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| HSBC Bank USA, N.A. v Merrill Lynch Mtge. Lending, Inc. |
| 2016 NY Slip Op 32257(U) |
| November 3, 2016 |
| Supreme Court, New York County |
| Docket Number: 652727/14 |
| Judge: Marcy Friedman |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 60

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

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HSBC BANK USA, NATIONAL ASSOCIATION,
 in its capacity as Trustee of MERRILL LYNCH
 ALTERNATIVE NOTE ASSET TRUST, SERIES
 2007-A3,

Index No.: 652727/14

Plaintiff,

DECISION/ORDER

– against –

MERRILL LYNCH MORTGAGE LENDING,
 INC.,

Defendant.

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This is a breach of contract action involving residential mortgage-backed securities (RMBS), brought by plaintiff-Trustee, HSBC Bank USA, National Association, against defendant-Sponsor, Merrill Lynch Mortgage Lending, Inc. (Merrill Lynch). Defendant moved to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7). By decision on the record on October 23, 2015, the transcript of which was so ordered on December 21, 2015, the court determined all of the branches of the motion other than that seeking dismissal of the second cause of action for damages based on the Sponsor's alleged breach of a representation in a governing agreement that the "Seller's Information" in an offering document contained no untrue statement of fact regarding the mortgage loans or groups of loans. The court requested supplemental briefing on this branch of the motion, in light of the Appellate Division's decision in Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc. (133

AD3d 96 [1st Dept Oct. 13, 2015) (Nomura), addressing the viability of a damages claim based on a No Untrue Statement provision.¹

Plaintiff's second cause of action seeks damages based on defendant's alleged breach of a representation and warranty, in section 8 of the Mortgage Loan Purchase Agreement (MLPA), that the "'Seller's Information' – certain specific information in the Prospectus Supplement regarding the Mortgage Loans, including the borrower credit score, loan-to-value ratio, and the existence of documentation" – was accurate. (Compl., ¶ 91.) More particularly, MLPA § 8 (g) provides: "[T]he Seller's Information (as defined in Section 13 (a) hereof) does not include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 13 (a) defines Seller's Information as statements of fact identified in Exhibit 4. Exhibit 4 defines Seller's Information as: "All information in the Prospectus Supplement described under the following Sections: 'Summary—The Mortgage Loans,' 'Description of the Mortgage Groups' and 'Annex II—The Mortgage Groups'."

As is typical, the MLPA here was made between Merrill Lynch Mortgage Lending, Inc. as Sponsor and a related Merrill Lynch entity as Depositor. It is undisputed that by means of a Pooling and Servicing Agreement (PSA) among the Depositor, plaintiff-Trustee, and a Master Servicer and Securities Administrator, the Depositor assigned to the Trustee, on behalf of the Certificateholders and certain Insurers, its right in the MLPA, including its rights against the Sponsor for breaches of representations and warranties. (PSA § 2.03 [a].) MLPA § 7 contains a

¹ The RMBS securitization process was summarized by the Court of Appeals in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581, 589 [2015]). The process by which mortgages are securitized, and the roles of securitization participants, are discussed in this court's numerous prior RMBS decisions and will not be repeated here. (See e.g. HSH Nordbank AG v Barclays Bank PLC, 2014 WL 841289, * 1-2 [Sup Ct, NY County, Mar. 3, 2014, No. 652678/11].)

repurchase protocol (located after the representations and warranties in this section regarding the mortgage loans), which requires the Seller (i.e., Sponsor), upon discovery or receipt of notice “of a breach of any representation or warranty of the Seller set forth in this Section 7 which materially and adversely affects the value” of the Mortgage Loans, to cure or, as applicable, to substitute or repurchase such Loans. MLPA § 7 also contains a “sole remedy” provision, which states: “The obligations of the Seller to cure, purchase [or within a specified time period] substitute a qualifying Substitute Mortgage Loan shall constitute the Purchaser’s, the Trustee’s and the Certificateholder’s sole and exclusive remedy under this Agreement or otherwise respecting a breach of representations or warranties hereunder with respect to the Mortgage Loans, except for the obligation of the Seller to indemnify the Purchaser for such breach as set forth and limited by Section 14 hereof.”²

The PSA at issue here is consistent with the MLPA. After providing that the Depositor assigns its right in the MLPA to the Trustee, section 2.03 (a) of the PSA states: “The obligations of the Sponsor to substitute or repurchase, as applicable, a Mortgage Loan shall be the Trustee’s and the Certificateholders’ sole remedy for any breach thereof.”

