

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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Lehman XS Trust et al.,	:	
	:	
Plaintiffs,	:	12 Civ. 7935
	:	12 Civ. 7942
- against -	:	12 Civ. 7943
	:	
Greenpoint Mortgage Funding, Inc.,	:	
	:	MEMORANDUM &
Defendant.	:	ORDER
-----	X	

ANDREW L. CARTER, JR., District Judge:

I. INTRODUCTION

Defendant GreenPoint Mortgage Funding, Inc. (“GreenPoint”) moves to dismiss the Second Amended Consolidated Complaint (“SACC”) filed by Plaintiff U.S. Bank National Association, acting in its capacity as Trustee of the Lehman XS Trust, Series 2006-GP2 (“GP2”), the Lehman XS Trust, Series 2006-GP3 (“GP3”), and the Lehman XS Trust, Series 2006-GP4 (“GP4,” and collectively with GP2 and GP3, the “Trusts”) (the “Plaintiff Trustee”). Specifically, GreenPoint moves for summary judgment based on statute of limitations grounds on Plaintiff Trustee’s breach of contract claims for specific performance and damages, as well as indemnification, arising out of GreenPoint’s alleged breach of certain representations and warranties. GreenPoint further moves to dismiss the Plaintiff Trustee’s newly-added cause of action for lack of standing pursuant to Fed. R. Civ. P. 12(b)(1) and/or failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively, GreenPoint moves for reconsideration of the Court’s Memorandum and Order, filed herein on March 31, 2014, pursuant to Local Civil Rule 6.3, and dismissal of all claims alleged in the captioned actions pursuant to Fed. R. Civ. P. 12(b)(6).

For the reasons set forth below, Defendant’s motion is granted and the case is dismissed.

II. FACTUAL BACKGROUND & PROCEDURAL HISTORY

This case arises out of GreenPoint’s alleged breach of its contractual obligation to repurchase certain non-conforming mortgage loans that GreenPoint originated, pooled, deposited into the Trusts, and then securitized. The Trusts issued certificates that were sold to investors

(“Certificateholders”); the certificates represented interests in the mortgage loans, the value of which hinged on the quality of the underlying loans themselves. SACC ¶ 1.

GreenPoint sold specific groups of loans (“mortgage loan packages”) to Lehman Brothers Holdings, Inc. (“Lehman Holdings”) and Lehman Brothers Bank, FSB (“Lehman Bank,” and together with Lehman Holdings, “Lehman”) on different dates, pursuant to letter agreements known as Purchase Price and Terms Letters (“PPTLs”). ECF No. 11-3; ECF No. 11-4. Each PPTL provided a defined “closing date,” which represented the effective date on which the loans were sold by GreenPoint to Lehman. Dfdt.’s Rule 56.1 Statement ¶ 14 (citing Lehman Brothers Holdings, Inc. Aff. ¶ 12); Pl.’s Rule 56.1 Counterstatement ¶ 14.

For each of the Trusts, GreenPoint transferred the mortgage loans either directly to the sponsor, Lehman Holdings, or indirectly through Lehman Bank, pursuant to the following agreements: (i) a Flow Mortgage Loan Purchase and Warranties Agreement, dated as of December 12, 2001, by and between Lehman Bank and GreenPoint, as amended as of March 14, 2003, November 23, 2005, and February 28, 2006 (“Bank MLPA”), and (ii) a Flow Mortgage Loan Purchase and Warranties Agreement, dated as of April 10, 2006, by and between Lehman Holdings and GreenPoint (“Holdings MLPA,” and together with the Bank MLPA, the “MLPAs”). The MLPAs provided for separate closing dates for each pool of loans in the Trusts and for each loan pool to be securitized. SACC ¶ 22; Dfdt.’s Rule 56.1 Statement ¶ 3.

GreenPoint ultimately sold the mortgage loans at issue in this case as follows:

- GP2 Trust: GreenPoint sold the eight loans in this trust to Lehman between February 28, 2006 and June 15, 2006. Dfdt.’s Rule 56.1 Statement ¶ 15 (citing Lehman Brothers Holding, Inc. Aff. ¶¶ 9; 13-20); Pl.’s Rule 56.1 Counterstatement ¶ 15.
- GP3 Trust: GreenPoint sold the loans in this trust to Lehman between February 28, 2006 and June 15, 2006. Dfdt.’s Rule 56.1 Statement ¶¶ 16-17 (citing Lehman Brothers Holding, Inc. Aff. ¶¶ 10; 14; 20-220); Pl.’s Rule 56.1 Counterstatement ¶¶ 16-17.
- GP4 Trust: GreenPoint sold the loans in this trust to Lehman between March 30, 2006 and July 17, 2006. Dfdt.’s Rule 56.1 Statement ¶¶ 18-19 (citing Lehman Brothers Holding, Inc. Aff. ¶¶ 11; 16-19; 23-24); Pl.’s Rule 56.1 Counterstatement ¶¶ 18-19.

