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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 654464/2012
J.P. MORGAN MORTGAGE
vs
WMC MORTGAGE, LLC,
Sequence Number : 001
DISMISS

PART 54

INDEX NO. _____
MOTION DATE 10/15/13
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). 22-24
Answering Affidavits — Exhibits _____ | No(s). 34-40
Replying Affidavits _____ | No(s). 72-74

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
_____, 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

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THE BANK OF NEW YORK MELLON, solely as Securities Administrator for J.P. Morgan Mortgage Acquisition Trust 2006-WMC4,

Index No.: 654464/2012

DECISION & ORDER

Plaintiff,

-against-

WMC MORTGAGE, LLC, J.P. MORGAN MORTGAGE ACQUISITON CORPORATION, and J.P. MORGAN CHASE BANK, N.A.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendants WMC Mortgage, LLC (WMC), J.P. Morgan Mortgage Acquisition Corporation (JPMMAC), and J.P. Morgan Chase Bank, N.A. (JPMC Bank) move to dismiss the Complaint pursuant to CPLR 3211.[1] Defendants' motions are granted in part and denied in part for the reasons that follow.

I. Factual Background & Procedural History

This RMBS "put-back" action was commenced by The Bank of New York Mellon (BONY) on behalf of J.P. Mortgage Acquisition Trust-WMC4 (the Trust, collectively referred to as plaintiff). The Trust's investors (the Certificateholders) compelled BONY to commence this action.

[1] Defendants also moved to stay this case in favor of a declaratory judgment action they filed against plaintiff in federal court in Minnesota, one day before this action was commenced. That action has since been dismissed in favor of this action. Hence, defendants have withdrawn the portion of their motions seeking a stay.

Pursuant to a Mortgage Loan Sale and Interim Servicing Agreement, dated as of July 1, 2005 (the MLSA),[2] JPMMAC purchased loans from the originator (WMC), then sold some of those loans to a "depositor" (in this case, a non-party J.P. Morgan affiliate), and the loans were transferred to the Trust pursuant to a Pooling and Servicing Agreement (the PSA), which had a closing date of December 20, 2006. JPMC Bank is the loan servicer.

Plaintiff seeks to enforce the Repurchase Protocol set forth in the MLSA and the PSA. The Repurchase Protocol provides that when the relevant bank either discovers ("discovery") or is informed by an investor ("notice") that a loan in the Trust does not comply with one of myriad representations and warranties, the Trust is entitled to a refund for that loan (either through the substitution of a conforming loan or the receipt of a defined cash payment).[3] The MLSA and the PSA provide that the Repurchase Protocol is the Trust's "sole remedy" for being compensated for non-conforming loans. This court[4] and virtually all of the federal and state courts in New York that have recently considered this issue[5] have held that a Trust's ability to recoup its RMBS losses is limited to the defined repurchase price for non-conforming loans. That is, no matter the

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[2] Called an "MLPA" by other banks.

[3] In this MLSA, a put-back claim can only be maintained against WMC where a false representation "materially and adversely affects the value of a Mortgage Loan."

[4] *See ACE Securities Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.*, 40 Misc3d 562 (Sup Ct, NY County 2013); *Assured Guar. Mun. Corp. v DLJ Mortg. Capital, Inc.*, 37 Misc3d 1212(A), at *10 (Sup Ct, NY County 2012). *See also* Index No. 650327/2013 (Decision on Motion Seq. No. 001).

[5] *See, e.g., Assured Guar. Corp. v EMC Mortg., LLC*, 39 Misc3d 1207(A), at *6 (Sup Ct, NY County 2013) (Ramos, J.); *Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 920 FSupp2d 475, 513 (SDNY 2013) (Rakoff, J.); *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Securities Inc.*, 2013 WL 4399210, at * 4, (SDNY 2013) (Baer, J.); *La Salle Bank N.A. v CIBC, Inc.*, 2012 WL 112208, at *2 (SDNY 2012) (Pauley, J.)

basis for plaintiff's put-back cause of action,[6] it is a claim for an amount of money under the Repurchase Protocol for non-compliant loans. Consequently, much of the parties' dispute – namely, how to properly characterize the breach (e.g. failure to repurchase vs. failure to notify)[7] and which loans qualify for repurchase (e.g. liquidated loans)[8] – does not merit further discussion. Regardless of the sufficiency of defendants' notifications and the adequacy of their production of loan files, damages in this action are capped at the total repurchase price of the Trust's non-conforming loans. *See MASTR*, 2013 WL 4399210, at *4 ("No matter how the breach is characterized, Plaintiffs' repurchase remedy is limited to 'the Purchase Price' under the PSAs.").

