

**Federal Hous. Fin. Agency v Morgan Stanley ABS
Capital I Inc.**

2016 NY Slip Op 32867(U)

April 12, 2016

Supreme Court, New York County

Docket Number: 650291/2013

Judge: Marcy Friedman

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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

Federal Housing Finance Agency, as Conservator for
the Federal Home Loan Mortgage Corporation, on
behalf of the Trustee of the Morgan Stanley ABS Capital
I Inc. Trust, Series 2007-NC1 (MSAC 2007-NC1) INDEX NO. 650291/2013

-against- MOTION DATE _____

Morgan Stanley ABS Capital I Inc. MOTION SEQ. NO. 002

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____
Answering Affidavits — Exhibits _____ No (s). _____
Replying Affidavits _____ No (s). _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Upon the foregoing papers, it is ORDERED that defendant Morgan Stanley ABS Capital I Inc.'s motion to dismiss is decided in accordance with this court's decision/order dated April 12, 2016.

Dated: 4-12-16 Marcy S. Friedman J.S.C.
MARCY S. FRIEDMAN, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate:.....Motion is: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

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 FOR THE FEDERAL HOME
 LOAN MORTGAGE CORPORATION, on behalf
 of the Trustee of the MORGAN STANLEY ABS
 CAPITAL I INC. TRUST, SERIES 2007-NC1
 (MSAC 2007-NC1),

Index No.: 650291/2013

DECISION/ORDER

Plaintiff,

– against –

MORGAN STANLEY ABS CAPITAL I INC.,

Defendant.

This residential mortgage-backed securities (RMBS) breach of contract action is based on alleged breaches of representations and warranties by nonparty NC Capital Corporation (NC Capital), the loan seller, regarding the quality and characteristics of the underlying loans. Defendant Morgan Stanley ABS Capital I Inc. (MSAC) was the Depositor of the loans into the Trust, and served as what is colloquially known as a “backstop” to NC Capital – that is, it was obligated, under a contractual repurchase protocol, to repurchase loans as to which NC Capital breached representations and warranties.¹ Deutsche Bank National Trust Company is Trustee of MSAC 2007-NC1, the Trust at issue. 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. The

¹ The RMBS securitization process was recently summarized by the Court of Appeals in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581, 589 [2015]). The process by which mortgages are securitized, and the roles of securitization participants, are discussed in this court’s prior RMBS decisions and will not be repeated here. (See e.g. HSN Nordbank AG v Barclays Bank PLC, 2014 WL 841289, * 1-2 [Sup Ct, NY County, Mar. 3, 2014, No. 652678/11].)

Trustee subsequently filed the complaint and amended complaint. Defendant MSAC moves to dismiss the amended complaint pursuant to CPLR 3211 (a) (1), (3), (5) and (7) on the grounds, among others, that the action was not timely commenced, and that the complaint is defectively pleaded.²

The amended complaint pleads the following four causes of action: a first, for breach of contract based on NC Capital's alleged breaches of representations and warranties (Am. Compl. ¶¶ 79-92); a second, for breach of contract based on MSAC's alleged failure to give prompt written notice to the Trustee of its discovery of breaches of those representations and warranties (id. ¶¶ 93-102); a third, for breach of contract based on MSAC's alleged failure to repurchase defective mortgage loans, and for anticipatory breach of contract based on such failure (id. ¶¶ 103-116); and a fourth, for breach of the implied covenant of good faith and fair dealing. (Id. ¶¶ 117-124.)

TIMELINESS

As a threshold matter, MSAC contends that this action was not timely commenced. In particular, MSAC argues that even if FHFA commenced the action within the statute of limitations, it lacked standing to sue, and that the Trustee's complaint, filed after the statute of limitations expired, did not relate back to FHFA's summons with notice. MSAC argues that the action was untimely for the additional reasons that the summons with notice was filed "prior to making any repurchase demands, and more than six years after the date of the contracts on which [the Trustee's] claims are based." (Def.'s Memo. in Supp. at 5-6.)

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 court has accordingly issued numerous decisions in the RMBS litigation. 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.

The facts relevant to the determination of the timeliness issue are not in dispute. The loans were transferred to the Trust pursuant to a Pooling and Servicing Agreement (PSA) dated January 1, 2007, with a Closing Date of January 26, 2007. The PSA was entered between and among MSAC as Depositor, the securitization servicers, NC Capital as loan seller, and the Trustee. The representations and warranties made by NC Capital, which are the subject of this action, were expressly made as of January 26, 2007, the Closing Date. (See PSA, Sched. III, at 1 [Am. Compl., Exh. C].) Section 2.03 (f) of the PSA provides that “[w]ithin 90 days of the earlier of either discovery by or notice” to MSAC of a breach of any such representation or warranty “that materially and adversely affects the value of any Mortgage Loan or the interest of the Trustee or the Certificateholders therein, the Depositor [MSAC] shall use its best efforts to promptly cure such breach in all material respects and, if such defect or breach cannot be remedied,” repurchase or substitute the defective loans.