Lehman then conveyed the mortgage loans and its rights under the MLPAs to Structured Asset Securities Corporation (“SASC”) pursuant to three agreements: a Mortgage Loan Sale and

Assignment Agreement for LXS 2006-GP2, dated as of May 1, 2006 (the “LXS 2006-GP2 MSAA”); a Mortgage Loan Sale and Assignment Agreement for LXS 2006-GP3, dated as of June 1, 2006 (the “LXS 2006-GP3 MSAA”); and a Mortgage Loan Sale and Assignment Agreement for LXS 2006-GP4, dated as of July 1, 2006 (the “LXS 2006-GP4 MSAA,” and together with the LXS 2006-GP2 MSAA and the LXS 2006-GP3 MSAA, the “MSAAs”). SACC ¶ 23; Dfdt.’s Rule 56.1 Statement ¶ 24.

The Assignment and Assumption Agreements provide that Lehman “assigns to the Assignee [SASC] all of its right, title and interest in and to the Mortgage Loans and the Sale/Servicing Agreements, to the extent relating to the Mortgage Loans (other than the rights of the Assignor [Lehman] to indemnification thereunder, and the Assignee [SASC] hereby assumes all of the Assignor’s [Lehman’s] obligation under the Sale/Servicing Agreements . . .” Assignment and Assumption Agreements § 1.¹

SASC then conveyed the mortgage loans and all of its rights and obligations under the MSAAs, to the Trusts under three agreements: a trust agreement for LXS 2006-GP2 dated as of May 1, 2006, among Depositor, Aurora Loan Services LLC (“Aurora”) as “Master Servicer,” and the Trustee (the “LXS 2006-GP2 Trust Agreement”); a trust agreement for LXS 2006-GP3 dated as of June 1, 2006, among Depositor, Aurora as “Master Servicer,” and the Trustee (the “LXS 2006-GP3 Trust Agreement”); and a trust agreement for LXS 2006-GP4 dated as of July 1, 2006, among Depositor, Aurora as “Master Servicer,” and the Trustee (the “LXS 2006-GP4 Trust Agreement,” and together with the LXS 2006-GP2 Trust Agreement and the LXS 2006-GP3 Trust Agreement, the “Trust Agreements”). SACC ¶ 24; Dfdt.’s Rule 56.1 Statement ¶ 25.

Pursuant to the Trust Agreements, the mortgage loans were securitized through the issuance of Certificates backed by the mortgage loans, for sale to Certificateholders. SACC ¶ 24; Dfdt.’s Rule 56.1 Statement ¶ 26. Certificateholders are “the registered owner of any certificate as recorded on the books of the Certificate Registrar;” the “Certificate Registrar” is defined as the Trustee, which was appointed to maintain the books and records for registration and transfer of

¹ Defendant argues that the Assignment and Assumption Agreements “expressly carved out of the assignment [Lehman’s] rights of indemnification under the MLPAs.” Dfdt.’s 56.1 Statement ¶ 23. Plaintiff Trustee avers that Section 1 “exclude[s] from the assignment only those existing indemnification rights that Lehman Bank might have against GreenPoint based on any losses that Lehman Bank had suffered or may suffer. The Assignment and Assumption Agreements do not exclude Lehman Bank’s broad rights of indemnification under the MLPAs, and those rights were assigned to the Trustee.” Pl.’s 56.1 Counter Statement ¶ 23.

Certificates. Trust Agreements §§ 1.01, 3.02. Under Section 8.03 of the Trust Agreements, Cede & Co. was the registered owner of the certificates.² Ex. G, Tr. at 155–56.

