

**Home Equity Mtge. Trust Series 2006-1 v DLJ Mtg.  
Capital, Inc.**

2013 NY Slip Op 32564(U)

October 9, 2013

Sup Ct, New York County

Docket Number: 156016/2012

Judge: Melvin L. Schweitzer

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, et al

INDEX NO. 156016/2012

-v-

MOTION DATE

DLJ Mortgage Capital, Inc. et al

MOTION SEQ. NO. 003

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

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

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by defendant Select Portfolio Servicing, Inc. ("SPS") is granted in part and denied in part per the attached Decision and Order as follows:

Motion to dismiss DENIED w/ failure to notify cause of action, access to records cause of action, declaratory judgment cause of action;
Motion to dismiss GRANTED w/ indemnification cause of action.

Also, plaintiffs are granted leave to amend their complaint.

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

Dated: October 9, 2013

Melvin L. Schweitzer, J.S.C.
MELVIN L. SCHWEITZER

- 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 45

-----X	
HOME EQUITY MORTGAGE TRUST SERIES 2006-1,	:
HOME EQUITY MORTGAGE TRUST SERIES 2006-3,	:
and HOME EQUITY MORTGAGE TRUST SERIES	:
2006-4,	:
	:
Plaintiffs,	:
	:
-against-	:
	:
DLJ MORTGAGE CAPITAL, INC., and SELECT	:
PORTFOLIO SERVICING, INC.,	:
	:
Defendants.	:
-----X	

Index No. 156016/2012  
DECISION AND ORDER  
Motion Sequence No. 003

**MELVIN L. SCHWEITZER, J.:**

Select Portfolio Servicing, Inc. (SPS) moves to dismiss the complaint against it pursuant to CPLR 3211 (a) (1), (3), (5), and (7). Plaintiffs bring this action alleging breach of contract (the Pooling and Servicing Agreements) where DLJ failed to cure the breached representations and warranties through the repurchase of relevant loans, as provided for in the agreements, and where SPS failed to inform the other parties to the agreements of the breaches upon its discovery of such misrepresentations. The motion to dismiss the complaint against SPS is granted in part and denied in part.

**Background**

The facts are as taken from the complaint.

This action is brought by Home Equity Mortgage Trust Series 2006-1, 2006-3, and 2006-4 (the Trusts) by U.S. Bank National Association (the Trustee) in its capacity as Trustee of the Trusts. The Trusts are New York common law trusts established pursuant to Pooling and Servicing Agreements (PSAs). The Trustee is a national banking association, organized and

existing under the laws of the United States with its principal place of business in St. Paul, Minnesota and an office in New York County.

DLJ Mortgage Capital, Inc. (DLJ) is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc., and is primarily engaged in the purchase and sale of mortgage loans. In the underlying transactions, DLJ played the role of Sellers to the Trusts. Select Portfolio Servicing, Inc. (SPS) is a corporation organized under the laws of Utah with its principal place of business in Salt Lake City, Utah. It, like DLJ, is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. SPS acted as a Servicer and Special Servicer for the Trusts.

The Trusts were created in 2006 to hold mortgage loans that DLJ had acquired from third-party originators. The Trusts purchased pools of mortgage loans from DLJ and issued certificates to investors that represent interests in the assets of the Trusts. The mortgage loans were initially sold by DLJ to Credit Suisse First Boston Mortgage Securities Corporation (the Depositor) pursuant to Assignment and Assumption Agreements. The Depositor then conveyed the loans to the Trust and assigned all of its right, title, and interest in the loans to the Trustee for the benefit of the certificateholders pursuant to the PSAs.

When the mortgage-backed securities were issued, DLJ made a series of representations and warranties (R&Ws) to the Trusts regarding the characteristics and risk profiles of the underlying loans. Plaintiffs allege that the investors in the Trusts did not have access to the origination files of the relevant loans and therefore could only depend on DLJ's R&Ws as to the quality and characteristics of the loans. Specifically, DLJ allegedly made R&Ws that each of the loans had been originated according to underwriting guidelines that were "designed to ensure the quality" of the loans. Section 2.03 of the PSAs states that if the R&Ws were later found to be

false, DLJ would repurchase the loans from the Trusts. Alleged breaches of such R&Ws are the foundation of this action.

Section 2.03 of the PSAs requires all parties, including SPS, to “give prompt notice” to the other PSA parties if they discover that DLJ breached a representation or warranty that materially and adversely affects the interests of the certificateholders in any loan. SPS, as a servicer, modified mortgages in certain instances in which borrowers were unable to make loan payments. Plaintiffs allege that the process of loan modification requires SPS to scrutinize the underlying origination files and any supplemental information provided by the borrower to assess the borrower’s ability to pay. It claims that SPS likely became aware of breached R&Ws through the loan modification process.

