

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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

MORGAN STANLEY MORTGAGE LOAN TRUST INDEX NO. 653429/2012
2006-13ARX, by U.S. BANK, NATIONAL ASSOCIATION, solely in its capacity as Trustee on behalf of the Trust, Plaintiff,

-against- MOTION DATE

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC, Defendant. MOTION SEQ. NO. 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 defendant's motion to dismiss is decided in accordance with the attached decision/order, dated September 25, 2014.

Dated: 9-25-14

Marcy S. Friedman, J.S.C.
MARCYS. 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.

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MORGAN STANLEY MORTGAGE LOAN  
TRUST 2006-13ARX, by U.S. BANK,  
NATIONAL ASSOCIATION, solely in its capacity  
as Trustee on behalf of the Trust,

Index No.: 653429/2012

*Plaintiff,*

DECISION/ORDER

– against –

MORGAN STANLEY MORTGAGE CAPITAL  
HOLDINGS LLC,

*Defendant.*

\_\_\_\_\_ x

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 in interest to sponsor Morgan Stanley Mortgage Capital, Inc., to repurchase allegedly defective loans from plaintiff Trustee. Defendant moves to dismiss the claims in the amended complaint for rescissory damages, and claims based on liquidated loans or loans that were not the subject of repurchase demands. Except as discussed below, 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 a recent decision 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]).

On the authority and reasoning relied on in the June 26, 2014 decision, the court holds that that the relief available to plaintiff is limited by the sole remedy provisions in the Pooling and

Servicing Agreement (PSA) and the Mortgage Loan Purchase Agreement (MLPA) which govern the securitization at issue. Pursuant to PSA § 2.05 and MLPA § 3.01, 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. (See 2014 WL 2890341 at \* 7-8, 10-11.) Plaintiff's claims for rescission and rescissory damages should therefore be dismissed. (Id. at \* 13-14.)

As further held in Nomura Home Equity Loan Trust, Inc., Series 2006-2 v Nomura Credit & Capital, Inc., (Index No. 650337/13, July 18, 2014), even assuming arguendo that the sole remedy provision is the type of contractual limitation on damages which may be rendered unenforceable by willful misconduct or gross negligence, the allegations in the complaint fall far short of alleging the willful intent to harm the plaintiff, or the tortious conduct that smacks of intentional wrongdoing, necessary to obtain relief from such a limitation.

For the reasons set forth in Nomura (2014 WL 2890341, at \* 7-8, 15-16), in ACE Securities Corp. Home Equity Loan Trust, Series 2007-ASAP2 v DB Structured Products, Inc. (Index No. 651936/2013, August 28, 2014, at 2-3, 9), and in ACE Securities Corp. Home Equity Loan Trust, Series 2007-WM1 v DB Structured Products, Inc. (Index No. 650312/2013, September 25, 2014, at 2-3) the court rejects defendant's showing at this juncture that claims based on liquidated loans are not subject to repurchase, and that plaintiff's claims related to defective loans which were not the subject of its timely repurchase demands are not adequately pleaded.

In ACE Secs. Corp. v DB Structured Prods., Inc. (112 AD3d 522 [2013], lv granted 23 NY3d 906 [ACE]), this Department held that a cause of action for breach of a sponsor's mortgage representations accrued on the closing date of the governing agreements, when any breach of the representations and warranties occurred, and not when the sponsor failed to cure or repurchase any defective mortgage loans. As this court explained in Nomura, the ACE holding bars plaintiff from

asserting a separate cause of action for a breach of a sponsor's obligations to repurchase under a sole remedy provision. (2014 WL 2890341, at \* 6-7 [and authorities cited therein].) Put another way, non-compliance with the repurchase protocol, a mere remedy, does not give rise to an independent breach of contract by the sponsor, or expand the remedies available against the sponsor under the contract. Here, plaintiff advances a similar claim, pleading a breach of sponsor Morgan Stanley's duty under the repurchase protocol to notify the Trustee upon its discovery of defective loans. This cause of action for failure to notify must be rejected, as it is yet another way of asserting that breaches of the repurchase protocol constitute independent breaches of the contract which are not subject to the limited remedy for breach of the mortgage representations agreed to by the parties.<sup>1</sup>

Defendant further moves to dismiss the Trust's claim for indemnification of its attorney's fees, costs, and expenses. Plaintiff cites no contractual provision as a basis for this claim, which will accordingly be dismissed.

Finally, the court holds that the sixth cause of action seeking a declaratory judgment should be dismissed as duplicative of the breach of contract claims. This cause of action is based on the same set of allegations underlying the first five causes of action.

It is accordingly hereby ORDERED that defendant's motion to dismiss the complaint is granted to the following extent:

It is ORDERED that the first and second causes of action for breach of contract, based on breach of the representations and warranties, are dismissed only to the extent that they demand

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<sup>1</sup> It is noted that there is authority that a cause of action for breach of an obligation to notify may be pleaded against the servicer in an RMBS transaction, where the Trustee's relief against the servicer is not limited by the sole remedy provision. (See SACO I Trust 2006-5 v EMC Mtge. LLC (2014 WL 2451356, \* 11 [Sup Ct NY County May 29, 2014] [Bransten, J.] )

rescission, rescissory damages or damages otherwise inconsistent with the terms of the repurchase protocol; and it is further

ORDERED that the third and fourth causes of action for breach of contract and anticipatory breach, respectively, based on breach of the repurchase obligations, are dismissed; and it is further

ORDERED that the fifth cause of action for breach of contract based on the sponsor's failure to notify the Trustee of its discovery of breaches of the representations and warranties, is dismissed; and it is further

ORDERED that the sixth cause of action for a declaratory judgment is dismissed; and it is further

ORDERED that plaintiff's claim for an award of attorney's fees, costs, and other related expenses is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York  
September 25, 2014

  
MARCY FRIEDMAN, J.S.C.