The Trusts were created and the mortgage loans were conveyed to their respective Trusts on the Closing Dates of the Trusts as follows:

- The LXS 2006-GP2 Trust closed on May 31, 2006 (the “LXS 2006-GP2 Closing Date”). GreenPoint originated the entire pool of approximately 3,300 Mortgage Loans in this Trust, with an aggregate principal balance at closing of approximately \$1.1 billion.
- The LXS 2006-GP3 Trust closed on June 30, 2006 (the “LXS 2006-GP3 Closing Date”). GreenPoint originated the entire pool of approximately 2,783 Mortgage Loans in this Trust, with an aggregate principal balance at closing of approximately \$1.0 billion.
- The LXS 2006-GP4 Trust closed on July 31, 2006 (the “LXS 2006-GP4 Closing Date”; together with the LXS 2006-GP2 Closing Date and the LXS 2006-GP3 Closing Date, the “Trust Closing Dates”). GreenPoint originated the entire pool of approximately 3,511 Mortgage Loans in this Trust, with an aggregate principal balance at closing of approximately \$1.3 billion.

SACC ¶ 21; Dfdt.’s Rule 56.1 Statement ¶ 28.

GreenPoint made certain representations and warranties regarding the characteristics of the mortgage loans, including that the loans met certain quality standards, complied with underwriting practices, and conformed to applicable legal requirements. SACC ¶¶ 28, 30 (discussing Section 7 of the MLPAs); Dfdt.’s Rule 56.1 Statement ¶ 4; Pl.’s Rule 56.1 Counterstatement ¶ 4. The MLPAs provided that GreenPoint made the applicable representations and warranties “as of each Closing Date,” a term defined in the MLPAs to be the date on which GreenPoint sold the specific loans. Dfdt.’s Rule 56.1 Statement ¶¶ 9–10 (citing Sections 6 & 7 of the MLPAs); Pl.’s Rule 56.1 Counterstatement ¶¶ 9 mortgage loans 10.

In the event that any of the mortgage loans breached these representations and warranties, the Trusts’ respective MLPAs required GreenPoint to cure or repurchase the defective loans. SACC ¶ 33 (discussing Section 8(c) of the MLPAs); Dfdt.’s Rule 56.1 Statement ¶ 5. The repurchase obligation is set forth in Section 8(c) of the MLPAs and provides, “Within 60 days of the earlier of either discovery by or notice to the Seller [GreenPoint] of any Breach of a representation or warranty, the Seller [GreenPoint] shall use its best efforts promptly to cure such

² Defendant asserts that “FHFA never had a direct or indirect ownership interest in any of the Certificates issued by the Trusts” because the registered owner of the Certificates was Cede & Co. Dfdt.’s Rule 56.1 Statement ¶ 35. Plaintiff contends that Freddie Mac was a beneficial owner of the Certificates. Because “FHFA is the Conservator of the Federal Home Loan Mortgage Corporation (“Freddie Mac”), and was the Conservator of Freddie Mac when each Summons with Notice referred to herein was filed. As such, FHFA had an interest in the Certificates held by Freddie Mac.” Pl.’s Rule 56.1 Counterstatement ¶ 35.

Breach in all material respects and, if such Breach cannot be cured, the Seller [GreenPoint] shall, at the Purchaser's [Lehman's] option, repurchase such Mortgage Loan at the Repurchase Price.”

Section 8(c) further provides that “with respect to those representation and warranties which are made to the best of the Seller's [GreenPoint's] knowledge, if it is discovered by the Seller [GreenPoint] or the Purchaser [Lehman] that the substance of such representation and warranty is inaccurate and such inaccuracy materially and adversely affects the value of the related Mortgage Loan or the interest of the Purchaser [Lehman] . . . notwithstanding the Seller's [GreenPoint's] lack of knowledge with respect to the substance of such representation and warranty, such inaccuracy shall be deemed a breach of the applicable representation and warranty.”

Any cause of action against GreenPoint for breach of the representation and warranty accrues upon: (i) discovery of such Breach by the Purchaser [Lehman] or notice thereof by the Seller [GreenPoint] to the Purchaser [Lehman], (ii) failures by the Seller [GreenPoint] to cure such Breach or repurchase such Mortgage Loan as specified above, and (iii) demand upon the Seller [GreenPoint] by the Purchaser [Lehman] for compliance with this Agreement.” MLPA, Section 8(c).

The Trust Agreement similarly recognizes GreenPoint's repurchase obligation and permits Trustee to enforce its rights under the applicable agreements. Section 2.04 of the Trust Agreement provides in relevant part, “in the event of discovery of a breach of any representation and warranty of a Transferor [GreenPoint] assigned to the Trustee, the Trustee shall enforce its rights under the applicable Transfer Agreement [the MLPAs] and the Mortgage Loan Sale Agreement [the MSAAs] for the benefit of Certificateholders.” The Trust Agreement requires GreenPoint to cure or repurchase the defective loans within 90 days from discovery of breach. Trust Agreement § 2.04.

