UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BANK OF NEW YORK MELLON, solely as Trustee for GE-WMC Mortgage Securities Trust 2006-1, Plaintiff, -v- WMC MORTGAGE, LLC, and GE MORTGAGE HOLDING, L.L.C., Defendants.	12cv7096 (DLC) OPINION AND ORDER

APPEARANCES

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DENISE COTE, District Judge:

Defendant WMC Mortgage, LLC ("WMC") brings this motion for a jury trial pursuant to the Seventh Amendment of the U.S. Constitution, which guarantees the right to a jury trial for cases arising in law. The underlying action consists principally of a breach of contract claim brought by Bank of New York Mellon as the trustee ("BoNY" or "Trustee") of a residential mortgage backed securities ("RMBS") trust against the entities that sponsored and arranged for the securitization, based on breaches of the representations and warranties that were made to describe the loans ("R&Ws") backing the securitization. The governing contract provides for equitable remedies only, but BoNY has sought money damages where the equitable remedies are no longer available. On May 22, 2015, this Court issued an Opinion finding that money damages were available in lieu of the equitable relief described in the contract. Bank of New York Mellon v. WMC Mortgage, LLC, 12cv7096 (DLC), 2015 WL 2449313 (S.D.N.Y. May 22, 2015). For the following reasons, WMC's motion for a jury trial is denied.

BACKGROUND

The trust, GE-WMC Mortgage Securities Trust 2006-I ("Trust"), contains 4,654 residential mortgage loans originated or acquired by WMC. The Trust received the loans pursuant to a Pooling and Servicing Agreement ("PSA"). Upon discovery or receipt of notice of a breach of the R&WS, the PSA requires the Trustee to notify WMC, the sponsor of the securitization, who must then cure the breach, "substitute for" the defective loan, or repurchase the defective loan from the Trust within 90 days of receiving the notice. This remedy constitutes the "sole remedy . . . available to the Trustee."

A separate contract, to which the Trustee is not a party but which it has the right to enforce, requires WMC to cure, repurchase, or substitute for a defective loan if it discovers or receives notice of a breach of the R&Ws. This document, the Mortgage Loan Purchase Agreement ("MLPA"), requires WMC to repurchase defective loans at a "price equal to the Purchase Price." The PSA includes a formula for calculating the Purchase Price. According to this formula, the Purchase Price of some loans where the underlying property has been foreclosed upon will be zero. Much like the PSA, the MLPA provides that the obligations of WMC to cure, repurchase, or substitute for a

defective loan "constitute the sole remedies of [the Trustee] against [WMC]."

From the time that the loans were transferred to the Trust, the servicer of the loans foreclosed on and sold a number of properties securing the mortgage loans. The parties have not provided the percentage of loans at issue in this lawsuit where the underlying property was foreclosed upon, but it appears that as many as 1,829 loans may fall into this category.

BoNY commenced this suit on August 21, 2012 in state court. WMC removed the case to federal court on September 20, 2012, and BoNY amended its complaint on May 29, 2013 ("Complaint"). In the Complaint, BoNY requests a judgment against WMC in the form of "damages in an amount to be determined at trial, but in an amount that is not less than $378 million."

On September 6, the parties submitted a joint scheduling order form to the Honorable Katherine B. Forrest, to whom this action was then assigned ("Joint Scheduling Order"). The Joint Scheduling Order states that "Trial will be before a jury. [To the extent permitted by the governing agreements]." (Brackets in original.) Having denied pending motions to dismiss, on September 13, Judge Forrest issued a scheduling order adopting the parties' Joint Scheduling Order. The September 13

scheduling order states that trial will be before a jury to the extent permitted by the governing agreements. This case was reassigned to this Court approximately one year later, on September 16, 2014.

On December 17, 2014, WMC filed a motion for partial summary judgment on the ground that BoNY's remedies were limited under the PSA and MLPA to repurchase, cure, or substitution, and that these equitable remedies were not available for loans that had already been liquidated due to foreclosure on the underlying property. This Court held that where equitable relief was "impossible" or "impracticable," "money damages may be awarded in lieu of repurchase even where equitable relief is described as the 'sole remedy.'" Bank of New York Mellon, 2015 WL 2449313, at *2. As a consequence, the remedies for BoNY's claim based on breaches of the R&Ws differ based on the foreclosure status of the properties securing the loans. First, for loans where the underlying properties have not been foreclosed upon, BoNY's remedies are limited to the equitable remedies described in the MLPA, namely repurchase, cure, or substitution.[1] Second,

[1] The only remedy at issue here is the repurchase remedy. Substitution of a different mortgage loan is only available for two years following the contract's closing date, which has long since expired. Nor has BoNY asked WMC to cure any breaches.

for loans that have been liquidated, BoNY may receive money damages "in lieu of repurchase." Id.

