SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE
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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., and COUNTRYWIDE FINANCIAL CORP.,

Defendants.
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Index No.: 602825/08
Motion Date: 1/22/09
Motion Sequence No.: 004

PRESENT: HON. EILEEN BRANSTEN, J.S.C.

Pursuant to CPLR 3016 (b) and 3211 (a) (1) and (a) (7), Countrywide Securities Corp. ("Countrywide Securities") and Countrywide Financial Corp. ("Countrywide Financial") seek dismissal of the entire complaint against them and Countrywide Home Loans, Inc. ("Countrywide Home") moves to dismiss the causes of action for fraud, negligent misrepresentation and breach of the implied covenant of good faith and fair dealing asserted against it. MBIA opposes the motion.

BACKGROUND

A residential mortgage-backed security ("RMBS") "is a type of security whose cash flows come from residential debt such as mortgages, home-equity loans and subprime mortgages" (http://www.investopedia.com/terms/r/rmbs.asp). An entity, typically a trust, issues notes secured by the RMBS (Compl at ¶ 28). The cash flows from these securitized

residential loans—in the form of payments of interest and principal—are used to pay obligations on the RMBS notes (the "Notes") (*id.* at ¶ 28).

Countrywide Financial is engaged in mortgage lending and other real-estate finance related businesses, including mortgage banking, securities dealing and insurance underwriting (*id.* at ¶ 9). Countrywide Home, which originates and services residential home mortgage loans, and Countrywide Securities, which is a registered broker-dealer and underwrites offerings of mortgage-backed securities, are both wholly owned subsidiaries of Countrywide Financial (*id.* at ¶¶ 10-11) (collectively, "Countrywide").

MBIA is a monoline[1] insurer and provides financial guarantee insurance and other forms of credit protection to issuers (Compl at ¶ 8).

Beginning in 2004, Countrywide expanded its origination and securitization of riskier products, including sub-prime mortgages, interest-only loans, closed-end second liens ("CES"), and home equity lines of credit ("HELOCs"), with a much broader base of potential borrowers (*id.* at ¶ 22).

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[1]Monoline refers to a business that focuses specifically in one financial area. (http://www.investopedia.com/terms/m/monoline.asp.) "The main advantage of monolines is that these companies have specialized skills and provide expertise beyond what can usually be expected from companies that businesses are spread across many different financial areas" (*id.*).

From 2002 through 2007, MBIA provided credit enhancement in a total of 17 Countrywide securitizations of mortgage loans (*id.* at ¶ 34). However, this action only concerns the 10 securitizations underwritten between 2005 and 2007, involving home equity lines of credit and closed-end second liens[2] (*id.* at ¶¶ 27, 34). Because the mortgages are the only collateral supporting the RMBS, their credit quality is of critical importance to an RMBS noteholder (*id.* at ¶ 28).

To increase the marketability of the Notes, Countrywide engaged MBIA to provide credit enhancement—in the form of a guarantee of repayment of principal and interest for the RMBS notes in each securitization (*id.* at ¶ 30).

To induce MBIA to guarantee the securitizations, Countrywide made representations and warranties to MBIA concerning the origination and quality of the mortgage loans, including that the mortgage loans had been underwritten pursuant to its extensive set of approved guidelines (*id.* at ¶ 32). Countrywide made available to MBIA a summary of its underwriting procedures for each securitization and represented that its underwriting of the mortgage loans conformed to its stated underwriting procedures as well as industry standards

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[2]A HELOC is a second lien on residential property (Compl at ¶ 22). The borrower's equity in the property (the value of the property that is not used as collateral for the first lien) collateralizes a specified line of credit that may be drawn down by the borrower (*id.*). A CES is also collateralized by the borrower's equity, but the loan is of a fixed amount (*id.*). Since both are second liens, they are junior in priority to the first lien, and, if the property is foreclosed, the proceeds must be used to fully satisfy the first lien before the second lien is paid (*id.*).

(*id.* at ¶ 34). It also provided specific data points for each loan in what is known as a loan tape, which reported information such as the loan-to-value ratio ("LTV") for each loan and the debt-to-income ("DTI") ratio for each borrower, as well as each borrower's FICO score—a measure of creditworthiness (*id.*). Additionally, Countrywide provided to MBIA shadow credit ratings[3] on the proposed pool of mortgage loans intended for securitization, submitted a December 14, 2004 Prospectus filed with the Securities and Exchange Commission ("SEC") and supplemental prospectuses also filed with the SEC, and made formal presentations concerning its expertise and capabilities in loan origination and servicing (*id.* at ¶¶ 35-37).