Pursuant to Section 9 of the MLPAs, GreenPoint further agreed to indemnify the Purchaser [Lehman] and hold it harmless from and against any and all claims, losses, damages, penalties, fines, forfeitures, legal fees and related costs, judgments, and any other costs, fees and expenses that [it] may sustain in any way related to (i) any act or omission on the part of Seller [GreenPoint] or any other person or entity in the origination, receiving, processing, funding or servicing any Mortgage Loan . . . , (ii) any assertion based on, grounded upon resulting from [sic] a Breach of any of Seller's [GreenPoint's] representations and warranties contained herein, . . . (iv) the failure of Seller [GreenPoint] to perform in any way its duties . . . in strict compliance with the terms of this Agreement

SACC ¶ 97; Dfdt.'s Rule 56.1 Statement ¶ 6.

GreenPoint also entered into separate Indemnification Agreements with the other parties to the transaction, including the Trusts, dated May 30, 2006 (the "LXS 2006-GP2 Indemnification Agreement"), June 28, 2006 (the "LXS 2006-GP3 Indemnification Agreement"), and July 28, 2006 (the "LXS 2006-GP4 Indemnification Agreement"; together with the LXS 2006-GP2 Indemnification Agreement and the LXS 2006-GP3 Indemnification Agreement, the "Indemnification Agreements"), respectively. SACC ¶ 25.

Plaintiff Trustee alleges that a forensic review of the pool of loans GreenPoint conveyed to the Trusts uncovered "extensive breaches" of GreenPoint's MLPA representations and warranties with respect to each of the Trusts. SACC ¶¶ 4, 42-57 (alleging breaches for misrepresentation of borrower income, misrepresentation of occupancy status, improper calculation of debt and debt-to-income ratio, incorrect calculation of loan-to-value and cumulative loan-to-value ratios, and failure to verify borrower assets or qualifying loans with insufficient credit score). Following the forensic review, Plaintiff Trustee submitted notice to GreenPoint of the high levels of breaches that materially and adversely affected the interests of the Certificateholders. ("Breach Notices"). For the GP2 Trust, Plaintiff Trustee submitted Breach Notices on March 19, 2012 and August 24, 2012. SACC ¶ 63. The 60-day cure period under the MLPA expired May 18, 2012 and October 23, 2012, respectively; the 90-day cure period under the Trust Agreement expired June 17, 2012 and November 22, 2012, respectively. SACC ¶ 63. For the GP3 Trust, Plaintiff Trustee submitted a Breach Notice on March 19, 2012. SACC ¶ 64. The 60-day cure period under the MLPA expired May 18, 2012; the 90-day cure period under the Trust Agreement expired June 17, 2012. SACC ¶ 64. For the GP4 Trust, Plaintiff Trustee submitted a Breach Notice on April 17, 2012. SACC ¶ 65. The 60-day cure period under the MLPA expired June 16, 2012; the 90-day cure period under the Trust Agreement expired July 16, 2012. SACC ¶ 65. For each Trust, Plaintiff Trustee alleges that GreenPoint has refused to repurchase the defective loans. SACC ¶ 3. Plaintiff Trustee asserts that the resulting losses to the Trusts have been in excess of \$1 billion. SACC ¶ 21.

The Federal Housing Finance Agency ("FHFA"), in its capacity as Conservator of the Federal Home Loan Mortgage Corporation ("Freddie Mac"), filed summonses with notice in New York Supreme Court for the Country of New York, against GreenPoint on behalf of the Trustee of each Trust. FHFA filed summons with notice for the GP2 Trust on May 30, 2012; for the GP3

Trust on June 29, 2012; and for the GP4 Trust on July 30, 2012. Dfdt.'s Rule 56.1 Statement ¶ 29. GreenPoint removed the action to this Court on November 21, 2012. ECF No. 4.

On November 26, 2012, the Trusts, acting through the Trustee, and the FHFA, filed a Consolidated Complaint. The Amended Consolidated Complaint was filed January 25, 2013 removing FHFA as a plaintiff and naming only Trustee.³ In the Amended Consolidated Complaint, Trustee asserted claims for breach of contract for breaches of the representations and warranties contained in the MLPAs. Trustee sought specific performance (repurchase of the defective loans) or, in the alternative, compensatory, consequential, and rescissionary and damages. Trustee also brought an indemnification claim under Section 9 of the MLPA, seeking costs and expenses incurred in enforcing its remedies under the Trust Agreements.