WMC filed the instant motion for a jury trial on March 17, 2015. The motion was fully submitted on April 10. A trial is scheduled for September 21, 2015.

DISCUSSION

BoNY brought seven claims in the Complaint. Summary judgment has been granted in favor of the defendants on four of these claims.[2] In the principal remaining claim, BoNY seeks to enforce its contractual rights under the MLPA.[3] The central question presented by WMC's motion for a jury trial is whether this claim arises in law or equity. WMC argues that a breach of contract claim where the plaintiff seeks money damages despite the express prohibition in the governing contract is a "classic" legal claim and gives WMC a right to a jury trial under the

[2] WMC argued that it is also entitled a jury trial on Count IV of the Complaint, which is a claim for indemnification, but also moved to dismiss Count IV. As summary judgment has been entered in WMC's favor on the claim, WMC's entitlement to a jury trial on the issue presented in Count IV is not considered as part of this motion.

[3] The other two remaining claims include a declaratory judgment seeking to enforce the contract, and a claim for breach of contract for failure to notify BoNY of breaches of the R&Ws. The failure to notify claim may be barred by the recent New York Court of Appeals decision in ACE Sec. Corp. v. DB Structured Products, Inc., No. 85, 2015 WL 3616244 (N.Y. June 11, 2015).

Seventh Amendment. BoNY contends that a breach of contract claim, where the contract provides only for equitable relief, is equitable in nature, and any damages awarded to afford complete relief under the contract remain equitable in nature.

Equity developed in England after the emergence of the common law system as a means of resolving disputes where an unusual set of facts did not conform to the writs used to initiate a common law action in the courts of law. 1 Dan B. Dobbs, Law of Remedies § 2.2, at 67 (2d ed. 1993). Over time, suits in equity were brought before the King's Chancellor. By the fifteenth century, there was a dual system of common law courts and chancery courts of equity. Id. § 2.2, at 72. The "[l]aw courts were physically and historically separate from equity courts, staffed by different judges from different intellectual traditions." 3 Dobbs, supra, § 12.8(2), at 201.

In the United States, the Judiciary Act of 1789 conferred on federal courts jurisdiction over "all suits of a civil nature at common law or in equity" where there is subject matter jurisdiction. 1 Stat. 78 (1789). The jurisdiction conferred therefore included the "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of

Chancery at the time of the separation of the two countries." Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 318 (1999) (citation omitted).

In the nineteenth century, both the United States and England adopted procedural reforms that created one form of action, the civil action. 1 Dobbs, supra, § 2.6(1), at 148. These reforms are referred to as the merger of law and equity. Id. Before the merger, federal courts exercised powers in both equity and law but operated by "distinctly separating equity cases and [using] separate equity rules." Id. § 2.6(1) at 148 n.2. Only with the adoption of the Federal Rules of Civil Procedure in 1938 did this separation end in federal courts. Id. Under the Federal Rules, a party may join legal and equitable claims in a single action. Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471 (1962).

The Seventh Amendment guarantees the right to a trial by jury "in Suits at common law." U.S. Const. amend. VII. "Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time." Curtis v. Loether, 415 U.S. 189, 193 (1974). "The phrase 'Suits at common law' refers to suits in

which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." Eberhard v. Marcu, 530 F.3d 122, 135 (2d Cir. 2008) (citation omitted).

In Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), the Supreme Court set forth a two-part test to determine whether a private action is a "suit at common law." Eberhard, 530 F.3d at 135. The first step is to determine whether the action was a legal or equitable action in eighteenth-century England. Granfinanciera, 492 U.S. at 42. The second, which is weighed more heavily than the first, analyzes whether the remedy being sought is "legal or equitable in nature." Id.

When an action presents both legal and equitable claims, the plaintiff is entitled to a jury trial on the legal claims. Dairy Queen, 369 U.S. at 472-73. This right cannot be denied by characterizing legal claims as merely "incidental to" equitable issues. Curtis, 415 U.S. at 196 n.11; Dairy Queen, 369 U.S. at 470. Moreover, "the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings." Dairy Queen, 369 U.S. at 477-78. If a "legal claim is joined with an equitable claim, the right to a jury trial on

the legal claim, including all issues common to both claims, remains intact." Curtis, 415 U.S. at 196 n.11.

