Deutsche Bank Natl. Trust Co. v Barclays Bank PLC
2016 NY Slip Op 31056(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 651789/2013
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR2, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR3, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR4, SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR5,

Plaintiff,

– against –

BARCLAYS BANK PLC and WMC MORTGAGE, LLC, as successor to WMC MORTGAGE CORP.,

Defendants.

Index No.: 651789/2013

DECISION/ORDER

This residential mortgage-backed securities (RMBS) breach of contract action is brought by plaintiff trustee, Deutsche Bank National Trust Co. (DBNTC), against defendants, Barclays Bank PLC (Barclays or BBPLC), the parent of the non-party Depositor and the "Administrator" of the non-party Sponsor, and WMC Mortgage, LLC, as successor to WMC Mortgage Corp. (WMC), an Originator of mortgage loans underlying two of the four securitizations at issue. Defendants WMC and Barclays separately move to dismiss the complaint.

The complaint alleges that defendants breached representations and warranties regarding the quality and characteristics of mortgage loans underlying the four securitizations: Securitized

Asset Backed Receivables LLC Trust 2007-BR2 (BR2), 2007-BR3 (BR3), 2007-BR4 (BR4), and 2007-BR5 (BR5). For each of these four Trusts, Barclays and the Depositor entered into a Barclays Representation Agreement, in which Barclays made its representations and warranties regarding the mortgage loans, and agreed to a protocol for repurchase or substitution of loans as a remedy for breaches of such representations.[1] The date of each Barclays Representation Agreement was the Closing Date for the respective securitization: May 17, 2007 (BR2); June 13, 2007 (BR3); June 14, 2007 (BR4); and July 10, 2007 (BR5).

It is undisputed that this action was commenced with respect to the BR2, BR3, and BR5 Trusts by DBNTC's filing of a Summons with Notice on May 17, 2013, the six-year anniversary of the BR2 Closing Date. The action was commenced with respect to the BR4 Trust by DBNTC's filing of a Supplemental Summons with Notice on June 14, 2013, the six-year anniversary of the BR4 Closing Date. Prior to May 17, 2013, DBNTC sent Barclays a single repurchase demand, dated April 1, 2013, notifying Barclays of breaches affecting 326 loans in the BR5 Trust only. (Compl. ¶¶ 157-158, Barclays' Memo. In Support at 8.) As of May 17, 2013, the 60-day time period for Barclays to cure or repurchase, pursuant to the BR5 repurchase demand, had not yet expired. After the commencement of the action, DBNTC sent Barclays additional demand notices, identifying alleged breaches of representations and warranties for loans in each of the four securitizations.

WMC originated 3,465 loans of the 5,484 loans in the BR2 Trust and 1,585 loans of the 5,390 loans in the BR3 Trust. (See Tr. at 34; BR2 Prospectus Supp. at 130; BR3 Prospectus Supp. at 136.) The remaining loans underlying the BR2 and BR3 Trusts were originated by New Century. WMC made its representations and warranties regarding the loans it originated in

[1] In discussing the repurchase protocol established by section 3 (a) of the Barclays Representation Agreements, Barclays takes the position that the agreements are "substantively identical." (Oral Argument Transcript [Tr.] at 18.)

section 2.03 (b) of the Pooling and Servicing Agreements (PSAs) for the BR2 and BR3 securitizations. The BR2 PSA is dated April 1, 2007, with a Closing Date of May 17, 2007. The BR3 PSA is dated May 1, 2007, with a Closing Date of June 13, 2007. More than 60 days prior to the commencement of the action, DBNTC sent a series of repurchase demands to WMC, identifying a total of 823 allegedly defective loans in the BR2 securitization. (Complaint, ¶¶ 74-89.) DBNTC did not send any presuit repurchase demands regarding BR3 loans.

