SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 11, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Saxe, Moskowitz, Gische, Webber, JJ.

936 IKB International S.A. in Liquidation, et al., Plaintiffs-Respondents, Index 653964/12

-against-

Morgan Stanley, et al.,
Defendants-Appellants.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for appellants.

Schlam Stone & Dolan LLP, New York (Richard H. Dolan of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 29, 2014, which, insofar as appealed from, denied defendants' motion to dismiss the causes of action for fraud and aiding and abetting fraud except as related to the four certificates purchased before November 16, 2005, and, as related to all other certificates, except to the extent they are based on alleged misrepresentations regarding transfer of notes and mortgages to the trusts, unanimously affirmed, without costs.

This fraud action arises out of the significant financial losses plaintiffs incurred as a result of defendants' allegedly fraudulent conduct in connection with the offer, sale, structure, and marketing of $132,665,000 in residential mortgage backed securities (RMBS). Primarily, this appeal concerns whether plaintiffs adequately pleaded the elements of justifiable reliance and scienter necessary for fraud claims, both as to the RMBS that defendants sold directly to them and as to four RMBS for which defendants only acted as the underwriter. We hold, as more fully explained below, that plaintiffs adequately pleaded these elements by alleging that defendants knew that the offering documents misrepresented critical characteristics of the underlying mortgage loans, that they fraudulently concealed the inferior quality of those loans by means of misstatements, misrepresentations, and omissions of material fact in the offering documents, and that plaintiffs undertook appropriate due diligence before purchasing the RMBS. The fraud claims concerning defendants' role as an underwriter are also sufficiently pleaded, based upon plaintiffs' allegations that defendants participated in or had knowledge of the fraud.

Plaintiff IKB International S.A. (IKB SA), a Luxembourg incorporated financial institution, is a subsidiary of plaintiff IKB Deutsche Industriebank AG (IKB AG), a German corporation. Between June 2005 and April 2007, IKB SA purchased a total of 25 RMBS certificates in connection with 18 securitizations that defendants sponsored, arranged, marketed, underwrote, and/or sold. In 2008, IKB SA sold all 25 RMBS at a massive financial loss. Two of the RMBS were sold to a nonparty buyer and the other 23 RMBS were sold to IKB AG. In November 2008, IKB AG sold the 23 RMBS it was holding to Rio Debt Holdings (Ireland) Limited (Rio). In December 2008, both IKB SA and IKB AG assigned all of their claims arising from the purchase of the RMBS, including claims against the issuers, underwriters, and sellers of the securities, to Rio. In November 2011, plaintiffs, defendants, and Rio entered into a tolling and forbearance agreement concerning claims related to the RMBS (the statute of limitations was due to expire on May 15, 2012). On May 9, 2012, Rio reassigned all claims arising from the RMBS to IKB AG, but did not physically deliver the securities themselves. This action was commenced on November 16, 2012 and a complaint was filed May 17, 2013. This series of events forms the backbone of defendants' additional arguments, that this action violates the champerty statute because plaintiffs purchased the claims for the sole purpose of bringing an action (Judiciary Law § 489), plaintiffs lack standing, and in any event, it is time barred. We agree with the motion court that defendants failed to show, as a matter of law, that the reassignment of claims from Rio to IKB

SA violated the champerty statute. The defendants also failed to show, as a matter of law, that the claims are subject to the 3-year German statute of limitations, as opposed to the 30-year Luxembourg statute of limitations.

To establish a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance, and resulting injury (*Dembeck v 220 Cent. Park S*., LLC, 33 AD3d 491, 492 [1st Dept 2006]). Defendants argue that plaintiffs are sophisticated investors and have not adequately alleged the justifiable reliance element of their claims, because they made a substantial investment without conducting any due diligence of their own to independently appraise the risks attendant to the RMBS in which they invested.

Where a plaintiff is a sophisticated entity, "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] [internal quotation marks omitted]; *MP Cool Inv. Ltd v Forkosh*, __ AD3d __, 2016 NY Slip Op 04159, *3 [1st Dept May 31, 2016]). In other words, a sophisticated investor claiming that it has been defrauded has to allege that it took reasonable steps to protect itself against deception by, for instance, examining available financial information to ascertain the true nature of a particular transaction or facts averred (*see e.g., DDJ Mgt., LLC v Rhone Group LLC*, 15 NY3d 147, 154-155 [2010]).

Plaintiffs allege that defendants knowingly misrepresented the credit quality and characteristics of the pool of residential mortgage loans that comprised the securitizations. For instance, defendants represented that rigorous loan underwriting standards had been employed in the loan origination process, and that if a particular loan did not comply, there were other compensating factors, when in fact the originators had systematically abandoned their underwriting standards, selling loans that they knew were defective. There were also misrepresentations about loan to value ratios, the appraised values of the underlying loans, owner occupancy of the mortgaged properties, and credit ratings.

Specifically on the issue of justifiable reliance, the complaint alleges that plaintiffs' investment advisors analyzed the RMBS based upon information in the prospectuses, prospective supplements and other offering documents and that plaintiffs lacked access to the underlying mortgage loan files. They further claim that they would not have received the loan files even if they had been requested because of applicable regulations protecting the borrowers' personal information (*see* 17 CFR 248.1, SEC Privacy of Consumer Financial Information). Plaintiffs further allege that defendants cautioned investors to rely only on the offering documents and expressly warned that anyone offering conflicting information about the investment was unauthorized to do so. These allegations are sufficient to allege justifiable reliance under the circumstances of this case.

Defendants argue that in order to establish justifiable reliance, plaintiffs were required to allege that they sought additional information from defendants about the truthfulness of the representations made in the offering documents or that they requested the loan files for the loans underlying the RMBS. The level of due diligence advocated by defendants requires a prospective purchaser to assume that the credit ratings assigned to the securities were fraudulent and to verify them through a detailed retracing of the steps undertaken by the underwriter and credit rating agency. We do not require this heightened due diligence standard to support justifiable reliance in a pleading concerning such sales of securities by prospectus (*see Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 142-143, 144 [1st Dept 2015]; *CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*, 106 AD3d 437 [1st Dept 2013]).

Defendants also argue that the motion court erred in failing to dismiss plaintiffs' fraud claims because the element of scienter is only based on generalized allegations that defendants knew of the falsity of their representations. "The element of scienter, that is, the requirement that the defendant knew of the falsity of the representation being made to the plaintiff, is, of course, the element most likely to be within the sole knowledge of the defendant and least amenable to direct proof" (*Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [1st Dept 2003]). All that is required to defeat a motion to dismiss a fraud claim for lack of scienter is "a rational inference of actual knowledge" (*see AIG Fin. Prods. Corp. v ICP Asset Mgt., LLC*, 108 AD3d 446, 452 [1st Dept 2013]). The allegations that defendants were informed about defects in the loans they were securitizing because they obtained this information through their own due diligence are sufficient to plead scienter *(see e.g. Basis Yield Alpha Fund Master*, 136 AD3d at 145). The due diligence reports prepared during the securitization process suggest that almost

39% of the loan files reviewed for defendants were defective; yet defendants included 56% of the nonconforming loans in its RMBS, often making deals that allowed them to obtain the loans at steep discounts. The complaint also alleges that defendants were uniquely positioned to know that the originators had abandoned their underwriting guidelines. These allegations satisfy the element of scienter for pleading purposes. Defendants' argument, that they also suffered financial losses and that it defies logic that they would have invested as heavily as they did (almost $543 million) in securities expected to fail, does not render the pleading legally infirm.

