SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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STEPHEN FINKELSTEIN

Plaintiff,

- v -

U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE (AND ANY PREDECESSORS OR SUCCESSORS THERETO),

Defendant.

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INDEX NO. 651893/2022

MOTION DATE 11/06/2023, 01/02/2024

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 128

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for STRIKE PLEADINGS.

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 3.11.24), the motion to amend the complaint (Mtn. Seq. No. 002) is denied without prejudice. The instant action has been the subject of numerous prior trial court and appellate decisions, including a motion to dismiss before this Court (the **Prior Decision**; Index No. 650849/2021, NYSCEF Doc. No. 161) and an appeal taken from that same motion (*Finkelstein v U.S. Bank*, N.A., 219 AD3d 401 [1st Dept 2023]). Familiarity with these prior decisions is presumed.

The claims asserted in the original Complaint were predicated on the failure of the trustee to enforce the repurchase obligation based on a general and not specific duty identified in the PSAs.

Previously, the Plaintiff argued that the PSAs did not make logical sense in that if the Trustee's general obligation to "exercise the rights referred to" in the PSAs did not equate to an obligation on the Trustees to enforce such repurchase obligation, then that would mean there was no one to enforce a pre-EOD default-based on document defects. This Court held in the Prior Decision that the Trustee leaned in too heavily at the motion to dismiss stage into the absence of this specific belt and suspenders language. This argument was, however, ultimately rejected by the Court of Appeals even at the motion to dismiss stage (*cf. IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 292-303 [2023] [Wilson, C.J., dissenting in part]).

Under CPLR 3025(b), a party may amend his or her pleading at any time by leave of court, with such leave being freely given upon such terms as may be just. Whether to allow an amendment is committed almost entirely to the court's discretion to be determined on a sui generis basis, *i.e.*, the court possesses the widest possible latitude (*Murray v. New York*, 43 N.Y.2d 400, 404-405 [1977]). Leave should be given where the amendment is (i) not palpably insufficient or patently devoid of merit and (ii) the delay in seeking amendment does not prejudice or surprise the opposing party (*US Bank, N.A. v Primiano*, 140 AD3d 857 [2d Dept 2016]).

A plaintiff may only add an untimely claim (one that would be time-barred) if it relates back to the original pleading (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 50 [2022]; CPLR 203[f]). Relation back applies only if the complaint placed the defendant on notice of the transactions, occurrences, or series of transactions or occurrences, to be proved in support of that claim (*id.* at 50-51). Notice is not shown (i) where the new claims are factually distinct and discordant from a plaintiff's prior allegations or (ii) where the prior complaint foreclosed a factual or inferential

basis for such notice by unqualifiedly alleging a specific theory to the exclusion of an alternate theory of recovery or factual allegations (*id*. at 53).

The new claims the Plaintiff proposes to assert in the proposed amended complaint and proposed second amended complaint (NYSCEF Doc. No. 22; collectively, hereinafter, the **PAC**) consist of: (i) a separate class of pre-EOD claims based on the Trustee's alleged failure to enforce repurchase of loans with Representations and Warranties (**R&W**) breaches, (ii) post-EOD claims based on the Trustee's failure to fulfill prudent person duties and (iii) implied covenant claims. Inasmuch as the lion's share of the claims are palpably insufficient, the PAC fails.

I. The Plaintiff's claims are untimely.

The Plaintiffs claims that are predicated on the Trustee forcing obligated parties to repurchase the loan lapsed, at the latest, six years after the trust's closing date (*ACE Sec. Corp. vs DB Structured Prods, Inc.* 25 NY.3d 581, 595 [2015]; *Zittman v Bank of NY Mellon*, 2022 WL 1412764, at *3 [NY Sup. Ct. May 10, 2022]). Class action tolling as to the trusts involved in *Royal Park* and the *Blackrock Allocation* lawsuits do not save these claims. Tolling started for the *Royal Park* trusts[1] on April 11, 2014, and on November 24, 2014 and June 19, 2015 for the Blackrock actions (both state and federal)'s trusts.[2] It ended in (i) July 2018 for the *Royal Park* trusts, (ii) in May 18, 2015, for the Blackrock trusts in the federal action and (iii) in January 2018

[1] BSABS 2006-AC2, HEAT 2006-6.
[2] ABSHE 2005-HE8, ABSHE 2006-HE5, ARMT 2005-10, ARMT 2005-6A, ARMT 2005-7, BAFC 2006-I, BASIC 2006-1, FFML 2006-FF12, FFML 2006-FF2, GPMF 2006-AR4, GPMF 2006-AR5, GSR 2004-14, HEAT 2004-3, HEAT 2004-4, LXS 2006-GP4, LXS 2007-12N, MABS 2006-FRE1, MABS 2006-HE4, MABS 2006-NC1, MABS 2006-WMC1, SARM 2006-5, SASC 2006-WF1, STARM 2007-S1, and WMLT 2005-WMC1.

