, INC.,

Defendant.

Index No. 650369/2013  
Motion Date: 9/1/2015  
Motion Seq. No. 008

-----X  
**BRANSTEN, J.**

In this action, Plaintiff U.S. Bank National Association (“Trustee”) asserts a breach of contract claim against Defendant DLJ Mortgage Capital, Inc. (“DLJ”). Defendant DLJ brings the instant motion, seeking to dismiss the Trustee’s Second Amended Complaint in its entirety and to strike certain allegations from the pleading. The Trustee opposes. For the reasons that follow, DLJ’s motion is denied.

**I. Background**

Plaintiffs’ claims stem from the Home Equity Asset Trust 2007-1 (“HEAT 2007-1”) securitization sponsored by DLJ, which was comprised of approximately 5,153 residential mortgage loans. (Compl.<sup>1</sup> ¶ 1.) These mortgage loans were pooled in the HEAT 2007-1 Trust, which issued certificates that were sold to investors. *Id.* The

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<sup>1</sup> All references to the complaint herein are to the Second Amended Complaint, which is the subject of this motion.

certificates represented interests in the mortgage loans, the value of which hinged on the quality of the loans themselves. *Id.*

DLJ made certain representations and warranties regarding the characteristics of the mortgage loans, including that the loans met certain quality standards and complied with sound underwriting practices and applicable legal requirements. *Id.* ¶ 2. In the event that any mortgage loans breached these representations and warranties – and the breaches materially and adversely affected the value of the loans and the interest of the certificateholders in the loans – the transaction’s Pooling and Servicing Agreement (“PSA”) required that DLJ cure or repurchase the breaching loans. *Id.*

On December 6, 2011 and March 30, 2012, the Trustee gave notice to DLJ of breaches concerning approximately 300 loans and 900 loans, respectively, which were purportedly in breach. *Id.* ¶ 10. Plaintiff contends that DLJ has refused to repurchase all but “a few dozen” of these loans. *Id.*

The Trustee alleges that DLJ performed due diligence on the loans before placing them in the Trust and making them subject to its representations and warranties. *Id.* ¶ 4. Therefore, due in part to this due diligence, the Trustee asserts that “DLJ was in a unique position to know and ... did know, about the defective nature of the Mortgage Loans long before the Trustee learned of the breaches that it noticed here.” *Id.* ¶ 5.

The initial complaint in this action was filed on February 1, 2013. On June 28, 2013, the Trustee filed an Amended Complaint, asserting three breach of contract claims

against DLJ premised on DLJ's alleged breaches of representations and warranties and sought: (1) specific performance of the repurchase protocol; (2) compensatory, consequential, rescissionary, and equitable damages; and, (3) indemnification. In a decision and order dated January 15, 2014, this Court granted DLJ's motion to dismiss the Trustee's second and third claims and denied the motion insofar as it sought to dismiss the breach of contract claim seeking specific performance.

The Trustee then filed a Second Amended Complaint, adding new allegations in support of its remaining claim. In particular, the Trustee contends that DLJ discovered on its own that loans in the Trust breached certain of its representations and warranties and that this discovery triggered DLJ's obligation to repurchase the breaching loans. (Compl. ¶ 94.) To date, DLJ purportedly has failed to notify the Trustee of a single breach and has failed to honor its obligation to repurchase these breaching loans.

## **II. Discussion**

### *A. Motion to Dismiss*

DLJ seeks dismissal of the Second Amended Complaint, arguing that the Trustee's breach of contract claim should be dismissed as to those loans not itemized in the Trustee's December 6, 2011 and March 30, 2012 breach letters. DLJ contends that the repurchase remedy cannot be triggered for loans for which the Trustee has not formally sought repurchase.

The Trustee opposes on two grounds. First, the Trustee contends that its breach letters sufficiently apprised DLJ of its obligation to repurchase all breaching loans. However, in any event, the Trustee maintains that DLJ independently discovered that certain of the loans breached its representations and warranties, thereby triggering DLJ's repurchase obligation, irrespective of any notice from the Trustee.

On this motion to dismiss, the Trustee is correct on both counts.

Section 2.03 states, in relevant part:

*Upon discovery by any of the parties hereto of a breach of a representation or warranty ... that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties. [DLJ] hereby covenants that within 90 days of the earlier of its discovery or its receipt of written notice from any party of a breach ... it shall cure such breach in all material respects, and if such breach is not so cured shall ... (ii) repurchase the affected Mortgage Loan or Mortgage Loans from the Trustee...*

(Affirmation of Richard Jacobsen Ex. 2 § 2.03(d)) (emphasis added).

The Trustee's December 6, 2011 breach letter clearly provided notice to DLJ of its obligation to repurchase "all loans that breached representations and warranties. See Jacobsen Affirm. Ex. 6 at 1 (December 6, 2011 Breach Letter). The letter cited to two batches of 112 and 192 loans for which the Federal Housing Finance Authority sought repurchase but noted that DLJ's obligation under Section 2.03 of the PSA went beyond these loans to include "any others that did not comply with the representations and warranties" made by DLJ in the PSA. *Id.* While DLJ now seeks to impose a more

stringent notice requirement upon the Trustee, this is beyond what the PSA language requires. *See Home Equity Mtge. Trust Series 2006-5 v. DLJ Mtee. Capital, Inc.*, 2014 WL 317838, at \*5-6 (Sup. Ct. N.Y. Cnty. Jan. 27, 2014) (concluding that repurchase letter “demand[ing] that DLJ repurchase all breaching Loans” sufficed to demand that DLJ repurchase all breaching loans).

