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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 60

-----X
DEUTSCHE BANK NATIONAL TRUST COMPANY,
solely in its capacity as Trustee of the
MORGAN STANLEY ABS CAPITAL I INC.
TRUST 2007-NC4,

Plaintiff,

-against-

Index No.
652877/17

MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS
LLC, as Successor-by-Merger to MORGAN
STANLEY MORTGAGE CAPITAL INC., AND
MORGAN STANLEY ABS CAPITAL I INC.,

Defendants.

MOTION

-----X
60 Centre Street
New York, New York
October 20, 2015

B E F O R E:

HONORABLE MARCY S. FRIEDMAN,

JUSTICE.

A P P E A R A N C E S:

MOLO LAMKEN
ATTORNEYS FOR THE PLAINTIFF
600 NEW HAMPSHIRE AVENUE, N.W.
WASHINGTON D C, 20037
BY: ROBERT K. KRY, ESQ;
LAUREN WEINSTEIN, ESQ.,

DAVIS POLK & WARDWELL LLP
ATTORNEYS FOR THE DEFENDANTS
450 LEXINGTON AVENUE
NEW YORK, NEW YORK, 10017
BY: BRIAN S. WEINSTEIN, ESQ.,
ELISABETH GRIPPANDO, ESQ.,.

VINCENT J. PALOMBO, RMR, CRR
OFFICIAL COURT REPORTER

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THE COURT: Good morning. May I have counsel's appearances, please.

MR. KRY: Your Honor, Robert Kry and Lauren Weinstein from Molo Lamken, for the plaintiffs Deutsche Bank.

MR. WEINSTEIN: Good morning, your Honor. Brian Weinstein from Davis Polk for the Morgan Stanley defendants, and with me is my colleague, Elisabeth Grippando.

THE COURT: How long would you like to have for the oral argument of the motion?

MR. WEINSTEIN: Your Honor, I think I'll only need about ten minutes or so for my opening statements, and if I may reserve five minutes for reply, in case that's necessary.

THE COURT: That's fine.

Is that satisfactory?

MR. KRY: Yes.

THE COURT: Please.

MR. WEINSTEIN: Your Honor, this is one of the many RMBS trustee put-back actions before this Court and the claim is one for breach of contract. There are several issues I'd like to address, some of which are affected by the First Department's decision from last week in the Nomura cases and I will address the impact

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2 of that decision as I walk through the issues.

3 THE COURT: Mr. Weinstein, I'm going to have
4 supplemental briefing on the impact of the Nomura case.
5 I would like to hear argument on the other --
6 principally, on the other branches of the motion to
7 dismiss.

8 MR. WEINSTEIN: Sure.

9 THE COURT: If you wish to discuss briefly the
10 recent Appellate Division decision, that will be fine,
11 but I will have supplemental briefing.

12 MR. WEINSTEIN: Thank you, your Honor.

13 The first issue I'd like to address is
14 plaintiff's claim for rescission or rescissory damages.
15 The governing contracts here have the same sole remedy
16 provision as in the other RMBS cases that have been
17 before this Court, and as this Court has repeatedly
18 held, rescission and rescissory damages are precluded by
19 the sole remedy provision.

20 The plaintiff argues that the sole remedy
21 provision is unenforceable because of its allegations of
22 gross negligence or willful misconduct. But this Court
23 has repeatedly rejected that same argument, first, in
24 one of the Nomura cases and then in series of subsequent
25 cases. Your Honor held that the allegation that the
26 defendant knew of pervasive breaches within the trust

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2 was not the type of willful misconduct or gross
3 negligence that could render the sole remedy provision
4 unenforceable.

