Matter of Part 60 RMBS Put-Back Litig.
2018 NY Slip Op 32679(U)
October 18, 2018
Supreme Court, New York County
Docket Number: 777000/2015
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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IN RE PART 60 RMBS PUT-BACK LITIGATION — Index No. 777000/2015

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NOMURA ASSET ACCEPTANCE CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AF2 TRUST, by HSBC Bank USA, National Association, as Trustee, — Index No. 652614/2012

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

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HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2, — Index No. 650337/2013

Plaintiff,

-against-

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR THE MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC4, — Index No. 652877/2014

Plaintiff,

-against- — DECISION/ORDER

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to MORGAN STANLEY CAPITAL INC., and MORGAN STANLEY ABS CAPITAL I INC.,

Defendants.

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HON. MARCY S. FRIEDMAN, J.S.C.

In two residential mortgage-backed securities (RMBS) actions brought by plaintiff-trustee, HSBC Bank USA, National Association (HSBC), against defendant-securitizer, Nomura Credit & Capital, Inc. (Nomura) (the HSBC Actions), HSBC asserts causes of action for breach of contract based on Nomura's alleged breaches of representations and warranties regarding the mortgage loans and on Nomura's alleged failure to notify HSBC of its discovery of such breaches. Nomura moves for leave to amend its answers in the two actions to assert a statute of limitations defense based on CPLR 202, the borrowing statute. Nomura contends that because HSBC is a national banking association, its residence for purposes of the borrowing statute is Delaware, the state in which it had its main office at the time of closing, and that HSBC's claims are therefore time-barred under Delaware's four year statute of limitations.[1] HSBC counters that it is a resident of the State of New York for purposes of the borrowing statute, because New York is its principal place of business, and that its claims are timely under New York's six year statute of limitations. HSBC also contends that the standards for leave to amend have not been satisfied and that it would be prejudiced by the amendment.

In a separate breach of contract action brought by plaintiff-trustee, Deutsche Bank National Trust Company (DBNT), against defendant-securitizer, Morgan Stanley Mortgage Capital Holdings LLC (Morgan Stanley) (the DBNT Action), DBNT alleges causes of action based on Morgan Stanley's alleged breaches of representations and warranties and on its alleged failure to notify DBNT of its discovery of such breaches. Morgan Stanley moves for leave to amend its answer to assert a statute of limitations defense to these causes of action based on

[1] In this decision, the terms "national banking association" and "national bank" will be used interchangeably.

CPLR 202. According to Morgan Stanley, the causes of action are time-barred under the Appellate Division decision in Deutsche Bank National Trust Co. v Barclays Bank PLC and Deutsche Bank National Trust Co. v HSBC Bank USA, National Association (156 AD3d 401 [1st Dept 2017] [DBNT/Barclays], lv granted ___NY3d___, 2018 WL 4440302 [Sept 18, 2018]). There, the Court applied the borrowing statute to DBNT, a conceded resident of California where it has its principal place of business. The Court held that the causes of action for breaches of representations and warranties brought by DBNT as trustee against defendant-securitizers were time-barred under the California statute of limitations. Morgan Stanley argues that the analysis of the Appellate Division is equally applicable to bar DBNT's assertion of such claims here. DBNT seeks to distinguish the trust at issue in this action from the trusts considered in DBNT/Barclays. Like HSBC, it argues that the standards for leave to amend have not been satisfied and that it would sustain prejudice if leave to amend were granted.

The defendants in the HSBC and DBNT Actions seek stays of expert discovery pending final resolution of the appeal of DBNT/Barclays by the Court of Appeals. Defendants in other RMBS breach of contract actions brought by HSBC and DBNT, respectively, also seek stays of such discovery in those actions.[2]

DISCUSSION

CPLR 3211 (e) provides that a "defense based upon a ground set forth in paragraphs one, three, four, five [which includes the statute of limitations] and six of subdivision (a) is waived unless raised either by such motion [i.e., a motion to dismiss] or in the responsive pleading." It

[2] These actions are consolidated solely for purposes of decision of these motions and of the applications for stays.

is well settled, however, that the decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co., Inc. v City of New York, 60 NY2d 957, 959 [1983].) A court retains discretion to grant leave to amend as to defenses waived under CPLR 3211 (e). (A.J. Pegno Constr. Corp. v City of New York, 95 AD2d 655, 656 [1st Dept 1983]; Onewest, F.S.B. v Goddard, 131 AD3d 1028, 1029 [2d Dept 2015].)

In general, leave to amend a pleading should be freely granted absent prejudice or surprise resulting from the delay. (CPLR 3025 [b]; Thomas Crimmins Contr. Co., Inc. v City of New York, 74 NY2d 166, 170 [1989].) "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." (Edenwald Contr. Co. Inc., 60 NY2d at 959 [internal quotation marks and citation omitted].)

The party opposing the amendment has the burden of demonstrating prejudice. (Gonzalez v New York City Hous. Auth., 107 AD3d 471, 471 [1st Dept 2013]; Leslie v Hymes, 60 AD2d 564, 564 [1st Dept 1977].) "A proper showing of prejudice must be 'traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.'" (Williams v Tompkins, 132 AD3d 532, 533 [1st Dept 2015], quoting A.J. Pegno Constr. Corp., 95 AD2d at 656.) Prejudice also occurs when a party "is hindered in the preparation of its case or has been prevented from taking some measure in support of its position." (Anoun v City of New York, 85 AD3d 694, 694 [1st Dept 2011] [granting leave to amend answer]; Norwood v City of New York, 203 AD2d 147, 149 [1st Dept 1994] [same], lv dismissed 84 NY2d 849; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502,

504 [1st Dept 2011] [granting leave to amend complaint], quoting Loomis v Civetta Corino Constr. Corp., 54 NY2d 18, 23 [1981]; Spitzer v Schussel, 48 AD3d 233, 233 [1st Dept 2008] [same].)

It is further settled that the amendment should be denied if the amendment "plainly lacks merit." (Thomas Crimmins Contr. Co. Inc., 74 NY2d at 170; Herrick v Second Cuthouse, Ltd., 64 NY2d 692, 693 [1984].) As the Appellate Division of this Department has repeatedly held, on a motion for leave to amend a pleading, the movant "need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 [1st Dept 2010] [internal citation omitted]; accord e.g. Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek, 85 AD3d at 505.)

Applying these standards, the court holds, for the reasons discussed further below, that leave to amend should be granted in both the HSBC and the DBNT Actions.

HSBC Actions

As a threshold matter, the court rejects HSBC's contentions that Nomura intentionally waived the statute of limitations defense and that leave to amend must be denied because Nomura lacks a sufficient excuse for failure to assert the defense in its answer. (HSBC Memo. In Opp., at 8, 10.) By way of explanation for its delay in asserting the defense, Nomura claims that the First Department's recent decision in DBNT/Barclays effected a change in, or constituted a development of, the law as to the standards for application of the borrowing statute to an RMBS trustee. (Nomura Memo. In Supp., at 15-16.)

