Morgan Stanley Mtge. Loan Trust 2006-14SL v Morgan Stanley Mtge. Capital Holdings LLC
2013 NY Slip Op 33623(U)
August 16, 2013
Sup Ct, New York County
Docket Number: 652763/2012
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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MORGAN STANLEY MORTGAGE LOAN TRUST 2006-14SL, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-12SL and MORGAN STANLEY MORTGAGE LOAN TRUST 2007-4SL, MORTGAGE PASS-THROUGH CERTIFICIATES, SERIES 2007-4SL,

Plaintiffs,

- *against* -

MORGAN STANELY MORTGAGE CAPITAL HOLDINGS LLC, as successor to Morgan Stanley Mortgage Capital, Inc.,

Defendant.

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Index No.: 652763/2012
Motion Date: 03/06/2013
Motion Seq. No.: 001

The following papers, numbered 1 to 3, were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: August 16, 2013

Eileen Bransten J.S.C.
Hon. Eileen Bransten

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. CHECK ONE: .....☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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MORGAN STANLEY MORTGAGE LOAN TRUST 2006-14SL, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-14SL and MORGAN STANLEY MORTGAGE LOAN TRUST 2007-4SL, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-4SL,

Plaintiffs,

- *against* -

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as successor to Morgan Stanley Mortgage Capital, Inc.,

Defendant.

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Index No. 652763/2012
Motion Date: 3/6/2013
Motion Seq. No.: 001

BRANSTEN, J.

In this breach of contract action regrading mortgage-backed securities, Defendant Morgan Stanley Mortgage Capital Holdings, LLC ("MSMC") moves to dismiss the Complaint of Plaintiff Morgan Stanley Mortgage Loan Trust 2006-14SL, Mortgage Pass-Through Certificates, Series 2006-14SL ("2006 Trust") and Plaintiff Morgan Stanley Mortgage Loan Trust 2007-4SL, Mortgage Pass-Through Certificates, Series 2007-4SL ("2007 Trust") (collectively, "Plaintiffs") pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose. For the reasons set forth below, Defendant's motion is granted, in part, and denied, in part.

Background[1]

According to the Complaint, MSMC purchased thousands of second-lien residential mortgage loans from various non-party mortgage originators, pursuant to certain purchase agreements ("Third-Party Purchase Agreements"). (Cmpl. ¶¶ 18, 25). MSMC then sold the loans to an affiliated depositor, pursuant to the terms of two mortgage loan purchase agreements that are identical in all respects pertinent to the instant motion (the "Mortgage Loan Purchase Agreements" or "MLPAs"). *See* Cmpl. ¶¶ 15, 51, Exs. 1, 3. The depositor, in turn, sold the loans to Plaintiffs, which are two trusts organized for the express purpose of securitizing residential mortgages. (Cmpl. ¶¶ 14, 50). Under the two agreements establishing the trusts, also identical in all respects pertinent to the instant motion, the depositor assigned all of its rights and interests to Plaintiffs, including the depositor's right to enforce breaches of representations and warranties made in the Mortgage Loan Purchase Agreements ("Trust Agreements"). *See* Cmpl. ¶¶ 15, 51, Exs. 2, 4.

Plaintiffs aver that they have suffered over $378 million in losses, for an average loss of 57% of the original principal balance of the loans. *See* Cmpl. ¶¶ 25, 62. Allegedly due to these heavy losses, a certificate holder representing a majority of the voting rights in the 2007 Trust conducted an investigation into the underlying loans.

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[1] All facts in this section are undisputed, unless otherwise noted.

(Cmpl. ¶ 3). The investigation, conducted at some point in 2010 and using publicly available information, allegedly discovered 163 loans that materially failed to conform to MSMC's representations and warranties.[2] (Cmpl. ¶ 3). On August 20, 2010, the trustee of the 2007 Trust sent a letter that "informed [MSMC] of the specific breaches . . . and reminded [MSMC] of its obligation to repurchase these 163 Defective Loans and any other [defective loans]" ("Plaintiff's Letter"). (Cmpl. ¶ 3).

In September 2011, the 2006 Trust was also investigated. (Cmpl. ¶ 7). On December 14, 2011, the trustee demanded that MSMC repurchase 187 loans in the 2006 Trust that were specifically identified as breaching warranties, as well as all other breaching loans. (Cmpl. ¶ 7). Plaintiffs aver that, after a further review of the 2006 Trust, they discovered that 564 out of 613 loans, or 92%, were in breach of various representations and warranties. (Cmpl. ¶ 7). Defendant allegedly has agreed to repurchase only four loans, has explicitly refused to repurchase 207 loans, and does not consider itself to have received notice of any other breaches. (Cmpl. ¶ 46).