5 In this Court's first decision on this issue in
6 one of the Nomura cases, your Honor also held that the
7 plaintiff had not shown that the gross negligence,
8 willful misconduct exception to the enforceability of
9 exculpatory causes even applied. You cited an opinion
10 from Judge Nathan in the Southern District which noted
11 the stark distinction between, on the one hand,
12 provisions that eliminate liability or limit it to a
13 nominal sum, and on the other hand, the sole remedy
14 provision which make the plaintiffs whole for those
15 loans found to be defective, but your Honor held, in any
16 event, that you didn't even need to reach the question
17 of whether this gross negligence or willful misconduct
18 exception applied, because even if it did, the
19 allegation that there were pervasive breaches on the
20 pool and that the defendant knew about them, was not the
21 type of allegation that could render the sole remedy
22 provision unenforceable.

23 Now, the plaintiffs in Nomura appealed this
24 aspect of this Court's holding, and they argued
25 extensively in their briefs that the sole remedy
26 provision should be deemed unenforceable because of

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their allegations of willful misconduct or gross negligence, but the First Department did not accept those arguments, your Honor, it declined to hold that the sole remedy provision was unenforceable, based on allegations that the defendant knew of pervasive breaches, and although the First Department didn't discuss this issue explicitly in its opinion, it held that this Court's decision was affirmed in all respects other than those specifically addressed. And the First Department held that rescission and rescissory damages were unavailable, just as this Court has held, and we submit that the same decision is required here.

Now, the plaintiff argues that the results should be different here because Morgan Stanley entered into a settlement agreement with the SEC concerning some of the loans in the trust. And in particular, as alleged in the complaint, that settlement related to allegations that a relatively small percentage of the loans in the trust, less than five percent, were 30 days or more delinquent as of the closing date. But that settlement, your Honor, in no way changes the analysis concerning the enforceability of the sole remedy provision, nor does it make this case qualitatively different from the other ones that have been before this Court.

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2 These other cases before your Honor have
3 included allegations that defendant knew that large
4 percentages of the loans in the trust, often more than
5 50 percent or more, were in breach, either because they
6 were in default or for other reasons. And those
7 allegations, of course, have to be accepted as true on a
8 motion to dismiss.

9 And yet despite those allegations, which the
10 Court had to accept as true, this Court held that the
11 sole remedy provision was un -- was enforceable, even in
12 the face of such allegations, and we submit the same
13 conclusion applies here.

14 Similarly, your Honor, if such allegations that
15 the defendant knew of pervasive breaches do not
16 constitute the type of willful misconduct or gross
17 negligence that would render the sole remedy provision
18 unenforceable, as this Court has held, we submit that it
19 likewise could not support a claim for punitive damages
20 and that the plaintiff's request for punitive damages in
21 this case must be dismissed.

22 So, we submit plaintiffs could not seek
23 rescission or rescissory damages, nor can they seek
24 punitive damages.

25 We acknowledge, however, that the First
26 Department did hold in Nomura, albeit in a single

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2 sentence, that a plaintiff can bring a claim for damages
3 based on breach of the obligation to provide notice of
4 loans that the defendant knew were in breach. And so
5 unless this holding is reserved by the Court of Appeals,
6 we acknowledge that plaintiff's third cause of action
7 against MSAC for failure to notify should proceed past
8 the motion to dismiss. Of course the ultimate question
9 of liability, as well as the question of how damages, if
10 any, for breach of such duty to notify could be
11 calculated is a matter for another day.

12 The next issue I'd like to address, your Honor,
13 is plaintiff's claim which is based solely on
14 information and belief that MSAC failed to convey good
15 title, and that this prevented the trustee from
16 foreclosing on defaulted loans.

17 The trustee alleges the following, your Honor,
18 at paragraph 63 of its complaint, it says, quote, on
19 information and belief, these breaches materially and
20 adversely affected the value of the mortgage loans and
21 the interest of the trustee and certificateholders
22 therein by preventing the trustee from, among other
23 things, foreclosing on a defaulted mortgage loan for
24 which MSAC did not convey good title.