The parties dispute whether the MLPA § 8 (g) representation is analogous to the No Untrue Statement provision in Nomura, and whether the remedies for its breach are limited to specific performance of the cure and repurchase obligations under the sole remedy provisions in the MLPA and PSA.

The court holds that although section 8 (g) is similar to the No Untrue Statement provision in Nomura, the sole remedy provisions in the Nomura MLPAs and PSAs are materially

² Section 14 is a typographical error. Section 13 provides for indemnification. Plaintiff does not contend that section 13 limits the applicability of the sole remedy provisions to its claims in this action for breaches of representations and warranties.

different than those at issue here. In Nomura, each of the sole remedy provisions by its terms limited the cure or repurchase obligation to representations regarding the mortgage loans that were referenced in the sole remedy provisions. Thus, Nomura MLPA § 9 (c) and PSA §2.03 (d), which included the sole remedy provisions, referred specifically to breaches of representations and warranties set forth in MLPA § 8. The No Untrue Statement representation, in contrast, was made in a separate section, MLPA § 7 (v), which provided: “This Agreement does not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained herein not misleading. The written statements, reports and other documents prepared and furnished or to be prepared and furnished by the Seller pursuant to this Agreement or in connection with the transactions contemplated hereby taken in the aggregate do not contain any untrue statement of material fact or omit to state a material fact necessary to make the statements contained therein not misleading.”³

The Nomura Court held that the sole remedy provisions applied only to section 8, and not to the No Untrue Statement representation in section 7. The Court specifically explained that “[h]ad these ‘very sophisticated parties’ desired to have the sole remedy provisions apply to both section 8 and section 7 breaches, they certainly could have included such language in the contracts.” (133 AD3d at 107-108 [emphasis in original, internal quotation marks and citations omitted].) Significantly, the Nomura Court distinguished its earlier holding in Ambac Assurance Corp. v EMC Mortgage LLC (121 AD3d 514 [2014]) (Ambac) that the sole remedy provisions applied not only to breaches of the Sponsor’s representations as to the mortgage loans in MLPA

³ The quotations and section numbers are to the governing documents for Nomura Asset Acceptance Corp., Series 2006-AF2 (Malloy Supp. Aff., Ex. H [MLPA], Ex. S [PSA].) As noted in Nomura, although there were different governing documents for the various securitizations at issue, the language was the same. (133 AD3d at 100, n 2.)

The numbering of the relevant Nomura MLPA provisions is the reverse of that in the Merrill Lynch MLPA. In Nomura, section 8 set forth representations and warranties regarding the mortgage loans, and section 7 included the No Untrue Statement provision, which the parties here refer to as the Seller’s Information provision.

§ 7 but also to breaches of a No Untrue Statement representation in MLPA § 8. In distinguishing Ambac, the Court reasoned that the sole remedy provisions there “were more broadly worded, stating that those provisions were applicable to ‘this Agreement,’ not as here, to specific sections of the MLPA.” (Nomura, 133 AD3d at 107.)

The sole remedy provisions in Ambac, MLPA § 7 and PSA § 2.03, are virtually identical to those at issue here. Ambac MLPA § 7, like Merrill Lynch MLPA § 7, provides that the repurchase and substitution obligations, as applicable, “shall constitute the Purchaser’s, the Trustee’s and the Certificateholder’s sole and exclusive remedies under this Agreement or otherwise respecting a breach of representations or warranties hereunder with respect to the Mortgage Loans, except for the obligation of the Mortgage Loan Seller to indemnify the Purchaser for such breach as set forth in and limited by Section 13 hereof.” Ambac PSA section 2.03 (a), like Merrill Lynch PSA § 2.03 (a), provides for the Depositor’s assignment to the Trustee of its rights under the MLPA, and then states: “The obligations of the Sponsor to substitute or repurchase, as applicable, a Mortgage Loan shall be the Trustee’s and the Certificateholders’ sole remedy for any breach thereof.”⁴

Moreover, Ambac MLPA § 8 and Merrill Lynch MLPA § 8 include similar Sponsor representations as to the accuracy of the Sponsor’s statements in the Prospectus Supplement regarding the mortgage loans. (See Merrill Lynch MLPA § 8 [g] [quoted supra at 2]; Ambac § 8 [vii] [summarized in Ambac (121 AD3d at 518) as “addressing the accuracy of the information in the prospectus supplements concerning the mortgage loans in the transactions”].) In addition, Merrill Lynch MLPA § 7 (h) sets forth a Sponsor representation similar to that in Ambac MLPA

⁴The quotations and section numbers are to the governing documents for Ambac – Bear Stearns Mortgage Funding Trust 2006-AR2 (Malloy Supp. Aff., Ex. B [MLPA], Ex. L [PSA].) It is not disputed that the language is the same in the governing documents for the other securitizations at issue in Ambac.

§ 7 (xx). Section 7 (h) here provides: “the information set forth under the captions ‘Description of the Mortgage Groups—General,’ ‘—Tabular Characteristics of the Mortgage Loans’ and in Annex II of the Prospectus Supplement is true and correct in all material respects.” Ambac MLPA § 7 (xx) provides: “the information set forth in Schedule A of the Prospectus Supplement with respect to the Mortgage Loans is true and correct in all material respects.”

In Ambac, the Court expressly held that MLPA § 7 (xx) was “essentially the same warranty” as the warranty in section 8 addressing the accuracy of information in the prospectus supplements regarding the mortgage loans. (121 Ad3d at 518.) The Court accordingly held that the sole remedy provision applied to breaches of both representations. (Id. at 517.)

The terms of the Ambac and Merrill Lynch MLPAs and PSAs are materially indistinguishable in all relevant respects. This court accordingly holds that Ambac rather than Nomura governs the determination of the remaining branch of Merrill Lynch’s motion to dismiss, and that the sole remedy provisions of the MLPA and PSA apply to the Trustee’s claim for breach not only of the MLPA § 7 representations and warranties, but also of the MLPA § 8 (g) representation and warranty.

In so holding, the court rejects the Trustee’s contention that the Ambac holding was dicta because the Ambac Court also decided that Ambac lacked standing to pursue its claims. The Ambac Court held that the sole remedy provisions did not by their terms bind Ambac but did bind the Trustee – the sole party authorized by the PSAs to enforce, on behalf of the certificateholders and Ambac as certificate insurer, the repurchase protocol for breaches of representations and warranties regarding the mortgage loans. The Court therefore held that Ambac lacked standing. (122 AD3d at 519.)

Finally, although there is overlap between the MLPA section 7 (h) and section 8 (g) representations, the court cannot say on this record that the representations are entirely duplicative. The court is also unpersuaded by the Trustee's contention that even assuming that the sole remedy provision applies to the Seller's Information provision, the second cause of action can proceed with repurchase as the remedy. The second cause of action pleads only "actual damages," unlike the first, which pleads specific performance or damages consistent with the repurchase protocol set forth in the sole remedy provisions.⁵ The second cause of action will accordingly be dismissed. The court further holds, however, that the pleading of the first cause of action is broad enough to encompass alleged breaches of representations and warranties made in both section 7 and section 8 (g) of the MLPA.

It is accordingly hereby ORDERED that the branch of defendant's motion to dismiss the second cause of action of the complaint is granted to the extent of dismissing that cause of action with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
November 3, 2016


MARCY FRIEDMAN, J.S.C.

⁵As the Nomura Court held, "plaintiffs may pursue monetary damages with respect to any defective mortgage loan in those instances where cure or repurchase is impossible." (133 AD3d at 107; see also Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341 * 7-10, 13, Index No. 653390/12 [Sup Ct, NY County June 26, 2014] [this court's prior decision, which was not the subject of the Nomura appeal discussed in this decision, collecting authorities holding that where repurchase of loans is impossible, damages consistent with the repurchase protocol are available].)