Countrywide further agreed that, in the event of a breach of any representation or warranty related to a mortgage loan (a "Defective Loan"), it would either cure the breach or repurchase or substitute eligible mortgage loans for the Defective Loan (*id.* at ¶ 33).

Components of a securitization

Countrywide arranged and securitized each of the ten securitizations through a similar series of contracts, including: (a) a Purchase Agreement, which provided for the sale of

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[3]This is a rating performed on an issuing party, but without any public announcement of the results (http://www.investopedia.com/terms/s/shadowrating.asp). "Shadow ratings are useful for companies trying to assess how much a debt issue might be worth to investors. Rather than publicly releasing the results of a credit analysis by a third party, companies might wish to first know what the results are before it is released to the public" (*id.*).

mortgage loans to a Countrywide affiliate created to effect the securitizations; (b) a Sale and Servicing Agreement which transferred the mortgage loans to a single purpose trust (the "Trust"), and confirmed the terms of Countrywide's engagement by the Trust to service the mortgage loans; (c) a Prospectus and Supplemental Prospectus filed by the Trust, which Countrywide used to sell the mortgage-backed securities; and (d) a Trust Indenture, which, among other things, established the rights of holders of securities and the obligations of the Trustee (collectively, the "Transaction Documents") (*id.* at ¶ 38).

Countrywide, the Trust, and MBIA then entered into an Insurance Agreement which provided the terms for the issuance of an MBIA financial guaranty policy that would be issued to the Trust (*id.* at ¶ 39). In each transaction, the Insurance Agreement incorporated the representations and warranties and the obligations of the parties in the Transaction Documents and gave MBIA the right to rely on these representations and warranties, to enforce their terms, and to exercise remedies for any breach (*id.*).

Securitizations deteriorate

Starting in 2007, there was a marked increase in loan delinquencies from the securitizations (*id.* at ¶ 55). The total cash flow from the mortgage payments in several of the securitizations was insufficient for the Trusts to meet their payment obligations to holders of the RMBS notes (*id.*). These deficiencies caused the Trusts to submit claims on MBIA's insurance policies, demanding that MBIA cover the shortage of funds (*id.*).

By September 2008, MBIA had paid over $459 million on its policies that covered the Countrywide securitizations (*id.* at ¶ 56).

In 2008, MBIA commenced this action asserting causes of action for (1) fraud; (2) negligent misrepresentation; (3) breach of the insurance agreement; (4) breach of the sale and servicing agreement; (5) breach of the implied covenant of good faith and fair dealing; and (6) indemnification.

ANALYSIS

Fraudulent inducement

Duplicative claims

MBIA's fraud claim is based on allegations that "Countrywide made available to MBIA . . . a summary of its underwriting procedures for each Securitization, and represented that its underwriting of the Mortgage Loans conformed to its stated underwriting procedures as well underwriting standards"; "provided MBIA with specific data points for each loan in what is known as a loan tape," which "reported information such as the loan-to-value ratio (LTV) for reach loan and the debt-to-income (DTI) ratio for each borrower, as well as each borrower's FICO score, which is a measure of creditworthiness"; and "represented that it was not aware of any reason why a borrower would not be able to repay a mortgage loan" (Compl at ¶ 34; *see id.* at ¶ 32).

At the outset, Countrywide argues that MBIA's fraud claim must be dismissed because "[a] fraud-based cause of action is duplicative of a breach of contract claim 'when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract'" (*MaNas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008] [insufficient to allege that defendants did not intend to compensate plaintiff in conformity with their promises]).

A tort claim cannot be recast as a breach of contract claim (*see Kaminer v Wexler*, 40 AD3d 405, 406 [1st Dept 2007]). On the other hand, "if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim" (*First Bank of the Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291-92 [1st Dept 1999] [hereinafter "*First Bank*"]).

While the same transaction may give rise to a claim for fraud or for breach of warranty, a fraud claim based on misrepresentations made in a warranty that does not arise out of collateral facts, may be precluded as duplicative (*see Varo, Inc. v Alvis PLC*, 261 AD2d 262, 265 [1st Dept 1999] [claim for fraud did not arise out of collateral facts because "the fraud is alleged to have occurred by virtue of the representations made in the environmental warranty"] [dicta], *lv denied sub nom. IMO Indus. v Alvis PLC*, 95 NY2d 767 [2000] [table]).

As the cases cited by both MBIA and Countrywide illustrate, fraud claims have been dismissed as duplicative of breach of a contract claim when a plaintiff merely alleged that the defendant misrepresented its intent to perform under an agreement (*see, e.g., 767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 76 [1st Dept 2004] ["It is well established that a fraud claim must fail if the alleged fraudulent misrepresentations only relate to a party's claimed intent to breach a contractual obligation"]; *Brine v 65th Street Townhouse LLC*, 2008 WL 3915784, *3 [Sup Ct, NY County 2008] [duplicative when the only alleged fraud was that the defendant was not sincere when it promised to perform under the contract]).

Another basis is when the alleged misrepresentation is the breach of the warranty itself (*see, e.g., Pramco III, LLC v Partners Trust Bank*, 15 Misc 3d 1142[A], 2007 NY Slip Op 51119[U], * 2 [Sup Ct, Monroe County 2007] ["the only misrepresentation alleged by (plaintiff) was the contractual warranty itself"]; *Martian Entertainment, LLC v Harris*, 12 Misc 3d 1190[A], 2006 NY Slip Op 51517[U], *5 [Sup Ct, NY County 2006] [the "alleged misrepresentations are simply allegations that the best efforts provision of the . . . Agreement had not been performed that is, that (it) was breached"]).

Although warranties generally constitute statements of fact instead of intent (*First Bank*, 257 AD2d at 292 ["A warranty is not a promise of performance, but a statement of

present fact"]), fraudulent-misrepresentation allegations in connection with contractual warranties will be dismissed if no other misrepresentation other than the warranty is alleged.

In contrast, a fraudulent inducement claim will be sustained when it is alleged that misrepresentations were made to induce the plaintiff to enter into the contract in the first place (*see, e.g., WIT Holding Corp. v Klein*, 282 AD2d 527, 528-29 [2d Dept 2001] [fraud claim sustained when plaintiff alleged that, during discussions about an agreement to purchase an interest in a company, defendants made misrepresentations of fact to induce plaintiff to enter into the agreement]; *B & F Prod. Dev., Inc. v Fasst Prods. LLC*, 22 Misc 3d 1107[A], 2009 NY Slip Op 50063[U], *5 [Sup Ct, Kings County 2009] [extraneous when plaintiff alleged that fraudulent misrepresentations were made by defendants prior to, and as an inducement for it to enter into the Agreement]; *J.A.O. Acquisition Corp. v Stavitsky*, 192 Misc 2d 7, 13 [Sup Ct, NY County 2001] ["The core of plaintiffs' claim is that defendants intentionally misrepresented material facts about the inventory, the accounts, and the financial viability and net worth of the company, so that those warranties appeared satisfied. This is an appropriate fraud claim"]).

Even when the alleged misrepresentations are also contained in the agreement, a fraudulent inducement claim has been permitted to proceed along with a breach of contract claim (*see Jo Ann Homes at Bellmore, Inc. v Dworetz*, 25 NY2d 112, 118-19 [1969] [reinstating the fraud cause of action when plaintiff alleged that he was fraudulently induced

into signing a land sales contract by a number of misrepresentations concerning the condition of the property, even though the alleged misrepresentations were set forth in the contract as warranties]; *see also VTech Holdings Ltd. v Lucent Techs. Inc.*, 172 F Supp 2d 435, 439 [SD NY 2001] [alleged misrepresentations of present fact in certifications, submitted at the closing, induced plaintiff into believing that the conditions precedent to the closing were satisfied and therefore based on allegations that it was "induced to enter into a contract and then complete the closing by a series of misrepresentations of present fact, rather than a series of false promises"]; *but see Bank of Tokyo-Mitsubishi Ltd. v Enron Corp. (In re Enron)*, 2005 US Dist LEXIS 2134, *43 [SD NY 2005] [alleged misrepresentations could not form the basis of a separate fraudulent inducement claim when, in defining an "Event of Default" to include the misrepresentations, the agreement specifically envisioned the remedies that should be available if those misrepresentations materialized]).