Turning to the first Granfinanciera prong, the Court finds that this action would have been brought before a court of equity in 1791.[4] In eighteenth-century England, the writ of assumpsit was used to redress contract claims seeking money damages. 1 Dobbs, supra, §§ 4.2(1), 4.2(3) (describing the development of the writ of assumpsit as a vehicle for enforcing ordinary contracts). Assumpsit was an action at law. See id. § 4.2(1), at 571 (describing assumpsit as a writ at "common law"); see also Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 459 (1977); 8 Moore's Federal Practice § 38.10(2)(c) (Matthew Bender 3d ed.). By contrast, an action for specific performance would have been brought before a court of equity. See Atlas Roofing, 430 U.S. at 459 ("[S]pecific performance was a remedy unavailable in a court of law . . . ."); see also 8 Moore's Federal Practice, supra, § 38.10(3); 3 Dobbs, supra, § 12.8, at 191. In some circumstances, where an action was brought for specific

[4] The parties did not address in their briefing the Granfinanciera test or eighteenth-century jurisprudence.

performance, the English Court of Chancery would award money damages as a substitute for equitable relief. See Fleming James, Jr., Right to A Jury Trial in Civil Actions, 72 Yale L.J. 655, 659 n.27, 672-73, 677 (1963).

There is no dispute that the remedies described in the MLPA and PSA as BoNY's "sole remedies" for breaches of the R&Ws are equitable in nature, and the Complaint brings a breach of contract claim seeking to enforce these remedies. A claim relating to the breach of R&Ws is thus a claim for specific performance, and would have been enforced in a court of equity in the eighteenth century. Atlas Roofing, 430 U.S. at 459. The conclusion that such an action arises in equity is not altered by the fact that BoNY framed its claim as one for damages; the right to a jury trial does not turn on the form of the complaint. Dairy Queen, 369 U.S. at 477-78.

Because the Seventh Amendment "preserve[s] the right to a jury trial as it existed in 1791," Curtis, 415 U.S. at 193, it may be unnecessary to discuss the second prong of the Granfinanciera analysis in those instances in which the claim existed in 1791 and the historical record makes it clear that the action would have been brought in law or equity in eighteenth-century England. After all, the Granfinanciera test

was developed in the context of a statutory claim. 492 U.S. at 23.

As a breach of contract claim seeking specific performance existed in 1791 and could only have been brought in a court of equity, the first Granfinanciera prong could be viewed as dispositive. But, as at least one commentator has noted, American equitable courts expanded the concept of substituted relief (when specific performance was unavailable) beyond what was permitted in eighteenth-century England. James, supra, at 677; see also Edward Yorio, Contract Enforcement: Specific Performance and Injunctions §§ 19.1-19.3. For this additional reason, it is appropriate to complete the Granfinanciera analysis.

The second Granfinanciera factor asks whether the remedy sought is legal or equitable. The remedy sought by BoNY is equitable. As the Court of Appeals for the Sixth Circuit observed in Golden v. Kelsey-Hayes Co., 73 F.3d 648, 661 (6th Cir. 1996), a monetary award can be an equitable remedy even though it is generally a form of legal relief. See generally Restatement §§ 346-56. The Supreme Court itself has recognized that not every "award of monetary relief must necessarily be 'legal' relief." Chauffeurs, Teamsters & Helpers, Local No. 391

v. Terry, 494 U.S. 558, 570 (1990) (citation omitted). It is well established that "equitable relief includes monetary damages where required to afford complete relief." Restatement § 358(3); see also Tull v. United States, 481 U.S. 412, 424 (1987).

Accordingly, while every legal issue affords a party the right to a jury trial on that issue even if the legal issue is incidental to equitable claims, "a monetary award incidental to or intertwined with injunctive relief may be equitable." Terry, 494 U.S. at 571 (citation omitted). "A court does not err in denying a jury trial where the monetary award sought is incidental to, or intertwined with, equitable relief. It does err when it denies a jury trial because of its determination that legal issues in the case are merely incidental to equitable ones." Golden, 73 F.3d at 661; see also Entergy Arkansas, Inc. v. Nebraska, 358 F.3d 528, 546 (8th Cir. 2004).

