SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely in its capacity as Trustee of the SECURITIZED ASSET BACKED RECEIVABLES LLC TRUST 2007-BR1 (SABR 2007-BR1),
Plaintiff,

- against -

BARCLAYS BANK PLC,
Defendant

DECISION/ORDER
Index No. 651338/2013
Mot. Seq. 002

DEUTSCHE BANK NATIONAL TRUST COMPANY, solely as Trustee for HSI ASSET SECURITIZATION CORPORATION TRUST 2007-NC1,
Plaintiff,

- against -

HSBC BANK USA, NATIONAL ASSOCIATION,
Defendant

Index No. 652001/2013
Mot. Seq. 002

In these separate breach of contract actions, each brought by a plaintiff-trustee against the defendant-securitizer of residential mortgage-backed securities (RMBS), plaintiff alleges that defendant breached representations and warranties regarding the quality and characteristics of mortgage loans underlying the securities. In each case, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5), and (7), on the ground, among others, that the complaint is time-barred by the California statute of limitations. The actions are consolidated solely for purposes of this decision of the motions to dismiss, which raise substantially similar arguments on substantially similar pleadings and governing agreements.

California Statute of Limitations

Defendants argue that both plaintiff-trustees have their principal place of business in California, that their causes of action therefore accrued in California, and that, under New York's

borrowing statute, the actions are barred by the four-year California statute of limitations. Plaintiffs counter that the borrowing statute is inapplicable because the choice of law provisions in the governing Pooling and Servicing Agreements (PSAs) require application of the New York statute of limitations. In the alternative, plaintiffs dispute defendants' claim that their place of business dictates the place of accrual of the causes of action.

It is well settled that "[c]hoice of law provisions typically apply to only substantive issues, and statutes of limitations are considered 'procedural'. . . ." (Portfolio Recovery Assocs., LLC v King, 14 NY3d 410, 416 [2010], rearg denied 15 NY3d 833 [internal citation omitted].) A choice of law provision that does not evidence an "express intention" to apply a state's statute of limitations will not be "read to encompass that limitations period." (Id.) The choice of law provisions in the PSAs at issue by their terms make only the "substantive laws" of New York applicable. They state that the obligations, rights and remedies of the parties to the PSAs shall be determined in accordance with "such laws"; but the only laws to which the PSAs expressly refer are "substantive laws." (Barclays PSA § 10.03; HSBC PSA § 12.03.)[1] Plaintiffs cite no authority, and the court does not find, that such terms sufficiently evidence the "express intent" to make the New York statute of limitations applicable.

The court accordingly turns to the application of CPLR 202, the New York borrowing statute. Under the borrowing statute, where a non-resident sues on a cause of action accruing outside New York, "the cause of action [must] be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." (Global Fin. Corp. v Triarc Corp., 93 NY2d 525, 528 [1999].) In cases involving purely economic loss, "the place of injury

[1] Barclays PSA § 10.03 provides in full: "Governing Law. This Agreement shall be construed in accordance with and governed by the substantive laws of the State of New York applicable to agreements made and to be performed in the State of New York and the obligations, rights and remedies of the parties hereto and the certificateholders shall be determined in accordance with such laws." (After the words Governing Law, all capital letters in the original.)

usually is where the plaintiff resides and sustains the economic impact of the loss," which would typically be a corporation's place of incorporation or principal place of business. (Id. at 529; Portfolio Recovery Assocs., LLC, 14 NY3d at 416.) As the Court of Appeals has emphasized, "CPLR 202 is designed to add clarity to the law and to provide the certainty of uniform application to litigants. This goal is better served by a rule requiring the single determination of a plaintiff's residence" than by a center of gravity approach. (Global Fin. Corp., 93 NY2d at 530 [internal quotation marks & citation omitted].) Thus, although there is authority that a court "can properly consider all relevant factors in determining where the loss is felt" (Lang v Paine, Webber, Jackson & Curtis, Inc., 582 F Supp 1421, 1424-1426 [SD NY 1984]), this exception has been applied only in extremely rare cases. (See Metropolitan Life Ins. Co. v Morgan Stanley, 2013 WL 3724938, at * 7 [Sup Ct, NY County June 8, 2013] [Bransten, J.] [and authorities cited therein]; Global Fin Corp., 93 NY2d at 530 [summarizing Lang as involving a "Canadian plaintiff [who] intentionally maintained separate financial base in Massachusetts; under the circumstances, injury of losing Massachusetts funds was felt in Massachusetts, not Canada"].)

The general rule is not, however, invariable. While the parties do not cite any authority that applies the New York borrowing statute to a case brought by an RMBS trustee, courts applying the borrowing statute to cases brought by non-RMBS trustees have repeatedly rejected the trustees' residence as determinative of the place of accrual of the causes of action. In a leading case, Maiden v Biehl (582 F Supp 1209 [SD NY 1984]), the Court held that "[w]here the plaintiff is a trust, the use of the residency of the trustee as the sole factor to determine the place of accrual does not make sense as a practical matter, and is not required legally." (Id. at 1217.) As the Court reasoned, it was "the Trust itself that suffered the loss . . . . The corpus of the Trust diminished as a result of the investment . . . ." (Id. at 1218.) The Court further held: "From all

the facts presented on this motion, it is clear that the Trust is located in New York. New York is where taxes are paid, where its investment decisions are made, and where the securities are physically kept. For the purposes of determining the applicability of the borrowing statute, New York is where the cause of action accrued." (Id.; see also The 2002 Lawrence R. Buchalter Alaska Trust v Philadelphia Fin. Life Assur. Co., 96 F Supp 3d 182, 201-02 & fn 7 [SD NY 2015] [following the Maiden holding that the trust itself suffered the loss, and determining that the injury occurred in Alaska for purposes of the borrowing statute, based on the following factors: the trust was located in Alaska and organized under Alaska law; the trustee at the time of the injuries was an Alaska party; and the trust beneficiaries were not entitled to guaranteed distributions and their location was unknown]; Appel v Kidder, Peabody & Co. Inc., 628 F Supp 153, 155-56 [SD NY 1986] [holding that for purposes of the borrowing statute, injury occurred not in New York where trust investments were made but in Connecticut where family members, who were trustees and beneficiaries of employee pension trust, resided, court applying a factors analysis as in Maiden, but reaching different result].)

Here, the California residence of the trustees is not a reliable indicator of the place where the injury occurred. The trusts were established in the PSAs, pursuant to New York law. (Barclays PSA § 2.01 [c]; HSBC PSA § 2.01 [c].) As discussed above, the rights of the parties to the PSAs are governed by New York law. (Barclays PSA § 10.03; HSBC PSA § 12.03.) The trustees hold the mortgage loans on behalf of the trusts, for the benefit of the certificateholders. (Barclays PSA, § 2.01 [a] ["The Depositor . . . hereby sells, transfers, . . . and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby

accepts the Trust Fund"]; HSBC PSA § 2.01 [a], [d].) The trust corpus was therefore allegedly diminished as a result of the loss in value of the loans.

The other factors considered by the courts in determining the place of injury to non-RMBS trusts lack apparent relevance in the RMBS context. These factors do not, in any event, point to California.[2] Even assuming that the trusts are administered from the California offices of the trustees, RMBS trustees do not make major investment decisions, as the loans underlying the trusts are selected and pooled by the sponsors and/or depositors before the trusts are established. (See ACE Secs. Corp, Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc., 25 NY3d 581, 589-590 [2015] [ACE] [describing securitization process]; U.S. Bank Natl. Assn. v DLJ Mtge. Capital, 121 AD3d 535, 536 [1st Dept 2014] [noting that the RMBS trust "typically does not come into existence prior to the closing of the transaction"].)

As to the location of the trusts' assets, in the Barclays action, it appears to be undisputed that the mortgage notes are held in California. The PSA allows, however, for the possibility that the notes will be held in other states. (Barclays PSA § 2.02 [providing that the mortgage notes will be held in California "unless otherwise permitted by the Rating Agencies"].) In the HSBC action, PSA § 2.02 provides that the notes will be held not only in California but also in Minnesota and Utah, unless otherwise permitted by the Rating Agencies. The complaint alleges, and HSBC does not dispute, that the notes are actually held in Minnesota. (HSBC Second Am. Compl., ¶ 18.)

The PSAs contemplate payment of federal and local taxes. (Barclays PSA § 8.11 [a]; HSBC PSA § 8.11 [a].) In both actions, however, the complaints allege, and defendants do not

[2] Review of this court's RMBS docket shows that there are nearly 40 currently pending RMBS breach of contract actions (colloquially known as put-back actions). Although many involve out-of-state trustees, the two actions at issue are the only ones in which the court has to date heard motions to dismiss based on the out-of-state residence of the trustees.

dispute, that the trusts have not owed or in fact paid taxes in any state. (Barclays Am. Complaint, ¶ 19; HSBC Second Am. Compl., ¶ 18.)

Finally, the complaints allege, and defendants do not dispute, that the residence of the numerous certificateholders, who are the beneficiaries of the trusts, does not furnish a workable basis for determining where the injury occurred. (See Maiden, 582 F Supp at 1218 ["If the beneficiaries were scattered, it would be unworkable to fractionalize one claim because some parts were time-barred"].)[3]

The court accordingly concludes that defendants in both actions fail to make a prima facie showing that the cause of action accrued in California, and therefore that the four-year California statute of limitations bars maintenance of these actions. It is well settled that in moving to dismiss a cause of action based on the statute of limitations, "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." (Benn v Benn, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks and citation omitted]; see 400 East 77th Owners, Inc. v New York Eng'g. Assn., P.C., 122 AD3d 474, 474-75 [1st Dept 2014].) The burden does not shift to the plaintiff to raise a triable issue of fact until the defendant has met its initial burden. (State of Narrow Fabric, Inc. v Unifi, Inc., 126 AD3d 881, 882 [2d Dept 2015].) As defendants fail to meet their burden, the branch of their motions for dismissal under the borrowing statute must be denied.

Barclays' Remaining Bases for Dismissal

Barclays also argues that all of plaintiff's claims, except as to the 74 loans that were the subject of a pre-suit notice to repurchase, are time-barred under New York law. The parties' memoranda of law, which were filed prior to the Appellate Division's recent decision in Nomura

[3] Defendants do not claim that the certificates are generally held in California. Rather, it is undisputed that many are held by a nominee (Cede & Co.) in New York. (Barclays Am. Compl., ¶ 35; HSBC Second Am. Compl., ¶ 30.)

Home Equity Loan, Inc. Series 2006-FM2 v Nomura Credit & Capital, Inc. (___AD3d ___, 2015 WL 5935177 [1st Dept Oct. 13, 2015] [Nomura]), did not address the impact of this decision on Barclays' claim, although the decision was briefly discussed at the oral argument. Barclays also appears to have conceded at the oral argument that the trustee is authorized to maintain claims, at least for "systematic" breaches of representations and warranties, based either on Barclays' own discovery of such breaches, or on notice to Barclays of the breaches. (See Nov. 10, 2015 Oral Argument at 29-30 [referring to Barclays Representation Agreement § 3 [a], second sentence].) This branch of the motion to dismiss will accordingly be denied.

Barclays also seeks dismissal of plaintiff's second cause of action for anticipatory repudiation, which is based on Barclays' alleged categorical rejection of breach notices and failure to repurchase any loans. (Barclays Am. Compl., ¶¶ 81-86.) This branch of the motion will be granted for the reasons previously stated, and on the authority previously cited, in this court's RMBS decisions involving similar arguments. (See e.g. Law Debenture Trust Co. of New York, Home Equity Loan Trust Series AMQ 2007-HE2 v DLJ Mtge. Capital, Inc., 2015 WL 1573381, * 9-10 [Sup Ct, NY County Apr. 8, 2015].)

Plaintiff's third cause of action for breach of the duty to cure or repurchase defective loans will also be dismissed. Although this cause of action was dismissed by this court's decision dated March 13, 2015, it was improperly restated in the amended complaint. (See generally Orient Overseas Assocs. v XL Ins. Am., Inc., 132 AD3d 574, 2015 WL 6456455, * 3 [App Div 1st Dept Oct. 27, 2015].) The claim is barred by ACE (25 NY3d at 599).

On the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at *7), the court holds that plaintiff's request for rescissory damages is not maintainable. Plaintiff's claim for unspecified consequential damages will also be dismissed.

(See Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2015 WL 4038760, * 6 [Sup Ct, NY County July 1, 2015] [this court's prior decision dismissing claim for consequential damages inconsistent with the repurchase protocol].)[4]

Finally, Barclays seeks dismissal of plaintiff's claim for attorney's fees. This claim is based on the definition of Repurchase Price in the PSA, which includes "all expenses incurred by the Trustee arising out of the Trustee's enforcement of Barclays Bank PLC's purchase obligation under the Barclays Representation Agreement." (Barclays PSA, Art. I.) As this court has previously held in the RMBS litigation, this provision does not unmistakably evidence the parties' intent to authorize attorney's fees, as it does not expressly include such fees among the covered expenses. (See Nomura Home Equity Loan, Inc., Home Equity Loan Trust, Series 2007-2 v Nomura Credit & Capital, Inc., 2014 WL 5243512, * 2 [Sup Ct, NY County July 18, 2014], mod on other grounds 2015 WL 5935177 [1st Dept Oct. 13, 2015]; ACE Secs. Corp., Home Equity Loan Trust, Series 2007-WM1 v DB Structured Prods., Inc., 2014 WL 5243511, * 2 [Sup Ct, NY County Sept. 25, 2014] [citing authorities].)

HSBC's Remaining Bases for Dismissal

HSBC argues that plaintiff's breach of contract claims are time-barred under New York law because its representations and warranties were made on the "as of" date, as opposed to the closing date, of the governing agreements, and the action was commenced more than six years after the "as of" date. The governing agreements do not support these contentions. In so holding, the court rejects HSBC's contention that the trust was created prior to the closing date of the PSA. (See HSBC PSA §§ 2.01 [a], [d]; Mortgage Loan Purchase Agreement § 4; see generally ACE, 25 NY3d at 599; U.S. Bank Natl. Assn., 121 AD3d at 536.)

[4] It is noted that the amended complaint in the Barclays action does not plead the damages claims upheld in Nomura (2015 WL 5935177, at * 8) for breach of a No Untrue Statement provision or for the defendant's "failure to give prompt written notice after discovering material breaches of the representations and warranties."

HSBC also seeks dismissal of plaintiff's second cause of action for breach of contract based on HSBC's alleged failure to promptly notify plaintiff-trustee of HSBC's breaches of representations and warranties regarding the mortgage loans. The original complaint pleaded the same cause of action, as well as a cause of action for breach of contract based on failure to cure or repurchase defective loans. By decision and order dated October 17, 2014, this court dismissed the original complaint, and granted leave to plaintiff solely to replead a cause of action for breach of contract based on breaches of representations and warranties. Plaintiff subsequently served a first amended complaint which pleaded a first cause of action for breaches of representations and warranties, and restated the dismissed cause of action for failure to notify. By stipulation of the parties dated December 10, 2014, plaintiff served the second amended complaint, which repleads the causes of action from the first amended complaint and adds a third cause of action for anticipatory repudiation. This stipulation preserved HSBC's objections to the pleaded claims.

In its recent decision in Nomura, the Appellate Division held, without elaboration, that this court had "erred in not allowing plaintiffs to pursue damages for defendant's failure to give prompt written notice after it discovered material breaches of the representations and warranties" in the RMBS governing agreement. (2015 WL 5935177, at * 7.) As discussed above, the parties' briefs were filed prior to the Nomura decision and did not discuss its import. Given that the notice claim was repleaded without leave, the claim will be dismissed. In light of Nomura's potentially wide-ranging impact, however, the dismissal will be without prejudice (as further set forth in the ordering provision).

The branch of HSBC's motion to dismiss plaintiff's third cause of action for anticipatory repudiation will be granted for the reasons stated in connection with Barclays' motion to dismiss.

HSBC's claim that liquidated loans are not subject to repurchase will be denied on the authority of the Appellate Division's recent decision in Nomura (2015 WL 5935177, at * 5). In construing a substantially similar governing agreement, the Appellate Division also rejected the claim, which HSBC makes here, that the sole remedy provision (or repurchase protocol) is inconsistent with a claim for money damages where cure or repurchase is impossible. (Id. at * 7.)[5] Plaintiff's claim for attorney's fees is not, however, maintainable, for the reasons stated on Barclays' motion to dismiss.

It is accordingly hereby ORDERED that Barclays' motion to dismiss the amended complaint is granted to the extent of dismissing the following claims with prejudice: the second cause of action (anticipatory repudiation); the third cause of action (breaches of the duty to cure or repurchase defective loans); and the claims for rescissory damages, consequential damages, and attorney's fees incurred by the trustee and trust to enforce Barclays' obligations under the PSA; and it is further

ORDERED that HSBC's motion to dismiss the second amended complaint is granted to the extent of dismissing the following claims with prejudice: the third cause of action (anticipatory repudiation); and the claim for attorney's fees incurred by the trustee and trust to enforce HSBC's obligations under the PSA; and it is further

ORDERED that HSBC's motion to dismiss the second cause of action in the second amended complaint (breach of contractual duties to notify and repurchase defective loans) is granted to the following extent: The cause of action is dismissed with prejudice insofar as it pleads a claim for an independent breach of a duty to repurchase defective loans; and the cause of action is dismissed without prejudice insofar as it pleads a claim with respect to a breach of a

[5] The second amended complaint in the HSBC action does not by its terms seek rescissory or consequential damages.

duty to give prompt written notice of breaches of HSBC's representations and warranties. Provided that: plaintiff's right, if any, to seek leave to replead a claim with respect to the duty to notify shall be sought in conformity with procedures to be established in the coordinated RMBS put-back actions in Part 60. Nothing herein shall be construed as determining the scope or import of the Appellate Division Nomura decision (___AD3d ___, 2015 WL 5935177 [Oct. 13, 2015]) with respect to such claim.

This constitutes the decision and order of the court.

Dated: New York, New York
November 25, 2015

MARCY S. FRIEDMAN, J.S.C.