Under the borrowing statute, CPLR 202, where a nonresident brings "[a]n action based

upon a cause of action accruing without the state," the action "cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued. . . ." In DBNT/Barclays it was undisputed that DBNT was not a resident of New York. In determining where DBNT's breach of contract cause of action accrued, the Court applied the test set forth by the Court of Appeals in Global Financial Corp. v Triarc Corp. (93 NY2d 525 [1999]). Under this test, a nonresident's cause of action accrues at the time and place of the injury, and "[w]hen an alleged injury is purely economic, the place of injury usually is where the [nonresident] plaintiff resides and sustains the economic impact of the loss." (Id., at 529.) The Appellate Division accepted California, DBNT's undisputed principal place of business, as DBNT's residence and the place where the injury was felt. (DBNT/Barclays, 156 AD3d at 401-402.) In the alternative, the Appellate Division determined the place where the injury was felt, and the cause of action therefore accrued, under a "multi-factor test" articulated in Maiden v Biehl (582 F Supp 1209 [SD NY 1984]), a federal case that applied CPLR 202 to a non-RMBS trustee-plaintiff. (DBNT/Barclays, 156 AD3d at 402.) The Appellate Division concluded that "we need not decide whether the plaintiff-residence rule or the multi-factor test applies in this context because, even under the multi-factor test, we find that the injury/economic impact was felt in California and the claims are thus deemed to have accrued there." (Id.)

DBNT/Barclays applied existing tests in determining where a nonresident RMBS trustee's cause of action accrues. Although it did not articulate a new test, or create a new statute of limitations defense for RMBS trustees, it was the first New York appellate decision to apply the borrowing statute to an RMBS trustee. DBNT/Barclays raises issues of importance to the

RMBS litigation which will now be the subject of consideration by the Court of Appeals.

As HSBC correctly points out, however, prior to the Appellate Division decision, Nomura filed answers asserting a statute of limitations defense in five other RMBS breach of contract cases brought by HSBC as trustee. (HSBC Memo. In Opp., at 1.) The timeliness of trustees' claims under the borrowing statute was challenged in the coordinated Part 60 RMBS litigation several years prior to the Appellate Division decision in DBNT/Barclays. The borrowing statute was in fact raised in a motion to dismiss, initially brought in January 2014 and then re-filed in January 2015 (Index No 652001/2013, NYSCEF Doc Nos 9, 73), in one of the cases that was ultimately determined by DBNT/Barclays. The answers in the five HSBC cases asserted a defense under "the applicable statute of limitations" and were all served after the filing of the 2014 motion to dismiss which raised the borrowing statute.[3] The potential availability of a statute of limitations defense under the borrowing statute was thus known to the parties, although the application of the borrowing statute to RMBS trustees was not the subject of appellate

[3] The answers asserting the statute of limitations in the actions brought by HSBC were filed as of the following dates: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012) – August 11, 2014; Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012) – August 26, 2014; Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014) – May 5, 2015; Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012) – Amended Answer, October 26, 2015; Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013) – Amended Answer, October 26, 2015.

In three of the five above actions, Nomura asserted the defense in the answers notwithstanding the fact that motions to dismiss based on the New York statute of limitations had been denied, raising the inference that another state's statute of limitations was at issue. (See Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc., 2014 NY Slip Op 31671 [U], 2014 WL 2890341, * 5-6 [Sup Ct, NY County 2014]; Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc., Index No 652619/2012, NYSCEF Doc No 103 [Sup Ct, NY County July 17, 2014]; Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc., Tr. of Decision on the Record on Feb. 24, 2015, so-ordered on Mar. 23, 2015, Index No 652842/2014, NYSCEF Doc No 70 [Sup Ct, NY County].)

authority prior to DBNT/Barclays.[4] Under these circumstances, the court holds that Nomura's excuse for its failure to assert the defense prior to this motion is less than compelling.

The court further holds, however, that the absence of a compelling excuse for the delay here is not determinative of whether leave to amend should be granted. As discussed above, under long-standing authority, the general rule is that there "must be lateness coupled with significant prejudice to the other side" in order for an amendment to be barred. (Edenwald Contr. Co., Inc., 60 NY2d at 959 [internal quotation marks and citation omitted] [reversing the denial of leave to amend to assert a waiver defense post-note of issue, without discussion of the excuse for the delay, the Court reasoning that the party opposing the amendment did not show significant prejudice]; see also Cherebin v Express Ambulance Serv., Inc., 43 AD3d 364, 365 [1st Dept 2007] [reversing the denial of leave to the plaintiff to amend the complaint, notwithstanding that the "plaintiff's excuse for the delay could have been more compelling," where the trial court failed to address "the critical issue of defendant's failure to demonstrate meaningful prejudice by the delay"].)

With respect to the statute of limitations, in particular, in Fahey v County of Ontario (44 NY2d 934 [1978], revg 55 AD2d 1034 [4th Dept 1977]), the Court of Appeals reversed the Appellate Division's affirmance of the denial of a motion for leave to amend an answer to assert a statute of limitations defense, where the Appellate Division had relied on the defendant's

[4] 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." The RMBS breach of contract actions in this Part (colloquially known as put-back actions) have been coordinated under a common master index number, pursuant to a Case Management Order (CMO). (Index No 777000/2015, NYCEF Doc Nos 1 [Master Filing Order, Aug. 28, 2015], 17 [CMO #1, Dec. 7, 2015].) Coordination has involved the appointment of liaison counsel to facilitate communication between the court and the parties, with the goal, among others, of avoiding duplication of motion practice involving issues common to multiple actions. (See CMO #1, ¶¶ II, IV.)

failure to offer any explanation for its delay. Without discussion of excuse, the Court of Appeals reasoned that, under CPLR 3025 (b), "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay. Since the respondents cannot claim here such prejudice or surprise, the court below abused its discretion as a matter of law in denying appellant's motion to amend the answer to plead the Statute of Limitations." (Id. at 935 [internal quotation marks and citations omitted].)

Substantial authority in this Department has held that leave to amend to assert a statute of limitations defense is not proper where the defendant lacks a reasonable excuse for the delay, particularly where the delay is lengthy and the case has been certified as trial ready. As the Appellate Division has explained, "where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be discreet, circumspect, prudent and cautious." (Cseh v New York City Tr. Auth., 240 AD2d 270, 272 [1st Dept 1997] [internal quotation marks and citation omitted] [reversing the grant of leave to amend to add a statute of limitations defense after a 10-year delay, the Court finding "significant prejudice" to the plaintiff, but also stating that, in permitting the defendant to amend the answer after this time "without offering any excuse for the delay, we believe the court improvidently exercise[d] its discretion"]; Borges v Placeres, 123 AD3d 611, 611 [1st Dept 2014] [affirming the denial of a motion for leave to amend to add a statute of limitations defense, made on the eve of trial 8 years after the answer was served, "for lack of any excuse for the delay"]; Cameron v 1199 Hous. Corp., 208 AD2d 454, 454-455 [1st Dept 1994] [affirming the denial of the defendant's motion for leave to amend to assert the statute of limitations where the motion was made 6 years after the defendants served their answer and after the case was placed

on the calendar, the Court finding that prejudice to the plaintiff, "coupled with [defendants'] failure to offer any excuse for the delay in asserting the defense, provided ample reason for denying the motion"].)

