

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH

PART 54

Justice

Index Number : 650327/2013
ACE SECURITIES CORP. HOME
vs
DB STRUCTURED PRODUCTS, INC.
Sequence Number : 001
DISMISS ACTION

INDEX NO.
MOTION DATE 9/16/13
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 10-12
Answering Affidavits — Exhibits No(s) 13
Replying Affidavits No(s) 15

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 11/21/13

SHIRLEY WERNER KORNREICH J.S.C.

- 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: PART 54

-----X
ACE SECURITIES CORP., HOME EQUITY LOAN
TRUST, SERIES 2007-HE1, by HSBC Bank USA,
National Association, as Trustee,

Index No.: 650327/2013

DECISION & ORDER

Plaintiff,

-against-

DB STRUCTURED PRODUCTS, INC.,

Defendant.

-----X
SHIRLEY WERNER KORNREICH, J.:

Defendant DB Structured Products, Inc. (DBSP) moves to dismiss the Complaint pursuant to CPLR 3211. Defendant's motion is granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

The court assumes familiarity with its order dated May 13, 2013 in a related case, *ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 40 Misc3d 562 (SL2). The instant case is another mortgage-backed securities "put-back" action involving the same parties, virtually the same contracts, the same claims, and a trust comprised of similar loans.

On this motion, DBSP proffers three grounds for dismissal:¹ (1) plaintiff's damages are limited to the Pooling and Servicing Agreement's (the PSA) "sole remedy" provision, the Repurchase Protocol; (2) dismissal is warranted for loans which are not the subject of a breach

¹ Unlike in *SL2*, DBSP does not assert a statute of limitations defense.

notice; and (3) certain categories of loans, such as those that were liquidated, cannot be repurchased.

In *SL2*, this court held that Released, Charged Off, and Liquidated Loans are subject to repurchase, but, in any event, dismissal cannot be granted for such loans because discovery is necessary to determine which, if any, of the loans fall into these categories. *SL2*, 40 Misc3d at 568-69.² Consequently, DBSP has withdrawn this prong of its motion. As for DBSP's remaining arguments, the court holds that plaintiff's damages are limited to the formula set forth in the Repurchase Protocol, but that plaintiff may maintain put-back claims for all non-conforming loans in the Trust.

II. Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, L.L.C. v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); see also *Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual

² The court's ruling on this issue was endorsed in a similar federal case. See *Deutsche Alt-A Securities Mortg. Loan Trust, Series 2006-OA1 v DB Structured Prods., Inc.*, 2013 WL 3863861, at *12-14 (SDNY July 24, 2013) (Sweet, J.); see also *Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 920 FSupp2d 475, 514 (SDNY 2013) (Rakoff, J.) (awarding damages for non-conforming loans where repurchase demand was made after foreclosure).

allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

Plaintiff’s lawsuit, and indeed all put-back actions, seek a refund for loans that do not comply with the representations and warranties in Mortgage Loan Purchase Agreements and PSAs. These contracts specify the types of loan defects that call for a refund and the amount of the refund. If 8 out of 10 loans are non-compliant, plaintiff gets a refund for those 8.³ Plaintiff, however, does not get a refund for the 2 compliant loans, regardless of how bad the other 8 may be.⁴ In essence, this is DBSP’s argument refuting plaintiff’s claim for rescission or a complete refund based on a “fundamental breach.” Indeed, just as this court held in *SL2* that repurchase

³ This does not mean sampling cannot be used, but, continuing this example, if sampling demonstrates that 80% of the loans are non-compliant, plaintiff only gets a refund for 80% of its investment (assuming that sampling takes into account the average repurchase price of non-compliant loans, since one must obviously control for the fact that non-compliant loans may have a different repurchase value than compliant loans – for instance, it might be the case that the average fraudulent loan was for a greater amount than a non-fraudulent loan).