Defendants separately urge the dismissal of the fraud claims concerning the ACCR 2004-3, ACCR 2006-1, NCHET 2005-C, and NCHET 2005-D securitizations. They argue that they acted exclusively as underwriter with respect to these securitizations, whose issuers are not parties to this action, and that the allegations in the complaint do not support a claim that they made any of the material misrepresentations in the offering materials for these securitizations (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400 [1st Dept 2007], *affd* 12 NY3d 553 [2009]). Although an underwriter does not usually "make" statements in offering documents, it constructively represents that statements made in an offering document are complete and accurate (*see e.g. In re MTC Elec. Tech. Shareholder Litig.*, 993 F. Supp. 160, 162 [ED NY 1997]). The complaint in this case alleges that defendants' role as an underwriter was significant, active and not passive, because among other responsibilities it purchased bonds, identified potential investors, and provided them with the offering documents in order to solicit their investment. Moreover, as underwriter, defendants were privy to and had actual knowledge of the issuers' fraud, given their active involvment in the entire securitization process. Defendants worked closely with the sponsor, rating agencies, and originators in structuring the transaction. Two of the prospectus supplements disclosed a lending relationship between defendants as underwriter and the depositor. Defendants' name was on the offering documents, and for at least one of the securitizations defendants were identified as the “lead manager." These alleged facts permit a reasonable inference that defendants, in their underwriter role, had a significant presence in many aspects of the securitization process and that they not only knew of the substandard quality of the loans being securitized, they actively participated in it (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]). Unassailable proof of these facts is not necessary at the pleading stage to withstand a dismissal motion *(Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

CLERK

Friedman, J.P., Acosta, Moskowitz, Kapnick, Gesmer, JJ.

1122N BGC Notes, LLC, Index 651808/14
Plaintiff-Appellant,

-against-

Kevin J. Gordon,
Defendant-Respondent.

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Michael S. Popok, New York, for appellant.

Stern Tannenbaum & Bell LLP, New York (Aegis J. Frumento of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 15, 2015, which denied the motion of plaintiff BGC Notes, LLC for summary judgment in lieu of a complaint, and granted defendant's motion to compel arbitration and to stay the action, unanimously affirmed, without costs.

Nonparty BGC Financial is a securities broker-dealer and a member of the Financial Industry Regulatory Authority, Inc. (FINRA); BGC Notes is an affiliate of BGC Financial. BGC Notes is not itself a member of FINRA, but some of its affiliates, such as BGC Financial, are members. Similarly, defendant Kevin J. Gordon is a FINRA-registered broker.

In 2011, BGC Financial recruited Gordon to become a broker on its asset-backed swaps desk, and in August of that year, Gordon and BGC Financial entered into an employment agreement to memorialize the terms of Gordon’s employment. Under the terms of the employment agreement, Gordon was to receive a $700,000 signing bonus to be structured as an employee-forgivable loan and was to remain an employee of BGC Financial for five years, until April 2017. With respect to the $700,000 loan, the employment agreement stated that BGC Financial would “cause” its affiliate, BGC Notes, to make to Gordon a one-time loan “[i]n consideration for services [to be] performed” by Gordon, and “as consideration for [Gordon]’s consent to enter this [employment agreement].” The employment agreement went on to provide that the terms and conditions of the repayment of that loan would be set forth in “the applicable promissory note.” The employment agreement also contained a broad arbitration provision providing that “any disputes, differences or controversies” arising under the employment agreement or from “[Gordon]’s employment” would be subject to FINRA arbitration.

At the same time that he signed the employment agreement in August 2011, Gordon also entered into a cash advance distribution agreement and promissory note with BGC Notes. The note contemplated that Gordon would eventually earn limited partnership interests in BGC Holdings, L.P., another one of BGC Financial’s affiliates. Under the note’s terms, the periodic principal and interest due on the loan were to be paid from

Gordon’s anticipated net partnership distributions, and the annual interest was set at the then-prevailing federal rate of 1.15%. The note also provided that BGC Notes would be entitled to accelerate the loan if Gordon failed to become a partner of BGC Holdings within 90 days of beginning his employment, or if Gordon ceased to be a partner of BGC Holdings before the employment agreement expired.

The note, unlike the employment agreement, provided for resolution of related disputes by the New York State courts rather than by arbitration. Specifically, the note stated that “all disputes arising” from the note were to be litigated in the New York State courts. The parties also expressly agreed that the note was “an agreement for the payment of money only” subject to enforcement under CPLR 3213 – that is, the provision of the CPLR providing for a motion for summary judgment in lieu of a complaint.

Gordon did not begin working at BGC Financial until April 16, 2012, eight months after signing the employment agreement and the note. In accordance with the note, BGC Notes advanced Gordon the $700,000 loan several weeks later. While working at BGC Financial, Gordon was presented with the opportunity to sign a limited partnership agreement with BGC Holdings, but he declined to so. BGC Notes contends that BGC Holdings allocated the partnership units to Gordon regardless of his failure to sign the partnership agreement because BGC Holdings anticipated that Gordon would sign the partnership agreement in the future.

In November of 2012, around six months after starting his employment with BGC Financial and nearly five years before the end of the term set forth in the employment agreement, Gordon resigned to join Credit Suisse, one of BGC Financial's largest customers. Gordon maintained that he had intended to work for BGC Financial for the full term of his employment agreement, but that he left because of certain disagreements between him and BGC Financial. For example, Gordon stated, BGC Financial had been unable to negotiate a timely buyout of his noncompetition agreement with his previous employer, thus costing Gordon approximately $1 million. Gordon also contends that BGC Financial had not, as it had promised, fully reimbursed him for the costs and expenses incurred in negotiating and coming to a settlement with his former employer. Nonetheless, Gordon continued to refer business to BGC Financial during his one-and-a-half-year employment with Credit Suisse, and claimed that those referrals resulted in at least $1 million in commissions to BGC Financial.

Gordon apparently did not make any payments toward the note after he left BGC Financial. In June 2014, when the total outstanding balance on the note was $704,063, BGC Notes commenced this action by way of summary judgment in lieu of a complaint under CPLR 3213, purportedly under the terms of the note (the BGC action). A month later, in July 2014, Gordon filed his own proceeding before FINRA against BGC Financial, BGC Notes, and others, seeking damages for, among other things, defamation and breach of his employment agreement. Further, Gordon moved in the BGC action to compel arbitration and for a stay of the BGC action pending a ruling in the FINRA arbitration.

The IAS court denied BGC Notes' motion for summary judgment. Additionally, the IAS court granted Gordon's motion for a stay of the BGC action and directed BGC Notes to arbitrate the note's enforcement as part of the FINRA arbitration. In so doing, the IAS court found that BGC Notes should be compelled to arbitrate because it had received "direct benefits" flowing from the employment agreement containing an arbitration clause.

The motion court correctly ordered BGC Notes to arbitrate its claims against Gordon in accordance with the terms of Gordon's employment agreement with BGC Financial. Although BGC Notes was not a signatory to the employment agreement, which is the document actually containing the arbitration provision, BGC Notes nonetheless received a "direct benefit" directly traceable to the employment agreement (*Life Tech. Corp. v AB Sciex Pte.*

Ltd., 803 F Supp 2d 270, 275 [SD NY 2011]; *Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013]). Specifically, section 3(d) of the employment agreement provides that BGC Financial would "cause" BGC Notes to make a loan to Gordon by way of the very note that BGC Notes sues upon in this action, and BGC Notes received all the benefits that an entity ordinarily receives upon the giving of a loan (*see Mark Ross & Co., Inc. v XE Capital Mgt., LLC*, 46 AD3d 296, 297 [1st Dept 2007]). Thus, BGC Notes derived benefits from the employment agreement, and BGC Notes' contention that section 3(d) conferred a benefit only to Gordon, and at most an "indirect" benefit to BGC Notes itself, belies the terms of the employment agreement (*Life Tech. Corp.*, 803 F Supp 2d at 276).