25 But, your Honor, if MSAC's failure to convey
26 good title prevented the trustee from defaulting -- from

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2 foreclosing on defaulted loans, as the trustee alleges,
3 then the trustee should know that and it should be able
4 to plead such facts. It shouldn't have to plead on
5 information and belief, and as we argue in our brief,
6 your Honor, and plaintiffs have not disputed this. The
7 law is that a plaintiff may only plead on information
8 and belief when it is not in a position to plead based
9 on personal knowledge.

10 And Justice Fried stated this principle in a
11 case that we cited in our brief, what he held was,
12 quote, allegations made upon information and belief are
13 reserved for situations where the statements being made
14 are not or are not expected to be within the plaintiff's
15 personal knowledge, close quote.

16 And he then dismissed the claim based on
17 allegations that should have been alleged based on
18 personal knowledge because they were only pled on
19 information and belief.

20 And we would submit the same conclusion should
21 apply here, your Honor. If title problems prevented the
22 trustee from being able to foreclose on defaulted loans,
23 as they allege in their complaint, then they should be
24 able to plead such facts, rather than plead on
25 information and belief, and nothing in the complaint or
26 in plaintiff's brief purports to explain why the trustee

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2 is not in a position to do so.

3 And finally, your Honor, our motion asks for a
4 dismissal of plaintiff's request for attorneys fees.
5 Under this Court's precedence and under the Court of
6 Appeals standard in and Hooper Associates case, and as
7 plaintiff concedes in their opposition, this Court in US
8 Bank versus DLJ dismissed a request for attorneys fees
9 based on the same language that the plaintiff would
10 purport to rely upon here.

11 Plaintiff states that it is raising the issue
12 solely to preserve it for review, which is obviously its
13 prerogative, but they've given the Court no basis to
14 depart from its earlier decisions on this issue.

15 Unless the Court has any other questions, your
16 Honor, I would like to reserve the remainder of my time
17 for rebuttal.

18 THE COURT: Thank you.

19 MR. WEINSTEIN: Thank you.

20 MR. KRY: Good morning, your Honor. We agree
21 with Mr. Weinstein that Nomura obviously has significant
22 implications for trustee's claim for failure to notify,
23 we look forward to addressing that in our supplemental
24 brief.

25 As for the issues that Mr. Weinstein raised on
26 the claim for willful misconduct as a ground for

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2 overcoming the sole remedies clause, we don't believe
3 that Nomura addressed that issue. There's certainly
4 nothing in the opinion that talks about it, it's not my
5 understanding that that was an issue given any
6 significant treatment in the briefs, and so I believe
7 that issue is still in front of the Court.

8 I would note that those issues are up in front
9 of the First Department for a case that's going to be
10 argued in December, so it may be that further guidance
11 is coming, but I think even on existing law, there is --
12 more than adequate basis for finding that standard met
13 here.

14 There's really two issues that Mr. Weinstein
15 raised, one of which is -- while there's no dispute at
16 its most basic level that under New York law public
17 policy forbids the enforcement of restrictions on
18 damages in cases where the defendants engaged in conduct
19 that smacks of intentional wrongdoing. That's the
20 phrases that are used in cases like Sommers and cases
21 like Kalisch. Your Honor, so that only two questions
22 here are, one, are the facts -- do to the facts of this
23 case smack of intentional wrongdoing; and two, does this
24 rule apply to causes that merely restrict the measure of
25 damages rather than eliminating damages entirely.

26 And on the first of those two issues

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2 Mr. Weinstein is quite right, that this Court has had
3 occasioned number of times to pass upon whether
4 particular allegations rise to that level of smacking at
5 intention wrongdoing, and this Court has certainly held
6 that general allegations that there were widespread
7 breaches in a loan pool that a defendant didn't adhere
8 to underwriting standards don't rise to that level, and
9 that's ultimately the basis for the decision in cases
10 like Nomura and cases like the courts Ace opinion from
11 last year, and on that issue, the facts of this case are
12 fundamentally different. We have a situation here where
13 it's not just a generalized allegation that there were
14 widespread pools in the breaches, and that the sponsor
15 knew or should have known about them, this is a
16 situation where the SEC found -- and these are the SEC's
17 very words -- that Morgan Stanley operated a fraud and a
18 deceit upon purchasers.

19 Morgan Stanley told the public in its
20 prospectuses that this loan pool had a certain
21 delinquency ratio when it knew based on information it
22 had on hand a week before putting those prospectuses out
23 that that was just flat out false. So this is not a
24 situation of constructive knowledge, it's not a
25 situation of generalized knowledge from sponsor's due
26 diligence. It is a situation of outright fraud. And

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2 that -- if that doesn't smack of intentional wrongdoing,
3 I'm not sure what does. That standard has to mean
4 something and fraud seems like a paradigm match example
5 of what that standard is intended to cover.

6 In that respect, your Honor, this case is just
7 fundamentally different on its facts from any of the
8 ones that this Court's previously opined upon.

9 The second issue that Mr. Weinstein raises is
10 whether that principle, that New York public policy
11 exception applies in situations like this where we have
12 a contract provision that doesn't eliminate remedies all
13 together, but nonetheless restricts the types of
14 remedies or the amounts of damages plaintiff can
15 recover.

16 And this is an issue that was raised by the
17 defendant for the first time in its reply and so it's
18 not covered in the same depths in the brief as I would
19 like, but I do want to draw your Honor's attention to
20 several authorities we believe bear on this issue and I
21 have some cases, if your Honor would indulge me, I would
22 like to hand up. Would that be all right?

23 THE COURT: No -- cases on what?

24 MR. KRY: Addressing the issue of whether New
25 York's public policy exception applies when a
26 contractual provision merely restricts the measure of

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2 damages, rather than eliminating it entirely?

3 THE COURT: No, that would be tantamount to
4 further briefing. This case is going to be decided on
5 the briefs, but I have done my own research on this
6 issue, as I almost always do. If you want to put the
7 citations on the record to preserve your record and if
8 there's anything that you think that I absolutely should
9 look at before I rule, I will do so.

10 MR. KRY: Thank you, your Honor. I'll just
11 mention them briefly.

12 One is the Second Circuit's decision from
13 Turkish versus Kasenetz, that's 27 F3d 23, and in
14 particular the discussion on page 28.

15 Two other cases, Empire One Telecommunications
16 versus Verizon, that's at 26 Misc. 3d 541.

17 And Sorroof Trading versus G.E. Fuel Cell, which
18 I imagine your Honor has probably seen, 842 F Supp. 2d,
19 502.

20 And then also just the three cases that we
21 already did cite in our briefs at page five.

22 THE COURT: You don't need to put the citations
23 for the cases that are cited in the briefs. I have read
24 the briefs.

25 MR. KRY: Certainly. We think there are a
26 number of cases out there that stand for the proposition

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2 that this public policy exception applies to limitations
3 of damages and not just provisions eliminating damages.

4 The authorities that Mr. Weinstein cites to the
5 contrary, cases from the New York Court of Appeals, such
6 as Sommers and Kalisch really don't address this issue.
7 Those cases hold that the public policy exception does
8 apply to provisions that eliminate damages or exculpate
9 a defendant entirely, but they certainly don't say the
10 contrary, that if a provision does anything less than a
11 complete elimination of damages, the public policy
12 exception doesn't apply. And as for this Court's own
13 cases, as I mentioned, in case after case this Court has
14 assumed that the exception applies to provisions like
15 the sole remedies clause and just hasn't found the level
16 of misconduct to rise to the level where the exception
17 will be called into play.

