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Home Equity Asset Trust 2006-5 (Heat 2006-5) v DLJ Mtge. Capital, Inc.
2014 NY Slip Op 50001(U)
Decided on January 3, 2014
Supreme Court, New York County
Bransten, J.
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Decided on January 3, 2014

Supreme Court, New York County

Home Equity Asset Trust 2006-5 (Heat 2006-5), by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee, Plaintiff,

against

DLJ Mortgage Capital, Inc., Defendant.

HOME EQUITY ASSET TRUST 2006-6 (HEAT 2006-6), by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee, Plaintiff,

against

DLJ MORTGAGE CAPITAL, INC., Defendant.

HOME EQUITY ASSET TRUST 2006-7 (HEAT 2006-7), by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee, Plaintiff,

against

DLJ MORTGAGE CAPITAL, INC., Defendant.

652344/2012

Appearances of counsel:

Lori Lynn Phillips, Barry S. Levin, Darren S. Teshima, John Ansbro, and Richard A. Jacobsen of Orrick, Herrington & Sutcliffe LLP for Defendant DLJ Mortgage Capital, Inc.

Marc E. Kasowitz, Hector Torres, Christopher P. Johnson, and David J. Abrams of Kasowitz, Benson, Torres & Friedman LLP for Plaintiffs

Eileen Bransten, J.

In the three above-captioned actions, the Plaintiff-Trusts,[FN1] acting by and through Trustee U.S. Bank National Association, asserting three breach of contract claims against Defendant DLJ Mortgage Capital, Inc. ("DLJ"). DLJ now moves to dismiss the Trusts' claims pursuant to CPLR 3211(a)(1), (3), (5), (7), and (8). The Trusts oppose. For the reasons that follow, DLJ's motion is granted with prejudice.

I.*Background*

Plaintiffs' claims stem from three securitizations sponsored by DLJ, which were comprised of approximately 14,790 residential mortgage loans. (Consol. Compl. ¶ 1.) These mortgage loans were pooled in the Trusts, which issued certificates that were sold to investors. *Id.* The certificates represented interests in the mortgage loans, the value of which hinged on the quality of the loans themselves. *Id.*

DLJ made certain representations and warranties regarding the characteristics of the mortgage loans, including that the mortgage loans met certain quality standards and complied with sound underwriting practices and applicable legal requirements. *Id.* at ¶ 2. In the event that any mortgage loans breached these representations and warranties — and the breaches materially and adversely

affected the value of the loans, as well as the interest of the certificateholders in the loans — the Trusts' Pooling and Servicing Agreements ("PSA") required that DLJ cure or repurchase the breaching loans. *Id.*

Plaintiff-Trusts allege that their "[f]orensic review of certain loan files from all three Trusts establishes DLJ's extensive breaches of its [representations and warranties] with respect to each of the Trusts." *Id.* ¶ 5. On October 19, 2012, the Trustee gave notice to DLJ of breaches concerning 629 loans in the HEAT 2006-5 Trust, 765 loans in the HEAT 2006-6 Trust, and 1,270 loans in the HEAT 2006-7 Trust. *Id.* ¶ 7. Plaintiffs contend that DLJ has refused to repurchase any of these loans. *Id.* [*2]

Before making these repurchase demands, the Federal Housing Finance Agency ("FHFA") filed a summons with notice on July 3, 2012. FHFA commenced the action in its capacity as Conservator of the Federal Home Loan Mortgage Corporation ("Freddie Mac"), which was a certificateholder in each of the Trusts. FHFA's summons with notice provided notice of breach of contract, specific performance, declaratory relief, and indemnification claims "arising from [DLJ's] breaches of representations and warranties" with regard to the loans in the HEAT 2006-5 trust. *See* Affirmation of Lori Lynn Phillips ("Phillips Affirm.") Ex. 9. On July 31, 2012, FHFA filed a similar summons with notice relating to the HEAT 2006-6 Trust, and on October 2, 2012, it filed another for HEAT 2006-7. *Id.* Ex. 10 & 11.

After FHFA served its summons with notice relating to HEAT 2006-5, DLJ demanded a complaint. On December 18, 2012, a complaint concerning the HEAT 2006-5 transaction was filed; however, FHFA was no longer the plaintiff. Instead, the action was brought by the HEAT 2006-5 Trust, and the complaint asserted that the Trust was "acting through the Trustee, U.S. Bank National Association." Phillips Affirm. Ex. 12.

The parties then agreed to consolidate the HEAT 2006-5 case with the actions relating to HEAT 2006-6 and HEAT 2006-7. On January 31, 2013, a Consolidated Complaint was filed, which, this time, identified the plaintiff in the HEAT 2006-5 action as "Home Equity Asset Trust 2006-5, by U.S. Bank National Association, solely in its capacity as Trustee." (Phillips Affirm. Ex. 1.) The Trusts were similarly identified for the HEAT 2006-6 and HEAT 2006-7 actions. *Id.* On July 3, 2013, the Trust-Plaintiffs filed an Amended Consolidated Complaint, asserting three breach of contract claims against DLJ premised on DLJ's alleged breaches of representations and warranties and seeks: (1) specific performance of the repurchase protocol; (2) compensatory, consequential, rescissionary, and equitable damages; and, (3) indemnification.

