SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 39

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KNIGHTS OF COLUMBUS,

Plaintiff,

-against- Index No. 651442/2011

THE BANK OF NEW YORK MELLON, **DECISION AND ORDER**

Defendant.

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HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract, defendant The Bank of New York Mellon ("BNYM") moves to dismiss the breach of contract cause of action set forth in the second amended complaint, or alternatively, to continue the stay of the accounting cause of action set forth in the second amended complaint.

Plaintiff Knights of Columbus ("Knights") invested in eighteen trusts, of which BNYM was trustee. The trusts were primarily comprised of residential mortgage loans, which were originated and sold by Countrywide Home Loans Inc. and its affiliates ("Countrywide"). Each trust was administered pursuant to a Pooling and Servicing Agreement ("PSA"). Pursuant to the terms of the PSAs, the mortgage loans were to be deposited into each trust and borrowers were to make loan payments to the trust through a master servicer for each trust. The master servicer, which was Countrywide, was to then transfer those payments, less allowable deductions to the trustee (i.e. BNYM), and then the trustee would distribute those payments to each trust's beneficiary (i.e. Knights).

In 2008, during the financial and housing market crisis, many mortgages foreclosed, and resulted in losses for investors, including Knights. Knights commenced this action seeking to recover damages for BNYM's alleged violation of its duties as trustee.

In or about October 2011, BNYM moved to dismiss Knights' First Amended Complaint. In April 2013, this court (Kapnick, J.) dismissed the second, third, fifth and seventh causes of action, stayed the sixth cause of action for an accounting, and granted leave to replead the first cause of action for breach of contact with more specificity.

In the Second Amended Complaint, Knights re-pled its claim for breach of contract, setting forth five alleged breaches: (1) failure to obtain and hold the trust corpus for the benefit of trust beneficiaries; (2) failure to inspect and inventory mortgage documents, to make accurate certifications as to its receipt of the mortgage documents, and to affix certain language to each assignment of mortgage; (3) failure to give notice of breaches of representations and warranties; (4) failure to give notice of defaults pursuant to the Trust Indenture Act 315(b); and (5) failure to give notice of an event of default and to exercise prudence.[1]

Discussion

BNYM now moves to dismiss the breach of contract claim set forth in the second amended complaint. On a CPLR §3211 motion to dismiss, the pleadings are afforded a

[1] In a letter dated January 9, 2015, Knights voluntarily withdrew its claim that the Trust Indenture Act imposed duties on BNYM (the fourth alleged breach in Knights' breach of contract claim).

liberal construction, and the plaintiff is given the benefit of every favorable inference. *Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 A.D.3d 78 (1st Dept. 2013). A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. *American Exp. Bank Ltd. v. Uniroyal, Inc.*, 164 A.D.2d 275, 277 (1st Dept. 1990). A contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties. *Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170 (1st Dept. 2003).

The first alleged breaching act was stated in the second amended complaint as the "failure to obtain and hold the trust corpus for the benefit of trust beneficiaries." At oral argument on this motion on October 7, 2014, Knights clarified that it is not arguing that BNYM had an obligation to go to Countrywide and obtain or get documents. Specifically, Knights' counsel stated, "we're not saying that they had an obligation to go to Countrywide and get the documents." As such, this first alleged breaching act will not serve as a basis for Knights' breach of contract claim.

The second alleged breaching act was stated as the "failure to inspect and inventory mortgage documents, to make accurate certifications as to its receipt of the mortgage documents, and to affix certain language to each assignment of mortgage."

Knights refers to PSA § 2.01©, which provides,

> As promptly as practicable subsequent to such transfer and assignment, and in any event, within thirty (30) days thereafter, the Trustee shall (I) as the assignee

> thereof, affix the following language to each assignment of Mortgage: "CWALT Series 2006-6CB, The Bank of New York, as trustee", (ii) cause such assignment to be in proper form for recording in the appropriate public office for real property records and (iii) cause to be delivered for recording in the appropriate public office for real property records the assignments of the Mortgages to the Trustee, except that, with respect to any assignments of Mortgage as to which the Trustee has not received the information required to prepare such assignment in recordable form, the Trustee's obligation to do so and to deliver the same for such recording shall be as soon as practicable after receipt of such information and in any event within thirty (30) days after receipt thereof and that the Trustee need not cause to be recorded any assignment which relates to a Mortgage Loan (a) the Mortgaged Property and Mortgage File relating to which are located in California or (b) in any other jurisdiction (including Puerto Rico) under the laws of which in the opinion of counsel the recordation of such assignment is not necessary to protect the Trustee's and the Certificateholders' interest in the related Mortgage Loan.

Knights maintains that the mortgage assignments did not have the required affixed language. BNYM argues that according to the PSAs, it was not required to affix the subject language on assignments for loans in any state as to which it received an opinion of counsel that doing so was unnecessary, and that it received such opinions for all but Maryland and, for some trusts, Kentucky.

As BNYM contends, the PSA does state that if a trustee receives an opinion of counsel, recordation of assignment is not necessary. According to BNYM, several of the subject trusts received the opinion of counsel. However, the parties dispute whether the only purpose of affixation was for recordation, or, as Knights maintains, for other purposes such as identification. It would be premature to reach a resolution as to this dispute at this time.

Knights also maintains that PSA § 2.02 requires that the trustee perform "a review and examination" of the mortgage files and determine what documents for each mortgage loan were in its possession, as well as provide initial, delay delivery, and final certifications. It states that BNYM failed to diligently inventory the mortgage files and accurately certify what it had received and identify what it had not received. Finally, Knights claims that BNYM was required to inspect all documents delivered to it to determine if they were in proper form, pursuant to PSA § 8.01.

I find that Knights has adequately stated a claim for breach of contract based upon this second alleged breaching act, as set forth by the terms of the PSAs. Whether or not BNYM properly reviewed and examined the mortgage files, diligently inventoried them and accurately certified what it had received, and identified what it had not received, may only be determined after discovery.

The third alleged breaching act, the failure to give notice of alleged breaches of warranties and representations, is premised on Section 2.03©, which states that "upon discovery by any of the parties hereto of a breach of a representation or warranty with respect to a mortgage loan made pursuant to Section 2.03(a)...that materially and adversely affects the interests of the certificate holders in that mortgage loan, the party discovering such breach shall give prompt notice thereof to the other parties." The complaint alleges "discovery" of breaches through, *inter alia*, (a) BNYM's inventory of delivered (and undelivered) documents; (b) in BNYM's delay delivery certification; and

© in notices received from certificateholders. Knights maintains that Section 2.03(a) requires a party discovering a breach that materially and adversely affects the interests of the certificateholders to give prompt notice thereof, and alleges that BNYM never gave notice or prompt notice.

I find that at this stage of the litigation, Knights' allegations in the second amended complaint, read together with the PSAs, adequately set forth a claim for the failure to give notice of alleged breaches of warranties and representations. With regard to BNYM's argument that Knights failed to set forth breaches with respect to specific loans, I find that Knights has made sufficient factual allegations to state a plausible claim, and is not expected to be able to have access to or knowledge of all specific details prior to disclosure. *See generally Okla. Police Pension & Ret. Sys. v. United States Bank Nat'l Ass'n*, 291 F.R.D. 47 (S.D.N.Y. 2013); *Policemen's Annuity & Benefit Fund of Chi. v. Bank of Am., NA*, 907 F. Supp. 2d 536 (S.D.N.Y. 2012). Disclosure will shed light on whether there were breaches as to specific loans, and whether "upon discovery" of those breaches, BNYM did not give notice thereof.

The final breaching act alleged is BNYM's failure to give notice of an Event of Default to the certificateholders and to "exercise such of the rights and powers vested in it by this Agreement, and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of such person's

own affairs" as stated in PSA §8.01. Section 7.01 of the PSAs, entitled "Events of Default," provides, in relevant part, that an Event of Default means,

> "any failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement (except with respect to a failure related to a Limited Exchange Act Reporting Obligation), which failure materially affects the rights of Certificateholders, that failure continues unremedied for a period of 60 days after the date on which written notice of such failure shall have been given to the Master Servicer by the Trustee or the Depositor, or to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates..."

Knights argues that, contrary to BNYM's contention, it is not maintaining that BNYM owed a duty to undertake a complicated and speculative investigation as to whether Countrywide had been properly performing its duties and obligations. Rather, Knights pled that BNYM had knowledge of Countrywide's event of default, i.e. its failure to perform its duties and obligations as master servicer, from various sources including government investigations and lawsuits, private lawsuits, and news media reports. Knights claims that in failing to provide notice of the event of default to certificateholders, BNYM breached its duties as trustee under PSA §§7.03(b) and 10.05. Section 7.03(b) provides, "within 60 days after the occurrence of any event of default, the trustee shall transmit by mail to all certificateholders notice of each such event of default hereunder known to the trustee, unless such event of default shall have been cured or waived." Section 10.05 provides that the trustee shall use its best efforts to promptly provide notice to rating agencies of certain defaults of which it has actual knowledge.

BNYM argues that it can not be charged with this breach because Knights fails to allege that BNYM received written notice of any event of default, and actual knowledge of an event of default is not sufficient to trigger its duty to provide notice to certificateholders. Section 8.02(viii) of the PSAs states that "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof."

Knights alleges that an October 18, 2010 letter from Gibbs & Bruns served as written notice to BNYM of the event of default. In that letter, Gibbs & Bruns gave notice to the trustee and master servicer of the failure of the master servicer to perform pursuant to Section 7.01(ii) of the PSAs. However, that letter did not apply to 16 out of 18 of the subject trusts in this case, and, in any event, the letter was not a "written notice" of an event of default, rather, it stated, "if [these failures to perform] continue for an additional sixty days from the date of this letter, each of them – independently – will constitute an Event of Default." Knights has not alleged that there was any additional documentary evidence of a written notice to BNYM of an event of default.

Knights has failed to plead any specific failure by the Master Servicer, of which it had notice, written or otherwise, sufficient to constitute an Event of Default. Rather, it only refers to widespread knowledge of alleged improper servicing on the part of Countrywide, such as robo-signing, and illegally foreclosing on homes owned by members of the military, of which it had general knowledge through news media reports,

investigations and lawsuits.[2] As such, this fifth alleged breaching act may not serve as a basis for Knights' breach of contract claim.

The court in *Matter of Bank of N.Y. Mellon*, 2015 NY Slip Op 01880 (Sup Ct. N.Y. Co., March 5, 2015) approved the settlement in all respects, and therefore any requests for a stay pending a resolution in that proceeding are moot.

In accordance with the foregoing, it is hereby

ORDERED that defendant The Bank of New York Mellon's motion to dismiss the breach of contract cause of action set forth in the second amended complaint, or alternatively, to continue the stay of the accounting cause of action set forth in the second amended complaint, is granted only to the extent that the first, fourth and fifth alleged breaching acts as set forth in Count I of the second amended complaint are dismissed; and the remaining claims are severed and shall continue, and any stays of claims in this action are lifted.

This constitutes the decision and order of the court.

Dated: New York, New York
July 10, 2015

ENTER:

J.S.C.
HON. SALIANN SCARPULLA

HON. SALIANN SCARPULLA

[2] I note that generalized public information about Countrywide's servicing of loan portfolios was equally available to Knights and BNYM.