Barclays' Motion

In its motion to dismiss, Barclays argues that DBNTC's claims are untimely as to all four Trusts; that DBNTC's claims must be dismissed based on DBNTC's failure to provide prompt notice to Barclays of the alleged breaches of representations and warranties; that DBNTC is bound by the sole remedy provision in the repurchase protocol and is not entitled to damages; that Barclays is not obligated to repurchase liquidated loans; and that DBNTC is not entitled to attorney's fees.[2]

The arguments made on this motion are primarily the same as the arguments made by Barclays and DBNTC on a motion to dismiss determined by this court's May 25, 2016 decision in Deutsche Bank Natl. Trust Co., EquiFirst Loan Securitization Trust 2007-1 v EquiFirst Corp. (2016 WL 3017760 [Sup Ct NY County May 25, 2016] [DBNTC/EquiFirst].) That case involved a Barclays Representation Agreement with a virtually identical repurchase protocol. All of Barclays' asserted grounds for dismissal on this motion are decided as provided in

[2] At the oral argument of these motions, each defendant argued for the first time that rather than clearly framing its causes of action as ones for breaches of representations and warranties, plaintiff's complaint pleaded that defendants breached their obligation to repurchase defective loans. Defendants therefore asserted that the complaint should be dismissed with leave to replead. The court finds that the complaint adequately articulates a claim for breach of representations and warranties. To the extent plaintiff's claims are based on defendants' alleged breach of an independent obligation to cure or repurchase breaching loans, such claims cannot stand in light of ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015] [holding that the sponsor's "refusal to repurchase the allegedly defective mortgages did not give rise to a separate cause of action"].)

DBNTC/EquiFirst, on the authorities cited and for the reasons stated in that decision, which should be read together with this decision.[3] Here, the court will address only arguments specific to this action.

As to its assertion that DBNTC's claims are time-barred, Barclays argues, more explicitly than in DBNTC/EquiFirst, that DBNTC's Summonses with Notice did not toll the statute of limitations because DBNTC failed to satisfy repurchase demand conditions precedents for any of the Trusts prior to the commencement of the action and, with respect to the BR2, BR3, and BR4 Trusts, prior to the expiration of the statute of limitations. (Barclays' Memo. In Support at 10.)

This court adheres to its recent decision in ACE Securities Corp. v DB Structured Products, Inc. (___ Misc 3d ___, 29 NYS3d 139 [Sup Ct, NY County Mar. 29, 2016] [ACE IV]), rejecting this argument. That decision considered whether an RMBS breach of contract action could be refiled under CPLR 205 (a), where the Court of Appeals (25 NY3d 581 [2015] [ACE]) had upheld dismissal of the original action for failure to satisfy a repurchase demand condition precedent. Based on the text of the Court of Appeals' decision and review of an extensive body of law on the effect of condition precedent dismissals on the timeliness of an action, this court concluded that the Court of Appeals' condition precedent dismissal was not a dismissal on timeliness grounds and that the first ACE action was not rendered untimely by the plaintiff's failure to satisfy a repurchase demand condition precedent prior to commencing the first action or prior to the expiration of the statute of limitations. (ACE IV, 29 NYS3d at 151-159.) As also held in ACE IV and related decisions, the action will not be found to have been timely commenced unless the Summons with Notice was filed within the statute of limitations by a party with standing – in the case of typical RMBS governing agreements, the trustee, as opposed

[3] This case differs from DBNTC/EquiFirst in that the complaint does not plead a claim against Barclays for failure to notify the Trustee of breaches of representations and warranties.

to a certificateholder. (Id. at 143-146; U.S. Bank Natl. Assoc. [ABSHE 2006-HE7] v DLJ Mtge. Capital, Inc., 2016 WL 1306279, * 4 [Sup Ct, NY County March 29, 2016].) Reference is made to these decisions for a full discussion of the court's reasoning, which will not be repeated here.

As to Barclays' argument that section 3 (a) of the Barclays Representation Agreement, the repurchase protocol, does not provide for Barclays' repurchase of loans upon either its own discovery or notice to it of material breaches of representations and warranties regarding the loans, the court again holds that Barclays has not demonstrated on this motion that this action is not maintainable based on the allegations of the complaint as to Barclays' own discovery. Barclays cites the first sentence of section 3 (a), providing for Barclays to repurchase upon "receipt of request" from DBNTC. (Barclays' Reply Memo. at 6.) As in DBNTC/EquiFirst, however, Barclays does not address the effect of the second, third, and fifth sentences of section 3 (a) on the issue of whether, or under what circumstances, a repurchase demand is a condition precedent to maintenance of claims. (DBNTC/EquiFirst, 2016 WL 3017760 at * 5-6.) Further, as also previously held, the accrual clause does not impose a condition precedent requirement. (See U.S. Bank Natl. Assoc. [JPALT 2007-A2] v GreenPoint Mtge. Funding, Inc., 2015 WL 915444, * 5-6, 6 n 4 [Sup Ct, NY County March 3, 2015].)