On April 17, 2013, GreenPoint moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Consolidated Complaint for failure to state a claim for relief. ECF No. 30. By Memorandum and Order dated March 31, 2014, the Court denied GreenPoint's motion to dismiss the Amended Consolidated Complaint. In the decision, the Court concluded that the original Consolidated Complaint, in which the Trust first appeared as a plaintiff, was filed more than six years after the dates on which Plaintiff's contract claims accrued, and thus, after the expiration of the limitations period. Memorandum and Order, at 6. However, based on the record available to the Court at that time, the Court could not determine whether FHFA had standing to commence valid actions by summons with notice. Thus, the Court denied the motion to dismiss on statute of limitations grounds at that time. Memorandum and Order at 8–9.

The parties agreed to discovery to address the statute of limitations and standing issues. ECF No. 35, at 1–5. Although discovery was completed by December 1, 2014, Plaintiff requested that summary judgment be stayed, pending the decision of the New York Court of Appeals in ACE Securities Corp. v. DB Structured Products, Inc., 112 A.D.3d 522 (1st Dep't 2013) ("ACE I"). ECF No. 52. In June 2015, Plaintiff then moved for leave to file an amended pleading, the SACC. The SACC was filed on March 3, 2016. ECF No. 88. The SACC expands the third cause of action for indemnification, which now moves beyond seeking specific performance and expenses to

³ Defendant asserts that FHFA filed the original summonses with notice without the consent or authorization of the Trustee. Dfdt.'s Rule 56.1 Statement ¶ 37. Plaintiff avers that "after FHFA filed the Summonses with Notice, on November 26, 2012, the Trusts, acting through the Trustee, and FHFA, filed the Original Complaint, which expressly ratified the filing of the Summonses with Notice by FHFA." Pl.'s Rule 56.1 Counterstatement ¶ 37.

request a monetary award of all losses or damages allegedly sustained as a result of GreenPoint's alleged breaches of the representations and warranties in the MLPAs. SACC ¶ 99.

The SACC also adds a new cause of action for indemnification arising under the Indemnification Agreements relating to the respective Trusts. SACC ¶¶ 105–16. In relevant part, the Indemnification Agreements provide for indemnity to the Trusts, as well as other entities, for claims arising out of breaches of the representations and warranties made in the “GreenPoint Information” — information provided by or on behalf of GreenPoint for inclusion in the Prospectus Supplements provided to investors in the Certificates issued by the Trusts. Indemnification Agreements, at 1–2. The Indemnification Agreements were each made “as of the date of the [respective] Prospectus Supplements.” SACC ¶ 111. The date of the Prospectus Supplements were May 30, 2006 for the GP2 Trust; June 28, 2006 for the GP3 Trust; and July 28, 2006 for the GP4 Trust. SACC ¶¶ 106–08. Plaintiff's indemnity claim pursuant to the Indemnification Agreements is brought in order to recover alleged losses from breaches of GreenPoint's representations and warranties concerning the accuracy of the GreenPoint Information in the Prospectus Supplements.

GreenPoint seeks summary judgment dismissing Plaintiff Trustee's breach of contract claim arising out of the MLPAs as untimely. Greenpoint also seeks dismissal of the newly asserted claim in the SACC as time-barred, as well as for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) due to Plaintiff Trustee's lack of standing and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

III. LEGAL STANDARDS RELEVANT TO CLAIMS 1, 2, & 3 ON SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate where the moving party demonstrates that when “construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party's favor, there is ‘no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.’” Rivera v. Rochester Genesee Reg'l Transp. Auth., 702 F.3d 685, 692 (2d Cir. 2012) (quoting Fed. R. Civ. P. 56(c)) (other quotations omitted). The burden then “shifts to the non[-]moving party to present specific evidence showing a genuine dispute.” Jaramillo v. Weyerhaeuser Co., 536 F.3d 140, 145 (2d Cir. 2008). This requires more than simply show[ing] that there is some metaphysical doubt as to the material facts.” Brown v. Eli Lilly & Co., 654 F.3d 347, 358 (2d Cir. 2011) (quoting Matsushita Elec. Indus. Co. v. Zenith

Radio Corp., 475 U.S. 574, 586 (1986)). The non-moving party cannot “rely on conclusory allegations or unsubstantiated speculation.” Id.