II.*Discussion*

DLJ now brings the instant motion to dismiss the Plaintiff-Trusts' claims in their entirety. In support of its motion, DLJ contends that the Trusts' claims are time-barred and that the Trusts lack standing to enforce the remedies provided in the PSAs. Each argument will be considered in turn.

A.*Motion to Dismiss Standard*

On a motion to dismiss for failure to state a cause of action, the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977); *see* CPLR 3211(a)(7). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss must be denied, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks and citations omitted).

On the other hand, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 AD2d 423, 424 (1st Dep't 1995). [*3]

B.*Statute of Limitations*

DLJ first contends that the Plaintiff-Trusts' entire complaint must be dismissed for failure to commence the action within New York's six-year limitations period for breach of contract claims. FHFA filed its summonses for the HEAT 2005-6, HEAT 2006-6, and HEAT 2006-7 transactions on July 3, July 31, and October 2, 2012 respectively. DLJ argues that these summonses with notice were filed more than six years after the "As Of" dates for the transaction's PSAs, when the claims purportedly accrued. Each of the PSAs contains an "As Of" date on its first page, stating that the Agreement is "Dated as of June 1, 2006" in the case of the HEAT 2006-5 PSA — or for HEAT 2006-6 and 2006-7 PSAs, July 1 and September 1, 2006. *See* Phillips Affirm. Ex. 3, 4, & 5.

While using the "As Of" date as the accrual date would render FHFA's initial filings untimely, the First Department recently ruled that breach of contract claims stemming from breaches of representations and warranties accrue on the closing date of the transaction. *See ACE Sec. Corp. v. DB Structured Products, Inc.*, — N.Y.S.2d —, 2013 WL 6670379 at *1 (1st Dep't Dec. 19, 2013).

The closing dates for the HEAT 2006-5, 2006-6, and 2006-7 transactions were July 5, August 1, and October 3, 2006. (Consol. Compl. ¶¶ 20-22.) Therefore, FHFA's July 3, July 31, and October 2, 2012 summonses with notice, if properly filed, would be considered timely.

FHFA's summonses with notice, however, were not properly filed. FHFA commenced this action, in its capacity as conservator to Freddie Mac, before the Trustee served its repurchase notices on Defendant. Under Section 2.03 of the PSAs, Defendant was entitled to a 90-day period to cure and repurchase the loans identified by the Trustee in its repurchase demands.[FN2] Here, the Consolidated Complaint alleges that the Trustee submitted its repurchase requests on October 19, 2012. *See* Consol. Compl. ¶ 7 ("On October 19, 2012, the Trustee gave notice to DLJ of breaches of R & Ws concerning 629 Defective Loans in the HEAT 2006-5 Trust, 765 Defective Loans in the HEAT 2006-6 Trust, and 1,270 Defective Loans in the HEAT 2006-7 Trust that were the subject of forensic review, together with supporting documentation.") Thus, the cure period had not elapsed — and had not even begun — when FHFA filed its summonses with notice on July 3, July 31, and October 2, 2012. FHFA's "failure to comply with a condition precedent to commencing suit rendered [its] summons[es] with notice a nullity." *ACE Sec. Corp. v. DB Structured Prod., Inc.*, — N.Y.S.2d —, 2013 WL 6670379, at *1 (1st Dep't Dec. 19, 2013). Accordingly, this action is barred by the six-year statute of limitations on contract claims. *See* CPLR 213(2). [*4]

C.*Standing*

Even if timely filed, Plaintiffs' claims nonetheless would fail as they suffer from a fatal defect — lack of standing. FHFA was not a proper plaintiff in this action. Plaintiffs ultimately named the Trusts themselves as plaintiffs in the Consolidated Complaint; however, this January 31, 2013 filing was outside the limitations period. Further, there was no valid pre-existing action to which the Consolidated Complaint could relate back.

The above-captioned actions were commenced by FHFA, in its role as conservator for Freddie Mac, a certificateholder in each of the Trusts at issue. Under Section 10.08 of the Trusts' PSAs, a certificateholder is expressly barred from initiating an action, such as the instant actions, unless, *inter alia*, the certificateholder "previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof..." *See* Phillips Affirm. Ex. 3, 4, & 5 (the "No Action clauses"). Here, the Amended Consolidated Complaint alleges that the Trusts gave their written notice of an Event of Default in the form of repurchase requests on October 19, 2012. *See* Am. Consol. Compl. ¶ 7 ("On October 19, 2012, the Trustee gave notice to DLJ of breaches of R & Ws concerning 629 Defective Loans in the HEAT 2006-5 Trust, 765 Defective Loans in the HEAT

2006-6 Trust, and 1,270 Defective Loans in the HEAT 2006-7 Trust that were the subject of forensic review, together with supporting documentation.")

