Morgan Stanley Mtge. Loan Trust 2006-4SL v Morgan Stanley Mtge. Capital Inc.
2014 NY Slip Op 32152(U)
August 8, 2014
Supreme Court, New York County
Docket Number: 650579/2012
Judge: Eileen Branstan
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[* 1]

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

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

Plaintiffs,

- *against* -

MORGAN STANLEY MORTGAGE CAPITAL INC.,

Defendant.

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Index No. 650579/2012
Motion Date: 05/23/2013
Motion Seq. No.: 001

BRANSTEN, J.

In this breach of contract action regarding mortgage-backed securities, Defendant Morgan Stanley Mortgage Capital Inc. ("MSMC") moves to dismiss the Complaint of Plaintiffs Morgan Stanley Mortgage Loan Trust 2006-4SL and Mortgage Pass-Through Certificates, Series 2006-4SL (together, the "Trust" or "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 originated or purchased 5,395 residential mortgage loans from various non-party mortgage originators, pursuant to certain purchase

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

agreements ("Third-Party Purchase Agreements"). (Compl. ¶ 28.) MSMC then sold the loans to an affiliated depositor, pursuant to the terms of the Mortgage Loan Purchase Agreement ("MLPA"), dated March 1, 2006. (*Id.* ¶¶ 2, 55, Ex. 1.) The depositor, in turn, sold the loans to the Trust, organized for the express purpose of securitizing residential mortgages. (*Id.* ¶ 2.) Under the agreement establishing the Trust, 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 Agreement ("Trust Agreement"). (*Id.* ¶ 2, Ex. 2.)

Pursuant to the Mortgage Loan Purchase Agreement and the Trust Agreement, investors were provided with a Mortgage Loan Schedule ("MLS"). The MLS 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 MLPA specifically warranted that the MLS was "complete, true and correct in all material respects." (*Id.* ¶ 24, Ex. 1 (MLPA § 3.01(a)).)

Plaintiffs allege that they have lost over $100 million, nearly one-third of the original principal balance of the loans. (*Id.* ¶ 36.) Allegedly due to these heavy losses, Plaintiffs hired forensic review firms to investigate the underlying loans. (*Id.* ¶¶ 6, 36.) The investigation allegedly discovered 2,950 loans that materially failed to conform to MSMC's representations and warranties. (*Id.* ¶ 7.) Between December 2011 and April

2012, Plaintiffs sent six letters to MSMC that identified the breaching loans and demanded that MSMC repurchase those loans ("Breach Notices"). (*Id.* ¶ 80.) Defendant has not agreed to repurchase any loans. (*Id.* ¶ 81.)

Plaintiffs commenced this action on February 29, 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 MLPA, (ii) specific performance of repurchase obligations under the Trust Agreement, (iii) rescission of the MLPA, (iv) rescissory damages relating to the MLPA, and costs and attorneys' fees. Defendant now seeks dismissal of the Complaint in its entirety. Plaintiffs oppose.

On August 21, 2013, this Court decided a motion to dismiss in a related case, *Morgan Stanley Mortgage Loan Trust 2006-14SL v. Morgan Stanley Mortgage Capital Holdings LLC*, No. 652763/2012, 2013 WL 4488367 (Sup. Ct. N.Y. Cnty. Aug. 16, 2013). Defendant filed a notice of appeal of that decision on September 26, 2013, and Plaintiff filed a notice of cross-appeal on October 7, 2013. Due to the identity of issues presented there and here, this Court stayed consideration of this motion pending the outcome on appeal. Defendant's time to perfect the appeal in that case lapsed on June 26, 2014, so the Court now considers this motion.

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 MLPA and Trust Agreement 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 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 the Complaint fails to plead facts sufficient to support any allegations of breach, even relating to loans discussed in the Breach Notices. Second, MSMC argues that it has not received the contractually-prescribed "notice" from Plaintiffs regarding any loans not analyzed in the Breach Notices. Finally, MSMC contends that loans with no principal balance are not subject to the MLPA's repurchase requirement.

i. *Plaintiffs Have Alleged Sufficient Notice*

MSMC argues that Section 3.01 of the MLPA 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 the Breach Notices that listed 2,950 loans. MSMC contends that it must be given sufficient information so that it may conduct its own analysis of the loans. Plaintiffs counter that MSMC knew of the breaches prior to receiving the Breach Notices and that the MLPA solely calls for "prompt written notice," which does not mandate any level of detail about the loans.

MLPA Section 3.01 provides that "[u]pon discovery by the Depositor, the Seller, the Servicer, the Purchase or any assignee . . . of a breach of any of the representations and warranties contained in this Article III . . . the party discovering the breach shall give prompt written notice to the others." *See* Compl. Ex. 1. Regarding the loans identified in the Breach Notices, MSMC's attempt to supplement the contractual language to require "sufficient information" 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 that many of the loans violated some warranty and that Plaintiffs demanded repurchase. *See MBIA Ins. Corp v. Credit*

Suisse Sec. (USA) LLC, 32 Misc. 3d 758, 778 (Sup. Ct. N.Y. Cnty. June 1, 2011) ("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) (denying motion to dismiss for lack of notice because "Ambac has conducted a review that has revealed breaches in many of the Loans reviewed").

As to loans not identified in the Breach Notices, the Complaint's allegations also cannot be dismissed due to insufficient notice. MSMC, as the "Seller," had an obligation to repurchase defective loans within 90 days of its own discovery of any breaches. *See* Compl. Ex. 1 (MLPA § 3.01). The Complaint alleges that MSMC knew that numerous loans breached warranties, irrespective of the Breach Notices, and that MSMC even sued a loan originator for severely deficient underwriting in 2007. *See* Compl. ¶ 66, 87, 94. Accepting the allegations of the Complaint as true on this motion to dismiss, MSMC discovered that certain loans breached representations and warranties and failed to repurchase them in violation of its contractual obligations under the MLPA. *See ACE Sec. Corp. v. DB Structured Products, Inc.*, 41 Misc. 3d 1229(A), at *2 (Sup. Ct. N.Y. Cnty. Nov. 21, 2013) (finding allegation of defendant's discovery of loan breaches sufficient to withstand motion to dismiss).

Therefore, the Complaint sufficiently states a cause of action for breach of contract as to loans other than those discussed in the Breach Notices. Plaintiffs have alleged the existence of the MLPA and the Trust Agreement, 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.

ii. *Loans with No Principal Balance or Loans No Longer in the Trust*

Defendant next argues that loans with no principal balance cannot be repurchased because the "Purchase Price" would be zero and the loans are no longer in the trust. Defendant contends that the "Purchase Price" is zero because the unpaid principal balance has been written down to zero prior to the repurchase demand date. Defendant also posits that the Trustee cannot comply with its obligations to trigger a repurchase because it no longer has the loan file that it must deliver to MSMC.

Defendant's contention regarding loans with no principal balance or loans no longer in the Trust is unpersuasive. Defendant cites Section 1.01 of the Trust Agreement, 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. Fin. 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 Agreement does not state that the "Purchase Price" will be the written-down principal balance, but rather that it will be simply the "principal balance."

Further, as this Court and others in New York have held, loans that are no longer in the Trust are still subject to the repurchase obligation. *See ACE Sec. Corp. Home Equity Loan Trust, Series 2007-HE3 v. DB Structured Products, Inc.*, 13 CIV. 1869, 2014 WL 1116758, at *8 (S.D.N.Y. Mar. 20, 2014) ("specific performance is an equitable remedy, and 'where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy.'");

Deutsche Alt-A Sec. Mortg. Loan Trust, Series 2006-OA1 v. DB Structured Products, Inc., 958 F. Supp. 2d 488, 505 (S.D.N.Y. July 24, 2013) (refusing to dismiss claims related to liquidated loans because otherwise "DBSP [would have] the ability to frustrate the Trust's repurchase remedy by delaying or refusing to repurchase the breaching Mortgage Loans until the servicer had, in mitigation of the Trust's losses, foreclosed on them."); *Bank of New York Mellon v. WMC Mortg., LLC*, 41 Misc. 3d 1230(A), at *1 (Sup. Ct. N.Y. Cnty. Nov. 21, 2013) ("no 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[,] . . . [such as] which loans qualify for repurchase (e.g. liquidated loans)–does not merit further discussion.")

Therefore, MSMC can "be compelled to either specifically perform its obligation to repurchase loans or to pay damages equivalent to the cost of repurchase." *ACE Sec. Corp. v. DB Structured Products, Inc.*, No. 653394/2012, 2014 WL 1384490, at *5 (Sup. Ct. N.Y. Cnty. April 4, 2014); *see also U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 42 Misc. 3d 1213(A), at *3 (Sup. Ct. N.Y. Cnty. January 15, 2014).

iii. *Breach of MLPA § 3.01(w) via Balloon Loans*

MSMC next argues that all allegations relating to the breach of MLPA Section 3.01(w) should be dismissed. Section 3.01(w) states that "[e]ach mortgage note requires

a monthly payment that is sufficient to amortize fully the original principal balance over the original term . . . . No Loan contains terms or provisions which would result in negative amortization." *See* Compl. Ex. 1. Plaintiffs contend that loans that do not fully amortize over their term, or balloon loans, violate the warranty in Section 3.01(w).

MSMC acknowledges that balloon loans are present in the loan pool, but makes two arguments supporting dismissal of claims arising from Section 3.01(w). First, MSMC argues that only negative amortization loans, and not balloon loans, violate Section 3.01(w). According to MSMC, balloon loans do amortize the principal balance over the original term when the final payment is included. Second, MSMC argues that the Prospectus Supplement, referenced in the MLPA, clearly shows that balloon loans comprise nearly two-thirds of the entire loan pool and therefore Plaintiffs have failed to provide "prompt" written notice of the breach as required by the MLPA.

MSMC's arguments are unavailing because Plaintiffs are not required to prove their allegations at the motion to dismiss stage. The Complaint alleges the existence of the MLPA, the violation of section 3.01(w), and resulting damages. There is no evidence before the Court regarding which loans are "balloon loans" or "negative amortizing loans," however those terms may be defined. In order to prevail on a motion to dismiss based upon documentary evidence, the evidence submitted must conclusively prove that Plaintiffs have no cause of action. *See Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994). The

documents submitted by MSMC, namely the Breach Notices and Prospectus Supplement, do not conclusively prove that no loans violated the representations made in MLPA Section 3.01(w).

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

Plaintiffs' third and fourth 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* Compl. Ex. 1 ("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 . . . ." *Id.*

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." *See* Compl. Ex. 1. 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. Fin. Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

ii. *Neither Rescission Nor Rescissory Damages Available*

Under First Department precedent, neither recession nor rescissory damages are available to Plaintiffs. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412 (1st Dep't 2013). In New York, courts hold that rescission is a very rarely

used equitable tool and that it is typically only available "where a party lacks a complete and adequate remedy at law." *See Alper v. Seavey*, 9 A.D.3d 263, 264 (1st Dep't 2004). Further, for rescissory damages to be available, "rescission must be impracticable because the subject of the contract no longer exists, or is otherwise impossible to recover." *MBIA*, 105 A.D.3d at 413.

Here, Plaintiffs are not entitled to rescission because they have a viable alternative remedy in the repurchase protocol. *See Alper v. Seavey*, 9 A.D.3d at 264; *Bristol Oaks, L.P. v. Citibank, N.A.*, 272 A.D.2d 258, 259 (1st Dep't 2000) ("the availability of an adequate remedy at law . . . obviates the necessity of the third cause of action for rescission"); *Assured Guar. Mun. Corp. v. DB Structured Products, Inc.*, 44 Misc. 3d 1206(A), at *7 (Sup. Ct. N.Y. Cnty. July 3, 2014) (holding that the repurchase protocol "is an available alternative remedy") (quoting *U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 2014 WL 1621046, at *5 (Sup. Ct. N.Y. Cnty. April 21, 2014)).

Rescissory damages are also unavailable. To be entitled to rescissory damages, Plaintiffs must show that they are entitled to rescission but rescission is impracticable. *MBIA*, 105 A.D.3d at 413. Plaintiffs cannot recover rescissory damages because they have not shown that "[r]escission [is] impracticable because the subject of the contract no longer exists, or is otherwise impossible to recover." *Id.* Plaintiffs are not entitled to rescissory damages simply because rescission is legally unavailable. *Id.*

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 third and fourth causes of action, relating to rescission and damages for breaches of Section 3.02(v), is granted.

D. *Third-Party Obligations*

Plaintiffs also seek MSMC's specific performance of third-party cure obligations that MSMC adopted pursuant to the Trust Agreement. Section 2.05 of the Trust Agreement provides that MSMC will abide by representations and warranties made in the three Third-Party Purchase Agreements. MSMC entered into the Third-Party Purchase Agreements with three mortgage originators, American Home Mortgage Corp., Fremont Investment & Loan, and Aegis Mortgage Corp. *See* Compl. ¶ 28. The Third-Party Purchase Agreements represented that the mortgage loans met certain standard underwriting guidelines. *See* Compl. ¶ 29.

MSMC maintains that Plaintiffs have failed to state a claim based on the third-party representations. MSMC argues that the Complaint is devoid of even a minimal amount of detail regarding which loans breached which third-party representations.

As noted above, CPLR § 3013 only requires that a party give sufficient notice of the transactions underlying the suit. The Complaint sufficiently states a cause of action

for breach of contract by alleging that a loan-level review revealed that many of the loans violated some warranty and that Plaintiffs demanded repurchase.

E. *Costs and Expenses for Maintaining Lawsuit*

Finally, Plaintiffs seek an award of expenses, including attorneys' fees, incurred to investigate MSMC's failure to accurately disclose loan-level information. Plaintiffs allege that the indemnification clause, Section 5.01 of the Mortgage Loan Purchase Agreement, entitles 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.

i. *No Indemnification Under MLPA Section 5.01*

Section 5.01 of the Mortgage Loan Purchase Agreement states "[MSMC] agrees to indemnify and hold harmless [Plaintiffs] . . . 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 . . . ." *See* Compl. Ex. 1.

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. *See, 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." *See* Compl. Ex. 1 (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) describe when a party will be entitled to indemnification, 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 . . . ." *See* Compl. Ex. 1 (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. *See, 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.

(The order of the Court appears on the following page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that defendant's motion to dismiss the complaint is GRANTED as to the third and fourth causes of action of the complaint, which are dismissed with prejudice, and is DENIED as to the first and second counts; 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 September 16, 2014, at 10:00 AM.

This constitutes the decision and order of the Court.

Dated: New York, New York
August 8, 2014

ENTER:

Hon. Eileen Bransten, J.S.C.