

**IXIS Real Estate Capital Trust 2007- HE1 v Natixis  
Real Estate Holdings, LLC**

2018 NY Slip Op 30590(U)

April 3, 2018

Supreme Court, New York County

Docket Number: 652087/2014

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.

IXIS REAL ESTATE CAPITAL TRUST 2007-  
HE1, by COMPUTERSHARE TRUST  
COMPANY, NATIONAL ASSOCIATION, solely  
in its capacity as Separate Securities Administrator,

Index No.: 652087/2014

*Plaintiff,*

DECISION/ORDER

– against –

NATIXIS REAL ESTATE HOLDINGS, LLC,  
successor in interest to NATIXIS REAL ESTATE  
CAPITAL INC. f/n/a IXIS REAL ESATE  
CAPITAL INC.,

*Defendant.*

IXIS REAL ESTATE CAPITAL TRUST 2006-  
HE3, by COMPUTERSHARE TRUST  
COMPANY, NATIONAL ASSOCIATION, solely  
in its capacity as Separate Securities Administrator,

Index No.: 652088/2014

*Plaintiff,*

– against –

NATIXIS REAL ESTATE HOLDINGS, LLC,  
successor in interest to NATIXIS REAL ESTATE  
CAPITAL INC. f/n/a IXIS REAL ESATE  
CAPITAL INC.,

*Defendant.*

These related residential mortgage-backed securities (RMBS) breach of contract actions are based upon alleged breaches of representations and warranties made by originators regarding the quality and characteristics of mortgage loans held in two securitization trusts: IXIS Real Estate Capital Trust 2007-HE1 (HE1) and IXIS Real Estate Capital Trust 2006-HE3 (HE3) (collectively, the Securitizations or Trusts). Plaintiff Computershare Trust Company, National Association (Computershare), the separate securities administrator of the two securitized trusts at

issue, seeks to enforce the “backstop” obligation of defendant-sponsor, Natixis Real Estate Holdings, LLC (Natixis), to repurchase the mortgage loans. Natixis moves to dismiss each action pursuant to CPLR 3211 (a) (1), (3), (5), and (7) on the grounds, among others, that the actions were not timely commenced.<sup>1</sup>

As alleged in the amended complaints, pursuant to Mortgage Loan Purchase Agreements (MLPAs), the non-party originators of the mortgage loans now held by the Trusts sold those loans to Natixis. Under the MLPAs, the originators made representations and warranties regarding the quality and characteristics of the loans, and agreed that if a breach of a representation or warranty “materially and adversely” affected the value of a loan, the originator would cure the breach or repurchase the affected loan.<sup>2</sup> (HE1 Am. Compl. ¶¶ 21-23; HE3 Am. Compl. ¶¶ 21-23.) Pursuant to Assignment & Recognition Agreements (ARAs), Natixis assigned the loans to the depositor for each Trust, and the originator remade or reaffirmed its representations and warranties for the benefit of the Trust, as of either the Closing Date of the Trust, or as of the date the loans were transferred from the purchaser to a new servicer.<sup>3</sup> (*Id.* ¶ 25.)

The HE1 Trust was formed pursuant to a Pooling and Servicing Agreement (PSA), which was executed on and had a Closing Date of January 30, 2007. (HE1 Am. Compl. ¶ 17.) The

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<sup>1</sup> Natixis contends that plaintiff Computershare lacks standing to bring these actions because a Securities Administrator lacks such standing under the Pooling and Servicing Agreements (PSAs). (HE1 Memo. In Supp. at 2-3.) This argument was rejected in Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC (149 AD3d 127, 132-34 [1st Dept 2017], affg 2015 WL 4038760 [Sup Ct, NY County, July 1, 2015, No. 153945/2013].) There, based on materially identical language in the PSA, this Department affirmed this court’s determination that the Securities Administrator had standing to commence an action based on breaches of representations and warranties. It is noted that no claim is made on these motions that Computershare lacks standing based on its status as “Separate” Securities Administrator. (See in re Part 60 RMBS Put-Back Litigation, 155AD3d 482 [1<sup>st</sup> Dept 2017].)

<sup>2</sup> Loans subject to repurchase under the MLPAs are referred to in this decision as “breaching loans.”

<sup>3</sup> The parties do not specify the date of any transfer to a new servicer; but neither party asserts that the representations and warranties were made as of a date later than the Closing Date of each Trust.

