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

PRESENT: MARCY S. FRIEDMAN Justice PART 60

HSH NORDBANK AG, et al.,

Plaintiffs,

-against-

MORGAN STANLEY, et al.,

Defendants.

INDEX NO. 652988/2012

MOTION DATE _____

MOTION SEQ. NOs. 002

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

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

**Cross-Motion:** ☐ Yes ☑ No

Defendants' motion to dismiss is decided in accordance with the attached decision/order, dated July 14, 2015.

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

Dated: 7-14-15

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

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

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

---

HSH NORDBANK AG, et al.,

Index No.: 652988/2012

*Plaintiffs*,

– against –

DECISION/ORDER

MORGAN STANLEY, et al.,

*Defendants.*

---

This residential mortgage-backed securities (RMBS) fraud action is brought by plaintiffs HSH Nordbank AG and various related entities (collectively HSH Nordbank) and Carrera Capital Finance Limited (Carrera) against defendants Morgan Stanley and various related entities (collectively Morgan Stanley) and Natixis Real Estate Capital LLC (Natixis). The complaint alleges that defendants made misrepresentations and omissions about the quality and characteristics of the underlying mortgage loans in 21 RMBS securitizations, involving 58 certificates. Morgan Stanley and Natixis each separately move to dismiss the action, pursuant to CPLR 3211 (a) (1), (5) and (7).

Morgan Stanley Motion

Standing

The Morgan Stanley motion raises a threshold issue of standing which this court has not previously addressed in the context of the RMBS Litigation. Morgan Stanley challenges HSH Nordbank's standing to the extent that it asserts fraud claims based on certificates allegedly

assigned to it from non-parties Rasmus Purchase No. 2 Limited and Rasmus Purchase No. 8 Limited (collectively Rasmus). The sole allegations in the complaint regarding this assignment are as follows: "Rasmus has transferred all of its rights and interests in the Certificates to HSH. HSH and Carrera continue to hold the Certificates as of the date hereof." (Compl., ¶ 40.) "HSH is also the assignee of Rasmus's claims relating to the purchase of the Certificates." (Id., ¶ 41.) Morgan Stanley contends that this pleading is insufficient because the complaint must allege that Ramus explicitly assigned its fraud claims to HSH Nordbank. (Morgan Stanley [MS] Memo. Of Law In Supp. at 7.)

In Commonwealth of Pennsylvania Public School Employees' Retirement System v Morgan Stanley & Co., Inc. (2015 NY Slip Op 05591, 2015 WL 3948200 [June 30, 2015]), the Court of Appeals clarified the standards for asserting standing to sue on a fraud claim in connection with an assignment – there, a note. Determining a question certified by the Second Circuit, the Court held that "where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language – although no specific words are required – that evinces that intent and effectuates the transfer of such rights." The Court surveyed leading authority, contrasting Banque Arabe et Internationale D'Investissement v Maryland National Bank (57 F3d 146 [2d Cir 1995]) with State of California Public Employees' Retirement System v Shearman & Sterling (95 NY2d 427 [2000] [CALPERS].) As the Court explained, Banque Arabe held that an "assignment of interest and rights in [the] 'transaction' . . . [was] broad enough to encompass tort claims," whereas CALPERS held that an "assignment of rights and interests arising out of [the] loan documents and promissory note did not assign" a tort cause of action. Noting that Banque Arabe considered the circumstances surrounding the transfer in determining whether tort claims had been assigned (there, a dissolution of the assigning entity), the Court of Appeals further explained that the cases

"do not stand for the proposition . . . that the surrounding circumstances can be sufficient, in the absence of any supporting language . . . ."[1]

Although Commonwealth of Pennsylvania was decided on a factually developed record, the result is not different here. Under well settled standards for determination of motion to dismiss, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." (Simkin v Blank, 19 NY3d 46, 52 [2012] [internal quotation marks and citation omitted]. See also Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 181-182 [2011] [plaintiff asserting that it was a third-party beneficiary under contract failed to plead claim, where the complaint "only offer[ed] conclusory allegations without pleading the pertinent terms of the purported agreement"].)

HSH Nordbank's complaint offers the conclusory assertion that HSH Nordbank was the assignee of all "rights and interests" in the certificates. Under Commonwealth of Pennsylvania, however, a transfer merely of "rights and interests" is plainly insufficient on its face to effect an assignment of tort claims. The further allegation that HSH Nordbank was "the assignee of Rasmus's claims relating to the purchase of the Certificates" is wholly lacking any detail as to the specific terms of the assignment – information within HSH Nordbank's possession as assignee – and is therefore similarly insufficient to plead an assignment of tort claims.

---

[1] North Fork Bank v Cohen & Krassner (44 AD3d 375, 375 [1st Dept 2007]) is a rare case which appears to hold, without discussion, that an assignment of "all of [the assignee's] right, title and interest in and to" the instrument (there, a mortgage) is sufficient to assign tort claims. In Commonwealth of Pennsylvania, the Court of Appeals does not cite North Fork Bank. In view of the Court of Appeals' holding, North Fork Bank is not controlling authority.

The court is also unpersuaded by HSH Nordbank's alternative argument that it has standing with respect to certain certificates as equitable subrogee of Rasmus and also of Carrera. In claiming equitable subrogation the complaint pleads: "HSH's rights of subrogation flow from its acquisition of certain Certificates from Rasmus and Carrera at or near par value subsequent to the losses. This acquisition was necessary in order to protect HSH's economic interests, which were at risk due to HSH's contractual obligation in its role as Liquidity Provider, Capital Noteholder and/or Letter of Credit Provider to cover certain debts, and/or absorb certain losses of Rasmus and Carrera." (Compl., ¶ 41.)

It has long been held that the doctrine of equitable subrogation "is applicable to cases where a party is compelled to pay the debt of a third person protect his own rights, or to save his own property." (Gerseta Corp. v Equitable Trust Co. of N.Y., 241 NY 418, 426 [1926] [internal quotation marks and citation omitted]; accord Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, 937 [2d Dept 2010].) The purpose of the doctrine "is to afford a person who pays a debt that is owed primarily by someone else every opportunity to be reimbursed in full." (Chemical Bank v Meltzer, 93 NY2d 296, 304 [1999] [applying doctrine to surety]; Banco Nacional de Mexico, S.A. v Ecoban Fin. Ltd., 276 AD2d 284 [1st Dept 2000] [applying doctrine to guarantor].) "However, while the scope of subrogation is broad, it cannot be invoked where the payments sought to be recovered are voluntary. A party seeking subrogation can establish that its payments were not voluntary either by pointing to a contractual obligation or to the need to protect its own legal or economic interests." (Broadway Houston Mack, 71 AD3d at 937 [internal citations omitted].) The party seeking subrogation on the latter ground "must show that the act is not merely helpful but necessary to the protection of its interests." (Id.)

HSH Nordbank's allegation that its acquisition of Rasmus and Carrera certificates was "necessary" to protect its economic interests is again conclusory. Although HSH Nordbank pleads

that it had contractual obligations to cover debts or absorb losses of Rasmus and Carrera, it fails to plead even the most minimal detail as to the circumstances under which these obligations arose and, notably, does not allege that it had any specific contractual obligation to purchase the certificates. The allegations of the complaint are therefore insufficient to plead HSH Nordbank's standing under the equitable subrogation doctrine.

The court accordingly holds that the complaint should be dismissed to the extent that it asserts claims based on an assignment of Rasmus certificates or, under the equitable subrogation doctrine, based on its acquisition of Rasmus and Carrera certificates.[2]

The court notes that HSH Nordbank requests leave to replead in the event of a dismissal for failure to plead standing. This request, which is made in a footnote in HSH Nordbank's brief, is unaccompanied by any offer of facts that would support standing under either an assignment or an equitable subrogation theory. (See Ps.' Memo. In Opp. at 11, n 12.) The contract by which the alleged assignment was made is, however, in HSH Nordbank's possession, as is the contractual or other support for its claim that it is an equitable subrogee. Under these circumstances, the court declines to grant leave to replead. (See Pollak v Moore, 85 AD3d 578, 579 [1st Dept 2011]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010] [rejecting plaintiff's "cursory request" for leave to replead "because there was no proposed pleading accompanied by an affidavit of merit"]; see also AJW Partners, LLC v Admiralty Holding Co., 93 AD3d 486, 486 [1st Dept 2012].) In the event that HSH Nordbank can offer facts that would overcome the legal defects in the complaint, it may move for leave to replead.

The court further notes that the record is unclear as to which of HSH Nordbank's claims

---

[2] In a footnote, Morgan Stanley claims that Carrera lacks standing because HSH Nordbank purchased Carrera's certificates at or near par value, and Carrera therefore suffered no injury. (See MS Memo. In Supp. at 12 n 16; see also CALPERS, 95 NY2d at 436.) The complaint pleads, however, that both HSH Nordbank and Carrera continue to hold certificates. (Compl. ¶ 40.) As the record is unclear as to whether Carrera also purports to maintain claims based on certificates purchased from it at par value, the viability of such claims must be addressed at a later time.

are direct – i.e., based on its own purchase of certificates – and which are based on the Rasmus assignment or are asserted under the equitable subrogation doctrine. The ordering provision which follows contains a directive for resolving this issue.

German Statute of Limitations

Morgan Stanley also moves to dismiss the action on the ground that it is time-barred. Morgan Stanley entered into a tolling agreement with HSH Nordbank in 2011, and does not dispute that the action is timely under the New York statute of limitations. Morgan Stanley argues, rather, that the action is time-barred under the law of Germany, which applies under the New York borrowing statute, CPLR 202.