Likewise, we reject BGC Notes' argument that it cannot be compelled to arbitrate because it is not subject to FINRA's jurisdiction. FINRA routinely hears arbitrations brought by customers of securities firms that are not FINRA members, and FINRAs procedures permit nonmember parties to submit to FINRA arbitration even when they do not fall under FINRA's rules on mandatory arbitration. Moreover, BGC Notes may not do indirectly what it is forbidden to do directly – namely, divest an employee of his right under the FINRA Rules to arbitrate employment disputes. Here, Gordon entered into the note as part of his compensation package and as directly provided for in the employment agreement, and his decision to end his employment directly relates to his default on the note. Indeed, FINRA Rule 13806 establishes promissory note proceedings for disputes surrounding employee-forgivable loans like the note here. Thus, despite BGC Notes' assertion to the contrary, this action does not bear a mere tangential relation to the employer-employee relationship between BGC Financial and Gordon.

Given the foregoing, the IAS court correctly denied BGC Notes' motion.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

CLERK

Tom, J.P., Richter, Gische, Webber, JJ.

1209- Index 603611/08
1210 Gentry T. Beach, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Touradji Capital Management, LP, et al.,
Defendants-Respondents-Appellants.
- - - - -
Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Respondents-Appellants,

-against-

Gentry T. Beach, et al.,
Counterclaim Defendants-Appellants-Respondents.
- - - - -
Touradji Capital Management, LP, et al.,
Counterclaim Plaintiffs-Respondents-Appellants,

-against-

Vollero Beach Capital Partners LLC, et al.,
Counterclaim Defendants-Appellants-Respondents,

Gary Beach,
Counterclaim Defendant.

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Liddle & Robinson, LLP, New York (Matthew J. McDonald of counsel), for appellants-respondents.

O'Brien LLP, New York (Sean R. O'Brien of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 18, 2014, which granted in part and denied in part counterclaim plaintiffs' motion to amend their counterclaims, unanimously modified, on the law and the facts, to

Corrected Order - August 11, 2016

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1135-
1135A Jay D. Kramer, **Index 653567/12**
Plaintiff-Appellant,

-against-

Arthur B. Greene, et al.,
Defendants-Respondents.

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Barack Ferrazzano Kirschbaum & Nagelberg, LLP, Chicago, IL (Robert E. Shapiro of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant.

Cohen Tauber Spievack & Wagner, P.C., New York (Sari E. Kolatch of counsel), for respondents.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about December 12, 2014, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment, unanimously modified, on the law, to deny defendant's motion, and otherwise affirmed, without costs.

Plaintiff, an attorney, assisted defendant Arthur B. Greene, an accountant and financial manager, in various matters that Greene handled as a literary agent for Stephen King. While plaintiff was initially compensated on an hourly basis, in or about 1988, Greene began paying him a percentage of the commissions that he received from King on completed deals, with the percentage increasing over time to compensate plaintiff for work he was doing on projects that were not generating any revenue.

On March 30, 2012, plaintiff was terminated after King stated that he did not want him working on his business. At first, defendants continued to pay plaintiff a share of Greene's commissions on completed work, but they soon stopped paying him. As a result, plaintiff commenced this action in which, in the now remaining causes of action, he seeks to recover, under theories breach of an oral contract, or alternatively, quantum meruit or unjust enrichment, a share of Greene's commissions on revenue-generating projects on which plaintiff completed his work before he was terminated. Defendants contend that once plaintiff stopped providing services for Greene, he was not entitled to any further compensation, even on completed deals that were still generating commissions.

An oral agreement may be enforceable as long as the terms are clear and definite and the conduct of the parties evinces mutual assent "sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (*Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]; *Carlsen v Rockefeller Ctr. N., Inc.*, 74 AD3d 608 [1st Dept 2010]). However, not all terms of a contract need be fixed with absolute certainty, and courts will not apply the doctrine of indefiniteness to "defeat the reasonable expectations of the parties in entering into the contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]). Where "there may exist an objective method for supplying the missing terms needed to calculate the alleged compensation owed plaintiff," a claimed oral agreement is "not as a matter of law unenforceable for indefiniteness" (*Basu v Alphabet Mgt. LLC*, 127 AD3d 450, 450 [1st Dept 2015]; *Abrams Realty Corp. v Elo*, 279 AD2d 261 [1st Dept 2001], *lv denied* 96 NY2d 715 [2001]).

Defendants argue that the motion court correctly dismissed the breach of contract claim because plaintiff did not establish that there was a meeting of the minds between himself and Greene that commission payments would continue even after he was no longer providing any services for defendants. However, although the party seeking to enforce the contract bears the burden at trial to establish that a binding agreement was made and to prove its terms (*see Sardis v Frankel*, 113 AD3d 135, 144 [1st Dept 2014]), each party bears the burden of demonstrating that its motion for summary judgment should be granted due to the absence of any genuine issue of material fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It is not until that burden is met that the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Furthermore, where questions of fact and credibility exist with respect to the existence of a binding oral agreement, and the terms thereof, summary judgment in favor of either side is inappropriate (*see Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 436 [1st Dept 2012]).

Here, defendants did not present evidence establishing the terms of Greene's commission agreement with plaintiff. Rather, they relied primarily on plaintiff's deposition testimony, which allegedly demonstrated that he and Greene never discussed, let alone came to any formal agreement on, whether the payment of commissions related to successful projects on which plaintiff had already completed his work would continue after his employment with defendants had ended.

At his deposition, when asked if there was any agreement between himself and Greene under which "[he] would receive a percentage of commissions . . . regardless of whether or not [he] [was] . . . continuing to do any work for Arthur Greene," plaintiff responded, "We both understood what a commission is. We were both experienced in the industry and we understood that a commission was payable from a percentage of a client's earnings for so long as the client was receiving income from deals that we worked on on a contingent basis." Plaintiff also testified, "[I]t was my complete expectation that in accordance with the industry custom I would be paid my commissions[,] and we had these conversations repeatedly."

While plaintiff acknowledged that Greene never expressly stated that this was his understanding or that plaintiff would continue to be paid commissions if he no longer worked on King matters, defendant presented no competent proof of Greene's understanding. Plaintiff negotiated his agreement with Greene alone, and Greene was not deposed and did not submit an affidavit in support of defendants' position that plaintiff's entitlement to a share of commissions ended when his employment was terminated, even on completed projects that were still generating revenue.

Plaintiff also submitted an affidavit in which he claimed that he and Greene "agreed orally" that his compensation "would comprise a percentage share of the commissions [] Greene received from King on the projects [he] worked on," and "[t]hus," Greene agreed that "whenever [he] received money on projects [plaintiff] worked on, a percentage would be paid to [plaintiff]." Contrary to defendants' contention, there was never any "admission" by plaintiff that the contract required that he be doing new work in order to receive payment on work he had already done.

Furthermore, plaintiff asserted that during his 24-year relationship with Greene, there were numerous occasions when he received his share of commissions on completed work even though he was not doing any new work for King through Greene. Defendants also continued to pay plaintiff commissions on completed work for a short time after he was terminated.

That the family of an accountant that Greene used did not challenge Greene's refusal to pay his estate commissions on completed work after he died does not establish the terms of plaintiff's agreement with Greene. Nor does Mrs. Greene's uncorroborated explanation for Greene's willingness to increase plaintiff's commission rate establish as a matter of law that commissions were to cease when plaintiff's employment terminated.

Thus, summary judgment dismissing the breach of contract claim is inappropriate.

The cause of action for unjust enrichment or quantum meruit also should not be dismissed. Generally, quasi-contractual remedies are unavailable where there exists a valid and enforceable agreement governing the particular subject matter (*see MG W. 100 LLC v St. Michael's Prot. Episcopal Church*, 127 AD3d 624, 626 [1st Dept 2015]). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies" (*Goldman v Simon Prop. Group, Inc.*, 58 AD3d 208, 220 [2d Dept 2008]). Here, defendants argue that there was no binding contract because there was no meeting of the minds. Accordingly, plaintiff did not have to elect his remedies (*see e.g. Sabre Intl. Sec.*, 95 AD3d at 439; *Henry Loheac, P.C. v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]).

To establish unjust enrichment, a plaintiff must show "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks omitted]). To establish a claim for quantum meruit, the plaintiff must demonstrate: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" *(Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012][internal quotation marks omitted]).

