

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

2019 NY Slip Op 30507(U)

February 28, 2019

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: COMMERCIAL DIVISION PART 60

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

Plaintiff,

- v -

NATIXIS REAL ESTATE HOLDINGS, LLC,

Defendant.

INDEX NO. 652087/2014

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 003

**DECISION AND ORDER**

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HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150 were read on this motion for Leave to Reargue and Renew

Plaintiff Computershare Trust Company, National Association (Computershare), the separate securities administrator of the residential mortgage-backed securities (RMBS) trust at issue, IXIS Real Estate Capital Trust 2007-HE1, seeks leave to reargue and renew a motion to dismiss that was decided by this court’s decision and order dated April 4, 2018. (NY Slip Op 30590 [U], 2018 WL 1626405 [Sup Ct, New York County April 4, 2018] [prior decision].)<sup>1</sup> The prior decision dismissed plaintiff’s complaint as time-barred. The complaint alleged fifteen separate causes of action against defendant-sponsor, Natixis Real Estate Holdings, LLC (Natixis), seeking to enforce Natixis’s “backstop” obligation to cure or repurchase mortgage

<sup>1</sup> The court assumes familiarity with the prior decision, which sets forth the facts in detail.

loans upon the failure of fifteen separate originators to repurchase breaching loans that they had sold to defendant.<sup>2</sup> On this motion to reargue and renew, plaintiff seeks to reinstate its fourth cause of action against defendant for breach of its backstop obligation with respect to loans originated by First NLC Financial Services, LLC (First NLC).

On the prior motion, Natixis argued that its backstop obligation is “derivative of the R&Ws at issue” and that plaintiff’s claim therefore accrued at the time the representations and warranties were made. (Prior decision, 2018 WL 1626405, at \* 2, quoting Natixis’s Memo. in Supp. of Motion to Dismiss, at 10.) Plaintiff contended that “no breach of Natixis’s independent backstop 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.” (*Id.*, quoting Pl.’s Memo. in Opp. to Motion to Dismiss, at 8.) Plaintiff alleged that it had “sent notices of the breaches to the applicable originators and Natixis on January 31, February 10, and May 2, 2014.” (Pl.’s Memo. in Opp. to Motion to Dismiss, at 6.) It was undisputed that each of these notices was sent more than six years after the representations and warranties were made. Relying on Bank of New York Mellon v WMC Mortgage, LLC (151 AD3d 72 [1st Dept 2017] [BNYM]), this court held that plaintiff had first notified the originators of breaching loans long after the statute of limitations against the originators had elapsed, and that 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.” (Prior decision, 2018 WL 1626405, at \* 3, quoting BNYM, 151 AD3d at 80.)

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<sup>2</sup> In the governing agreements, each non-party originator of the mortgage loans 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. Natixis agreed to “backstop” the repurchase obligations of each originator—i.e., to repurchase breaching loans if the originator did not. (Prior decision, 2018 WL 1626405, at \* 1.)

On this motion to reargue and renew, plaintiff asserts for the first time that Natixis's backstop obligation with respect to loans originated by First NLC accrued not in 2014, but in 2008. More particularly, plaintiff claims that First NLC restated its representations and warranties regarding the mortgage loans in an Assignment & Recognition Agreement (ARA), and that First NLC listed the ARA as an executory contract in a bankruptcy proceeding that First NLC filed in 2008. According to plaintiff, First NLC "repudiated its contractual obligation to repurchase breaching mortgage loans on July 8, 2008," when this purported executory contract was deemed rejected by the bankruptcy trustee. (Pl.'s Memo. In Supp., at 4, 8.) Plaintiff contends that this repudiation triggered Natixis's backstop obligation with respect to the First NLC loans, and that the action is timely as to such loans because the action was commenced exactly six years after the repudiation. (Id. at 7-8; Pl.'s Reply Memo., at 1.) Natixis opposes plaintiff's new accrual theory on the merits, and disputes, among other things, that the ARA was repudiated in the course of the bankruptcy proceeding. (Natixis's Memo. in Opp., at 1-2.) Natixis contends that plaintiff fails, in any event, to meet the standard for leave to reargue or renew. (Id. at 1.)

#### Standard of Review

CPLR 2221 (d) (2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." It is well settled that the purpose of a reargument motion "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided. Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application." Foley v Roche, 68 AD2d 558, 567-568 [1st Dept 1979]

[internal citations omitted]; accord Matter of Setters [v AI Props. & Devs. (USA) Corp.], 139 AD3d 492, 492 [1st Dept 2016].)

Pursuant to CPLR 2221 (e) (2) and (3), a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion.” It is well settled that a motion for leave to renew must ordinarily “be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court. Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application.” (Foley v Roche, 68 AD2d at 568; Nassau County v Metropolitan Transp. Authority, 99 AD3d 617, 618-619 [1st Dept 2012], lv denied in part, dismissed in part 21 NY3d 921 [2013].)