When the evidence shows that the plaintiff has not filed suit within the time required by the statute of limitations, summary judgment is properly entered dismissing the claim. Overall v. Estate of Klotz, 52 F.3d 398, 400 (2d Cir. 1995).

B. Statute of Limitations

The MLPAs are governed by New York law. Under New York law, the statute of limitations on a breach of contract is six years. CPLR § 214(3); Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co., 967 N.E.2d 1187, 1190 (N.Y. 2012). “[W]here a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete. . . .” CPLR § 206(a).

In other words, “the cause of action accrues when the party making the claim possesses a legal right to demand payment . . . , not when it actually made the demand.” Hahn, 967 N.E.2d at 1190–91. It is well-settled that in a claim for breach of contract against a loan originator arising out of alleged breach[es] of representations and warranties, “the claims accrue[] on the closing date of the [PPTLs] . . . when any breach of the representations and warranties therein occurred.” ACE I, 112 A.D.3d at 523 (citing Ely–Cruikshank Co. v. Bank of Montreal, 81 N.Y.2d 399, 402 (1993); Varo, Inc. v. Alvis PLC, 261 A.D.2d 262, 267–268 (1st Dep’t 1999), lv. denied 95 N.Y.2d 767 (2000)). See also Deutsche Bank Nat. Trust Co. v. Quicken Loans Inc., 2014 WL 3819356, at *3 (S.D.N.Y. Aug. 4, 2014), aff’d, 810 F.3d 861 (2d Cir. 2015) (applying ACE I, 112 A.D.3d at 523).

By contrast, “a cause of action based upon a contract of indemnification does not arise until liability is incurred by way of actual payment.” Varo, Inc. v. Alvis PLC, 261 A.D.2d 262, 265, 691 N.Y.S.2d 51, 55 (1st Dep’t 1999) (quoting Travelers Indem. Co. v LLJV Dev. Corp., 227 A.D.2d 151, 154, 643 N.Y.S.2d 520, 523 (1st Dep’t 1996)). This is because the principle of indemnity is that “if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him.” Raquet v. Braun, 90 N.Y.2d 177, 183, 240 (N.Y. 1997) (quoting Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 468 (N.Y. 1892)). Thus, under New York law, a cause of action for indemnity requires that the plaintiff seek reimbursement for payment made to a third party. Peoples’ Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 350 (2d Cir. 1986)

(“an indemnity claim seeks reimbursement for payment made to a third party”); McDermott v. City of N.Y., 50 N.Y.2d 211, 216 (N.Y. 1980) (“indemnification claims generally do not accrue for the purpose of the Statute of Limitations until the party seeking indemnification has made payment to the injured person.”).

Where the parties to a contract “agree to ‘indemnify’ each other for losses incurred by a breach of contract, [but] those losses do not relate to liability to a third party, the characterization of ‘indemnification’ is no more than an epithet for recovery for breach of contract.” Xerox State & Local Sols., Inc. v. Xchanging Sols. (USA), Inc., 2016 WL 6135660, at *6 (S.D.N.Y. Oct. 20, 2016). This is because duplicative claims are subject to the same statute of limitations as the underlying claims; under New York law, claims are duplicative when both “arise from the same facts and seek the identical damages for each alleged breach.” Deutsche Bank Nat. Trust Co. v. Quicken Loans Inc., 810 F.3d 861, 869 (2d Cir. 2015) (citing Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce, 70 A.D.3d 423, 426, (1st Dep’t 2010)). See also Deer Park Enters., LLC v. Ail Sys., Inc., 57 A.D.3d 711, 712 (2d Dep’t 2008) (claims are duplicative where “the conduct and resulting injury alleged” are identical).

A plaintiff cannot end-run the statute of limitations period by using the label “indemnification” when the claim is really one for breach of representations and warranties. See Peoples' Democratic Republic of Yemen v. Goodpasture, Inc., 782 F.2d 346, 350 (2d Cir. 1986) (“An action does not become one for indemnity merely because the pleader has so denominated it.”). Thus, the fact that the underlying agreement labels the claim “as one for ‘indemnification’ does not alter the fact that it is one for breach of representations and warranties, which accrues at the time the representations and warranties are made.” Xerox, 2016 WL 6135660, at *6.