However, these repurchase requests did not give notice of an Event of Default, as defined in Section 7.01 of the Trusts' PSAs. *See* Phillips Affirm.Ex. 3 at § 7.01, Ex. 4 at § 7.01, and Ex. 5 at § 7.01. The Events of Default defined in the PSAs all pertain to actions, or inactions, by the Servicer. *See id.* The representation and warranty breaches asserted by the Trustee in its repurchase requests, however, fall outside the servicing-related Event of Default categories enumerated in the PSAs. Accordingly, FHFA's actions, initiated on behalf of certificateholder Freddie Mac, are barred by the PSAs' No Action clauses. *See ACE Sec. Corp. v. DB Structured Prod., Inc.*, — N.Y.S.2d —, 2013 WL 667 6670379, at *1 (1st Dep't Dec. 19, 2013) ("[T]he certificate holders lacked standing to commence the action on behalf of the trust. The "no-action" clause in § 12.03 of the PSA sets forth as a condition precedent to such an action that the certificate holders provide the trustee with a written notice of default and of the continuance thereof.' However, the defaults' enumerated in the PSA concern failures of performance by the servicer or master servicer only."); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 AD3d 684, 684-85 (1st Dep't 2012) (barring action brought by certificateholder seeking repurchase of defective loans since "the no action' clause in the PSAs, which plainly limits certificate holders' right to sue to an Event of Default' ...").

Further, the substitution of the Trustee as plaintiff in the Consolidated Complaint does not salvage Plaintiffs' actions. The Plaintiff-Trusts urge the Court to look past FHFA's lack of standing at the initiation of this action and hold that the Consolidated Complaint relates back to the date of the summonses with notice initially filed by FHFA within the limitations period. However, "[r]elation-back applies to the amendment of [*5]claims and parties and is dependent upon the existence of a valid preexisting action." *Southern Wine & Spirits of Am., Inc. v. Impact Envtl. Eng'g, PLLC*, 80 AD3d 505, 505—506 (1st Dep't 2011). There was no valid preexisting action in this instance, since FHFA lacked standing to sue. *See Goldberg v. Camp Mikan—Recro*, 42 NY2d 1029, 1030 (1977); *Southern Wine & Spirits of Am., Inc.*, 80 AD3d at 505-506 ("Relation back applies to the amendment of claims and parties and is dependent upon the existence of a valid preexisting. Here, however, the original complaint was brought by plaintiffs in violation of the condition precedent, and plaintiffs cannot rely upon CPLR 203(f) to cure such failure to comply."); *ACE Sec. Corp*., 2013 WL 6670379, at *1 ("Nor does the substitution of the trustee as plaintiff permit us to deem timely filed the trustee's complaint.").

III.*Conclusion*

For the foregoing reasons, Plaintiffs' claims fail, and Defendant's motion to dismiss is granted with prejudice.[FN3] The remainder of Defendant's arguments are moot.

Accordingly, it is

ORDERED that Defendant DLJ Mortgage Capital, Inc.'s motion to dismiss is granted with prejudice; and it is further

(*Order continues on next page.*)

ORDERED that the Clerk is directed to enter judgment in favor of Defendant dismissing this action, together with costs and disbursements to Defendant, as taxed by the Clerk upon presentation of a bill of costs.

Dated: New York, New York

January 3, 2014

ENTER: [*6]

Hon. Eileen Bransten, J.S.C.

Footnotes

Footnote 1: The Plaintiff-Trusts ("Trusts") are the Home Equity Asset Trust 2006-5 ("HEAT 2006-5"), Home Equity Asset Trust 2006-6 ("HEAT 2006-6"), and Home Equity Asset Trust 2006-7 ("HEAT 2006-7").

Footnote 2: Under Section 2.03(d), the 90-day cure or repurchase window begins upon the earlier of Defendant's discovery of, or its receipt of written notice from any party of, a breach. Here, the Consolidated Complaint does not allege that Defendant was aware of the breaches alleged before it received the Trustee's written notice. Therefore, based on the facts as pleaded, the 90-day cure or repurchase window commenced when Defendant received the Trustee's repurchase demands.

Footnote 3: On December 31, 2013, the Court received a letter from the Plaintiff-Trusts, stating their intention to file an amended complaint to include allegations concerning the applicability of the Housing and Economic Recovery Act of 2008 to the accrual of their causes of action. *See*

Docket No. 122. As an initial matter, Plaintiffs failed to raise such an argument in opposition to Defendant's motion to dismiss, which was based in part on statute of limitations grounds. Plaintiffs likewise do not contend that this argument could not have been raised in their opposition. However, putting that aside, the potential amendment discussed by Plaintiffs, if meritorious, would cure, at most, the statute of limitations issues with its claims. The amendment would not cure the standing defects outlined above. Accordingly, notwithstanding Plaintiffs' desire to amend, their action is nonetheless dismissed with prejudice for the reasons outlined in this opinion.

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