

Mark A. Zittman, IRA v HSBC Bank USA, N.A.

2023 NY Slip Op 30864(U)

March 20, 2023

Supreme Court, New York County

Docket Number: Index No. 656038/2021

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 MARK A. ZITTMAN, IRA FBO MARK ZITTMAN, AND
 MARK A. ZITTMAN AS BENEFICIARY OF IRA FBO
 MARK ZITTMAN

INDEX NO. 656038/2021

MOTION DATE 08/19/2022

MOTION SEQ. NO. 003

Plaintiff,

- v -

HSBC BANK USA, N.A., AS TRUSTEE (AND ANY
 PREDECESSORS OR SUCCESSORS THERETO),.

**DECISION + ORDER ON
 MOTION**

Defendant.

-----X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 14, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84

were read on this motion to/for

DISMISSAL

In this action arising from defendant's alleged breach of contractual duty as the trustee for eight residential mortgage-backed securities (RMBS) trusts, defendant HSBC Bank USA, N.A. (HSBC or Trustee) moves pursuant to CPLR 3211(a)(1), (5), and (7) for an order dismissing plaintiffs' complaints.¹

Background

Plaintiffs purchased certificates issued by eight RMBS trusts, for which HSBC serves as trustee. The eight trusts in this consolidated action are DBALT 2006-AR1, DBALT 2006-AR6, NAA 2006-AR1, SEMT 2007-1, SEMT 2007-3, SGMS 2006-FRE1, WFHET 2006-1, and WFHET 2007-2 (collectively, Trusts). Plaintiffs allege that their investments into these Trusts suffered losses of hundreds of millions of dollars as a result of the Trustee's breach of its contractual duty related to the document defects in the mortgage files of the Trusts (NYSCEF # 2 – complaint, ¶¶ 13-14). In this action, plaintiffs allege only one breach of contract claim: HSBC breached its duty for failing to enforce the obligors duty to repurchase

¹ As a related action, *Mark A. Zittman et al v HSBC Bank USA, N.A.* (index no. 656965/2021), was consolidated with this instant action under index no. 656038/2021 (NYSCEF # 14 – the court's February 14, 2022 consolidation order), the complaints filed in both actions stand as the complaints in this consolidated action.

the affected loans after the obligors failed to cure the document defects in the Trusts' mortgage files (*id.* ¶ 3).

The Trusts are governed by their respective pooling and servicing agreements (PSAs) (NYSCEF #s 39-41, 44-48). Of relevance here, the PSAs require that the loan sellers provide certain mortgage files to the Trusts by conveying them to the Trustee (complaint, ¶¶ 46-47). The Trustee, or a custodian acting on its behalf, shall then review the mortgage files to determine if any of the documents were missing or defective (*id.*, ¶ 50). According to the complaints, when the Trustee discovers or is notified of a document defect, it should promptly notify the party obligated to cure the defects (Obligor) and demand that the Obligor cure it (*id.*, ¶ 52). If the Obligor fails to cure the document defect within a certain time, the Trustee is responsible for enforcing the Obligor to repurchase the affected loans (*id.*, ¶ 53). Plaintiffs quote section 2.3 of the PSA for DBALT 2006-AR6 as an exemplar:

“... if the Seller does not deliver such missing document or cure such defect or breach in all material respects during such period, the Trustee shall enforce the obligations of the Seller under the Mortgage Loan Purchase Agreement to repurchase such Loan from REMIC I at the Purchase Price within 90 days after the date on which the Seller was notified of such missing document, defect or breach, if and to the extent that the Seller is obligated to do so under the Mortgage Loan Purchase Agreement.”

(NYSCEF # 41 - DBALT 2006-AR6 PSA, § 2.3).

Plaintiffs assert that there is no express deadline in the PSAs for the Trustee to enforce the Obligor's obligation, thus the Trustee had up to six years to fulfill its enforcement duty by bringing repurchase litigation against the Obligor but failed to do so (complaint, ¶¶ 55, 59, 215). As support, plaintiffs cite *BlackRock Balanced Capital Portfolio, et al v HSBC Bank USA, N.A.*, No. 14-cv-9366 (BlackRock Action), a class action that was commenced against HSBC on November 24, 2014, for breaching its duties as the trustee for hundreds of RMBS trusts, including the Trusts at issue (*id.*, ¶ 218; NYSCEF # 7 – Ex. 5). The BlackRock Action was pending for a total of 1,166 days from November 24, 2014 through the denial of class certification on February 1, 2018 (*id.*). In October 2014, another class action *Royal Park Invs. SA/NV v HSBC Bank USA, N.A.*, No. 14-cv-9366 (Royal Park Action) was commenced against HSBC (complaint, ¶ 219; NYSCEF # 8 – Ex. 6). The Royal Park Action did not involve any at-issue Trusts, and only covered trusts with the same prefix as the Trusts here, such as DBALT. Plaintiffs also allege that the time to sue HSBC was further tolled by a series of executive orders issued by the Governor of the State of New York in response to the COVID-19 pandemic (complaint, ¶ 220), and “[u]pon information and belief,” by tolling agreements HSBC entered with some Obligor (*id.*, ¶ 221).