C. Plaintiff Trustee’s Claims 1 & 2 Are Time-Barred

GreenPoint contends that Plaintiff Trustee’s breach of contract claims pursuant to the MLPAs are time-barred. The Court agrees. The uncontroverted facts are that the closing dates for the PPTLs for the respective loans were as follows: GP2 on May 15, 2006; GP3 on June 15, 2008; and GP4 on July 17, 2006. Dfdt.’s Rule 56.1 Statement ¶ 15-19. Plaintiff does not dispute this; in fact, the body of Plaintiff’s brief fails to respond to GreenPoint’s arguments for dismissal of the first two causes of action for breach of contract.

Thus, there is no genuine issue of material fact that the representations and warranties were made on the aforementioned dates. As a matter of law, the statute of limitations for breach of

contract started running on the aforementioned dates, as Lehman would have been entitled to make the repurchase demands and seek other damages as soon as the PPTLs closed. FHFA filed summons with notice for the GP2 Trust on May 30, 2012; for the GP3 Trust on June 29, 2012; and for the GP4 Trust on July 30, 2012. Dfdt.'s Rule 56.1 Statement ¶ 29. Each of these actions was filed over six years after the statute of limitations on the breach of contract actions began running. Therefore, Defendant is entitled to summary judgment as a matter of law that Plaintiff's causes of action for breach of contract are time-barred. Plaintiff's first two claims are dismissed.

D. Plaintiff Trustee's Third Claim Is Time-Barred

In its third cause of action, Plaintiff seeks indemnification for its losses, costs, fees, and expenses arising out of and related to the breaches of Defendant's representations and warranties (namely, the costs incurred in bringing the current litigation). Plaintiff Trustee argues that its claim for indemnification pursuant to Section 9 of the MLPAs is not time-barred because a claim for indemnification does not accrue until the to-be-indemnified losses are incurred. Plaintiff asserts that the Trusts suffered no losses from GreenPoint's breach of the representations and warranties until the Trusts came into existence and acquired the Loans.

Here, however, the Trusts did not face liability to a third party as a result of GreenPoint's alleged breach of the representations and warranties in the MLPAs. Thus, Plaintiff Trustee's claim is not one for indemnification. Xerox, 2016 WL 6135660, at *6 (S.D.N.Y. Oct. 20, 2016) ("Where parties agree to 'indemnify' each other for losses incurred by a breach of contract, [but] those losses do not relate to liability to a third party, the characterization of 'indemnification' is no more than an epithet for recovery for breach of contract."). Plaintiff's claim is more appropriately characterized as one to recover losses incurred by breach of contract.

As stated above, there is no genuine issue of material fact that the representations and warranties of the MLPAs that are at issue in this case were made more than six years before FHFA filed summonses with notice for each Trust. Dfdt.'s Rule 56.1 Statement ¶ 29. As a matter of law, Plaintiff's indemnification claim arising from breach of the MLPA representations and warranties is time-barred. Accordingly, Plaintiff's third cause of action is dismissed.

IV. LEGAL STANDARDS RELEVANT TO CLAIM NUMBER FOUR

In its fourth cause of action, Plaintiff Trustee brings a new claim for breach of contract arising out of GreenPoint's alleged breaches of its representations and warranties in the

Indemnification Agreements. Specifically, Plaintiff Trustee seeks losses, damages, fees, costs, and other expenses resulting from enforcing remedies, including the costs of this action, attorneys' fees and other such expenses.

A. Federal Rule of Civil Procedure 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient factual allegations in the complaint that, accepted as true, "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff is not required to provide "detailed factual allegations" in the complaint, but must assert "more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The facts pleaded in the complaint "must be enough to raise a right to relief above the speculative level." Id. On a **12(b)(6)** motion to dismiss, a district court may consider only the complaint, documents attached to the complaint, matters of which a court can take judicial notice, documents possessed by plaintiffs, or documents that plaintiffs knew about and relied upon. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002). A district court considering a Rule **12(b)(6)** motion must accept all factual allegations in the complaint as true, while also drawing all reasonable inferences in favor of the nonmoving party. ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007).