Substantial other authority in this Department has, however, held, without consideration of whether the defendant had a valid excuse for a lengthy delay in seeking leave to assert a statute of limitations defense, that leave was proper where the plaintiff did not show prejudice or surprise resulting from the delay. (See Arellano v HSBC Bank USA, 67 AD3d 554, 554 [1st Dept 2009] [3-year delay]; Lettieri v Allen, 59 AD3d 202, 202 [1st Dept 2009] [motion made on the eve of trial after 2-year delay]; Solomon Holding Corp. v Golia, 55 AD3d 507, 507 [1st Dept 2008] [19-month delay]; Seda v New York City Hous. Auth., 181 AD2d 469, 470 [1st Dept 1992], lv denied 80 NY2d 759 [1992] [3-year delay]; Barbour v Hospital for Special Surgery, 169 AD2d 385, 386 [1st Dept 1991] [7-year delay].)[5]

Here, Nomura's answers in the two cases were filed on August 27, 2014. Neither answer pleaded a statute of limitations defense. The motion for leave to amend was filed nearly four years later on April 13, 2018. Expert discovery is, however, ongoing, and the note of issue has not been filed. Nomura's delay in moving for leave to amend, although unquestionably lengthy,

[5] At least in the context of motions for leave to amend complaints, there is also authority that a reasonable excuse must be offered for lengthy delay in moving for leave to amend. (Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assocs., LLC, 4 AD3d 290, 293 [1st Dept 2004] ["where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" [internal quotation marks, citation, and brackets omitted]; see also Hickey v Steven E. Kaufman, P.C., 156 AD3d 436, 436 [1st Dept 2017], lv denied ___ NY3d ___, 2018 WL 4440619 [Sept. 18, 2018] [same] [holding that the plaintiff was not required to explain a 6-month delay in moving to amend the complaint, and comparing cases involving 2 1/2 and 6-year delays in which the lack of an excuse was cited as a basis for denial of the motion]; Van Damme v Gelber, 111 AD3d 408, 409-410 [1st Dept 2013], lv denied 23 NY3d 904 [2014].)

is not comparable to the delays in the cases, discussed above, in which the defendants sought leave post-note of issue, and in which the Courts cited the lack of a reasonable excuse for the delay as a basis for, or at least as a factor supporting, denial of leave. Based on the particular circumstances of Nomura's motion and the numerous cases in which leave to amend has been granted without consideration of the sufficiency of the defendant's excuse for the delay in seeking leave, this court is not persuaded that Nomura's motion should be denied based on the lack or weakness of its excuse for its delay in asserting the statute of limitations defense. The court accordingly turns to the critical issue of whether HSBC has shown prejudice or surprise as a result of Nomura's delayed assertion of the defense.

In opposing Nomura's motion for leave to amend, HSBC asserts that "[i]n reliance on Nomura's decision not to raise a statute of limitations defense," it has engaged in extensive pre-trial motion practice and extensive fact discovery, filed six expert reports, and incurred millions of dollars in attorney's fees and other expenses. (HSBC Memo. In Opp., at 13.)

In a number of cases, Courts have found that plaintiffs have sustained prejudice as a result of the delayed assertion of a statute of limitations (or other dispositive) defense where, prior to the assertion of the defense, the parties have conducted significant discovery or other pre-trial proceedings addressed to the merits. (See e.g. Cseh, 240 AD2d at 271-272 [finding that the defendant hospital's 10-year delay in asserting the statute of limitations defense caused prejudice because the scope of discovery to establish the hospital's liability had been "significantly broadened" beyond the discovery needed to establish the liability of the co-defendant doctors who had asserted the defense]; Cameron, 208 AD2d at 454-455 [holding that the plaintiff was prejudiced by a post-note of issue motion to assert a statute of limitations

defense, as the plaintiff "had engaged in motion practice and disclosure . . . , and otherwise spent considerable time and expense preparing for trial"]; see also Arias-Paulino v Academy Bus Tours, Inc., 48 AD3d 350, 350 [1st Dept 2008] [reversing the grant of leave to the defendant to assert the defense of release, where the plaintiff had litigated the matter extensively and participated in a mediation over the 2 1/2 year delay]; compare Seda, 181 AD2d at 470 [holding that the plaintiff was not prejudiced by the delay where there had been "a dearth of discovery" in the 3 years preceding the motion for leave to amend]; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:7.)[6]

The mere conduct of discovery or other pre-trial proceedings is not, however, dispositive. In numerous other cases, even after a lengthy delay during which the cases have been prepared for trial on the merits, Courts have granted leave to assert statute of limitations (or other dispositive) defenses, where the plaintiffs have not shown that they have been prejudiced or surprised as a result of the defendants' delay. (See e.g. Barbour, 169 AD2d at 386 [holding that the plaintiffs could "hardly claim" that they were surprised by the defendant doctor's assertion of a statute of limitations defense 7 years after the commencement of the action, where the co-defendant hospital had asserted the defense from the outset]; Lettieri, 59 AD3d at 202 [granting leave to assert a statute of limitations defense on the eve of trial, where the plaintiff could not

[6] In the context of motions for leave to amend complaints, however, there are authorities holding that the expense of litigating the claims that were asserted prior to the amendment does not constitute prejudice that would bar the amendment. (See e.g. Hickey, 156 AD3d at 436 [holding that time and expense in briefing and preparing to argue a motion to dismiss the original complaint was "not the kind of prejudice required to defeat an amendment"]; Pomerance v McGrath, 124 AD3d 481, 482 [1st Dept 2015], lv dismissed 25 NY3d 1038 [holding that the defendants' expenditure of $200,000 in legal fees prior to the amendment did not constitute prejudice]; Jacobson v Croman, 107 AD3d 644, 645 [1st Dept 2013] [rejecting the argument of the opponents of the amendment that they were prejudiced because they had tailored their extensive preparations to the claims that had originally been asserted].)

"reasonably claim" that he was prejudiced or surprised by the request for leave to amend]; Arellano, 67 AD3d at 554 [granting leave to assert a statute of limitations defense 3 years after the defendants answered]; see generally Norwood, 203 AD2d at 149 [reversing the denial of a motion for leave to amend at trial to assert a defense of qualified privilege, the Court reasoning that the plaintiff "cannot claim surprise since the facts and circumstances with respect to the qualified privilege were fully explored during discovery"].)

