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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.

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the EQUIFIRST LOAN SECURITIZATION TRUST 2007-1

Plaintiff,

– against –

EQUIFIRST CORPORATION, EQUIFIRST MORTGAGE CORPORATION OF MINNESOTA and BARCLAYS BANK PLC,

Defendants.

Index No.: 651957/13

DECISION/ORDER

This residential mortgage-backed securities (RMBS) breach of contract action is brought by plaintiff trustee, Deutsche Bank National Trust Co. (DBNTC), against defendants, EquiFirst Corp. and EquiFirst Mortgage Corp. of Minnesota (collectively, EquiFirst), the originators of the mortgage loans, and Barclays Bank PLC (Barclays or BBPLC), the parent of the non-party depositor. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (2), (5), (7), and (8).

Sutton Funding LLC (Sutton) purchased the loans from the EquiFirst defendants, pursuant to a Mortgage Loan Purchase Agreement (MLPA), dated as of March 1, 2007, in which EquiFirst made representations and warranties regarding the quality and characteristics of the mortgage loans, "as of the related Closing Date" for the sale of the loans. (MLPA § 9.02.) Sutton assigned the loans to BCAP LLC, the Depositor, pursuant to an Assignment, Assumption

and Recognition Agreement (AAR), dated June 27, 2007. The EquiFirst defendants were also parties to the AAR, and represented and warranted, "for the benefit of" Sutton, BCAP LLC, the Trust, and Barclays, that the EquiFirst representations and warranties in the MLPA were true and correct as of April 23, 2007, the Servicing Transfer Date – i.e., the date as of which EquiFirst ceased to perform as interim servicer. (AAR § 4.) Barclays then entered into an agreement with BCAP LLC, entitled "Barclays Representation Agreement," dated as of June 27, 2007, the Closing Date of the securitization, in which Barclays made certain representations and warranties regarding the loans. Pursuant to a Pooling and Servicing Agreement (PSA), dated as of June 1, 2007 with a Closing Date of June 27, 2007, BCAP LLC transferred the loans, and its rights under the Barclays Representation Agreement and the AAR, to the Trust. (PSA § 2.01 [a]; Art. I – Definitions, Trust Fund.) The parties to the PSA were BCAP LLC as Depositor, DBNTC as Trustee, a Servicer, and a Custodian.

The MLPA establishes a repurchase protocol under which EquiFirst is obligated to cure or repurchase loans affected by material breaches of EquiFirst's representations and warranties. (MPLA § 9.03.) The Barclays Representation Agreement also establishes a repurchase protocol under which Barclays is obligated to cure or repurchase loans affected by certain breaches of representations and warranties. (Agreement § 3.)

The complaint pleads two causes of action. The first, for breach of contract, alleges breaches of representations and warranties by both the EquiFirst defendants and Barclays, regarding the quality and characteristics of the loans. (Compl. ¶ 113.) This cause of action also alleges that the EquiFirst and Barclays defendants breached obligations to provide notice to plaintiff Trustee of such breaches and to cure or repurchase loans affected by the breaches. (Id. ¶ 114.) The second cause of action alleges that both defendants breached the implied covenant of

good faith and fair dealing, "by selling breaching Mortgage Loans for placement into the Trust and keeping silent about them, only to let foreclosure proceedings go forward . . . [which] had the effect of destroying the Trustee's rights to have those breaching Mortgage Loans repurchased at a price necessary to make the Trust whole . . . ." (Id. ¶ 128.)

Defendants' motion to dismiss raises many arguments that have previously been considered in the RMBS litigation by this court[1] and, in some instances, by the appellate courts. In determining issues on this motion that were previously decided on substantially similar pleadings and governing agreements, the court will generally rely on the reasoning of the prior decisions.

Repurchase and Failure to Notify Claims

Plaintiff's breach of contract claim, to the extent based on defendants' alleged breach of an independent obligation to cure or repurchase breaching loans, cannot stand in light of ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015], affg 112 AD3d 522 [1st Dept 2013].) There, in considering a similar RMBS repurchase protocol, the Court of Appeals held that the Trust had a cause of action against the sponsor for breach of representations and warranties, which accrued at the point of contract execution, and that the sponsor's "refusal to repurchase the allegedly defective mortgages did not give rise to a separate cause of action." (Id. at 589.)

Plaintiff's breach of contract claim is also based on defendants' alleged breach of an independent obligation to give plaintiff prompt written notice of their discovery of breaches of representations and warranties. In Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura

[1] By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this [C]ourt alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities."

Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024] [Nomura]), the Court stated that this court had "correctly declined to permit plaintiffs [trustees] to pursue damages for defendant's [the sponsor's] failure to repurchase defective loans." (Id. at 108, citing ACE, 25 NY3d at 589.) The Court also stated, however, that this court had "erred in not allowing plaintiffs to pursue damages for defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties" in the RMBS governing agreements. (Id. at 108.) In the numerous put-back and monoline cases that are pending before this court, the court has requested coordinated briefing on the scope and viability of failure to notify claims, in light of Nomura.[2]

Here, the complaint alleges that Barclays' obligation to provide such notice arose under PSA § 2.08 and MLPA § 9.03, and that EquiFirst's obligation arose under MLPA § 9.03. (Compl. ¶¶ 55, 85-87.) Defendants' motion, which was briefed prior to Nomura, sought dismissal of this claim, on the ground that the duty to notify, like the duty to repurchase, is not an independent obligation under the repurchase protocol.[3] In the alternative, defendants acknowledged that EquiFirst had a prompt notice obligation pursuant to the MLPA, but disputed that Barclays, a non-party to the PSA and MLPA, had any duty to provide notice to the Trustee of breaches of representations and warranties. (Defs.' Reply Memo. at 9.)

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[2] The parties have agreed, with this court's approval, to defer such coordinated briefing pending determination of the Nomura appeal by the Court of Appeals. (See Second Case Management Order, dated Mar. 24, 2016, ¶ V [Index No. 777000/15] [NYSCEF No. 96].)

[3] Prior to Nomura, and based on the decisions of the Appellate Division and Court of Appeals in ACE (112 AD3d at 522-523; 25 NY3d at 599), this court, in accord with the weight of authority, had accepted the argument, which defendants advance here, that failure to notify claims, like failure to repurchase claims, were not maintainable as independent causes of action. (See e.g. Deutsche Bank Natl. Trust Co., Harborview Mtge. Loan Trust 2007-7 v Flagstar Capital Mkts Corp., 2015 WL 1646683, * 3 [Sup Ct, NY County Apr. 13, 2015] [this court's prior decision dismissing failure to notify claim]; U.S. Bank Natl. Assn., CSMC 2007-NC1 v DLJ Mtge. Capital, Inc., 2015 WL 298642, * 2 [Sup Ct, NY County, Jan. 16, 2015] [same]; see also Bank of N.Y. Mellon, 2006-WMC2 v WMC Mtge., LLC, 50 Misc 3d 229, 236 [Sup Ct NY County Sept. 18, 2015] [Kornreich, J.] [summarizing authorities].)

MLPA § 9.03, which governs EquiFirst's notice obligations, provides for it to give "prompt written notice" to the other parties to the agreement "upon discovery" by EquiFirst of breaches of the representations and warranties made in that Agreement. AAR § 2 (iv) identifies the Trustee as an entity that may enforce the repurchase protocol under MLPA § 9.03. Based on this contractual provision, defendants' motion to dismiss the claim against EquiFirst for failure to give prompt notice will be denied without prejudice to the requested coordinated briefing on the import of Nomura, as set forth in the ordering provision (infra).

A serious question exists, however, as to whether the governing agreements also impose a prompt notice obligation on Barclays. PSA § 2.08 requires the parties to that Agreement to give "prompt written notice" to the other parties to the Agreement and to EquiFirst and Barclays, respectively, upon discovery of a breach of a representation or warranty made by EquiFirst in the MLPA and AAR, and upon discovery of a breach of a representation or warranty made by Barclays in the Barclays Representation Agreement. Barclays was not a party to the PSA, the MLPA, or the AAR. The Barclays Representation Agreement, to which it was a party, does not contain a prompt notice provision requiring the party that discovers a breach to give prompt notice to the other parties to the Agreement or to third parties. Defendants have not, however, addressed plaintiff's allegations that Sutton had a prompt notice obligation under MLPA § 9.03 and that Barclays, as Sutton's Administrator, assumed that obligation, at least for the period during which Sutton retained the right to seek repurchase of loans affected by breaches. Defendant's motion to dismiss plaintiff's claim against Barclays for failure to give prompt notice will therefore also be denied without prejudice to the requested coordinated briefing.

Timeliness of Claims Against EquiFirst

Defendants argue that the claims against EquiFirst are time-barred because its latest representations were made as of April 23, 2007, and the Summons with Notice by which this action was commenced was not filed until May 31, 2013, more than six years later. (Defs.' Memo. In Support at 3-4.) This contention is unpersuasive. Although the AAR provided that EquiFirst's restated representations and warranties were "true and correct as of April 23, 2007" (AAR § 4), the AAR itself was not entered into until June 27, 2007. As the restated representations and warranties were not made until that later date, the action was brought within the six year statute of limitations. (See ACE, 25 NY3d at 589 [holding that RMBS Trust's cause of action against sponsor for breach of representations and warranties "accrued at the point of contract execution"]; U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 121 AD3d 535, 536 [1st Dept 2014] [holding that a claim for breach of a representation or warranty accrues "at the time of the execution of the contract," even when the "contract states that its 'effective date' is earlier," the court reasoning that "[t]he claim cannot accrue earlier, because until there is a binding contract, there can be no claim for breach of warranty"].)[4]

Dissolution of EquiFirst Mortgage Corporation of Minnesota

Defendants also argue that the claims against EquiFirst Mortgage Corporation of Minnesota are barred because this entity was dissolved in May 2009, and because Minnesota law, which applies to this Minnesota corporation, bars actions against dissolved corporations more than three years after notice of intent to dissolve. Plaintiff does not dispute that the claim is