Here, MBIA alleges that Countrywide misrepresented, among other things, the origination and quality of the mortgage loans to induce it into entering the Insurance Agreement. Because MBIA's claim relates to representations in connection with entering into the Insurance Agreement, and not simply a breach of its terms, the fraud claim is not duplicative.

Statement of fact or promise of future action

Countrywide also seeks dismissal of the fraud claim based on MBIA's allegation that it "had no intention of abiding by its contractual representations and warranties" (Compl at ¶ 66). Defendants' argument is unpersuasive. The misrepresentations MBIA alleges are specific affirmations not mere hopes or expectations (*see Channel Master Corp. v Aluminium Ltd. Sales, Inc.*, 4 NY2d 403, 408 [1958]). "Such statements and representations when false are actionable" (*id.*). Indeed, MBIA alleges that Countrywide misrepresented that certain things *occurred*, knowing they did not (*see* Compl at ¶¶ 66-81, 98). Accordingly, Countrywide fails to demonstrate that MBIA's fraud claim is not based on allegations of fact.

Justifiable reliance

Additionally, Countrywide asserts that MBIA fails to allege any justifiable reliance—an essential element of fraud. Specifically, Countrywide contends that MBIA received detailed loan information, but failed to avail itself of readily available information or wilfully ignored it.

"As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arms length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties" (*UST Private Equity Investors Fund, Inc. v Salomon Smith*

Barney, 288 AD2d 87, 88 [1st Dept 2001]). To sustain a fraud claim, sophisticated investors "must have discharged their own affirmative duty to exercise ordinary intelligence and conduct an independent appraisal of the risks they are assuming" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 60 AD3d 421, 424 [1st Dept 2009] [no reasonable reliance when plaintiffs failed to conduct due diligence related to financial statements, on which they primarily relied in making a loan]; *Valassis Communs., Inc. v Weimer*, 304 AD2d 448, 449 [1st Dept 2003] [sophisticated business entities failed to verify the accuracy of the financial information]).

It is unclear, however, how much information regarding the securitizations MBIA could access. Even assuming MBIA conducted a full inquiry under the circumstances in relation to the bidding process, it is not conclusive that MBIA could have discovered the alleged fraud. In *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, the Appellate Division, First Department, reasoned:

> "While the evidence might ultimately demonstrate that the information [defendant] allegedly had regarding the true value of the loan collateral was either nonexistent or available to plaintiff with the exercise of reasonable diligence—and thus that [defendant] did not misrepresent what it knew about the value of the collateral or that plaintiff was not justified in relying on [defendant's] misrepresentations—it is inappropriate to determine those issues as a matter of law based solely on the allegations in plaintiff's complaint, at this point in the proceedings" (301 AD2d 373, 378 [1st Dept 2003]).

Justifiable reliance has been sufficiently alleged and Countrywide has not demonstrated its non-existence as a matter of law so as to warrant dismissal.

Particularity

Countrywide maintains that MBIA's fraud claim also fails because it is not pleaded with sufficient particularity as required by CPLR 3016 (b).

However, as Countrywide points out, "section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud" (*id.* at 492).

In the cases Countrywide cited, in which fraud claims were dismissed for being insufficiently supported with particularity, the allegations were simply conclusory (*Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993] ["allegations of 'fraudulent billing', 'misstatements concerning patient's condition post surgery' and 'indicating that surgery was necessary' do not satisfy the statutory pleading requirement"]; *Lakeville Pace Mech., Inc. v Elmar Realty Corp.*, 276 AD2d 673, 676 [2d Dept 2000] ["not pleaded with sufficient particularity, since they did not articulate what representations were made by the Bank and how the alleged representations were fraudulent or otherwise injured the defendant contractors"]; *see also Orix Credit Alliance, Inc. v R.E. Hable Co.*, 256 AD2d 114, 116 [1st Dept 1998] [lacking the requisite particularity when plaintiff offered nothing but general rumors of misconduct based on conversations that may not have even occurred]); or

insufficient under Rule 9 (b) of the Federal Rules of Civil Procedure (*Forrest v Unifund Financial Group, Inc.*, 2005 WL 1087490, *4 [SD NY 2005] ["with respect to each of the allegedly fraudulent statements or representations, the pleadings fail to identify the speaker, when, where, or even by what means each was made"]).

