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

PRESENT: MARCY S. FRIEDMAN **PART** 60
Justice

MORGAN STANLEY MORTGAGE LOAN TRUST 2007-2AX, by U.S. BANK, NATIONAL ASSOCIATION, solely in its capacity as Trustee,

Plaintiff,

-against-

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, et al.

Defendants.

INDEX NO. 650339/2013

MOTION DATE _____

MOTION SEQ. NO. 001, 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

Upon the foregoing papers, it is ORDERED that defendants' motions to dismiss are decided in accordance with the attached decision/order, dated November 24, 2014.

Dated: 11-24-14

Marcy Friedman, J.S.C.

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.

MORGAN STANLEY MORTGAGE LOAN TRUST 2007-2AX (MSM 2007-2AX), by U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee,

Plaintiff,

– against –

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, as Successor-by-Merger to MORGAN STANLEY MORTGAGE CAPITAL INC. and GREENPOINT MORTGAGE FUNDING, INC.,

Defendants.

Index No.: 650339/2013

DECISION/ORDER

Seq. 001, 002

This residential mortgage backed securities (RMBS) action for breach of contract, known as a put-back action, arises out of the failure of Morgan Stanley Mortgage Capital Holdings LLC (Morgan Stanley), successor-by-merger to sponsor Morgan Stanley Mortgage Capital, Inc., and of originator GreenPoint Mortgage Funding, Inc. (GreenPoint) to repurchase allegedly defective loans from plaintiff Trustee. Morgan Stanley moves to dismiss the complaint pursuant to 3211 (a) (1), (3), (5), and (7). GreenPoint separately moves to dismiss pursuant to 3211 (a) (1) and (7).

This action is based on substantially similar pleadings and raises issues that do not differ in any material respect from those determined by this court in recent decisions in Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4, by HSBC Bank USA, Natl. Assn. v

Nomura Credit & Capital, Inc. (2014 WL 2890341, Index No. 653390/2012, June 26, 2014 [Nomura]), ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc. (2014 WL 4785503, Index No. 651936/2013, August 28, 2014 [ACE]), and Home Equity Asset Trust 2006-8 (HEAT 2006-8) v DLJ Mortgage Capital, Inc. (2014 WL 4966133, Index No. 654157/2012, October 1, 2014 [HEAT 2006-8]). Those issues will not be discussed at length here.

On the authority and reasoning relied on in Nomura, the court holds that the relief available to plaintiff is limited by the sole remedy provisions in the Pooling and Servicing Agreement (PSA), the Mortgage Loan Purchase Agreement (MLPA), and the Mortgage Loan Sale and Servicing Agreement (MLSSA), which govern the securitization at issue. Pursuant to PSA § 2.05, MLPA § 3.01, and MLSSA § 7.03, plaintiff's remedies for breach of the mortgage representations are limited to specific performance of the repurchase protocol, or if loans cannot be repurchased, to damages consistent with its terms – i.e. damages in the amount of the defined Purchase Price. (2014 WL 2890341 at * 7-8, 10-11; see also Morgan Stanley Mtge. Loan Trust 2006-13ARX, by US Bank Nat. Assoc. v Morgan Stanley Mtge. Capital Holdings LLC, 2014 WL 4829638 [Index No. 653429/2012, Sept. 25, 2014].) Plaintiff's claims for rescissory damages should be dismissed. (Nomura, 2014 WL 2890341 at * 13-14.)

As recently held by the Appellate Division, the cause of action for breach of contract accrued on the date the representations and warranties were made – i.e., the date of execution of the PSA and MLPA and the closing date of the transaction – and not on the "as of" date, as Morgan Stanley contends here. (U.S. Bank Natl. Assn. v DLJ Mtge. Capital, Inc., 121 AD3d 535 [1st Dept 2014].) This action was timely commenced by summons with notice filed on January 30, 2013, within six years of the closing date, January 31, 2007.

