

**Wilmington Trust Co. v Morgan Stanley Mtge.
Capital Holdings LLC**

2016 NY Slip Op 31130(U)

June 14, 2016

Supreme Court, New York County

Docket Number: 652686/2013

Judge: Marcy Friedman

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

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

WILMINGTON TRUST COMPANY, not in its
individual capacity but solely in its capacity as
Trustee of MORGAN STANLEY MORTGAGE
LOAN TRUST 2007-12,

Index No.: 652686/2013

Plaintiff,

DECISION/ORDER

– against –

MORGAN STANLEY MORTGAGE CAPITAL
HOLDINGS LLC, MORGAN STANLEY CREDIT
CORPORATION, and MORGAN STANLEY
PRIVATE BANK, NATIONAL ASSOCIATION,

Defendants.

This residential mortgage-backed securities (RMBS) breach of contract action is brought by plaintiff trustee, Wilmington Trust Company (Trustee), against defendants Morgan Stanley Mortgage Capital Holdings LLC (MSMCH), the Sponsor of the securitization at issue; Morgan Stanley Credit Corporation (MSCC), an Originator of some of the underlying loans; and Morgan Stanley Private Bank, National Association, successor-in-interest to MSCC. Defendants move to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7).

The complaint alleges that defendants breached representations and warranties regarding the quality and characteristics of mortgage loans underlying the Trust, and that following their discovery of such breaches, defendants failed to provide notice to the Trustee as required by the governing agreements. The complaint pleads three causes of action for breach of contract,¹ each

¹ To the extent plaintiff's claims are based on defendants' alleged breach of an independent obligation to cure or repurchase breaching loans, such claims cannot stand in light of ACE Securities Corp. v DB Structured Products,

related to a different category of securitized mortgage loans, governed by different contractual provisions. The complaint also pleads a fourth cause of action seeking a declaratory judgment.

Sponsor MSMCH sold certain loans to the non-party Depositor pursuant to a Mortgage Loan Purchase Agreement (MLPA). The MLPA was dated as of July 1, 2007 and had a Closing Date of July 31, 2007. MLPA § 3.01 sets forth MSMCH's representations and warranties about a category of loans it purchased from lenders and various originators (MSMCH Loans). (Compl. ¶ 24.) This provision also includes a repurchase protocol for MSMCH's breaches of representations and warranties as to these loans. A second category consists of loans originated by First National Bank of Nevada, IndyMac Bank, F.S.B., Quicken Loans, Inc., and Wachovia Mortgage Corp. (non-MSMCH Loans). (Compl. ¶ 26.) Pooling and Servicing Agreement (PSA) § 2.05 sets forth MSMCH's representations regarding these non-MSMCH Loans, and governs MSMCH's repurchase obligations as to these and other loans. The PSA was dated as of July 1, 2007 and had a Closing Date of July 31, 2007. The final category consists of loans originated by MSCC (MSCC Loans). Under the Restated Master Mortgage Loan Purchase Agreement (MSCC Purchase Agreement), dated as of November 1, 2005, MSCC made a series of representations and warranties about the mortgage loans it would sell, from time to time, to MSMCH's predecessor-in-interest, Morgan Stanley Mortgage Capital Inc. This Agreement also provided a repurchase remedy. (MSCC Purchase Agreement § 5 (b), (c); Compl. ¶ 58.) Pursuant to an Assignment, Assumption and Recognition Agreement (MSCC AAR), dated as of July 1, 2007, MSCC restated these representations, for the benefit of the Depositor, the Trustee, and the Trust, as of the Closing Date of the securitization, July 31, 2007.

It is undisputed that this action was commenced by the Trustee's filing of the Summons

Inc. (25 NY3d 581 [2015] [holding that the sponsor's "refusal to repurchase the allegedly defective mortgages did not give rise to a separate cause of action".])

with Notice on July 31, 2013, the six-year anniversary of the Closing Date of the securitization. It is also undisputed that the Trustee sent a single repurchase demand to defendants on July 30, 2013, and that the 90-day time period to cure or repurchase, under the repurchase protocol, had not yet expired when the action was commenced.

