

Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc.
2018 NY Slip Op 30927(U)
May 14, 2018
Supreme Court, New York County
Docket Number: 652619/2012
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 ASSET ACCEPTANCE
CORPORATION ALTERNATIVE LOAN TRUST,
SERIES 2006-S3, by HSBC BANK USA,
NATIONAL ASSOCIATION, in its capacity as
Trustee pursuant to a Pooling and Servicing
Agreement, dated as of July 1, 2006,

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, and on their alleged failures to comply with their servicing or supervisory servicing obligations (the second cause of action).

The third-party complaint also pleads a cause of action for indemnification against both Servicers (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 determinations of the Servicers' 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 claim is 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 supervisory servicing obligations; that some or all of Nomura's claims are time barred; that Nomura fails to state a claim against Wells Fargo in its capacity as Custodian; and that Nomura has no right to indemnification from Wells Fargo under the facts as alleged. 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 claim is 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 lacks standing to enforce Ocwen's servicing obligations; that Nomura's alleged damages constitute impermissibly speculative consequential damages; that Nomura has no right to indemnification from Ocwen under the facts as alleged; 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 GMAC Mortgage Corporation. 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.

Wells Fargo also argues that Nomura has no "right" to bring a breach of contract claim arising out of Wells Fargo's failure to enforce Ocwen's servicing obligations because Wells Fargo's supervisory obligations are owed only to the Trustee and certificateholders. (Wells Fargo Memo. In Supp., at 15.) This argument is 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 2 n 4.)

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 cause of action for indemnification as against Ocwen, and the second cause of action for breach of contract to the extent that it purports to plead a claim for successor liability against Ocwen based on the acts of GMAC Mortgage Corporation; and it is further

ORDERED that the motion of Wells Fargo Bank, N.A. (Wells Fargo) to dismiss the third-party complaint is granted solely to the extent of dismissing the third cause of action for indemnification as against Wells Fargo, and the second cause of action for breach of contract to

the extent that it pleads that Wells Fargo breached its duties as Custodian.

This constitutes the decision and order of the court.

Dated: New York, New York
May 14, 2018


MARCY FRIEDMAN, J.S.C.