

**HSBC Bank USA, N.A. v
Nomura Credit & Capital, Inc.**

2023 NY Slip Op 33361(U)

September 27, 2023

Supreme Court, New York County

Docket Number: Index No. 650337/2013

Judge: Melissa Crane

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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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,

Plaintiff,

- v -

NOMURA CREDIT & CAPITAL, INC.,

Defendant.

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NOMURA CREDIT & CAPITAL, INC.

Plaintiff,

-against-

WELLS FARGO BANK, N.A., OCWEN LOAN SERVICING,
LLC

Defendant.

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INDEX NO. 650337/2013
MOTION DATE 09/30/2022
MOTION SEQ. NO. 026

DECISION + ORDER ON
MOTION

Third-Party
Index No. 595359/2014

The following e-filed documents, listed by NYSCEF document number (Motion 026) 1120, 1121, 1122,
1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138,
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were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This action is one among many related to residential mortgage-backed securities
("RMBS") sponsored by Defendant/Third-Party Plaintiff Nomura Credit & Capital, Inc.

("Nomura") which allegedly breached various representations and warranties that Nomura made to the Plaintiff/Trustee HSBC Bank USA, N.A. ("HSBC"). After HSBC filed the underlying complaint in this case against Nomura, Nomura filed a third-party complaint against servicers Ocwen Loan Servicing, LLC ("Ocwen") and Wells Fargo Bank, N.A. ("Wells Fargo"). After unsuccessfully moving to dismiss the third-party complaint, Ocwen answered and filed counterclaims against Nomura. This decision is on Nomura's motion for summary judgment dismissing Ocwen's counterclaims. For the following reasons, the court grants Nomura's motion in its entirety.

FACTUAL AND PROCEDURAL HISTORY

The court refers to the factual and procedural history in the decision and order on Ocwen's summary judgment motion (*see* September 19, 2023 Decision and Order, NYSCEF Doc. No. 3020). However, the court provides brief background here for context.

This action is related to the Series 2007-2 RMBS trust that Nomura sponsored pursuant to a January 1, 2007 pooling and servicing agreement ("PSA") (*see* January 1, 2007 PSA, NYSCEF Doc. No. 1812). Ocwen acted as the servicer and Wells Fargo acted as the master servicer and securities administrator. The underlying complaint alleges that Nomura breached representations and warranties regarding the loans underpinning the 2007-2 trust, and that Nomura has failed to repurchase the breaching loans as it is required to under the PSA (Complaint, NYSCEF Doc. No. 1, ¶¶ 1-2, 11). The underlying complaint alleges causes of action for breach of contract and rescission. The Trustee also seeks specific performance of the repurchase of the mortgage loans, as well as a declaratory judgment that Nomura must reimburse HSBC for its expenses incurred in connection with enforcing remedies for the alleged breaches. The court granted in part Nomura's motion to dismiss, dismissing the rescission cause of action and declaring that Nomura was not

liable to indemnify plaintiff for attorney's fees (July 18, 2014 Decision and Order, NYSCEF Doc. No. 53).

Subsequently, Nomura filed a third-party complaint on August 27, 2014 against Ocwen and Wells Fargo¹ (Third-Party Complaint, NYSCEF Doc. No. 64). The third-party complaint alleges two causes of action for breach of contract against Ocwen and Wells Fargo. The third-party complaint's second cause of action alleges that under PSA § 2.03(e), Ocwen and Wells Fargo were required to provide notice to Nomura upon discovery of a breach of the representations and warranties, and that they failed to do so (Third-Party Complaint, ¶¶ 44-46). The third-party complaint's third cause of action, on the other hand, alleges that Ocwen was required under the PSA to act consistently with accepted servicing practices, and that Ocwen failed to do so (Third-Party Complaint, ¶¶ 50-51).

Ocwen moved to dismiss the third-party complaint. On May 14, 2018, the court granted the motion to dismiss solely to the extent that the third-party complaint purported to plead a claim for successor liability against Ocwen based on actions of a prior servicer, Equity One, Inc., but otherwise denied the motion (May 14, 2018 Order, NYSCEF Doc. No. 327).

On August 3, 2018, Ocwen answered the third-party complaint, asserting a counterclaim against Nomura for breach of contract. Ocwen alleges that Nomura had a duty to notify Ocwen of any material breaches pursuant to the PSA and that Nomura failed to provide that notice to Ocwen (Ocwen Counterclaims, NYSCEF Doc. No. 418, ¶¶ 24, 29-30). According to Ocwen, "[h]ad Nomura notified Ocwen . . . of such material breaches of the Mortgage Representations, Nomura would have become obligated to cure, repurchase, or substitute out those Mortgage Loans" (*id.*, ¶

¹ Nomura discontinued the third-party action against Wells Fargo, and the court denied Wells Fargo's motion for summary judgment (MS 23) as moot (*see* April 7, 2022 Decision and Order, NYSCEF Doc. No. 1655). This decision and order concerns only third-party defendant Ocwen's counterclaims against Nomura.