B. Federal Rule of Civil Procedure 15

Federal Rule of Civil Procedure 15(a) provides that pleadings may be amended "by leave of court . . . and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see Manhattan Cable Television, Inc. v. Cable Doctor, Inc., 824 F. Supp. 34, 36 (S.D.N.Y. 1993). However, new causes of action in the amended pleadings must relate back to the date of the original pleading. See Fed. R. Civ. P. 15(c). An amended pleading "relates back to the date of the original pleading when . . . (2) the claim . . . asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed. R. Civ. P. 15(c)(2). Under Rule 15(c), "the essential inquiry in determining whether the new allegations relate back is whether the defendant was given adequate notice that such claims might be made upon examining the facts alleged in the original pleading." Ainbinder v. Kelleher, 1997 WL 420279, at *9 (S.D.N.Y. July 25, 1997) (internal quotation and citation omitted).

C. Plaintiff Trustee's Fourth Cause of Action Is Time-Barred

Greenpoint argues that Plaintiff Trustee's fourth cause of action must be dismissed for two reasons. First, GreenPoint asserts that with regard to the GP3 and GP4 Trusts, Plaintiff Trustee's claim for breach of contract arising out of breaches of the representations and warranties in the applicable Indemnification Agreement is time-barred. The Court agrees.

According to the SACC, GreenPoint entered into the Indemnification Agreements as follows: GP2 on May 30, 2006; GP3 June 28, 2006; and GP4 on July 28, 2006. SACC ¶¶ 106–108. Under the law, the statute of limitations for breach of the representations and warranties in the contract started running on the aforementioned dates, as SASC and Lehman would have been entitled to sue for breach as soon as the Indemnification Agreements closed. The SACC also asserts that FHFA filed summons with notice for the GP2 Trust on May 30, 2012; for the GP3 Trust on June 29, 2012; and for the GP4 Trust on July 30, 2012. Dfdt.'s Rule 56.1 Statement ¶ 29. The actions for the GP3 and GP4 Trusts were filed over six years after the statute of limitations on the breach of contract actions began running. Therefore, Plaintiff Trustee's cause of action for breach of the representations and warranties in the Indemnification Agreements is time-barred as to the GP3 and GP4 Trusts.

Second, GreenPoint contends that Plaintiff Trustee's cause of action for breach of the representations and warranties in the GP2 Indemnification Agreement must also be dismissed as time-barred pursuant to Rule 15(a). Greenpoint argues that because the claims for breach of contract of the MLPAs raised in the state court actions were not timely filed, Plaintiff cannot rely on the original causes of action to toll the statute of limitations on the newly-added claim. Next, even if Plaintiff could somehow rely on the original claims for tolling purposes, the newly-added claim is based on a different contract than the one implicated in the original filing. The Court agrees.

The original causes of action for breach of the MLPA representation and warranties are time-barred; therefore, Plaintiff cannot rely on the timeliness of those claims to amend the SACC to bring the cause of action for breach of the representations and warranties in the Indemnification Agreement. Moreover, the newly-added claim is based on a different contract, between different parties, for different purposes — the Indemnification Agreement. This amendment falls squarely within Wright and Miller's description of claims time barred under Rule 15:

When plaintiff attempts to allege an entirely different transaction by amendment, as, for example, the separate publication of a libelous statement or the breach of an independent contract, the new claim will be subject to the defense of statute of limitations.

Wright & Miller, 6 Federal Practice and Procedure § 1497 at 489–90 (1971).

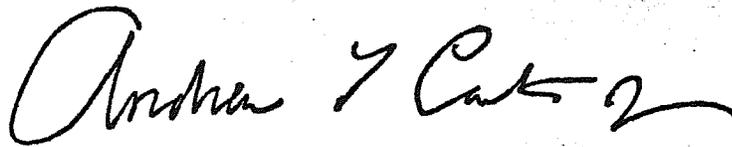
While the Court recognizes that some of the evidence against Greenpoint for alleged breach of the representations and warranties of the MLPAs would apply to Plaintiff Trustee's claim against Greenpoint for alleged breach of the representations and warranties of the Indemnification Agreements, it cannot be said that based on the facts alleged in the original pleading, GreenPoint was given adequate notice that Plaintiff would bring claims pursuant to the Indemnification Agreements. Thus, Plaintiff Trustee's fourth cause of action is time-barred. The fourth cause of action must be dismissed.

V. CONCLUSION

For the foregoing reasons, Defendant GreenPoint's motion for summary judgment to dismiss claims one, two and three of the SACC are granted. Additionally, Plaintiff's fourth cause of action is dismissed as time-barred. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close the case.

SO ORDERED.

Dated: March 29, 2017
New York, New York



ANDREW L. CARTER, JR.
United States District Judge