All of the arguments raised by defendants on this motion to dismiss have previously been considered in the RMBS litigation by this court² 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 rely on the reasoning of the prior decisions.

In moving to dismiss, defendants make the following assertions: (1) the action is time-barred both because it was filed more than six years after the “as of” or “effective date” of the governing agreements, and because the Trustee failed to fulfill a condition precedent prior to commencement of the action or the expiration of the limitations period; (2) the inclusion of interest-only and balloon loans in the securitization does not constitute a breach of MLPA § 3.01 (u); (3) defendants’ alleged failure to notify the Trustee of breaches is not an independent breach of contract; (4) damages are not available to plaintiff under the sole remedy clause, and plaintiff’s failure to seek specific performance of the repurchase protocol precludes any remedy; (5) the indemnification provision does not provide for reimbursement of intra-party attorney’s fees; and (6) the cause of action seeking a declaratory judgment is duplicative of plaintiff’s breach of contract claims.

The court rejects defendants’ claim that the action is time-barred because it was filed more than six years after the July 1, 2007 “as of” or “effective date” of the PSA, MSCC AAR,

² 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.”

and MLPA. In claiming that the action is time-barred defendants equate the “as of” dates of the governing agreements with the effective dates. Defendants do not argue that the execution dates are the same as the “as of” dates. Nor do they dispute that the representations and warranties were made as of the July 31, 2007 Closing Date.³

The authority does not support defendants’ contention that the cause of action for breach of the representations and warranties accrues on the “as of” date of an RMBS contract. As the Appellate Division has held in the RMBS context, claims for breaches of representations and warranties “typically accrue at the time the contract containing the representations is executed.” Even if a PSA is executed prior to the Closing Date, however, where the representations and warranties are made effective “as of the Closing Date . . . the claims accrue[] on that date and not earlier.” (Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., ___ AD3d ___, 2016 WL 2859548 [1st Dept May 17, 2016]; see also Deutsche Bank Natl. Trust Co. [SABR 2007-BR2] v Barclays Bank PLC, 2016 WL 3185197 [Sup Ct NY County June 8, 2016] [this court’s decision holding that a cause of action for breach of representations made effective as of the Closing Date accrued on the Closing Date, and discussing the viability of a claim for breach of representations made effective prior to the execution date].)

The court further rejects defendants’ assertion that the action is rendered untimely by the Trustee’s failure to satisfy a repurchase demand condition precedent prior to commencement of the action or the expiration of the statute of limitations. The court refers to its recent decisions for an extensive discussion of the court’s reasoning on this issue, which will not be repeated

³ The parties have not discussed the effective dates of representations regarding the different categories of loans. Review of the governing agreements shows, however, that MSCC’s representations and warranties were restated for the benefit of the Trust and the Trustee in MSCC AAR § 3 (c) as of the Closing Date. MSMCH’s representations with respect to all loans were also made as of the Closing Date (PSA § 2.05), as were all but two of its representations with respect to the MSMCH Loans. (MLPA § 3.01.) MLPA 3.01 [a] and [p] are stated to be true on the Cut-Off Date, defined as July 1, 2007.

here. (See ACE Securities Corp. v DB Structured Products, Inc., ___ Misc 3d ___, 29 NYS3d 139, 151-159 [Sup Ct, NY County Mar. 29, 2016] [ACE IV]; U.S. Bank Natl. Assoc. [ABSHE 2006-HE7] v DLJ Mtge. Capital, Inc., 2016 WL 1306279, * 4 [Sup Ct, NY County Mar. 29, 2016].)

The court also rejects defendants' argument that this action must be dismissed for failure to make repurchase demands and to allow the time to comply with them to elapse prior to the commencement of the action. As this court has repeatedly held, where the governing agreement provides that a defendant's own discovery of breaches of representations and warranties independently gives rise to its repurchase obligation, a breach of contract action may be maintained based on allegations of the defendant's discovery, and without the satisfaction of a repurchase demand condition precedent. (See e.g., Deutsche Bank Natl. Trust Co., EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp., 2016 WL 3017760, * 5-6 [Sup Ct NY County May 25, 2016] [DBNTC/EquiFirst] [this court's prior decision discussing these alternative triggers of a sponsor's obligation to cure or repurchase]; ACE Secs. Corp. [2007-ASAP2] v DB Structured Prods., Inc., 2014 WL 4785503, * 2-3 [Sup Ct, NY County, Aug. 28, 2014, No. 651936/13] [ACE 2007-ASAP2] [same]; Nomura Asset Acceptance Corp. [2006-S4] v Nomura Credit & Capital, Inc., 2014 WL 2890341, * 15-16 [Sup Ct, NY County, June 26, 2014, No. 653390/12 [Nomura [2006-S4]]] [same]; see also Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc. (133 AD3d 96, 108 [1st Dept 2015], appeal docketed [APL-2016-00024] [Nomura] [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].)

