

Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.

2018 NY Slip Op 30930(U)

May 14, 2018

Supreme Court, New York County

Docket Number: 653783/2012

Judge: Marcy Friedman

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Marc V. Friedman, J.S.C.

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NOMURA HOME EQUITY LOAN, INC., SERIES
2006-FM2, pursuant to a Pooling and Servicing
Agreement, dated as of October 1, 2006, by HSBC
BANK USA, NATIONAL ASSOCIATION, solely
in its capacity as Trustee,

DECISION/ORDER
Index No.: 653783/2012

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 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 the Servicers' motions to dismiss the third-party complaint in another action 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)].) The claims and governing agreements in this action and in Nomura (2006-S4) 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 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 lacks standing to enforce Ocwen's servicing obligations; 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.

It is noted that Nomura's cause of action for breach of servicing and supervisory servicing obligations pleads that Ocwen "failed to comply with Accepted Servicing Practices by, among other things, (i) failing to properly manage the REO process; (ii) failing to take timely corrective action with respect to title-related issues; (iii) failing to timely initiate claims for damage to properties; and (iv) failing to maintain complete documentation with respect to the Mortgage Loans." (Third-Party Compl., ¶ 51.) These allegations are, if anything, more specific than the allegations which this court found to be adequately pleaded in Nomura (2006-S4).

It is further noted that the PSA in this case, unlike the PSA in Nomura (2006-S4), does not appear to set forth a list of actions Ocwen is expressly empowered to take upon a loan default. (Compare Nomura [2006-S4] PSA, § 3.09 [a] [i] [providing that Ocwen will decide whether, among other things, to write off the unpaid principal balance, permit a short refinancing, arrange for a repayment plan, agree to a modification, or commence foreclosure proceedings].) This PSA does, however, include similar provisions requiring Ocwen to service and administer the loans in accordance with Accepted Servicing Practices (PSA, § 3.01), and to "use reasonable efforts to foreclose upon or otherwise comparably convert the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments." (Id., § 3.09 [a].) Given these provisions, the absence from this PSA of a list of actions Ocwen is expressly empowered to take upon a loan default is not material to the court's decision that the cause of action for breach of servicing and supervisory servicing obligations is adequately pleaded.

With respect to the failure to notify claim, Wells Fargo also argues in this action that Nomura “effectively pleads itself out of a breach of contract claim by acknowledging that Wells Fargo provided Nomura with the precise notice that it alleges is lacking from Wells Fargo.” (Wells Fargo Memo. In Supp., at 13.) In support of this argument, Wells Fargo relies on the allegation of the third-party complaint which states, in pertinent part, that “[p]rior to May 2012, HSBC [the Trustee] and Wells Fargo provided Nomura with certain individual demands for cure, replacement, or repurchase.” (Third-Party Compl., ¶ 27 [emphasis supplied].) Contrary to Wells Fargo’s contention, this allegation plainly cannot be construed as an admission that Wells Fargo fully complied with its prompt notice obligation.

With respect to the claim for breach of servicing obligations, 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 section 4.02 of the governing Pooling and Servicing Agreement (PSA) provides that “[t]he Master Servicer [Wells Fargo], for the benefit of the Trustee and the Certificateholders, shall enforce the obligations of the Servicer [Ocwen] under this Agreement” (Wells Fargo Memo. In Supp., at 15.) According to Wells Fargo, this provision affords only the Trustee and certificateholders—not Nomura—the right to sue Wells Fargo for breaching its oversight and enforcement obligations.

The PSA in Nomura (2006-S4) contained a substantially similar provision. (PSA, § 3A.02 [b].) Wells Fargo did not raise a standing claim based on this provision in that case. The argument that Wells Fargo now makes based on PSA section 4.02 is, however, substantially similar to an argument made by Ocwen against Nomura’s standing in Nomura (2006-S4). The PSA in that case required Ocwen to service the loans on behalf of the trust and in the best interest of certificateholders. The court held that this language did not preclude Nomura from

suing Ocwen for its breach of this servicing obligation to the extent that the breach also caused damage to Nomura. Consistent with the Nomura (2006-S4), the court holds in this case that section 4.02 of the PSA 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. As held in Nomura (2006-S4), this holding is not that Nomura has the right to enforce the PSA servicing obligations on behalf of the Trust or certificateholders, but rather that Nomura has the right to sue on its own behalf.

Wells Fargo fails to cite authority that supports its claim that Nomura lacks standing. (See Nomura [2006-S4], at 28-29 [discussing authorities cited by Ocwen, on which Wells Fargo also relies here].) Ambac Assur. Corp. v EMC Mortgage LLC (121 AD3d 514 [1st Dept 2014]), a case not cited by the parties in Nomura (2006-S4) but relied upon by Wells Fargo here, is also inapposite. In that case, the Appellate Division held that only the trustee, and not the plaintiff certificate insurer, could sue a sponsor for breaches of representations and warranties made to the depositor in Mortgage Loan Purchase Agreements (MLPAs), to which the insurer was not a party. The insurer was an express third-party beneficiary of the PSAs. In the PSAs, however, "the depositor, 'on behalf of the Trust for the benefit of the Certificateholders and the Certificate Insurer [Ambac],' assigned to the trustee all of its rights under the MLPAs." (Id., at 516 [brackets in original].) The Court held that the PSAs "confer[red] upon the trustee the full responsibility for enforcing the repurchase protocol on their behalf"—that is, on behalf of the certificateholders and certificate insurer. (Id., at 519.) The provisions of the PSA in the instant case are materially different. There is no equivalent provision in this PSA that confers upon the trustee the sole responsibility for enforcing Wells Fargo's obligations under the PSA on behalf of

Nomura. Moreover, Nomura itself is a party to the agreement it is seeking to enforce (the PSA), unlike the insurer in Ambac, which was not a party to the MLPAs.

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-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.