FHFA commenced this action by filing a summons with notice on January 25, 2013. Subsequently, on May 23 and June 10, 2013, the Trustee made repurchase demands on MSAC. (Am. Compl. ¶¶ 41, 49.) The Trustee, purporting to substitute itself as plaintiff, filed the initial complaint on July 2, 2013, over five months after FHFA filed the summons with notice. The Trustee filed an amended complaint on February 3, 2014.

In Ace Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015], affg 112 AD3d 522 [1st Dept 2013]), the Court of Appeals recently resolved an issue of widespread importance in the RMBS litigation regarding the statute of limitations for a breach of contract claim against a securitizer (there, a sponsor) under a repurchase protocol. Like the instant action, ACE involved an action commenced by certificateholders by the filing of a summons with notice just prior to the expiration of the statute of limitations, and the Trustee’s filing of a

complaint after the expiration. The Court determined that “the Trust’s cause of action against [the sponsor] for breach of representations and warranties accrued at the point of contract execution,” when the representations and warranties were made, and not when the sponsor failed to comply with a repurchase demand. (Id. at 589.) The Court further held that the action should be dismissed because the certificateholders that brought the action “failed to comply with the contractual condition precedent to suit; namely, affording [the sponsor] 60 days to cure and 90 days to repurchase from the date of notice of the alleged non-conforming loans.” (Id.) In view of the failure to fulfill this repurchase demand condition precedent, the Court expressly declined to address the issues of the standing of the certificateholders and the relation back of the trustee’s complaint, which the Appellate Division had addressed in an alternative holding. (Id. at 599.)

Like the Court of Appeals, the Appellate Division held that the defendant’s motion to dismiss the complaint should have been granted based on the certificateholders’ failure to comply with the condition precedent to suit. (112 AD3d at 523.) The Appellate Division also held that “the certificate holders lacked standing to commence the action on behalf of the trust.” (Id.) This holding was based on the ACE PSA. As described by the Appellate Division, the no-action clause authorized certificateholders to commence an action only upon a “written notice of default” to the Trustee and “the continuance thereof.” The PSA, however, defined Events of Default only as defaults of the servicers, and not as breaches by the sponsor of representations and warranties. (Id.) Distinguishing cases in which the parties had been found sufficiently related to permit substitution under the relation back doctrine, the Appellate Division further held that the substitution of the trustee as plaintiff did not “permit [the Court] to deem timely filed the trustee’s complaint.” (Id.)

The ACE action was refiled, purportedly pursuant to the CPLR 205 (a) savings provision, while the appeal to the Court of Appeals was pending. By decision issued on March 29, 2016, this court considered whether the trustee was entitled to avail itself of the savings provision, which permits a plaintiff to refile a dismissed action where the first action was timely commenced and was not terminated by a final judgment upon the merits or on other enumerated grounds. (See ACE Secs. Corp. v DB Structured Prods., Inc., 2016 WL 1222166 [Sup Ct, NY County, Mar. 29, 2016, No. 651854/14].) This court's ACE decision (March 29, 2016 decision), to which the parties are referred, extensively discussed the Appellate Division and Court of Appeals' ACE decisions. (Id. at * 5-7.) Based on the text of the Court of Appeals' decision and review of an extensive body of law under CPLR 205 (a) on the effect of condition precedent dismissals on the timeliness of a first action, this court concluded that the Court of Appeals' condition precedent dismissal was not a dismissal on timeliness grounds (id. at * 7-8), and that the first ACE action was not rendered untimely by the plaintiff's failure to satisfy the repurchase demand condition precedent prior to commencing the first action or prior to the expiration of the statute of limitations. (Id. at * 9-17.) This court determined, however, that it also remained bound by the Appellate Division's alternative standing and relation back holdings, under which the Trustee's complaint was found untimely. (See id. at * 1, 17-18.)

On the reasoning of the March 29, 2016 decision, which will not be repeated here, the court holds that this action was not rendered untimely by plaintiff's failure to satisfy a repurchase demand condition precedent prior to the filing of the summons with notice, which commenced the action, or prior to the expiration of the limitations period. In this regard, the court finds that there is no material difference between FHFA's failure to make a repurchase demand prior to the commencement of the action or the expiration of the statute of limitations, and the ACE

certificateholders' failure, after making a repurchase demand, to let the cure and repurchase periods lapse prior to such commencement or expiration.³

The court also rejects defendant MSAC's contention that the Trustee's claims accrued on the PSA "as of" date, January 1, 2007, rather than on the Closing Date of January 26, 2007. (See Def.'s Memo. in Supp. at 10-11.) As the Appellate Division of this Department has held, the statute of limitations accrues at the point of contract execution "even where the contract states that its 'effective date' is earlier." (U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 121 AD3d 535, 536 [1st Dept 2014]; see also Nomura Asset Acceptance Corp. [2006-S4], 2014 WL 2890341, at * 5 & n 4 [this court's prior decision to the same effect, collecting authorities].)