[6] The Complaint lists 8 causes of action: (1) breach of the MLSA's representations and warranties against WMC; (2) failure to repurchase against WMC; (3) breach of the PSA's representations and warranties against JPMMAC; (4) failure to repurchase against JPMMAC; (5) failure to indemnify against WMC; (6) failure to provide loan files against JPMC Bank; (7) failure to notify against all defendants; and (8) a declaratory judgment against WMC and JPMMAC as to their breaches of contract. For the reasons discussed herein, the breach of contract claims survive, including the claim for failure to adequately provide loan files against JPMC Bank, since discovery is needed to determine the sufficiency of JPMC Bank's production. But, the court dismisses the declaratory judgment claim as duplicative. *See Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1998) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.").

[7] To be sure, a servicer such as JPMC Bank cannot receive actual notice of originator fraud, not tell anyone, and think it can credibly maintain it did nothing wrong. This type of "failure to notify" upends the framework of the MLSA and PSA. Whether it is a stand-alone cause of action or merely part of the myriad steps defendants allegedly took in contravention of their put-back obligations is more of an academic dispute than a meaningful legal distinction. Simply put, if loans did not comply with their respective representations and warranties, defendants are liable and discovery would determine how liability should be apportioned.

[8] *See ACE*, 40 Misc3d at 568-69.

The remaining issues on this motion are: (1) whether JPMMAC's representations and warranties in the PSA apply to the breaches alleged in the Complaint; and (2) whether plaintiff can recover its costs and attorneys' fees from WMC.

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 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).

A. JPMMAC's Representations In The PSA

JPMMAC's "Representations and Warranties as to the Mortgage Loans" can be found in Section 2.06 of the PSA. Unlike WMC's representations, most of the representations in Section 2.06 contain a temporal limitation. That is, JPMMAC was only representing certain facts to be true within a specified time period. Each subsection states the applicable time period and then references sections in an attached "Schedule 4", which contains a list of representations. For instance, Section 2.06(a)(v)'s time period is the Servicing Transfer Date to the Closing Date (December 1 to December 20, 2006). One of the listed representations, "(e)", is a warranty about properties having certain insurance coverage. In other words, JPMMAC is warranting that, for the stated time period, a particular fact (the existence of coverage) is true.

However, representation "(a)" in Section 2.06(a)(iii) does not appear to have a temporal limitation, despite the stated time period of the Whole Loan Sale Date to the Closing Date (October 30 to December 20, 2006). Representation "(a)" provides:

> Mortgage Loans as Described. The information set forth in the Mortgage Loan Schedule and the tape delivered by the Seller to the Purchaser is true, correct and complete in all material respects.

This refers to data about the loans' underwriting, including the loan tape, which contains information about the borrower's income, the property value, and other information related to the borrower's likelihood of paying off a loan. The truth of the specific facts in the loan tape is the very thing the originator, WMC, warrants in the MLSA. The falsity of such facts is the basis for plaintiff's claims against WMC.

JPMMAC is correct that, in the PSA, it does not warrant specific, itemized facts about loan origination in the way WMC does in the MLSA. However, in warranting that the loan tape

is accurate, JPMMAC is effectively warranting the truth of the specific facts behind the loan.[9] Rather than list 40 or 60 separate warranties about borrower income, occupancy, credit scores, and so forth, in two lines, JPMMAC issued a warranty tantamount to WMC's.

JPMMAC argues that this loan tape representation must be read in the same manner as its other temporally restricted warranties – that is, solely warranting the truth of the information within the specified time period. Plaintiff rebuts JPMMAC's argument with a philosophical axiom: the truth about the past is as true today as it was then. In other words, if the loan tape indicates that a borrower's income was $100,000 when he applied for the loan (for instance, in 2004), if the borrower's income was really $20,000, the loan tape is equally as false (1) in 2004, when the loan was originated; (2) in 2005, when the MLSA was executed; and (3) in 2006, when the PSA was executed. Ergo, when JPMMAC warrants that the loan tape was accurate between October 30 and December 20, 2006, it is warranting its accuracy in 2004 since the past cannot be changed.

Nonetheless, JPMMAC argues that Section 2.06(a)(iii)'s temporal limitation indicates that JPMMAC is only warranting falsities during the stated period (i.e. insurance coverage lapses in November 2006). JPMMAC characterizes this type of warranty as a "bring down" representation, contending that it merely warranted that "nothing had changed" with respect to the loans. However, while interpreting such representations as "bring down" makes sense with respect to some of the listed warranties (e.g. insurance converge, which could change over time),

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[9] JPMMAC's lack of an obligation to conduct due diligence on the loan tape does not mean that it did not choose to insure loan level defects. *See ACE*, 40 Misc3d at 566-67 (the securitizer "has no duty to ensure that [PSA] representations are true. ... [w]hatever due diligence [the securitizer] conducted was a matter of its sole discretion. If [the securitizer] knew of or recklessly disregarded signs that the representations were false, it did so at its own peril because of its potential liability to the trustee under [the Repurchase Protocol].").

it is hard to see the logic of a "bring down" loan tape warranty, since the accuracy of the loan tape cannot change. Either the loan tape accurately reflected reality at origination, or it did not.