35). In addition to the cause of action for breach of contract, Ocwen also seeks a declaration that Nomura is “barred from obtaining the relief sought from Ocwen to the extent of Nomura’s failure to provide Ocwen with notice as provided for by the PSA” (Ocwen Counterclaims, ¶ 41).

After years of fact and expert discovery, the parties in the various related Nomura RMBS actions filed summary judgment motions. Included among these motions were: (1) Ocwen’s motion for summary judgment dismissing the third-party complaint (MS 22); and (2) Nomura’s motion for summary judgment dismissing Ocwen’s counterclaims (MS 26). On September 19, 2023, the court granted in part and denied in part Ocwen’s motion for summary judgment (September 19, 2023 Decision and Order). The court now grants Nomura’s motion for summary judgment dismissing Ocwen’s counterclaims in their entirety.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Aguilar v City of New York*, 162 AD3d 601, 601 [1st Dept 2018]; *AGFA Photo USA Corp. v Chromazone, Inc.*, 82 AD3d 402, 403 [1st Dept 2011]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *AGFA Photo USA Corp.*, 82 AD3d at 403; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment “regardless of the sufficiency of the opposition papers” (*O’Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

I. Failure to Notify

Nomura first argues that the court should dismiss Ocwen's breach of contract counterclaim because Ocwen does not have an independent cause of action against Nomura for failure to notify under the PSA. In particular, Nomura argues that because Nomura has a repurchase obligation under the PSA, the notice requirement is a procedural prerequisite to that repurchase obligation rather than an independent claim (Opening Memo., NYSCEF Doc. No 1762, p. 25). There is conflicting case law as to whether Ocwen can maintain an independent cause of action against Nomura based on failure to notify (*see e.g., US Bank NA v DLJ Mortgage Capital, Inc.*, 33 NY3d 72 [2019] [holding that "RMBS notice and sole remedy provisions are not substantive elements of the cause of action" but a mere "procedural prerequisite to suit" [internal quotation marks and citation omitted]; *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 133 AD3d 96, 108 [1st Dept 2015] [finding the lower court erred in not allowing plaintiffs to seek damages for "defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties"])

However, the court need not determine whether or not Ocwen can pursue an independent cause of action against Nomura for failure to notify because, even if Ocwen could, Nomura has shown that it is entitled to dismissal for lack of damages. As an initial matter, the court rejects Ocwen's contention at oral argument that it is not seeking damages for lost profits. Ocwen contended at oral argument that it is not seeking lost profit damages but rather is seeking damages in the form of "servicing income that flows directly from Nomura's obligation to notify and substitute loans, non-breaching loans" (September 30, 2022 Oral Argument Transcript, p. 85). However, Ocwen's argument is semantic because Ocwen acknowledges in its opposition to Nomura's summary judgment motion that it is seeking "consequential damages" and then refers

to the same factors that the proponent of lost profit damages must establish (Opposition, NYSCEF Doc. No. 1250, p. 23 [“The parties agree that in order to recover consequential damages the proponent must establish three things: (1) the claimed damages were contemplated by the parties at the time of contracting; (2) the damages were caused by the breach; and (3) the damages can be proven with reasonable certainty”]; see *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 183 [1st Dept 2007]).

In any event, the alleged damages relating to additional “servicing income” that Ocwen would have attained with non-breaching loans clearly appear to be consequential lost profit damages as they represent income that Ocwen allegedly would have received as a result of transactions involving unrelated parties (*i.e.*, Nomura’s purchase of non-breaching mortgage loans to replace the breaching mortgage loans) (see *Fresenius Kabi USA, LLC v Hetero USA, Inc.*, 184 AD3d 459, 459 [1st Dept 2020] [“Whether damages for lost profits are considered general or consequential turns on “whether the lost profits flowed directly from the contract itself or were, instead, the result of a separate agreement with a nonparty.”] [internal citation and quotation marks omitted]).

In order to establish entitlement to lost profits, a plaintiff must show that “such damages were actually caused by the breach, that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made and that the alleged loss is capable of proof with reasonable certainty” (*Awards.com*, 42 AD3d at 183 [1st Dept 2007] [internal citation and quotation marks omitted]; see also *Rising Sun Construction L.L.C. v CabGram Developer LLC*, 202 AD3d 557, 558 [1st Dept 2022]).

