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U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc.
2014 NY Slip Op 50029(U)
Decided on January 15, 2014
Supreme Court, New York County
Bransten, J.
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Supreme Court, New York County

U.S. Bank National Association, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-1 (HEAT 2007-1), Plaintiff,

against

DLJ Mortgage Capital, Inc., Defendant.

650369/2013

Appearances of counsel:

Barry Levin, Darren Teshima, John Ansbro, and Richard A. Jacobsen of Orrick, Herrington & Sutcliffe LLP for Defendant DLJ Mortgage Capital, Inc.

Marc E. Kasowitz, Hector Torres, Christopher P. Johnson, and David J. Abrams of Kasowitz, Benson, Torres & Friedman LLP.

Eileen Bransten, J.

In this action, Plaintiff U.S. Bank National Association ("Trustee") asserts three breach of contract claims against Defendant DLJ Mortgage Capital, Inc. ("DLJ"). Defendant DLJ brings the instant motion, seeking to dismiss the Trustee's Amended Complaint in its entirety. [FN1] The Trustee opposes. For the reasons that follow, DLJ's motion is granted in part and denied in part.

I.*Background*

Plaintiffs' claims stem from the Home Equity Asset Trust 2007-1 ("HEAT 2007-1") securitization sponsored by DLJ, which was comprised of approximately 5,153 residential [*2]mortgage loans. (Am. Compl. ¶ 1.) These mortgage loans were pooled in the HEAT 2007-1 Trust, which issued certificates that were sold to investors. *Id.* The certificates represented interests in the mortgage loans, the value of which hinged on the quality of the loans themselves. *Id.*

DLJ made certain representations and warranties regarding the characteristics of the mortgage loans, including that the loans met certain quality standards and complied with sound underwriting practices and applicable legal requirements. *Id.* ¶ 2. In the event that any mortgage loans breached these representations and warranties — and the breaches materially and adversely affected the value of the loans and the interest of the certificateholders in the loans — the transaction's Pooling and Servicing Agreement ("PSA") required that DLJ cure or repurchase the breaching loans. *Id.*

Plaintiff alleges that its "[f]orensic review of certain loan files from the Trust establishes DLJ's extensive breaches of its [representations and warranties]." *Id.* ¶ 5. On December 6, 2011 and March 30, 2012, the Trustee gave notice to DLJ of breaches concerning 300 loans and 900 loans, respectively, which were purportedly in breach. *Id.* ¶ 7. Plaintiff contends that DLJ has refused to repurchase all but three of these loans. *Id.*

The initial complaint in this action was filed on February 1, 2013. On June 28, 2013, the Trustee filed an Amended Complaint, asserting three breach of contract claims against DLJ premised on DLJ's alleged breaches of representations and warranties and seeks: (1) specific performance of the repurchase protocol; (2) compensatory, consequential, rescissionary, and

equitable damages; and, (3) indemnification.

II.*Discussion*

DLJ now brings the instant motion to dismiss the Trustee's claims in their entirety. In support of its motion, DLJ contends that the Trustee's claims are time-barred and fail to state a cause of action. Each argument will be considered in turn.

A.*Motion to Dismiss Standard*

On a motion to dismiss for failure to state a cause of action, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977); *see* CPLR 3211 (a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 NY2d 83, 87-88 (1994). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 NY2d 144, 152 (2002) (internal quotation marks and citations omitted).

B.*Statute of Limitations*

DLJ first contends that the Trustee's entire Amended Complaint must be dismissed for failure to commence the action within New York's six-year limitations period for breach of contract claims. In support, DLJ argues that the Trustee's claims accrued, and the statute of limitations began running, on the "as of" date listed on the cover of the PSA: January 1, 2007. Therefore, according to DLJ, the filing of Plaintiff's original complaint on February 1, 2013 was [*3]untimely.

In New York, the statute of limitations for a breach of contract claim accrues at the time of the breach. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 NY2d 399, 402 (1993). "The Statute runs from the time of the breach though no damage occurs until later." *Id.* Here, the breach occurred at the time the representations and warranties at issue were made. The First Department recently ruled that breach of contract claims stemming from breaches of representations and warranties accrue on the closing date of the transaction. *See ACE Sec. Corp. v. DB Structured Prod., Inc.*, — N.Y.S.2d —, 2013 WL 6670379 at *1 (1st Dep't Dec. 19, 2013) ("To the contrary, the claims accrued on the closing date of the MLPA, March 28,

2006, when any breach of the representations and warranties therein occurred.").

DLJ argues that the First Department's ruling in *ACE Securities Corp.* does not guide the instant statute of limitations analysis, as the First Department did not consider whether claims accrue earlier than closing where the contract at issue is dated "as of" a prior date. In a January 6, 2014 letter, DLJ maintains that the contract at issue in *ACE Securities Corp.* was dated "as of" the closing. *See* Jan. 6, 2014 Letter from DLJ Counsel to Court (Docket No. 83).