for the Blackrock trusts involved in the state court action (*Chavez v. Occidential Chem. Corp.,* 35 N.Y.3d 492, 506 [2020]). As to COVID tolling, tolling only applied from March 20, 2020, through November 3, 2020 (*i.e.*, 229 days) (*Murphy v. Harris,* 210 AD.3d 410, 411 [1st Dept 2022]). Thus, for repurchase related claims for 26 trusts,[3] the claims expired prior to September 19, 2023 and the pre-EOD R&W claims in 13 trusts, pre-EOD document defect claims for 4 trusts,[4] and both pre-EOD R&W and document defect claims for GPMF 2006-AR5 and SASC 2006-WF1 are untimely.[5]

II. The PAC asserts pre-EOD R&W claims and post-EOD claims do not relate back to the original complaint.

The original complaint asserted that the Trustee failed to identify and cure the lack of complete mortgage files. No prior version of the complaint put the Trustee on notice that either (i) that R&W breaches would be raised or (ii) post-EOD claims would be raised. The omission of these claims was explicitly stated on the face of the Complaint[6] and the Amended Consolidated Complaint themselves:[7]

> 7. While U.S. Bank appears to have breached its duties as trustee in a host of ways, Plaintiff in this Complaint **asserts only claims arising from U.S. Bank's failure to identify** and cure the lack of complete mortgage files for many of the underlying mortgage loans in the Trusts.
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> 39. Second, for all but two Trusts, the notice requirement applies only when there has

[3] *See* Fns. 1 & 2.
[4] Specifically, MABS 2006-HE4, GSR 2004-14, HEAT 2004-3 and HEAT 2004-4.
[5] The Court notes that in the opposition papers to the instant motion, the Trustee argued that claims relating to GPMF 2006-AR5, SASC 2006-WF1, and MABS 2006-HE4 are untimely because these trusts have never been at issue in this action. In their reply brief and on the record (*tr.* 3.11.24), the Plaintiff indicated that these trusts are not the subject of the instant action (*see* NYSCEF Doc. No. 120, at 13), so the Court need not address them here.
[6] Index No. 650849/2021, NYSCEF Doc. No. 2 (Feb. 5, 2021). The complaints in both actions are consolidated for the purposes of this motion.
[7] Index No. 650849/2021, NYSCEF Doc. No. 61 (June 18, 2021).

> been an Event of Default or Master Servicer Event of Termination as defined in the PSAs Because **this action does not allege an Event of Default** or Master Servicer Event of Termination, the no action clause does not apply for those trusts.

(Complaint ¶¶ 7, 39 [emphasis added]);

> 4. In this action, U.S. Bank makes **only one breach of contract claim**: that, if nothing else, U.S. Bank's position as the Trustee of the Trusts meant that, if U.S. Bank discovered or was told that the Trusts had never obtained the complete Mortgage Files, or if there were Document Defects in the Mortgage Files, then U.S. Bank was **required, by the terms of the Governing Agreements, to enforce the Trusts' right to have the Document Defects cured**. Such cure could have occurred by having the missing document replaced, or having the defective loan itself repurchased or replaced (but only within two years of closing) by a substitute loan (a Document Defect "Cure").
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> 7. It is this duty that Plaintiff alleges U.S. Bank breached here. Upon information and belief, U.S. Bank identified massive numbers of Document Defects in the Mortgage Files, and upon information and belief U.S. Bank notified the Obligors of these defects and demanded that they be Cured. But when the Obligors **failed or refused to Cure those Document Defects, U.S. Bank then sat on its hands and did nothing, in breach of its duty** to enforce the Obligors' obligation to Cure those defects.
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> ...
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> 44. Second, for 19 of the 29 Trusts, the notice requirement applies only when there has been an Event of Default or Master Servicer Event of Termination as defined in the PSAs. Because **this action does not allege an Event of Default** or Master Servicer Event of Termination, the no action clause does not apply for those trusts.

(Index No. 650849/2021, NYSCEF Doc. No. 61 (June 18, 2021), ¶¶ 4, 7, 44 [emphasis added]).

