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Bank of N.Y. Mellon v WMC Mtge., LLC
2015 NY Slip Op 25318
Decided on September 18, 2015
Supreme Court, New York County
Kornreich, J.
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The Bank of New York Mellon, Solely in its Capacity as Securities Administrator for J.P. Morgan Mortgage Acquisition Trust, SERIES 2006-WMC2, Plaintiff,

against

WMC Mortgage, LLC, as Successor-by-Merger- to WMC MORTGAGE ACQUISITON CORP., J.P. MORGAN MORTGAGE ACQUISITON CORPORATION, and J.P. MORGAN CHASE BANK, N.A., Defendants.

653831/2013

Quinn Emanuel Urquhart & Sullivan, LLP, for plaintiff.

Jenner & Block LLP, for WMC.

Sullivan & Cromwell LLP, for JPMorgan.

Shirley Werner Kornreich, J.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendants WMC Mortgage, LLC (WMC), J.P. Morgan Mortgage Acquisition Corporation (JPMMAC), and J.P. Morgan Chase Bank, N.A. (JPMC Bank, and together with JPMMAC, JPMorgan) move, pursuant to CPLR 3211, to dismiss the complaint. Defendants' motions are granted for the reason that follow.

I.*Procedural History & Factual Background*

This is a residential mortgage backed securities (RMBS) put-back action. Familiarity with this type of case is presumed.[FN1] *See generally Morgan Stanley Mortg. Loan Trust 2007-2AX (MSM 2007-2AX) v Morgan Stanley Mortg. Capital Holdings LLC*, 2014 WL 6669698, at *1 (Sup Ct, NY County 2014) (Friedman, J.) (collecting cases); *see also FHFA v Nomura Holding [*2]Am. Inc.*, 2015 WL 2183875, at *5-13 (SDNY 2015) (Cote, J.) (detailed discussion of the origination and securitization process). This action concerns the J.P. Morgan Mortgage Acquisition

Trust, Series 2006-WMC2 (the Trust), for which JPMMAC was the sponsor, JPMC Bank is the servicer, and WMC was the originator. Pursuant to a Mortgage Loan Sale and Interim Servicing Agreement, dated as of July 1, 2005 (the MLSA) (*see* Dkt. 7),[FN2] JPMMAC purchased loans from WMC, then sold some of those loans to a "depositor" (in this case, a non-party JPMorgan affiliate), and the loans were transferred to the Trust pursuant to a Pooling and Servicing Agreement (the PSA) (*see* Dkt. 8), which had a closing date of June 28, 2006.

On November 1, 2013, plaintiff, The Bank of New York Mellon, the Securities Administrator for the Trust, commenced the instant action seeking to put back non-conforming loans (i.e., those that do not conform to their applicable representations and warranties) by filing a summons with notice. Plaintiff filed a complaint on December 23, 2013. *See* Dkt. 6

Defendants originally moved to dismiss on March 14, 2014, arguing that plaintiff's put-back claims were time barred under *ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 112 AD3d 522 (1st Dept 2013), a decision issued by the Appellate Division on December 19, 2013. It is undisputed that, as in *ACE*, the transaction closed more than six years before this action was commenced. Therefore, in opposition, plaintiff attempted to distinguish this action from *ACE*, arguing that differences in the transaction and its claims render the case timely. Oral argument was held on May 6, 2014. *See* Dkt. 82 (5/6/14 Tr.).

In an order dated June 27, 2014 (Dkt. 83), the court stayed this action pending a decision by the Court of Appeals in *ACE*. On June 11, 2015, the Court of Appeals affirmed the ruling of the Appellate Division. *See ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 25 NY3d 581 (2015). Consequently, it is now the law in New York that to timely commence a put-back action, the trustee must commence suit within six years of the PSA's closing. As noted above, it is undisputed that this action was commenced after this six year period had elapsed.[FN3] By order dated June 15, 2015 (Dkt. 90), the court directed further briefing to afford plaintiff the opportunity to argue that *ACE* does not render this case time-barred. The parties submitted supplemental

briefing (*see* Dkt. 91-98), and the motions have now been marked fully submitted.