Morgan Stanley's contention that the plaintiff lacks standing because the summons with notice named the Trust as plaintiff, rather than the Trustee, is without merit. The captions of both the summons with notice and the subsequent complaint, which inverted the order of the names of the Trust and Trustee, identify the Trustee as the party bringing the action on behalf of the Trust, and the complaint makes clear that the Trustee is the plaintiff. (See Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge. Capital, Inc., 2014 WL 317838, * 3-4 [Sup Ct NY County Jan. 27, 2014] [Schweitzer, J.].)

For the reasons set forth in Nomura (2014 WL 2890341, at * 7-10), the court rejects defendants' showing at this juncture that claims based on liquidated loans are not subject to repurchase.[1]

The court further rejects defendants' contention that plaintiff's claims related to defective loans which were not the subject of its timely repurchase demands are not adequately pleaded. As this court held in ACE (2014 WL 4785503, * 4-6), which involved a substantially similar repurchase provision, the PSA here imposes a repurchase obligation upon service of a repurchase demand as a condition precedent to commencement of the action, or upon the defendants' independent discovery of breaches of the representations and warranties, or upon both. In accordance with the weight of authority, this court has also previously held that the pleading of discovery of breaches is not deficient as a matter of law because the complaint does not specifically identify each defective loan that the defendants are claimed to have discovered (id. at * 6 [and authorities cited therein]) or because the repurchase demand does not specifically identify each loan as to which repurchase is sought. (Nomura, 2014 WL 2890341 at * 15-16 [and authorities cited therein].)

[1] It is noted that the PSA at issue includes repurchase provisions and definitions of Purchase Price and Mortgage Loans substantially similar to those in Nomura. (See PSA §§ 1.01, 2.05.)

Here, with respect to GreenPoint, the complaint alleges that the Trustee served a timely repurchase demand which was based on a review of a sample of 56 loans, 55 of which were originated by GreenPoint. (Compl. ¶¶ 1, 7, Snyder Aff., Ex. G.) The review found breaches of representations and warranties in 100 percent of the loans sampled. (Compl. ¶¶ 34-36.) The demand to repurchase 55 loans of the 182 loans that GreenPoint originated in this securitization, amounted to notice of breaches in approximately 30 percent of the total number of Greenpoint-originated loans. (Oral Argument Transcript at 29.) Greenpoint's discovery of the breaches is adequately pleaded based on the service of the timely repurchase demand, coupled with Greenpoint's role as originator, and thus its familiarity with the extent of its own non-compliance with its underwriting guidelines,. (ACE, 2014 WL 4785503 at * 4-6.)

As to Morgan Stanley, the complaint alleges service of a repurchase demand identifying the 56 sampled loans. Morgan Stanley's discovery of the defects is also alleged based on the September 2011 Federal Housing Finance Agency (FHFA) complaint against Morgan Stanley involving, among others, the securitization at issue in the instant case. The FHFA complaint alleged, with respect to the securitization at issue here, that a forensic review of a sample of 758 of the loans showed that specified large percentages of loans did not comply with applicable underwriting guidelines, and that stated owner occupancy rates and loan to value ratios were inaccurate. (Compl. ¶¶ 5, 61-62; HEAT 2006-8, 2014 WL 4966133 at * 1.) Under these circumstances, plaintiff's allegations are sufficient to support a reasonable inference that Morgan Stanley was notified of and/or discovered sufficiently widespread breaches of mortgage representations that gave rise to its repurchase obligation.

It is accordingly hereby ORDERED that defendants' motions to dismiss the complaint are granted to the following extent:

It is ORDERED that the first cause of action for breach of contract and specific performance is dismissed only to the extent that it alleges that breaches of defendants' repurchase obligations constitute independent breaches of contract; and it is further

ORDERED that the second cause of action for breach of contract and damages is dismissed only to the extent that it 1) alleges that breaches of defendants' repurchase obligations constitute independent breaches of contract, and 2) demands rescissory or other damages inconsistent with the terms of the repurchase protocol.

This constitutes the decision and order of the court.

Dated: New York, New York
November 24, 2014

MARCY FRIEDMAN, J.S.C.