18 The one case I think which is an arguable
19 exception is the first of that, which is the Nomura
20 decision from last year, but even reading that case,
21 your Honor, at least -- as I read it, and your Honor can
22 obviously draw your own conclusions, but I think the
23 bottom line of that case was that the allegations fell
24 short of establishing willful intent. Your Honor did
25 remark that the plaintiff hadn't submitted legal
26 authority which convinced you that this doctrine was

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2 even called into play, but we submit on this record we
3 have submitted such authority and so we believe there's
4 adequate basis on the pleadings here for finding that at
5 the pleading stage, at least, conduct that smacks of
6 willful misconduct such that the sole remedies cause
7 would not limit the remedies available to the trustee.

8 Turning to the second issue, your Honor, and
9 this is the question of punitive damages, it is
10 certainly related to the first issue. New York courts
11 and the New York Court of Appeals has made clear that in
12 some cases, although the normal rule may be no punitive
13 damages for breach of contract, there is a class of
14 cases where punitive damages are available and as one
15 involving conduct that is independent or that's
16 egregious and causes harm not just to the plaintiff but
17 to the broader public, and on these facts at the
18 pleading stage, your Honor, we think that the trustee
19 has made out an adequate claim to pursue that sort of
20 remedy here.

21 Again, we're not opening the door to these
22 sorts of claims in every RMBS case because this case is
23 really quite distinct. As the SEC found, this is a case
24 where Morgan Stanley engaged in a course of conduct that
25 operated as a fraud and a deceit upon the purchasers of
26 these certificates. So if this had been a case where

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2 the certificateholders has come in and stated a fraud
3 claim against Morgan Stanley, there is no reason why
4 they wouldn't be permitted to pursue punitive damages in
5 connection with this. And by the same principle, under
6 New York law standard in cases like Rocanova and New
7 York University, because the breach of contract that was
8 committed here is bound up with that independently
9 tortious conduct that was directed to the broader
10 public. The trustee here, as well, can seek punitive
11 damages based on that conduct.

12 Again, it's just a fact of this case that stems
13 from the relatively unique posture where the defendant
14 in this case was essentially found by the SEC to have
15 engaged in deceitful and fraudulent conducts that was
16 directed not just at one entity, but at the broader
17 public, purchasers of these certificates nationwide, and
18 so this case falls squarely within the test set forth in
19 those decisions from the New York Court of Appeals.

20 The third issue that Mr. Weinstein mentioned is
21 this question of the claim against MSAC for failure to
22 convey good title. And he focused in particular on
23 paragraph 63. And just to give your Honor the
24 background for this claim, what this stems from -- and
25 your Honor may recall this case, it related to the same
26 trust as a separate suit by the FGIC uninsured on this

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2 trust that was argued before your Honor a few months
3 ago, in the course of the litigation of that case it was
4 discovered that there were instances where there were
5 problems with the conveyance of title and so there was a
6 claim in that case that MSAC failed to have good title
7 on that same claim is also made here, because those
8 sorts of breaches would also affect the trustee.

9 We don't know how many and of those title
10 defects there are. We do know there were some, because
11 as mentioned in paragraph 63, there is at least one,
12 possibly more instances, where there was an attempted
13 foreclosure and it couldn't be consummated because there
14 was a defective title. And that is why paragraph 63
15 says on information and belief these breaches materially
16 and adversely affected the value of the mortgage loans
17 and the interest of the trustee and certificateholders
18 therein by preventing the trustee from, among other
19 things -- and that's the key phrase there -- foreclosing
20 on a defaulted mortgage loan for which MSAC did not
21 convey good title.

22 Your Honor, our claim is not limited to that
23 one instance where there is a title defect we know
24 about. The basis for the claim is that it's reasonable
25 to assume if we observed specific title problems there
26 are probably many more throughout the trust. And that's

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2 why it's an information and belief pleading. We don't
3 have, we don't know every instance where there's a title
4 defect. That's not information you can tell,
5 necessarily, from information in the trustees files.
6 It's not necessarily going to be reflected in the
7 custodian files, not necessarily going to be reflected
8 in the servicer files. Sometimes that information won't
9 be discovered until you actually try and foreclose on
10 one of these things. In that circumstance, it is
11 perfectly appropriate to plead a claim on information
12 and belief.