Plaintiffs’ claim that SPS was also responsible for determining whether delinquent loans should be “charged off” and then “released” from the Trusts. This process allegedly requires SPS to assess whether a “Significant Net Recovery” would be possible on the severely delinquent loans, which would require SPS to decide whether the borrowers had the current ability to pay. As in the loan modification process, SPS allegedly was required to scrutinize the underlying origination files as well as supplementary information to assess the borrower’s ability to pay. Plaintiffs claim that this process likely would have caused SPS to become aware of the breached R&Ws.

Plaintiffs’ first cause of action against SPS is for breach of contract: failure to notify. Section 2.03 (f) requires SPS, as a servicer, to give prompt written notice to the other PSA parties when it discovers that any loans breached DLJ’s R&Ws. Plaintiffs allege that SPS knew that the loans breached DLJ’s representations and warranties but failed to notify the Trustee of

such breaches. Plaintiffs also allege that SPS's breaches are material and adverse to the value of the loans and the interests of the certificateholders, which resulted in damages to the Trusts.

Plaintiffs' second cause of action against SPS is for indemnification. Section 8.05 of the PSA requires SPS to indemnify the Trustee for any expense, including attorney's fees and expenses, incurred in connection with any claim or legal action relating to the PSA, to the extent such indemnity relates to the failure of the Servicer to perform its obligations in accordance with the PSA. Plaintiffs claim that because SPS failed to perform its obligations under the PSA, part of which is a reason for this legal action, it must indemnify the Trustee for its expenses incurred in bringing this action.

Plaintiffs also bring causes of action related to its contractual right of access to records and for declaratory relief in this respect.

#### **Discussion**

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPLR 3211 (a) (1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211 (a) (1)] motion . . . a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitely disposes of the plaintiff's claim." *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept 2001), *leave to appeal denied* 97 NY2d 605. In other words, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every

favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether “from the [complaint’s] four corners[,] ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

### Standing

SPS argues that the complaint against it must be dismissed in its entirety because the Trusts, as opposed to the Trustee, is the actual plaintiff bringing suit and a Trust does not have the requisite standing to sue to enforce the PSA. It argues that because the Trustee is not a plaintiff in the action, the Trusts cannot assert claims on its behalf. The court finds both arguments unavailing.

SPS claims that the actual plaintiffs in this case are the Trusts, not the Trustee, and that even if the Trustee were the intended plaintiff, the complaint does not sufficiently reflect that position. It cites a recent decision, *Master Adjustable Rate Mortgages Trust 2006-OAI (MARM), et al. v. UBS Real Estate Securities, Inc.*, Index No. 651282/2012, in which the court granted the defendants’ motion to dismiss for lack of standing without prejudice. Although the court in *MARM* granted the motion, there are several distinctions that can be drawn between that case and the subject action.

First, the *MARM* complaint did not name the trustee in the caption and also lacked specific allegations that the trustee was bringing the action on behalf of the trust. Here, the complaint not only names the Trustee in the caption, but also consistently and repeatedly makes

clear that the Trustee is acting on behalf of the Trust.<sup>1</sup> Second, in *MARM*, after finding that the complaint was unclear as to whether the trust or trustee was the actual plaintiff, the court offered the plaintiff three choices: 1) obtain some form of authorization from the trustee indicating approval to continue the litigation on its behalf, 2) commence a special proceeding to compel the trustee to bring suit for the trust, or 3) amend the complaint to include allegations that make clear that the trustee is the actual plaintiff. The court was prepared to grant the plaintiff an opportunity to amend the complaint without dismissing the complaint. Third, the *MARM* complaint also improperly named a certificate holder as a plaintiff. This issue was raised after the court offered the aforementioned choices to the plaintiff. For that reason, in addition to the plaintiff's willingness to file an amended complaint, the court chose to grant the motion to dismiss without prejudice so that the parties could begin anew with a clean slate.

The presence of a certificateholder as an inappropriate plaintiff is not at issue in this action. In *MARM*, but for the presence of that certificate holder, the court was prepared to allow the plaintiff to amend its pleadings to meet the required standard.

SPS also argues that the Trustee should be a stand-alone plaintiff. Not only does SPS offer no evidence to support its claim, but if the Trustee were required to be a stand-alone plaintiff, the proper remedy would not be a dismissal of the complaint, but an amendment to the caption. An amendment would follow our policy of favoring liberal amendments to pleadings. *Am. Home Assur. Co. v Scanlon*, 164 AD2d 751, 752 (1st Dept 1990). The original complaint sufficiently placed the defendants on notice of the subject action and an amendment would not unduly prejudice them in any way. NY CPLR 2001 (providing that the court may permit a

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<sup>1</sup> Apart from naming the Trustee in the caption, the complaint also states that the Trust is "acting through the Trustee." Additionally, the causes of action laid out at the end of the complaint specify the Trustee as the source of many relevant actions and allegations.



mistake or defect to the pleadings may be corrected if a substantial right of a party is not prejudiced).

The original complaint is sufficient in its current form. It is clear to the court that both the Trusts and the Trustee are plaintiffs and the challenge to standing is not cause for dismissal. Nevertheless, to ensure the absence of doubt with respect to this matter, the plaintiff is granted leave to amend the complaint to add the Trustee as a stand-alone plaintiff in addition to the Trusts. Both the Trusts and Trustee are plaintiffs and the challenge to standing is not cause for dismissal. The plaintiffs are granted leave to amend the complaint. As the court finds that the complaint contains sufficient allegations to establish the Trustee as plaintiffs, bringing suit on behalf of the Trusts, it is unnecessary to address the defendants' argument that the Trusts cannot seek relief on behalf of the nonparty Trustee.

#### Breach of Contract: Failure to Notify

Plaintiffs' first cause of action against SPS is for breach of contract: failure to notify. SPS claims that this cause of action must be dismissed because the plaintiffs' allegations that SPS has breached the PSA by failing to inform it of DLJ's breached representations are speculative and conclusory. Section 2.03 (g) of the PSA states in relevant part:

“Upon discovery by any of the parties hereto of a breach of a representation or warranty made pursuant to Section 2.03 (f) that materially and adversely affects the interests of the Certificateholders in any Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties.”<sup>2</sup>

SPS also argues that the plaintiffs' allegations that it breached its servicing obligations pursuant to the PSA are based on misunderstandings of what qualifies as servicing obligations. It states that the plaintiffs are making unsubstantiated assumptions that when making loan

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<sup>2</sup> The referenced representations and warranties from Section 2.03 (f) are those made by the Seller (DLJ) to the Trustee and are detailed in Schedule IV of the PSA.

modifications or releasing loans, SPS must have reviewed the origination files, underwriting guidelines, and deal-specific representations and warranties relevant to the analysis of whether a material breach of such representations and warranties took place.

The inquiry of whether the duty to notify other parties to the PSA is a servicing obligation is inappropriate to ask at the motion to dismiss stage. On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. NY CPLR 3211 (a) (7); *Povich*, 11 AD3d at 120. The plaintiffs allege in the complaint that, upon information and belief, when SPS performs its servicing obligations of reviewing the loans, assessing the borrower's ability to pay off the loans, modifying the loans, and releasing the loans, it must also re-underwrite the loans. This process allegedly requires SPS to review the origination files. As the court takes the plaintiffs' allegations in the complaint as true, SPS's argument that the alleged underlying understanding of SPS's servicing obligations is incorrect is to no avail.

The plaintiffs' allegations in the complaint are also sufficient to survive a motion to dismiss. The complaint not only claims that SPS has breached the PSA by failing to notify the other parties of the discovered breaches, but it also specifies the process by which SPS's obligations under the PSA led it to discover the breached representations.

As the court finds that the complaint is not conclusory, SPS's motion to dismiss the complaint with respect to the cause of action for breach of contract – failure to notify, is denied.

#### Breach of Contract: Indemnification

Plaintiffs' second cause of action against SPS is for breach of contract: indemnification. SPS seeks to dismiss this claim on the ground that plaintiff does not allege that SPS has failed to perform its obligations to properly service the loans. SPS also claims that the circumstances of

this case fall under the exception to the indemnification provision, which does not mandate indemnification where the costs sought are incurred from actions directed by the certificateholders. Section 8.05 of the PSA states in relevant part:

“The Trustee and any director, officer, employee or agent of the Trustee shall be indemnified by the Depositor and the Servicers, to the extent such indemnity related to the failure of the related Servicer to perform its servicing obligations in accordance with this Agreement . . . other than any loss, liability or expense incurred by reason of willful misfeasance, bad faith or negligence in the performance of any of the Trustee’s duties hereunder or incurred by reason of any action of the Trustee taken at the direction of the Certificateholders.”

The PSA is the controlling document in this action and the contractual language specifically provides an exception to the indemnification clause. In circumstances where the certificateholders direct the initiation of the lawsuit, the Trustee does not receive indemnification from the servicer. Here, the plaintiffs seek indemnification for the expenses incurred in bringing the subject action and argue that the exception to the indemnification provision does not apply in this case because the costs for which they seek indemnification were not necessarily incurred by reason of the certificateholders.

The plaintiffs’ argument is defeated by language found elsewhere in the complaint. While the complaint states that “SPS must indemnify the Trustee for its expenses, including attorney’s fees and expenses, incurred in bringing this action . . . ,” it also states that “the Trust, acting through the Trustee (acting, in turn, at the instruction of the Directing Certificateholders), now brings this action for breach of contract, specific performance, and the declaratory judgment to enforce the obligations of DLJ and SPS under the PSA.” The Trustee seeks indemnification for the expenses incurred in bringing this action, and the subject action was instigated at the direction of the directing certificateholders – placing these circumstances directly within the scope of the exception to the indemnification provision.

Apart from the provision of the PSA excluding indemnification from SPS in this circumstance, there is another provision that protects the Trustee from the costs associated with actions related to the PSA. Section 10.08 of the PSA outlines criteria that must be met before certificateholders are able to institute a legal proceeding with respect to this agreement. One such requirement concerns indemnification of the incurred costs: “[the certificateholder] shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses, and liabilities to be incurred therein or thereby . . . .” The PSAs already encompass how indemnification must occur in this situation. The only way in which the directing certificateholders are able to instruct the Trustee to bring this action, as alleged in the complaint, is that they are also indemnifying the Trustee for the incurred expenses with relation to this action. The indemnification that the Trustee is seeking from SPS has already been given to it by the certificateholders.

It is clear that plaintiffs seek indemnification for the costs incurred in bringing the subject action and that the subject action was brought at the direction of the directing certificateholders. These circumstances firmly place this action within the intention of the exception to indemnification from the servicer. Additionally, plaintiffs are already protected from the liabilities incurred as a result of bringing this action. The motion to dismiss is granted with respect to the cause of action seeking indemnification.

#### Access to Records

Section 3.07 of the PSA permits the Trustee to access certain records of the Servicer under specific circumstances:

Each Servicer shall afford the Depositor and the Trustee reasonable access to all records and documentation regarding the Mortgage Loans and all accounts, insurance information and other matters relating to this Agreement, such access

being afforded without charge, but only upon reasonable request and during normal business hours at the office designated by such Servicer.

Plaintiffs and SPS are engaged in a dispute as to what is “reasonable access to all records and documentation regarding the mortgage loans . . .” In particular, the question of whether plaintiffs may make copies of records under the “reasonable access” clause is an open issue. Details, such as the time period for inspector access and number of inspectors who may have access, present additional open issues.

Now is not the point in this proceeding to answer these questions.

The motion to dismiss this cause of action is denied.

#### Declaratory Judgment

SPS moves to dismiss plaintiffs’ declaratory judgment claim against it because that claim supposedly “entirely duplicates” the plaintiffs’ access claim, based on breach-of-contract.

Plaintiffs’ cause of action for SPS’s breach of the PSAs’ file access provision requests specific performance relief on account of SPS’s failure to provide access to “certain Origination Files,” *i.e.* the specific Origination Files to which the Trustee had requested access prior to filing the complaint. By contrast, plaintiffs’ cause of action for declaratory judgment contemplates *prospective* action: the plaintiffs’ request a judgment that if the plaintiffs review Origination Files at SPS’s offices in the future, SPS not be permitted to continue imposing the burdensome restrictions it placed on the Trustee in the build up to the complaint. The plaintiffs’ declaratory judgment claim is therefore not duplicative of their breach-of-contract claim.

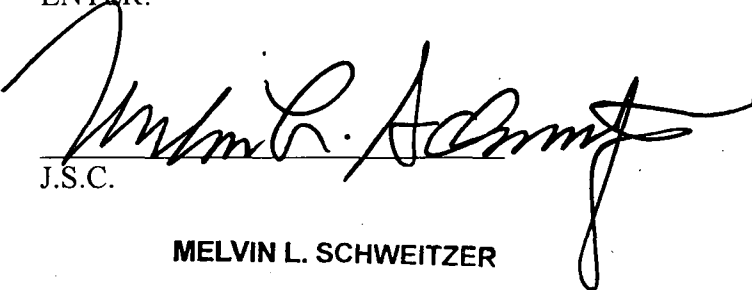
The motion to dismiss this cause of action is denied.

**Conclusion**

ORDERED that defendants' motion to dismiss is denied with respect to the failure to notify cause of action, access to records cause of action, declaratory judgment cause of action, and granted with respect to the indemnification cause of action, and plaintiffs are granted leave to amend the complaint.

Dated: October 9, 2013

ENTER:

  
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J.S.C.  
**MELVIN L. SCHWEITZER**