

ACE Sec. Corp. v DB Structured Prods., Inc.

2022 NY Slip Op 33408(U)

October 4, 2022

Supreme Court, New York County

Docket Number: Index No. 656258/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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ACE SECURITIES CORP. HOME EQUITY LOAN TRUST, SERIES 2006-FM1, BY HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE	INDEX NO. <u>656258/2019</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>001</u>
DB STRUCTURED PRODUCTS, INC.,	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 38, 44

were read on this motion to/for DISMISS.

Before the court is defendant DB Structured Products, Inc.'s (DBSP) renewed motion to dismiss the complaint (motion sequence number 001) of plaintiff HSBC Bank USA, National Association, as trustee (Trustee), of ACE Securities Corp. Home Equity Loan Trust, Series 2006-FM1 (Trust) pursuant to CPLR 3211(a)(5).¹

The court presumes familiarity with the underlying facts of this action and several related actions,² which are also the subject of this action.

¹ DBSP originally filed its motion to dismiss the complaint on December 16, 2019. DBSP's renewal of its motion to dismiss, by attorney affirmation, was made in accordance with the court's prior decision. (NYSCEF Doc. No. [NYSCEF] 38, Decision and Order [mot. seq. no. 001]; see NYSCEF 40, William T. Russell, Jr. aff [July 12, 2022].) The Trustee further stipulated that it "will not file further papers in opposition to DBSP's motion to renew." (NYSCEF 39, Stipulation Regarding Motion to Renew at 2 [July 11, 2022].)

² The related actions, identified by NYSCEF index numbers, are discussed below.

Procedural History

This revival action, or preservation action, stems from the case captioned *Freedom Trust 2011-2, on behalf of ACE Secs. Corp. Home Equity Loan Trust, Series 2006-FM1 v DB Structured Prods., Inc. et al.*, bearing index number 652985/2012 (Original Action).³ The procedural history of the Original Action is detailed in the court's Decision and Order dated July 2, 2022. (See NYSCEF 40, Decision and Order [mot. seq. no. 001] [in the Freedom Trust Revival Action, 656245/2019].) Relevant here is that Freedom Trust 2011-2 (Freedom Trust) is a certificateholder of the Trust, owning approximately 29% of the total outstanding certificate balance. (*Id.* at 2.) Freedom Trust initiated the Original Action on August 24, 2012, assertedly on behalf of the Trust, but the Trustee later substituted itself as plaintiff and filed a complaint and an amended complaint. (See *id.* at 3.) DBSP moved to dismiss the Trustee's amended complaint and the Trustee moved for leave of court to file a second amended complaint. In 2018, the trial court denied leave to file a second amended complaint and dismissed the Trustee's causes of action for breach of representations and warranties as time-barred. (See *Freedom Trust 2011-2 v DB Structured Prods., Inc.*, 2018 NY Slip Op 30506[U], *3-4 [Sup Ct, NY County 2018, Friedman, J.], *affd as mod sub nom. LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1 [1st Dept 2019].) The trial court also held that Freedom Trust, as a certificateholder, lacked standing to assert the claims against DBSP based upon the controlling language of the agreements despite initiating the

³ There is also another revival action stemming from the Original Action captioned *Freedom Trust 2011-2, on behalf of ACE Secs. Corp. Home Equity Loan Trust, Series 2006-FM1 v DB Structured Prods., Inc.*, index No. 656245/2019 (Freedom Trust Revival Action). This revival action, and the Freedom Trust Revival Action, deal with the same Trust and the same agreements as the Original Action.

action within the prescribed statute of limitations. (*Freedom Trust 2011-2*, 2018 NY Slip Op 30506, *4.)