The motion court found that defendants were not unjustly enriched because plaintiff was well compensated for his work over the years, and his compensation kept growing as a percentage of the amount Greene was paid. The court dismissed the quantum meruit claim upon the finding that plaintiff was paid through April 2012. However, material issues of fact exist with respect to whether plaintiff is entitled to some further compensation for the work he completed before his termination and for which he did not receive a share of the commission or any direct compensation at all (*see Balestriere PLLC v Banxcorp*, 96 AD3d 497, 498 [1st Dept 2012]). Material issues of fact also exist as to whether defendants were enriched by plaintiff's work, and whether it would be unfair for defendants to retain that benefit without payment to plaintiff (*see John Anthony Rubino & Co., CPA., P.C. v Swartz*, 84 AD3d 599 [1st Dept 2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

Susanna Rojas

CLERK

deny so much of the motion that sought to add (1) an allegation to the breach of fiduciary duty counterclaim (Count One) about plaintiff/counterclaim defendant Robert Vollero's conversation with plaintiff/counterclaim defendant Gentry Beach's lawyer, (2) an allegation to the breach of fiduciary duty counterclaim (Count One) about Vollero's destruction of documents, as against Beach, and (3) a counterclaim for tortious interference with contract (Count Ten), as against Vollero, and otherwise affirmed, without costs.

The new counterclaim for tortious interference with defendant/counterclaim plaintiff Touradji Capital Management's contract with nonparty Benjamin Bram relates back to the original counterclaims (*see* CPLR 203[f]; *Jennings-Purnell v Jennings,* 107 AD3d 513 [1st Dept 2013]; *Giambrone v Kings Harbor Multicare Ctr.,* 104 AD3d 546, 548 [1st Dept 2013]). The original counterclaims gave plaintiffs ample notice that counterclaim plaintiffs were complaining about plaintiffs' allegedly false statements regarding Touradji Capital's dealings with Amaranth. Plaintiffs' alleged inducement of Bram to make false statements to an investigator about Touradji Capital's dealings with Amaranth, i.e., the new tortious interference counterclaim, is part and parcel of the Amaranth transaction or occurrence mentioned in the original counterclaims. However, the amended counterclaims lack factual allegations that Vollero induced Bram to breach his contract with Touradji Capital or that Vollero conspired with Beach with respect to this deed. Hence, Touradji Capital should not be allowed to assert this counterclaim against Vollero.

So much of the breach of fiduciary duty counterclaim as is based on plaintiffs' violation of Rule 105 of Regulation M of the Securities Exchange Act of 1934 is subject to a three-year rather than a six-year statute of limitations (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Counterclaim plaintiffs' argument that the statute of limitations is six years may be considered for the first time on appeal because it does not depend on matter outside the record (*see generally Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]). By contrast, their argument that this portion of their counterclaim did not accrue until they settled with the Securities and Exchange Commission in December 2011 depends on matter outside the record, namely, when they suffered damage by incurring costs to defend against the SEC's inquiry (*see Federal Ins. Co. v Distinguished Props. Umbrella Mgrs. Inc.*, 721 F Supp 2d 293, 298 [SD NY 2010]), so it will not be considered. We are not persuaded by counterclaim plaintiffs' argument that the statute of limitations was tolled between June 21, 2010 (when the court ordered them to wait until discovery was complete before amending their counterclaims) and September 26, 2013 (the completion of discovery).

The Rule 105 allegation does not relate back to the original counterclaims, which gave plaintiffs no notice of this transaction or occurrence (*see e.g. Wright v Emigrant Sav. Bank,* 112 AD3d 401 [1st Dept 2013]; *Matter of Greenspan,* 78 AD3d 555, 556 [1st Dept 2010]). However, it relates back to plaintiffs' own complaint. The Rule 105 allegation relates to Haynesville Shale, and part of plaintiffs' claim is based on that investment (*see Mintz & Fraade, P.C. v Docuport, Inc.,* 110 AD3d 496 [1st Dept 2013]; *Enrico & Sons Contr. v Bridgemarket Assoc.,* 252 AD2d 429, 430 [1st Dept 1998]).

Plaintiffs' violation of a securities regulation, which caused their employer to incur penalties, is "directly against the employer's interests" (*Veritas Capital Mgt., L.L.C. v Campbell,* 82 AD3d 529, 530 [1st Dept 2011], *lv dismissed* 17 NY3d 778 [2011]; *see also Morgan Stanley v Skowron,* 989 F Supp 2d 356, 362-363 [SD NY 2013]). Similarly, the allegation that Vollero destroyed his handwritten notes of his conversations with defendant/counterclaim plaintiff Paul Touradji, replacing them with word-processed versions that progressively became more favorable to plaintiffs, is, when viewed in the context of the overall counterclaim, sufficient to support a breach of fiduciary duty (*see Veritas,* 82 AD3d at 530). However, because these factual allegations only describe Vollero's actions, Touradji Capital should not be allowed to assert this allegation against Beach.

"A party may not invoke the attorney-client privilege where it involves client communications that may have been in furtherance of . . . an alleged breach of fiduciary duty" (*Art Capital Group LLC v Rose,* 54 AD3d 276, 277 [1st Dept 2008] [internal quotation marks omitted]). Because the referee determined that Vollero's conversation with Gentry's lawyer "was for his own representation," Vollero's conversation was privileged and did not violate his fiduciary duty to Touradji Capital, and therefore was not "directly against the employer's interests" (*see Veritas*, 82 AD3d at 530).

The court did not err by treating the spoliation counterclaim as a motion for sanctions (*see Lawrence v North Country Animal Control Ctr., Inc.,* 126 AD3d 1078, 1080 [3d Dept 2015]). This was not barred by law of the case since defendants/ counterclaim plaintiffs' earlier motion sought the ultimate sanction of dismissal of the complaint and plaintiffs' defenses to certain counterclaims, and the court's prior decision left open the possibility of lesser sanctions.

The court properly denied the defamation counterclaim amendment, because Touradji Capital did not allege the place where the statements were made (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]).

Plaintiffs were not prejudiced by the amendment of the counterclaims (*see e.g. Valdes v Marbrose Realty,* 289 AD2d 28, 29 [1st Dept 2001]).

The motion court providently exercised its discretion (*see Bardazzi v Smook,* 189 AD2d 691 [1st Dept 1993]) by not requiring counterclaim plaintiffs to shoulder the cost of any additional discovery necessitated by the amendments.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

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CLERK

Friedman, J.P., Renwick, Moskowitz, Richter, Kapnick, JJ.

1323-
1323A Dragica Brankov,
Plaintiff-Appellant,

Index 103002/11

-against-

David Hazzard, et al.,
Defendants-Respondents,

Euro Lloyd Travel, LLC,
Defendant.

____

The Law Office of Albert Van-Lare, New York (Albert Van-Lare of counsel), for appellant.

Hughes Hubbard & Reid LLP, New York (Ned H. Bassen of counsel), for respondents.

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered March 16, 2015, dismissing the complaint as against defendants David Hazzard and WestLB, AG, unanimously affirmed. Appeal from order, same court and Justice, entered March 3, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In determining whether an ostensible non employer is actually a "joint employer" for purposes of employment discrimination claims under the State and City Human Rights Laws (HRLs), numerous Federal District Courts have applied the "immediate control" test (*see e.g. Tate v Rocketball, Ltd.*, 45 F Supp 3d 268, 273 [ED NY 2014]; *Haight v NYU Langone Med. Ctr., Inc.*, 2014 WL 2933190, *11, 2014 US Dist LEXIS 88117, *28-29 [SD NY 2014]; *Daniel v T&M Protection Resources, Inc.*, 992 F Supp 2d 302, 313 [SD NY 2014]).[1] Under the "immediate control" formulation, a "joint employer relationship may be found to exist where there is sufficient evidence that the defendant had immediate control over the other company's employees," and particularly the defendant's control "over the employee in setting the terms and conditions of the employee's work." "Relevant factors" in this exercise "include commonality of hiring, firing, discipline, pay, insurance, records, and supervision." Of these factors, "the extent of the employer's right to control the means and manner of the worker's performance is the most important factor." If such control is established, other factors "are then of marginal importance" (*Haight*, 2014 WL 2933190, *11, 2014 US Dist LEXIS 88117, *28-29 [internal quotation marks and brackets omitted]).

