SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

----------X

CONDOR CAPITAL CORP.,

Plaintiff,

- v -

CALS INVESTORS, LLC,CONDOR ASSETCO SECURITIZATION TRUST, CONDOR HOLDCO SECURITIZATION TRUST, CONDOR RECOVERY SECURITIZATION TRUST, FIRST ASSOCIATES LOAN SERVICING, LLC

Defendant.

----------X

INDEX NO. 650034/2019

MOTION DATE 01/02/2020, 01/02/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 53, 54, 55, 59, 61

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 56, 58, 60

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this action for, *inter alia*, breach of contract, defendants CALS Investors, LLC, and Condor AssetCo Securitization Trust, Condor HoldCo Securitization Trust, and Condor Recovery Securitization Trust (collectively, "the Securitization Trusts," and together with CALS Investors, LLC, "CALS") move, pursuant to CPLR 3211(a)(1), (3), (7) and (8), to dismiss the first amended complaint ("FAC") filed by plaintiff Condor Capital Corp. ("Condor Capital"). Defendant First Associates Loan Servicing, LLC ("First Associates") also moves to dismiss the FAC pursuant to CPLR §3211(a)(1), (3), (7) and (8). Condor Capital cross-moves for an order finding that CALS and First

Associates waived service of process, or alternatively, granting Condor Capital, pursuant to CPLR 306-b, an extension of time to serve the FAC.

Condor Capital is an underwriter of subprime automobile loans. On November 23, 2015, CALS and Condor Capital (including its court-appointed receiver, nonparty Denis O'Connor) entered a portfolio purchase agreement (the "PPA"), in which Condor Capital sold a portfolio of auto loans (the "Portfolio") to CALS in exchange for a purchase price comprised of (1) payment at closing ("Closing Payment") and (2) additional payment if the underlying loans sufficiently performed ("Earnout Payments").

According to the FAC, on the PPA closing date of February 26, 2016, CALS wired Condor Capital $13,947,543.62 representing a portion of the Closing Payment and another portion of the Closing Payment, totaling $5.8 million, was placed into escrowed "Holdback Buckets" held by CALS. Condor Capital alleges that funds remaining in the Holdback Buckets were to be released to Condor Capital at various times.

In addition to the Closing Payment, section 3.01(c) of the PPA provided that, on "the first Information Delivery Date[1] after the sixth (6th) month after the Earnout Target Date"[2], CALS must pay Condor Capital quarterly Earnout Payments. The amount to be

---

[1] As defined by the PPA, the "Information Delivery Date" is the monthly statement sent by CALS to Condor detailing the amount of cash collected, the net cash collected, calculation of IRR and MOIC Targets and the Holdback Bucket balance.

[2] The PPA defines "Earnout Target Date" as "the first day following the first calendar quarter… in which [CALS] achieved the IRR Target and the MOIC Target for the period beginning on the Closing Date and ending on the last day of such quarter."

paid would be "equal to Thirty Percent (30%) of the excess of (i) the Net Cash Collected from and after the Closing Date through the last day of the First Earnout Quarter, over (ii) the amount of Net Cash Collected from and after the Closing Date that was necessary in order for [CALS] to achieve the IRR [internal rate of return] Target and MOIC [Multiple of Invested Capital] Target through the last day of the First Earnout Quarter."

CALS was required to pay the Earnout Payments to Condor Capital if the Portfolio achieves two performance targets: 1) an IRR of 15% on its investment in the portfolio; and 2) a MOIC of 115% of its investment in the portfolio.

The FAC alleges that CALS failed to make Earnout Payments in the correct amount and failed to provide any calculation illustrating how it arrived at the amounts of the Earnout Payments that were made.

After the closing, CALS transferred ownership of portions of the Portfolio to Condor Assetco Securitization Trust, Condor HoldCo Securitization Trust and Condor Recovery Securitization Trust (collectively, the "Securitization Trusts"). Under Section 13.11 of the PPA, "any such assignment shall not relieve [CALS] of any of its obligations hereunder and it shall remain secondarily liable with respect thereto." Further, the Securitization Trusts executed a form of joinder to the PPA which provided that each would "become a party to the [PPA] and shall be fully bound by, and subject to, all of the covenants, terms and conditions of the [PPA] as though an original party thereto… including those obligations set forth in Section 3.01(c)…." The joinder also stated that Condor Capital is an intended third-party beneficiary of the joinder and may enforce its terms.