Even accepting, for the sake of argument, DLJ's contention that the First Department's ruling is inapplicable, the language of the PSA for the instant transaction states that the representations and warranties for which Plaintiff seeks redress were made "as of the Closing Date," defined in the agreement as February 1, 2007. *See* Affirmation of Lori Lynn Phillips Ex. A § 2.03(b), § 1.01 ("PSA"). Thus, by arguing that Plaintiff's claims accrued on January 1, 2007, DLJ seeks to have the Court hold that such breach of representation and warranty claims accrued before the representations and warranties themselves were made. The loans at issue in this litigation were not in breach of the representations made under the PSA until those representations took effect on the Closing Date. As a result, the breach did not occur until the Closing Date, and Plaintiff's claims did not accrue until February 1, 2007.

DLJ cites to *Lana & Edward's Realty Corp. v. Katz/Weinstein Partnership*, 26 Misc 3d 1238(A) (Sup. Ct. Kings Cnty. Mar. 17, 2010) in support of its argument that breach of contract claims accrue on the "as of" date. In the *Lana & Edward's* case, the court concluded that representations made in a real property contract took effect on the date the contract was executed, notwithstanding the fact that the representation at issue was made as of a later date, the closing. The *Lana & Edward's* court premised its ruling on the determination that the representations must have been in effect at the time of execution since plaintiff had a remedy as of that time. The court noted that "[w]hile plaintiff could not have sought damages until it took title on [the closing date], it could have sued for rescission on [the contract execution date]." *Id.* at *4.

The same is not true here. As explained in the HEAT 2007-1 Prospectus Supplement, the Trust was not created until the Closing Date. *See* Affirmation of David J. Abrams Ex. 1 ("The depositor will establish the Home Equity Asset Trust 2007-1 on the closing date pursuant to a pooling and servicing agreement among the depositor, the seller, the servicers,

the modification oversight agent, the credit risk manager and the trustee, dated as of initial cut-off date."). Thus, the Trustee could not have sought a remedy on the "as of" date — and indeed no representations could have been made to the Trustee on that date — since the Trust did not yet exist. Accordingly, the Court concludes that even if the First Department's *ACE Securities Corp.* decision were inapplicable, Plaintiff's claims nonetheless accrued on the Closing Date, February [*4]1, 2007. Plaintiff's claims therefore are timely, since they were filed within six years of the date the representations at issue were made.

C.*Count Two — Compensatory, Consequential, Rescissionary and Equitable Damages*

DLJ next argues that the PSA's "sole remedy" provision precludes the Trustee's second claim for compensatory, consequential, rescissory and equitable damages. The "sole remedy" provision, found at Section 2.03(d) of the PSA, states in relevant part:

> It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or substitute any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor *or the Trustee on their behalf.*

(emphasis added.)

The language of this provision is clear and bars the recovery of the damages sought by Plaintiff for breaches of those representation and warranties made in PSA Section 2.03(b). To the extent that DLJ breaches its obligation to repurchase breaching loans under Section 2.03 (d), Plaintiff contends that it is entitled to "the full panoply of contract remedies under New York law." (Pl.'s Opp. Br. at 16.) However, the sole remedy contractual language agreed upon by the parties is not vitiated because DLJ allegedly breached its obligation to perform the remedy therein. Instead, the remedy in that instance is to direct DLJ's performance of its repurchase obligation. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 2011 WL 5335566, at *5 (S.D.NY Oct. 31, 2011) (rejecting plaintiff's assertion that the sole remedy provision "completely dissolve[s] in the event that, as alleged here, Flagstar fails to cure or repurchase' the defective loans within the applicable 30 day period."). Where a loan cannot be repurchased because, for example, it is no longer in the Trust, the remedy is an award of damages equal to the repurchase amount, consistent with the sole remedy provision.

Moreover, the cases cited by Plaintiff in support of its interpretation are not to the contrary. For example, Plaintiff cites to *LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc.*, 237 F. Supp. 2d 618, 638 (D. Md. 2002), a case in which the contract at issue did not contain a sole remedy provision. Plaintiff also cites to *Resolution Trust Corp. v. Key Financial Services, Inc.*, 280 F.3d 12, 18 (1st Cir. 2002) and *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 513 (S.D.NY 2013) — two cases in which courts held that plaintiffs' damages were limited to repurchase under a sole remedy provision and awarded damages equal to repurchase where repurchase itself was unavailing. In *Resolution Trust Corp.*, the First Circuit affirmed the district court's enforcement of a sole remedy provision and ruling that Defendant pay "damages equal to the repurchase amount" for loans that were no longer in the Trust. *See id.* at 18 n.15 ("In fact, the district court's calculation of damages merely represents what Key would have paid Home Owners had it repurchased the loans when it was supposed to have done so ..."). In *Assured Guaranty Municipal Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 513 (S.D.NY 2013), the district court held that under a sole remedy clause, [*5]a plaintiff-insurer's damages were limited to "reimbursement of the claims [the insurer] has paid to the bondholders to the extent that the amounts Flagstar should have paid into the Trust would be sufficient to cover Assured's claim payments." *Id.* at 513-514. Accordingly, Plaintiff's arguments as to these cases, and those cited with them in the briefing, do not allow for the Trust to evade the sole remedy language of the PSA.