Viewed in the light most favorable to plaintiff, the record fails to demonstrate that defendant WestLB had the requisite

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[1] The Second Circuit declined to reach the question of whether a joint employer theory could be used "to visit Title VII liability on a constructive employer" (*Arculeo v On-Site Sales & Mktg., LLC*, 425 F3d 193, 202 n 11 2d Cir 2005]).

"immediate control" over the terms and conditions of plaintiff's employment to be subject to liability under the New York State and New York City HRLs as a "joint employer" (*see* e.g. *id.*; *Daniel v T&M Protection Resources, Inc.*, 992 F Supp 2d at 313.

Defendant Euro Lloyd hired plaintiff, paid her salary and bonuses, controlled where she was assigned to work, and placed her at WestLB and later transferred her to other locations. A Euro Lloyd employee supervised plaintiff on a day to day basis. WestLB had no say in the end of plaintiff's employment with Euro Lloyd years after she had been transferred to another location. The record plainly indicates that Euro Lloyd, and not WestLB, ultimately controlled plaintiff's employment.

Accordingly, the motion court correctly held that WestLB was not plaintiff's joint employer, and correctly dismissed plaintiff's claims against WestLB and Hazzard under the State and City HRLs, as those claims rested on plaintiff's theory of joint employment.

Nor does the record, viewed in the light most favorable to plaintiff, show the extreme and outrageous conduct required to support a claim of intentional infliction of emotional distress (*see Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Gische, JJ.

154 Morgan Stanley Mortgage Loan Trust 2006-13ARX, etc., Index 653429/12
Plaintiff-Appellant,

-against-

Morgan Stanley Mortgage Capital Holdings LLC, etc.,
Defendant-Respondent.

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Molo Lamken LLP, New York (Steven F. Molo of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Brian S. Weinstein of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 30, 2014, unanimously reversed, on the law, without costs, and the motion denied.

Opinion by Gische, J. All concur.

Order filed.

Acosta, J.P., Renwick, Saxe, Richter, Gische, JJ.

1492 & M-2710 Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Harborview Mortgage Loan Trust 2007-7, Index 653048/13
Plaintiff-Appellant,

-against-

Flagstar Capital Markets Corporation,
Defendant,

Quicken Loans, Inc.,
Defendant-Respondent.

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WMC Mortgage, LLC,
Amicus Curiae.

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Lowenstein Sandler LLP, New York (Zachary D. Rosenbaum and Michael J. Hampson of counsel), for appellant.

Jones Day, New York (Howard F. Sidman of counsel), for respondent.

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for WMC Mortgage, LLC, amicus curiae.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 14, 2015, affirmed, with costs.

Opinion by Acosta, J. All concur.

M-2710 - ***Deutsche Bank National Trust Company, etc., v Quicken Loans, Inc.***

Motion for leave to file amicus curiae brief granted.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
David B. Saxe
Rosalyn H. Richter
Judith J. Gische, JJ.

1492 & M-2710
Index 653048/13

Deutsche Bank National Trust Company, solely in its capacity as Trustee of the Harborview Mortgage Loan Trust 2007-7,
Plaintiff-Appellant,

-against-

Flagstar Capital Markets Corporation,
Defendant,

Quicken Loans, Inc.,
Defendant-Respondent.

- - - - -

WMC Mortgage, LLC,
Amicus Curiae.

Plaintiff appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered April 14, 2015, which, insofar as appealed from as limited by the briefs, granted defendant Quicken Loans, Inc.'s motion to dismiss the breach of contract claim as time-barred.

Lowenstein Sandler LLP, New York (Zachary D. Rosenbaum, Michael J. Hampson and Jonathan C. Wishnia of counsel), for appellant.

Jones Day, New York (Howard F. Sidman, Heidi A. Wendel and Michael O. Thayer of counsel), for respondent.

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for WMC Mortgage, LLC, amicus curiae.

ACOSTA, J.

In this appeal, we must decide whether the statute of limitations bars a breach of contract action that was brought more than six years after the seller made allegedly false representations and warranties as to loans underlying residential mortgage-backed securities (RMBS). We find that dismissal of the action is mandated by the Court of Appeals' decision in *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v DB Structured Prods., Inc.* (25 NY3d 581 [2015]), which sets forth a clear rule that a breach of contract claim in an RMBS put-back action accrues on the date the allegedly false representations and warranties were made. Notwithstanding the parties' sophistication and their assent to a contract provision specifying a set of conditions that would have delayed the cause of action's accrual, we find that the accrual provision is unenforceable as against public policy, because it is tantamount to extending the statute of limitations based on an imprecise "discovery" rule, which the Court of Appeals has consistently rejected in the commercial sphere (*see id.* at 593-594). Moreover, the accrual provision does not compel defendant to undertake a promised future performance, separate from its obligations to cure or repurchase defective loans, so as to trigger the statute of limitations anew; nor does it contemplate a substantive condition precedent to defendant's performance that would delay accrual of the breach of contract claim (*see id.* at 595, 597; *Deutsche Bank Natl. Trust Co. v Quicken Loans Inc.*, 810 F3d 861 [2d Cir 2015]). Therefore, we affirm the motion court's dismissal of the action as barred by the six-year statute of limitations applicable to breach of contract actions (CPLR 213[2]).

Facts and Background

Defendant Quicken Loans, Inc. originated mortgage loans that were sold to nonparty purchaser/sponsor Morgan Stanley Mortgage Capital, Inc. (Morgan Stanley), pursuant to a Second Amended and Restated Mortgage Loan Purchase and Warranties Agreement, dated June 1, 2006. In sections 9.01 and 9.02 of the agreement, defendant, as originator and seller of the loans, made various representations and warranties to Morgan Stanley, as purchaser, concerning the characteristics, quality, and risk profile of the loans. The representations and warranties were made effective as of the date of the agreement and as of the "closing date" of each loan.[1] It is undisputed that the closing date for the sale of

[1] The agreement defined "Closing Date" as "[t]he date or dates on which the Purchaser from time to time shall purchase, and the Seller from time to time shall sell, the Mortgage Loans listed on the related Mortgage Loan Schedule with respect to the related Mortgage Loan Package."

each package of loans occurred between December 7, 2006, and May 31, 2007.

Section 9.03 of the agreement set forth remedies for breach of representations and warranties. Upon discovery by either the seller or the purchaser of a material breach of any of the representations and warranties, the discovering party was to give the other relevant parties prompt written notice. Within 60 days of either discovery by or notice to the seller of any material breach, the seller was required to cure the breach or either repurchase the defective loan or substitute a "Qualified" loan in its place (the repurchase protocol), and provide indemnification; these were to be the "sole remedies" for the breach.

Section 9.03 also included a provision that purported to delay the accrual of a breach of contract claim until three conditions were met. The accrual provision specified that any cause of action against defendant relating to a breach of representations and warranties "shall accrue as to any Mortgage Loan upon (i) discovery of such breach by the Purchaser or notice thereof by the Seller to the Purchaser, (ii) failure by the Seller to [cure, repurchase or substitute] and (iii) demand upon the Seller by the Purchaser for compliance with this Agreement."

Through various assignments, the loan pool was ultimately conveyed to the HarborView Mortgage Loan Trust 2007-7 (the Trust) and securitized through the issuance of Mortgage Pass-Through Certificates, Series 2007-7, which were sold to investor certificateholders in a securitization that closed on October 2, 2007. Morgan Stanley's rights and remedies as purchaser were subsequently assigned to the Trust, of which plaintiff is the trustee.