In January 2017, a putative class action was filed in Indiana state court naming the Securitization Trusts as defendants (the "Indiana Class Action"). In April 2017, a putative class action was filed in the United States District Court for the Eastern District of Pennsylvania, naming Condor Capital and the Securitization Trusts as defendants (the "Pennsylvania Class Action", and together with the Indiana Class Action, the "Class Actions")[3]. The Class Actions alleged that customers were given improper notices for impending repossession or sales of the automobiles that secured their loans.

On November 6, 2018, the District Court for the Eastern District of Pennsylvania approved a final settlement of the Class Actions (the "Class Actions Settlement"). Pursuant to the Class Actions Settlement, the Securitization Trusts: 1) paid $5,700,000 into a settlement fund; and 2) forgave loans totaling more than $14,000,000 by waiving and eliminating all deficiency claims against class members. Condor Capital alleges, on information and belief, that First Associates contributed a portion of the $5,700,000 in cash and that such contribution establishes responsibility for the claims asserted by the Class Actions.

As per the FAC, CALS has asserted that "it is entitled to deduct from the pool of funds available for distribution to Condor Capital all defense and settlement costs related to class action proceedings arising from the administration of the loan portfolio by CALS and its loan servicing agent, First Associates." Condor Capital objects to the deduction, arguing that, because the defense and settlement costs were incurred to address acts taken

[3] The Class Actions were consolidated and on May 16, 2018, plaintiffs filed a Third Amended Complaint which dropped Condor as a defendant.

by CALS and First Associates after the sale of the Portfolio, Condor Capital's payout should not be reduced by such expenses. Condor Capital also alleges that the PPA does not require it to indemnify CALS or the Securitization Trusts for any damages the latter two parties suffered due to the Class Actions.

The FAC, filed on May 30, 2019, asserts causes of action against CALS and the Securitization Trusts for breach of contract and breach of the covenant of good faith and fair dealing. The FAC also contains a cause of action against First Associates for professional malpractice. Lastly, the FAC contains a cause of action for negligence against all defendants.

Procedural History

Condor Capital filed a prior complaint against CALS ("Condor 1") for breach of contract, alleging that CALS breached the PPA by using a higher than allowed purchase price in calculating payments due to Condor Capital.[4] In a decision dated June 7, 2018 ("Condor 1 Decision"), I found that

> [i]n accordance with the plain language of the PPA, which calculates the MOIC Target based on the Closing Cash Purchase Price as a defined term, Condor has failed to plead a breach of contract cause of action based upon CALS' alleged incorrect calculation of the MOIC Target.

On the same day that Condor Capital filed its notice of appeal in Condor 1, it initiated the current action.

The First Department ultimately affirmed the Condor 1 Decision, noting that the PPA's definition of MOIC Target was "unambiguous" and thus the PPA should be

[4] Index No. 652700/2017.

enforced as written. *Condor Capital Corp. v. CALS Investors, LLC*, No. 652700/17, 2020 WL 423420 at *1 (N.Y. Sup. Ct. Jan. 28, 2020).

CALS and First Associates now move to dismiss the FAC on the grounds of documentary evidence, lack of standing, lack of personal jurisdiction and failure to state a claim.

Standing

CALS and First Associates first argue that Condor Capital lacks standing because it failed to serve the summons and complaint on them.[5] In response to CALS' motion to dismiss, Condor Capital cross-moved for an order: 1) finding that CALS waived service of process; or 2) granting an extension of time to Condor Capital to serve the FAC (pursuant to CPLR 306-b). In response to First Associates' motion to dismiss, Condor Capital cross-moved for an order granting it an extension of time to serve the FAC.

At the oral argument on this motion defense counsel agreed to accept service on their clients' behalf, thereby waiving the defect in service. Thus, CALS' and First Associates' standing argument is now moot. Similarly, Condor Capital's cross-motions are also moot.

[5] In the case of First Associates, its contention is that, although it was served with the FAC, Condor Capital failed to serve it with the original Summons and Complaint.

Documentary Evidence and Failure to State a Claim

"On a motion to dismiss, a court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" *Seaman v. Schulte Roth and Zabel LLP*, 176 A.D.3d 538, 538 (1st Dept. 2019) (citation omitted). Further, pursuant to CPLR 3211(a)(1), dismissal is appropriate only when the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Id*. at 538-539 (internal quotation marks and citation omitted). However, allegations comprised of "bare legal conclusions" and "factual claims flatly contradicted by documentary evidence" are not accorded such consideration. *Myers v. Schneiderman*, 62 N.Y.S.3d 838, 842 (2017) (internal quotation marks and citations omitted).