This action and ACE, however, involve substantially similar facts regarding commencement of the action within the statute of limitations by a certificateholder (here, the conservator for the certificateholder) and the Trustee's filing of the complaint after the expiration of the statute of limitations. Both actions allege breach of contract claims based on breaches of representations and warranties as to the underlying loans.⁴ The no-action clauses in both actions

³ The court also notes that where, as here, the governing agreement, PSA § 2.03 (f) (quoted supra at 3), provides that the 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 ACE Secs. Corp. [2007-ASAP2] v DB Structured Prods., Inc., 2014 WL 4785503 [Sup Ct, NY County, Aug. 28, 2014, No. 651936/13, * 2-3 [ACE 2007-ASAP2] [this court's prior decision discussing these alternative triggers of a sponsor's obligation to cure or repurchase]; 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 [same, collecting authorities].)

As this court has previously explained, the trustee in ACE did not argue that the sponsor's discovery of breaches gave rise to its repurchase obligation. Rather, it argued that its cause of action accrued not at the time the representations and warranties regarding the loans were made but, rather, when the sponsor breached its allegedly independent obligation to repurchase the loans in response to the repurchase demand. The Court of Appeals rejected that claim in holding that "the cure or repurchase obligation was not an independently enforceable right." (ACE, 25 NY3d at 599; ACE 2007-ASAP2, 2014 WL 4785503, at * 2.)

⁴ This action, unlike ACE, also alleges a cause of action based on the failure of defendant Depositor MSAC to notify the Trustee of its discovery of breaches of the representations and warranties. That cause of action is discussed infra at 19-20.

are also similar.⁵ Under the ACE Appellate Division standing and relation back holdings by which this court remains bound, and on the reasoning of the March 29, 2016 decision, which will not be repeated here, this court holds that FHFA lacked standing to commence this action, and that the Trustee's complaint did not relate back to FHFA's summons with notice. The court further holds that the Trustee's first cause of action, based on breaches of representations and warranties, is therefore untimely.

In so holding, the court rejects the arguments advanced by the Trustee in support of its claim that the action was timely commenced. First, the Trustee argues that FHFA's summons with notice was proper because it "was filed derivatively on behalf of the Trustee." (Tee.'s Memo. in Opp. at 1.) The Trustee notes that the summons with notice "explicitly states that the suit was brought 'on behalf of the Trustee,'" and seeks "'an award of . . . damages to the Trust,' making clear that the Trust will be the beneficiary of the suit." (Id. at 5 [emphasis omitted].) The no-action clause, however, bars "any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement" unless its requirements have been satisfied. (See PSA § 10.08.) The mere inclusion of the words "on behalf of the Trustee" in the caption of a summons with notice does not enable a certificateholder to escape the limitations of the governing agreements, or the ACE decisions, which were decided on substantially similar facts.⁶

⁵ Like the no-action clause in ACE (discussed supra at 4), the no-action clause here, PSA § 10.08, sets forth as a condition precedent to a certificateholder action that the certificateholder provide the Trustee with "written notice of an Event of Default and of the continuance thereof . . ." The provision on Events of Default, PSA § 7.01, also like that in ACE, defines defaults as those of the servicer or master servicer, and thus does not authorize certificateholders to give notice of, and then to commence suits based on, defaults by other entities – here, breaches of representations and warranties by the loan seller.

⁶ The summons with notice in ACE, of which this court takes judicial notice, similarly stated that the certificateholders were bringing the action "on behalf of the Trust" and that "Plaintiffs – holders of over 25% of the voting rights in the Certificates – make the claims herein derivatively on behalf of the Trust and all of the Certificate holders." (Summons With Notice, at 2, ACE [Sup Ct, NY County, No. 650980/2012] [Komreich, J.] [NYSCEF No. 1].) Both appellate decisions note that the certificateholders in that action filed the summons with notice "on behalf of the Trust." (ACE, 25 NY3d at 592; 112 AD3d at 523.)

Second, the Trustee argues that the action is timely under an accrual clause in the Sixth Amended and Restated Mortgage Loan and Warranties Agreement (MLPWA), dated as of May 1, 2006, and entered into between NC Capital as loan seller and nonparty Morgan Stanley Mortgage Capital Inc. as loan purchaser. (See Tee.'s Memo. in Opp. at 8.) Section 9.03 of the MLPWA (Am. Compl., Exh. A) provides:

“Any cause of action against the Seller [NC Capital] relating to or arising out of the breach of any representations and warranties made in Subsections 9.01 and 9.02 [of the MLPWA] shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser [Morgan Stanley Mortgage Capital Inc.] or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to cure such breach or repurchase such Mortgage Loan as specified above, and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement.”