Here, Nomura has established entitlement to dismissal of the claim for lost profits by showing that the parties to the PSA did not contemplate lost profits. Rather, the PSA limits

remedies against Nomura for any breach to the sole remedies of cure, repurchase, or replace (*see* PSA, § 2.03[e] [“[T]he obligation under this Agreement of the Sponsor to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred or is continuing shall constitute the sole remedies against the Sponsor respecting such breach available to Certificateholder, the Depositor or the Trustee.”]). Thus, the PSA unambiguously does not contemplate lost profits as a remedy. Even if PSA § 2.03(e)’s silence as to whether servicers in particular can recover lost profits created an ambiguity, Ocwen still would have failed to meet its burden. If a contract is “silent” on the issue of lost profits, the court must consider extrinsic evidence and employ a “commonsense” approach to “determine what the parties intended” (*Awards.com, LLC*, 42 AD3d at 183). Ocwen has presented no extrinsic evidence to indicate that the parties ever contemplated lost profits as a component of damages in the event of a breach.

Rather, Ocwen merely argues that the PSA contemplated lost profit damages based on how the “Servicers’ compensation as vendors is a very small fractional percentage of the principal balance of the mortgage loans” and, therefore, the “Servicers earn more on compliant loans than breaching loans” (Opposition, p. 23). However, whether or not Ocwen would have earned more servicing compliant loans is irrelevant to the question of whether the PSA contemplated that Ocwen could recover lost profits in a lawsuit seeking the difference between non-compliant and compliant loans. The PSA unambiguously specifies cure, repurchase, and replace as the sole remedies, and Ocwen has presented nothing to refute that text.

In addition, the court dismisses the lost profits claim because it is wholly speculative. A lost profits claim should be dismissed where it is “predicated not upon the requisite reasonably certain assessment but upon nothing more than assumptions, speculation and conjecture” (*Zink v Mark Goodson Productions, Inc.*, 261 AD2d 105, 106 [1st Dept 1999]; *see Kantor v 75 Worth*

Street, LLC, 95 AD3d 718, 718-19 [1st Dept 2012]). Here, Ocwen's lost profits damages theory is that if Nomura had followed proper procedures under the PSA, it would have replaced the breaching loans with non-breaching loans and Ocwen would have received greater servicing fees as a result (September 30, 2022 Oral Argument Transcript, pp. 89-90). In support of this argument, Ocwen cites the report of their counterclaim damages expert, Samuel Warren. However, in assessing damages, Mr. Warren relies on "industry average servicing costs" and his determination that mortgage loans that comply with representations and warranties "stay in the Trusts longer, on average, and therefore generate more compensation" (Ocwen Rule 19-a Statement, NYSCEF Doc. No. 1252, ¶¶ 122, 130 [emphasis added]; Warren Report, NYSCEF Doc. No. 1849, ¶ 25 ["I derive Ocwen's damages by calculating the difference in the Net Servicing Cashflows Ocwen received on loans in the Allegedly Breaching Loan Population and the Net Servicing Cashflows it should have earned had the loans in that population performed, on average, like the loans in the Non-Breaching Loan Population."]) [emphasis added]). Fundamentally, this analysis based on averages is not a "reasonably certain assessment" of damages. It is, instead, a speculative modeling of what damages potentially could be based on theoretical replacement loans that Nomura undisputedly never purchased. This is not sufficient to establish damages based on lost profits.

II. Declaratory Judgment

The court dismisses Ocwen's second cause of action for an order "declaring that Nomura is barred from obtaining the relief sought from Ocwen to the extent of Nomura's failure to provide Ocwen with notice as provided for by the PSA" (Ocwen Counterclaims, ¶ 41). Counsel for Ocwen acknowledged at oral argument that this cause of action rises and falls with the first counterclaim cause of action for breach of contract (*see* Oral Argument Transcript, p. 81), which the court has now dismissed. In any event, to the extent Ocwen seeks a declaratory judgment that Nomura is

barred from obtaining relief from Ocwen for failure to notify, the request is moot, as the court already granted summary judgment to Ocwen dismissing Nomura’s failure to notify claim (see September 19, 2023 Decision and Order). Therefore, the court dismisses the second cause of action for declaratory judgment.

The court has considered the parties’ remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Ocwen’s first counterclaim for breach of contract is dismissed; and it is further

ORDERED that Ocwen’s second counterclaim for declaratory judgment is dismissed; and it is further

ORDERED, ADJUDGED, and DECLARED that Nomura is not barred from obtaining the relief sought from Ocwen to the extent of Nomura’s failure to provide Ocwen with notice as provided for by the PSA.

09/27/2023
DATE


MELISSA CRANE, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: