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DECISION

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

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

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

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



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

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

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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

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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



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

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

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

(Continued on next page:)

Deutsche Bank National Trust Company v.
Morgan Stanley Mortgage Capital Holdings LLC
INDEX No. 652877/2014

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


The record is closed.

* * *

CERTIFIED THE FOREGOING IS
A TRUE AND ACCURATE TRANSCRIPTION
OF THE PROCEEDINGS, THIS DATE.


VINCENT J. PALOMBO, RMR

So Ordered

 12/10/15
MARCY S. FRIEDMAN, J.S.C.