[4] It is noted that DBNTC also argues that its claims are timely under an accrual clause which provides that any cause of action for breach of representations and warranties shall accrue upon (i) discovery of the breach by the purchaser of the loan or notice thereof by the seller to the purchaser, (ii) failure by the seller to cure the breach or repurchase the loan, and (iii) demand upon the seller by the purchaser for compliance with this agreement. (MLPA § 9.03.) As this court has previously held, this clause is ineffective to extend the statute of limitations for a cause of action for breach of representations and warranties. (Federal Hous. Fin. Agency, MSAC 2007-NC1 v Morgan Stanley ABS Capital I Inc., 2016 WL 1587345, * 4-5 [Sup Ct, NY County Apr. 12, 2016] [this court's prior decision, collecting authorities].) This court has also rejected the contention, which DBNTC makes here, that the claims are timely under the federal Housing and Economic Recovery Act of 2008. (Id. at * 5.)

no longer maintainable against EquiFirst Mortgage Corporation of Minnesota, but argues that Barclays is liable for the acts of the dissolved entity under theories of alter ego and successor liability. (Pl.'s Memo. In Opp. at 3 n 4.) This branch of defendants' motion will be granted. The court notes, moreover, that no claim for alter ego or successor liability is pleaded in the complaint.

Timeliness of Claims Against Barclays

1. Sufficiency of the Summons with Notice

Defendants next argue that the claims against Barclays are time-barred because the Summons with Notice is jurisdictionally defective due to its lack of detail as to specific breaches of representations and warranties and its failure to identify loans affected by such breaches. (Defs.' Memo. In Support at 9-11.) CPLR 305 (b) requires that a summons served without a complaint "shall contain or have attached thereto a notice stating the nature of the action and the relief sought . . . ." The Notice attached to plaintiff's Summons states that plaintiff's claims for breach of contract arise from defendants' breach of representations and warranties regarding the mortgage loans, defendants' failure to give notice of breaches they discovered, and their failure to repurchase mortgage loans as required by the governing agreements. The Notice also specifies certain representations and warranties that were breached, including that the mortgage loans were in compliance with all federal and state laws, that the mortgage loan files contained an appraisal of the mortgaged property by an independent appraiser, that the mortgage loans were underwritten in accordance with underwriting guidelines in effect at the time the mortgage loans were originated, and that no mortgage loan was classified as a "High Cost Loan" or "Covered Loan." The Notice apprises defendants that a review of the pooled loans identified pervasive breaches of the representations and warranties, and that defendants failed to repurchase

the loans pursuant to their repurchase obligation under the applicable agreements. Finally, the Notice sets forth the requested categories of damages and equitable relief. The court holds that this Notice provides adequate specificity as to the nature of the action and relief sought. (Compare Roth v State Univ. of New York, 61 AD3d 476 [1st Dept 2009]; lv denied 13 NY3d 711.)

2. Failure to Satisfy Condition Precedent

In this action, DBNTC made two repurchase demands – the first, dated September 19, 2012, regarding 1685 of the 5683 pooled loans in this securitization, was made more than 60 days prior to the filing of the Summons with Notice on May 31, 2013, the last day of the statute of limitations for commencement of the action. The repurchase protocols afforded defendants 60 days to cure or repurchase loans affected by material breaches of representations and warranties. (Barclays Representation Agreement § 3 [a]; MLPA § 9.03.) The cure or repurchase period under the first repurchase demand had thus expired prior to the commencement of the action and prior to the expiration of the statute of limitations. The second repurchase demand, for 63 loans, was made after the filing of the Summons with Notice and therefore also after the passage of the statute of limitations. (Compl. ¶¶ 90-91 [detailing repurchase demands]; Aff. In Opp. of Zachary Rosenbaum, Ex. A [annexing Sept. 19, 2012 repurchase demand].)

Defendants do not contend that plaintiff has failed to satisfy a condition precedent with respect to the loans that were the subject of the first demand. They argue, however, that DBNTC's claims are time-barred as to loans that were the subject of the second repurchase demand. They also appear to argue that claims as to loans that were not included in the first demand could not be included in a future demand as they would be time-barred. Defendants in effect assert that a repurchase demand is a condition precedent to the maintenance of any claim

in this action seeking relief as to a loan. (See Defs.' Memo. In Support at 11-12, 12 n 8.) Plaintiff counters that defendants "were obligated – separate from and independent of notice provided by the Trustee – to cure or repurchase defective Mortgage Loans upon their own discovery of such defects." (Pl.'s Memo. In Opp. at 2, 16, 19.) Plaintiff further alleges that defendants discovered widespread breaches of representations and warranties based on EquiFirst's due diligence in originating the loans and Barclays' review of EquiFirst's origination practices in selecting the loans. (Compl. ¶¶ 4, 6, 48-55.) As also alleged in the complaint, initial forensic reviews revealed breaches of representations and warranties regarding 1685 of the 1710 mortgage loans examined. (Id. ¶¶ 56-58.)

