

Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.
2018 NY Slip Op 30926(U)
May 14, 2018
Supreme Court, New York County
Docket Number: 651124/2013
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.

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NOMURA HOME EQUITY LOAN, INC., SERIES
2007-3, pursuant to a Pooling and Servicing
Agreement, dated as of April 1, 2007, by HSBC
BANK USA, NATIONAL ASSOCIATION, solely
in its capacity as Trustee,

DECISION/ORDER
Index No.: 651124/2013

Plaintiff,

- against -

NOMURA CREDIT & CAPITAL, INC.,

Defendant,

NOMURA CREDIT & CAPITAL, INC.,

Third-Party Plaintiff,

- against -

WELLS FARGO BANK, N.A. and OCWEN
LOAN SERVICING, LLC,

Third-Party Defendants.

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In this action involving residential mortgage-backed securities (RMBS), third-party defendants Wells Fargo Bank, N.A. (Wells Fargo) and Ocwen Loan Servicing, LLC (Ocwen) (together with Wells Fargo, the Servicers) separately move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the third-party complaint. The third-party complaint pleads a breach of contract claim against the Servicers based on the Servicers' alleged failures to notify third-party plaintiff Nomura Credit & Capital, Inc. (Nomura) upon their discoveries of breaches of representations and warranties regarding the mortgage loans (the second cause of action), and a

separate breach of contract claim against the Servicers based on their alleged failures to comply with their servicing and/or supervisory servicing obligations (the third cause of action).

Except as noted below, the parties' arguments in support of and in opposition to the Servicers' motions are substantially similar to the arguments considered and addressed by the court in its recent determination of motions to dismiss the third-party complaints in two other actions involving the same parties. (See generally Decision & Order, Nomura Asset Acceptance Corp. Alternative Loan Trust Series 2006-S4 v Nomura Credit & Capital, Inc. [Sup Ct, NY County, May 14, 2018, No. 653390/2012] [Nomura (2006-S4)]; Decision & Order, Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc. [Sup Ct, NY County, May 14, 2018, No. 653783/2012] [Nomura (2006-FM2)].) The claims and governing agreements in this action and in Nomura (2006-S4) and Nomura (2006-FM2) are also substantially similar.

In moving to dismiss the third-party complaint in this action, Wells Fargo argues principally that Nomura's breach of contract claims are barred by Nomura's own breaches of representations and warranties; that Nomura fails to adequately plead that Wells Fargo discovered defective loans or breached any of its servicing or supervisory servicing obligations; that some or all of Nomura's claims are time barred; and that Nomura fails to state a claim against Wells Fargo in its capacity as Custodian. In its separate motion to dismiss, Ocwen argues principally that impleader was improper; that Nomura fails to plead its own performance under the PSA because its claims are premised on breaches of representations and warranties; that Nomura fails to adequately plead that Ocwen discovered breaches or that it breached its servicing duties; that Nomura's alleged damages constitute impermissibly speculative consequential damages; that some or all of Nomura's claims are time barred; and that Nomura

fails to plead that Ocwen is liable as the successor to non-party Equity One, Inc. These arguments by the Servicers are resolved in accordance with Nomura (2006-S4), for the reasons stated and based on the authorities cited in that decision.

In this case, unlike in Nomura (2006-S4), Wells Fargo has not only supervisory servicing obligations, but also servicing obligations for certain loans. Under a Seller's Warranties and Servicing Agreement, dated as of March 1, 2006 (the Servicing Agreement [Sidman Aff. In Supp. Of Wells Fargo MTD, Exh. 7]), entered into between Nomura as Purchaser and Wells Fargo as Seller and Servicer of mortgage loans, Wells Fargo was required to service and administer mortgage loans consistent with "Accepted Servicing Practices" to the extent not inconsistent with other provisions of the Servicing Agreement. (Id., § 4.01.) A Pooling and Servicing Agreement (the PSA [Sidman Aff. In Supp. Of Wells Fargo MTD, Exh. 3]) was subsequently entered into between and among Nomura as Sponsor, Ocwen and non-party Equity One, Inc. as Servicers, Wells Fargo as Master Servicer and Securities Administrator, and HSBC Bank USA, National Association as Trustee. In the PSA, the parties agreed that Ocwen would service certain of the mortgage loans,¹ but that it would not "have any responsibility to service or administer the Wells Fargo Mortgage Loans [defined as the loans serviced by Wells Fargo pursuant to the Servicing Agreement] or have any other obligation or liability with respect to the Wells Fargo Mortgage Loans." (Id., § 3.01.) The PSA further provided that "Wells Fargo shall have no obligation to service and administer the Wells Fargo Mortgage Loans in accordance with this Agreement [the PSA]" (Id.) Rather, "[t]he Wells Fargo Mortgage Loans will be serviced and administered by Wells Fargo pursuant to the terms and provisions of the Servicing Agreement" (Id.) Section 4.01 of the PSA imposed certain duties on Wells Fargo to

¹ Ocwen's servicing obligations under the PSA are materially indistinguishable from its obligations in Nomura (2006-S4), and will not be discussed further here.

“supervise, monitor and oversee the obligation of each Servicer [e.g. Ocwen] to service and administer the related Mortgage Loans in accordance with the terms of this Agreement or the Servicing Agreement, as applicable.”

On April 1, 2007, the same date as of which the parties entered into the PSA, Nomura as Assignor and Nomura Home Equity Loan, Inc. as Assignee entered into an Assignment, Assumption and Recognition Agreement (the AARA [annexed as Exhibit T to the PSA]) by which Nomura assigned all of its right, title and interest under the Servicing Agreement as it related to mortgage loans sold by Nomura to the Assignee pursuant to a separate Mortgage Loan Purchase Agreement. (Id., opening two paragraphs, and § 1.)

Wells Fargo argues that Nomura has no “right” to bring a breach of contract claim against Wells Fargo in its capacity as Servicer. In support of this argument, Wells Fargo relies solely on Nomura’s entry into the AARA, assigning its rights under the Servicing Agreement to a separate Nomura entity. (See Wells Fargo Memo. In Supp., at 16.) Under the PSA of the same date as the AARA, however, Wells Fargo agreed to service specified mortgage loans on a going-forward basis “pursuant to the terms and provisions of the Servicing Agreement . . .” (PSA, § 3.01.) Wells Fargo does not discuss the interrelationship between the two agreements and their effect on Nomura’s right to enforce Wells Fargo’s obligations as a Servicer. Wells Fargo accordingly fails to demonstrate Nomura’s lack of standing on this claim.

Wells Fargo also argues that Nomura has no right to bring a breach of contract claim against Wells Fargo in its capacity as Master Servicer. In support of this claim, Wells Fargo argues that its supervisory servicing obligations are owed only to the Trustee and certificateholders. (Wells Fargo Memo. In Supp., at 17.) This claim is based on section 4.02 of the PSA, which provides, in pertinent part, that “[t]he Master Servicer [Wells Fargo], for the

benefit of the Trustee and the Certificateholders, shall enforce the obligations of the Servicers [e.g. Ocwen] under this Agreement and, if applicable, the Servicing Agreement” For the reasons stated and based on the authorities cited in Nomura (2006-FM2), the court holds that section 4.02 does not preclude Nomura from suing Wells Fargo to recover the damages that Nomura itself allegedly suffered as a result of Wells Fargo’s failure to enforce Ocwen’s servicing obligations for the benefit of the Trustee and the certificateholders.

Finally, Wells Fargo also argues that Nomura “effectively pleads itself out of” a failure to notify claim by acknowledging that Wells Fargo provided Nomura with notice of certain breaches of representations and warranties. (Wells Fargo Memo. In Supp., at 14.) This argument is also resolved in accordance with Nomura (2006-FM2), for the reasons stated and based on the authorities cited in that decision.

Nomura has agreed to withdraw the portion of its breach of contract claim against Wells Fargo in its capacity as Custodian. (Nomura Memo. In Opp. To Wells Fargo, at 3 n 5.)

It is accordingly hereby ORDERED that the motion of Ocwen Loan Servicing, LLC (Ocwen) to dismiss the third-party complaint is granted solely to the extent of dismissing the third-party complaint to the extent that it purports to plead a claim for successor liability against Ocwen based on the acts of Equity One, Inc.; and it is further

ORDERED that the motion of defendant Wells Fargo Bank, N.A. (Wells Fargo) to dismiss the third-party complaint is granted solely to the extent of dismissing the third-party complaint as against Wells Fargo as Custodian.

This constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2018



MARCY FRIEDMAN, J.S.C.