Pursuant to the Mortgage Loan Purchase Agreements and the Trust Agreements, investors were provided with a Mortgage Loan Schedule ("MLS"). The MLS for both the

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[2] The alleged breaches included 87 loans listed as "owner occupied," but whose borrower did not list the property as his or her primary residence with county tax recorders; 68 properties that were subject to undisclosed liens; and 63 loans with combined-loan-to-value ratios over 100%. (Cmpl. ¶ 25).

2006 Trust and the 2007 Trust provided investors with information about each loan, such as the principal balance, interest rate, occupancy status, and combined-loan-to-value ratio of each property. The MLPAs specifically warranted that the MLS was "complete, true and correct in all material respects." (Cmpl. Exs. 1, 3) (MLPA § 3.01(a)).

Plaintiffs commenced this action on August 8, 2012, asserting that Defendant's failure to repurchase loans that violated various representations and warranties constitutes breach of contract. Accordingly, Plaintiffs brought claims for (i) specific performance of repurchase obligations under the 2007 MLPA, (ii) rescission of the 2007 MLPA, (iii) rescissory damages relating to the 2007 MLPA, (iv) specific performance of repurchase obligations under the 2007 Trust Agreement, (v) specific performance of repurchase obligations under the 2006 MLPA, (vi) rescission of the 2006 MLPA, (vii) rescissory damages relating to the 2006 MLPA, (viii) specific performance of repurchase obligations under the 2007 Trust Agreement, and costs and attorneys fees. Defendant now seeks dismissal of the Complaint in its entirety. Plaintiffs oppose.

I. Defendant's Motion to Dismiss

Defendant moves to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7), on the grounds that the Plaintiffs fail to state a cause of action and that the terms of the MLPAs and Trust Agreements foreclose Plaintiffs' claims.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "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 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted). However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the

documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Breach of MLPA § 3.01*

MSMC first argues that it has not received the contractually prescribed "notice" from Plaintiffs regarding a large majority of loans because Plaintiff's Letter analyzed only a small subset of loans. Second, MSMC contends that "Released Mortgage Loans" are not subject to the MLPA's repurchase requirement.

i. *Sufficient Notice Was Provided*

MSMC argues that Section 3.01 of the Mortgage Loan Purchase Agreements provides loan-by-loan remedies that can only be triggered with specific notice identifying the breaching loans and providing evidence of the breach. Defendant argues that the Section 3.01 remedies cannot be triggered by letters sent by Plaintiffs that reference statistical sampling of the loan pool and request repurchase of all breaching loans. MSMC contends that it must be given sufficient information so that it may conduct its own analysis of the loans. Plaintiffs counter that the MLPA solely calls for "prompt written notice" and does not mandate any level of detail about the loans.

Section 3.01 provides that "[u]pon discovery . . . of a breach of any of the warranties and representations contained in this Article III . . . the party discovering the breach shall give prompt written notice to the others." (Cmpl. Exs. 1, 3). MSMC's attempt to supplement the contractual language is unavailing. CPLR 3013 only requires that a party give sufficient notice of the transactions underlying the suit. As other courts that have dealt with RMBS cases have held, the Complaint sufficiently states a cause of action for breach of contract by alleging that a loan-level review revealed over 90% of the loans violate some warranty and that Plaintiffs demanded MSMC repurchase all non-conforming loans. *See MBIA Ins. Corp v. Credit Suisse Sec. (USA) LLC*, 32 Misc.3d 758, 778 (Sup. Ct. N.Y. Cnty. June 1, 2011), *reh'g granted and rev'd on other grounds*, 102 A.D.3d 488 (1st Dep't 2013) ("Under CPLR § 3013, a party bringing an action for breach of contract need only provide notice of the transactions . . . MBIA has conducted a review that has revealed breaches in more than 80% of the loans"); *Ambac Assur. Corp. v. DLJ Mortg. Capital, Inc.*, 31 Misc.3d 1208(A) (Sup. Ct. N.Y. Cnty. April 7, 2011), *reh'g granted and rev'd on other grounds*, 102 A.D.3d 487 (1st Dep't 2013) (denying motion to dismiss for lack of notice because "Ambac has conducted a review that has revealed breaches in many of the Loans reviewed").

Further, Defendant relies on a mortgage-backed securities case that is factually distinct on a rather basic level. *See MASTR Asset Backed Secs. Trust 2006-HE3 v. WMC*

Mortg. Corp., 843 F. Supp. 2d 996 (D. Minn. Feb. 16, 2012) (granting motion to dismiss in part) ("*WMC*"). In *WMC*, the court granted defendants' motion to dismiss, due to a lack of notice, for claims relating to "loans other than the loans in the first sample." *WMC*, 843 F. Supp. 2d at 1000. In so holding, the court noted that "[t]here is no dispute that [plaintiff] has never demanded that [defendants] cure any defective loans other than the loans in the first sample." *Id.* In contrast, Plaintiffs here allegedly sent demand letters requesting that Defendant repurchase "every other Defective Loan in [both trusts]." *See* Cmpl. ¶¶ 29, 63. In *WMC*, there was no demand for repurchase outside of the statistical sample, while here there was such a demand.

The Complaint sufficiently states a cause of action for breach of contract. Plaintiffs have alleged the existence of several contracts, such as the two MLPAs, the breach of those contracts through MSMC's failure to repurchase allegedly defective loans, and millions of dollars in damages as a result of the failure to repurchase. "Although [Plaintiffs] may ultimately be required to itemize the breaches constituting its contract claims, the pleadings give sufficient notice of the claim at this juncture." *MBIA*, 32 Misc.3d at 778.[3]

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[3] Because this Court finds that the statistical sampling provides sufficient notice of Plaintiffs' repurchase demands, there is no need to the address Plaintiffs' contention that providing notice would be futile.

ii. *Released Loans Are Not Excluded*

MSMC next posits that many of the loans at issue in this case are "Released Mortgage Loans" that are not considered "Mortgage Loans" subject to the repurchase obligations of Section 3.01. MSMC argues that because the sole remedy available to Plaintiffs is loan-repurchase, any claims related to loans that cannot be repurchased must be dismissed.

MSMC's contention rests on the interlocking definitions of the agreements underlying the securitizations at issue. First, MLPA Section 3.01 requires MSMC to "cure . . . or repurchase the affected Mortgage Loan [that breached a warranty]." Second, Trust Agreement Section 1.01, in defining a "Mortgage Loan," states that "[a]ny Released Mortgage Loan shall not be considered a Mortgage Loan subject to this Agreement."[4] Finally, a "Released Mortgage Loan" is defined as any loan that has either been "delinquent in payment" for 210 days, or has been a "Charged-Off Loan" for 30 days. If the plain-language analysis ended here, MSMC's argument might have been correct, and any loan delinquent for at least 210 days would not be subject to repurchase.

Critically, however, in order to qualify as a "Released Mortgage Loan," the loan must also be "reported by the Servicer to the trustee as a 'Released Mortgage Loan.'"

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[4] Section 1.01 of the MLPA states that all terms therein have the same meaning as defined in the Trust Agreements.

(Cmpl. Exs. 2, 4) (Trust Agreements § 1.01). The allegations in the Complaint, which must be accepted as true for purposes of a CPLR 3211 motion, simply state that "the Servicer has not reported any of these loans to the Trustee as Released Mortgage Loans and the Trustee has not released a single mortgage loan from the Trust[s]." (Cmpl. ¶¶ 49, 80). Therefore, MSMC's motion to dismiss claims relating to "Released Mortgage Loans" is denied.

iii. *Charged-Off Loans are Not Excluded*

Defendant next argues that "Charged-off Loans" cannot be the subject of a cause of action for specific performance of the repurchase obligation because "Charged-off Loans" "have a principal balance of zero and are no longer in the trust[s]." (Defendant's Memorandum of Law in Support of Motion to Dismiss ("Def.'s Br.") at 21). Defendant again relies on distinguishable case law to support its contention. *See MASTR Asset Backed Secs. Trust 2006-HE3 v. WMC Mortg. Corp.*, CIV. 11-2542 JRT/TNL, 2012 WL 4511065 (D. Minn. Oct. 1, 2012) (granting summary judgment to defendants) ("*WMC II*").

