

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

FEDERAL HOUSING FINANCE AGENCY, AS
CONSERVATOR FOR THE FEDERAL HOME LOAN
MORTGAGE CORPORATION, on behalf of the
Trustee of the STRUCTURED ASSET SECURITIES
CORPORATION MORTGAGE LOAN TRUST,
SERIES 2007-BC2 (SASC 2007-BC2)

INDEX NO. 650692/2013

Plaintiff,

-against-

MOTION SEQ. NO. 001

EQUIFIRST CORPORATION and BARCLAYS BANK PLC,

Defendants.

The following papers, numbered 1 to _____ were read on this motion.

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

Cross-Motion: Yes No

It is hereby ORDERED that the motion of defendants EquiFirst Corporation and Barclays Bank PLC is decided in accordance with the attached Decision/Order of the same date.

Dated: 7-19-16


MARCY S. FRIEDMAN, 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

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

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

PRESENT: Hon. Marcy Friedman, J.S.C.

FEDERAL HOUSING FINANCE AGENCY, AS
CONSERVATOR FOR THE FEDERAL HOME
LOAN MORTGAGE CORPORATION, on behalf
of the Trustee of the STRUCTURED ASSET
SECURITIES CORPORATION MORTGAGE
LOAN TRUST, SERIES 2007-BC2 (SASC 2007-
BC2),

Index No.: 650692/2013

DECISION/ORDER

Plaintiff,

– against –

EQUIFIRST CORPORATION and BARCLAYS
BANK PLC,

Defendants.

This residential mortgage backed securities (RMBS) breach of contract action is based on breaches of representations and warranties by defendant EquiFirst Corporation (EquiFirst), the loan originator, regarding the quality and characteristics of the loans.¹ Defendant Barclays Bank PLC (Barclays) is alleged to be the successor and alter ego of EquiFirst. U.S. Bank National Association is the Trustee of SASC 2007-BC2, the Trust to which the loans were conveyed. Federal Housing Finance Agency (FHFA), acting as conservator for a certificateholder in the Trust, commenced this action by filing a summons with notice. The Trustee subsequently filed the complaint. Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7) on the grounds, among others, that the action was not timely commenced, and that the complaint is defectively pleaded.

¹ The RMBS securitization process was recently summarized by the Court of Appeals in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581, 589 [2015]).

The complaint pleads the following three causes of action: a first, for breach of contract based on EquiFirst's alleged breaches of representations and warranties and failure to cure or repurchase affected loans (Compl. ¶¶ 101, 103); a second, for anticipatory breach based on defendants' failure to promptly notify the Trust of breaches and "repudiat[ion of] their contractual obligations to cure the breaches noticed [by the Trustee] or to repurchase the affected Mortgage Loans" (*id.* ¶ 115); and a third, for breach of the implied covenant of good faith and fair dealing based on defendants' failure to notify the Trust of breaches while foreclosure proceedings were occurring, allegedly resulting in destruction of "the Trustee's rights to have those breaching Mortgage Loans repurchased at a price necessary to make the Trust whole." (*Id.* ¶ 125.)

This motion raises many issues that have now been resolved by the appellate Courts and have been the subject of this court's decisions in the RMBS litigation.² By Stipulation dated May 20, 2016, the parties agreed that this court's decisions in Federal Housing Finance Agency v Morgan Stanley ABS Capital I Inc. (2016 WL 1587345 [Sup Ct, NY County, Apr. 12, 2016, No. 650291/2013] [FHFA (NC1)]) and Federal Housing Finance Agency v Morgan Stanley Mortgage Capital Holdings LLC (2016 WL 1587344 [Sup Ct, NY County, Apr. 12, 2016, No. 651959/2013] [FHFA (NC3)]) (together, the FHFA Opinions) "address[ed] arguments substantially identical to those made [in the instant motion papers] and dismiss[ed] claims for (among others) breach of contract, anticipatory breach, and breach of the implied covenant of good faith and fair dealing." (May 20, 2016 Stipulation, at 2 [NYSCEF No. 141].) Subsequent to the parties' entry into the Stipulation, the Appellate Division of this Department in U.S. Bank

² By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this [C]ourt alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities."

National Association v DLJ Mortgage Capital, Inc. (2016 WL 3620193, * 1 [1st Dept July 7, 2016] [DLJ]) reached issues of standing and relation back that are dispositive of the threshold issue of the timeliness of the Trustee's breach of contract claims.³ (See also Nomura Asset Acceptance Corp. Alternative Home Loan Trust v Nomura Credit & Capital, 139 AD3d 519 [1st Dept 2016].)