Here, similarly, HSBC cannot persuasively claim that it conducted discovery in reliance on Nomura's waiver of the statute of limitations defense or that it was unaware of the possible assertion of the defense. As noted above, the statute of limitations was pleaded by Nomura in five other cases brought against it by HSBC as trustee, in answers filed in 2014 and 2015. (See supra, n 2.) In none of these cases has the viability of the defense been the subject of motion practice.[7] Yet, by the time the motion in the instant actions was brought, HSBC had proceeded to conduct extensive fact discovery in each of the five actions and had served, or was about to serve, expert reunderwriting reports. (See Exhibit C to Put-back Liaison Counsels' Joint Letter, dated May 11, 2018, Index No 777000/2015, NYSCEF Doc No 516.) Here, HSBC has also expended substantial time and money on discovery in order to prepare the two cases for hearing on the merits. HSBC's claim that it performed this discovery in reliance on Nomura's failure to assert the statute of limitations lacks plausibility under these circumstances in which it performed

[7] HSBC asserts that if the statute of limitations defense based on the borrowing statute had been raised in the cases at issue in the initial motion to dismiss, the viability of the defense could have been determined in October 2015, when the Appellate Division issued a decision on the appeal from the decision on that motion, and "before the parties spent any meaningful time in discovery." (HSBC Memo. In Opp., at 12.) This assertion is not only highly speculative, but also ignores the terms of CPLR 3211 (e), under which a defendant may timely raise a statute of limitations defense in either a motion to dismiss or in the answer. It also ignores the conduct of the parties, discussed above, in five other cases brought by HSBC.

substantially similar discovery in the other five cases notwithstanding the assertion of the statute of limitations defenses there. Put another way, HSBC does not argue that, after these defenses were asserted in the other five cases, it curtailed preparation of the cases for trial on the merits or conducted discovery that was any narrower than that conducted here. Nor does HSBC point to any discovery that it requires as a result of the delayed assertion of the statute of limitations defense.

The court turns to the merits of the proposed amendment. As a federally-chartered national banking association, HSBC is required to designate in its articles of association the location of its main office. (Wachovia Bank v Schmidt, 546 US 303, 307 n 1 [2006] [citing 12 USC § 22 and other federal banking laws and regulations].) The main office of a national bank is "the place where its operations of discount and deposit are to be carried on." (Id. [internal quotation marks omitted].) "The State in which the main office is located qualifies as the bank's 'home State' under the banking laws." (Id.) HSBC's designated main office as of the closing of the securitization was located in Delaware, and the main office was subsequently relocated to Virginia. (See Articles of Association, Kahn Aff., Exs. E, F.)

The parties do not dispute that CPLR 202, the borrowing statute, does not apply to New York residents. Rather, they dispute whether HSBC is a New York resident. Nomura contends that a national bank's sole state of residence for purposes of the borrowing statute is the state of its designated main office. (See Nomura Memo. In Supp., at 9.) HSBC contends that a national bank, like other business entities, is a New York resident if its principal place of business is in New York, and that it qualifies as a New York resident under this standard. (See HSBC Memo. In Opp., at 2.)

In support of its contention that HSBC's designation of its main office is conclusive of its residence for purposes of the borrowing statute, Nomura relies on federal authority determining the location of national banks for purposes of diversity jurisdiction. In Wachovia Bank v Schmidt (546 US 303, supra), the Supreme Court construed 28 USC § 1348, the federal diversity jurisdiction statute applicable to national banks, which provides that national banks "shall . . . be deemed citizens of the States in which they are respectively located." Rejecting the Circuit Court's holding that, for diversity purposes, "located" could refer to any state in which a national bank had a branch, the Supreme Court reasoned that the meaning of the word "located" "depends on the context in and purpose for which it is used." (546 US at 318.) The Court noted that under various provisions of the National Bank Act, a national bank may be considered to be "located" either at its main office or at its branch offices, depending upon the purpose of the provision. (Id., at 313.) In the context of venue, the Court reasoned that the word "located" "may refer to multiple places," because venue "is primarily a matter of choosing a convenient forum." (Id., at 316, 318.) In the differing context of diversity jurisdiction, the Court reasoned that locating the place of citizenship of a national bank in any state in which it had a branch, rather than in the state of its main office, would impermissibly curtail the access of national banks to the federal forum, compared to the access afforded state banks and other state incorporated entities. (Id., at 307.)

In OneWest Bank, N.A. v Melina (827 F3d 214 [2d Cir 2016]), the Second Circuit joined other Circuit Courts in holding, for purposes of federal diversity jurisdiction, that a national bank is a citizen only of the state in which its main office is located, and not also of the state of its principal place of business. (Id. at 216, 217.) The Court's holding was based on a comparison of

the differing terms of the federal diversity jurisdiction statutes applicable to national banks and corporations, respectively, and the fact that only the latter, 28 USC § 1332, provides that a corporation shall be deemed a citizen of its state of incorporation and of the state where it has its principal place of business. (Id. at 218.) This case thus recognized that a national bank may have a principal place of business different from its main office. Wachovia also recognized this distinction. (See 546 US at 317, n 9.) According to OneWest, however, Wachovia "left open the question of whether a national bank is also a citizen of the state of its principal place of business" for purposes of diversity jurisdiction. (827 F3d at 218.)

Contrary to Nomura's contention, Wachovia and OneWest do not support its claim that because a national bank is a "creature[] of federal statutory law," and a citizen only of the state of its designated main office, it is also a resident only of the state of its main office for purposes of the borrowing statute. (See Nomura Reply, at 11-12.) As the above review of these authorities shows, the determination of citizenship involved policy concerns and interpretation of statutory terms specific to diversity jurisdiction. On this motion, Nomura fails to claim—let alone, show—that the different policy considerations underlying the borrowing statute would be served by equating the residence of a national bank only with the location of its main office and, more particularly, by treating a national bank with a principal place of business in New York as a nonresident of New York.[8]

As explained by the Court of Appeals, "[t]he primary purpose of CPLR 202 and its

[8] Nomura also contends that because the state in which HSBC's main office is located is also its "home State," this state must be its residence under the borrowing statute. (See Nomura Reply, at 11-12.) Nomura undertakes no analysis of the purposes for which a national bank's home State is relevant under the banking laws. It accordingly also does not make any showing that such purposes are relevant to the purpose underlying the borrowing statute.

predecessors is to prevent forum shopping by a nonresident seeking to take advantage of a more favorable Statute of Limitations in New York or, as the Court also stated, to "discourag[e] forum shopping by plaintiffs who have no significant contacts with New York. . . ." (Antone v General Motors Corp., Buick Motor Div., 64 NY2d 20, 29, 27-28 [1984]; accord Global Fin. Corp., 93 NY2d at 528; Norex Petroleum Ltd. v Blavatnik, 23 NY3d 665, 676 [2014] [also explaining that "the legislature enacted section 202 primarily to prevent forum shopping; i.e., to make sure that nonresidents do not select a New York forum and burden New York's state and federal courts when, and perhaps precisely because, their lawsuits are time-barred by the applicable laws of the foreign states where the causes of action accrued"].)