DBNTC's September 19, 2012 repurchase demand refers to and annexes the letter of FHFA (certificateholder Freddie Mac's conservator), which identifies breaches of representations and warranties, and requests that the Trustee enforce the repurchase protocol. FHFA's letter expressly reserves the right to identify further breaches and to assert further claims. The court holds that this letter is analogous to the repurchase demands that have been held sufficient – most recently by the Appellate Division in Nomura and by the weight of authority – to support the maintenance of RMBS breach of contract actions at the pleading stage. (See Nomura, 133 AD3d at 108 [holding RMBS breach of contract actions maintainable based on presuit breach notices (i.e., repurchase demands) that "put defendant on notice that the certificateholders whom plaintiffs (as trustees) represented were investigating the mortgage loans and might uncover additional defective loans for which claims would be made," but did not identify all loans affected by breaches]; see also Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341, * 15-16 [Sup Ct, NY County June 26, 2014, Index No. 653390/12] [Nomura, 2006-S4] [this court's prior

decision, summarizing extensive authorities holding actions maintainable based on repurchase demands that did not specifically identify all loans affected by breaches of representations and warranties].)[5]

Further, in Nomura, the repurchase protocols provided for the defendants to repurchase loans affected by material breaches of representations and warranties, upon defendants' own discovery or notice to them of such breaches. In holding that the trustees' breach of contract actions were maintainable at the pleading stage, the Appellate Division cited not only the trustees' repurchase demands, including one with which the time to comply had expired prior to the timely commencement of the actions, but also the plaintiffs' allegations as to the defendants' own discovery of breaches of representations and warranties. The Court thus reasoned: "Furthermore, in addition to sending defendant notices of breach, plaintiffs allege that defendant already knew, based on its own due diligence, that certain loans in the trusts at issue breached its representations and warranties." (133 AD3d at 108 [internal citations omitted].)

Like Nomura, this action presents an issue – common in the RMBS litigation – as to whether defendants' repurchase obligation is triggered by defendants' own discovery of breaches of representations and warranties, without regard to whether a repurchase demand is also made upon defendants. Resolution of this issue, in turn, depends on the terms of the repurchase protocols in the governing agreements. Where the repurchase protocols provide for the defendant sponsor's (or other securitizer's) cure or repurchase of loans upon either the defendant's own discovery of material breaches of representations and warranties, or upon notice to the defendant of such breaches, the Courts in the RMBS litigation have repeatedly found

[5] The Nomura, 2006-S4 decision was not the subject of the Appellate Division's Nomura decision (133 AD3d 96, supra), which involved appeals of this court's later decisions on motions to dismiss claims of different Nomura trusts. The later decisions relied on the reasoning of the Nomura, 2006-S4 decision, which had addressed most of the claims on substantially similar pleadings and governing agreements.

allegations of the defendant's discovery, similar to the allegations here, sufficient, at the pleading stage, to support the plaintiff's maintenance of breach of contract claims. (See ACE Secs. Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503, * 3-6 [Sup Ct, NY County Aug. 28, 2014] [collecting authorities]; Nomura, 2006-S4, 2014 WL 2890341, * 15 [same].)

Here, MLPA § 9.03 by its terms provides for EquiFirst to cure or repurchase loans "[w]ithin 60 days of the earlier of either discovery by or notice to the applicable Seller [EquiFirst] of any such breach of a representation or warranty, which materially and adversely affects the value of the Mortgage Loans . . . ."

Barclays Representation Agreement § 3 (a) (quoted at length infra at 14) poses more difficult interpretive issues as to whether, or under what circumstances, a repurchase demand is a condition precedent to maintenance of claims. The first sentence appears to require Barclays to cure certain breaches within 60 days of either its own discovery or notice to it of the breaches. However, it further provides that if the breaches cannot be cured, Barclays shall within 60 days of its "receipt of request" from the Depositor repurchase the mortgage loan. The following sentences of the repurchase protocol do not contain any mention of a request to repurchase, and arguably at least limit, if not eliminate, the circumstances in which a receipt of request from the Depositor is required.[6]

The proper interpretation of the repurchase protocols has not, however, been addressed by the parties on this motion. Defendants merely assume that these protocols require a repurchase demand to be made as a condition precedent to commencement of an action based on

[6] In addition, a question exists as to whether the "receipt of request" requirement is a condition precedent as to some or all loans, or applies, rather, to a choice of remedies (e.g., substitution or repurchase of a loan).

breaches of representations and warranties.[7] DBNTC merely asserts that the repurchase protocols require defendants to repurchase loans upon defendants' discovery of material breaches. On this record, the court accordingly rejects defendants' contention that this action may not be maintained based on plaintiff's allegations of defendants' own discovery of breaches.

The branch of defendants' motion to dismiss claims based on the loans that were the subject of the second repurchase demand will also be denied. This motion, which was briefed and argued before the Appellate Division's Nomura decision, does not address the impact of that decision, which discussed the relation-back doctrine in the context of repurchase demands made after commencement of the action and after the passage of the statute of limitations. (See Nomura, 133 AD3d at 108.)