Further, even if not barred under the "sole remedy" provision, Plaintiff's claims for consequential and rescissory damages nonetheless fail. Consequential damages are "rarely awarded" and are permitted only where the contract conveys that the parties intended consequential damages to be recoverable in the event of breach. *See Home Equity Mortg. Trust Series 2006-5 v. DLJ Mortg. Capital, Inc.*, No. 653787/2012, 2013 WL 5314331, at *6 (Sup. Ct. NY Cnty. Sept. 18, 2013). Here, Plaintiff points to no language and makes no argument that such damages were "within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting." *Brody Truck Rental v. Country Wide Ins. Co.*, 277 AD2d 125 (1st Dep't 2000). The Court likewise finds no such language. Thus, Plaintiff's claim for consequential damages merits dismissal.

Plaintiff's claim for rescissory damages also fails. As the First Department noted in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 105 AD3d 412, 413 (1st Dep't 2013), rescission is a "very rarely used equitable tool." Indeed, the First Department

explained that rescissory damages are only applicable where rescission is impracticable and no alternative legal remedies are availing. *Id.*; *see also Alper v. Seavey*, 9 AD3d 263, 264 (1st Dep't 2004) ("Generally, rescission is available where a party lacks a "complete and adequate remedy at law and where the status quo may be substantially restored."). While Plaintiff maintains that rescission would be impracticable, Plaintiff's claim for rescissory damages lacks merit, since Plaintiff has an alternative remedy — repurchase. Notwithstanding Plaintiff's "pervasive breach" arguments, the sole remedy provision agreed to by the parties limits the Trust's remedies to the repurchase protocol.

Although Plaintiff contends that DLJ's arguments regarding damages are premature on this motion to dismiss, the arguments raise purely legal issues for which no further analysis or discovery of facts is necessary. Accordingly, it is unnecessary to defer consideration of these issues, and the Court grants DLJ's motion to dismiss count two of Plaintiff's Amended Complaint.

D.*Count Three — Indemnification*

Finally, DLJ seeks dismissal of the Trustee's claim for reimbursement of expenses incurred in bringing this suit, including attorneys' fees. The Trustee premises its claim on Section 2.03(d) of the PSA, which provides, in relevant part, that "[DLJ] shall promptly reimburse ... the Trustee for any actual out-of-pocket expenses reasonably incurred by ... the Trustee in respect of enforcing the remedies for" a breach of representation and warranty. DLJ contends that this reimbursement provision does not demonstrate an intent to indemnify the Trustee for claims brought between the parties themselves.

Under New York law, "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assoc. Ltd. v. AGS Computers, Inc.*, 74 NY2d [*6]487, 491 (1989). For an indemnification clause, such as the one at issue here, to cover claims between the contracting parties rather than third party actions, the language of the indemnification provision must be "unmistakably clear" and "exclusively or unequivocally" reflect that the parties intended for indemnification of costs arising out of litigation between the parties. *Id.* at 492; *see also Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 AD3d 203, 206 (1st Dep't 2010) (stating that under *Hooper*, "for an indemnification clause to cover claims between the contracting parties rather than third party claims, its language must

unequivocally reflect that intent.").

The provision at issue here "falls short of satisfying [*Hooper*'s] exacting standard." *Gotham Partners, L.P.*, 76 AD3d at 206. Section 2.03(d) does not contain language clearly permitting the Trustee to recover costs incurred in a suit against DLJ and does not "exclusively or unequivocally refer[] to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff" for the expenses incurred in bringing this litigation. *Hooper Assoc. Ltd.*, 74 NY2d at 492. Accordingly, DLJ's motion to dismiss the Trustee's claim for indemnification is granted.

III.*Conclusion*

For the foregoing reasons, it is

ORDERED that Defendant DLJ Mortgage Capital, Inc.'s motion to dismiss is granted as to counts two and three of the Amended Complaint, and is otherwise denied; and it is

ORDERED that Defendant DLJ Mortgage Capital, Inc. is directed to serve an Answer to the Amended Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on March 11, 2013, at 10 AM.

Dated: New York, New York

January 15, 2014

E N T E R

/s/

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: After DLJ filed its motion to dismiss, Plaintiff filed an Amended Complaint. The parties then agreed that the instant motion "and all associated briefing relating thereto shall be

deemed applicable to the Amended Complaint." *See* July 12, 2013 Stipulation and Order (Docket No. 45). Accordingly, the Court considers the Amended Complaint for the purpose of this motion to dismiss.

Return to Decision List