Breach of Contract Cause of Action

Condor Capital's breach of contract cause of action alleges that CALS breached the PPA "to the extent that they have subtracted the funds paid to defend and settle the Class Actions from the equation used to calculate the Earnout Payments due to Condor under the PPA." Condor Capital also alleges that CALS breached the PPA by "forgiving $14,000,000,000 or more of loan deficiencies" and classifying the loan forgiveness as damages.

CALS argues that the breach of contract cause of action must be dismissed because the PPA explicitly allows CALS to deduct from any Earnout Payments, all

damages and expenses stemming from CALS' ownership of the Portfolio. CALS posits that the PPA's definition of damages encompasses the amounts spent to litigate and settle the Class Actions. CALS further states that the $14 million in deficiency balances was forgiven as part of the Class Actions settlement and also qualifies as a proper deduction.

In opposition, Condor Capital argues that, even if the definition of damages includes amounts spent on the litigation and settlement of the Class Action, CALS still breached the PPA by its failure to: 1) produce evidence regarding what amounts were subtracted from Net Cash Collected as damages; or 2) show that such amounts were actually damages from the Class Actions. It is Condor Capital's position that proper calculation of the Net Cash Collected is a factual determination that must be made after discovery and trial.

"Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole." *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239, 244 (2014) (internal quotation marks and citations omitted). Indeed, a facially clear and unambiguous contract, "must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).

Here, section 3.01(c) of the PPA sets forth how Earnings Payments are to be calculated and Net Cash Collected is a component of this calculation. Section 1.01 provides that in calculating the Net Cash Collected, CALS may deduct, among other things,

> (j) any Damages incurred by [CALS] during such period pursuant the terms of this Agreement (but only to the extent such Damages are not otherwise recovered by a [CALS] Indemnified Party pursuant to the terms of this Agreement), and minus (k) any expenses incurred during such period in connection with the ownership and servicing of the Conveyed Property (but only to the extent such expenses are not otherwise recovered by a [CALS] Indemnified Party pursuant to the terms of this Agreement).

Damages, in turn, are defined in the PPA to include

> [a]ny and all losses, claims, damages, liabilities, obligations, judgments, equitable relief granted, settlements, awards, demands, fines, penalties, deficiencies, offsets, defenses, counterclaims, actions or proceedings, costs, expenses, reasonable attorneys' fees…, interest and penalties

These definitions explicitly allow CALS to deduct from its Net Cash Collected figure any damages and expenses including "any and all losses," "settlements," "deficiencies," and "attorneys' fees." Thus, the expenses associated with the Class Actions, including the loan forgiveness, plainly fall under the PPA's definition of damages and expenses and CALS' deduction of such expenses cannot support a breach of contract cause of action.

Moreover, there is no provision in the PPA requiring CALS to produce "evidence" or an accounting pertaining to its deductions from the Net Cash Collected amount, and Condor Capital fails to support this argument by citing to any PPA provision. Nor does Condor Capital specifically allege any information to which it is entitled but was denied under the PPA.

Condor Capital next argues that even if the calculations were available and undisputed, CALS still could not deduct Class Actions-related expenses as damages because they were incurred by the Securitization Trusts, and deductions are only

available to the buyer under the PPA, which is CALS. However, as CALS correctly posits, the joinder agreements to the PPA expressly state that the Securitization Trusts "shall be deemed to be within the definition of Buyer." In addition, Condor Capital quotes the language of the joinder agreement in the FAC, noting that once the Securitization Trusts execute the agreement, they "become a party to the [PPA] and shall be fully bound by, and subject to all of the covenants, terms and conditions of the [PPA] as though an original party thereto…." Hence, pursuant to the plaint terms of the PPA, the deductions at issue are allowable regardless of whether they were incurred by the Securitization Trusts or CALS.

Lastly, Condor Capital puts forth a new argument that was not pleaded in the FAC, based on Sections 8.08 and 10.02 of the PPA. These sections of the PPA were raised for the first time in Condor Capital's opposition to the motion to dismiss. Because Condor Capital improperly argued in support of a breach of contract claim based on sections of the PPA that are not pled in the FAC, I do not address the argument.