Here, the applicable repurchase protocols for the MSMCH Loans and the MSCC Loans provide that defendants' repurchase obligation is triggered by either a repurchase demand or discovery. (See MLPA § 3.01 and MSCC Purchase Agreement § 5 [c].) Moreover, the allegations as to defendants' discovery of breaches of representations warranties, based on defendants' due diligence or role in the origination of the loans, are comparable to allegations that this court has previously held sufficient, at the pleading stage, to support the plaintiff's maintenance of breach of contract claims. (DBNTC/EquiFirst, 2016 WL 3017760, at * 5; ACE 2007-ASAP2, 2014 WL 4785503, at * 3-6.)⁴

The court reaches a different result with respect to the non-MSMCH Loans. As conceded by plaintiff during the oral argument, the applicable repurchase provision does not obligate MSMCH to repurchase loans absent service of a repurchase demand. (Transcript at 21-22; PSA § 2.05.) The parties have not advised the court whether the repurchase demand that was made includes non-MSMCH Loans. As this motion was briefed and argued prior to the Appellate Division's decision in Nomura, the parties have not addressed the import of the Court's discussion of the possible application of the relation-back doctrine to permit claims to be added in an RMBS breach of contract action. (See 133 AD3d at 108.) The parties also have not had the opportunity to address this court's ACE IV holding as to the effect of failure to satisfy a

⁴ Although the complaint sufficiently pleads defendant's discovery of breaches of representations and warranties, plaintiff will have the ultimate burden of proving whether and to what extent defendant discovered the breaches. (ACE 2007-ASAP2, 2014 WL 4785503, at * 3.) As previously held, the court rejects defendants' claim that the complaint is deficient because it does not specifically identify each loan as to which representations were allegedly breached, or because the repurchase demand does not specifically identify each loan as to which repurchase is sought. (See id., at * 6 [this court's prior decision citing authorities and holding that at the pleading stage, the allegations of the complaint as to the defendant's role in the securitization, together with the allegations as to the widespread nature of the breaches, as confirmed by the plaintiff's loan-level analysis, were sufficient to support a reasonable inference that defendant discovered widespread breaches]; Nomura [2006-S4], 2014 WL 2890341, at * 15-16; Ownt Mtge. Loan Trust, Series 2006-5 v Merrill Lynch Mtge. Lending, Inc., 2015 WL 8028372, * 1 [Sup Ct, NY County Dec. 7, 2015, No. 651370/14].)

repurchase demand condition precedent on the timeliness of an action. (See supra at 4-5.) In addition, an unaddressed issue exists as to whether the cause of action based on the non-MSMCH Loans should be dismissed without prejudice to possible refiling pursuant to CPLR 205 (a). (Cf. Weksler v Weksler, ___ AD3d ___, 2016 WL 3247588 [1st Dept June 14, 2016] [upholding refiling under CPLR 205 (a) of a dismissed or terminated cause of action, as opposed to a complaint dismissed in its entirety].) The motion to dismiss claims regarding non-MSMCH Loans will therefore be denied without prejudice.