This action was commenced in August 2012. The German statute of limitations, German Civil Code § 199, runs for three years, "commenc[ing] at the end of the year in which: 1. the claim arose and 2. the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence." Thus, as Morgan Stanley acknowledges, in order to be barred by the German statute of limitations, HSH Nordbank would have had to have knowledge, or absent gross negligence would have obtained knowledge, by the end of the year 2007. Morgan Stanley further claims that this standard is met by publicly available information in 2007 as to, among other things, originator bankruptcies, a near halt in the market for non-agency mortgage securitizations, and downgrades of three of the certificates at issue. (MS Memo. In Supp. at 7-8.)

The court is asked to take notice of German law from the affidavits submitted on this motion by German law experts (Profs. Heinz-Peter Mansel and Jan Nedden for plaintiffs and defendants, respectively). As held in prior RMBS decisions involving substantially similar experts' affidavits, they do not adequately address the circumstances that trigger the duty of inquiry and the types of efforts that satisfy the gross negligence standard. (HSH Nordbank AG v

Barclays Bank PLC, 2014 WL 841289, * 8 [Sup Ct, NY County Mar. 3, 2014] [HSH/Barclays]); Deutsche Zentral-Genossenschaftsbank AG v The Goldman Sachs Group, Inc., Index No. 653134/2012, Decision on the Record, Mar. 11, 2014 [DZ/Goldman Sachs]; Bayerische Landesbank v Barclays Bank PLC, 2014 WL 3738082, * 1 [Sup Ct, NY County July 28, 2014] [Bayerische Landesbank/Barclays].)[3] The court accordingly holds that Morgan Stanley fails on this record to eliminate triable issues of fact as to the bar of the German statute of limitations.

Remaining Claims

Morgan Stanley also argues that the complaint fails to state a cause of action. In particular, it argues that the complaint does not allege actionable misrepresentations regarding the underlying mortgage loans, including misrepresentations as to compliance with underwriting guidelines, appraisals or combined loan-to-value ratios, owner occupancy of the mortgaged properties, credit ratings, and transfer of the loans to the trusts. Morgan Stanley also argues that the complaint fails to adequately plead scienter, loss causation, justifiable reliance, and negligent misrepresentation.

This court has discussed the extensive legal authority on the sufficiency of substantially similar pleadings in Allstate Ins. Co. v Credit Suisse Secs. (USA) LLC (2014 WL 432458 [Jan. 24, 2014] [Allstate/Credit Suisse]), HSH/Barclays, and IKB Deutsche Industriebank AG v Credit Suisse Secs. (USA) LLC (2014 WL 859355 [Mar. 3, 2014]). The allegations of the complaint in the instant action and the arguments in support of and against dismissal of the pleaded causes of action do not differ in any material respect from those considered in the prior decisions. For the reasons stated and on the authorities cited in the prior decisions, the complaint states actionable misrepresentations, except to the extent that it is based on allegations regarding the transfer of notes and mortgages to the trusts. (See HSH/Barclays, 2014 WL 841289 at * 12-14.)

[3] The record on the German statute of limitations issue must also be further developed as which of the entities' claims are subject to German law.

In addition, the court rejects Morgan Stanley's claim that its own investment in junior tranches of the certificates undermines any reasonable inference of scienter. As this court has also previously held, the effect on defendant's scienter of its interest in the securitizations, and any steps it may have taken to hedge its losses, at most raise triable issues of fact that are not appropriate for resolution on a motion to dismiss. (Bank Hapoalim B.M. v Morgan Stanley, Index No. 653036/2012, Decision on the Record, Apr. 22, 2014 [Bank Hapoalim/Morgan Stanley].) Further, the disclosures in the offering materials, which are similar to those previously considered by this court, are ineffective to notify investors of the systematic or wholesale abandonment of underwriting standards which is alleged here, or to negate justifiable reliance as a matter of law. (Allstate/Credit Suisse, 2014 WL 432458 at * 8-9; HSH/Barclays, 2014 WL 841289 at * 20-21; Deutsche Zentral-Genossenschaftsbank AG v UBS AG, 2014 WL 1495632, * 1 [Sup Ct, NY County Apr. 17, 2014].)

On the reasoning and authorities cited in prior decisions, the court further holds that loss causation is adequately pleaded. (HSH/Barclays, 2014 WL 841289 at * 21.) Contrary to Morgan Stanley's contention, this conclusion is not changed by HSH Nordbank's alleged attribution of its losses to a marketwide crash. (See MS Memo. In Supp. at 13-14; 2008 HSH Nordbank Press Release, stating that writedowns on Bank's securities portfolio were prompted by a further decline in the valuations of the portfolios as a result of the worsening of the US financial market crisis] [Rouhandeh, Ex. 32].) This alleged admission is subject to explanation at trial and does not eliminate triable issues of fact as to whether plaintiff's losses were also causally related to defendants' securitization practices. (Bank Hapoalim/Morgan Stanley, Index No. 653036/2012 Decision on the Record, Apr. 22, 2014.)

Finally, the negligent misrepresentation, fraudulent concealment, and rescission causes of action must be dismissed for the reasons stated in this court's prior decisions. (See e.g. HSH/Barclays, 2014 WL 841289 at * 22.)

Natixis Motion

Natixis joins in Morgan Stanley's motion to dismiss for lack of standing and failure to state a cause of action. It also moves to dismiss on the ground that all of the claims against it are barred by the New York statute of limitations.

CPLR 213 (8) provides that the time within which a fraud "action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it."

Natixis was the sponsor and/or seller of four of the securitizations at issue. (Compl., ¶ 37.) The last of the Natixis certificates was purchased on June 30, 2006. (Natixis Memo. In Supp. at 2.) This action was commenced on August 24, 2012. Natixis was not a party to the tolling agreement with HSH Nordbank.

It is undisputed that the action was brought more than six years after the last purchase of a Natixis certificate, and that the complaint is barred unless HSH Nordbank could not with reasonable diligence have discovered the fraud by August 24, 2010, two years before the action was brought.

In claiming that the two year discovery rule of CPLR 213 (8) is a bar to the claims against it, Natixis cites publicly available information as of 2010, including information about bankruptcies of originators of the loans (Comp., ¶ 160 [Jan. 2008 bankruptcy of First NLC Financial Services LLC]; ¶ 173 [2008 bankruptcy of Fremont]; ¶¶ 187, 189 [2008 bankruptcy of New Century from which originator NC Capital allegedly acquired loans]), and litigation in 2008 against Fremont and New Century. (Natixis Memo. In Supp. at 12.) Natixis also relies on the

undisputed fact that all but one of the certificates in the Natixis securitizations was downgraded below investment grade prior to August 2010, and many of the certificates were downgraded by 2008 and 2009. (Oral Arg. Tr. at 36; Letter dated March 31, 2014 [mistakenly dated March 31, 2013] [NYSCEF Doc No 88].)

In determining motions to dismiss on statutes of limitations grounds in RMBS actions involving substantially similar pleadings, this court has repeatedly held that the plaintiffs could with reasonable diligence have discovered the alleged fraud by 2010, based on the downgrades of the certificates to below investment grade, originator bankruptcies, and other publicly available information. (See e.g. IKB Intl., S.A. v Morgan Stanley, 2014 WL 5471650, * 4 [Sup Ct, NY County Oct. 28, 2014] [fraud discoverable prior to November 16, 2009]; Deutsche Zentral-Genossenschaftsbank AG, New York Branch v Morgan Stanley, Index No. 654035/2012, Decision on the Record, June 10, 2014 [fraud discoverable prior to November 21, 2010]; Deutsche Zentral-Genossenschaftsbank AG v Credit Suisse, Index No., 650967/2013, Decision on the Record, May 1, 2014 [fraud discoverable prior to January 19, 2010]; see also HSH/ Barclays, 2014 WL 841289 at * 7-8 [citing authorities granting motions to dismiss RMBS cases on statute of limitations grounds based on evidence of noncompliance with underwriting standards by key originators and decline in value of certificates]; Commerzbank AG London Branch v UBS AG, 2015 WL 3857321 [Sup Ct, NY County June 17, 2015 [adhering to above decisions].)

Here, similarly, the court holds that the two-year discovery rule is a bar to the claims against Natixis, and that with reasonable diligence HSH Nordbank could have discovered the alleged fraud by August 24, 2010.

In view of this holding, the court does not reach Natixis' remaining bases for dismissal.

It is hereby ORDERED that the motion of Morgan Stanley is granted to the following extent: 1) All claims by HSH Nordbank based on an assignment from Rasmus or brought under

the equitable subrogation doctrine with respect to certificates purchased from Rasmus and Carrera are dismissed. The parties shall confer in an effort to reach a stipulation identifying the certificates as to which such claims are barred. In the event the parties are unable to reach agreement, Morgan Stanley shall settle a proposed order identifying the certificates; 2) with respect to all other certificates, the first cause of action for fraud and the fourth cause of action for aiding and abetting fraud are dismissed only to the extent that they are based on alleged misrepresentations regarding transfer of notes and mortgages to the trusts; and 3) the second cause of action for fraudulent concealment, the third cause of action for negligent misrepresentation, and the fifth cause of action for rescission are dismissed; and it is further

ORDERED that the motion of Natixis is granted to the extent of dismissing the complaint against it with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
July 14, 2015

MARCY FRIEDMAN, J.S.C.