In sum, because the PPA is unambiguous as to Net Cash Collected deductions and the definition of damages, it must be enforced according to its plain language. *See Wachtel v. Park Ave. & 84th St., Inc.*, No. 657144/17, 2020 WL 825987 at *1 (1st Dept. Feb. 20, 2020). Accordingly, Condor Capital has failed to plead a breach of contract cause of action based on CALS' alleged improper calculation of the Earnout Payments or forgiveness of loan deficiencies.

Breach of the Covenant of Good Faith and Fair Dealing Cause of Action

CALS argues that the breach of covenant of good faith and fair dealing cause of action is duplicative of the breach of contract cause of action. "A claim for 'breach of the implied covenant of good faith and fair dealing … may not be used as a substitute for a nonviable claim of breach of contract.'" *Smile Train, Inc. v. Ferris Consulting Corp.*, 117 A.D.3d 629, 630 (1st Dept. 2014) (citation omitted). Where a cause of action for breach of the covenant of good faith and fair dealing merely duplicates a breach of contract cause of action, it must be dismissed. *Brembo v. T.A.W. Performance LLC*, 176 A.D.3d 535, 536 (1st Dept. 2019).

Condor Capital alleges no facts in support of its breach of the implied covenant of good faith and fair dealing cause of action that differ from those that it contends support the cause of action for breach of express contractual provisions.[6] In addition, the damages sought are identical for both causes of action. Accordingly, I dismiss the cause of action for breach of the implied covenant of good faith and fair dealing as duplicative.

Negligence Cause of Action

In the FAC, Condor Capital asserts that CALS owed a duty to Condor to service the Portfolio in a competent and legal manner and/or to retain and employ a loan servicing agent to do so. In addition, Condor Capital alleges that First Associates was an agent of CALS and owed both CALS and Condor a duty to service the Portfolio legally and competently yet failed in this duty. As per the FAC, due to "First Associates'

[6] Specifically, both causes of action are based on CALS' deduction of funds from the equation used to calculate the Earnout Payments under the PPA and the loan forgiveness.

negligence, CALS and the Securitization Trusts paid millions of dollars to settle the Class Actions and forgave over $14 million in indebtedness." CALS and First Associates each separately move to dismiss the negligence cause of action.

a. CALS' Motion To Dismiss The Negligence Cause Of Action

CALS argues that the negligence cause of action against it must be dismissed because: 1) it is barred by the economic loss rule; 2) it fails to plead an independent duty of care; and 3) its requested damages are duplicative of the breach of contract cause of action. Condor Capital, in opposition, states that the economic loss rule is inapplicable to commercial cases.

It is well established that "a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Dormitory Authority v. Samson Construction Co.*, 30 N.Y.3d 704, 711 (2018) (internal quotation marks and citation omitted). In other words, "where the damages alleged 'were clearly within the contemplation of the written agreement… [m]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim.'" *Id*. (citation omitted).

Here, the negligence cause of action is based on identical allegations, and seeks identical damages,[7] as the breach of contract cause of action. And, Condor Capital's factually unsupported and conclusory assertion that CALS had a" duty" to exercise

[7] Condor Capital even concedes that the damages sought are duplicative. See Memorandum of Law in Opposition to the CALS Defendants' Motion to Dismiss, footnote 4.

reasonable care in servicing the Portfolio that was independent of any PPA duty is insufficient to defeat CALS' motion to dismiss. The negligence cause of action against CALS is thus dismissed.

b. First Associates' Motion To Dismiss The Negligence Cause Of Action

First Associates argues that the negligence cause of action must be dismissed because Condor Capital alleges no duty owed to it by First Associates. To support its negligence cause of action against First Associates Condor Capital relies upon a personal injury case that enunciated three factors to be considered in assessing whether a duty exists in the negligence context. *See Katz v. United Synagogue of Conservative Judaism*, 135 A.D.3d 458 (1st Dept. 2016) (holding that plaintiff who suffered a knee injury while participating in a study-abroad program established a claim of negligence against operator of the program). The *Katz* case – and its three-factor analysis – however, is completely inapplicable to the case before me. Significantly, the FAC lacks any non-conclusory allegations showing that First Associates owed a duty of care to Condor Capital. In fact, the FAC only pleads that "First Associates… was at all relevant times, an agent of CALS." There is also no alleged contractual relationship between Condor Capital and First Associates.