13 Now with respect to the one title defect that
14 prevented us from foreclosing on the loan, I mean in
15 reality, as it stands, that's pled on facts in the
16 existing complaint, so that's not even an information
17 and belief claim because we know about that one, but the
18 gift of the information and belief claim is there's
19 another larger set of unknown defects in title. We've
20 observed some and we certainly have reasonable grounds
21 for suspecting there's more --

22 THE COURT: Excuse me for one moment.

23 (There is a pause in the proceedings.)

24 THE COURT: Please continue.

25 MR. KRY: Thank you, your Honor. And in those
26 circumstances where the information is not within our

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2 possession, we're entitled to plead that on information
3 and belief and determine through the course of
4 litigation how extensive these title defects are,
5 category of defects for which MSAC agreed to be held
6 responsible and that's why that claim is pled the way it
7 is.

8 Two more issues. The fourth issue
9 Mr. Weinstein didn't address, I'm not sure there's any
10 debate. To be clear, our complaint did not allege that
11 any departure from underwriting guidelines under any
12 circumstance would amount to a breach of representation
13 and warranty. Certainly, failure to follow underwriting
14 guidelines will be very material. Breaches of many of
15 the representations and warranties that were made, among
16 others, the one in Part B for Subsection C for Group 1
17 mortgage loans in which MSMCH represented for the Group
18 1 loans based on New Century's underwriting methodology
19 the Group 1 mortgage loans originator made a reasonable
20 determination that at the time of origination the
21 related mortgager had the ability to make timely
22 payments on the Group 1 mortgage loan. That's one
23 example. There are other reps and warranty which
24 certainly will be informed by whether Morgan Stanley --
25 whether New Century complied with its underwriting
26 guidelines, but we have a claim -- it's not an intent to

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2 claim that any departure from underwriting guidelines
3 automatically breaches some rep and warranty, at least
4 on the documents of this particular case.

5 And with respect to the last issue,
6 indemnification, Mr. Weinstein did accurately state our
7 position. We don't believe we -- on the basis of the
8 language on which we rely, have a claim for attorneys
9 fees under this Court's decisions, and so we've just
10 noted that in the papers.

11 Unless your Honor has any questions.

12 THE COURT: Thank you.

13 MR. KRY: Thank you.

14 MR. WEINSTEIN: Your Honor, I won't repeat my
15 earlier arguments, I just want to make one final point
16 which is with respect to plaintiff's claim for failure
17 to convey good title, Mr. Kry said that they did plead
18 facts concerning what they say was one situation or one
19 loan that the trustee couldn't foreclose on because of
20 title issues. He said that those facts are alleged in
21 the complaint, but there's nothing in the complaint
22 whatsoever stating such facts, your Honor, nor was there
23 anything in plaintiff's opposition brief referring to
24 those facts or purporting to explain that that's what
25 they meant when they pled on information and belief.
26 The only thing the complaint says about this issue is

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2 that on information and belief there were title problems
3 and they prevented the trustee from foreclosing on
4 defaulted loans. There are no facts pled and
5 essentially the plaintiffs are more or less trying to
6 amend their complaint on the flight of argument which we
7 don't think is appropriate, your Honor, and we would
8 submit that that claim should be dismissed.

9 Apart from that, unless the Court has any
10 questions, we'll rely on our earlier arguments and our
11 briefs.

12 THE COURT: Thank you. We will take a five to
13 ten minute recess and then I will give you a decision on
14 the record of all of the branches of the motion, other
15 than that which relates to notice.

16 Off the record.

17 (Recess taken)

18 THE COURT: Before I put the decision on the
19 record, Mr. Weinstein, I want to revisit the issue of
20 the third cause of action against MSAC for breach of
21 contract based on failure to give notice.

22 Do I understand correctly that you conceded in
23 your oral argument that under the recent Appellate
24 Division decision in Nomura on the particular pleadings
25 and governing agreements in this case dismissal of this
26 third cause of action is not warranted at this stage of

DECISION

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the litigation?