The court rejects Barclays' argument that the Summonses with Notice were insufficient to toll the statute of limitations. Although the Supplemental Summons for BR4 does not specifically refer to forensic analyses of loans in that Trust, it otherwise contains detail comparable to that in the Summons with Notice for BR2, BR3, and BR5. This detail is, in turn, comparable to that in the Summons with Notice held sufficient in DBNTC/EquiFirst. (Id. at * 4.)

Finally, DBNTC seeks attorney's fees in connection with the Trustee's enforcement of

Barclays' repurchase obligation, based on the definition of Repurchase Price in the governing Pooling and Servicing Agreements. (DBNTC's Memo. In Opp. to Barclays' Motion at 24-25.) The definition of Repurchase Price in each of the four PSAs includes unpaid principal balance and interest, plus "all expenses incurred by the Trustee arising out of the Trustee's enforcement of Barclays' purchase obligation under the Barclays Representation Agreement." In considering a virtually identical definition of Repurchase Price in the PSA at issue in DBNTC/EquiFirst (2016 WL 3017760, at * 11 [citing appellate authorities]), this court held that this definition does not unmistakably evidence the parties' intent to authorize attorney's fees, as it does not expressly include such fees among the covered expenses. DBNTC's claim against Barclays for attorney's fees will therefore be dismissed.

The court notes that it is undisputed that the complaint does not seek relief against Barclays for breaches of representations and warranties with respect to WMC loans. As discussed further below, WMC concedes, on its own motion to dismiss, that it faces potential liability for attorney's fees under this Repurchase Price definition, in the event it is held to be obligated to repurchase its own loans. (See WMC's Memo. In Support at 24, n 18.) The court remains persuaded that the definition does not provide for attorney's fees. WMC's concession cannot, in any event, establish Barclays' liability for attorney's fees.

WMC's Motion

In moving to dismiss, WMC contends that DBNTC's claims are untimely as to the BR2 and BR3 Trusts based on the execution dates of the PSAs; that DBNTC's claims must be dismissed based on DBNTC's failure to provide prompt notice to WMC of alleged breaches of representations and warranties with respect to any loans that were not identified in presuit repurchase demands; that DBNTC is bound by the sole remedy provision in the repurchase

protocol and is not entitled to damages; that DBNTC's claim for WMC's failure to notify DBNTC of breaches is not an independent breach of contract and must be dismissed; and that DBNTC is not entitled to indemnification.

As to its timeliness claim, WMC contends that its representations and warranties in each PSA were made on the execution date of the PSA rather than the Closing Date, and that the execution date was the date "as of" which each PSA stated that it was dated. (WMC's Memo. In Support at 9-14; see BR2 cover page, stating: "POOLING AND SERVICING AGREEMENT Dated as of April 1, 2007"; BR3 cover page, stating: "POOLING AND SERVICING AGREEMENT Dated as of May 1, 2007.") WMC further contends that, as the execution dates of the PSAs for BR2 and BR3 were more six years before the filing of the Summons with Notice on May 17, 2013, the claims against it are untimely. DBNTC counters that WMC's representations and warranties claims accrued on the Closing Date of each PSA. In support of this contention, DBNTC claims that the Trusts did not possess any mortgage loans, and that the Trusts did not exist, prior to the Closing Dates. (DBNTC's Memo. In Opp. at 4-7.)

PSA section 2.03 (b) provides that: "WMC hereby makes the representations and warranties set forth in Schedule III and Schedule IV to the Depositor and to the Trustee, as of the dates set forth in such schedule." PSA Schedule III states that WMC makes the representations to the Trustee and the Depositor "as of the Closing Date or such other date as may be specified below." Other earlier dates are specified in this schedule for certain representations and warranties. It is undisputed, however, that a substantial majority of the representations and warranties were made as of the Closing Date.

As the Appellate Division has held in the RMBS context, claims for breaches of representations and warranties "typically accrue at the time the contract containing the

representations is executed." Even if a PSA is executed prior to the Closing Date, however, where the representations and warranties are made effective "as of the Closing Date . . . the claims accrue[] on that date and not earlier." (Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc., 2016 WL 2859548 [1st Dept May 17, 2016].) This action is therefore clearly maintainable based on those representations and warranties which, by their terms, were made effective as of the Closing Date.