In light of Condor Capital's failure to establish the existence of a duty of care, it cannot state a *prima facie* cause of action for negligence against First Associates. *See Lexington Village Condominium v. Scottsdale Ins. Co.*, 136 A.D.3d 645, 648 (2d Dept. 2016). The negligence cause of action asserted against First Associates is thus dismissed.

Professional Malpractice Cause of Action Against First Associates

Condor Capital's cause of action for professional malpractice alleges that First Associates is a "loan servicing agent" that failed to comply with acceptable practice standards of the auto loan servicing industry which, in turn, caused CALS to spend millions of dollars to settle the Class Actions, which, in turn, harmed Condor Capital by reducing the funds to be distributed under the Earnout Payments.

First Associates argues that, like the negligence cause of action, the professional malpractice cause of action against it must be dismissed because it owes no duty of care to Condor Capital and there is no privity between Condor Capital and First Associates. First Associates further argues that the professional malpractice cause of action is duplicative of the negligence cause of action, and that First Associates is not a professional as a matter of law.

To maintain a cause of action for professional malpractice, the defendant must be a professional, a term which courts have found to include doctors, attorneys, engineers, architects and accountants. *See Chase Scientific Research Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20, 29 (2001). Qualities of professionals liable for professional malpractice include "extensive formal learning and training, licensure and regulation indicating a

qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards." *Id*. In cases alleging professional malpractice, courts have been reluctant to extend the definition of "professional" to professions other than the aforementioned. *See, e.g., Vista Food Exchange, Inc. v. BenefitMall*, 138 A.D.3d 535, 537 (1st Dept. 2016) (stating that plaintiff failed to state a claim for professional malpractice because HR consulting specialists are not professionals under New York law); *Leather v. US Trust Co. of New York*, 279 A.D.2d 311, 312 (1st Dept. 2001) (financial planners are not professionals for the purpose of professional malpractice); *Health Acquisition Corp. v. Program Risk Mgt., Inc.*, 105 A.D. 3d 1001, 1004 (2d Dept. 2013) (holding that an actuary is not a professional for purposes of a malpractice claim); *Atkins Nutritionals, Inc. v. Ernst & Young U.S., LLC*, 301 A.D.2d 547, 548 (2d Dept. 2003) (no cause of action for professional malpractice by computer consultants).

There are no New York cases holding that loan servicers are the type of professionals against whom a professional malpractice cause of action may be maintained. Loan servicers are more akin to the professions (cited above) that courts have found outside the ambit of professional malpractice. Because loan servicing is not the type of profession for which a professional malpractice cause of action may be

maintained, I dismiss the professional malpractice cause of action against First Associates.[8]

In accordance with the foregoing it is

ORDERED that the motion by defendants CALS Investors, LLC, and Condor AssetCo Securitization Trust, Condor HoldCo Securitization Trust, and Condor Recovery Securitization Trust to dismiss Condor Capital Corp.'s first amended complaint based on standing is denied as moot; and it is further

ORDERED that the motion by defendants CALS Investors, LLC, and Condor AssetCo Securitization Trust, Condor HoldCo Securitization Trust, and Condor Recovery Securitization Trust to dismiss Condor Capital Corp.'s causes of action for breach of contract, breach of the covenant of good faith and fair dealing and negligence is granted, and the first amended complaint is dismissed as to these defendants; and it is further

ORDERED that the motion by defendant First Associates Loan Servicing, LLC to dismiss Condor Capital Corp.'s first amended complaint based on standing is denied as moot; and it is further

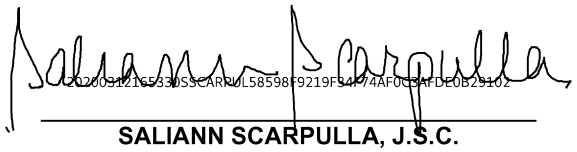
ORDERED that the motion by defendant First Associates Loan Servicing, LLC to dismiss Condor Capital Corp.'s causes of action for negligence and professional malpractice is granted, and the complaint as against First Associates is dismissed; and it is further

[8] Even if loan servicers were the type of professionals against whom a professional malpractice cause of action could be alleged, the malpractice cause of action would still fail as there is no alleged duty of acre owed by First Associates to Condor Capital.

ORDERED that plaintiff Condor Capital Corp.'s cross-motions are denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the first amended complaint against all defendants.

This constitutes the decision and order of the Court.



3/11/2020
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	