Failure of Trustee To Provide Prompt Notice

Defendants contend that the complaint must also be dismissed due to plaintiff Trustee's alleged failure to give prompt written notice of breaches of representations and warranties. MLPA § 9.03 provides that "the party discovering [a] breach shall give prompt written notice to the other." PSA § 2.08 also provides that "the party discovering such breach shall give prompt written notice thereof to the other parties to this Agreement and the applicable Original Loan Seller [EquiFirst] or Barclays Bank PLC, as applicable."

The repurchase protocol in MLPA § 9.03 does not, however, condition EquiFirst's cure or repurchase obligation on the Trustee's prior provision of prompt notice to EquiFirst but, rather, provides for EquiFirst to cure and repurchase on either its own discovery or on notice to

[7] In another action before this court involving a Barclays Representation Agreement with a virtually identical repurchase protocol (although Barclays' representations were different), Barclays, by the same counsel, apparently conceded at the oral argument that the trustee was authorized to maintain claims, at least for "systematic" breaches of representations and warranties, based either on Barclays' own discovery of such breaches, or on notice to Barclays of the breaches. (See Deutsche Bank Natl. Trust Co., SABR 2007-BR1 v Barclays Bank PLC, 2015 WL 7625829, * 3 [Sup Ct, NY County Nov. 25, 2015].)

it. As discussed above, the extent to which the repurchase protocol in the Barclays Representation Agreement requires Barclays to cure and repurchase upon its own discovery of breaches has not been addressed by the parties and therefore will not be determined on this record.

As held above, defendants have not demonstrated on this motion that this action may not be maintained based on plaintiff's allegations of defendants' own discovery of breaches. Moreover, even assuming arguendo that plaintiff Trustee's failure to give prompt written notice of breaches may constitute a defense to plaintiff's claims for repurchase of some of the loans, triable issues of fact exist as to whether plaintiff gave prompt notice.

Barclays' Alleged Backstop Obligation

The parties sharply dispute whether the Barclays Representation Agreement obligates Barclays to repurchase mortgage loans affected by EquiFirst's alleged breaches of representations and warranties, as opposed to loans affected only by Barclays' own alleged breaches. As noted above, EquiFirst's representations are made in the MLPA and AAR. Barclays' representations are made in § 2 of the Barclays Representation Agreement. In § 2 (a), Barclays represents and warrants to the Depositor "that nothing has occurred since the Servicing Transfer Date [i.e., April 23, 2007, the date on which EquiFirst ceased to perform as servicer] that would render the representations and warranties set forth in Part A of Exhibit I hereto to be untrue in any material respect as of the Closing Date," June 27, 2007. In § 2 (b), Barclays makes the same representation with respect to the representations and warranties set forth in Part B of Exhibit I. Exhibit I includes a wide range of representations and warranties regarding the quality and characteristics of the mortgage loans.[8] In § 2 (c), Barclays represents to the Depositor that

[8] The Part A representations include, but are not limited to, representations as to the status of the payments on the loans, liens, appraisals, occupancy, and LTV (loan to value), qualification of the loans under the Tax Code for

no mortgage loan is a "High Cost Loan" or "Covered Loan," and that as to each loan, all requirements of federal, state, and local law have been complied with.

Section 3 of the Barclays' Representation Agreement, which sets forth the repurchase protocol, provides in pertinent part:

> "**1.** (a) Within sixty (60) days of the earlier of either discovery by or notice to BBPLC of any breach of a representation or warranty which materially and adversely affects the value of the Mortgage Loans or the interest of the Depositor therein (or which materially and adversely affects the value of the applicable Mortgage Loan or the interest of the Depositor therein), BBPLC shall cure such breach in all material respects and, if such breach cannot be cured, BBPLC shall, within sixty (60) calendar days of BBPLC's receipt of request from the Depositor, purchase such Mortgage Loan at the Repurchase Price. **2.** In the event that such a breach shall involve any representation or warranty set forth in Section 2 of this Agreement, and such breach cannot be cured within sixty (60) days of the earlier of either discovery by or notice to BBPLC of such breach, all of the Mortgage Loans materially and adversely affected thereby shall be purchased by BBPLC at the Repurchase Price. **3.** Notwithstanding the above sentence, within sixty (60) days of the earlier of either discovery by, or notice to, BBPLC of any breach of the representations or warranties set forth in Section 2(c), clauses (p), (v) and (w) on Part A of Exhibit I or on Part B of Exhibit I, BBPLC shall repurchase the affected Mortgage Loan or Mortgage Loans at the Repurchase Price, together with all expenses incurred by the Depositor as a result of such repurchase. [**4** is omitted].
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> **5.** However, if the breach shall involve a representation or warranty set forth in Section 2 of this Agreement (other than the representations or warranties set forth in Section 2(c), clauses (p), (v) and (w) on Part A of Exhibit I or on Part B of Exhibit I) relating to any Mortgage Loan and BBPLC discovers or receives notice of any such breach within two years of the Closing Date, BBPLC shall, at the Depositor's option . . ." substitute such loan.

(Section 3 [numbers of sentences in bold type are not part of the provision and are added by the court].)