In 2013, a certificateholder, Federal Home Loan Mortgage Corporation (Freddie Mac), engaged an underwriting firm to perform a forensic review of the loans underlying some of the certificates. The review process revealed that a large number of the loans breached representations and warranties made by defendant regarding the quality and characteristics of the loans. In July 2013, Freddie Mac informed plaintiff of the breaches, and plaintiff forwarded this information to the master servicer, who notified defendant of the breaches and demanded that defendant comply with the repurchase protocol. In August 2013, Freddie Mac informed the master servicer of additional breaches, and in September the master servicer notified defendant of those breaches and demanded compliance.

On August 30, 2013, plaintiff, at the direction of Freddie Mac, commenced this action against defendant by filing a summons with notice for breach of contract in connection with defendant's breaches and failure to cure or repurchase the loans. On

February 3, 2014, plaintiff filed the complaint in this action seeking specific performance, damages and/or rescission, and asserting a cause of action for breach of contract and a cause of action for breach of the implied covenant of good faith and fair dealing.

Defendant moved to dismiss the complaint based upon the statute of limitations, in addition to other grounds not relevant here. In arguing that the action was untimely, defendant contended that the loans at issue were sold to Morgan Stanley in several groups, with the closing date for the sale of each package of loans occurring between December 7, 2006, and May 31, 2007, so that all claims accrued in or before May 2007. Thus, defendant argued, the action was untimely commenced on August 30, 2013, more than six years after the accrual date.

In opposition, plaintiff did not dispute that the representations under the agreement were effective as of the closing date for the sale of the loans (i.e., May 31, 2007, at the latest), but argued that the statute of limitations had not lapsed, under the agreement's accrual provision.

The motion court granted defendant's motion to dismiss, as relevant on appeal, the breach of contract claim as untimely.

Plaintiff appeals.

<u>Discussion</u>

"Statutes of limitation not only save litigants from defending stale claims, but also 'express[] a societal interest or public policy of giving repose to human affairs'" (*ACE Sec. Corp. v DB Structured Products, Inc.* [*ACE*], 25 NY3d 581, 593 [2015], quoting *John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979], omitting internal quotation marks). "Because of the combined private and public interests involved, individual parties are not entirely free to waive or modify the statutory defense" (*Kassner*, 46 NY2d at 550). Although parties may agree *after* a cause of action has accrued to extend the statute of limitations, an "agreement to . . . extend the Statute of Limitations [that] is made at the inception of liability [will be] unenforceable because a party cannot 'in advance, make a valid promise that a statute founded in public policy shall be inoperative'" (*id.* at 551, quoting *Shapley v Abbott*, 42 NY 443, 452 [1870]).

In *ACE*, the Court of Appeals held that a breach of contract claim in an RMBS put-back action accrues on the date the allegedly false representations and warranties were made (25 NY3d 589). The Court stated, "Where . . . representations and warranties concern the characteristics of [the loans] as of the date they are made, they are breached, if at all, on that date" (*id.* at 589). The agreement in the instant case made defendant's representations and warranties effective on the date of the agreement (June 1, 2006), and on the closing date of the sale of the loans. It is undisputed that the closing dates of the loan sales were between December 7, 2006, and May 31, 2007. Therefore, plaintiff's causes of action for breach of contract accrued, at the latest, on May 31, 2007, and this action, commenced more than six years later on August 30, 2013, is barred by the statute of limitations (CPLR 213[2]).

Plaintiff's attempt to distinguish *ACE* by the absence of an accrual provision in that case is unavailing. The accrual provision in the agreement is unenforceable, despite the principle of freedom of contract upon which plaintiff relies. To be sure, freedom of contract is fundamental in New York law, but it is not absolute, and must give way to "countervailing public policy concerns" in appropriate circumstances (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]). New York's statutes of limitation codify the public policies of "finality, certainty and predictability that [our] contract law endorses" (*ACE*, 25 NY3d at 593). The parties' accrual provision runs afoul of these important policies.

Not only would enforcement of the accrual provision, entered into at the inception of the breach, serve to "*postpone the time* *from which the period of limitation is to be computed*" (*Kassner*, 46 NY2d at 551, quoting 1961 Report of NY Law Rev Comm, pp 97, 98, adding emphasis), but it also would contravene the principle that "New York does not apply the 'discovery' rule to statutes of limitations in contract actions" (*ACE*, 25 NY3d at 594). The accrual provision's set of conditions creates an imprecisely ascertainable accrual date - possibly occurring decades in the future, since some of the loans extend for 30 years - which the Court of Appeals has "repeatedly rejected . . . in favor of a bright line approach" (*id.* at 593-594 [internal quotation marks omitted]).

In addition, it is noteworthy that the Second Circuit adhered to *ACE* in a matter involving an accrual provision that is materially identical to the one at issue here, although it did so without voiding the provision on public policy grounds. In *Deutsche Bank Natl. Trust Co. v Quicken Loans Inc.* (810 F3d 861, 863 [2d Cir 2015]), the Second Circuit held, inter alia, that the statute of limitations ran from the date the representations and warranties were made and thus barred the trustee's action, notwithstanding the presence of an accrual provision. Assuming arguendo that the accrual provision is not unenforceable as a matter of public policy, we are persuaded by the Second Circuit's reasoning in *Deutsche Bank*, and similarly apply *ACE* here.

Plaintiff's untimely action cannot be saved by construing the accrual provision as a promise of future performance by defendant. The *ACE* Court noted that "[a]lthough parties may contractually agree to undertake a separate obligation, the breach of which does not arise until some future date, the repurchase obligation undertaken by [the seller in that case] d[id] not fit this description" (*id.* at 594). As an example of a contract to undertake a separate obligation, the *ACE* Court discussed *Bulova Watch Co. v Celotex Corp.* (46 NY2d 606 [1979]), in which a contract for the sale of a roof contained a separate clause guaranteeing that the seller would make repairs at its own expense (*ACE*, 25 NY3d at 595). The *Bulova Watch* Court held that the repair clause was a separate obligation "from the contract to supply roofing materials, the breach of which triggered the statute of limitations anew" (*id.* [internal quotation marks omitted]). Unlike the guarantee of future performance in *Bulova Watch*, the defendant's cure-or-repurchase obligation in *ACE* "could not reasonably be viewed as a distinct promise of future performance," because "[i]t was dependent on, and indeed derivative of, [the] representations and warranties" underlying the loans (*id.* at 595). So too here.

Plaintiff argues that defendant promised future performance because the agreement states that the representations and warranties are to survive the sale of the loans. The Second Circuit's decision in *Deutsche Bank* explains why "[t]his argument misses the mark" (810 F3d at 866). The representations and warranties made by defendant

> "guarantee, at their core, no more than the present characteristics and quality of the loans as of a specific moment in time. Whether they 'survive'—*i.e.*, remain valid and enforceable—does not alter the question of performance. A representation of present fact is either true or false—and the contract therefore performed or breached—if the underlying fact was true or false at the time the representation was made" (*id.* [footnote omitted]).

Thus, plaintiff "was entitled to demand [its] contractual remedy" at the moment the representations became effective, "and the cause of action therefore accrued at that time" (*id.*). As the agreement did not call for future performance of a separate obligation by defendant, this action cannot be deemed timely on that basis.

Similarly, the accrual provision's requirement that plaintiff make a demand on defendant for performance of the agreement does not constitute a substantive condition precedent that could delay accrual of the breach of contract claim. As in *ACE*, plaintiff overlooks the significant distinction between substantive and procedural demand requirements (*see* 25 NY3d at 597). A demand "that is a condition to a party's *performance*" is a substantive condition precedent, which can delay accrual of a claim, whereas "a demand that seeks a remedy for a preexisting wrong" is a procedural prerequisite to suit, which cannot (*see id.*; *Deutsche Bank*, 810 F3d at 867). Because plaintiff "suffered a legal wrong at the moment [defendant] allegedly breached the representations and warranties[,] . . . a cause of action existed for breach of a representation and warranty" at that time (*ACE*, 25 NY3d at 597-598). Plaintiff was merely "limited in its remedies for that breach" (*id.*), and could only have pursued its "sole remedies" under the repurchase protocol. "Hence, the condition [that plaintiff demand defendant's compliance with the agreement] was a procedural prerequisite to suit," not a substantive condition precedent to defendant's performance (*id.* at 598; *see also Deutsche Bank*, 810 F3d at 867).