The parties dispute whether this clause applies to the Trustee's claims against MSAC under the PSA. (See Def.'s Reply Memo. at 4-5.) Even assuming arguendo that the clause applies, it does not differ in any material respect from accrual clauses which Courts in the RMBS litigation have consistently held cannot serve to extend the statute of limitations for a cause of action for breach of representations and warranties. Under ACE, such a claim accrues when the representations and warranties are made, not when the repurchase demand is made and refused. (ACE, 25 NY3d at 589; see e.g. Deutsche Bank Natl. Trust Co. v Quicken Loans Inc., 810 F.3d 861, 866-867 [2d Cir 2015] [concluding that similar accrual clause did not constitute a substantive condition precedent that would delay accrual of breach of contract cause of action]; U.S. Bank Natl. Assn. [2007-A2] v Greenpoint Mtge. Funding, Inc., 2015 WL 915444, * 5-6 [Sup Ct, NY County, Mar. 3, 2015, No. 651954/13] [this court's prior decision to the same effect, collecting authorities]; Bank of N.Y. Mellon [2006-WMC2] v WMC Mtge., LLC, 50

Misc3d 229, 233-236 [Sup Ct, NY County, Sept. 18, 2015, No. 653831/2013] [Kornreich, J.] [same].)⁷

Third, the Trustee argues that the action is timely under the federal Housing and Economic Recovery Act of 2008 (HERA), which extends the limitations period for certain actions “brought by” FHFA. (See 12 USC § 4617 [b] [12].) However, as the Court of Appeals for the Second Circuit recently held, where “FHFA’s only involvement was filing a summons with notice in state court – arguably while contractually barred from doing so by a no-action clause,” the resulting action “cannot reasonably be said to have been ‘brought by’ FHFA.” (See Quicken Loans Inc., 810 F.3d at 868; see also Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts. Corp., 2015 WL 1646683, * 3 [Sup Ct, NY County, Apr. 13, 2015, No. 653048/13] [this court’s prior decision to the same effect, collecting authorities]; Law Debenture Trust Co. of N.Y. v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 5 n 4 [Sup Ct, NY County, Apr. 8, 2015, No. 651958/13] [same].)

TOLLING AGREEMENTS

Finally, the Trustee argues that it is a third-party beneficiary of tolling agreements between MSAC and two separate nonparty certificateholders, and that its causes of action are timely under these agreements. (See Tee.’s Suppl. Memo. at 1; AIG Tolling Agreement [Weinstein Aff., Exh. C]; HSH Tolling Agreement [Weinstein Aff. Exh. D].)⁸ MSAC does not

⁷ The Trustee appears to argue that under the PSA repurchase protocol (§ 2.03 [f]) as well as the MLPWA, MSAC’s duty to repurchase did not accrue until “discovery by or notice to” MSAC of NC Capital’s breaches. (See Transcript of Oral Argument at 38.) This argument ignores the ACE holding that the cause of action against the securitizer “for breach of representations and warranties accrue[s] at the point of contract execution.” (25 NY3d at 589.)

⁸ While this motion was pending, the court authorized the parties to submit supplemental briefing addressing the applicability of these two tolling agreements to the Trustee’s claims. (See Letter from Robert K. Kry [counsel for plaintiff] [NYSCEF No. 58].)

dispute that if the Trustee benefits from the tolling period set forth in either agreement, this action is timely.

The AIG Tolling Agreement

The first agreement, dated January 17, 2011, was entered into between Morgan Stanley and American International Group, Inc. (AIG), a certificateholder in the Trust, and these parties' "subsidiaries and affiliated entities" (including MSAC). (AIG Tolling Agreement, at 1.) The first Whereas Clause sets forth AIG's purpose in entering into the agreement as follows:

"... AIG wishes to preserve its rights to assert any and all causes of action and claims it may have against Morgan Stanley, or that may be asserted on its behalf, arising out of or relating in any way to its purchase of residential and commercial mortgage backed securities ('RMBS/CMBS') ... including, without limitation, any claims relating to the repurchase of loans in RMBS/CMBS transactions that may be asserted now or in the future by AIG or securitization trustees (the 'Potential Claims')."

Section 1 further provides that the agreement "relates to," among other things, "claims asserted by securitization trustees relating to the repurchase of loans in RMBS/CMBS transactions." Section 15, however, provides that "[t]his Tolling Agreement is intended solely for the benefit of the Parties, and their successors and assigns. No other person or entity is intended to be a third-party beneficiary of, or to have the power to enforce, this Tolling Agreement." Section 4, concerning termination of the agreement, provides, in full:

"The Termination Date of the Tolling Agreement shall be thirty (30) calendar days after either Party receives written notice of termination from the other Party by overnight courier (such as Federal Express or UPS), with a courtesy copy provided via e-mail, to the undersigned counsel. Each party reserves to itself the absolute and sole discretion to terminate the Tolling Agreement by the method provided herein for any reason or no reason whatsoever."

MSAC and the Trustee dispute whether the language of this agreement clearly evinces an intent to benefit the Trustee. (Def.'s Suppl. Memo. at 5; Tee.'s Suppl. Memo. at 7.) They

further dispute whether a settlement agreement subsequently entered into between AIG and Morgan Stanley prevents the Trustee from benefitting from the tolling period.⁹ (Def.'s Suppl. Memo. at 8; Tee.'s Suppl. Memo. at 9.) The court need not address these issues, however, as it finds that the AIG Tolling Agreement is ineffective for the reason, also asserted by defendant, that the agreement fails to specify a definite end date.