On October 19 and December 14, 2021, plaintiffs commenced the two actions that were later consolidated. While addressing different trusts (DBALT 2006-AR1 and DBALT 2006 -AR6), the complaints raise identical claims against HSBC: breach of contract for failing to enforce the Obligors' repurchase obligations (first cause of action), and for a declaratory judgment that HSBC is not entitled to use the Trusts' funds for any fees or losses incurred in this action (second cause of action).

HSBC moves to dismiss the complaints as time-barred, arguing that the claims accrued as a matter of law no later than July 2008 (less than a year after the closing of the Trusts) and therefore expired by July 2014, more than seven years before plaintiffs brought the action. Additionally, HSBC contends that the declaratory judgment claim should be dismissed or stayed.

In opposition, plaintiffs argue that their claims are timely because (1) the claims did not accrue until the time for HSBC to enforce expired, which time was unspecified in the PSAs and thus cannot be determined as a matter of law; (2) the statute of limitations was tolled for at least 1,166 days by BlackRock Action and other class actions that addressed the same set of concerns in RMBS trusts with the same prefix; (3) the statute of limitations was further tolled for 228 days by the COVID-19 pandemic tolling; (4) some tolling agreements HSBC entered with Obligors also tolled the limitations period; and (5) HSBC hid its failure-to-cure document defects from investors and thus is equitably estopped from raising the statute of limitations defense. Plaintiffs also maintain that the declaratory judgment claim is not time-barred or subject to a stay.

Discussion

On a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff with "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Morgenthau & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003] [internal quotation marks and citation omitted]).

Dismissal based on a statute of limitations defense under CPLR 3211(a)(5) is warranted if the moving defendant can establish *prima facie* that the time to commence an action has expired and the plaintiff cannot raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*U.S. Bank Natl. Assn. v Gordon*, 176 AD3d 1006, 1007-1008 [2d Dept 2019]; *MLRN LLC v U.S. Bank Natl. Assn.*, 2019 WL 5963202, *3 [Sup Ct, NY County, Nov. 13, 2019]).

Accrual of the Claim

The scope of an indenture trustee's pre-Event-of-Default duties, including whether the duties are continuing, is strictly defined and limited to those expressly specified in the four corners of the governing agreements (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146, 156-157 [2008]; see also *BlackRock Core Bond Portfolio v U.S. Bank Natl. Assn.*, 165 F Supp 3d 80, 91 [SD NY 2016]). Hence, the contractual language itself is critical in determining the accrual date of the claim against the Trustee, which turns on how much time the Trustee had, but failed, to carry out its enforcement duty.

If the PSAs specify a particular time for the trustee to perform its duties, then investors' claims accrue upon the trustee's failure to perform by that time (*Phoenix Light SF Ltd. v Wells Fargo Bank, N.A.*, 2022 WL 2702616, *24-25 [SD NY, July 12, 2022] [finding the claims untimely with respect to three trusts for which the PSAs specified the trustee's time to enforce, while refusing to dismiss claims concerning other trusts for which the PSAs did not provide a time]; *Royal Park Invs. SA/NV v HSBC Bank USA, N.A.*, 109 F Supp 3d 587, 608 [SD NY 2015] [same]; *Ambac Assur. Corp. v U.S. Bank Natl. Assn.*, -- F Supp 3d --, 2022 WL 4621431, *13 [SD NY, Sept. 30, 2022] ["in cases where the PSA set a deadline, the deadline governed"]). On the other hand, when "[t]he governing agreements did not specify how soon after the sellers' failure to cure that defendants were required to initiate a putback action," "what would be a reasonable time, in lieu of a specified time, cannot be determined at this stage" (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 208 AD3d 423, 429 [1st Dept 2022]; *Zittman v The Bank of N.Y. Mellon*, 2022 WL 1471264, * 3 [Sup Ct, NY County, May 10, 2022][*Zittman/BNYM*] [the outset of the trustee's performance period is six years after closing since the specific time could not be properly resolved at the pleading stage]).