Here, in contrast, MBIA alleges sufficient facts to permit a factfinder to infer that the alleged conduct was committed (*see Pludeman*, 10 NY3d at 492-93 ["Lest we willfully ignore the obvious—or the strong suspicion of a fraud—we have always acknowledged that, in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud"]; *Caprer v Nussbaum*, 36 AD3d 176, 202 [2d Dept 2006] ["the standard is simply whether the allegations are set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and this rule of pleading must not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting fraud"]).

MBIA has sufficiently pleaded a cause of action sounding in fraud; therefore, Countrywide's motion to dismiss the fraud claim is denied (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Negligent misrepresentation

MBIA alleges that "Countrywide was aware that MBIA relied on Countrywide's expertise and experience and depended upon Countrywide for accurate and truthful information, Countrywide also knew that the facts regarding Countrywide's compliance with its underwriting standards were exclusively within Countrywide's knowledge" (Compl at ¶ 114); "Countrywide had a duty to provide MBIA complete, accurate, and timely information regarding the Mortgage Loans and the Securitizations. Countrywide breached its duty to provide such information to MBIA" (*id.* at ¶ 115).

"A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (*Hudson River Club v Consolidated Edison Co.*, 275 AD2d 218, 220 [1st Dept 2000]).

Countrywide urges that MBIA's negligent misrepresentation claim fails because no underlying duty supports the claim.

MBIA responds that, at this stage, determining whether a special relationship existed is unwarranted. It nevertheless contends that it has sufficiently pleaded a relationship to support the negligent misrepresentation claim.

Whether a special relationship exists between parties is generally a factual issue (*see Kimmell v Schaefer*, 89 NY2d 257, 264 [1996]).

MBIA, however, has not alleged the violation of any special relationship of trust or confidence (*see Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 264 [1st Dept 2001] ["No special relationship of trust or confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable"]). Furthermore, its vague allegations of general expertise in mortgage lending is not enough to support a special relationship (*United Safety of America, Inc. v Consolidated Edison Company of New York, Inc*, 213 AD2d 283, 286 [1st Dept 1995] [An "arm's length business relationship" is insufficient]). Consequently, the negligent misrepresentation cause of action must be dismissed (*see, e.g., Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 385 [1st Dept 2008] [dismissal appropriate absent requisite underlying relationship of trust and confidence]; *Sheridan v Trs. of Columbia Univ.*, 296 AD2d 314, 316 [1st Dept 2002] [negligent misrepresentation must be dismissed when the parties were clearly acting at arm's length"]).

Implied covenant of good faith and fair dealing

Countrywide contends that because MBIA's allegations related to breach of the implied covenant of good faith and fair dealing are the same as those asserted in support of the breach of contract claim, the cause of action must be dismissed.

MBIA counters that the Insurance Agreement was premised on representations that Mortgage Loans had been evaluated consistently with Countrywide's underwriting standards and that the implied covenant of good faith required application of those standards (*see* Compl at ¶¶ 146-47).

The implied covenant of good faith and fair dealing in the performance of contractual duties "is breached when a party 'acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*Skillgames, LLC v Brody*, 1 AD3d 247 at 252, quoting *Jaffe v Paramount Communications Inc.*, 222 AD2d 17, 22 [1996]).

The implied obligation to exercise good faith embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995], citing *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 [1933]). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion" (*id.*). "While the duties of good faith

and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotations marks and citations omitted]).

MBIA maintains that "Countrywide exercised its discretion in bad faith to deprive it of the fruits of the agreements and unfairly shifted the risks of default and delinquencies to MBIA" (Mem in Opp, at 39). Accepted as true and viewed in a light most favorable to plaintiff, MBIA's allegations are sufficient to state a claim. However, the claim survives to the limited extent that it asserts that corrective action—such as investigating loans which became over 30-days delinquent—would have preserved MBIA's benefits under the bargain, but that Countrywide Home deliberately refused to take such action in order to collect more late payment fees and service charges (*see, e.g.*, Compl at ¶ 78).

Accordingly, Countrywide's motion to dismiss the breach of the implied covenant of good faith and fair dealing cause of action is denied.

Causes of action against Countrywide Securities and Countrywide Financial

As to the fraud cause of action, Countrywide argues that MBIA has not pleaded sufficient facts upon which Countrywide Securities could be liable for fraud.