Thus, the Complaint and Amended Consolidated Complaint foreclose any sufficient factual or inferential basis for relation back outside of the claims raised. To the contrary, these pleadings notice the exact opposite: that the Plaintiff was intentionally choosing *not* to litigate post-EOD claims (*id.*; *Goldstein v. Brogan Cadillac Oldsmobile Corp.*, 90 A.D.2d 512, 513 [2d Dept 1982]). In line with that strategy, the Plaintiff asserted breach solely as it related to document defects in mortgage files because the Trustee allegedly sat on its hands and did nothing. As

such, these claims are factually and legally distinct and do not relate back (*see Phoenix Light SF Ltd. v Deutsche Bank Natl. Tr. Co.*, 585 F Supp 3d 540, 572 [SDNY 2022], *affd sub nom. Phoenix Light SF Ltd. v Bank of New York Mellon*, 66 F4th 365 [2d Cir 2023]). Put another way, the document defect based claims in the prior complaints are vastly different claims than whether the quality and characteristics of the mortgage loans met underwriting guidelines, and for that reason they do not relate back.

III. The PAC fails to state a cause of action for breach of contract in connection with a number of trusts.

The proposed complaint fails to allege a cause of action based on: (i) post-EOD claims regarding 12 trusts; (ii) an EOD regarding 12 trusts; and (iii) that the Trustee received written notice of an EOD for 4 trusts.

In the case of post-EOD claims, the proposed amendment does not adequately allege a breach of the duty to act as a prudent person – that duty would only arise post-EOD, if the Trustee had actual or written notice of the EOD. The December 2009, October 2010, and May 2011 letters are simply insufficient to provide notice of the EOD (*W. and S. Life Ins. Co. v U.S. Bank N.A.*, 209 AD3d 6, 16 [1st Dept 2022]). The general allegation that the Trustee gave the servicers and master servicers notice of the failure to maintain properties in REO and that such failures resulted in fines is not an allegation that the servicers and master servicers actually received written notice of breach of a particular covenant or agreement as to any particular trust. This is insufficient under CPLR 3013. The prevention doctrine also does not save these claims (*Blackrock Balanced Capital Portfolio (FI) v U.S. Bank N.A.*, 165 AD3d 526, 527 [1st Dept

2018]; *Fixed Income Shares: Series M v Citibank, NA,* 157 AD.3d 541, 542 [1st Dept 2018]; *IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 208 AD3d 423, 430 [1st Dept 2022]; *MLRN v. US Bank,* 2019 WL 5963202, at *7 [NY Sup. Ct. Nov. 13, 2019]). Finally, the Streit Act does not serve to impose any duties on the Trustee not expressly included in these agreements. In sum, there are no EODs pled as to 12 trusts,[8] and claims relating to them are therefore devoid of merit.

As to 4 trusts,[9] the PAC fails to plead that the Trustee received actual notice of an EOD under § 8.02 (viii) of the relevant PSAs.

As to pre-EOD enforcement claims, this too is problematic as to 25 of the 33 trusts. For 15 trusts,[10] document-defect claims fail to properly allege a Trustee enforcement duty. As to BASIC 2006-1, the Appellate Division already held that the document defect repurchase obligation was against the obligors and not against the Trustee because the duty to enforce the obligor's repurchase obligation was on the securities administrator.

For 6 trusts,[11] the Trustees enforcement duty arises only if it receives written notice that the obligated party has not delivered such missing document or there was breach in all material respect during the cure period. The PAC fails, however, to allege receipt of written notice. Thus, the R&W claims fail as to those trusts.

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[8] ARMT 2005-10; ARMT 2005-6A; ARMT 2005-7; BASIC 2006-1; BSABS 2006-AC2; GSR 2004-14; HEAT 2004-3; HEAT 2004-4; HEAT 2006-6; STARM 2007-S1; SURF 2006-BC4; WMLT 2005-WMC1.
[9] HEAT 2004-3; HEAT 2004-4; HEAT 2006-6; SURF 2006-BC4.
[10] FFML 2006-FF2; FFML 2006-FF12; GPMF 2006-AR4; GPMF 2006-AR5; GPMF 2007-AR1; GPMF 2007-AR2; LXS 2006-GP4; LXS 2007-12N; SARM 2006-5; SASC 2006-WF1; SASC 2006-WF3; SASC 2007-WF1; STARM 2007-S1; WMLT 2005-WMC1. BASIC 2006-1 is the fifteenth, which is subsequently addressed.
[11] BAFC 2006-I; BAFC 2007-C; MABS 2006-FRE1; MABS 2006-FRE1; MABS 2006-NC1; MABS 2006-WMC1.

As to the document defect claims, the PAC also indicates that the Trustee received notice from the obligors, custodians, servicers, and other parties that defects remained and were uncured, but this is patently insufficient – there is no allegation that the Trustee received *written notice* as to any of the trusts at issue in this case.