II.*Discussion*

Plaintiff proffers two arguments as to why this action is not time barred under *ACE*. First, plaintiff argues that the MLSA expressly provides that a put-back claim does not accrue [*3]until defendants breach the repurchase protocol and that such accrual provision is a substantive condition precedent to suit which is enforceable under well-settled New York law, as well as *ACE*. Indeed, plaintiff goes so far as to argue that "*ACE* mandates denial of Defendants' motions to dismiss." *See* Dkt. 91 at 4. Defendants disagree, arguing that the accrual provision is a procedural condition precedent and, in any event, is unenforceable under New York law, which, defendants further aver, was not disturbed by *ACE*. Plaintiff's second argument is that it has pleaded a valid cause of action against JPMorgan for "failure to notify" which, plaintiff contends, may be maintained as an independent cause of action and which is not time barred. Defendants, again, disagree, arguing that every court to consider these arguments, including this one, has rejected them. For the reasons set forth below, defendants are correct in all respects and this action is dismissed as time barred.

A.The MLSA's Accrual Provision

Section 7.03 of the MLSA, titled "Remedies for Breach of Representations and Warranties", contains what is colloquially known as the "repurchase protocol". *See* Dkt. 8 at 42. It provides, *inter alia*, that:

Within sixty (60) days of the earlier of either discovery by or notice to either the Seller or the Servicer of any breach of a representation or warranty which materially and adversely affects the value of a Mortgage Loan or the Mortgage Loans or the interest of the Purchaser therein, the Seller or the Servicer, as the case may be, shall use its

commercially reasonable efforts promptly to cure such breach in all material respects and, if such breach cannot be cured, the Seller shall repurchase such Mortgage Loan or Mortgage Loans at the Repurchase Price.

See id. Section 7.03, which spans approximately two single-spaced pages, concludes by stating:

It is understood and agreed that the obligations of the Seller or the Servicer, as applicable, set forth in this Subsection 7.03 to cure, repurchase or substitute for a defective Mortgage Loan and/or to indemnify the Purchaser **constitute the sole remedies** of the Purchaser respecting a breach of the representations and warranties set forth in Subsections 7.01 and 7.02.

See id. at 44 (emphasis added). The subject accrual language appears in the second to last paragraph of Section 7.03, which provides:

Any cause of action against the Seller or the Servicer, as applicable, relating to or arising out of the breach of any representations and warranties made in Subsection 7.01 or 7.02 **shall accrue** upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller or the Servicer to Purchaser, (ii) failure by the Seller or the Servicer, as applicable, to cure such breach, repurchase such Mortgage Loan as specified above, substitute a Substitute Mortgage Loan for such Mortgage Loan as specified above and/or indemnify the Purchaser, **and** (iii) demand upon

the Seller or the Servicer, as applicable, by the Purchaser for compliance with the terms of this Agreement.

See id. at 43-44 (emphasis added). The word "and" prior to step three indicates that a put-back claim does not accrue until plaintiff serves a demand on defendants after defendants refuse to cure or repurchase an allegedly non-conforming loan. Plaintiff, therefore, contends that even though *ACE* held that put-back claims accrue at closing, the holding in *ACE* was a default rule that is applicable only when RMBS contracts are silent on accrual. Plaintiff avers that where, as [*4]here, the MLSA is not silent, and expressly provides a specific accrual date, that accrual date must govern for statute of limitations purposes.

There is much intuitive appeal to plaintiff's position. Plaintiff is basically arguing that the court should respect sophisticated parties' express contractual decisions with respect to accrual of their claims with the same level of deference courts ordinarily provide to all other unambiguous contractual provisions. *See Quadrant Structured Prods. Co. v Vertin*, 23 NY3d 549, 559-60 (2014) ("In construing a contract we look to its language, for a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'"), quoting *Greenfield v Philles Records,* 98 NY2d 562, 569 (2002). To wit, in the very decision *ACE* overturned, this court noted that "[i]t is highly peculiar that the PSA would leave out an effective 6-year statute of repose if such a limitations period were actually contemplated by the parties." *See ACE Secs. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 40 Misc 3d 562, 567 (Sup Ct, NY County 2013). Here, the parties not only set forth a comprehensive repurchase protocol, they even set forth a precise three step process that would be used to define and determine the accrual of a claim for breach of Section 7.03 — plaintiff's sole remedy for defendants' breaches of the MLSA's representations and warranties.