The Appellate Division, First Department affirmed, in part, the trial court's dismissal of the Trustee's causes of action for breach of representations and warranties as time-barred, finding that the "breach of contract claims based on breaches of representations and warranties accrued on the closing date of the [Mortgage Loan and Purchase Agreement]" and holding that the Trustee's claims "are barred by the six-year statute of limitations on contract causes of action."⁴ (*LDIR*, 172 AD3d at 6.) The First Department reversed the part of the decision denying the Trustee leave to serve a second amended complaint to plead a cause of action for breach of contract based on DBSP's failure to notify the Trustee of the breaches of representations and warranties DBSP discovered. (*Id.* at 4.) The Freedom Trust Revival Action and this action were then initiated within six months of the date of *LDIR*.

Another related action is captioned *ACE Secs. Corp. Home Equity Loan Trust, Series 2006-SL2, by HSBC Bank USA, Natl. Assn., solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006 v DB Structured Prods., Inc.* bearing index number 650980/2012 (SL2 Action). The SL2 Action dealt with the ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 trust (SL2 Trust) and was initially brought by two certificateholders of the SL2 Trust, RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC. (NYSCEF 1, Summons with Notice; see also NYCEF 15, So Ordered Stipulation [Nov. 27, 2012].)

⁴ The Court of Appeals' decision in the SL2 Action, 25 NY3d 581, is dated June 11, 2015 and discussed in greater detail below.

Later, HSBC Bank USA, National Association, the trustee to the SL2 Trust,⁵ substituted itself as plaintiff in place of the certificateholders (*id.*), which, however, ultimately proved futile as the Court of Appeals affirmed the First Department's dismissal of the SL2 Action brought by the Trustee and by the certificateholders. (See *ACE Secs. Corp. v DB Structured Prods., Inc.*, 25 NY3d 581, 589-599 [2015].) On June 18, 2014, the Trustee initiated a revival action pursuant to CPLR 205(a) captioned *ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2, by HSBC Bank USA, Natl. Assn., solely in its capacity as Trustee pursuant to a Pooling and Servicing Agreement, dated as of March 1, 2006 v DB Structured Prods., Inc.* and bearing the index number 651854/2014 (SL2 Revival Action). DBSP moved to dismiss the SL2 Revival Action pursuant to CPLR 3211(a)(5) on the grounds that the Trustee could not invoke CPLR 205(a) to avoid dismissal of the time-barred claim. The trial court (Friedman, J.) dismissed the complaint, and the First Department unanimously affirmed the trial court's ruling on November 19, 2019. (*U.S. Bank N.A. v UBS Real Estate Sec., Inc.*, 177 AD3d 493, 493-94 [1st Dept 2019] [holding that the Trustee was not a "plaintiff" under CPLR 205(a) when the prior action was commenced by the certificateholders of the Trust], *affd sub nom. ACE Secs. Corp. v DB Structured Prods., Inc.*, 2022 NY Slip Op 03927 [Ct App June 16, 2022].) The Trustee sought leave to appeal to the Court of Appeals and leave was granted on September 1, 2020. (See *ACE Secs. Corp. v DB Structured Prods.f, Inc.* 35 NY3D 911 [2020].)

⁵ The trustee to the SL2 Trust is the same trustee of the Trust in the present action. Therefore, references to the trustee of the SL2 Trust are also referred to as "Trustee," as defined in this decision.

This revival action now before the court is similar to the SL2 Revival Action in both procedure and substance. Here, the Trustee brought this revival action in October 2019 pursuant to CPLR 205(a), which provides:

“[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.”

DBSP moved to dismiss contending, in essence, that CPLR 205(a) does not apply to the Trustee’s claim for breach of representation and warranty claims, claims which were originally asserted more than six years ago and dismissed as time-barred. While DBSP’s motion to dismiss was pending, the Trustee was in the midst of appealing the SL2 Revival Action to the Court of Appeals, as discussed above. This action was subsequently “stayed pending a decision from the Court of Appeals in SL2 [Revival Action] as per the parties’ stipulation so ordered on June 8, 2021” and DBSP’s motion to dismiss was “denied without prejudice to renew upon attorney affirmation once the stay is lifted.” (NYSCEF 38, Decision and Order [mot. seq. no. 001].) The parties’ June 8, 2021 stipulation provides that the SL2 Action presented “issues that may be dispositive in this action.” (NYSCEF 37, So Ordered Stipulation [June 8, 2021].)