MBIA alleges, however, that Countrywide participated in various capacities with respect to the securitizations:

> "First, Countrywide Home originated or acquired all the Mortgage Loans for each Securitization, and sold (or otherwise conveyed) the Mortgage Loans to the Trusts that issued the RMBS. Second, Countrywide Securities arranged and underwrote each Securitization, structuring and marketing the transaction as well as making SEC filings. Third, Countrywide Home acted as servicer for the Mortgage Loans in each Securitization, contracting with each of the Trusts that it caused to be created to issue the RMBS" (Compl at ¶ 29).
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> . . .
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> "Through the Trust, Countrywide Securities, securitized the mortgage loans, and then, through offerings of securities, offloaded the risks associated with the mortgage loans that Countrywide Home had originated. Although the securities were collateralized by the risk-challenged mortgage loans, Countrywide Securities marketed the securities by fraudulently representing that the mortgage loans had been originated consistently with Countrywide Financial and Countrywide Home's traditional underwriting standards, and the strength of their reputation for conservative lending practices and high quality loans" (*id.* at ¶ 96).

Accordingly, MBIA sufficiently alleges that fraud was committed through Countrywide Financial and its subsidiaries–Countrywide Home and Countrywide Securities.

While Countrywide contends that the fraud and negligent misrepresentation causes of action should be dismissed as against Countrywide Securities and Countrywide Financial because MBIA's allegations lack particularity, its reliance on *Henry v City of New York* is unwarranted (2007 WL 1062519, *5 [ED NY 2007]). After being granted leave to amend

her complaint, the plaintiff in *Henry* failed to plead with the required specificity under Rule 9 (b) of the Federal Rules of Civil Procedure (*id.*).

With respect to the pertinent rule, CPLR 3016 (b), the Court of Appeals has stated:

> "This provision requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud" (*Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]).

Here, MBIA's allegations are sufficiently detailed to give Countrywide notice of the substance of the claims (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1997]).

As to the breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification causes action, Countrywide contends that dismissal is warranted as against Countrywide Securities and Countrywide Financial because neither are signatories to the relevant agreements.

A "parent company can be held liable as a party to its subsidiary's contract if the parent's conduct manifests an intent to be bound by the contract" (*Horsehead Indus. v Metallgesellschaft AG*, 239 AD2d 171, 172 [1st Dept 1997] [plaintiff's "alleged extensive participation in the negotiations leading up to the Shareholders Agreement, during which time (the subsidiary) was wholly owned by (the parent) itself and allegedly had no purpose other than to hold (plaintiff's) shares, manifests (the parent's) intent to be bound thereby"]).

The "intent is inferable from the parent's participation in the negotiation of the contract, or if the subsidiary is a dummy for the parent, or if the subsidiary is controlled by the parent for the parent's own purposes" (*id.*).

Here, MBIA does not allege sufficient facts to infer that either Countrywide Financial or Countrywide Securities intended to be bound. Further, its assertion that Countrywide Financial "manifested its intent to be bound under the contracts by exercising domination and control over [Countrywide Home's] daily operations, and that [Countrywide Securities] manifested this same intent during the bid and negotiation process" (Mem in Opp, at 34) is unsupported by any factual allegations in the Complaint or in the supporting affidavits submitted in opposition to the motion to dismiss. Allegations that either entity was "involved" with Countrywide Home to some degree does not rise to a level such that contractual liability may be imposed (*see Billy v Consolidated Machine Tool Corp.*, 51 NY2d 152, 163 [1980] [in order to disregard separate corporate identities, "there must be direct intervention by the parent in the management of the subsidiary to such an extent that 'the subsidiary's paraphernalia of incorporation, directors and officers' are completely ignored"]). Because MBIA fails to sufficiently allege that Countrywide Financial or Countrywide Securities intended to be bound under the agreements, the breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification causes action are dismissed as against them.

Accordingly, it is

ORDERED that the motion to dismiss is GRANTED in part and the negligent misrepresentation (second) cause of action is dismissed; and it is further

ORDERED that the breach of contract (third and fourth), breach of the implied covenant of good faith and fair dealing (fifth) and indemnification (sixth) causes of action are dismissed solely as against Countrywide Financial and Countrywide Securities; and it is further

ORDERED that Defendants are directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 8, 2009

ENTER

Hon. Eileen Bransten