General Obligations Law § 17-103 (1), which governs promises to waive or extend the statute of limitations applicable to contract actions, provides, in pertinent part, that a tolling agreement “is effective, according to its terms, to prevent interposition of the defense of the statute of limitation[s] in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise.” This statute precludes parties from tolling the statute of limitations indefinitely.

The Court of Appeals has held that when an agreement “purport[s] to extend the limitations period to an indefinite date in the future in contravention of the six-year maximum provided by the statute, it cannot be enforced ‘according to its terms.’” (Bayridge Air Rights, Inc. v Blitman Constr. Corp., 80 NY2d 777, 779-780 [1992].) In Bayridge, the parties’ agreement purported to extend the six-year limitations period governing the plaintiff’s breach of contract claim so that it would commence upon the final payment from an escrow account – an uncertain and indefinite future event. (Id. at 779.) The plaintiff in fact commenced its action only “five years after the contract [tolling agreement] was signed,” and, thus, before the six-year

⁹ More particularly, on or about December 12, 2013, AIG and Morgan Stanley entered into a Confidential Settlement Agreement and Release, which provides that the AIG Tolling Agreement is “null and void ab initio.” (AIG Settlement Agreement ¶ 11 [Weinstein Aff. Exh. F].) Section 7 of this agreement provides that AIG will not initiate or participate in any effort, “whether directly or through a third party, to require any party to repurchase, substitute or provide loss reimbursement of mortgage loans for any reason from any Morgan Stanley Offering”

maximum tolling period permitted by Section 17-103 had expired. (Id.) The Court nonetheless found the agreement “void and unenforceable.” (Id.) In so holding, the Court explicitly declined to “rewrite the agreement so that, instead of the explicit but unlawful extension of six years from final payment, the contract would extend the limitations period only for a lawful six years from the date of the agreement.” (Id. at 780.) According to the Court,

“[s]uch a construction would require courts to ignore the legislative direction that a promise to extend the Statute of Limitations be enforced ‘according to its terms,’ and either to speculate on the parties’ intent as to the length of the extension they would have desired or to impose a blanket six-year extension irrespective of their intent.”

(Id.; see also City of N.Y. v Black & Veatch, 1997 WL 624985, * 14 n 10 [SD NY, Oct. 6, 1997, No. 95 Civ 1299] [noting that, in Bayridge, the Court “[held] invalid the waiver [of the statute of limitations defense] even though the claim was brought only five years after the signing of the waiver. Clearly, the court wanted to send the message that waivers must explicitly set out an acceptable time period, and that one will not be inferred by the courts in hindsight”].)

Here, as noted above, the AIG Tolling Agreement (§ 4) provides that the tolling period is to terminate “thirty (30) calendar days after either Party receives written notice of termination from the other Party” Under controlling authority, such a provision, like the termination clause in Bayridge, is too indefinite to be enforced “according to its terms.” (See e.g. T & N PLC v Fred S. James & Co. of N.Y., Inc., 29 F3d 57, 61-62 [2d Cir. 1994] [agreement to toll the applicable statute of limitations “from the date of this letter until 30 days after receipt of notice of termination of this agreement by either party,” held to be indefinite, although the action was initiated approximately two years after the agreement was entered]; Allenby, LLC v Credit Suisse, AG, 2015 WL 1442370, * 2 [Sup Ct, NY County, Mar. 3, 2015, No. 652491/13] [Ramos, J.] affd 134 AD3d 577, 578 [1st Dept 2015] [tolling agreement, which provided for termination

date of “thirty (30) calendar days following the date that either [party] provides written notice to the other party that the [] Tolling Agreement is terminated,” held to be indefinite, although the plaintiff terminated the agreement less than three years after it was entered].)

These authorities leave no room for the Trustee’s contention that the AIG Tolling Agreement is enforceable because the parties intended the agreement “to be a valid and binding obligation” (AIG Tolling Agreement § 16), and because they “acted as if the tolling agreement was valid” when they subsequently revoked it for consideration, effective December 26, 2013. (See Transcript of Oral Argument [Tr.] at 29.) As the parties to the tolling agreement failed to specify a termination date that was definite and consistent with General Obligations Law § 17-103, the agreement is unenforceable and cannot serve to render this action timely.

The HSH Tolling Agreement

The second tolling agreement was “made as of August 25, 2011” between HSH Nordbank AG (HSH), a certificateholder in the Trust, and specifically named entities related to HSH, “together with their respective parents, subsidiaries, affiliates, officers, directors, agents, representatives, employees, successors and assigns, and any of their respective partners, managing directors, employees, agents, directors or officers” (collectively defined as the Tolling Plaintiffs) and Morgan Stanley entities, including MSAC (the Tolling Defendants). (See HSH Tolling Agreement, at 1.) The agreement defines the claims being tolled as “any and all claims against the Tolling Defendants based on, arising out of, or relating to, directly or indirectly, the Tolling Plaintiffs’ purchase of RMBS in the Covered Securitizations listed on Schedule I,” including the Trust at issue. (*Id.* at 1 & Sched. I.) The Tolling Period is defined to terminate, at the latest, “one year after the Effective Date” of August 25, 2011. (*Id.* ¶¶ 1, 3.) The agreement contains no express provision with respect to third-party beneficiaries.