In *WMC II*, the court granted summary judgment as to eighty loans that could not be repurchased because they had been liquidated and were no longer in the trust. *Id.* at *6. The court reasoned that the underlying contract required that a "Mortgage Loan as a

whole [must] remain to be repurchased," and because the trustee no longer held title to the real property securing the loans, the loans did not qualify as "Mortgage Loans" under the contract. *Id.* at *5.

Unlike *WMC II*, the instant motion is not for summary judgment and there is no evidence before the court regarding ownership of collateral. Further, the loans at issue in *WMC II* were admittedly no longer part of the trusts, while here the Complaint alleges that no loans have been removed from the trusts. (Cmpl. ¶¶ 49, 80). Finally, the Trust Agreements here define a "Mortgage Loan," subject to repurchase, as excluding "Released Mortgage Loans," but the definition make no mention of a "Charged-off Loan." (Trust Agreements § 1.01). A "Charged-off Loan," by definition, has not been released by the trusts–otherwise it would be a "Released Mortgage Loan."

Defendant further contends that "Charged-off Loans" cannot be subject to the remedy of specific performance because the "Purchase Price" under the Trust Agreements would be zero. Defendant argues that the "Purchase Price" for "Charged-off Loans" is zero because the "unpaid principal balance [has been] written down to zero prior to the repurchase demand date." (Defendant's Reply Brief in Support of Motion to Dismiss ("Def.'s Reply") at 9).

Defendant's second contention regarding "Charged-off Loans" is also unpersuasive. Defendant cites Section 1.01 of the Trust Agreements, which defines

"Purchase Price" as "100% of the unpaid principal balance of the Mortgage Loan on the date of [repurchase]," plus accrued interest. However, Defendant seeks to supplement the definition with the words "written down," arguing that the definition of "Purchase Price" should be "100% of the unpaid principal balance as written down on the date of repurchase."

When dealing with issues of contract interpretation, courts must construe the agreement according to the parties' intent, and the best evidence of what parties to a written agreement intended is what was said in the writing. *See, e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Accordingly, courts may not fashion a new contract for the parties under the guise of interpreting the writing. *See, e.g., Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.3d 567, 568 (1st Dep't 2011) (*quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

The Court cannot supplement the definition of "Purchase Price" to favor Defendant's interpretation. The Trust Agreements do not state that the "Purchase Price" will be the written-down principal balance, but rather that it will be simply the "principal balance." Whether the principal balance is the principal that was never paid on the loan, or whether it is the amount expected to be paid (zero in the case of a written-down loan), the court cannot dismiss the claims related to "Charged-off Loans" on a CPLR 3211(a)(1) motion. Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary

evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," and the Court finds that the Trust Agreements do not establish a conclusive defense. *See Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994).

C. *Failure to Show Breach of MLPA § 3.02(v)*

Plaintiffs' second, third, sixth, and seventh causes of action seek rescission or, in the alternative, rescissory damages. These remedies are outside of the contractually specified "sole remedies" provision of MLPA Section 3.01. Plaintiffs contend, however, that Defendant's delivery of the materially misleading Mortgage Loan Schedule violated MLPA Section 3.02(v), which contains no "sole remedy" clause and permits rescission or rescissory damages.

Section 3.02 generally contains representations and warranties relating to MSMC as the Seller. *See* Cmpl. Exs. 1, 3 ("The Seller is duly organized, . . . has the power and authority to make . . . this Agreement, . . . holds all necessary licenses . . . [and] is not insolvent"). Plaintiffs contend Section 3.02 also contains "pool-wide representations" about the loans, because 3.02(v) states that "[n]o certificate of an officer, written statement or report delivered pursuant to the terms [of the Mortgage Loan Purchase Agreement] by the Seller contains any untrue statement of a material fact . . . ." (Cmpl. Exs. 1, 3).

i. *No Breach of MLPA § 3.02(v)*

Plaintiffs argue that the Mortgage Loan Schedule, which allegedly contained materially untrue statements of fact, is a written statement or report delivered pursuant to the terms of the MLPA. While this argument has some facial appeal, it is belied by both the structure of the MLPA and, more importantly, the specific inclusion of the MLS in Section 3.01(a).