Nomura does not argue, and this court does not find, that this prohibition against forum shopping by a nonresident is furthered by precluding a business entity with a principal place of business in New York from initiating suit in New York. As held with respect to other business entities, a plaintiff with a "significant connection with the state does not 'come into' New York to take advantage of its laws, the person is already there. . . . Establishment of a principal place of business in New York is a sufficiently 'significant connection' to New York to qualify as a resident for purposes of C.P.L.R. § 202." (Matter of Countrywide Fin. Corp. Mortgage-Backed Secs. Litigation, 834 F Supp 2d 949, 968 [CD Cal 2012] [Pfaelzer, J.] [Countrywide] [holding CPLR 202 inapplicable to AIG and related corporate entities, which had their principal place of business in New York but were incorporated outside the state].)

Nomura does not cite, and this court has not located, any authority which analyzes whether a national bank's residence for purposes of the borrowing statute is its main office or

principal place of business.[9] Courts which have considered the residence of corporations under the borrowing statute have, however, repeatedly held that the residence may be the state of incorporation or the principal place of business, or only the principal place of business.

In determining the residence of a corporation for purposes of the borrowing statute, the Court of Appeals has looked to both the place of incorporation and the principal place of business. (E.g. Global Fin. Corp., 93 NY2d at 530 [holding that the plaintiff corporation's "causes of action are time-barred whether one looks to its State of incorporation or its principal place of business"].) Although the Court of Appeals has not expressly held that the corporation's residence may be in both places, there is intermediate appellate authority that the residence of a corporate plaintiff under CPLR 202 "may be the state of incorporation or its principal place of business." (Oxbow Calcining USA Inc. v American Indus. Partners, 96 AD3d 646, 651 [1st Dept 2012].)[10]

As noted above, a federal court applying CPLR 202 in an RMBS action held that corporate insurers with a principal place of business in New York were New York residents, although they were incorporated outside this state. (Countrywide, 834 F Supp 2d 949, supra [extensively surveying New York authorities on residence under the borrowing statute].) The

[9] As discussed below, this issue was not addressed in DBNT/Barclays.

[10] Prior to Global Finance, the Court of Appeals had held that an entity incorporated in New York, with a principal place of business in Massachusetts, was a New York resident for purposes of the borrowing statute. (Wydallis v United States Fidelity & Guar. Co., 63 NY2d 872 [1984].) Outside the context of the borrowing statute, the Court of Appeals has observed that "[i]t is generally recognized that a corporation, like an individual, may have a place of residence other than its domicile. Corporations often have their principal places of business outside of the State of incorporation. The domicile of a corporation is the State in which it is incorporated." (Sease v Central Greyhound Lines, Inc., of New York, 306 NY 284, 286 [1954].) It is also noted that in Antone (64 NY2d at 28-30), the Court held that an individual may have more than one residence for purposes of the borrowing statute, and that residence is not equivalent to domicile.

United States Court of Appeals, in applying CPLR 202, has recently observed that "Courts within the Second Circuit have consistently held that a business entity's residence is determined by its principal place of business." (Luv N' Care, Ltd. v Goldberg Cohen, LLP, 703 Fed Appx 26, 28 [2d Cir 2017]; see e.g. Robb Evans & Assocs. LLC v Sun Am. Life Ins., 2012 WL 488257, * 3 [SD NY, No 10 Civ 5999, Feb. 14. 2012] [Daniels, J.]; National Union Fire Ins. Co. of Pittsburgh, Pa. v Forman 635 Joint Venture, 1996 WL 507317, * 3-4 [SD NY, No 94 Civ 1312, Sept. 6, 1996] [Stanton, J.].)[11]

As HSBC correctly points out (HSBC Memo. In Opp., at 20-21), Nomura cites no authority that the residence of a national bank should be treated differently than that of other business entities by a court in applying the borrowing statute. To the extent that Nomura argues that Courts have rejected the principal place of business as the place of other business entities' residence for purposes of the borrowing statute, the authority on which Nomura relies does not support this contention. (See Nomura Memo. In Supp., at 11-12, citing Verizon Directories Corp. v Continuum Health Partners, Inc., 74 AD3d 416, 417 [1st Dept 2010], lv denied 15 NY3d 716, affg 2009 WL 1116113 [Sup Ct, NY County 2009] [rejecting the plaintiff corporation's claim that it was a resident of New York "by virtue of its authorization to do business and asserted extensive presence here" where, as indicated in the trial court decision, the plaintiff was

[11] In Countrywide, the Court held that a corporation is a New York resident under CPLR 202 if the corporation "is either incorporated in New York or maintains its principal place of business there." (834 F Supp 2d at 958.)

In contrast, the federal courts in the Second Circuit appear to hold that only the principal place of business is relevant to the determination of where the business entity resides. (Luv N' Care, Ltd., 703 Fed Appx at 28 n 1 [stating, in the case of a nonresident plaintiff, that "[i]t would seem that an economic harm has greater effect on a for-profit enterprise's activities at its principal place of business rather than at its place of incorporation"]; Robb Evans & Assocs. LLC, 2012 WL 488257, * 3 [in a case involving a partnership, holding that "the sole residency of a business entity for the purpose of the New York borrowing statute is its principal place of business"].)

incorporated in and had its principal place of business in other states][12]; Gordon v Credno, 102 AD3d 584, 585 [1st Dept 2013] [holding, without discussing where the plaintiff had its principal place of business, that "given the minimal business activities of the [plaintiff] corporation," its cause of action accrued for purposes of the borrowing statute in its out-of-state place of incorporation].)

In holding that a national bank is a New York resident if its principal place of business is here, this court rejects Nomura's contention that the Appellate Division decision in DBNT/Barclays is dispositive of whether HSBC's claims are time-barred. (See Nomura's Memo. In Supp., at 3.) There, the parties did not dispute that the plaintiff-trustee, DBNT, a national bank, was a California resident, with its principal place of business and main office in California. As stated by the Appellate Division, each of the defendant-securitizers (Barclays and HSBC) "moved to dismiss the action against it, arguing, in pertinent part, that, because plaintiff's principal place of business is in California, plaintiff's contractual claim is barred by California's four-year statute of limitations. . . ." (156 AD3d at 401-402.) The Court was not presented with the issue of whether a national bank's residence for purposes of the borrowing statute should be considered its main office as opposed to its principal place of business. Rather, the issue before the Court was whether "the plaintiff-residence rule or the multi-factor test" should be applied in determining the place of accrual of a nonresident RMBS trustee's cause of action under the borrowing statute. (Id. at 402.) In determining this issue, the court accepted the principal place of business as the place of the trustee's residence. Here, in contrast, there is no agreement as to

[12] This reading of Verizon was endorsed by the Appellate Division in a subsequent decision. (Oxbow Calcining USA Inc., 96 AD3d at 651.)

the place of HSBC's residence.