Finally, we reject plaintiff's argument that even if the motion court correctly deemed the accrual provision unenforceable, it erred in holding that all of the breach of contract claims were time-barred. Plaintiff contends that at least one of the representations was allegedly breached by defendant as late as October 2, 2007 (the closing date of the securitization, when the loans and rights under the purchase agreement were assigned to the Trust), rendering timely the claim asserted in the complaint filed on August 30, 2013. The complaint alleges that in connection with the securitization, defendant made certain representations in addition to those made in the agreement, and cites section 9.01(m)[2] of the agreement as one of the representations and warranties defendant made in connection with the loans that implicated the repurchase protocol *as well as* the securitization transaction. However, the complaint's allegations all relate to the representations and warranties made about the loans in the agreement in 2006 and the closing dates of the loan sales, the last of which occurred in May 2007.[3] They do not address any other allegedly false statement or information furnished by defendant on October 2, 2007, in connection with the securitization. Therefore, all of plaintiff's claims accrued no later than May 31, 2007, and were not timely asserted when plaintiff commenced this action more than six years later.

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[2] Section 9.01(m) states in pertinent part that "[t]o the Seller's knowledge, neither this Agreement nor any information . . . furnished or to be furnished pursuant to this Agreement or in connection with the transactions contemplated hereby (including any Securitization Transaction . . . .) contains or will contain any untrue statement of fact or omits or will omit to state a fact necessary to make the statements contained herein or therein not misleading."

[3] Even section 9.01(m) appears under the broader provision of section 9.01, stating that defendant's representations and warranties were made "as of the date hereof [June 1, 2006] and as of each Closing Date [which was defined as the date of sale of the loans, the latest of which was on May 31, 2007]."

Conclusion

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered April 14, 2015, which, insofar as appealed from as limited by the briefs, granted defendant Quicken Loans Inc.'s motion to dismiss the breach of contract claim as time-barred, should be affirmed, with costs.

All concur.

M-2710 - ***Deutsche Bank National Trust Company, etc., v Quicken Loans, Inc.***

Motion for leave to file amicus curiae brief granted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

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CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Karla M. Moskowitz
Rosalyn H. Richter
Judith J. Gische, JJ.

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______________________________________x

Morgan Stanley Mortgage Loan Trust 2006-13ARX, etc.,
Plaintiff-Appellant,

-against-

Morgan Stanley Mortgage Capital Holdings LLC, etc.,
Defendant-Respondent.

______________________________________x

Plaintiff appeals from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered September 30, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the first and second causes of action to the extent they seek damages inconsistent with the terms of the repurchase protocols and the fifth cause of action.

Molo Lamken LLP, New York (Steven F. Molo, Justin M. Ellis, Tuongvy T. Le, Joel M. Melendez and Gajan Sivakumaran of counsel), for appellant.

Davis Polk & Wardwell LLP, New York (Brian S. Weinstein, James P. Rouhandeh, Carissa M. Pilotti and Craig T. Cagney of counsel), for respondent.

GISCHE, J.

This case arises from the securitization and sale of residential mortgages. The mortgage loans originated with an affiliated entity of defendant, Morgan Stanley Capital Holdings LLC (Morgan Stanley). Plaintiff, U.S. Bank National Association (Trustee), as trustee of the Morgan Stanley Mortgage Loan Trust 2006-13ARX holding the underlying loans ("Trust"), seeks redress for the massive loan defaults that occurred, rendering the residential mortgage backed securities (RMBS) it sold to outside investors virtually worthless. Insofar as relevant to this appeal, the Trustee, in addition to its other breach of contract claims, alleges that Morgan Stanley breached a contractual duty to notify the Trustee of the defective loans, giving rise to damages not governed by the sole remedies restrictions in the parties' agreements, and also that Morgan Stanley's gross negligence otherwise renders the sole remedies clauses unenforceable. We are called upon to decide whether the motion court correctly granted defendant's preanswer motion dismissing these particular claims. We hold that, consistent with our recent decision in *Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.* (133 AD3d 96, 108 [1st Dept 2015] [*lv granted* 1st Dept January 5, 2016]), defendant's alleged breach of its contractual duty to notify the Trustee of defective loans gives rise to an independent, separate claim for breach of the parties' agreements, which should not have been dismissed. We also hold that, under the highly deferential standard afforded to pleadings, the particular facts alleged in the amended complaint are sufficient to support plaintiff's claim of gross negligence, which should not have been dismissed (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]).

Morgan Stanley is the successor in interest to Morgan Stanley Mortgage Capital, Inc., which sold debt, in the form of 1,873 residential mortgage loans, to a Morgan Stanley affiliate, Morgan Stanley Capital I, Inc. The sale, which represented an unpaid principal balance of more than $600,000,000, was largely effectuated through two integrated agreements, a Mortgage Loan Purchase Agreement (MLPA) and a Pooling and Servicing Agreement (PSA), both dated as of September 1, 2006. These residential mortgage loans were pooled together and sold to the Trust, which issued certificates representing ownership shares in the combined assets. These RMBS were then offered for sale, by prospectus, to investors. Mortgage payments were the anticipated source of revenues that the Trustee would use to pay investors. However, when hundreds of the borrowers defaulted in making their mortgage payments, the RMBS became virtually worthless (see *Nomura* at 99 [discussion on how RMBS are created]).

MLPA Article III, section 301, sets forth 39 warranties and representations made by Morgan Stanley in connection with the sale of the loans to the Trust. These are incorporated by reference in the PSA. Most of the representations and warranties pertain to the characteristics, quality and overall risk profile of the loans. Among them are the following:

> "(a) The information set forth in the Mortgage Loan Schedule is complete, true and correct in all material respects as of the Cut-Off Date [September 1, 2006].
>
> "(b) Seller is the sole owner and holder of the Mortgage Loans free and clear of any liens . . . and has full right and authority to sell and assign same. . .
>
> "(d) The Mortgage Loan is not in default and all monthly payments due prior to the transaction have been paid . . .
>
> "(m) There is no default, breach, violation, anticipated breach or event of acceleration existing under the Mortgage or the related Mortgage Note and no existing or known event which, with the passage of time . . . would constitute a default, breach, violation or event of acceleration under such Mortgage or the related Mortgage Note. . .
>
> "(w) Each Mortgaged Property is improved by a one- to four-family residential dwelling . . . "

The MLPA states further that any representations and warranties are made to the "best of the Seller's knowledge" and provides for the following actions to take place in the event of a breach:

> "(mm) . . . if it is discovered by the Depositor, the Seller, the Service or the Trustee . . . 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 therein of the Purchaser or the Purchaser's assignee, transferee or

> designee then, notwithstanding the Seller's lack of knowledge with respect to the substance of such representation and warranty being inaccurate at the time the representation or warranty was made, such inaccuracy shall be deemed a breach of the applicable representation or warranty."

If any party later discovered that any loans breached a representation or materially and adversely affected the value of any loan, the purchaser's interest, etc., then within 90 days of such discovery, the party discovering the defect had to notify the other parties and the seller was obligated to cure the defect by providing any missing documentation, replacing the defective mortgage with an "eligible" one, or repurchasing the affected loan at the "purchase price," defined as follows:

> "the sum of (i) 100% of the unpaid principal balance of the Mortgage Loan on the date of such purchase and (ii) accrued interest thereon . . . from the date through which interest was last paid by the Mortgagor to the Due Date in the month in which the Purchase Price is to be distributed to Certificate holders . . . and (iii) costs and damages incurred by the Trust Fund in connection with repurchase . . .that arises out of a violation of any predatory or abusive lending law . . ."