The parties offer conflicting interpretations as to whether the first sentence of § 3 obligates Barclays to repurchase loans as to which EquiFirst, rather than Barclays, breached

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transfer to a REMIC, requirements for mortgagors to purchase certain insurance, and absence of mandatory arbitration provisions binding mortgagors. As represented by defendants at the oral argument, the Part B representations refer to agency loans. (Tr. at 10.)

representations and warranties. Plaintiff argues that "Barclays agreed to a repurchase obligation for "**any**" material breach of any R&W, not merely a breach of Barclays' own R&Ws." (Pl.'s Memo. In Opp. at 2-3 [plaintiff's emphasis].) Plaintiff thus contrasts sentence 1, which sets forth Barclays' obligation to cure or repurchase loans affected by "any" material breach of a representation or warranty, with sentences 2, 3, and 5, which specifically refer to breaches of a representation or warranty set forth in § 2 of the Barclays Representation Agreement. (Id.) Defendants argue that Barclays' representations and warranties "cover only: (1) events occurring in the 'gap' period from April 23, 2007, to June 27, 2007; and (2) the Loans' compliance with law." (Defs.' Memo. In Support at 14.) Defendants further argue that the Barclays Representation Agreement is a self-contained agreement that sets forth Barclays' limited representations and warranties and the parties' rights and remedies in the event of a Barclays' breach. (Defs.' Reply Memo. at 2-3.) According to defendants, § 3 (a) addresses only the representations and warranties made by Barclays in the Barclays Representation Agreement, and, if the first sentence of § 3(a) were intended to cover EquiFirst's representations and warranties in the separate MLPA, the parties would have said so in plain language. (Id. at 3.)

Under settled principles of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." (W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 162 [1990]; accord Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004].) Where an instrument "was negotiated between sophisticated, counseled business people negotiating at arm's length. . . . , courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties

have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (Vermont Teddy Bear Co., 1 NY3d at 475 [internal quotation marks and citations omitted]; accord ACE, 25 NY3d at 597; see Schron v Troutman Sanders LLP, 20 NY3d 430, 437 [2013].)

In addition, "[t]he court should construe the agreements so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose." (Beal Sav. Bank v Sommer, 8 NY3d 318, 324-25 [2007] [internal quotation marks and citations omitted]; W.W.W. Assocs. v Giancontieri, 77 NY2d at 162 [reading the contract, "as a whole to determine its purpose and intent"].) Thus, "particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." (Riverside South Planning Corp. v CRP/Extell Riverside, L.P., 13 NY3d 398, 404 [2009] [internal quotation marks, citations, and brackets omitted].) Finally, "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency." (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].)

Reading the Barclays Representation Agreement as a whole, the court finds that the clear purpose of this Agreement was to provide for Barclays to make specified representations and to obligate itself to cure or repurchase loans, pursuant to a repurchase protocol, in the event of material breaches of the representations that it made in the Agreement. The Whereas Clauses of the Agreement recite the other agreements made in connection with the securitization –

specifically, the MLPA and AAR, in which EquiFirst made representations; and the PSA, in which the Depositor transferred its rights in the Trust Fund to the Trust, including its rights under the Barclays Representation Agreement and the EquiFirst Assignment Agreement. (PSA § 2.01; Art. I – Definitions, Trust Fund.) The final Whereas Clause states: "WHEREAS, in connection with the securitization of the Mortgage Loans and the issuance of the Certificates, the parties hereto have determined it to be necessary and appropriate for BBPLC to make various representations and warranties to the Depositor regarding the Mortgage Loans." The Agreement then goes on to set forth BBPLC's representations in § 2 and the repurchase protocol in § 3.

Although the parties' statement of purpose is not determinative, it is appropriately considered by the court in determining the parties' intent. (See Ronnen v Ajax Elec. Motor Corp., 88 NY2d 582, 588 [1996] [considering "recital purpose clause," along with operative provisions of the agreement, in construing the agreement]; United States of Am. v Hamdi, 432 F3d 115, 123 [2d Cir. 2005] ["[C]ontracts may, and frequently do, include recitals of the purposes and motives of the contracting parties, which may shed light on, but are distinct from, the contract's operative promises to perform"]; 22 NY Jur 2d Contracts § 253.)

Here, the Whereas Clause indicates that the purpose of the Barclays Representation Agreement is for Barclays to make representations to the Depositor regarding the mortgage loans. This Whereas Clause is consistent with the operative provisions of the Agreement. Barclays' representations are made in § 2. As defendants correctly argue, these representations are limited to (1) "gap representations" – i.e., representations that nothing occurred in the period between the Servicing Transfer Date, April 27, 2007 and the Closing Date of the securitization, June 27, 2007, which rendered any of the Exhibit I representations about the quality and characteristics of the loans untrue, and (2) representations that the loans were not "High Cost" or

"Covered Loans" and were in compliance with federal, state, and local laws.