The principal dispute between the parties with respect to this agreement is whether its language and the surrounding circumstances sufficiently indicate the contracting parties' intent that the Trustee be a third-party beneficiary of the agreement. The Trustee contends that it is an express third-party beneficiary of the HSH Tolling Agreement because the definition of "Tolling Plaintiffs" includes "representatives" of HSH Nordbank and its affiliates. The Trustee argues that this language "is broad enough to cover the Trustee, which is acting as a 'representative' of certificateholders in this case." (Tee.'s Suppl. Memo. at 11.)

It is well settled that a party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost." (Mendel v Henry Phipps Plaza W., Inc., 6 NY3d 783, 786 [2006] [internal quotation marks and citation omitted]; accord Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]; State of Cal. Pub. Empls.' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-435 [2000].)

As the Court of Appeals has explained, "[e]ssential to status as an intended beneficiary . . . is either that 'performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary' [not here relevant] or that 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'" (Fourth Ocean Putnam Corp. v Interstate Wrecking Co., 66 NY2d 38, 44 [1985], quoting Restatement [Second] of Contracts § 302.) A third party's right to enforce a contract has been upheld where "no one other than the third party can recover if the promisor breaches the contract or [where]

the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party.” (Id. at 45 [internal citation omitted].)

As the Appellate Division of this Department has further explained, “[a]bsent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to interpret circumstances to construe such an intent.” (LaSalle Natl. Bank v Ernst & Young L.L.P., 285 AD2d 101, 108-109 [1st Dept 2001] [also stating that “the parties’ intent to benefit the third party must be apparent from the face of the contract”]; see U.S. Bank Natl. Assn. v GreenPoint Mtge. Funding, Inc., 105 AD3d 639, 640 [1st Dept 2013], lv denied 22 NY3d 863 [2014] [holding that plaintiff monoline insurers, which were non-parties to the loan sale agreements, lacked standing to bring breach of representation and warranty claims against the originator of mortgage loans, “given the absence of any clear language on the face of the loan sale agreements evincing an intent to benefit third parties”]; Aymes v Gateway Demolition Inc., 30 AD3d 196, 196 [1st Dept 2006] [denying third-party beneficiary status where the “contracts do not contain language evincing an intent to benefit the property owner”]; see also Grunewald v Metropolitan Museum of Art, 125 AD3d 438, 439 [1st Dept 2015] [holding that plaintiffs were not third-party beneficiaries, where “[n]either the language of the lease nor any other circumstances indicate that the parties intended to give these plaintiffs individually enforceable rights thereunder”].)

As these authorities make clear, the issue is not whether the term “representatives” is “broad enough to cover the Trustee” (Tee.’s Suppl. Memo. at 11.) Rather, it is whether the inclusion of that term in the HSH Tolling Agreement clearly indicates that HSH and Morgan Stanley intended that the Trustee would be a third-party beneficiary of the contract.

In its March 29, 2016 decision in ACE, this court considered whether the trustee was the representative of the certificateholder that had filed the summons with notice by which the action was commenced. The decision noted that certificateholders are the beneficiaries of the trust and, in a general sense, are represented by the trustee to the extent that they are or will be the ultimate beneficiaries of successful litigation commenced by the trustee on behalf of the trust. As held in the decision and as MSAC correctly argues here, however, certificateholders have limited rights to enforce the governing agreements or to control litigation by the trustee. In contrast, the trustee is contractually authorized to enforce securitizers' obligations to repurchase mortgage loans that breach representations and warranties regarding the quality and characteristics of the loans. (ACE, 2016 WL 1306272, at * 3-4.) Individual certificateholders' restricted power to control trustees distinguishes trustees from other parties or personnel enumerated in the HSH Tolling Agreement who might be considered the individual certificateholders' representatives.¹⁰

¹⁰ This court's March 29, 2016 decision in ACE considered whether the trustee was the representative of the certificateholders that had commenced the original action, for purposes of applying the CPLR 205 (a) savings provision. As explained in the decision, CPLR 205 (a) permits refiling of a dismissed action only by the same plaintiff as the plaintiff that brought the dismissed action. An administrator or executor who succeeds to a decedent's cause of action qualifies as the same plaintiff, under the express terms of CPLR 205 (a) and settled case law. As noted in Reliance Ins. Co. v PolyVision Corp. (9 NY3d 52, 57 [2007]), outside the representative context of an executor or administrator, the Court of Appeals has never held that a plaintiff, for purposes of CPLR 205 (a), includes an individual or entity other than the original plaintiff. The March 29, 2016 decision reasoned that, unlike an administrator or executor, a trustee does not merely succeed to a certificateholder's cause of action, and therefore does not act, in an RMBS repurchase action, in a representative capacity akin to that of an administrator. (2016 WL 1306272, at * 2-4.)