HE3 Trust was formed pursuant to a Pooling and Servicing Agreement, which was executed on and had a Closing Date of September 29, 2006. (HE3 Am. Compl. ¶ 17.) Under each PSA, Natixis agreed to “backstop” the repurchase obligations of the originator—i.e., to repurchase breaching loans if the originator did not.<sup>4</sup> Specifically, PSA 2.03 (d) provides:

“In the event there is a breach of a representation or warranty by [originator] with respect to an [originator] Loan that materially and adversely affects the value of such Mortgage Loan or the interest of the Trustee and the Certificateholders therein, and, upon discovery or receipt of notice, [originator] fails to cure, substitute or repurchase such Mortgage Loan within the period specified in either the [originator] Assignment Agreement or the [originator] Purchase Agreement, the Unaffiliated Seller [Natixis] shall cure, substitute or repurchase such Mortgage Loan subject to the conditions set forth in this Section 2.03. . . . Notwithstanding the Unaffiliated Seller’s lack of knowledge, in the event it is discovered by the Unaffiliated Seller, the Depositor or the Trust (including the Trustee and the Servicer acting on the Trust’s behalf), that the substance of a representation or warranty was inaccurate as of the applicable date of such representation or warranty and such inaccuracy materially and adversely affects the value of the related Mortgage Loan, the Unaffiliated Seller shall use its best efforts to cure such breach or substitute or repurchase such Mortgage Loan in accordance with this Section 2.03(d).”<sup>5</sup>

Plaintiff commenced these actions against Natixis on July 8, 2014. The HE1 amended complaint alleges that on January 31, 2014, February 10, 2014, and May 2, 2014, plaintiff sent letters to Natixis, the applicable originator, and other parties to the PSA, notifying them of breaching loans. (HE1 Am. Compl. ¶¶ 77, 84.) The Trustee forwarded the notices to the originators and Natixis, and requested repurchase by the applicable party, on February 6, 2014,

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<sup>4</sup> Natixis contends that its repurchase obligation extended only to breaches of the Unaffiliated Seller Agreement representations—a limited set of representations made by Natixis itself—and that it did not agree to backstop the representations of the originators. (See HE1 Memo. in Supp. at 20-22, HE1 Memo. in Reply at 15.) As held by this court in Natixis Real Estate Capital Trust 2007-HE2, based on materially similar repurchase provisions, PSA § 2.03 [d] expressly obligates Natixis, as backstop, to repurchase loans affected by a breach of a representation or warranty by an originator, if the originator fails to repurchase within the applicable time period following discovery or receipt of notice. (2015 WL 4038760 at \* 5, aff’d 149 AD3d at 137-40 [upholding pleading of Natixis’ backstop repurchase obligation based on originators’ breaches of representations and warranties and also upholding pleading that such backstop obligation is triggered by notice to Natixis or its own discovery of such breaches].)

<sup>5</sup> The quoted portion of PSA § 2.03 (d) appears in both the HE1 and HE3 PSAs in substantially identical form, differing only with respect to the names of the various originators identified in the provision.

February 12, 2014, and May 9, 2014, respectively. (Id. ¶¶ 78, 85.)<sup>6</sup> The HE3 Trust amended complaint alleges that on January 31, 2014, plaintiff sent a letter to Natixis, the applicable originator, and other parties to the PSA, notifying them of breaching loans. (HE3 Am. Compl. ¶ 73.) The Trustee forwarded the notice to the originators and Natixis, and requested repurchase by the applicable party, on February 6, 2014. (Id. ¶ 74.)

The Court of Appeals has determined that a claim for breach of representations and warranties in an RMBS action accrues on the date the defendant made the representations and warranties, and not at the time the defendant fails to repurchase breaching loans in response to a demand. (ACE Secs. Corp. v DB Structured Prods., Inc., 25 NY3d 581 [2015] [ACE].) Thus, the statute of limitations for any claim against an originator of the loans at issue in these actions would have expired on January 30, 2013 and September 29, 2012, the six year anniversaries of the Closing Dates of the HE1 and HE3 Trusts, respectively.<sup>7</sup> It is undisputed that, prior to these dates, plaintiff did not commence an action against the originators, and did not notify any party of breaching loans.

In moving to dismiss plaintiff's claims as time-barred, Natixis contends that because its repurchase obligations "are derivative of the R&Ws at issue, the statute of limitations began to run when the R&Ws were made and allegedly breached." (HE1 Memo. In Supp. at 10, HE3 Memo. In Supp. at 10.) Plaintiff counters that "no breach of Natixis' independent backstop

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<sup>6</sup> The Trustee did not send repurchase demands to three originators that were subject to ongoing bankruptcy proceedings or had previously petitioned for and exited bankruptcy. (HE1 Am. Compl. ¶ 78 n 2.)

<sup>7</sup> Plaintiff contends that a so-called "accrual clause" in the MLPAs delayed accrual of the claim for breach of representation and warranties against the originators until they were notified of breaching loans and failed to repurchase. (See HE1 Memo. In Opp. at 13-15.) As repeatedly held by the Appellate Division, this clause is unenforceable under New York law, and will not extend the time to file a timely repurchase claim. (Deutsche Bank Natl. Trust Co. v Flagstar Capital Markets Corp., 143 AD3d 15, 19-22 [1st Dept 2016]; U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc., 147 AD3d 79, 89 n 2 [1st Dept 2016]; see also Bank of New York Mellon v WMC Mtge. LLC, 151 AD3d 72, 77 [1st Dept 2017].)

obligation occurred until the originators failed to cure or repurchase the materially breaching loans,” and that such failure did not occur until 2014, when the originators were notified of the breaching loans.<sup>8</sup> (HE1 Memo. In Opp. at 8, HE3 Memo. In Opp. at 8.)