To wit, plaintiff submits an example of another bank's PSA, which has a "bring down" warranty stating that "no event has occurred in [a specified time period]." Though the court does not view the terms of other PSAs as dispositive of the instant PSA's meaning, the difference does highlight how JPMMAC might have drafted its PSA if it did not intend to insure loan level defects.

If JPMMAC did not intend to warrant loan level defects, it should have drafted the PSA differently. As defendants argue regarding the "sole remedy provisions," the court must enforce the PSA as written. *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."); *Mount Vernon Fire Ins. Co. v Creative Housing Ltd.*, 88 NY2d 347, 362 (1996) ("provisions in a contract are not ambiguous merely because the parties interpret them differently."). As written, JPMMAC warranted the loan tapes' truth.

B. Plaintiff's Costs & Attorneys' Fees

Plaintiff seeks to recoup its costs of making put-back claims against WMC. It relies on Section 7.03 of the MLSA, which provides:

> In addition to [its repurchase obligations], [WMC] shall indemnify the Purchaser and hold it harmless against any out-of-pocket losses, penalties ... legal fees (including, without limitation, legal fees incurred in connection with the enforcement of [WMC's] indemnification obligation under this Subsection 7.03) and related costs, judgments and other costs and expenses resulting from any claim, demand, defense or assertion arising from or relating to, a breach of [WMC's] representations and warranties contained in this Agreement."

New York courts have held that similar MLSA/PSA indemnity provisions cover a trustee's put-back costs. *See, e.g., Assured Guar. Corp. v EMC Mortg., LLC*, 39 Misc3d 1207(A) at *7; *Assured Guar. Mun. Corp. v Flagstar Bank, FSB*, 920 FSupp2d at 516. However, WMC avers that Section 7.03 merely covers third-party claims against plaintiff, not plaintiff's first-party claims against WMC. In truth, in trustee put-back cases, the line between first-party and third-party claims is blurred. On the one hand, plaintiff appears to be asserting a first-party claim against WMC. Yet, plaintiff is acting on behalf of the Certificateholders, whose demand on BONY – a third-party claim – is the basis for this action. Arguably, this nominally first-party action qualifies for third-party indemnity since it is arises from a third-party put-back demand.

According to a federal district court in Minnesota, which recently considered this very issue when confronted with a virtually identical indemnity clause involving WMC, the indemnity does not apply. *See MASTR Asset Backed Secs. Trust 2006-HE3 v WMC Mortgage, LLC*, 2013 WL 5596419, at *8 (D Minn Oct. 11, 2013), accord *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492 (1989) (under New York law, intention to cover first-party losses must be "unmistakably clear"). The Minnesota court reasoned that because "it is equally plausible" that the indemnity's concluding catchall of losses directly "'resulting from' a breach of the representations" only covers third-party claims, the indemnity does not "unmistakably" provide coverage for first-party claims. *Id.* Moreover, the court held that a trustee's put-back suit is a first-party claim, notwithstanding the fact that it was brought at the behest of the Certificateholders. *Id.*

This court disagrees. To be sure, Section 7.03 could have been more artfully drafted. The first half of the section clearly includes indemnity for third-party claims, but in the latter part of the section, WMC agrees to provide indemnification for "other costs ... resulting from any claim ... relating to [] a breach of [WMC's] representations ... in [the MLSA]." It strains credulity not to interpret Section 7.03 to cover plaintiff's costs in making a put-back claim. When WMC refused such claim, plaintiff commenced this case for the purpose of enforcing its put-back rights. Plaintiff's legal fees are an expense related to WMC's MLSA breaches. Consequently, this court concludes that Section 7.03's indemnification provision applies to this case. Accordingly, it is

ORDERED that the motions to dismiss the Complaint by defendant defendants WMC Mortgage, LLC (WMC), J.P. Morgan Mortgage Acquisition Corporation (JPMMAC), and J.P. Morgan Chase Bank, N.A. (JPMC Bank) are denied on the first through seventh causes of action, but granted on the eight causes of action (declaratory judgment), which is dismissed as duplicative of plaintiff's breach of contract claims; and it is further

ORDERED that the multiple breach of contract claims against WMC and JPMMAC are deemed to be pled as one cause of action against each defendant for breaching the Repurchase Protocol, and damages for such breach is limited to the Repurchase Protocol's put-back amount for non-conforming loans (i.e. plaintiff cannot recover damages in excess of its non-conforming loan refund); and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on December 5, 2013 at 11:00 in the forenoon.

Dated: November 21, 2013

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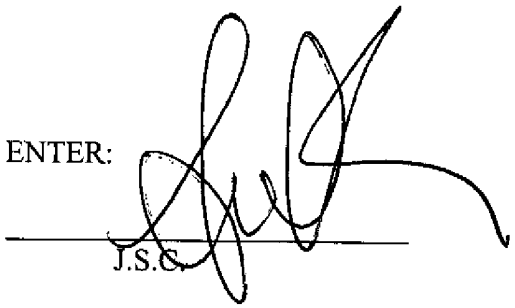

J.S.C.