The Trustee cites substantial authority referring to a trustee as the representative of the trust and its beneficiaries. (See e.g. Restatement [Third] of Trusts § 107, cmt. b ["As holder of the title to trust property . . . , and as the representative of the trust and its beneficiaries, the trustee is normally the appropriate person to bring (and to decide whether to bring) an action against a third party on behalf of the trust"]; Talcott J. Franklin & Thomas F. Nealon III, Mortgage and Asset Backed Secs. Litigation Handbook § 1:67 ["The trustee generally acts under the PSA as the representative of the certificateholders and is responsible for making distributions of principal and interest to them"]; cf. Matter of Hunter, 4 NY3d 260, 268 [2005].) This authority, however, supports the proposition that a trustee generally acts as the representative of the trust and of the certificateholders collectively. It does not support the Trustee's apparent suggestion that an RMBS trustee acts as the representative of any given individual certificateholder.

That the contracting parties here did not intend the term “representatives” to encompass RMBS trustees is shown by the surrounding language of the HSH Tolling Agreement itself. It is a well-established rule of construction that “the meaning of a word in a series of words is determined ‘by the company it keeps.’” (242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co., 31 AD3d 100, 103-104 [1st Dept 2006], quoting People v Illardo, 48 NY2d 408, 416 [1979].) “In accordance with that rule, a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series.” (Id. at 104 [internal quotation marks and citations omitted].)

The word “representatives” in the HSH Tolling Agreement is surrounded by a series of words identifying persons or entities having close business relations with HSH. Immediately preceding the term are the words “officers, directors, [and] agents.” The term is followed by the word “employees.” Other categories listed are “parents, subsidiaries, affiliates, . . . successors and assigns, and any of their respective partners, managing directors, employees, agents, directors or officers.” These positions, nearly all of which are internal to HSH or its corporate family, are not comparable to HSH’s relationship with the Trustee, an independent entity responsible for managing a Trust in which HSH is but one of many certificateholders.

Under the doctrine of “*inclusio unius est exclusio alerius*,” which is also applicable in interpreting contracts, the inclusion or specification of certain items in the contract implies the exclusion of other items. (See 28 NY Prac., Contract Law § 10:13.) Given the purpose and context of the agreement, the absence of a category like “securitization trustees” (compare AIG Tolling Agreement § 1) among the many positions listed further undermines the Trustee’s assertion that the parties intended that it would be a third-party beneficiary of the HSH Tolling Agreement.

It bears emphasis that HSH and Morgan Stanley are commercial entities with a highly sophisticated understanding of RMBS transactions. Had these parties intended to make the Trustee a third-party beneficiary of their RMBS tolling agreement, they could readily have included specific language in the agreement to that effect, rather than content themselves with the vague term “representatives.” Nor will this court read such intent into the agreement, as “[C]ourts 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.” (ACE, 25 NY3d at 597, quoting Vermont Teddy Bear Co. v 538 Madison Realty Co., 1 NY3d 470, 475 [2004].)

The court rejects the Trustee’s alternative contention that it must be considered an implied beneficiary because, under the PSA’s no-action clause, “claims under the contract generally can be pursued only by the Trustee.” (Tee.’s Suppl. Memo. at 13.) The question of a certificateholder’s standing to bring repurchase claims was unsettled in 2011, when the HSH Tolling Agreement was made. For example, in Walnut Place LLC v Countrywide Home Loans, Inc. (2012 WL 1138863, * 4-5 [Sup Ct, NY County, Mar. 28, 2012, No. 650497/11] [Kapnick, J.], affd 96 AD3d 684 [1st Dept 2012]) and Nomura Asset Acceptance Corp. [2005-S4] v Nomura Credit & Capital, Inc. (2013 WL 2072817, * 6 [Sup Ct, NY County, May 10, 2013, No. 653541/11] [Sherwood, J.]), both decided after this agreement was made, RMBS certificateholders took the position that they could properly initiate repurchase litigation notwithstanding similar no-action clauses in their governing agreements. The Courts ultimately held that the no-action clauses applied to and barred the certificateholders’ actions. (See e.g. Walnut Place LLC, 96 AD3d at 684.)

Against this background, the court cannot find that the contracting parties' agreement to toll "any and all claims" clearly evinces an intent to make the Trustee a third-party beneficiary of the agreement. Although the law now sharply limits the circumstances in which certificateholders may bring repurchase claims, the present state of the law cannot be relied upon to show that the parties intended, earlier, to make the Trustee a third-party beneficiary. Nor do the terms of their agreement clearly evidence that intent.

For all of the above reasons, neither tolling agreement saves the Trustee's first cause of action for breach of contract. This cause of action is untimely under the ACE decisions and will accordingly be dismissed.

BREACH OF REPURCHASE OBLIGATIONS

The third cause of action of the amended complaint alleges a breach of contract claim based on breach of MSAC's repurchase obligations under the PSA. (Am. Compl. ¶ 110.) It also alleges anticipatory breach or repudiation of MSAC's repurchase obligations. (Id. ¶ 114.) The breach of contract claim is not maintainable as an independent cause of action under the Court of Appeals' decision in ACE. (25 NY3d at 599.) For the reasons previously stated, and on the authorities cited in this court's prior decisions, the anticipatory breach claim is also not maintainable. (Law Debenture, 2015 WL 1573381, at * 9-10; Deutsche Bank Natl. Trust Co. v Barclays Bank PLC, 2015 WL 7625829, * 3 [Sup Ct, NY County, Nov. 25, 2015, Nos. 651338/13, 652001/13].)