Following the submission of this motion, this Department addressed the accrual of a similar backstop repurchase obligation in an RMBS put-back action. In Bank of N.Y. Mellon v WMC Mtge. LLC (151 AD3d 72 [1st Dept 2017] [BNYM]), the securitization closed on June 28, 2006, and the plaintiff first notified the defendant originator, WMC Mortgage LLC [WMC], and the backstop defendant, sponsor J.P. Morgan Acquisition Corp. [JPMAC], of breaching loans on June 7, 2012. (Id. at 75-76.) Several months later, more than six years after the closing date of the trust, plaintiff notified defendants of additional breaching loans. (Id. at 76.) On November 1, 2013, plaintiff commenced the action. (Id.) The Court dismissed the action against WMC as untimely, but found that plaintiff asserted a timely claim against JPMAC in connection with the June 7, 2012 notice. The court stated:

“[T]o assert a claim against JPMAC based on JPMAC’s backstop guaranty obligation, BNY had to assert an underlying WMC breach of the repurchase obligation that triggered JPMAC’s backstop repurchase duty. When BNY gave WMC notice of breaching loans on June 7, 2012, WMC’s repurchase obligation remained in effect, and when WMC did not repurchase within 90 days, JPMAC’s backstop obligation kicked in under the PSA provision stating that in the event WMC ‘shall fail’ to repurchase a loan in accordance with the Repurchase Protocol, JPMAC ‘shall do so.’”

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<sup>8</sup> The amended complaints do not allege that either the originators or Natixis discovered or otherwise received notice of breaching loans. The original complaints in these actions contained allegations that Natixis discovered breaching loans through due diligence conducted prior to or at the time the securitization closed, and failed to provide notice to other parties, as required by the PSA. (See HE1 Compl. ¶¶ 2, 7, 79.) The cause of action based on Natixis’ failure to notify, and allegations related to the discovery of breaching loans do not appear in the amended complaints. Natixis argues that plaintiff’s original allegations as to Natixis’s discovery at the time of closing are binding judicial admissions, and that the accrual of any claim by plaintiff would be triggered by the failure to repurchase following this alleged discovery. (See HE1 Memo. In Supp. at 6-8.) Natixis thus contends that plaintiff’s theory that the backstop obligation did not accrue until 2014, when the originators were notified and failed to repurchase, is barred by the allegations of the original complaint. Plaintiff contends that these allegations are not binding as they were made on information and belief in unverified complaints. The court need not reach the issue, given that, as discussed below, the actions are time-barred even under the theory asserted by plaintiff on these motions.

(Id. at 80.) In so holding, the BNYM Court reasoned that the fact that “both WMC’s and JPMAC’s repurchase obligations are part of the same remedial scheme for breaches of WMC’s warranties does not mean that the backstop obligation expired at the same time the WMC repurchase obligation expired.” (Id.)

The BNYM Court further found that plaintiff “could not assert such a claim when WMC failed to comply with a repurchase demand made after June 28, 2012 because after that date WMC had no repurchase obligation and JPMAC had no related backstop obligation. In sum, under ACE, the backstop repurchase claims may not be sustained to the extent they do not backstop a demand made on WMC when it was obliged to repurchase, before June 28, 2012.” (Id.) Put another way, the Court concluded that a claim for a backstop repurchase obligation accrued only after the originator of the loans was notified, and failed to repurchase, when still legally obligated to do so. The backstop obligation could not be triggered by a demand notice sent to the originator when the originator was no longer obligated to act.

Here, plaintiff first notified the originators of breaching loans on January 31, 2014, long after the statute of limitations against the originators had elapsed. The originators “legal obligation with respect to the loans had terminated by operation of the statute of limitations” on January 30, 2013 and September 29, 2012, for the HE1 and HE3 Trusts, respectively. (BNYM, 151 AD3d at 80.) Under the reasoning of BNYM, the backstop claims against Natixis “may not be sustained” because they “do not backstop a demand made on [the originator] when it was obliged to repurchase.” (Id.) The claims in these actions will accordingly be dismissed as time-barred.

In view of this disposition, the court need not, and does not, reach Natixis’ further contentions as to pleading defects.

It is accordingly hereby

ORDERED that the motion of defendant Natixis Real Estate Holdings Inc. in IXIS Real Estate Capital Trust 2007-HE1 v Natixis Real Estate Holdings Inc., Index No. 652087/2014 to dismiss the amended complaint is granted with prejudice; and it is further

ORDERED that the motion of defendant Natixis Real Estate Holdings Inc. in IXIS Real Estate Capital Trust 2006-HE3 v Natixis Real Estate Holdings Inc., Index No. 652088/2014 to dismiss the amended complaint is granted with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 3, 2018

  
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MARCY FRIEDMAN, J.S.C.