As to pre-EOD R&W claims based on the Trustee's alleged failure to enforce the duty to repurchase loans based on incomplete documentation, the governing documents do not contain an R&W that the seller delivered a complete mortgage file as to 4 trusts.[12]

Finally, the proposed implied covenant claims fail because the agreements provide (and New York courts have held) that except for those duties expressly set forth in the PSAs, obligations can not be implied as to pre-EOD claims; with respect to such claims, there is no obligation to act as a prudent person. The Plaintiff's attempt to reinvent previously dismissed claims by arguing now that the Trustee acted in bad faith by, in sum and substance, putting its head in the sand to avoid its post-EOD obligations fails as a transparent attempt to relitigate issues previously dismissed and decided by the Appellate Division and Court of Appeals.

The New York Court of Appeals has addressed the Trustee's role pre-EOD, finding that except as otherwise expressly provided in the relevant PSA, it is essentially ministerial: the Trustee has only a duty to avoid conflicts of interest and a duty to perform ministerial tasks with due care (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d 277, 285 [2023]). In this case, the trusts at issue were governed by servicing agreements that set forth an exclusive list of specific duties that

[12] BSABS 2006-AC2; FFML 2006-FF2; FFML 2006-FF12; GSR 2004-14.

the Trustee must comply with in the pre-EOD context and also provides that no implied covenants or obligations were to be read into the Trustee's responsibilities (*see*, *e.g.*, BAFC 2006-I, §9.01[b][i]). An EOD occurs when a servicer (i) materially breaches their obligations, (ii) receives written notice (generally from a contractually specified party), and (iii) fails to cure in accord with the relevant agreement. Once the Trustee had written notice or actual knowledge of the occurrence of a defined EOD, however, the Trustee's duty would transform into one to exercise its rights and powers as a "prudent person" (*see, e.g.*, NYSCEF Doc. No. 77, § 8.01). To the extent that the PAC seeks to re-litigate pre-EOD implied duties, it is utterly devoid of merit.

IV. The Plaintiff has not shown a reasonable excuse for the delay in moving to amend to add these new claims.

Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay (*Oil Heat Inst. of Long Is. Ins. Tr. v RMTS Assoc.*, LLC, 4 AD3d 290, 293 [1st Dept 2004]).

As the Plaintiff correctly argues, a relevant change in law has been found a sufficient basis upon which to allow amendment (*Yuko Ito v Suzuki*, 57 AD3d 205, 206-209 [1st Dept 2008]. In *Yuko Ito v Suzuki*, amendment was allowed because a change in the law concerning standing to sue a limited liability company enabled plaintiff to bring derivative claims (*id.*). This does not, however, mean that *all* changes in law constitute reasonable excuse for amendment. In the instant case, the new legal developments that the Plaintiff cites have the effect of limiting (not expanding) the legal theories by which the Plaintiff could recover (*cf. Yuko Ito*, 57 AD3d at 208).

In this case, the Plaintiff asks this Court for leave to amend because the Appellate Division dismissed the Plaintiff's earlier claims (*Finkelstein v U.S. Bank*, N.A., 219 AD3d 401 [1st Dept 2023]). It is clear that the Plaintiff made a deliberate tactical decision at the commencement of this litigation not to sue on a number of legal theories. Having charted his own course, the Plaintiff cannot now be heard to complain at this late hour and the change in the law does not provide any new basis upon which it can recover (*Oil Heat Inst. of Long Is. Ins. Tr. v RMTS Assoc., LLC*, 4 AD3d 290, 294 [1st Dept 2004]).

The motion to strike the Defendant's reply memorandum (Mtn. Seq. No. 003) is denied, but the Court declined to consider the reply memorandum in question (NYSCEF Doc. No. 120) solely to the extent that it exceeded the 4,200 word limit under the Commercial Division Rules.

The cross-motion to expand the word limit *nunc pro tunc* (cross-motion, Mtn. Seq. No. 003) is denied. The Plaintiff argues essentially that he should be granted this untimely request because he (i) assumed erroneously that the Trustee had filed a cross-motion to dismiss in connection with Mtn. Seq. No. 002 and (ii) otherwise feels he needed more space to fully address the arguments in the opposition brief. This reasoning is not at all convincing (particularly given that the Trustee offered to let the Plaintiff refile the Reply papers and the Plaintiff elected not to do so or otherwise seek permission from the Court), even if this request were timely, which it is not.

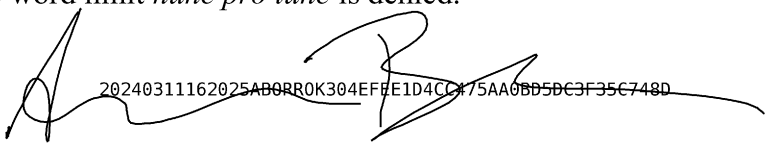
The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the motion to amend is denied without prejudice; and it is further

ORDERED that the motion to strike is denied; and it is further

ORDERED that the cross-motion to exceed the word limit *nunc pro tunc* is denied.



3/11/2024
DATE

ANDREW BORROK, J.S.C.

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