MR. WEINSTEIN: Yes, your Honor.

THE COURT: In that event, I am not going to request supplemental briefing on the third cause of action. The branch of the motion to dismiss that cause of action will be denied on consent and without prejudice to defendants' rights in the event of any changes as a result of subsequent litigation on appeal.

I will now place my decision on the remainder of the motion on the record.

In this put-back action, Morgan Stanley Mortgage Capital Holdings, LLC, hereafter, MSMCH, the sponsor of an RMBS securitization and Morgan Stanley ABS Capital Inc., hereafter MSAC, the depositor, moved pursuant to CPLR 3211 to dismiss various causes of action or allegations on which the causes of action are based.

The complaint pleads a first cause of action against both defendants for breach of representations and warranties. This cause of action seeks compensatory damages, rescission and/or recessionary damages and punitive damages, among other relief. The second cause of action, also pleaded against both defendants, is for breach of defendant's cure or repurchase obligations. The third cause of action, pleaded only against

DECISION

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2 defendant depositor, alleges damages for failure of the
3 depositor to give prompt written notice to the trustee
4 upon the depositor's discovery of a breach of the
5 sponsor's representations and warranties as set forth in
6 a Representation and Warranty Agreement, hereafter R and
7 W Agreement, between the depositor and the sponsor.

8 As this Court has been designated by
9 administrative order dated May 23, 2013, to hear all
10 RMBS cases filed after the date of the order, the Court
11 has issued numerous decisions on pleading issues raised
12 by motions to dismiss. The issues raised in connection
13 with the first and second causes of action have
14 previously been decided by this Court, and in some
15 instances by the appellate courts, on substantially
16 similar pleadings involving substantially similar
17 governing agreements. The Court will, therefore, not
18 discuss these issues at length here.

19 With respect to the first cause of action,
20 defendant's arguments are as follows: First, they claim
21 that plaintiff's request for rescission or rescissory
22 damages must be dismissed. This claim is dismissed on
23 the authority of the Appellate Division's recent
24 decision in *Nomura Home Equity Loan Inc., Series 2006-FM*
25 *2*, the *Nomura Credit and Capital Inc., Index Number*
26 *653783/12, 651124/13, 652614/12, 650337/13*, October 13,

DECISION

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2 2015, hereafter Nomura Appellate Division, modifying on
3 other grounds this Court's underlying decision on the
4 issue in 652614/12 and 650337/13.

5 In so holding, the Court rejects plaintiff's
6 claim that the facts underlying this action differ from
7 the facts in other RMBS breach of contract actions, and
8 that rescissory relief is therefore available, because
9 the Securities and Exchange Commission issued a cease
10 and desist order dated July 14, 2014, finding violations
11 of the Securities Act of 1933, based on defendant's
12 understatement of delinquent loans underlying the
13 securitization. This order does not make findings as to
14 the willfulness conduct or gross negligence that would
15 support rescissory relief or relief from the sole remedy
16 provisions into which the parties entered. Here, a sole
17 remedy provision in the R and W Agreement between the
18 sponsor and depositor and a sole remedy provision in the
19 pooling and servicing agreement between and among the
20 depositor, trustee and other parties. Indeed, the SEC
21 order specifically provides in the conclusion that the
22 violation of the Securities Act "may be established by a
23 showing of negligence." See Nomura 652614/12 and
24 650337/13, (discussing dismissal of rescissory claims
25 based on allegations of willful misconduct or gross
26 negligence) affirmed on grounds stated in Nomura

DECISION

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2 Appellate Division opinion on rescissory relief issue.
3 See also Ace Securities Corp., series 2007-WM 1 v DB
4 Structured Products Inc., Index Number 650312/13, 2014,
5 Westlaw 5243511, September 25, 2014 (this Court's
6 decision also discussing dismissal of rescissory relief
7 claim based on allegations of willful misconduct or
8 gross negligence.)

