UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE BANK OF NEW YORK MELLON, solely as Trustee for GE-WMC Mortgage Securities Trust 2006-1,

Plaintiff,

-v-

WMC MORTGAGE, LLC, and GE MORTGAGE HOLDING, L.L.C.,

Defendants.

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12cv7096 (DLC)

OPINION & ORDER

APPEARANCES

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DENISE COTE, District Judge:

Defendants WMC Mortgage, LLC ("WMC") and GE Mortgage Holding, L.C.C. ("GEMH"; collectively "defendants") have moved under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), to exclude the testimony of Robert Crisafulli ("Crisafulli"), an expert witness retained by plaintiff Bank of New York Mellon ("BoNY") to testify on the proper amount of damages due to BoNY. BoNY has moved in limine to exclude the testimony by defendants' damages experts on causation, which BoNY asserts is irrelevant to the issue of damages. For the following reasons, defendants' motion is granted, and BoNY's motion in limine is granted as moot.

BACKGROUND

I. History

This action involves a breach of contract claim brought by BoNY as the trustee ("Trustee") of a residential mortgage backed securities ("RMBS") trust. Defendant WMC, the sponsor of the securitization, sold the loans to co-defendant GEMH. GEMH then sold the loans to the depositor, GE-WMC Mortgage Securities, L.L.C. ("GE Securities"), who placed the loans into the trust. As part of the transfer of loans to the trust, the defendants made a number of contractual representations regarding the underlying mortgage loans.

The trust, GE-WMC Mortgage Securities Trust 2006-I ("Trust"), contains residential mortgage loans originated or acquired by WMC. The securitization of the loans placed into the Trust was accomplished through the execution of three documents in August 2006. First, WMC, the sponsor of the securitization, sold these loans to GEMH on August 10, pursuant to a Mortgage Loan Purchase Agreement ("Originator MLPA"). GEMH then transferred the mortgage loans to GE-WMC Securities, the depositor, pursuant to a second contract, also dated August 10 ("Seller MLPA" or collectively "MLPAs"). GE-WMC Securities conveyed the mortgage loans to the Trust, with BoNY as the Trustee, pursuant to a Pooling and Servicing Agreement ("PSA"), dated as of August 1. The closing date for the PSA was August 21, 2006. The Trustee is not a party to either MLPA but has the right to enforce both contracts.

In the Originator MLPA, WMC made over 80 representations and warranties ("R&Ws") concerning the quality of the loans. Originator MLPA § 7(a) requires WMC, upon "its discovery or receipt of notice" of a breach of the R&Ws, to give "prompt written notice" of such breach, and to "cure," "repurchase," or "substitute for" the defective loan within ninety days. Similarly, Seller MLPA § 7(a) requires GEMH to cure, repurchase, or substitute for a defective loan if it discovers or receives notice of a breach of the R&Ws contained within the Originator MLPA.[1] Under both MLPAs, any repurchase must be at a "price equal to the Purchase Price."

Section 2.03 of the PSA further defines the remedies available:

> Upon discovery or receipt of notice . . . of any materially defective document in, or that a document is missing from, the Mortgage File or of the breach by the Originator of any representation, warranty or covenant under the related [MLPA] in respect of any Mortgage Loan which materially adversely affects the value of such Mortgage Loan or the interest therein of the Certificateholders, the Trustee shall promptly notify the Originator, the Servicer and the NIMS Insurer of such defect, missing document or breach and request that the Originator deliver such missing document or cure such defect or breach within 90 days . . . or the Trustee shall enforce the obligations of the Originator under the related [MLPA] to repurchase such Mortgage Loan . . . at the Purchase Price within 90 days after the date on which the Originator was notified.

[1] Section 11.05 of the PSA sets forth detailed instructions for all "notices" under the PSA. Notices must be in writing, and the section includes addresses of recipients and acceptable manners of delivery.

(Emphasis added.) Section 2.03 further provides that in the event of material defects or breaches, the remedies described constitute the "sole remedy" available to the Trustee on behalf of the Certificateholders. Because the contractually-dictated time to substitute has long since passed, and because BoNY has never requested that the defendants cure any breaches of the R&Ws, the only contractual remedy at issue in this litigation has been repurchase.

The term Purchase Price, as used in § 2.03, is defined in § 1.01 of the PSA. The definition states that the Purchase Price is,

> [w]ith respect to any Mortgage Loan or REO Property[2] to be purchased pursuant to or as contemplated by Section 2.03, Section 3.16 or Section 9.01,[3] and as confirmed by an Officers' Certificate from the Servicer to the Trustee, an amount equal to the sum of (i) 100% of the Stated Principal Balance thereof as of the date of purchase, . . . (ii) . . . accrued interest on such Stated Principal Balance at the applicable Net Mortgage Rate in effect . . . (iii) any unreimbursed Servicing Advances and P&I Advances and any unpaid Servicing Fees allocable to such Mortgage Loan or REO Property, (iv) any amounts previously withdrawn from the Collection Account in respect of such Mortgage Loan or REO Property and (v) in the case of a Mortgage

[2] An REO Property is a "Mortgaged Property acquired by the Servicer . . . through foreclosure or deed-in-lieu of foreclosure."

[3] Section 2.03 describes the repurchase remedy at issue here. Section 3.16 describes the "optional purchase of defaulted mortgage loans," while Section 9.01 describes the termination of the agreement upon the repurchase or liquidation of all mortgage loans.

> Loan required to be repurchased pursuant to Section 2.03, expenses reasonably incurred or to be incurred by the Servicer, the Trustee or the NIMS Insurer[4] in respect of the breach or defect giving rise to the purchase obligation, as well as any costs and damages incurred by the Trust Fund in connection with any violation by such loan of any predatory or abusive lending law.

(Emphasis added.)

The first element of the Purchase Price, the Stated Principal Balance ("SPB"), is also defined. The SPB definition has two alternative definitions, the first applicable prior to the distribution of proceeds from the liquidation of the corresponding loans in the Trust and the second applicable after such distribution. Prior to the distribution of proceeds from liquidation, the SPB of a loan equals "the [initial] outstanding principal balance" minus principal payments and prepayments, and any proceeds received pursuant to other PSA provisions.

The second definition of SPB -- the one that is most relevant here -- states that the SPB is, "as of any date of determination coinciding with or subsequent to the [date] on which the proceeds, if any, of a Liquidation Event with respect to such Mortgage Loan would be distributed, zero." A "Liquidation Event" is elsewhere defined, in pertinent part, as "a Final Recovery Determination ["FRD"] [being] made as to [a]

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[4] Per the PSA, the NIMS Insurer is "[a]ny insurer that is guaranteeing certain payments under notes secured by collateral."

Mortgage Loan." An FRD, in turn, is defined as the servicer's determination that all proceeds it expected "in its reasonable good faith judgment" from a defaulted loan purchased by the originator, the seller of the loans, the depositor, or certain others pursuant to §§ 2.03, 3.16, and 9.01 -- chiefly liquidation and insurance proceeds -- have been recovered. Thus, for a liquidated loan whose proceeds the servicer has certified were properly paid out to the Certificateholders, the PSA requires that any Purchase Price calculation for that loan start with a sum of zero, to which are added the miscellaneous fees, advances, expenses, costs, and damages, if any, listed in (iii)-(v) of the Purchase Price definition.

The PSA also contains provisions governing the treatment of foreclosed or delinquent loans. Section 3.12 requires the servicer to foreclose upon "or otherwise comparably convert the ownership of properties securing the Mortgage Loans that come into and continue in default" and for which no collection arrangements can be made; § 3.13 authorizes the servicer to sell REO properties to third-party purchasers "on behalf of the Trustee and for the benefit of the Certificateholders." Section 4.02 requires the Trustee to make monthly disclosures by the Certificateholders, depositor, servicer, and other interested parties. On every Distribution Date -- defined as the 25th of each month -- the Trustee must issue a statement containing, inter alia, the number and aggregate outstanding balance of all loans that were delinquent or in foreclosure, as well as specific information on each REO property.

For loans on since-foreclosed properties for which the right to repurchase is unavailable, BoNY seeks monetary relief. The Court previously granted BoNY's summary judgment motion to permit it to argue it should be awarded damages for liquidated loans despite the agreements' description of the forms of relief therein as the "sole remedy." See Bank of New York Mellon v. WMC Mortgage, LLC, 12cv7096 (DLC), 2015 WL 2449313, at *2 (S.D.N.Y. May 22, 2015) ("Remedies Opinion"). The result was dictated by the well-settled principle of New York law that, "where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy." Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 443 (1956). The Remedies Opinion, however, only held that monetary damages were "not foreclosed by the contract language," and that "New York contract law may permit recovery of money damages in the circumstances at issue here." Remedies Opinion, 2015 WL 2449313, at *2 (emphasis added). It did not reach the issue of what measure or quantum of damages would be appropriate or whether damages would be awarded on a strict-liability basis. Id.

BoNY commenced this suit on August 21, 2012 in state court, alleging, among other things, numerous breaches of the R&Ws and seeking to enforce the remedies it asserts it is owed under the MLPA. WMC removed the case to federal court on September 20, 2012, and BoNY amended its complaint on May 29, 2013. Fact discovery closed on January 30, 2015, and expert discovery closed on June 23. The parties filed a joint pretrial order on July 31st, along with the instant motions. A bench trial is scheduled for September 21.

II. Crisafulli's Testimony

Crisafulli was retained by BoNY to "calculate for each Mortgage Loan the Purchase Price . . . set forth in the [PSA] or, where necessary, the reasonable economic equivalent of the Purchase Price." For each of the 2,274 loans[5] that BoNY's expert Ira Holt identified as "materially defective," Crisafulli's calculation methodology differed depending upon whether the loan had been liquidated or not. For the 433 loans outstanding -- i.e., that have not been liquidated -- he straightforwardly calculates the Purchase Price in accordance with the definition in § 1.01 of the PSA. For the 1,829 that have been liquidated, he "was asked by counsel to calculate damages using a methodology that replicates an economic value reasonably

[5] This number was later revised to 2,271 after BoNY withdrew its claims as to three loans.

equivalent of the contractual repurchase obligation," which he terms "Purchase Price Damages" ("PPD").

Crisafulli's first step in calculating the damages associated with each loan was to determine whether the loan was outstanding as of December 26, 2014, the date of the Trust's most recent count of its loans. If the loan was present in that count, it was considered outstanding, and he calculated the Purchase Price as the sum of the principal balance unpaid as of December 15, 2014; the interest on the unpaid principal through December 31, 2014 at the Net Mortgage Rate, as defined in the PSA; and any unpaid servicing fees.

If the loan was not part of the loan count, meaning that it had been liquidated,[6] Crisafulli used the PPD formula he created. Crisafulli's starting point for estimating PPD was the outstanding principal balance on the loan just prior to liquidation. Using this methodology, Crisafulli concluded that the total damages for outstanding loans is $90,780,644 and that the total damages for liquidated loans is $379,194,637. The total amount BoNY is due in damages, therefore, is $469,975,982.

[6] Twelve loans were classified as "not outstanding" but had not yet had their liquidation formally confirmed.

III. Causation Testimony by Defendants' Experts

Defendants have retained several experts to opine on damages and related issues: Ronald Greenspan, defendants' damages calculation expert; Brian Olasov, defendants' mortgage loan servicing expert; and David Abshier, defendants' mortgage loan underwriting expert. Defendants' principal position on the issue of damages is that any damages awarded for liquidated loans should be calculated using the Purchase Price formula provided in the PSA, which uses zero as the SPB for liquidated loans. This would result in a significantly lower damages figure for liquidated loans: approximately $2.5 million to $13.3 million, depending upon how certain other pretrial motions are resolved. The defendants' total damages estimate is approximately $100 million or less.

Both parties agree that, if the Purchase Price formula is applied, no element of causation needs to be proven. Defendants argue that a damages award for liquidated loans using any other measure of recovery, however, should be reduced to the extent that BoNY cannot show that a default on a mortgage loan was proximately caused by a breach of the R&Ws. All three of defendants' experts, to greater or lesser degree, offer testimony on potential causes of defaults other than the alleged breaches of the R&Ws. BoNY seeks to exclude such testimony as irrelevant on the ground that application of the PPD formula remains an "equitable remedy," and as such any award of damages is not bound by the requirements at law to establish damages, including causation.

DISCUSSION

These motions present a threshold question of contract interpretation: whether, in light of New York law, the Purchase Price formula must be used to calculate any damages awarded in lieu of equitable remedies that are unavailable. Both the MLPAs and PSA are contracts governed by the laws of the State of New York. Under New York law, "agreements are to be construed in accordance with the parties' intent," "the best evidence" of which "is what they say in their writing." In re World Trade Ctr. Disaster Site Litig., 754 F.3d 114, 122 (2d Cir. 2014) (citation omitted). "[A]ll writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they . . . were not all between the same parties." This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998) (citation omitted). Contracts should be read "as a whole to ensure that undue emphasis is not placed upon particular words and phrases, and to safeguard against adopting an interpretation that would render any individual provision superfluous." Law Debenture Trust Co. of New York v. Maverick Tube Corp., 595 F.3d 458, 468 (2d Cir. 2010) (citation omitted).

If a contract is found ambiguous and "the intent of the parties cannot be determined from the contractual language itself, the ambiguity presents a question of fact" to be resolved at trial. Hoyt v. Andreucci, 433 F.3d 320, 331 (2d Cir. 2006). If a contract is unambiguous, by contrast, its meaning is "a question of law for the court to decide." JA Apparel Corp. v. Abboud, 568 F.3d 390, 397 (2d Cir. 2009). "A contract is unambiguous when the contractual language has a definite and precise meaning about which there is no reasonable basis for a difference of opinion." Keiler v. Harlequin Enterprises Ltd., 751 F.3d 64, 69 (2d Cir. 2014).

As this Court previously recognized, while a provision providing for equitable relief as the "sole remedy" will generally foreclose alternative relief, "where the granting of equitable relief appears to be impossible or impracticable, equity may award damages in lieu of the desired equitable remedy." Doyle, 1 N.Y.2d at 443 (emphasis added). Accordingly, "New York contract law may permit recovery of money damages in the circumstances at issue here." Remedies Opinion, 2015 WL 2449313, at *2. Under New York law, however, "[a] court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case." Cruden v. Bank of New

York, 957 F.2d 961, 976 (2d Cir. 1992) (citation omitted). Such alternative relief as Doyle envisions is therefore bound in two important ways: It is available only insofar as the granting of relief "appears to be impossible or impracticable," Doyle, 1 N.Y.2d at 443, and it cannot go so far as to "rewrite" or "redraft a contract in accord with its instinct for the dispensation of equity." Cruden, 957 F.2d at 976. Applying the law described above resolves the issues presented here.

In this case, "BoNY presents a claim for specific performance of WMC's repurchase obligation and requests a monetary award where such relief is unavailable." Bank of New York Mellon v. WMC Mortgage, LLC, No. 12cv7096 (DLC), 2015 WL 4164691, at *6 (S.D.N.Y. July 10, 2015). The relief unavailable under the MLPA is the repurchase remedy. "Repurchase" is only "impossible or impracticable" in the most literal sense: the Trust no longer contains certain loans on which it seeks damages, and thus there is nothing left of those loans for WMC to repurchase. The Court has rejected defendants' contention that the contracts forbid any recovery for loans that have been liquidated. Accordingly, as the Remedies Opinion made clear, BoNY may seek an award of damages even though the "sole" remedy envisioned by the parties' agreements is no longer available with respect to liquidated loans.

Just because the Remedies Opinion authorized a limited departure from the literal language of the contract, however, it does not follow that the parties may disregard other explicit terms of the MLPA and PSA that bear on remedies. BoNY seeks monetary relief in equity; it has been allowed to seek that relief. The question here lies at the intersection of the contractual language and principles of equity, but it is different from that resolved in the Remedies Opinion, which held only, on the basis of the arguments that were presented at that time, that literal "repurchase" of liquidated loans is an impossible remedy. Here, however, both the language of the contract and equity counsel against departing from the Purchase Price formula.

The parties are sophisticated commercial entities who negotiated a complex agreement and formalized that agreement as one of a series of contracts whose language was drafted with precision. Looking for an appropriate measure of damages outside those contracts should be a last resort. Cf. US Airways, Inc. v. McCutchen, 133 S. Ct. 1537, 1548 (2013) (explaining that equitable "[p]rinciples of unjust enrichment give way when a court enforces" an explicit lien agreement, and "[t]he agreement itself becomes the measure of the parties' equities"). Read as a whole, and understood together, the MLPAs and PSA create a remedies scheme that provides a formula for recovery both before and after liquidation of a loan. Before liquidation, the Purchase Price formula boils down to a payment to BoNY of however much principal on the loan is outstanding, plus interest, plus reimbursement of applicable fees. After liquidation -- meaning after the Trust has effectively cashed in that loan -- the Purchase Price starts at zero because the Trust has received liquidation proceeds, but WMC has still guaranteed the reimbursement of certain other expenses.

BoNY has not propounded a persuasive alternative explanation for why the SPB definition encompasses loans that have been completely and finally liquidated. BoNY's claim that the definition of SPB is separate from the definition of Purchase Price and therefore "not part of the remedial scheme" is belied by the presence of the critical defined term Purchase Price in § 2.03 itself, as well as by the entirety of § 1.01, where definitional cross-references are ubiquitous, each defined term is precisely capitalized, and nothing is left to the imagination. It is unreasonable to assume that a definition incorporated by reference into one or more other definitions would be operative in some contexts and not in others. Had this been so, a contract exhibiting this degree of complexity and exactitude would surely have been more explicit.

Unlike repurchasing loans that can no longer exist, following the contractual formula for calculating the SPB is not "impossible." Because the PSA's Purchase Price formula may be applied in the situation here -- where loans have been liquidated -- that formula, to which the parties explicitly agreed, guides any calculation of damages. Put another way, while it is clear that BoNY is entitled to some monetary relief with respect to loans that cannot be "repurchased," there is no reason for the parties not to follow the formula to which they agreed and that dictates in detail the terms of reimbursement with respect to liquidated loans.

BoNY argues that to determine the measure of monetary relief by reference to the Purchase Price formula would "create a perverse incentive for similarly situated parties to delay repurchase in the hope that a non-performing materially defective loan will eventually be liquidated, freeing them from their repurchase obligations."[7] There are several observations that can be made. First of all, the perverse incentive

[7] BoNY also argues, in a footnote, that even assuming the Purchase Price formula is applicable to liquidated loans, that provision is unenforceable because defendants behaved with "gross negligence." The cases it cites, however, involve liability-limiting provisions. E.g., Gold Connection Disc. Jewelers, Inc. v. Am. Dist. Tel. Co., 622 N.Y.S.2d 740, 741 (2d Dep't 1995); but see Base Vill. Owner LLC v. Hypo Real Estate Capital Corp., 938 N.Y.S.2d 541, 542 (1st Dep't 2012) ("[T]he [liability-limiting] provision was not rendered ineffective by allegations of misconduct that 'smack' of intentional wrongdoing or willful, malicious or bad faith conduct.") At issue here, however, is a contractual formula used to determine damages applied to fashion appropriate equitable relief.

identified by BoNY does not appear to be a hazard inherent in the PSA's remedial scheme. Indeed, it may only exist in a collapsed housing market. In any event, the parties structured their relationship in a way that requires ongoing disclosure of the performance of the Trust's loans, and limits the time given to the seller to cure any defect or repurchase a defective loan. Moreover, these agreements were executed in the context of highly regulated commercial activity. Strict liability statutes, with their own formulae for recovery, were also available to many certificate holders until the statutes of limitations for those laws expired. Thus, it is not so clear that the SPB formula that will be applied here necessarily creates any perverse incentive to delay repurchase of a concededly defective loan. In any event, even if such incentives may have arisen here, BoNY has not shown that they provide a sufficient basis in this litigation to ignore the parties' agreed upon formula for measuring the value of a liquidated loan.[8]

BoNY relies heavily on the decision by the court in ACE Sec. Corp. v. DB Structured Products, Inc., 965 N.Y.S.2d 844 (N.Y. Sup. Ct.), rev'd on other grounds, 977 N.Y.S.2d 229 (1st

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[8] Whether departure from the Purchase Price formula, or any similar contractual formula, would constitute appropriate equitable relief under other circumstances is a question that need not be decided here.

Dep't 2013), aff'd, 2015 WL 3616244 (N.Y. June 11, 2015), which denied a motion to dismiss brought in an RMBS breach of contract lawsuit similar to the instant case. In the course of rejecting the ACE defendant's argument that its PSA barred all recovery for liquidated loans since they could not be "repurchased", the court observed that such a rule would create a "perverse[] incentive[e]" for securitizers to fill trusts with "junk mortgages that would expeditiously default . . . before a repurchase claim is made." 965 N.Y.S.2d at 850. That observation, of course, provides little guidance on the measurement of damages to be employed for liquidated loans. The observation, however, is very relevant to whether any remedy exists for a breach of R&Ws in connection with a liquidated loan, and as the Remedies Opinion has already found, equity demands that a remedy continue to exist. 2015 WL 2449313, at *2.

While the ACE court did not have occasion to decide upon the formula for recovery in the case of liquidated loans, it did make an observation that appears to be consistent with the approach taken in this Opinion. The ACE court observed that it would be important to follow the parties' agreed-upon terms in selecting a measure of damages: "[A]ny recovery under Section 2.03 must be limited to the formula set forth in the PSA. . . . The degree to which bargained for remedies are simple or convoluted is a matter for sophisticated commercial actors to address before the execution of a contract. It is not something to complain about in subsequent litigation." 965 N.Y.S.2d at 501.

While BoNY cites several other cases to support its position, it has made no showing that these other cases involve contracts with materially similar language. This is a breach of contract action, and the merits of the parties' arguments rest upon the text of the contract they signed, and whether the equitable remedies requested are sufficiently tethered to that contract.

Because Crisafulli's opinions on damages rest on the incorrect assumption that the contractual Purchase Price does not provide the proper measure of equitable monetary relief, his testimony and opinions cannot "help the trier of fact to . . . determine a fact in issue," Fed. R. Evid. 702(a), and must be excluded. And because the parties agree that causation need not be shown if the Purchase Price formula is used to calculate damages for liquidated loans, it is unnecessary to consider the issue of causation, and BoNY's motion in limine is granted as moot.

CONCLUSION

Defendants' July 31, 2015 motion to exclude the testimony of Robert Crisafulli is granted. BoNY's July 31, 2015 motion in limine to exclude evidence of causation is granted as moot.

Dated: New York, New York
August 18, 2015

Denise Cote
DENISE COTE
United States District Judge