However, even if the Trustee had failed to send repurchase demands for all breaching loans to DLJ, the Second Amended Complaint nonetheless alleges that DLJ’s independent discovery of breaches obligated it to repurchase the loans. DLJ advocates that Section 2.03(d) creates a unilateral duty, under which the Trustee was obligated to discover breaches and bring such breaches to DLJ’s attention in order to compel repurchase. This interpretation is contrary to the clear language of Section 2.03(d) and would render its language regarding DLJ’s discovery of breaches superfluous. *See, e.g., Biotronik A.G. v. Conor Medsys. Ireland, Ltd.*, 117 A.D.3d 551, 553 (1st Dep’t 2014) (noting that “[a] contract should be read to give meaning and effect to each of its provisions” and rejecting an interpretation rendering a provision superfluous).

Under Section 2.03(d), the onus was not simply on the Trustee to provide notice of breaches to DLJ in order to begin the repurchase process. Instead, DLJ’s discovery of breaching loans likewise could trigger repurchase. Plaintiff alleges in the Second Amended Complaint that DLJ discovered breaches when it “performed due diligence on the Mortgage Loans before placing them in the Trust” and that at the time it was selecting

the loans for inclusion in the Trust, DLJ “knowingly purchased defective Mortgage Loans from originators it considered shoddy...” See Compl. ¶¶ 57, 59. Taking Plaintiff’s allegations as true on this motion to dismiss, these events provided the contractual notice necessary to trigger DLJ’s obligation to repurchase breaching loans. See, e.g., *ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.*, 5 F.Supp.3d 543, 559 (S.D.N.Y. 2014) (“By alleging that [seller] conducted due diligence on loan pools that suffered from obvious and widespread breaches, Plaintiff has adequately alleged that [seller] discovered those breaches, and therefore that its cure-or-repurchase obligations were triggered independent of any notices.”); *Deutsche Alt-A Secs. Mtge. Loan Trust, Series 2006-OA1 v. DB Structured Prods., Inc.*, 958 F.Supp.2d 488, 497 (S.D.N.Y. 2013) (deeming allegation that seller discovered breaches “through its due diligence efforts” sufficient to plead that repurchase obligation triggered as to loans “not specifically listed in the Breach Notices”).

Defendant nonetheless cites to the First Department’s ruling in *ACE Securities Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522 (1st Dep’t 2013) for the proposition that the Appellate Division has imposed a strict procedural requirement for the maintenance of repurchase claims, which neither the Trustee’s breach notices nor its independent discovery theory satisfy. Specifically, Defendant urges that *ACE* bars claims seeking repurchase of loans not specifically identified in a breach notice, since the First

Department has required that Plaintiff first file a breach notice and allow Defendant to cure or repurchase.

DLJ overstates the holding of *ACE*. Like all RMBS breach of contract actions, *ACE* hinges on the language of the contracts and the circumstances of the claim. In *ACE*, the trustees of Home Equity Loan Trust, Series 2006-SL2 filed breach notices shortly before the expiration of the statute of limitations period for a breach of contract claim. Therefore, since the 60- and 90-day repurchase periods set forth in the securitization's Mortgage Loan Purchase Agreement and Pooling and Service Agreement had not yet expired by the time that the trustee filed its suit, the First Department held that the claim was not ripe and when ripe, would fall outside the limitations period. *Id.* at 522-23. This decision was affirmed by the Court of Appeals, *ACE Securities Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581 (2015).

Notably, the *ACE* decisions did not address the arguments raised here – that DLJ was apprised of its repurchase obligation as to all breaching loans in correspondence from the Trustee, and that in any event, DLJ itself independently discovered breaching loans in the Trust, triggering the requirement under the specific language of Section 2.03(d) to notify the Trust of the breach and cure or repurchase the breaching loans. Accordingly, DLJ articulates no basis for the Court to refashion the *ACE* decisions so to dismiss the instant action, and DLJ's motion to dismiss therefore is denied.

B. *Motion to Strike*

DLJ next seeks to strike eleven paragraphs from the Second Amended Complaint, arguing that these paragraphs reference “isolated and out-of-context quotations from emails produced in other lawsuits,” information about third-party due diligence providers used by DLJ and DLJ’s general repurchase policies, as well as allegations made by DLJ in a separate repurchase action. DLJ maintains that these allegations are superfluous and inflammatory, and therefore should be removed.

Under CPLR 3024(b), “[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading.” The First Department has explained that “[i]n reviewing a motion pursuant to CPLR 3024(b), the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action.” *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep’t 2007).

At this juncture, the allegations highlighted by DLJ appear to be relevant to the Trustee’s allegations about DLJ’s knowledge of the quality of the mortgage loans and of breaches independently discovered by DLJ. While DLJ argues that the paragraphs at issue do not pertain to the specific loans identified in the Trustee’s breach notices, as addressed herein, the Trustee’s claim in the instant action is not limited to the loans identified in those notices. Accordingly, DLJ’s motion to strike is denied.

**III. Conclusion**

For the foregoing reasons, it is

ORDERED that DLJ's motion to dismiss and motion to strike are denied; and it is further

ORDERED that DLJ is directed to serve an answer to the remaining claims in the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on October 28, 2015 at 10 AM.

Dated: New York, New York  
October 8, 2015

**ENTER**

  
Hon. Eileen Bransten, J.S.C.