Section 3.01(a) states that "[t]he information set forth in the Mortgage Loan Schedule is complete, true, and correct in all material respects as of the Cut-off Date." (Cmpl. Exs. 1, 3). The specific mention of the MLS in Section 3.01(a) governs over the general provision of Section 3.02(v). *See e.g., Greenwich Ins. Co. v. Volunteers of Am.-Greater New York, Inc.*, 62 A.D.3d 557, 557 (1st Dep't 2009) ("Paragraph 12 of the lease, which obligates defendant to pay for damages specifically caused by fire only if the fire was 'caused by [defendant's] action,' controls over paragraph 13, which generally obligates defendant to pay for any damages 'caused by [defendant] or any occupant or visitor.'").

This canon of interpretation is persuasive because "[p]eople commonly use general language without a clear consciousness of its full scope and without awareness that an exception should be made. Attention and understanding are likely to be in better focus when language is specific." Restatement (Second) of Contracts § 203 cmt. a (1981). The

specific warranty in Section 3.01(a) that the MLS contains "true and correct information," and the sole remedy provision therefore applicable, remove untrue statements in the MLS from the ambit of Section 3.02(v).

Further support for this interpretation comes from the structure of the MLPA. Section 3.01 deals with representations regarding the loans, while Section 3.02 contains representations about MSMC as a business entity, such as proper corporate authorization, due licensure and solvency. Also, Section 3.02(v) begins by stating that "[n]o certificate of any officer . . . contains any untrue statement," further tying it to representations about MSMC as a corporation, and not the Mortgage Loan Schedule.

Plaintiffs' rely on *U.S. Bank, N.A. v. Greenpoint Mortgage Funding, Inc.*, 26 Misc. 3d 1234(A) (Sup. Ct. N.Y. Cty. 2010) (Fried, J.) ("*Greenpoint*") to support their reading of Section 3.02(v). In *Greenpoint*, the mortgage purchase agreement contained provisions similar to Sections 3.01(a) and 3.02(v) present in this case. *Id.* at *7. Justice Fried held that there was an ambiguity as to whether a pervasive breach of the purchase agreement in *Greenpoint's* equivalent of Section 3.01(a) could rise to the level of a breach of the Section 3.02(v) equivalent. *Id.*

However, distinct from this case, the *Greenpoint* purchase agreement provided two separate remedy provisions, one for 3.01(a)-equivalent breaches, and one for 3.02(v)-equivalent breaches—neither of which had "sole remedy" clauses. *Id.* Here, the MLPA

does not specifically provide a remedy for the breach of Section 3.02(v), and Section 3.01 states that it contains the "sole remedies" for breaches of Section 3.01.

There is no ambiguity as to the remedy to be applied for untrue statements in the MLS because the structure of the MLPA is sufficiently distinct from the contract at issue in *Greenpoint*. Plaintiffs admit that a single breach of representations in the Mortgage Loan Schedule is a breach of Section 3.01(a), to which the "sole remedy" provision applies. However, Plaintiffs further contend that, under *Greenpoint*, a pervasive breach of Section 3.01(a) removes the application of the "sole remedy" provision. The lack of a sole remedy provision in *Greenpoint*, and presence here, forecloses such an argument, since allowing a second remedy would defeat the concept of a "sole" remedy. *See, e.g.*, *Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.3d 567, 568 (1st Dep't 2011)) ("Generally, 'courts may not by construction add . . . terms . . . and thereby make a new contract of the parties under the guise of interpreting the writing.'") (*quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

ii. *Rescission Not Available*

Under First Department precedent, neither recession nor rescissory damages are available to Plaintiffs pursuant to the MLPA's sole remedy clause. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412 (1st Dep't 2013). The *MBIA* court

held that "[p]laintiff voluntarily gave up the right to seek rescission–*under any circumstances* . . . Plaintiff should not be permitted to utilize this very rarely used equitable tool to reclaim a right it voluntarily contracted away . . . ." *MBIA*, 105 A.D.3d at 413 (emphasis in original) (citations omitted). The *MBIA* court also noted that rescissory damages are not available merely because rescission is legally unavailable. *Id.* To recover rescissory damages, "rescission must be impracticable because the subject of the contract no longer exists, or is otherwise impossible to recover." *Id.*

This Court holds that the MLPA conclusively establishes that untrue statements in the MLS are governed by Section 3.01's sole remedy clause and that the Plaintiffs voluntarily contracted away their right to rescission. Therefore, the only remedies available for untrue statements contained in the MLS are pursuant to the sole remedy clause of Section 3.01, namely cure, repurchase, or substitution. Defendant's motion to dismiss the second, third, sixth and seventh causes of action, relating to rescission and damages for breaches of Section 3.02(v), is granted.