The Court of Appeals for the Second Circuit recognized the distinction between legal issues incidental to equitable ones and monetary relief incidental to equitable relief in Crane Co. v. Am. Standard, Inc., 490 F.2d 332 (2d Cir. 1973). Holding that a defendant's Seventh Amendment right was not violated when

a judge awarded damages following a bench trial rather than an injunction, the Second Circuit distinguished cases

> where the question of the proper order for trying jury and non-jury issues arises before any trial has occurred, as in . . . Dairy Queen . . . [from] those where the action has been properly tried to a judge and damages enter the case only because defendant's acts subsequent to the judgment require retrospective relief, possibly including damages, rather than the prospective relief initially sought.

Id. at 341-42. The Second Circuit further noted that the unavailability of equitable relief as a result of the occurrence of the event sought to be enjoined would not "transform what had been a suit in equity into one at least partially at law simply because the chancellor might determine monetary relief to be a more appropriate remedy than a retrospective injunction." Id. at 342.

Applying these principles to the breach of contract claim here, it seeks an equitable remedy notwithstanding BoNY's request for damages. There is no dispute that the remedies described in the MLPA and PSA as BoNY's "sole remedies" are equitable. The breach of contract claim is based on breaches of the R&Ws in the MLPA. The fact that equity permits damages to be awarded where the specific equitable relief described by the contract is not available -- where the loans have been liquidated -- does not convert the otherwise equitable action to

an action at law. See id. Damages in such circumstances are "exactly the type of monetary relief that courts . . . envision as equitable relief; they are incidental to the grant of equitable relief, yet are necessary to afford complete relief." Entergy Arkansas, 358 F.3d at 546 (citation omitted).

WMC presents three main arguments in support of its motion for a jury trial on this claim. Each is unavailing. First, WMC argues that BoNY seeks money damages and any claim for such damages is by nature legal. It is true that BoNY framed its claim as one for damages rather than specific performance, and that contract actions for damages are historically (and in modern practice) legal in nature. As discussed above, however, the right to a jury trial does not depend on the form of the complaint. Dairy Queen, 369 U.S. at 477-78. A plaintiff cannot secure for itself the right to a jury trial by framing a claim to enforce equitable remedies as one for damages; nor could a plaintiff eliminate a defendant's right a jury trial by framing a legal claim as one for specific performance. A nominal claim for specific performance will not preclude a defendant's right to a jury trial if the claim seeks legal damages. But, here, the Complaint seeks enforcement of a contract providing for only an equitable remedy and only seeks damages on that cause of

action. An award of such damages is properly regarded as equitable in nature.[5] Golden, 73 F.3d at 661.

Second, WMC contends that case law establishing that a court of equity may award monetary relief is inapplicable because that case law predated the merger of law and equity in federal courts and is premised on the existence of the arguably defunct "clean up" doctrine. The clean-up rule allowed courts in equity to assume "incidental" jurisdiction to "decide all issues in a case, including legal issues, once they had taken jurisdiction to decide the equitable issues." See 1 Dobbs, supra, § 2.6(4), at 169. It is unclear whether the clean-up rule survived the merger of law and equity. See, e.g., Crane, 490 F.2d at 341-42. But, the cases describing monetary compensation as "equitable" where such compensation is incidental to equitable relief do not turn on the existence of the clean-up rule -- and, in any event, they post-date the merger of law and equity. See Entergy Arkansas, 358 F.3d at 546; Golden, 73 F.3d at 661; Crane, 490 F.2d at 341-42.

[5] It is worth observing that WMC and its affiliates drafted the MLPA. There can be no unfairness, therefore, in relying on that contract's terms to define the nature of the remedy available to the parties seeking to enforce its terms, and by extension, to answer the inquiry posed by Granfinanciera.

Finally, WMC argues that the claim for money damages cannot be incidental because the number of loans where equitable relief is no longer available is substantial in comparison to the number of loans where equitable relief is still available. Whether a single property was foreclosed upon, or many were, should not affect the determination of the nature of the remedy and the right to a jury trial. Rather, it is the presence of any legal issue, no matter how incidental, that would afford WMC the right to a jury trial. BoNY presents a claim for specific performance of WMC's repurchase obligation and requests a monetary award where such relief is unavailable. The need for a substituted remedy does not convert what would otherwise be an equitable claim into a legal one.

The plaintiff's claim, therefore, would have been brought in an equity court in eighteenth-century England and seeks an equitable remedy. Accordingly, WMC is not entitled to a jury trial based on BoNY's claim for breaches of the R&Ws.

CONCLUSION

WMC's March 17 motion for a jury trial is denied.

Dated: New York, New York
July 10, 2015

DENISE COTE
United States District Judge