⁴ See *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Securities Inc.*, 2013 WL 4399210, at * 4, (SDNY Aug. 15, 2013) (Baer, J.) (“I disagree with the Trusts to the extent that they argue that breach of the repurchase obligation somehow entitles them to damages that are greater than those that are commensurate with the sole remedy clause. *No matter how the breach is characterized, Plaintiffs’ repurchase remedy is limited to ‘the Purchase Price’ under the PSAs.*”) (emphasis added); see also *Assured Guar. Mun. Corp. v DLJ Mortg. Capital, Inc.*, 37 Misc3d 1212(A), at *10 (Sup Ct, NY County 2012) (Kornreich, J.) (“[monoline insurers] are not entitled to consequential damages” where the PSA’s Repurchase Protocol has a “sole remedy” provision).

claims are not limited to the first six years after securitization because, if that were the case, the PSA would have said so – likewise, plaintiff is not entitled to a refund for compliant loans because, again, if that were the case, the PSA would have said so. *See id.* at 567; *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 (2002) (“a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.”). As the court noted in *SL2*, compliant loans also have default risk, but such risk was meant to be borne by plaintiff. *SL2*, 40 Misc3d at 569.

That being said, as the court held in *SL2*, plaintiff is not precluded from maintaining put-back claims for loans not specified in its demand letters. *Id.* at 568. It is commercially unreasonable to require plaintiff to effectively re-underwrite the balance of the trust. Moreover, the basis for plaintiff’s invocation of the Repurchase Protocol is *not* merely its own discovery of non-conforming loans, but also DBSP’s alleged breach when, from the start, it knew that the majority of the subject loans were nonconforming and failed to repurchase despite its “*discovery*” of the nonconformance.

It should be noted that, if DBSP ran afoul of the PSA by failing to remedy the existence of nonconforming loans from the outset, such breach does not impact the timeliness of put-back claims because: (1) as noted in *SL2*, if DBSP was secretly hiding the existence of pervasive nonconformance, it would be continually guilty of breaching its duty of good faith and fair dealing; (2) regardless of DBSP’s bad acts at the outset, DBSP’s recurring obligation to comply with the Repurchase Protocol makes the put-back claims timely; and (3) if DBSP really filled the majority of the Trust with bad loans, and never intended to repurchase any of them by concealing its conduct until after the 6-year statute of limitations had run, DBSP would have committed fraud, for which the statute of limitations would not begin to run until 2 years from discovery.

CPLR 213(8). Indeed, in *SL2*, as soon as the Trustee found out about the non-conforming loans, it immediately made a repurchase demand. *See SL2*, 40 Misc3d at 568.

That being said, investor put-back actions are not fraud cases. The contracting parties specifically negotiated representations and warranties and the remedy for breach of these contractual provisions – the Repurchase Protocol. However, if the negotiated contract remedy is undermined and DBSP is immunized under the statute of limitations, the Trustee may well pursue a fraud claim. This would be unfortunate because the ensuing negative externalities (e.g. the added expense of litigating fraud and reputational risks) would be significant for all parties.⁵ The bottom line is that if non-conforming loans were put into the Trust, plaintiff is entitled to a refund.

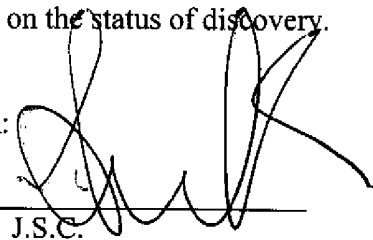
For these reasons, the court deems the Complaint to contain only one cause of action – breach of contract for DBSP’s failure to pay plaintiff a refund for all non-conforming loans in the Trust, in an amount to be computed based on the Repurchase Protocol. Accordingly, it is

ORDERED that the motion to dismiss the Complaint by defendant DB Structured Products, Inc. is granted in part, such that plaintiff’s breach of contract claim shall proceed in accordance with this decision; and it is further

ORDERED that within 20 days of the entry of this order on the NYSCEF system, the parties shall call the court, after 4:00 pm, to update it on the status of discovery.

Dated: November 21, 2013

ENTER:



J.S.C.

⁵ There also are many unique procedural hurdles that apply to fraud claims (e.g., particularity, scienter, assignment issues, etc.)