FAILURE TO NOTIFY

The second cause of action alleges a breach of contract claim based on MSAC's failure to give prompt written notice to the Trustee, pursuant to PSA § 2.03, upon discovery of breaches of representations and warranties made by NC Capital. (Am. Compl. ¶¶ 95-96.) In its recent

decision in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024] [Nomura]), the Appellate Division 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 agreement. (Id. at 108.) The parties’ briefs were filed prior to the Nomura decision. 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. The parties have not yet developed a protocol for such briefing in response to this request. (See Second Case Management Order, dated Mar. 24, 2016, ¶ V [Index. Nos. 777000/15, 779000/15] [NYSCEF No. 96].)¹¹ The motion to dismiss the second cause of action will be denied without prejudice, as set forth in the ordering provision (infra).

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The fourth cause of action for breach of the implied covenant of good faith and fair dealing alleges that MSAC breached the covenant by “keeping silent” about defects in the loans and failing to “voluntarily cure the breaches or repurchase the loans,” all for the purpose of “run[ning] out the statute of limitations” and “destroying the Trustee’s rights” to repurchase. (Am. Compl. ¶¶ 122-123.) This claim will be dismissed in accordance with extensive authority

¹¹ Prior to Nomura, and based on the decisions of the Appellate Division and Court of Appeals in ACE (112 AD 3d at 522-523; 25 NY3d at 599), this court, among others, had dismissed claims based on a sponsor’s failure to notify the trustee of its discovery of breaches. The court reasoned that such claims, like failure to repurchase claims, were not maintainable as independent causes of action. (See e.g. Flagstar, 2015 WL 1646683, at * 3; U.S. Bank Natl. Assn. [2007-NC1] v DLJ Mtge. Capital, Inc., 2015 WL 298642, * 2 [Sup Ct, NY County, Jan. 16, 2015, No. 652699/13]; see also Bank of N.Y. Mellon [2006-WMC2], 50 Misc 3d at 236 [Kornreich, J.] [summarizing authorities].)

dismissing implied covenant claims based on substantially similar allegations. (See Nomura, 133 AD3d at 108; Quicken Loans Inc., 810 F.3d at 869; Flagstar, 2015 WL 1646683, at * 4 [this court's prior decision to the same effect]; Law Debenture, 2015 WL 1573381, at * 11 [same].)

CONCLUSION

For the reasons set forth above, the first, third, and fourth causes of action must be dismissed. The court therefore need not and does not reach the additional grounds advanced by defendant MSAC for dismissal of such causes of action.

The Trustee's request for leave to replead the complaint will be denied. (See Tee.'s Memo In Opp. at 25, n 14 [requesting leave to replead if defendant's motion is granted].) This request is unsupported by a proposed amended complaint or any evidentiary or other showing that the Trustee can plead cognizable causes of action to replace the dismissed causes of action. (See e.g. Pollak v Moore, 85 AD3d 578, 579 [1st Dept 2011] [denial of leave to replead held proper, where plaintiff failed to annex proposed amended complaint to the motion papers, and "did not otherwise offer an affidavit of merit or any 'new' facts as would overcome the legal defects in his prior two complaints"]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010] [rejecting plaintiff's "cursory request" for leave to replead "because there was no proposed pleading accompanied by an affidavit of merit"]; see also Mendoza v Akerman Senterfitt LLP, 128 AD3d 480, 483 [1st Dept 2015] [denying request for leave to amend made at oral argument, the court noting that "[s]ince plaintiff failed to submit a proposed amended pleading, the motion court could not . . . judge whether the proposed amendment would have merit or be sufficient"]; AJW Partners, LLC v Admiralty Holding Co., 93 AD3d 486, 486 [1st Dept 2012].) Moreover, the first cause of action, which is based on breaches of representations and warranties, is dismissed on timeliness grounds. The dismissal is therefore on the merits.

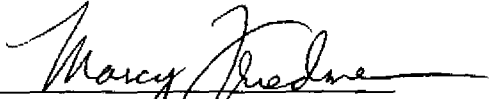
It is accordingly hereby ORDERED that the motion of defendant Morgan Stanley ABS Capital I Inc. (MSAC) to dismiss is granted to the extent of dismissing the first cause of action (Breach of Contract – Breach of Representations and Warranties), the third cause of action (Breach of Contract – Breach and Anticipatory Breach of Repurchase Obligations), and the fourth cause of action (Breach of the Implied Covenant of Good Faith and Fair Dealing); and it is further

ORDERED that the Trustee's request for leave to replead the dismissed causes of action is denied; and it is further

ORDERED that the branch of the motion to dismiss the second cause of action (Breach of Contract – Failure to Notify) is denied without prejudice. Defendant MSAC may move to dismiss this cause of action in conformity with procedures to be established in the coordinated 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 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
April 12, 2016


MARCY FRIEDMAN, J.S.C.