In is undisputed that FHFA commenced this action by filing a summons with notice on February 28, 2013, the six-year anniversary of the securitization closing date of February 28, 2007. The Trustee, purporting to substitute itself as plaintiff, filed the complaint on October 28, 2013.

On the reasoning of and authorities cited in the FHFA Opinions, as confirmed by the recent DLJ decision, the court holds that FHFA lacked standing to commence this action,⁴ and that the Trustee's complaint, filed after the passage of the statute of limitations, did not relate back to FHFA's summons with notice.

Consistent with the FHFA Opinions, the court rejects the Trustee's contention that the breach of representations and warranties claim is timely under the accrual clause set forth in Section 8 (b) of the Amended and Restated Flow Mortgage Loan Purchase and Warranties Agreement (MLPA [Day Aff., Exh. C]), pursuant to which the loans were sold by EquiFirst to non-party Purchaser Lehman Brothers Bank, FSB (Lehman), and in which the representations and warranties were made. (FHFA [NC1], 2016 WL 1587345, at * 4-5; FHFA [NC3], 2016 WL

³ This motion was briefed prior to the Court of Appeals decision in ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015]; affg 112 AD3d 522 [1st Dept 2013] [ACE]). By Order dated September 11, 2014, at the parties' request, the motion was held in abeyance pending determination of the appeal in ACE to that Court.

⁴ This holding is based on the no-action and Event of Default provisions set forth in Sections 8.01 (b) and 6.14 (a), respectively, of the Trust Agreement (annexed as Exh. E to the Aff. In Supp. of J. Brendan Day [counsel for defendants] [Day Aff.]), which are substantially similar to the provisions considered in the FHFA Opinions. (See FHFA [NC1], 2016 WL 1587345, at * 4 n 5; FHFA [NC3], 2016 WL 1587344, at *2.)

1587344, * 2.) Nor is the claim timely under the federal Housing and Economic Recovery Act of 2008 (HERA). (FHFA [NC1], 2016 WL 1587345, at * 5; FHFA [NC3], 2016 WL 1587344, * 2.)⁵

The court further rejects the Trustee's contention that the claim for breach of representations and warranties did not accrue until passage of the 60-day period to cure provided for by the repurchase protocol set forth in Section 8 (b) of the MLPA. (See Tee.'s Memo. In Opp., at 11.) In ACE Securities Corp. v DB Structured Products, Inc. (25 NY3d 581 [2015]; affg 112 AD3d 522 [1st Dept 2013] [ACE]), the Court of Appeals held that "the Trust's cause of action against [the defendant – there, the sponsor] for breach of representations and warranties accrued at the point of contract execution," when the representations and warranties were made, and not when the sponsor failed to comply with a repurchase demand. (25 NY3d at 589; see also ACE Secs. Corp. [HELT Series 2006-SL2] v DB Structured Prods., Inc., 2016 WL 1222166 [Sup Ct, NY County, Mar. 29, 2016, No. 651854/2014] [this court's decision, discussing the ACE decision at length].)

Although the Trustee argues for the alternative accrual dates rejected above, it does not dispute that the representations and warranties were made no later than the securitization closing date, February 28, 2007, more than six years before the filing of the complaint. Defendants contend that EquiFirst's representations and warranties were made, at the latest, on February 1, 2007. (Defs.' Memo. In Supp., at 4-5.) The court need not determine whether the representations and warranties were made on February 1 or February 28, 2007.⁶ Even assuming

⁵ It is noted that the caption of the summons with notice states that FHFA commenced this action "on behalf of the Trustee." In the FHFA Opinions, the court rejected the argument that such a designation in a summons with notice can serve to establish FHFA's standing. (FHFA [NC1], 2016 WL 1587345, at * 4; FHFA [NC3], 2016 WL 1587344, * 2.)

⁶ Nor could the court do so on this record. Defendants' argument that the representations and warranties were made on or before February 1, 2007 is based on Section 10 (b) of the MLPA, which provides that that "[a]ll of the

that the breach of contract cause of action accrued on February 28, given FHFA's lack of standing, its filing of the summons with notice on February 28, 2013 was ineffective to commence the action within the statute of limitations.

The court therefore holds that the first cause of action, to the extent that it alleges breaches of representations and warranties, is untimely.⁷ The first cause of action will also be dismissed to the extent that it pleads that defendants' failure to cure or repurchase defective loans was an independent breach of contract. This claim is foreclosed by ACE (25 NY3d at 599). (See FHFA [NC1], 2016 WL 1587345, at * 10.)

For the reasons previously stated, and on the authorities cited in this court's prior RMBS decisions, the second cause of action for anticipatory breach is not maintainable. (FHFA [NC1], 2016 WL 1587345, at * 10.) The third cause of action for breach of the implied covenant of good faith and fair dealing will also be dismissed, in accordance with extensive authority dismissing implied covenant claims based on substantially similar allegations. (See id. at * 11.)

As all causes of action against EquiFirst will be dismissed, the claims against Barclays as alleged successor and alter ego of EquiFirst will also be dismissed.

representations and warranties of the Seller [EquiFirst] under this Agreement . . . shall be true and correct as of the related Closing Date" The term Closing Date is defined in the MLPA as "a date on which the Seller [EquiFirst] shall sell and the Purchaser [Lehman] shall purchase Mortgage Loans under this Agreement as set forth in the related Purchase Price and Terms Agreement." (MLPA § 1.) Defendants contend that the sale to Lehman must have occurred prior to February 1, 2007, the "as of" date of the Assignment and Assumption Agreement pursuant to which Lehman sold the loans it acquired from EquiFirst to the Sponsor, non-party Lehman Brothers Holding, Inc. (See Defs.' Memo. In Supp. at 10; Compl. ¶ 19.) Defendants, however, fail to attach to their motion papers either the Assignment and Assumption Agreement or the Purchase Price and Terms Agreement referenced in the MLPA definition of Closing Date. (Compare Deutsche Bank Natl. Trust Co. [Harborview Mtge. Loan Trust 2007-7] v Flagstar Capital Mkts. Corp., 2015 WL 1646683 [Sup Ct, NY County, Apr. 13, 2015, No. 653048/2013].) As noted above, the sales could not have occurred later than the securitization closing date of February 28, 2007.

⁷ It is noted that, by stipulations dated July 17, 2013 (NYSCEF No. 6) and September 6, 2013 (NYSCEF No. 7), FHFA and defendants agreed to extend the time for FHFA to file a complaint. These stipulations do not affect the court's timeliness holding, as they were entered after the passage of the statute of limitations by a party without standing to sue.

In their May 20, 2016 Stipulation, the parties reserved to the Trustee the right “to seek leave to replead a failure to notify claim in conformity with procedures to be established in the coordinated put-back actions in Part 60 regarding motions with respect to failure to notify claims.”⁸ (Stipulation ¶ 5; see also Case Management Order No. 2, ¶ V [Index No. 777000/15, NYSCEF No. 96].) In accordance with the parties’ Stipulation, the dismissal of this action will be without prejudice to a motion for leave to replead brought in connection with such briefing.

The Trustee further requests that “any dismissal should be without prejudice with leave to replead.” (Tee.’s Memo. In Opp., at 25 n 24.) This request is unsupported by a proposed amended complaint or any evidentiary or other showing that the Trustee can plead cognizable causes of action to replace the dismissed causes of action, and is denied. (FHFA (NC1) (2016 WL 1587345, at * 11). The court has considered the parties’ remaining arguments and finds them unavailing. It is accordingly hereby

ORDERED that the motion to dismiss of defendants Equifirst Corporation and Barclays Bank PLC is granted to the extent of dismissing the complaint in its entirety. Provided that: U.S. Bank National Association (U.S. Bank) may seek leave to replead a claim with respect to the failure to notify, in conformity with procedures to be established in the coordinated put-back actions in Part 60. Nothing herein shall be construed as determining the scope or import of the Appellate Division decision in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024]) with respect to such claims; and it is further

⁸ The court has requested coordinated briefing on the scope and viability of failure to notify claims in light of the Appellate Division decision in Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc. (133 AD3d 96 [1st Dept 2015], appeal docketed [APL-2016-00024]). Although the complaint in this action does contain allegations that defendants breached a contractual obligation to notify the Trustee of defective loans (see e.g. Compl. ¶¶ 102, 113, 125), the parties’ Stipulation contemplates dismissal of the complaint in its entirety and a motion for leave to replead a failure to notify claim in conformity with the above coordinated briefing.

ORDERED that the request of U.S. Bank to replead the complaint is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 19, 2016


MARCY FRIEDMAN, J.S.C.