Barclays' representations are immediately followed by the repurchase protocol set forth in § 3. Significantly, nothing in the Barclays Representation Agreement states, or suggests, that Barclays agreed to be liable for EquiFirst's representations. In other RMBS cases before this court, where the parties have sought to impose a backstop obligation on the securitizer, the governing agreements have expressly set forth that obligation. (See e.g. Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2015 WL 4038760, * 3 [Sup Ct, NY County July 1, 2015] [PSA provided that in the event of a material breach of a representation by an originator and, if "upon discovery or receipt of notice" such originator fails to cure or repurchase the affected loan, sponsor shall cure or repurchase such loan, subject to the conditions set forth in the PSA provision]; U.S. Bank Natl. Assn., ABSHE 2006-HE7 v DLJ Mtge. Capital, Inc., 2015 WL 1331268, * 2-3 [Sup Ct, NY County Mar. 24, 2015], rearg granted and decision adhered to 2016 WL 1306279 [Sup Ct, NY County Mar. 29, 2016] [PSA provided that sponsor was obligated to cure or repurchase loans affected by originator's breaches of representations and warranties in the event originator was "unable" to comply with its repurchase obligation].) The highly sophisticated parties to this RMBS transaction also unquestionably knew how to, but did not, impose an express backstop obligation pursuant to which the securitizer would have been liable for breaches of the representations of the originator of the loans. This court will not impose that obligation under the guise of interpreting the agreement.

Finally, plaintiff's claim that Barclays is liable for EquiFirst's breaches of representations and warranties is premised on nothing more than the use of the word "any" in the first sentence of § 3. Defendants assert that the phrase "any breach of a representation" in sentence 1 is used "interchangeably" with the phrase "representation and warranty set forth in Section 2," in the

sentences that follow. (Defs.' Reply Memo. at 2.) They further assert that sentence 1 establishes the general repurchase protocol, but that sentences 2, 3, and 5 elaborate on the repurchase protocol established by sentence 1, by outlining "specific remedies available to the trustee" for particular breaches of Barclays' own representations and warranties. (See Oral Argument Tr. at 26-29.)

Although § 3 of the Barclays Representation Agreement is hardly a model of precise drafting, the court does not find any ambiguity as to whether it imposes a backstop obligation on Barclays. Sentence 1 provides a repurchase protocol only for Barclays' breaches of its own representations and warranties. This sentence simply is not reasonably susceptible of the interpretation, urged by plaintiff, that it refers to EquiFirst's breaches of representations and warranties, and renders Barclays liable as a backstop for such breaches. To hold otherwise would be to read the phrase "any breach of a representation" in isolation from its context in the Barclays Representation Agreement as a whole, the very purpose of which was to provide for Barclays to make representations for the first time in connection with the securitization at issue, and to provide a detailed repurchase protocol for Barclays' breaches of such representations.[9]

Remaining Claims

The parties' remaining claims raise issues that have previously been decided by this court or the Appellate Division on substantially similar pleadings and governing agreements. Defendants' claim that they have no obligation to repurchase liquidated loans is rejected. (Nomura, 133 AD3d at 106-107; Nomura, 2006-S4, 2014 WL 2890341, * 8-11.) The court also

[9] For purposes of this motion, the court need not determine whether defendants' claims should be accepted as to the reconciliation of sentence 1 with sentences 2, 3, and 5 and, in particular, as to the extent to which the latter sentences specify different remedies for different breaches of representations and warranties, or impose different requirements for the trustee to avail itself of remedies, depending on the nature of the breaches. However the sentences in § 3 may ultimately be interpreted, they govern the Trustee's remedies against Barclays solely for Barclays' own breaches.

rejects defendants' claim that plaintiff's remedy is limited to repurchase under the sole remedy provisions of the governing agreements, and that plaintiff is not entitled to damages. As the Appellate Division has held, "plaintiffs may pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible." (Nomura, 133 AD3d at 107.) Thus, as this court has previously held, the Trustee may pursue damages consistent with the terms of the sole remedy provision. (U.S. Bank Natl. Assn., ABSHE 2006-HE7 v DLJ Mtge. Capital, Inc., 2016 WL 1365966, * 4 [Sup Ct, NY County Apr. 5, 2016].) Unspecified consequential damages are not available. (Deutsche Bank Natl. Trust Co., SABR 2007-BR1 v Barclays Bank PLC, 2015 WL 7625829, * 4 [Sup Ct, NY County Nov. 25, 2015].) The claim for rescission or rescissory damages also fails. (Nomura, 133 AD3d at 108; Nomura, 2006-S4, 2014 WL 2890341, * 13-14.)

Plaintiff's claims that defendants repudiated the contract by refusing to repurchase loans, and that the sole remedy clause is unenforceable based on defendants' alleged gross negligence or willful misconduct, are also rejected. (Law Debenture Trust Co. of New York, ABSHE 2007-HE2 v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 9-10 [Sup Ct, NY County Apr. 8, 2015]; Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings, LLC, 2014 WL 4829638, * 1 [Sup Ct, NY County Sept. 25, 2014]; Nomura Home Equity Loan Trust, Inc., Series 2007-2 v Nomura Credit & Capital, Inc., 2014 WL 5243512, * 1 [Sup Ct, NY County July 18, 2014], mod on other grounds by Nomura, 133 AD3d 96.)

Plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing, based on allegations that defendants were "keeping silent" despite knowledge of breaches, and failed to "voluntarily" cure breaches or repurchase loans (Compl. ¶¶ 128-129), will be dismissed as duplicative of the breach of contract claim. (Nomura, 133 AD3d at 108;

Deutsche Bank Nat. Trust Co. v Quicken Loans Inc., 810 F3d 861, 869 [2d Cir 2015].)

Finally, plaintiff claims that it is entitled to indemnification for all losses arising out of the enforcement of defendants' repurchase obligations, including attorney's fees. (Pl.'s Memo. In Opp. at 24-25.) It is well settled that a promise by a party to a contract to indemnify the other for attorney's fees in intra-party litigation is contrary to the general rule that the parties bear their own attorney's fees. Thus, a court "should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." (Hooper Assocs. v AGS Computers, Inc., 74 NY2d 487, 492 [1989].)

The PSA's definition of "Repurchase Price" includes "all expenses incurred by the Trustee arising out of the Trustee's enforcement of the applicable Person's purchase obligation under the EquiFirst Agreements or the Barclays Representation Agreement," but does not contain any specific reference to attorney's fees or litigation expenses. (PSA, Art. I – Definitions.)[10] As this court has previously held in considering the same definition, this provision does not unmistakably evidence the parties' intent to authorize attorney's fees, as it does not expressly include such fees among the covered expenses. (See Deutsche Bank Natl. Trust Co., SABR 2007-BR1, 2015 WL 7625829, * 4; ACE Secs. Corp., Home Equity Loan Trust, Series 2007-WM1 v DB Structured Prods., Inc., 2014 WL 5243511, * 2 [Sup Ct, NY County Sept. 25, 2014].)

EquiFirst's indemnification obligations are further set forth in MLPA § 9.03, as follows:

> ". . . Seller shall indemnify the Purchaser and its present and former directors, officers, employees and agents and hold such parties harmless against any losses, damages, penalties, fines,

[10] A separate provision which does specifically pertain to attorney's fees, PSA § 2.08, provides that where the Trustee pursues legal remedies at the direction of the Depositor, after receiving written notice of a breach of a representation or warranty from the Depositor, the Trustee's legal expenses will be reimbursed from the Trust's assets, out of the Collection Account. Thus, where the PSA discusses legal fees in connection with the repurchase remedy, it does not contemplate payment by Barclays or EquiFirst.

> forfeitures, legal fees and expenses and related costs, judgments, and other costs and expenses resulting from any claim, demand, defense or assertion based on or grounded upon, or resulting from, a breach of any representation or warranty contained in this Agreement or any Reconstitution Agreement."

The indemnification clause includes terms – e.g., fines and penalties – plainly related to third-party claims. The remaining items for which MLPA § 9.03 provides indemnification do not unequivocally refer to a suit between the parties. All of the items for which indemnification is provided "are susceptible to third-party claims . . . . None are exclusively or unequivocally referable to claims between the parties themselves . . . ." (See Hooper, 74 NY2d at 492; see also Gotham Partners, L.P. v High River Ltd. Partnership, 76 AD3d 203, 206 [1st Dept 2010], lv denied 17 NY3d 713 [2011] ["for an indemnification clause to cover claims between the contracting parties rather than third-party claims, its language must unequivocally reflect that intent"]; U.S. Bank Nat. Assoc., JPALT 2007-A2 v Greenpoint Mtge. Funding, Inc., 2015 WL 915444, * 7 [Sup Ct, New York County Mar. 3, 2015] [this court's prior decision to the same effect].) As the provision fails to meet the strict standard of Hooper for coverage of intra-party claims, the court will grant the branch of defendants' motion to dismiss the Trustee's claim for indemnification of its legal fees in this action.

It is accordingly hereby ORDERED that defendants' motion to dismiss the complaint is granted to the extent of dismissing with prejudice, insofar as they are asserted against Barclays Bank PLC and EquiFirst Corp., the following claims: the first cause of action for breach of contract only insofar as it pleads a claim for an independent breach of a duty to repurchase defective loans; the second cause of action for breach of the implied covenant of good faith and fair dealing; and the claims for rescission, rescissory damages, consequential damages, and attorney's fees incurred by the trustee; and it is further

ORDERED that the branch of the motion for dismissal of the first cause of action to the extent it is based on the failure of defendants Barclays Bank PLC and EquiFirst Corp. to notify the Trustee of breaches of representations and warranties is denied without prejudice. Defendants Barclays Bank PLC and EquiFirst Corp. may move to dismiss this cause of action in conformity with procedures to be established in the coordinated RMBS put-back actions in Part 60 regarding motions with respect to failure to notify claims. Nothing herein shall be construed as determining the scope or import of the Appellate Division Nomura decision with respect to such claims; and it is further

ORDERED that all claims insofar as they are asserted against EquiFirst Mortgage Corporation of Minnesota are dismissed with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
May 25, 2016

MARCY FRIEDMAN, J.S.C.