A court may “in its discretion . . . grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made.” (Nassau County, at 619, quoting Tishman Constr. Corp. of NY v City of New York, 280 AD2d 374, 376 [1st Dept 2001].) Like reargument, however, “[r]enewal should not ‘be available where a party has proceeded on one legal theory . . . and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application.’” (Nassau County, 99 AD3d at 619, quoting Foley v Roche, 68 AD2d at 568.) “Renewal is granted sparingly . . . ; it is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation. Nor is it available to argue new legal theories which could have been previously relied upon but were not on the assumption that what was submitted was adequate.” (Matter of Weinberg [v Wynyard], 132 AD2d 190, 210 [1st Dept 1987], lv dismissed

71 NY2d 994 [1988]; Estate of Brown v Pullman Group, 60 AD3d 481, 482 [1st Dept 2009], ly dismissed 13 NY3d 789.)

Application of the Standard of Review

On this motion, plaintiff claims that the court “overlooked the impact of First NLC’s bankruptcy on Natixis’s backstop obligation.” (Pl.’s Memo. In Supp., at 7.)<sup>3</sup> This contention is without merit. As discussed above, plaintiff opposed the prior motion based on an argument that the backstop obligation was not triggered until the originators failed to repurchase in response to breach notices served in 2014, within six years of the commencement of this action. Plaintiff did not distinguish between or among originators. In opposing the motion to dismiss, plaintiff did not advance any argument that a different trigger applied to Natixis’s backstop obligation with respect to First NLC loans, and did not so much as mention First NLC’s bankruptcy or a repudiation of its repurchase obligation.<sup>4</sup>

Plaintiff thus advances an entirely new theory in opposition to Natixis’s argument that plaintiff’s backstop claim is time-barred as to First NLC loans. Moreover, as discussed above, plaintiff was aware of First NLC’s bankruptcy at the time this action was commenced, and the purported repudiation of First NLC’s repurchase obligation in the course of the bankruptcy proceeding occurred years before the briefing of the motion to dismiss. The facts in support of

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<sup>3</sup> Plaintiff does not comply with the requirement of CPLR 2221 (f) that “[a] combined motion for leave to reargue and leave to renew [] identify separately and support separately each item of relief sought.” The court nevertheless considers both branches of plaintiff’s motion.

<sup>4</sup> It is noted that the complaint, dated July 8, 2014, and the amended complaint, dated November 6, 2015, pleaded service of breach notices on Natixis and “the applicable originators” on January 31 and February 10, 2014. These pleadings also noted that plaintiff did not send repurchase demands to originators “currently undergoing liquidation in bankruptcy,” including First NLC. (Compl., ¶¶ 82, 83, n 3; Am. Compl., ¶¶ 77, 78 n 2, 80.) Neither of these pleadings made any reference to the purported July 8, 2008 repudiation. In the briefing of the prior motion, plaintiff was silent as to First NLC’s bankruptcy and as to repudiation. Plaintiff also did not seek to distinguish First NLC from any other originator in discussing the accrual of Natixis’s backstop obligations.

plaintiff's current theory were thus known or could, with reasonable diligence, have been known at the time of that motion.

In claiming that it should nevertheless be granted leave to reargue or renew in order to assert this new theory, plaintiff argues that it did not "focus on the impact of the bankruptcy" at the time the motion to dismiss was heard "because at that time the issue was whether the breach notices sent in early 2014 triggered Natixis's independent backstop obligation." (Pl.'s Reply Memo., at 5.) Plaintiff further asserts that the Appellate Division decision in BNYM "rendered the 2014 breach notices immaterial to the analysis while at the same time thrusting First NLC's bankruptcy back into the limelight." (Id.) As put slightly differently by plaintiff, the impact of the bankruptcy was not "germane to the issues being briefed by the parties" on the prior motion. (Pl.'s Reply Memo., at 6.)

This argument cannot be countenanced. In BNYM, this Department held 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. (151 AD3d 72, supra.) BNYM represented a development of the law on the circumstances under which a repurchase notice could trigger a backstop obligation. It did not make an entirely different trigger—here, a purported repudiation by an originator of its own repurchase obligation—"suddenly relevant." (See Pl.'s Reply Memo., at 5.) In responding to Natixis's challenge to the timeliness of the action, it was incumbent upon plaintiff to assert any basis it had for claiming that Natixis's obligation to backstop an originator's repurchase obligation accrued not at the time an originator failed to repurchase loans in response to a repurchase demand, but at some earlier time. Thus, as to First NLC, which, according to plaintiff's own pleading, was not served with a repurchase demand but was a subject of the motion to dismiss, it was incumbent on plaintiff to assert its

claim that Natixis's backstop obligation accrued in 2008 at the time of the purported repudiation of First NLC's repurchase obligation in the course of the bankruptcy proceeding. In short, plaintiff fails to advance a reasonable excuse for its failure on the prior motion to present the facts regarding the repudiation. Plaintiff also fails to make any showing that this court should exercise its discretion, notwithstanding this failure, to entertain renewal.

In view of this holding, the court does not reach the merits of plaintiff's new accrual theory based on the purported repudiation.<sup>5</sup>

It is accordingly hereby ORDERED that leave to reargue and renew is denied.

2/28/2019  
DATE

  
MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

<sup>5</sup> The court also need not and does not reach Natixis's alternative argument that the cause of action would in any event be time-barred based on plaintiff's allegations in the original complaint pleading Natixis's discovery of breaches more than six years before the action was commenced. (See Natixis's Memo. in Opp., at 10-11.)