However, intuition, as we know, does not always carry the day. The Court of Appeals has reaffirmed this state's longstanding public policy of providing for statute of limitations rules that take precedence over competing contractual and equitable considerations. *See ACE*, 25 NY3d at 593-94 (discussing the paramount "objectives of finality, certainty and predictability"). The *ACE* Court considered and rejected an RMBS trustee's arguments regarding why put-back claims should not be considered to accrue at closing. *See ACE*, 25 NY3d at 593-97. That

holding, as plaintiff concedes, is applicable to this case. The Court, however, also addressed what it deemed to be "The Trust's strongest argument": "that the cure or repurchase obligation was a **substantive** condition precedent to suit that delayed accrual of the cause of action." *Id.* at 597 (emphasis added). It rejected this argument. In holding that pre-suit repurchase demand is a procedural (as opposed to substantive) condition precedent, the Court distinguished "between a demand that is a condition to a party's *performance* and a demand that seeks a remedy for a preexisting wrong." *Id.* (emphasis in original). The Court reasoned that "[t]he Trust suffered a legal wrong at the moment DBSP allegedly breached the representations and warranties," that "the Trust was just limited in its remedies for that breach," and "[h]ence, the condition was a procedural prerequisite to suit." *Id.* at 597-98.

There is no difference here. Though *ACE* did not involve an accrual provision, the substance of the pre-suit demand process in the MLSA is substantively similar to the contracts in *ACE* and, indeed, is substantially similar to the typical governing contracts in put-back actions. Consequently, the court cannot hold that the repurchase protocol in Section 7.03 of the MLSA is a substantive condition precedent without contravening *ACE*. Moreover, every New York court to consider the issue has held that the repurchase protocol is a procedural condition precedent. *See, e.g., U.S. Bank Nat'l Ass'n v Greenpoint Mortg. Funding, Inc.*, 2015 WL 915444, at *6 (Sup Ct, NY County 2015) (Friedman, J.); *Deutsche Bank Nat'l Trust Co. v Quicken Loans Inc.*, 2014 WL 3819356, at *3-4 (SDNY 2014) (Crotty, J.); *Lehman XS Trust, Series 2006-GP2 v GreenPoint Mort. Funding, Inc.*, 2014 WL 1301944, at *3 (SDNY 2014) (Carter, J.); *Lehman XS Trust, Series 2006-4N v Greenpoint Mort. Funding, Inc.*, 991 FSupp2d 472, 478 (SDNY 2014) (Scheindlin, J.).

Although *Bear Stearns Mort. Funding Trust 2006-SL1 v EMC Mort. LLC*, 2015 WL 139731 (Del Ch 2015) holds otherwise, it is a Delaware case in which Vice Chancellor Laster held that Delaware law recognizes accrual provisions as conditions precedent to suit and permits such provisions to extend the statute of limitations. *See id.* at *10-12. Delaware law, thus, appears to differ from New York law.[FN4] *see also Bear Stearns*, 2015 WL 139731, at *17 ("[N]o matter the basis for plaintiff's put-back cause of action, it is a claim for an amount of money under the

Repurchase Protocol for non-compliant loans. Consequently, much of the parties' dispute ... [including] how to properly characterize the breach (e.g. failure to repurchase vs. failure to notify) ... does not merit further discussion."), quoting *WMC4*, 41 Misc 3d 1230(A), at *2-3. After *ACE*, the notion that a separate failure to notify claim is viable should be put to rest. *See Bank of NY Mellon v WMC Mort., LLC*, 2015 WL 4163343, at *2 n.4 (SDNY 2015) (Cote, J.). Accordingly, it is

ORDERED that the motions by defendants WMC Mortgage, LLC, J.P. Morgan Mortgage Acquisition Corporation, and J.P. Morgan Chase Bank, N.A. to dismiss the complaint

are granted, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Dated: September 18, 2015ENTER:

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J.S.C.

Footnotes

Footnote 1: The court also assumes familiarity with its decision on the motion to dismiss in *Bank of NY Mellon v WMC Mortg., LLC*, 41 Misc 3d 1230(A) (Sup Ct, NY County 2013) (*WMC4*). *WMC4* is a related RMBS put-back case with virtually identical contracts. The court's decision in *WMC4* rejected interpretations of the contracts that defendants argued warranted dismissal. Hence, defendants agreed not to reargue those issues on this motion. Instead,

defendants' briefs only address their statute of limitations arguments. Defendants, however, preserved their right to appeal the contract interpretation issues.

Footnote 2: Plaintiff's supplemental briefs erroneously refer to the MLSA as the "MLPA", an acronym that ordinarily stands for "Mortgage Loan Purchase Agreement." *See, e.g., Ace Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Prods., Inc.*, 5 FSupp3d 543, 548 (SDNY 2014). The MLSA in this case is tantamount to the MLPA in other actions.