Here, the PSAs expressly provided a time to perform, which did not give rise to a continuing obligation: "the Trustee shall enforce the obligations of the [Obligor] ... to repurchase such Loan ... within 90 days after the date on which the [Obligor] was notified of such missing document, defect or breach" (NYSCEF # 41 - DBALT 2006-AR6 PSA, § 2.3[a]). In accordance with the mortgage file acceptance process under the PSAs, plaintiffs' claim accrued no more than a year after the closing of the Trusts.² Thus, plaintiffs' claims have long since expired, and any alleged tolling cannot save them (see *Phoenix Light*, 2022 WL 2702616 * 24 n.31 [finding the claim time-barred under substantially similar PSA provisions]).³

² The Trustee's 90-day performance period followed a 60-day period in which the Obligor was obliged to cure the document defects upon the Trustee's notice and demand, which must be made "promptly" (*id.*, §§ 2.1-2.3).

³ The PSA language included, for example, that "the Trustee 'shall enforce' the responsible party's repurchase obligation within 90 days after the responsible party was notified" and "the Trustee 'shall enforce' the responsible party's obligation to repurchase the loan before

While plaintiffs aver that the PSAs for all the Trusts contain “substantially identical” provisions as the PSA for DBALT 2006-AR6, which is the exemplar PSA plaintiffs proffer, the court notes that only DBALT 2006-AR1’s PSA similarly specified a 90-day performance period (NYSCEF # 75 – Lundin Aff; NYSCEF # 67 – Lundin Aff Ex. 1; # 40 – DBALT 2006-AR1 PSA § 2.3[a]). For other Trusts, there are discrepancies in the PSAs that hold legal significance.

The PSAs for WFHET 2006-1, WFHET 2007-2, and SGMS 2006-FRE1 were silent on the time frame (NYSCEF #s 46-48), thus, what would be a reasonable performance time cannot be determined at the pleading stage and the outer boundary of the limitations period would be 12 years—six years for the Trustee to enforce the Obligors’ repurchase obligations plus six years for plaintiffs to sue the Trustee for failing to enforce (*see IKB*, 208 AD3d at 429; *Zittman/BNYM*, 2022 WL 1471264, *3). The PSAs for SEMT 2007-1 and SEMT 2007-3 were written differently too: “the Trustee shall enforce the [Obligor]’s obligation ... to purchase ... at the Purchase Price on or prior to the Determination Date following the expiration of such 90-day period” (NYSCEF #s 44-45). As in the recent *Ambac* decision, cited above, the “Determination Date” does not limit the Trustee’s time to enforce but rather modifies the term “Purchase Price” (*Ambac*, 2022 WL 4621431, *11-13 [reasoning that to interpret the “Determination Date” as the due date for trustee’s performance would yield absurd outcome]). Thus, affording plaintiffs the benefit of every possible favorable inference, the time to perform with respect to SEMT 2007-1 and SEMT 2007-3 cannot be determined at this stage either. Lastly, as HSBC points out, the claim regarding NAA 2006-AR1 must be dismissed since the PSA for this Trust did not even impose an enforcement duty on the Trustee (NYSCEF # 39 – NAA 2006-AR1 PSA; NYSCEF # 84 - Def’s Reply at 6, n2) (*see Park Royal I LLC v HSBC Bank USA, N.A.*, 2022 WL 1689873, *10 [Sup Ct, NY County, May 25, 2022] [addressing substantially identical provision]).

Bases for Tolling

Initially, as discussed above, plaintiffs’ claim relating to DBALT 2006-AR1, DBALT 2006-AR6, and NAA 2006-AR1 is dismissed regardless of any tolling considerations. To the extent that the remaining Trusts’ PSAs did not specify a performance time and an additional six-year would be calculated in for purposes of this motion, the claim must still be dismissed since none of the alleged tolling applies.

New York courts recognize the federal *American Pipe* tolling rule that the commencement of a class action suspends the applicable statute of limitations as to

the 15th day of the following month” (*id.*). *See also Royal Park*, 109 F Supp 3d at 608 (“the clauses in these trusts relating to initial document obligations set a time period during which HSBC must undertake these duties—within 60 to 90 days after the closing date of the trusts”).

“all asserted members of the class who would have been parties had the suit been permitted to continue as a class action” (*American Pipe & Constr. Co. v Utah*, 415 US 538, 554 [1977]; *Bermudez Chavez v Occidental Chem. Corp.*, 35 NY3d 492, 504-506 [2020]). Under this rule, plaintiffs contend that their time to sue was tolled for at least 1,166 days by BlackRock Action, which covered all the Trusts at issue.

However, while the BlackRock complaint asserted a wide array of claims against the same defendant HSBC, it did not involve the loan document defect claim, which is the sole basis of plaintiffs’ action here. As the present action is based on different contractual obligations and requires distinct proof from that of the BlackRock Action, plaintiffs cannot benefit from *American Pipe* tolling (*Singer v Eli Lilly and Co.*, 153 AD2d 210, 220 [1st Dept 1990] [noting that “*American Pipe* was a generous rule inviting abuse and that the rule should not be read as leaving a plaintiff free to raise different or peripheral claims following denial of class status”] [internal quotation marks omitted]).