D. *Third-Party Obligations*

Plaintiffs' fourth and eighth causes of action seek MSMC's specific performance of third-party "cure obligations" that MSMC adopted pursuant to the Trust Agreements. Section 2.05 of the Trusts Agreements provides that MSMC will abide by representations

and warranties made in Sections 9.01 and 9.03 of two Third-Party Purchase Agreements. MSMC entered into the Third-Party Purchase Agreements with two mortgage originators, American Home Mortgage Corp. and Decision One Mortgage Capital, LLC (collectively "Originators"), which warranted and represented, *inter alia*, that the mortgage loans met certain standard underwriting guidelines.

Section 2.05 of the Trust Agreements states, in pertinent part, that "if Originator[s] fail to cure the breach [of section 9.01 or 9.03,] or repurchase the affected Mortgage Loan . . . the Seller hereby agrees to honor [] Originator[s'] cure obligations." Plaintiffs contend that the phrase "cure obligations" refers to the three remedies that appear throughout the Trust Agreements and the MLPAs: cure, repurchase, or substitution. Defendant argues that "cure obligations" are solely the obligations to "cure" multiple defective loans, such as providing the trustee with missing documentation. Defendant further argues that if MSMC meant to assume both cure and repurchase obligations, it would have done so by explicitly stating "cure and repurchase obligations."

'Defendant's contention that "cure obligations" refer strictly to curing defective loans is persuasive when reading the clause in isolation. However, the structure of Section 2.05 defeats this argument because the two sentences following the "cure obligations" clause both describe the process for repurchasing loans. Immediately after MSMC "agrees to honor [] Originator[s'] cure obligations," Section 2.05 states that "[t]he

Purchase Price for the repurchased Mortgage Loan shall be deposited [in a designated account], and the Trustee shall . . . release to the Originator or the Seller, as applicable, the related Trustee Mortgage File . . . . If pursuant to the foregoing, the related Originator or the Seller repurchases a Mortgage Loan that is a MERS Mortgage loan [the Seller or Originator must be designated as the beneficiary with MERS]." (Cmpl. Exs. 2, 4) (Trust Agreements § 2.05(b)).

It would be curious for the Trust Agreements to provide that the Seller agrees only to cure loan defects and then devote the remainder of the paragraph to a description of the mechanism for repurchase. Courts should, "[w]hen interpreting a written contract . . . give effect to the intent of the parties as revealed by the language and structure of the contract." *Reda v. Eastman Kodak Co.*, 233 A.D.2d 914, 914 (4th Dep't 1996) (*citing Breed v. Insurance Co. of N. Am.*, 26 N.Y.2d 351, 355 (1978)). The structure of Section 2.05 makes it clear that when MSMC assumed the Originators' "cure obligations," it was assuming the duty to cure, repurchase, or substitute defective mortgage loans. Defendant's motion to dismiss the fourth and eighth causes of action is denied.[5]

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[5] MSMC also argues that a condition precedent to its third-party "cure obligations" is a cure demand on the Originators. While MSMC contends that Plaintiffs failed to satisfy this condition precedent, MSMC does not dispute that Originators are no longer in business. To dismiss the cause of action for failure to satisfy a condition that cannot be satisfied would elevate form over substance.

E. *Costs and Expenses for Maintaining Lawsuit*

Finally, Plaintiffs seek "an award of the costs and expenses of maintaining this action . . . including reasonable attorneys and expert fees." (Cmpl. at 45). Plaintiffs aver that both the indemnification clause, Section 5.01 of the Mortgage Loan Purchase Agreements, and the definition of "Purchase Price" in the Trust Agreements entitle Plaintiffs to the costs of suit. Defendant argues that the indemnification clause refers to claims made by third-parties, not by parties to the contract, and that there is no allegation of predatory-lending law violations as required by the "Purchase Price" definition.

i. *No Indemnification Under MLPA Section 5.01*

Section 5.01 of the Mortgage Loan Purchase Agreements states "[MSMC] agrees to indemnify and hold harmless [Plainiffs] . . . against any and all losses, claims, damages or liabilities . . . and will reimburse [Plaintiffs] . . . for any legal or other expenses incurred . . . in connection with investigating or defending any such losses . . . aris[ing] out of . . . any untrue statement . . .on the Mortgage Loan Schedule . . . ."