9 Second. Defendants argue that the claim for
10 punitive damages should be dismissed. Although this is
11 a breach of contract action, the claim for punitive
12 damages is based on plaintiff's purported pleading of
13 "all the facts necessary to support a claim for fraud on
14 the Certificateholders." Plaintiff's memo in op at 7.
15 This claim in turn is based on the SEC order. Contrary
16 to plaintiff's contention, an independent claim of fraud
17 is not pleaded, nor does the complaint plead a wrong
18 aimed at the public, generally. The punitive damages
19 claim will accordingly be dismissed.

20 Third. Defendants argue that the complaint
21 fails to plead a claim for breach of representations and
22 warranties against the depositor. As defendants
23 correctly argue, the sole representation made in the
24 Pooling and Servicing Agreement by MSAC is that
25 immediately prior to the transfer of the loans to the
26 trust, the depositor had good title to the loans. PSA

DECISION

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2 schedule III. The complaint alleges "on information and
3 belief" that MSAC did not have good title to numerous
4 loans. Complaint paragraph 62-63. Contrary to
5 defendant's contention, the complaint is not
6 inadequately pleaded based on the making of this
7 allegation on information and belief.

8 Fourth. Defendants argue that the complaint
9 fails to plead a claim for breaches of representations
10 and warranties against the sponsor, to the extent that
11 it is based on noncompliance with the underwriting
12 guidelines of the originator, New Century. This branch
13 of the motion is denied as plaintiff represents that it
14 does not seek to assert a breach of such a
15 representation. See plaintiff's memo in op at 9.

16 Fifth. Defendants seek dismissal of the claim
17 for attorneys fees. In *Nomura*, Index Number 650337/13,
18 2014 Westlaw, 5243512, this Court dismissed an attorneys
19 fee claim based on a substantially similar provision
20 authorizing the trustee's recovery of expenses for
21 enforcement of remedies. The Court adheres to this
22 reasoning. It is noted that the *Nomura* Appellate
23 Division decision did not address the plaintiff's claim
24 for attorneys fees.

25 The branch of defendant's motion to dismiss the
26 first cause of action is, accordingly, granted to the

DECISION

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2 extent of dismissing the claims for rescission and/or
3 rescissory damages, punitive damages and attorneys fees,
4 and is otherwise denied.

5 The Court turns to the branch of the motion to
6 dismiss the second cause of action. As recently held by
7 the Court of Appeals in *Ace Securities Corp. v DB*
8 *Structured Products Inc.*, 25 NY 3d 581, 599, June 11,
9 2015, hereafter *Ace*, a "cure or repurchase obligation
10 [is] not an independently enforceable right." This
11 cause of action must, accordingly, be dismissed.

12 At the outset, the Court addressed the third
13 cause of action.

14 (Continued on next page:)

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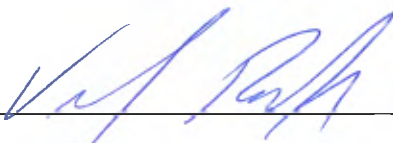
DECISION

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2 This concludes the Court's decision on the
3 motion to dismiss. Movant is requested to obtain a copy
4 of the transcript, to e-file it and to file two
5 hardcopies with the clerk of Part 60. The transcript
6 will not be so ordered until the hardcopies are filed.
7 The parties are advised that the Court reserves the
8 right to correct errors in the transcript, therefore, if
9 the decision is needed for any further purpose, the
10 parties should be sure that they have a copy of the
11 transcript as so ordered by the Court and not merely as
12 signed by the court reporter.

The record is closed.

* * *

14
15 CERTIFIED THE FOREGOING IS
16 A TRUE AND ACCURATE TRANSCRIPTION
17 OF THE PROCEEDINGS, THIS DATE.

18
19 
20 _____
VINCENT J. PALOMBO, RMR