On this record, however, HSBC fails to demonstrate that its principal place of business is in fact New York. In support of its claim that New York is its principal place of business, HSBC relies on the following pleadings and evidence: The complaints in both actions allege that HSBC is a national banking association with its registered main office in Virginia and its "principal executive office" in New York, New York. (Nomura Asset Acceptance Corp. [NAAC], Series 2006-AF2 Am. Compl., ¶ 22; Nomura Home Equity Loan, Inc. [NHELI], Series 2007-2 Compl., ¶ 22.) The Annual Reports for 2006 and 2007 filed with the Securities and Exchange Commission by HSBC USA Inc., HSBC's parent, state that HSBC's "main office is in Delaware and its domestic operations are primarily located in New York State." These Reports also state that HSBC's "principal executive offices" are located in Buffalo, New York. (Annual Reports, Aff. of Brendan DeMay [HSBC's counsel], Exs. A at 5, 17; B at 5, 18.) The Pooling and Servicing Agreements for the securitizations at issue state that the "principal corporate trust office" of the trustee is located at 452 Fifth Avenue, New York, New York. (NAAC 2006-AF2 and NHELI 2007-2 PSAs, Definition of "Corporate Trust Office," DeMay Aff., Exs. C, D.)[13]

[13] HSBC also argues that the depositor for each securitization was a New York resident, that the trustee is the assignee of the depositor, and that courts look to the residence of the assignor in applying CPLR 202. (See Nomura Memo. In Opp., at 23.) As set forth in the Prospectus Supplements for the securitizations, each depositor is an affiliate of defendant Nomura, the sponsor of the securitization, and each depositor is a special purpose corporation incorporated in Delaware, with a "principal executive office" in New York, New York. The "limited purposes" of the depositor include the acquisition of mortgage loans and other assets, and the issuance of securities and notes secured by or representing ownership interests in mortgage loans. "[T]he depositor does not have, nor is it expected in the future to have, any significant assets." (Prospectus Supplements, DeMay Aff., Exs. G at 158-159, H at 144-145.)

On this motion, the parties do not discuss whether the status of the depositors, as special purpose vehicles (or mere conduits), affects the determination of the place where the injury is felt and the cause of action accrues for purposes of the borrowing statute. Nor do they discuss, except in the most cursory fashion, the terms of the Pooling and Servicing agreements by which the depositors' rights to the trust corpus were transferred to the trustee, and the extent to which HSBC seeks in these actions to enforce breaches of representations and warranties that were made to

In opposition, Nomura points to numerous complaints, answers, and notices of removal filed by HSBC in other actions, in which HSBC states that its principal place of business is either in Delaware or, after HSBC relocated its main office, in Virginia. (See Nomura Memo. In Supp., at 7, Aff. of Daniel Kahn [Nomura's counsel], Exs. J-M, O-S.) Nomura also cites a page from HSBC's website, stating that its principal place of business is in Virginia. ("HSBC Cross-Border Disclosure," Kahn Aff., Ex. N at 5.)

A dispute of fact thus exists as to whether, or to what extent, a national bank's principal executive office is equivalent to its principal place of business and as to where HSBC's principal place of business is located. This dispute is not appropriately resolved on a motion to amend. If the court does not ultimately find that HSBC has its principal place of business in New York and thus finds that HSBC is not a New York resident, the court will be required by CPLR 202 to determine where HSBC's cause of action accrued. This determination will be made under the plaintiff-residence rule, the multi-factor test, or some other standard tailored to the unique characteristics of RMBS trusts. It is expected that the Court of Appeals' determination of DBNT/Barclays will provide much needed guidance on these issues. At this juncture, with HSBC's residence in dispute, the court cannot find that Nomura's requested amendment is patently without merit.

The court accordingly concludes that Nomura has met the standards for leave to amend its answers to add a statute of limitations defense.

DBNT Action

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the depositors. On this motion, the court accordingly declines to reach the issue of whether the residence of the depositors governs for purposes of CPLR 202.

Morgan Stanley's answer, which did not contain a statute of limitations defense, was filed on January 22, 2016. (NYSCEF Doc No 81.) By letter dated January 24, 2018, filed shortly after the DBNT/Barclays decision, Morgan Stanley first sought leave to amend to add a statute of limitations defense under the borrowing statute. (Joint Letter, Index No 777000/2015, NYSCEF Doc No 403.)

This action is brought by the same California trustee that brought the actions at issue in DBNT/Barclays. Here, as in those actions, DBNT does not dispute that it is a national bank with its principal place of business in California, and does not claim that it is a resident of any other state. (DBNT Memo. In Opp., at 12.) Rather, DBNT claims that its residence is not "dispositive" under the borrowing statute for purposes of determining the place where its cause of action accrued, and that the trust at issue here is "far less connected to California than the trusts considered in [DBNT/Barclays]." (Id. at 12.) DBNT thus in effect argues that, under the multi-factor test that was also considered in DBNT/Barclays, its cause of action would not accrue in California.

The sole difference in the factors that DBNT points to, in briefing this motion, is the percentage of loans that encumber California properties. (Id.) The court notes that this percentage does not appear to differ significantly from that in DBNT/Barclays. Moreover, as Morgan Stanley argues, and DBNT does not dispute, the other factors considered by the Court in DBNT/Barclays—e.g., the principal administration of the trust in California; the obligation of the trust to pay taxes, if any, in California; the origination of all of the mortgages by a California-based lender; and maintenance of the notes in California—apply equally to DBNT here. (See Morgan Stanley Memo. In Supp., at 4-5; DBNT Memo. In Opp., at 12-13; Oral Argument

Transcript at 25-26.) On the reasoning of DBNT/Barclays, these factors point to California as the place of accrual of its causes of action. Morgan Stanley thus makes a strong showing, under DBNT/Barclays, of the merit of the proposed amendment to assert a statute of limitations defense under the borrowing statute.[14] The critical issue, to which the court turns, is accordingly whether the standards for leave to amend are otherwise satisfied.

DBNT argues that Morgan Stanley waived the statute of limitations defense by virtue of its failure to assert the defense in its original answer, and that "[w]aiver is waiver, and leave to amend cannot cure it." (DBNT Memo. In Opp., at 8.) For the reasons stated, and on the authority cited, in the above determination of the HSBC Actions, this contention is without merit.