Footnote 3: It should be noted that the statute of limitations did not actually expire on June 28, 2012, six years after closing. Rather, on June 26, 2012, the parties executed a tolling agreement, which expired on December 26, 2012. Defendants concede that the tolling agreement extended the statute of limitations to December 28, 2012. In any event, plaintiff did not commence this action until November 1, 2013, more than seven years after closing, and approximately ten months after the tolling agreement expired.

Footnote 4: It should be noted, however, that courts in other jurisdictions, where the RMBS contracts are not governed by New York law, have refused to follow *ACE*. *See ResCap Liquidating Trust v EquiFirst Corp.*, 2015 WL 5008722, at *1-2 (D Minn 2015).

However, the contracts in this action are governed by New York law. This court will not contravene *ACE*, nor will it deviate from the clear consensus of every New York federal and state court trial court judge to consider this issue. *See U.S. Bank*, 2015 WL 915444, at *5 ("[t]he accrual provision cannot serve to delay the accrual of the breach of contract cause of action for purposes of the statute of limitations."), citing *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 551 (1979) ("If the agreement to waive' or extend the Statute of Limitations is made at the inception of liability it is unenforceable"); *see Lehman*, 2014 WL 1301944, at *3 (same). Contrary to plaintiff's argument, *ACE* did not purport to abrogate *Kassner*, nor does this court believe *Kassner* was abrogated *sub silentio*. Accordingly, the MLSA's accrual provision does not render this action to be timely.

B.Failure to Notify

To the extent this court has not expressly ruled on whether a "failure to notify" claim is an independent cause of action, it does so now, and holds that such an independent cause of action is not viable. Plaintiff bases this claim on Section 7.03 of the MLSA and Section 2.03 of the PSA, i.e., the repurchase protocol, which provide that if defendants discover a material and adverse breach of the representations and warranties, defendants must "give prompt written notice" to plaintiff. *See* Dkt. 8 at 42; *see* Dkt. 7 at 29. Virtually every court to consider this language, particularly where, as here, the MLSA contains a "sole remedy" clause, has concluded that a plaintiff has no independent cause of action for failure to notify. Plaintiff's remedy is the repurchase protocol, and under *ACE*, that remedy is no longer available since a claim for the underlying breach of the representations and warranties is time barred. The *ACE* Court recognized this:

> [C]ure or repurchase obligation [is] not a separate and continuing promise of future performance; rather, it [is] the Trust's sole remedy in the event of [the bank's] breach of representations and warranties. Viewed in this light, the cure or repurchase obligation [is] not an independently enforceable right.

ACE, 25 NY3d at 599-600. If the "cure or repurchase obligation" is not an independent promise of future performance, the bank's obligation to notify the Trustee cannot be considered to be an independent obligation since both are components of the repurchase protocol. Holding otherwise would contravene *ACE*.

Indeed, this holding was the prevailing view prior to *ACE*. *See Deutsche Bank Nat'l Trust Co. v Flagstar Capital Markets Corp.,* 2015 WL 1646683, at *4 (Sup Ct, NY County 2015) (Friedman, J.) ("this court has previously held that a seller's failure to notify the trustee of breaching loans is also not an independent breach of contract. Rather, non-compliance with the [*5]notice requirement under the repurchase protocol, a remedial

provision, does not give rise to an independent breach of contract by the seller, or expand the remedies available against the seller under the contract."), citing *Morgan Stanley Mortg. Loan Trust 2006-13Arx v Morgan Stanley Mortg. Capital Holdings LLC*, 2014 WL 4829638, at *2 (Sup Ct, NY County 2014) (Friedman, J.) ("Th[e] cause of action for failure to notify must be rejected, as it is yet another way of asserting that breaches of the repurchase protocol constitute independent breaches of the contract which are not subject to the limited remedy for breach of the mortgage representations agreed to by the parties");[FN5] Justice Friedman did note "that there is authority that a cause of action for breach of an obligation to notify may be pleaded against the servicer in an RMBS transaction, where the Trustee's relief against the servicer is not limited by the sole remedy provision." *See Morgan Stanley*, 2014 WL 4829638, at *2 n.1, citing *SACO I Trust 2006-5 v EMC Mort. LLC*, 2014 WL 2451356, at *11 (Sup Ct, NY County 2014) (Bransten, J.). In *SACO*, Justice Bransten held that a failure to notify claim was validity pleaded against a servicer not bound by the sole remedy clause, but that "damages for this claim are limited to repurchase or damages in the amount of the repurchase price." *Id.* at *11.

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