To the extent that WMC argues that the complaint must be dismissed as to representations and warranties made effective on or prior to the execution (i.e., "as of") date of the PSAs, that argument is not properly determined on the record as developed.[4]

Issues exist as to the transfer of the loans to the Trusts. Each PSA provides for transfer to the Trustee of the Trust Fund "concurrently with the execution" of the PSA. (PSA § 2.01 [a].) The Trust Fund includes the loans. (PSA § 2.01, Art. I – Definitions.) The PSAs also contain provisions referring to the transfer of the loans on the Closing Date. (PSA § 2.03 [c], 2.07 [h].) WMC appears to acknowledge that at least some of the loans were not in fact transferred, and the loan pool therefore was not fixed, until the Closing Date; but it contends that any changes in the loan pool as of the Closing Date "were expected to be immaterial." (WMC's Reply Memo. at 2-5, 3 n 2.) WMC does not, however, adequately address the impact of changes in the loan pool as of the Closing Date on the accrual of representations and warranties claims. Its assertion that the changes would be immaterial is based on the Prospectus Supplement issued in connection with the offering. This document is not documentary evidence of a kind that is conclusive as to

[4] Although WMC claims that the execution date is the same as the "as of" date of the PSAs, the copies of the PSAs in the record on this motion contain signature pages which do not show actual signatures but, rather, indicate, by the symbol "/s/", that the PSAs have been signed "as of the day and year first above written." Review of execution copies of PSAs, which have been provided in other RMBS cases, shows that the dates of the actual signatures have not always corresponded to the "as of" dates of the PSA. (See e.g. U.S. Bank Natl. Assn, HEAT 2007-2 v DLJ Mtge. Capital, Inc., Sup Ct, NY County, No. 651174/13] [PSA, NYSCEF Doc. 53]; U.S. Bank Natl. Assn, CSMC 2007-NC1 v DLJ Mtge. Capital, Inc., Sup Ct, NY County, 652699/13 [PSA, NYSCEF Doc. 15].)

whether the changes were immaterial – a factual issue. Moreover, WMC fails to explain how plaintiff could assert a claim for a breach as to a loan that had not yet been transferred to the pool.

Issues also exist as to the date of creation of the Trusts. As the Appellate Division has held: "If a contractual representation or warranty is false when made, a claim for its breach accrues at the time of the execution of the contract. This is true even where the contract states that its 'effective date' is earlier. The claim cannot accrue earlier, because until there is a binding contract, there can be no claim for breach of warranty." (See also U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 121 AD3d 535 [1st Dept 2014] [internal citation omitted].) As the Court further observed, the Closing Date is significant because "the trust that is the recipient of the representations and warranties typically does not come into existence prior to the closing of the transaction." (Id. at 536.)

Here, without discussion of the provisions of the PSA governing establishment of the Trust, WMC asserts, and DBNTC contests, that the Trust was created prior to the Closing Date. (See WMC's Memo. In Support at 13 n 9; DBNTC's Memo. In Opp. at 6 n 5.) The PSA expressly addresses such establishment, providing: "The Depositor does hereby establish, pursuant to the further provisions of this Agreement and the laws of the State of New York, an express trust

. . . ." (PSA § 2.01 [c].) Yet, WMC does not discuss the import of the "further provisions," and thus fails on this record to demonstrate contractual support for its claim that the Trust came into existence prior to the Closing Date.

Finally, ACE (25 NY3d at 589, 593) is not to the contrary. There, the issue before the Court was whether an RMBS breach of contract cause of action accrued at the time

representations and warranties were made, or at the time a repurchase demand was rejected. The Court held that the sponsor's refusal to repurchase did not give rise to a separate cause of action, and that the claim for breach of representations and warranties accrued "at the point of contract execution." Notably, the point of contract execution was not a matter in dispute, and the date of execution was in fact the Closing Date.[5]

For the above reasons, the branch of WMC's motion for dismissal of representations and warranties made effective prior to the Closing Date will be denied.