DBNT also argues that leave to amend should be denied because Morgan Stanley lacks an excuse for its delay in asserting the defense. (DBNT Memo. In Opp., at 9.) Morgan Stanley argues in its briefing of the motion that, under governing law, an excuse need not be shown in the absence of prejudice. (Morgan Stanley Reply, at 7.) At oral argument it also argued that it sought leave promptly after the Appellate Division decided DBNT/Barclays which, it asserts, represented a "development in the case law." (Tr. at 14.) Here, as in the HSBC Actions, the parties were aware of a potential defense under the borrowing statute and Morgan Stanley could

[14] In so holding, the court rejects DBNT's claim that the amendment lacks merit because this action, unlike the actions decided by DBNT/Barclays, pleads a failure to notify claim that is timely in whole or in part. (See DBNT Memo. In Opp., at 13-14.) The fact that the action may not be subject to dismissal in its entirety based on the statute of limitations defense does not render the amendment plainly lacking in merit or, as argued by DBNT, "futile."

The court also declines on this motion to consider DBNT's argument that the depositor for the securitization has its principal place of business in New York, and that the residence of the depositor, as DBNT's assignor, controls for purposes of the borrowing statute. By letter dated May 16, 2018, DBNT purported to join in the argument of HSBC to this effect, although DBNT did not assert this argument in its brief. In any event, for the reasons stated above with respect to the HSBC Actions (see n 11, supra), the record is not sufficiently developed to permit determination of this argument.

have asserted the defense prior to the decision in DBNT/Barclays. As in the HSBC Actions, however, the absence of a compelling excuse is not determinative as to whether leave to amend should be granted, given DBNT's failure to show that it is prejudiced or surprised by the amendment.

In support of its claim of prejudice, DBNT argues that "in reliance on" Morgan Stanley's failure to assert the statute of limitations defense, it conducted expensive and burdensome discovery and, in particular, reviewed hundreds of thousands of documents, reunderwrote over 400 loans, and served expert reports. (DBNT Memo. In Opp., at 1, 11.) Morgan Stanley argues, and DBNT does not dispute, that DBNT continued to conduct complex, expensive discovery in another RMBS case brought by DBNT in which the defendant asserted the statute of limitations.[15] (Morgan Stanley Reply, at 5, citing Joint Letter, Ex. C [Index No 777000/2015, NYSCEF Doc No 405].) Under these circumstances, the court finds unpersuasive DBNT's assertion that the extensive discovery here would have been avoided had Morgan Stanley asserted the statute of limitations defense.

The court is also unpersuaded by DBNT's contention that it is prejudiced because it has "lost the opportunity" to conduct discovery relevant to the statute of limitations defense. (See

[15] In this case, Deutsche Bank National Trust Co. (EQLS 2007-1) v EquiFirst Corp. (Index No 651957/2013 [EQLS Action]), a dissolved defendant-originator moved to dismiss under the Minnesota statute of limitations, and the dissolved defendant and a second defendant-originator moved to dismiss under the New York statute of limitations. The borrowing statute was not at issue on the motion. By decision dated May 25, 2016, this court granted the motion only to the extent that it was based on the Minnesota statute of limitations. (2016 WL 3017760, mod on other grounds 154 AD3d 605 [1st Dept 2017].) The remaining defendants, a second originator and the securitizer--defendant, then filed an answer, dated August 3, 2016, which asserted the statute of limitations. As DBNT acknowledges in a letter to this court regarding defendants' request for a stay in the instant action and the EQLS Action, DBNT completed fact discovery and served its initial expert reports, notwithstanding the assertion of the statute of limitations defense in the answer in the EQLS Action. (Joint Letter, Ex. C [Index No 777000/2015, NYSCEF Doc No 405].)

DBNT Memo. In Opp., at 10.) To the extent that DBNT claims that it requires discovery on the administration of the trust and its assets (see id.), this information is largely within its own possession. To the extent that DBNT also claims that it requires information regarding the California discovery rule (see id.), this discovery can still be obtained if it is not barred by DBNT/Barclays.

As the Appellate Division explained in DBNT/Barclays, under California law, "a discovery rule may apply in contract cases where breaches will not be reasonably discoverable by plaintiffs until a future time." (156 AD3d at 404 [internal quotation marks and citation omitted].) The Court held, on the record of the motion to dismiss, that DBNT's breach of contract claims were "not saved by California's discovery rule, inasmuch as the record establishe[d] that plaintiff reasonably could have discovered the alleged breaches within the limitation period, based on information in the prospectuses, the underwriting and default information it received after the closing." (Id.)

DBNT asserts that discovery would enable it to "develop[] evidence concerning what information was available concerning Morgan Stanley's breaches; what was done, not done, and why; and the ordinary practice for trustees of securitization trusts. More importantly, the Trustee could have an engaged an expert to opine on whether it acted with reasonable diligence here." (DBNT Memo. In Opp., at 10-11.) DBNT does not undertake any analysis of the record that the DBNT/Barclays Court had before it when it determined that the California discovery rule did not save DBNT's complaint. In particular, DBNT does not address whether there is any relevant difference between the pleadings in the cases before the DBNT/Barclays Court and the complaint here, or whether the DBNT/Barclays Court had any evidence before it. On this

record, this court cannot determine whether the DBNT/Barclays reasoning on the California discovery rule will effectively bar the discovery that DBNT seeks here.

Even assuming that DBNT can ultimately show that it is entitled to, and needs, discovery regarding the California discovery rule, DBNT will not sustain prejudice because the discovery can still be ordered. (See e.g. Williams, 132 AD3d at 533; Tri-Tec Design, Inc. v Zatek Corp., 123 AD3d 420, 420 [1st Dept 2014]; see also Jacobson v McNeil Consumer & Specialty Pharms., 68 AD3d 652, 654 [1st Dept 2009].) Cost shifting, if appropriate, can also be considered. (See CPLR 3025.)

The court accordingly concludes that Morgan Stanley has met the standards for leave to amend its answer to add a statute of limitations defense.

Stays

In the HSBC Actions, Nomura seeks a stay of expert discovery pending the Court of Appeals' decision of the DBNT/Barclays appeal. As authorized by this court, the request for a stay in these actions is made not in the motion for leave to amend the answer, but by separate letter applications, dated March 20, 2018. The defendants in seven other breach of contract actions brought by HSBC—five against Nomura and two against Merrill Lynch Mortgage Lending, Inc. and other entities (Merrill Lynch)—also seek such stays by letter applications, dated March 20, 2018.[16]

[16] The other actions brought by HSBC in which defendants seek stays of expert discovery are as follows: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012); Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012); Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014); Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012); Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013); Merrill Lynch Alternative Note Asset Trust, 2007-OAR5 v Merrill Lynch Mortgage Lending, Inc. (Index No 652793/2016); Merrill Lynch Alternative Note Asset Trust, 2007-A3 v Merrill Lynch Mortgage Lending, Inc. (Index No 652727/2014).

As held above, although Nomura's motion is not patently without merit and should be granted, HSBC raises a bona fide issue of fact as to whether its principal place of business is in New York and it is therefore a New York resident, rendering the borrowing statute inapplicable. As also explained above, the issue in DBNT/Barclays is where the cause of action accrues under the borrowing statute in an action brought by a nonresident RMBS trustee.