The court will grant the motion to the extent that it seeks dismissal of the complaint for failure to state a claim for breaches of a specific representation, MLPA § 3.01 (u), which provides: “Each Mortgage Note requires a monthly payment which is sufficient to amortize fully the original principal balance over the original term thereof and to pay interest at the related Mortgage Interest Rate. No Mortgage Loan contains terms or provisions which would result in negative amortization.” Plaintiff contends that the inclusion of interest-only loans and balloon loans violates MLPA § 3.01 (u), because the monthly payment at the time of the securitization would not fully repay the loan principal. For the reasons stated in Nomura [2006-S4] (2014 WL 2890341, at * 16), which involved a similar representation, the court holds that plaintiff may not maintain claims for breach of MLPA § 3.01 based on interest-only and balloon loans, which do not violate its terms.⁵

Defendants also seek dismissal of the breach of contract claims to the extent based on their alleged breach of an independent obligation to give plaintiff prompt written notice of their discovery of breaches of representations and warranties. In Nomura, the Court stated that this court had “correctly declined to permit plaintiffs [trustees] to pursue damages for defendant’s

⁵ Based on this holding, the court need not reach defendants’ claim that the court may consider the disclosure in the Prospectus Supplement that interest-only and balloon loans would be included in the loan pools.

[the sponsor's] failure to repurchase defective loans.” (133 AD3d 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.

It is undisputed that all of the governing agreements require defendants to give prompt written notice of their discovery of breaches. (MSCC Purchase Agreement § 5 [c], PSA § 2.05 [a], MLPA 3.01.) Defendants’ motion to dismiss the prompt written notice claim will therefore be denied without prejudice to the requested coordinated briefing on the import of Nomura as set forth in the ordering provision (infra).

The court is unpersuaded by defendants’ further argument that plaintiff’s sole remedy for breaches of representations and warranties is limited to specific performance and that plaintiff is not entitled to damages. The Appellate Division has rejected this claim in considering similar sole remedy provisions. (Nomura, 133 AD3d at 105-107 [holding that where cure or repurchase of mortgage loans is impossible, plaintiffs may pursue monetary damages in lieu of specific performance]; see also DBNTC/EquiFirst, 2016 WL 3017760 at * 10 [this court’s prior decision to the same effect, citing authorities].) Plaintiff’s failure to explicitly seek specific performance of the repurchase protocol will not preclude such equitable relief. (See MASTR Adjustable Rate Mtges. Trust 2006-OA2 v UBS Real Estate Secs. Inc., 2013 WL 4399210, * 3 [SD NY Aug. 15, 2013] [holding such relief available where, as here, the plaintiff sought “other and further relief as the Court may deem just and proper”].)

The court will grant the motion to the extent that it seeks dismissal of the claim for attorney's fees, brought solely against MSCC. As this court has previously held in considering a substantially similar clause, the indemnification provision in MSCC Purchase Agreement § 5 (c) authorizing reimbursement of attorney's fees is not exclusively or unequivocally referable to intra-party litigation. (See DBNTC/EquiFirst, 2016 WL 3017760, at * 11 [this court's prior decision denying indemnification for attorney's fees, citing authorities].)

Finally, the court holds that the fourth cause of action seeking a declaratory judgment should be dismissed as duplicative of the breach of contract claims. (Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC., 2014 WL 4829638, * 2 [Sup Ct NY County Sept. 25, 2014] [this court's prior decision dismissing declaratory judgment claim].)

It is accordingly hereby ORDERED that defendants' motion to dismiss the complaint is granted to the extent of dismissing the following claims with prejudice: (1) the first, second and third causes of action for breach of contract only insofar as they plead a claim for an independent breach of a duty to repurchase defective loans and insofar as they plead a claim for breach of MPLA § 3.01 (u) based on the inclusion of interest-only and balloon loans in the loan pool; (2) the claim for indemnification of attorney's fees against defendant MSCC; and (3) the fourth cause of action seeking a declaratory judgment; and it is further

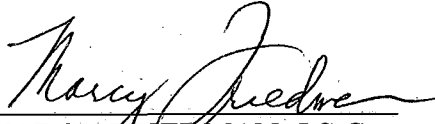
ORDERED that the branch of the motion to dismiss the second cause of action, to the extent based on the failure of plaintiff to fulfill a condition precedent regarding the non-MSMCH Loans, is denied without prejudice; and it is further

ORDERED that the branch of the motion to dismiss the first, second and third causes of action, to the extent based on the failure of defendants to notify the Trustee of breaches of

representations and warranties, is denied without prejudice. Defendants 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.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2016


MARCY FRIEDMAN, J.S.C.