On June 16, 2022, the Court of Appeals issued a decision in the SL2 Revival Action affirming the First Department’s dismissal of the Trustee’s action as it was not a “plaintiff” within the meaning of CPLR 205(a). The Court of Appeals reasoned that—under New York state precedent, the text of the statutory provision, and the public policy

underlying that statute—the benefit of CPLR 205(a) lies with the plaintiff who brought the initial action or, in the scenario where that plaintiff dies, the administrator of the plaintiff's estate. (See *ACE Secs. Corp. v DB Structured Prods., Inc.*, 2022 NY Slip Op 03927, *3 [Ct App June 16, 2022].) Therefore, as CPLR 205(a) does not apply, “HSBC’s failure to commence an action within the statute of limitations is fatal.” (*Id.* at *6.)

Discussion

Upon DBSP’s renewed motion to dismiss, the Trustee submits no new briefs and raises no new legal theories opposing dismissal of the action. (NYSCEF 39, Stipulation Regarding Motion to Renew at 2 [July 11, 2022].) Notably, in arguing in this action in favor of a stay, based upon the then-pending SL2 Revival Action appeal, the Trustee conceded that the “Court of Appeals will soon resolve the exact issue that determines the viability of this action and decides DB[SP]’s motion to dismiss.” (NYSCEF 29, Trustee mem of law in opp at 6⁶.)

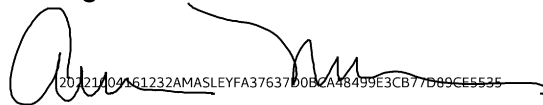
In view of the foregoing, and because the court is bound by decision of the Court of Appeals in the SL2 Revival Action, the Trustee’s revival action is dismissed. The Court of Appeals squarely held that the Trustee in the SL2 Revival Action could not benefit from CPLR 205(a) because the Trustee was not the same plaintiff(s) that initiated the original action, i.e., certificateholders RMBS Recovery Holdings 4, LLC and VP Structured Products, LLC of the SL2 Trust, even though the certificateholders timely commenced the SL2 Action. (See *ACE Secs. Corp.*, 2022 NY Slip Op 03927 at *1.) Here, Freedom Trust, a certificateholder, was the original plaintiff in the Original Action

⁶ Pages refer to NYSCEF generated pagination.

and the revival action was brought by the Trustee under the asserted authority of CPLR 205(a). Likewise, the original plaintiffs in the SL2 Action were certificateholders and the Trustee is the plaintiff in the SL2 Revival Action. The facts in this revival action do not warrant a different result.⁷ Therefore, now based on settled law, the Trustee in this action cannot benefit from CPLR 205(a) as the Trustee is “a different entity than the certificateholder plaintiffs [of the Original Action],” “neither an administrator or executor for the original plaintiffs, nor . . . [is the Trustee] . . . the certificateholder in a ‘different capacity.’” (*ACE Secs. Corp.*, 2022 NY Slip Op 03927, *5.) As the Trustee cannot avail itself of CPLR 205(a), the Trustee’s claims remain time-barred and dismissed pursuant to CPLR 3211(a)(5). (*LDIR*, 172 AD3d at 6.)

Accordingly, it is

ORDERED that defendant’s motion to dismiss is granted.



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<u>10/4/2022</u> DATE					<u>ANDREA MASLEY, J.S.C.</u>	
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	
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⁷ Despite the SL2 Action and Revival Action dealing with the SL2 Trust and the Original Action and this revival action dealing with the Trust, there is no meaningful difference that would merit a different outcome as the linchpin of the analysis is the identity of the plaintiffs in each action.