The court rejects WMC's further contention that DBNTC's claims for breach of representations and warranties must be dismissed with respect to any loans other than the 823 BR2 Trust loans that were identified in presuit repurchase demands. PSA section 2.03 (d) sets forth the applicable repurchase protocol, which provides that "within 60 days of the earlier of either discovery by or notice to WMC" of any material breach of a representation or warranty "WMC shall use its best efforts . . . to promptly cure such breach . . . and, if such defect or breach cannot be remedied, WMC shall, at the Depositor's option as specified in writing and provided to WMC, the Custodian and the Trustee," (i) substitute another loan if within two years of the Closing Date or (ii) repurchase. WMC concedes, at least with respect to some loans, that its cure or repurchase obligation may be triggered by either discovery or notice. WMC, however, contends that DBNTC's allegations as to WMC's discovery of breaches are insufficient. (WMC's Memo. In Support at 6 n 4, 19 n 13.)

On the authorities cited and for the reasons stated in DBNTC/EquiFirst, a case involving substantially similar pleadings and governing agreements, the court holds that WMC has not

[5] The Appellate Division's May 17, 2016 decision in Nomura (2016 WL 2859548, supra), and its 2014 decision in U.S. Bank v DLJ, 121 AD3d 535 (supra), both cite only the Court of Appeals' or the Appellate Division's decision in ACE for the proposition that the claim for breach of representations and warranties accrues at the time of execution of the contract.

demonstrated that this action may not be maintained based on the allegations of this complaint as to WMC's own discovery of breaches. (2016 WL 3017760, at * 5-7.)

PSA section 2.03 (c) imposes an obligation upon the parties to the Agreement – i.e., WMC, the Depositor, the Trustee, the Servicer, and the Custodian – to give prompt written notice to the other parties upon discovery of a breach of any of WMC's representations. Given this provision, WMC's motion to dismiss the claim against it for failure to give prompt notice upon its alleged discovery of breaches will be denied without prejudice to the requested coordinated briefing on the import of Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024] [Nomura]) as set forth in the ordering provision (infra). (See id. at * 2-3.)

With respect to the remedies available to DBNTC, as this court has previously held, the Trustee may pursue damages consistent with the terms of the sole remedy provision. Unspecified consequential damages, rescission, and rescissory damages are not available. (DBNTC/EquiFirst, 2016 WL 3017760 at * 10 [citing authorities].)

As to attorney's fees, in the briefing of its motion to dismiss, WMC opposes any claim that the indemnification provisions permit the Trustee's recovery of attorney's fees for intra-party litigation, but states that "to the extent DB [i.e., DBNTC] seeks attorneys' fees in connection with the repurchase remedy, those fees are taken into account in calculating the Repurchase Price, if DB first proves it is entitled to that remedy." (WMC's Memo. In Support at 25 n 18 [emphasis WMC's].) The court therefore will not dismiss the attorney's fees claim at this time.

It is accordingly hereby ORDERED that Barclays' motion to dismiss is granted to the extent of dismissing the following claims: the second, fifth, seventh, and eighth causes of action

for breach of contract only insofar as they plead a claim for an independent breach of a duty to repurchase defective loans; and the claims for rescission, rescissory damages, consequential damages, and attorney's fees incurred by the Trustee; and it is further

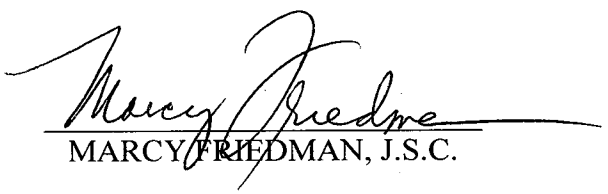
ORDERED that WMC's motion to dismiss is granted to the extent of dismissing the following claims: the first and fourth causes of action for breach of contract only insofar as they plead a claim for an independent breach of a duty to repurchase defective loans; and the claims for rescission, rescissory damages, and consequential damages; and it is further

ORDERED that the branch of the motion to dismiss the first and fourth causes of action, to the extent it seeks dismissal of representations and warranties made effective prior to the Closing Date, is denied without prejudice; and it is further

ORDERED that the branch of the motion to dismiss the third and sixth causes of action for failure of WMC to notify the Trustee of breaches of representations and warranties is denied without prejudice. Defendant WMC may move to dismiss this cause of action in conformity with procedures to be established in the coordinated RMBS put-back actions in Part 60 regarding motions with respect to failure to notify claims. Nothing herein shall be construed as determining the scope or import of the Appellate Division Nomura decision with respect to such claims.

This constitutes the decision and order of the court.

Dated: New York, New York
June 8, 2016



MARCY FRIEDMAN, J.S.C.