Federal Hous. Fin. Agency v UBS Real Estate Sec., Inc.
2016 NY Slip Op 31458(U)
July 27, 2016
Supreme Court, New York County
Docket Number: 651282/12
Judge: Marcy Friedman

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

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

FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR OF THE FEDERAL HOME LOAN MORTGAGE CORPORATION, on behalf of the Trustee of the MASTR ADJUSTABLE RATE MORTGAGES TRUST 2006-OA1 (MARM 2006-OA1)

Plaintiff,

– against –

UBS REAL ESTATE SECURITIES, INC.

Defendant.

Index No.: 651282/12
Motion Seq. No. 002

DECISION/ORDER

This residential mortgage backed securities (RMBS) breach of contract action is based on breaches of representations and warranties by defendant UBS Real Estate Securities Inc. (UBS), the Sponsor, regarding the quality and characteristics of the loans. U.S. Bank National Association is the Trustee of Mastr Adjustable Rate Mortgages Trust 2006-OA1, the Trust to which the loans were conveyed (MARM 2006-A1 or the Trust). Defendant moved to dismiss the Amended Complaint pursuant to CPLR 3211 (a). The motion was briefed before the Appellate Division and Court of Appeals decisions in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015], affg 112 AD3d 522 [1st Dept 2013] [ACE]). By stipulation of the parties, so-ordered on August 20, 2014, the motion was stayed pending the Court of Appeals decision. Subsequent to that decision, the parties filed supplemental memoranda of law.

The relevant facts are not disputed: Federal Housing Finance Agency (FHFA), acting as

conservator for the Federal Home Loan Mortgage Corporation (Freddie Mac), a certificateholder in the Trust, commenced this action by filing a Summons with Notice on April 19, 2012, six years minus one day after the Closing Date of the securitization. On September 19, 2012, a complaint was filed. The caption of the Complaint identified plaintiffs as "MASTR ADJUSTABLE RATE MORTGAGES TRUST 2006-OA1 (MARM 2006-OA1) and FEDERAL HOUSING FINANCE AGENCY, AS CONSERVATOR OF THE FEDERAL HOME LOAN MORTGAGE CORPORATION."[1] The body of the Complaint identified plaintiffs as follows: "MASTR Adjustable Rate Mortgages Trust 2006-OA1 ('MARM 2006-OA1 Trust' or 'Trust'), acting by U.S. Bank National Association, solely in its capacity as trustee of the Trust (the 'Trustee'), and the Federal Housing Finance Agency ('FHFA') as Conservator of the Federal Home Loan Mortgage Corporation ('Freddie Mac') (together with the Trust, 'Plaintiffs')." (Compl. at 1.)

Defendant brought a motion to dismiss the Complaint on the ground, among others, that FHFA lacked standing and that the action was barred by the statute of limitations. The motion was heard by Justice Oing of this Court, to whom the action was initially assigned. By decision on the record on June 12, 2013, so ordered on June 18, 2013, Justice Oing dismissed the Complaint with leave to amend "for lack of standing." (June 12, 2013 Transcript [Tr.] at 25.) The decision addressed at length Justice Oing's concern as to whether the Trustee had authorized the filing of the Complaint. (See Tr. at 21-26.) Citing Walnut Place LLC v Countrywide Home Loans, Inc. (96 AD3d 684 [1st Dept 2012]), Justice Oing also indicated that FHFA lacked standing, although he did not make an express finding to that effect. He thus stated: ". . . [T]his Walnut case . . . is on all fours with what we have, here. But the wiggle room I'm giving you is I

[1] The Trustee did not move for leave to intervene or for substitution as plaintiff, and the caption was never formally amended to replace the caption in the Summons with Notice.

want to know what U.S. Bank's role is in all this." (Id. at 19.) ". . . [I]n this P.S.A. here the trustee is the sole person that's going to be enforcing the right. . . ." (Id. at 23.) According to the transcript, however, the dismissal granted "plaintiffs" (plural) leave to amend. (Id. at 25.) An order, dated June 12, 2013, stated that the "Motion is decided on the record," and directed submission of the transcript for so-ordering.[2]

The instant motion seeks dismissal of the Amended Complaint on the ground that FHFA lacked standing to commence the action and that the Trustee did not timely commence the action. It is undisputed that the FHFA Summons with Notice was timely filed, and that the Trustee's Complaint and Amended Complaint were both filed after the passage of the statute of limitations.

To the extent that Justice Oing has not already held that FHFA lacked standing to commence this action, this court does so now. The court further holds that the Trustee's Amended Complaint, which alleges causes of action for specific performance and damages, both based on alleged breaches of representations and warranties, is untimely because it did not relate back to FHFA's ineffective Summons with Notice.[3] In two recent opinions, involving substantially similar pleadings and governing agreements, this court held that FHFA lacked standing to commence the action and that the action was untimely where the trustee's complaint was not filed until after the expiration of the statute of limitations. The actions involved pleadings and governing agreements substantially similar to those at issue here. (Federal Hous. Fin. Agency [MSAC 2007-NC1] v Morgan Stanley ABS Capital I Inc., 2016 WL 1587345 [Sup

[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." This action was subsequently transferred to this Part.

[3] To the extent that the Amended Complaint purports to plead the breach of contract causes of action based on an independent breach of UBS's repurchase obligations (Am. Compl. ¶¶ 76, 86), that claim is foreclosed by ACE (25 NY3d at 589).

Ct, NY County, Apr. 12, 2016, No. 650291/2013] [FHFA (NC1)]; Federal Hous. Fin. Agency [MSAC 2007-NC3] v Morgan Stanley Mtge. Capital Holdings LLC, 2016 WL 1587344 [Sup Ct, NY County, Apr. 12, 2016, No. 651959/2013] [FHFA (NC3)] [together, the FHFA Opinions].)[4]

Subsequent to the FHFA Opinions, the Appellate Division held, also on substantially similar pleadings and governing agreements, that FHFA lacked standing to commence an action for breaches of representations and warranties, and that a Trustee's subsequently filed complaint did not relate back to FHFA's Summons with Notice. (U.S. Bank Natl. Assoc. v DLJ Mtge. Capital, Inc. (2016 WL 3620193, * 1 [1st Dept July 7, 2016] [US Bank/DLJ]; see also Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., 139 AD3d 519, 519 [1st Dept 2016].) On this authority, the Amended Complaint must be dismissed.

In so holding, the court rejects the Trustee's contention that FHFA had standing to commence this action because FHFA notified the Trustee and Master Servicer of a Master Servicer Event of Termination; FHFA directed the Trustee to commence suit against UBS; and the Trustee waived any failure to comply with the other requirements of the no-action clause in the governing Pooling and Servicing Agreement (PSA). As this argument was not raised in the prior FHFA actions before this court, it will be addressed here.

The no-action clause, section 11.08 of the PSA, provides that no Certificateholder shall have the right to institute any suit under the PSA unless the Certificateholder shall have given the Trustee "written notice of a Master Servicer Event of Termination and of the continuance thereof." This clause further precludes a Certificateholder's institution of suit unless

[4] As explained in FHFA (NC1), these holdings are based on the Appellate Division decision in ACE (112 AD3d 522, affd on other grounds 25 NY3d 581), which remains binding on this court. (FHFA [NC1], 2016 WL 1587345, at * 4; see also ACE Secs. Corp. v DB Structured Prods., Inc., 2016 WL 1222166 [Sup Ct, NY County, Mar. 29, 2016, No. 651854/2014] [this court's decision discussing at length the import of the ACE Appellate Division and Court of Appeals decisions].) The court adheres to the reasoning of these cases, which will not be repeated here.

Certificateholders of not less than 25% of the Voting Rights shall also have made written request to the Trustee to institute such action; shall have offered the Trustee reasonable indemnity; and the Trustee "for 60 days after its receipt of such notice . . . shall have neglected or refused to institute any such action. . . ." The term Master Servicer Event of Termination is defined in section 7.01 as "Events of Default" on the Master Servicer's part, such as failure to deposit amounts required to be deposited in a Distribution Account, failure to perform its covenants under the PSA, and insolvency. As is typical in RMBS governing agreements, PSA section 2.03, the repurchase protocol, provides that the "Trustee shall enforce" the obligations of the responsible securitizer to cure and repurchase loans affected by material breaches of representations and warranties.

Here, by notice dated April 10, 2012, FHFA informed the Trustee and Master Servicer of specified Master Servicer defaults. (Notice of Master Servicer Event of Termination, annexed to Musoff Aff., Ex. 4.) By separate notice, also dated April 10, 2012, FHFA informed the Trustee that UBS was "in default of its obligations under the PSA" and requested "that the Trustee institute an action, suit, or proceeding . . . against [UBS] for breaching representations and warranties concerning the Mortgage Loans . . . ." (Request to Institute Action, Suit, or Proceeding, annexed to Musoff Aff., Ex. 4.) It is undisputed that FHFA filed the Summons with Notice on April 19, 2012, the day before the expiration of the statute of limitations, but before the expiration of the 60-day period for the Trustee to act that is provided for in the PSA no-action clause.

The Trustee concedes that it did not comply with this requirement of the no-action clause, but contends that because the no-action clause was made for its "sole benefit," the Trustee could unilaterally waive the 60-day waiting period. (Trustee's Suppl. Memo. In Opp. at 6; Transcript

of Oral Arg. on Dec. 8, 2015, at 19-23.) The Trustee fails to cite any authority in support of this contention. Indeed, there is persuasive authority to the contrary. In Federal Housing Finance Agency v WMC Mortgage, LLC (2015 WL 9450833 [SD NY, July 10, 2015, No. 13 Civ 584] [Hellerstein, J.], appeal docketed [15-2559] [WMC]), the Court held that FHFA violated a substantially similar no-action provision by filing the summons with notice less than 60 days after giving notice of servicer defaults and offering indemnity to the trustee. The Court reasoned that the trustee's "argument that it may 'waive' the prerequisites [of the no-action clause] because they are 'solely for its benefit' is a misstatement." (See id. at * 5.) Relying on the Court of Appeals decision in Quadrant Structured Prods. Co. v Vertin (23 NY3d 549, 565-566 [2014]), the WMC Court reasoned that the no-action clause "provides benefits to three parties: (i) the Trustee has the first opportunity to decide whether to bring a lawsuit before any individual Certificateholder may sue, (ii) individual Certificateholders are assured that it will be more difficult for others to bring 'lone ranger' suits, and (iii) potential Defendants are protected against defending numerous litigations." (WMC, 2015 WL 9450833, at *5.) This court adopts this reasoning here.[5]

Having held that the action must be dismissed as time-barred, the court turns to the Trustee's further contention that it should be permitted to re-file the action pursuant to CPLR 205 (a). As recently held by the Appellate Division, and discussed at length in a prior decision of this court, the Trustee may not avail itself of CPLR 205 (a) on these facts. (US Bank/DLJ, 2016 WL 3620193, at * 1-2; ACE Secs. Corp., 2016 WL 1222166, at * 1, 17-18.)

[5] As the court has concluded that the Trustee may not unilaterally waive the failure to comply with the no-action clause, the court does not reach the further issue of whether a certificateholder may sue for breach of representations and warranties where it does comply with a no-action clause requiring the certificateholder to provide notice of a Master Servicer Event of Termination based on a Master Servicer Event of Default. (See ACE, 112 AD3d at 523 [making no express finding on this issue]; Walnut Place LLC, 96 AD3d at 684-685 [same].)

In view of this holding, the court does not reach the parties' remaining contentions.

There is no claim in the Amended Complaint based on UBS's failure to notify the Trustee of breaches. The court has, however, requested coordinated briefing on the scope and viability of failure to notify claims in light of the Appellate Division decision in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024]). The dismissal of this action will be without prejudice to a motion for leave to replead such a claim, to be brought in connection with such briefing.

Accordingly, it is hereby ORDERED that the motion to dismiss of defendant UBS Real Estate Securities Inc. is granted to the extent of dismissing the Amended Complaint in its entirety; and it is further

ORDERED that in the event that U.S. Bank National Association intends to seek leave to replead a claim with respect to the failure to notify, it shall forthwith inform the court, and any motion for leave to replead shall be made in conformity with procedures to be established in the coordinated put-back actions in Part 60. Nothing herein shall be construed as determining the scope or import of the Appellate Division decision in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024]) with respect to such claims.

This constitutes the decision and order of the court.

Dated: New York, New York
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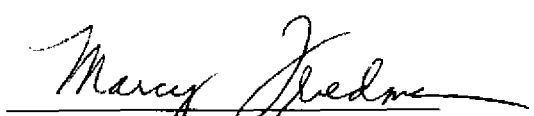

MARCY FRIEDMAN, J.S.C.

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The Trustee concedes that it did not comply with this requirement of the no-action clause, but contends that because the no-action clause was made for its "sole benefit," the Trustee could unilaterally waive the 60-day waiting period. (Trustee's Suppl. Memo. In Opp. at 6; Transcript

of Oral Arg. on Dec. 8, 2015, at 19-23.) The Trustee fails to cite any authority in support of this contention. Indeed, there is persuasive authority to the contrary. In Federal Housing Finance Agency v WMC Mortgage, LLC (2015 WL 9450833 [SD NY, July 10, 2015, No. 13 Civ 584] [Hellerstein, J.], appeal docketed [15-2559] [WMC]), the Court held that FHFA violated a substantially similar no-action provision by filing the summons with notice less than 60 days after giving notice of servicer defaults and offering indemnity to the trustee. The Court reasoned that the trustee's "argument that it may 'waive' the prerequisites [of the no-action clause] because they are 'solely for its benefit' is a misstatement." (See id. at * 5.) Relying on the Court of Appeals decision in Quadrant Structured Prods. Co. v Vertin (23 NY3d 549, 565-566 [2014]), the WMC Court reasoned that the no-action clause "provides benefits to three parties: (i) the Trustee has the first opportunity to decide whether to bring a lawsuit before any individual Certificateholder may sue, (ii) individual Certificateholders are assured that it will be more difficult for others to bring 'lone ranger' suits, and (iii) potential Defendants are protected against defending numerous litigations." (WMC, 2015 WL 9450833, at *5.) This court adopts this reasoning here.[5]

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In view of this holding, the court does not reach the parties' remaining contentions.

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Accordingly, it is hereby ORDERED that the motion to dismiss of defendant UBS Real Estate Securities Inc. is granted to the extent of dismissing the Amended Complaint in its entirety; and it is further

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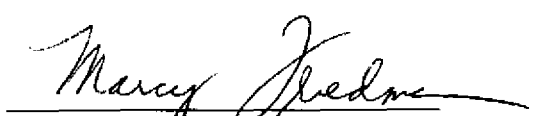
This constitutes the decision and order of the court.

Dated: New York, New York
July 27, 2016



MARCY FRIEDMAN, J.S.C.