Moreover, plaintiffs have not established that they were purported class members of the BlackRock Action since they had not purchased the Trusts’ certificates until after the class certification was denied in the BlackRock Action.⁴ In this connection, plaintiffs contend that Cede & Co. – Depository Trust Company (DTC) – was the holder of record of the Trusts’ certificates during the BlackRock Action period and later sold plaintiffs all the rights it had. However, there is no authority supporting plaintiffs’ theory that *American Pipe* tolling applies to investors who purchased certificates from the DTC after the class action ended (see *Royal Park Invs. S/NV v Deutsche Bank Natl. Trust Co.*, 2018 WL 1750595, *16-17 [SD NY, Apr. 11, 2018] [“The cause of action accrues to the class members, not to DTC, which, while holding the Certificates, is not a beneficial owner. Consequently, the applicable statutes of limitations are those that would properly apply to the class members, or in the case in which litigation rights were assigned, to the assignor.”]).

The court is also not persuaded by plaintiff’s unsupported shelf-tolling theory that their claim was tolled by class actions addressing “same set of concerns,” such as Royal Park Action which covered trusts with the same prefix as the Trusts. Plaintiffs’ reliance on *NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F3d 145 [2d Cir 2012], a case addressing class standing instead of class action tolling, is inapposite and was once rejected by this court in *Zittman/BNYM* (2022 WL 1471264, *4 [class action tolling does not apply because those trusts were never part of the class]). Further, the Second Circuit has clarified the limited scope of *NECA-IBEW*’s applicability and distinguished it from RMBS trustee actions that need proof trust-by-trust (*Retirement Board of Policemen’s Ann. & Benefit Fund of City of Chicago v Bank of N.Y. Mellon*, 775 F3d 154, 162 [2d Cir 2014] [the trustee’s

⁴ The putative class in BlackRock Action included all “current certificateholders” (NYSCEF #s 50-51 – Exs. 15-16, the pleadings in the BlackRock Action).

alleged conduct did not implicate “the same set of concerns” across different RMBS trusts because “[determining] whether a loan’s documentation was deficient requires looking at individual loans and documents” and there is “no way in which answering these questions for the trusts in which Plaintiffs invested will answer the same questions for the numerous trusts in which they did not invest”).

Based on “information and belief,” plaintiffs next allege that HSBC entered into certain tolling agreements with Obligor that further tolled the limitations period (complaint, ¶ 221). Without identifying the agreements and specifying the tolling period, plaintiffs’ conclusory assertions are not sufficient to establish tolling.

Finally, equitable tolling does not apply here either. Equitable estoppel, an “extraordinary remedy,” applies only when plaintiffs were “induced by fraud, misrepresentations, or deception to refrain from filing a timely action” and can “demonstrate reasonable reliance on the defendant’s misrepresentations” (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]; *Pahlad v Brustman*, 33 AD3d 518, 519 [1st Dept 2006]). Plaintiffs do not allege any relevant facts in the complaints and only add an allegation in their opposition brief that HSBC concealed the facts regarding document defects by stating in its Regulation AB disclosures that “it was in compliance” with the governing agreements (NYSCEF # 76 – Pltfs. Opp at 15). This is inadequate in light of the specificity requirement for equitable estoppel (*Twersky v Yeshiva Univ.*, 993 F Supp 2d 429, 445 [SD NY 2014]).

As this action is not subject to class action tolling or equitable tolling, plaintiffs’ claim is untimely regardless of whether the 228-day COVID-19 pandemic tolling applies.

The Declaratory Judgment Claim

Plaintiffs’ second cause of action seeks a declaratory judgment prohibiting HSBC from using the Trusts’ funds to cover legal expenses incurred in this litigation. Under the PSAs, the Trustee could seek indemnification from the trust fund except for expenses incurred by reason of the Trustee’s willful misfeasance, bad faith, or gross negligence (PSA, § 8.5). To prevail on that, plaintiffs must first prevail on their breach of contract claim against HSBC regarding document defects (*Zittman/BNYM*, 2022 WL 1471264, *11). However, as plaintiffs’ breach of contract claim is dismissed as time-barred, the declaratory judgment claim fails.

Plaintiffs’ reliance on *Finkelstein v U.S. Bank, N.A* and *Zittman/BNYM* does not change the conclusion for another reason. The court in those two cases granted a declaration that the trustees could not indemnify themselves from certain trusts because, unlike here, the governing agreements required another party, instead of the trust, to indemnify the trustees (*Finkelstein*, 75 Misc 3d 1202[A] [Sup Ct, NY County, 2022]; *Zittman/BNYM*, 2022 WL 1471264, * 11).

Conclusion

In view of the above, it is

ORDERED that the motion by defendant HSBC Bank USA, N.A. to dismiss the complaint as untimely is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

3/20/2023

DATE



MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE