Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC
2015 NY Slip Op 32360(U)
July 1, 2015
Supreme Court, New York County
Docket Number: 153945/2013
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

NATIXIS REAL ESTATE CAPITAL TRUST 2007-HE2, by WELLS FARGO BANK, NATIONAL ASSOCIATION, solely in its capacity as Securities Administrator,

-against-

NATIXIS REAL ESTATE HOLDINGS, LLC, as successor-by-merger to NATIXIS REAL ESTATE CAPITAL INC.

INDEX NO. 153945/2013

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____

Answering Affidavits — Exhibits _____ No (s). _____

Replying Affidavits _____ No (s). _____

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that

Upon the foregoing papers, it is ORDERED that defendant's motion to dismiss is decided in accordance with the attached decision/order, dated July 1, 2015.

Dated: 7/1/15

J.S.C.
MARCY S. FRIEDMAN, J.S.C.

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

1. Check one: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ 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 60

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NATIXIS REAL ESTATE CAPITAL TRUST 2007-HE2, by WELLS FARGO BANK, NATIONAL ASSOCIATION, solely in its capacity as Securities Administrator,

Plaintiff,

-against-

NATIXIS REAL ESTATE HOLDINGS, LLC, as successor-by-merger to NATIXIS REAL ESTATE CAPITAL INC., *f/k/a* IXIS REAL ESTATE CAPITAL, INC.,

Defendant.

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Index No. 153945/13

Motion Sequence 001

FRIEDMAN, J:

This residential mortgage-backed securities (RMBS) breach of contract action, colloquially known as a put-back action, was commenced by filing of a summons with notice on April 30, 2013 by Natixis Real Estate Capital Trust 2007-HE2, by Wells Fargo Bank, National Association (Wells Fargo), solely in its capacity as Securities Administrator. A complaint was subsequently filed by Natixis Real Estate Capital Trust 2007-HE2, by Computershare Trust Company, National Association (Computershare), solely in its capacity as Separate Securities Administrator (Wells Fargo and Computershare are collectively referred to as the Securities Administrator). The action is brought against defendant sponsor Natixis Real Estate Holdings, LLC (Natixis) for breaches of representations and warranties regarding the mortgage loans. Natixis moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (3), (5), and (7), and for other relief.

This motion raises a threshold standing issue that this court has not previously considered in the context of the RMBS Litigation. The remaining bases for dismissal largely present issues that the court has considered and will not address at length here.

Standing

Natixis argues that the Securities Administrator lacks standing to bring this action under the terms of section 2.03 (g) of the Pooling and Servicing Agreement (PSA) (Cioffi Aff., Ex. 2). The Securities Administrator claims standing under section 10.02 (viii).

Section 2.03 (g) of the PSA provides in pertinent part:

> "It is understood and agreed that the obligation under this Agreement of any Person to cure, repurchase or replace any Mortgage Loan as to which a breach has occurred and is continuing shall constitute the sole remedy against such Persons respecting such breach available to Certificateholders, the Depositor, the Unaffiliated Seller, the Custodian, the Securities Administrator or the Trustee on their behalf. In the event such required repurchase or replacement does not occur, the Securities Administrator shall take such actions as directed upon written direction from the Depositor and the provision of reasonable indemnity satisfactory to the Securities Administrator in accordance with Sections 6.03 and 10.02."

Section 10.02 (viii) of the PSA provides in pertinent part:

> "the Securities Administrator shall have no obligation to appear in, prosecute or defend any legal action that is not incidental to its duties hereunder and which in its opinion may involve it in any expense or liability; provided, however, that the Securities Administrator may in its discretion undertake any such action that it may deem necessary or desirable in respect of this Agreement and the rights and duties of the parties hereto and the interests of the Trustee, the Securities Administrator and the Certificateholders hereunder."

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (Greenfield v Philles Records, 98 NY2d 562, 569 [2002].) The agreement must be "read as a whole to determine its purpose and intent."

(W.W.W. Assoc. v Giancontieri, 77 NY2d 157, 162 [1990].) "It is a cardinal rule of contract construction that a court should 'avoid an interpretation that would leave contractual clauses meaningless.'" (150 Broadway N.Y. Assoc., L.P. v Bodner, 14 AD3d 1, 6 [1st Dept 2004] [citation omitted].) Moreover, "conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect . . . ." (Isaacs v Westchester Wood Works, 278 AD2d 184, 185 [1st Dept 2000].)

Based upon its plain language, section 2.03 (g) requires the Securities Administrator to take action as directed by the Depositor, subject to indemnity. Nothing contained in section 2.03 (g) limits the Securities Administrator's right to act under other provisions of the PSA, such as section 10.02 (viii), which broadly authorizes the Securities Administrator to take action, in its discretion, in the interests of the Trustee and the certificateholders. In other words, the Securities Administrator is required to act (and entitled to indemnification) when directed to do so by the Depositor, but is free to act on its own initiative, in the interests of the certificateholders, if the Depositor issues no written direction.

This interpretation harmonizes sections 2.03 (g) and 10.02 (viii) and gives meaning to both provisions. The interpretation, under which the Securities Administrator, as a signatory to the PSA, has standing to enforce it, is also consistent with case law. (See generally Hildene Capital Mgt., LLC v Bank of N.Y. Mellon, 105 AD3d 436, 438 [1st Dept 2013] [issuer of collateralized debt obligations, as signatory to trust indenture, has standing to assert claim for damage to trust estate caused by alleged breach of indenture, notwithstanding that any recovery it obtains "may have to be distributed to the noteholders"].)

The court rejects Natixis' contention that this interpretation of section 10.02 (viii) improperly grants the Securities Administrator powers that are reserved to the Trustee. Natixis argues that the Securities Administrator's "rights and duties are limited to administrative tasks of

the Trust," such as making distributions to certificateholders, registering certificates, and preparing filings, and that a trustee may delegate only ministerial, not discretionary, powers. (Natixis Memo. In Support at 9-10.) Here, however, there is no dispute that the Trustee retains the right to enforce the Trust's rights. The issue is whether the PSA limits the enforcement rights solely to the Trustee. The Securities Administrator does not claim standing by virtue of the Trustee's delegation of a discretionary power but, rather, based on the authority expressly granted by the PSA.

Asset Securitization Corp. v Orix Capital Mkts., LLC (12 AD3d 215 [1st Dept 2004]), on which Natixis relies, is not to the contrary. There, the court held that the sponsor of a commercial mortgage-backed securitization lacked standing to commence litigation on behalf of the certificateholders because the PSA did not authorize the plaintiff to commence litigation but, rather, committed that authority "solely" to the trustee. In the RMBS Litigation, this Department has similarly "rejected monoline insurers' attempts to enforce repurchase obligations where the relevant contracts conferred the right to enforce those obligations on other parties." (Ambac Assur. Corp. v EMC Mtge. LLC, 121 AD3d 514, 519-520 [2014] [holding that insurer lacked standing based on Court's finding that the PSA sections "state that the responsibility to enforce the repurchase protocol falls to the trustee on [the insurer's] behalf"]; see also Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2015 WL 3490753 [Sup Ct, NY County June 2, 2015] [this court's prior decision collecting and summarizing monoline insurer standing cases].) In contrast, as held above, the PSA at issue does not confer the right to enforce the repurchase protocol solely on the Trustee.

The court has considered Natixis' remaining objections to the Securities Administrator's standing, and finds them to be without merit.

Statute of Limitations

Natixis next argues that the Securities Administrator's claims are time-barred, because they accrued on April 1, 2007, the "as of" or effective date of the PSA. (Natixis Memo. In Support at 13.) This argument was rejected by the Court of Appeals in ACE Securities Corp. v DB Structured Products, Inc. (___ NY 3d ___, 2015 WL 3616244 [2015]), which held that a cause of action against a sponsor for breach of representations and warranties regarding the mortgage loans "accrue[s] at the point of contract execution" – here, the execution on April 30, 2007 of the PSA. The action is accordingly timely because it was brought on April 30, 2013, within six years of the execution date.

Condition Precedent

Natixis contends that plaintiff has failed to comply with a condition precedent to maintenance of this action, in that it has not served a timely repurchase demand on Natixis, and that plaintiff's claims are therefore not "ripe." (Natixis Memo. In Support at 17.)

Section 2.03 (d) of the PSA provides that any party discovering a breach of the representations made in section 2.03, or of specified representations made by Natixis in the Unaffiliated Seller's Agreement (the Agreement by which it sold the loans to the depositor), "shall give prompt written notice to the others." This section further provides that "[w]ithin 90 days of the earlier of either discovery by or notice" to Natixis of any breach of Natixis' aforesaid specified representations, Natixis shall cure or repurchase the breaching loan. Section 2.03 (d) further imposes a backstop obligation upon Natixis. It thus provides that in the event of a breach of a representation by an originator and, if "upon discovery or receipt of notice" such originator

fails to cure or repurchase the affected loan, Natixis shall cure or repurchase the loan "subject to the conditions set forth in this Section 2.03."[1]

Natixis acknowledges that on March 1, 2013, Natixis received notice of breaches of representations and a demand for repurchase (repurchase demand) of 1916 of the 4202 mortgage loans originally transferred to the Trustee. (Natixis Memo. In Support at 6, 17-18.) Natixis

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[1] The relevant paragraphs of section 2.03 provide more fully:

> ". . .Upon discovery by any of the Depositor, the Unaffiliated Seller, the Trustee, the Securities Administrator or the Servicer of a breach by the Unaffiliated Seller of any of the foregoing representations or any of the representations and warranties made pursuant to Sections 3.01 (f), 3.01 (h), 3.01 (n), 3.01 (o), 3.01 (p) or 3.03 of the Unaffiliated Seller's Agreement or by any Originator of the representations and warranties made pursuant to the related Assignment and Recognition Agreement, the party discovering such breach shall give prompt written notice to the others.
>
> Within 90 days of the earlier of either discovery by or notice to the Unaffiliated Seller of any breach of a representation or warranty set forth in Section 3.01 (f), 3.01 (h), 3.01 (n), 3.01 (o), 3.01 (p) or 3.03 of the Unaffiliated Seller's Agreement that materially and adversely affects the value of the Mortgage Loans or the interest of the Trustee or the Certificateholders therein, the Unaffiliated Seller shall use its best efforts to cure such breach in all material respects and, if such breach cannot be remedied, the Unaffiliated Seller shall, (i) if such 90-day period expires prior to the second anniversary of the related Delivery Date, remove such Mortgage Loan from the Trust Fund and substitute in its place a Substitute Mortgage Loan, in the manner and subject to the conditions set forth in this Section 2.03; or (ii) repurchase such Mortgage Loan at the Repurchase Price . . . .
>
> In the event there is a breach of a representation or warranty by an Originator with respect to a Mortgage Loan originated or acquired by such Originator that materially and adversely affects the value of such Mortgage Loan or the interest of the Trustee and the Certificateholders therein, and, upon discovery or receipt of notice, such Originator fails to cure, substitute or repurchase such Mortgage Loan within the period specified in either the applicable Assignment and Recognition Agreement, if any, or the applicable Mortgage Loan Purchase Agreement, the Unaffiliated Seller shall cure, substitute or repurchase such Mortgage Loan subject to the conditions set forth in this Section 2.03. . . . Notwithstanding the Unaffiliated Seller's lack of knowledge, in the event it is discovered by the Unaffiliated Seller, the Depositor or the Trust (including the Trustee and the Servicer acting on the Trust's behalf), that the substance of a representation or warranty was inaccurate as of the applicable date of such representation or warranty and such inaccuracy materially and adversely affects the value of the related Mortgage Loan, the Unaffiliated Seller shall use its best efforts to cure such breach or substitute or repurchase such Mortgage Loan in accordance with this Section 2.03 (d)."

argues that the Securities Administrator failed to comply with a condition precedent to maintenance of this action because the repurchase demand was not sent at least 90 days before the action was commenced on April 30, 2013. (Id. at 17.) The Securities Administrator counters that the originators' cure period was 60 days – a matter apparently not in dispute – and that Natixis' obligation to cure under PSA section 2.03 (d) attached immediately upon the expiration of the originators' cure period or upon the originators' repudiation of their obligations. (P.'s Memo. In Opp. at 15-16.)

The Securities Administrator correctly argues that section 2.03 (d) does not condition Natixis' backstop obligation on prior written notice to Natixis of the originator's failure to repurchase. Had the commercially sophisticated parties to this contract intended to impose such a condition, they could have done so. This court has repeatedly held that where the governing agreement provides that the defendant's own discovery of breaches independently gives rise to its repurchase obligation, a put-back action may be maintained based on allegations of the defendant's discovery. (See e.g. ACE Secs. Corp., Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Prods., Inc., 2014 WL 4785503, * 4-6 [Sup Ct, NY County Aug. 28, 2014] [and authorities cited therein] [ACE Series 2007-ASAP2]; U.S. Bank Natl. Assn. v Greenpoint Mtge. Funding, Inc., 2015 WL 915444, * 6 [Sup Ct, NY County Mar. 3, 2015].) In the context of backstop obligations in particular, this court recently considered a backstop provision which, unlike that here, expressly conditioned the sponsor's repurchase obligation, in the event of the originator's failure to repurchase, on notice to both the sponsor and the originator and on the Trustee's enforcement of the originator's repurchase obligation prior to resort to the sponsor. The decision distinguished between repurchase protocols, like the backstop provision at issue under which the obligation to repurchase was triggered by notice, and those under which the repurchase obligation was independently triggered by the sponsor's own

discovery of breaches. (See U.S. Bank Natl. Assn., ABSHE 2006-HE7 v DLJ Mtge. Capital, Inc., 2015 WL 1331268, * 3, 10 [Sup Ct, NY County Mar. 24, 2015] [U.S. Bank ABSHE 2006-HE7]; Law Debenture Trust Co. of New York, ABSHE 2007-HE2 v Mtge. Capital, Inc., 2015 WL 1573381, * 6 [Sup Ct, NY County Apr. 8, 2015].)[2]

The complaint in the instant action alleges that "Natixis purchased the Loans from the Originators, had the Loan Files in its possession, and hand-picked the Loans it securitized and sold to the Trust." (Complaint, ¶ 41.) Natixis' due diligence included "'reviewing select financial information for credit and risk assessment, conducting an underwriting guideline review, and performing senior level management interviews and/or background checks.'" (Id., ¶ 42.) The complaint pleads that at least 60% of the loans in the Trust are defective, and that Natixis' due diligence "would have revealed that the Loans were plagued with defects." (Id., ¶ 43.) The complaint also alleges that a forensic study into the credit quality and characteristics of the loans revealed pervasive misrepresentations, "widespread underwriting guideline violations" by the originators, and "material inaccuracies in the Mortgage Loan Schedule." (Id., ¶ 30.)

The court holds that the Securities Administrator's allegations as to Natixis' discovery are at least as specific as allegations which this court, relying on the weight of authorities, has previously found sufficient to support breach of contract claims in RMBS cases. (See e.g. U.S. Bank Natl. Assn, CSMC 2007-NC1 v DLJ Mtge. Capital, Inc., 2015 WL 298642, *1 [Sup Ct, NY County Jan. 16, 2015] [and authorities cited therein] [U.S. Bank CSMC 2007-NC1]; ACE Series 2007-ASAP2, 2014 WL 4785503, * 5 [and authorities cited therein].) As this court has previously noted, plaintiff will have the ultimate burden of proving whether and to what extent

[2] The backstop provision in these cases provided that "the Trustee shall promptly notify the Seller" of the Originator's breach, and if the Originator does not cure the breach "within 90 days from the date the Originator was notified of such . . . breach," the Trustee "shall enforce the obligations of the Originator . . . to repurchase. . . . In the event that an Originator shall be unable to . . . repurchase . . . in accordance with the preceding sentence, the Seller shall do so."

Natixis discovered the breaches. Given Natixis' backstop obligation, plaintiff will also have the burden of proving that the originators discovered the breaches and failed within the relevant time periods under the governing documents to cure or repurchase the affected loans. (See PSA 2.03 [d], paragraph 3 [referring to originators' cure period under the relevant Mortgage Loan Purchase Agreements and related Assignment and Recognition Agreements].) At the pleading stage, however, the discovery allegations are adequate.[3]

Finally, the court rejects Natixis' contention that it is only liable to repurchase loans affected by breaches of the six representations that Natixis itself made in the Unaffiliated Seller's Agreement regarding the mortgage loans. (See Natixis' Memo. In Support at 20-21.)[4] Natixis bases this claim on the clause in the third paragraph of PSA section 2.03 [d], which provides that in the event an originator fails to repurchase a breaching loan, Natixis will repurchase the loan "subject to the conditions set forth in this Section 2.03." Natixis' reading of this clause ignores

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[3] The court does not determine whether the Securities Administrator may maintain this action based not only on Natixis' alleged discovery of breaches, but also on service of a timely repurchase demand. The timeliness of the demand cannot be determined on this motion, given that the record is unclear as to whether the originators received a demand, and their cure period expired, before commencement of the action.

In addition, the parties have not adequately addressed the issue of whether under PSA section 2.03 (d), if the action is based on a repurchase demand, the sponsor's obligation to repurchase arises upon expiration of the originator's cure period, as the Securities Administrator contends, or only after the passage of 90 days from the service of the demand. In arguing their respective positions on this issue, both parties acknowledge that the third paragraph of section 2.03 (d), which provides for Natixis' backstop obligation, states that it is "subject to the conditions set forth in this Section 2.03. . . ." The parties merely assert that these conditions do or do not include the 90 day cure period from the preceding paragraph. The preceding paragraph, however, specifically relates to Natixis' repurchase of loans that breach its own representations in the Unaffiliated Seller's Agreement. Moreover, section 2.03 contains numerous conditions which apply both to Natixis' backstop obligation and its obligation to repurchase loans that breach its own representations. These include conditions with respect to substitution of mortgage loans (2.03 [f]); deposit of the Repurchase Price for repurchased loans in a Collection Account and transfer of title to repurchased loans (2.03 [g]); and a sole remedy provision (2.03 [g]). In failing to discuss the impact of these other provisions on their interpretations of the term "conditions," the parties violate the basic precept of contract interpretation that the agreement must be "read as a whole." (See W.W.W. Assoc. v Giancontieri, 77 NY2d at 162.)

In any event, the court need not determine this issue in light of its holding that the action is maintainable at this juncture based on Natixis' alleged discovery of the breaches.

[4] These representations are identified in PSA section 2.03 (d), paragraph 1, and were made by Natixis in the Unaffiliated Seller's Agreement (USA). They were that the loans were owned free of certain liens (USA, section 3.01 [f]; that the loans were purchased without notice of adverse claims (id., 3.01 [g]; that no loan is a high cost or covered loan (id., 3.01 [n]); that the loans complied with various laws including truth-in-lending laws (id., 3.01 [o]); that the loans were "qualified mortgages" (id., 3.01 [p]); and that no event had occurred between the time the originators made their representations and the closing date that would make the originators' representations untrue (id., 3.03 [a]).

that this paragraph of PSA section 2.03 expressly obligates Natixis, as backstop, to repurchase loans that breach "a representation or warranty by an Originator," not merely loans that breach Natixis' own representations [emphasis added]. Natixis' reading also ignores that section 2.03 (d) contains a separate paragraph – the second paragraph – which provides for Natixis to repurchase loans that breach its own six representations. In order to give meaning to all of the provisions of section 2.03, as the court is required to do, the clause "subject to the conditions set forth in this Section 2.03" must be read as requiring Natixis to repurchase loans subject to the repurchase protocol set forth in section 2.03, and not as limiting the repurchase obligation to loans that breach only originators' representations that duplicate Natixis' representations.

Remaining Claims

Natixis seeks dismissal of the first cause of action for breach of contract to the extent it seeks money damages as a remedy for its failure to repurchase loans affected by breaches of representations. Natixis also seeks dismissal of the third cause of action for rescissory damages. The court adheres to its prior reasoning that the sole remedy provision limits plaintiff's remedies for breach of mortgage representations to specific performance of the repurchase protocol or to damages consistent with its terms. The claims for rescissory and consequential damages will be dismissed. (See e.g. U.S. Bank ABSHE 2006-HE7, 2015 WL 1331268, at * 15; U.S. Bank CSMC 2007-NC1, 2015 WL 298642, at * 2; Nomura Asset Acceptance Corp. Alternative Loan Trust, 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341, * 7-8, 10-11 [Sup Ct, NY County June 26, 2014].)

The court adheres to its reasoning in prior decisions rejecting defendant's claim that the breach of contract causes of action cannot be based on alleged misrepresentations regarding loan-to-value and combined loan-to-value ratios because such ratios are based in part on the allegedly inactionable opinions of appraisers. (See id., 2014 WL 2890341, at * 17.)

The branches of Natixis' motion to dismiss plaintiff's claim for attorney's fees and to strike the jury demand will be granted without opposition.[5]

The court has considered Natixis' remaining claims and finds them to be without merit.

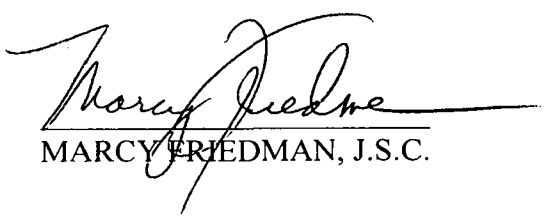
It is hereby ORDERED that Natixis' motion to dismiss is granted to the extent of 1) dismissing the first cause of action to the extent that it demands rescissory damages or other damages inconsistent with the terms of the repurchase protocol; 2) dismissing the third cause of action for rescission or rescissory damages; 3) striking paragraph (b) of the complaint's prayer for relief for rescission or rescissory damages; 4) striking paragraph (c) of the prayer for relief for consequential damages, including loss of profits; 5) striking paragraph (d) of the prayer for relief for attorney's fees; and 6) striking plaintiff's demand for a jury trial; and the motion is otherwise denied; 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 is further

ORDERED that counsel are directed to participate in the RMBS Litigation Put-Back Coordination, to the extent they have not already done so.

This constitutes the decision and order of the court.

Dated: New York, New York
July 1, 2015



MARCY FRIEDMAN, J.S.C.

[5] It is noted that Natixis does not move to dismiss the fourth cause of action which alleges breach of contract based on Natixis' alleged failure to notify the counter-parties to the PSA of discovery of breaches of representations regarding the mortgage loans. This court has previously dismissed such claims. (See U.S. Bank CSMC 2007-NC1, 2015 WL 298642, at * 2 [and authorities cited therein].)