Although there are some factual differences between the HSBC Actions and the seven other actions brought by HSBC, in all of the actions HSBC's claims as to its residence are the same. HSBC acknowledges that its main office was in Delaware at the time of accrual of its breach of representations and warranties cause of action, but maintains that its principal place of business is, and was, in New York. In none of the actions does Nomura or Merrill Lynch make any showing of a likelihood that HSBC will be unable to establish its residence in New York, and that HSBC's claims will thus be subject to, and time-barred under, the borrowing statute. Put another way, they make no showing of a likelihood that the DBNT/Barclays decision will be dispositive of the timeliness of the actions brought by HSBC as trustee. Under these circumstances, the court declines to exercise its discretion to stay discovery in these actions pending the appeal. (See Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2201:11.)

The court reaches a contrary result in the DBNT Action and in the EQLS Action (EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp., Index No 651957/2013), also brought by DBNT, in which stays of expert discovery are sought pending the DBNT/Barclays appeal to the Court of Appeals. The request for the stay is made in the motion for leave to amend in the DBNT Action and in a separate authorized letter application in the EQLS Action.

(DBNT Memo. In Supp., at 4-7; Joint Letter, Exs. B, C [Index No 777000/2015, NYSCEF Doc Nos. 404, 405].)

In these Actions, it is undisputed that DBNT is a California, not a New York, resident. As the borrowing statute is therefore applicable, the place where DBNT's cause of action accrued must be determined. DBNT attempts to distinguish the factors in the DBNT and EQLS Actions from the factors cited by the DBNT/Barclays Court in finding that California would be the place of injury if a multi-factor test, rather than a residence-rule, were applied. On the reasoning of DBNT/Barclays, however, significant factors in the DBNT and EQLS Actions, regarding the administration of the trusts and their assets, also point to California.

As held above, Morgan Stanley makes a strong showing, under existing law as articulated in DBNT/Barclays, of the merit of the proposed amendment. On the appeal of DBNT/Barclays, the Court of Appeals will decide the standards for application of the borrowing statute to DBNT as trustee. It is therefore also highly likely that the Court of Appeals' decision will be dispositive of the timeliness of DBNT's claims for breaches of representations and warranties in the DBNT and EQLS Actions. Contrary to DBNT's contention, the pleading in the DBNT and EQLS Actions of a failure to notify cause of action, which was not at issue before the DBNT/Barclays Court, does not militate against the requested stay. The timeliness of the failure to notify cause of action is also subject to determination under the borrowing statute, and the scope of expert discovery will be affected by the extent to which there are timely claims for alleged breaches of the duty to notify. (See generally Federal Hous. Fin. Agency v Morgan Stanley ABS Capital I Inc., 59 Misc 3d 754 [Sup Ct, NY County 2018] [this court's decision discussing the accrual dates for failure to notify claims].) Under these circumstances, the court will exercise its

discretion to stay all expert discovery in the DBNT and EQLS Actions pending determination of the DBNT/Barclays appeal.

ORDER

It is hereby ORDERED that the motion of defendant Nomura Credit & Capital, Inc., in Nomura Asset Acceptance Corp., Mortgage Pass-through Certificates, Series 2006-AF2, by HSBC Bank USA, National Association, as Trustee v Nomura Credit & Capital, Inc. (Index No 652614/2012, Motion Seq No 009), for leave to amend its answer is granted to the extent of granting leave to said defendant to serve and file the amended answer annexed as Exhibit A to the Affirmation of Daniel Kahn In Support of Defendant's Motion; and it is further

ORDERED that the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the motion of defendant Nomura Credit & Capital, Inc., in HSBC Bank USA, National Association, in its capacity as Trustee of Nomura Home Equity Loan, Inc., Asset Backed Certificates, Series 2007-2 v Nomura Credit & Capital, Inc. (Index No 650337/2013, Motion Seq No 009), for leave to amend its answer is granted to the extent of granting leave to said defendant to serve and file the amended answer annexed as Exhibit B to the Affirmation of Daniel Kahn In Support of Defendant's Motion; and it is further

ORDERED that the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the letter applications, dated March 20, 2018, by Nomura Credit & Capital, Inc. in the two-above captioned actions which are the subject of this decision and order,

for a stay of expert discovery pending hearing and determination by the Court of Appeals of Deutsche Bank National Trust Co. v Barclays Bank PLC and Deutsche Bank National Trust Co. v HSBC Bank USA, National Association (156 AD3d 401 [1st Dept 2017] [DBNT/Barclays], lv granted ___NY3d___, 2018 WL 4440302 [Sept 18, 2018]), are denied, pursuant to separate orders to be filed in said actions; and it is further

ORDERED that the motion of defendants Morgan Stanley Mortgage Capital Holdings LLC and Morgan Stanley ABS Capital I Inc., in Deutsche Bank National Trust Company, as Trustee for the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 v Morgan Stanley Mortgage Capital Holdings LLC (652877/2014, Motion Seq No 006), is granted to the following extent:

1. Leave is granted to defendants to serve and file the amended answer annexed as Exhibit A to the Affirmation of Brian S. Weinstein In Support of Defendants' Motion; and the amended answer shall be deemed served upon service of a copy of this order with notice of entry; and

2. All expert discovery in this action is stayed pending hearing and determination by the Court of Appeals of DBNT/Barclays; and it is further

ORDERED that the letter application, dated January 24, 2018, of defendants in EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp. (Index No 651957/2013 [the EQLS Action]), for a stay of discovery is granted, pursuant to a separate order to be filed in said action, to the extent of staying all expert discovery in the action pending hearing and determination by the Court of Appeals of DBNT/Barclays; and it is further

ORDERED that the letter applications, dated March 20, 2018, by defendants for a stay of expert discovery pending hearing and determination by the Court of Appeals of DBNT/Barclays,

are denied, pursuant to separate orders to be filed in the following actions: Nomura Asset Acceptance Corp., 2006-S4 v Nomura Credit & Capital, Inc. (Index No 653390/2012); Nomura Asset Acceptance Corp., 2006-S3 v Nomura Credit & Capital, Inc. (Index No 652619/2012); Nomura Asset Acceptance Corp., 2007-1 v Nomura Credit & Capital, Inc. (Index No 652842/2014); Nomura Home Equity Loan, Inc., 2006-FM2 v Nomura Credit & Capital, Inc. (Index No 653783/2012); Nomura Home Equity Loan, Inc., 2007-3 v Nomura Credit & Capital, Inc. (Index No 651124/2013); Merrill Lynch Alternative Note Asset Trust, 2007-OAR5 v Merrill Lynch Mortgage Lending, Inc. (Index No 652793/2016); Merrill Lynch Alternative Note Asset Trust, 2007-A3 v Merrill Lynch Mortgage Lending, Inc. (Index No 652727/2014).

Dated: New York, New York
October 18, 2018

MARCY FRIEDMAN, J.S.C.