Plaintiffs maintain that they are entitled to indemnification because they have investigated untrue statements in the MLS. However, both New York case law and the structure of the indemnification provision make clear that there is no duty to indemnify for claims brought by one party to the MLPA against the other.

First, New York courts follow the "American rule," which precludes the prevailing party from recovering legal fees except where authorized by statute, agreement, or court rule. *E.g.*, *Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 204 (1st Dep't 2010). The *Gotham Partners* court noted that New York "has been distinctly inhospitable" to claims for attorneys fees. *Id.* (*citing Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 492 (1989)).

In *Hooper*, the Court of Appeals delineated the rule that "the court should not infer a party's intention to waive the benefit of the [American] rule unless the intention to do so is *unmistakably clear* from the language of the promise." *Hooper*, 74 N.Y.3d at 492 (emphasis added). The indemnification clause at issue in *Hooper* "obligate[d] defendant to 'indemnify and hold harmless [plaintiff] * * * from any and all claims, damages, liabilities, costs and expenses.'" *Id.* The Court of Appeals held that the clause did "not contain language clearly permitting plaintiff to recover from defendant the attorney's fees incurred." *Id.*

Here, akin to *Hooper*, the clause requires Defendant to "indemnify and hold harmless [Plaintiffs] . . . against any and all losses, claims, damages, or liabilities." (Cmpl. Exs. 1, 3) (MLPA § 5.01(a)). Therefore, under the *Hooper* rule, MLPA Section 5.01 does not contain "unmistakably clear" language that entitles Plaintiffs to

indemnification for attorneys' fees unilaterality incurred, as opposed to fees incurred due to the acts of a third-party.

Second, the structure of the MLPA illuminates the parties' intent to have solely third-party claims indemnified. While MLPA Sections 5.01(a) and (b) explicate when a party will be entitled to indemnity, Section 5.01(c) clearly contemplates third-parties in describing the procedure to be employed when invoking Sections (a) and (b). Section 5.01(c) states that a party to be indemnified must notify the indemnifying party promptly, and that "[i]f any such claim shall be brought against an indemnified party, . . . the indemnifying party shall be entitled . . . to assume the defense thereof . . . ." (Cmpl. Exs. 1, 3) (MLPA § 5.01)

As the court in *Hooper* noted, "the requirement of notice and assumption of the defense has no logical application to a suit between the parties." *Hooper*, 74 N.Y.3d at 492-93. In rejecting the indemnification claim, the Court of Appeals held that "[c]onstruing the indemnification clause as pertaining only to third-party suits affords a fair meaning to all of the language employed in the contract and leaves no provision without force and effect." *Hooper*, 74 N.Y.3d at 493.

New York law requires that a contract be read to give effect to all of its provisions. *E.g., God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 374 (2006). Plaintiffs' proposed interpretation would nullify the procedural

paragraphs in Section 5.01(c) because they cannot apply to a suit between the parties. Although *Hooper* related to attorneys' fees, its structural analysis is equally applicable to non-legal costs because the procedural paragraphs relating to third-parties do not distinguish between attorneys' fees and other fees.

Plaintiffs' request for an award of the costs of maintaining the instant litigation is dismissed insofar as it related to Section 5.01 of the Mortgage Loan Purchase Agreement.

ii. *No Allegation of Predatory Lending*

Plaintiffs also fail to state a claim for costs relating to violations of predatory-lending laws. Section 1.01 of the Trust Agreements includes in the "Purchase Price" of repurchased mortgage loans the "costs and damages . . . arising out of a violation of any predatory or abusive lending law." However, the Plaintiffs do not allege the violation of any lending laws in the Complaint or elsewhere. Without pleading that Defendant violated predatory lending laws, Plaintiffs fail to establish a contractual right to recovery because "the facts as alleged [do not] fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). Plaintiffs' request for any award of costs and expenses, including reasonable attorneys and expert fees, is dismissed, without prejudice to replead predatory lending law violations.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that defendant's motion to dismiss the complaint is GRANTED to the extent that the second, third, sixth, and seventh causes of action of the complaint are dismissed with prejudice and is DENIED as to the first, fourth, fifth and eighth counts; and it is further

ORDERED that defendant's motion to dismiss plaintiffs' request for costs and expenses in maintaining this action is GRANTED, without prejudice to repleading allegations regarding predatory lending practices; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on October 8, 2013, at 10:00 AM.

This constitutes the decision and order of the Court.

Dated: New York, New York
August 16, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.