The MLPA provides further that

> "it is understood and agreed that the obligations of the Seller in this Section 3.01 to cure, repurchase or substitute for a defective Mortgage Loan ***constitutes the sole remedy of the Purchaser*** respecting a missing or defective document or a breach of the representations or warranties contained in this Section 3.01"(emphasis supplied).

The complaint alleges that the Trust has suffered more than $140 million in damages attributable to the falsity of the representations and warranties made by Morgan Stanley with reckless indifference, because it did not adhere to the barest minimum of underwriting standards. The Trustee claims that when it notified Morgan Stanley of the defective loans, demanding that Morgan Stanley repurchase them, Morgan Stanley refused to do so. The Trustee claims that upon conducting a forensic examination of the RMBS, it discovered that there were hundreds of loans that were of lesser quality than what Morgan Stanley had represented. The complaint alleges many of the underlying borrowers obtained their loans by providing basic and critical information on their applications that was inaccurate, if not outright false, and that Morgan Stanley failed to verify. For instance, the borrowers misrepresented their incomes, inaccurately reported their employment statuses and/or employment histories, and/or misrepresented their actual debt obligations. Some borrowers failed to disclose ownership of other mortgage encumbered properties, or that they did not occupy the underlying properties securing the mortgages. Many loans had incorrect and/or unsatisfactory debt-to-income ratios. The complaint alleges that Morgan Stanley should have notified the Trustee of these breaches because it knew of them, or could have discovered them with due diligence, given its superior access to documents and information about these loans. The Trustee contends that Morgan Stanley made representations to make the loans appear less risky than they were. Despite the sole remedy provision, the complaint alleges that contractual damages will not adequately compensate the Trust for its losses.

Morgan Stanley moved to dismiss the complaint. The motion court dismissed the fifth cause of action alleging a breach of contract based on Morgan Stanley's failure to notify plaintiff about the defective loans. The motion court rejected the Trustee's argument that Morgan Stanley's inaction constituted an independent breach of contract claim, finding that the requirement was not a contractual obligation, but merely a notification remedy. The motion court also dismissed the claims that Morgan Stanley's conduct constituted gross negligence on the basis that "the relief available to plaintiff is limited by the sole remedy provisions in the [PSA] and the [MLPA]..." Alternatively, the motion court held that even if, legally, the sole remedy limitations in the MLPA and PSA could be rendered unenforceable by Morgan Stanley's willful misconduct or gross negligence, the complaint did not contain facts to sufficiently support that claim.

In dismissing plaintiff's failure to notify cause of action, the motion court observed that the issues raised by the Trustee were substantially the same as those raised in another

RMBS case before it, *Nomura Asset Acceptance Corp. Alternative Loan Trust v Nomura Credit & Capital, Inc* (2014 Slip Op 31671 [U] [Sup Ct, NY County, June 26, 2014] [Friedman, J.]) and that its ruling was consistent with that earlier case. After the parties briefed this appeal, this Court modified the motion court's decision in *Nomura,* holding that under similar RMBS agreements, a seller's failure to provide the trustee with notice of material breaches it discovers in the underlying loans states an independently breached contractual obligation, allowing a plaintiff to pursue separate damages (*Nomura,* 133 AD3d at 108). Consistent with our decision in *Normura*, we now modify the motion court's order dismissing the failure to notify claim made in this case and reinstate it.

In connection with plaintiff's claims of gross negligence, our starting point is, as always when considering a preanswer motion to dismiss, a presumption that the allegations in the pleading are true and are entitled to the benefit of all favorable inferences that may be made therefrom (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court's role is to determine only whether the facts as alleged fit into any cognizable legal theory and not whether the plaintiff will ultimately be successful on the claim (*Nomura*, 133 AD3d at 105).

As a general principle of law, damages arising from a breach of contract will ordinarily be limited to those necessary to redress the wrong (*see e.g. Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Where parties contractually agree to a limitation on liability, that provision is enforceable, even against claims of a party's own ordinary negligence (*Sommer v Federal Signal Corp*., 79 NY2d at 553, 554). The purpose of provisions that limit liability or remedies available in the event of breach is to "allocat[e] the risk of economic loss in the event that the contemplated transaction is not fully executed" (*Metropolitan Life Ins. Co. v Noble Lowndes Int'l.*, 84 NY2d 430, 436 [1994]). Courts will generally honor the remedies that the parties have contractually agreed to (*id.*).

There are exceptions to this rule of law, however, and as a matter of long standing public policy, a party may not insulate itself from damages caused by its "grossly negligent conduct" (*Sommer* at 554). Used in this context, "gross negligence" differs in kind, and not only degree, from claims of ordinary negligence. "It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823-824 [1993], *citing Sommer* 79 NY2d at 554).

In support of its claim for gross negligence, the complaint alleges that Morgan Stanley acted with reckless indifference. It alleges there were widespread breaches across the loans being held by the Trust and that Morgan Stanley failed to adhere to even minimal underwriting standards or to verify basic and critical information about potential buyers; it further alleges that Morgan Stanley had access to the underlying loan files and that more than half of the loans later reviewed by plaintiff's forensic analysts revealed rampant breaches of the warranties Morgan Stanley made. It further alleges that Morgan Stanley simply ignored its contractual obligations, disregarded the known or obvious risks that the loans sold to the Trustee were defective and then failed to notify the Trustee of any breaches or effectuate a cure/repurchase. We hold that these allegations are sufficient to withstand dismissal at the pleading stage.

In other contexts, we have recognized that allegations of serious and pervasive misrepresentations regarding the level of risk in an investment with widespread, massive failures will support a claim for contractual gross negligence (*Ambac Assur. UK Ltd v JP Morgan Inv. Mgt., Inc.*, 88 AD3d 1 [1st Dept 2011]). In yet other contexts, we have recognized that this type of alleged conduct in substantially similar investments would even support a claim of fraud (*Basis Yield Alpha Fund Master v Morgan Stanley*, 136 AD3d 136, 143, 144 [1st Dept 2015]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287 [1st Dept 2011]). Consistent with these decisions, the allegations in this case are sufficient to support a claim of gross negligence. We recognize that some trial courts have taken different approaches when faced with issues involving the scope of the sole remedies clauses in residential mortgage put-back actions (*see e.g. SACO I Trust 2006-5 v EMC Mtge. LLC,* 2014 NY Slip Op 31432 [Sup Ct, NY County 2014]; *but see Deutsche Alt-A Sec. Mtge. Loan Trust, Series OA1 v DB Structured Prods., Inc*, 958 F Supp2d 488, 501 [SD NY 2013]). Given that this case is only at a pleading stage, and consistent with our own precedent however, we believe that the allegations of gross negligence should not be dismissed.

Morgan Stanley argues that because the contractual limitations at bar do not completely insulate it from liability, the gross negligence exception to enforcement does not apply. In *Sommer*, the Court of Appeals recognized that the public policy that prohibits a party from insulating itself from damages caused by grossly negligent conduct applies equally to a clause that completely exonerates a party from liability as well as to a clause limiting damages to something nominal (*Sommer* at 554). The same rationale applies to sole remedies that are illusory. Morgan Stanley argues that the sole remedy clauses at issue would make the investors whole "by requiring that any such loans be repurchased." That conclusion regarding the actual effect of the sole remedy clause remains to be tested. In *Nomura,* we recognized that the remedy of specific performance in put-back cases might be impossible to fulfill (*Nomura* at 106). It is for this reason we left open the possibility that, even for ordinary breach of contract claims, equity may require an award of monetary damages in lieu of specific performance. *Nomura* is now pending before the Court of Appeals. The issue of whether the sole remedies clause in these contracts will make the investors whole cannot be ascertained at this stage of the litigation, militating in favor of permitting the allegations of gross negligence to remain.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered September 30, 2014, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the first and second causes of action to the extent they seek damages inconsistent with the terms of the repurchase protocols and the fifth cause of action, should be reversed, on the law, without costs, and the motion denied.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 11, 2016

CLERK