

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**FLAGSTAR BANK, FSB,
Plaintiff,**

v.

**Case No. 13-137802-CK
Hon. James M. Alexander**

**LA MANAGEMENT & SERVICES, INC.,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant is a mortgage broker that presented a residential mortgage loan to Plaintiff for funding. On or about March 23, 2006, the parties executed a Correspondent Purchase Agreement that required Defendant, in relevant part, to reimburse Plaintiff any loss on the loan funded by Plaintiff when there was a defect in the loan's origination (regardless of cause).

Additionally, if Plaintiff sold the loan to a secondary market investor (such as Fannie Mae), then Defendant was required to reimburse if Plaintiff was required to repurchase the loan due to any defect. Defendant also warranted that all of the information submitted as part of the loan origination package was true and accurate and met Fannie Mae's requirements.

As it pertains to the current dispute, Defendant submitted a \$320,625 residential mortgage loan in 2007, which Plaintiff ultimately funded. The closing occurred on November 9, 2007. Following closing, Plaintiff sold and assigned the loan to Fannie Mae. The borrowers subsequently defaulted on the loan, and on October 19, 2012, Fannie Mae demanded that Plaintiff reimburse for

Fannie Mae's loss on the said loan.

Fannie Mae issued this request after a post-purchase review found that the original loan contained a misrepresentation. The subject property was to be delivered as an owner-occupied purchase. And an audit showed borrowers never established utilities nor received tax assessments at the subject property. Instead, relatives occupied the property making the loan ineligible for delivery to Fannie Mae. Thus, Plaintiff was required to repurchase the loan due to the defect.

In its Complaint, Plaintiff now seeks judgment for the loss of \$166,348.07 in damages, plus \$8,236.22 in attorney fees and costs – for a total of \$174,584.29.

To this end, Plaintiff now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for its claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under a (C)(10) motion, “the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

In response to Plaintiff's motion, Defendant argues that: (1) Plaintiff is not entitled to relief under the March 23, 2006 Agreement because the action was filed outside of the six-year statute of limitations period; (2) Plaintiff is not entitled to relief because there remains a question of fact as to whether Defendant breached the contract; (3) Defendant cannot be held liable for purported errors occurring in Plaintiff's original purchase of the loan; and (4) Plaintiff is otherwise barred from obtaining relief because Plaintiff has failed to mitigate its purported damages.

As stated, the parties' interactions were governed by the 2006 Correspondent Purchase

Agreement. Under section 3.1(a) of this agreement, Defendant warranted that:

Mortgage Loan Documents submitted by [Defendant] for each Mortgage Loan are in every respect valid and genuine, being what they support (sic) to be and all information submitted in each Mortgage Loan Document is true and accurate.

Under section 3.1(k), Defendant also warranted that:

Because Flagstar intends to sell the Mortgage loans to investors in the secondary market, the Mortgage Loans are in full compliance with all pertinent requirements of Fannie Mae, Freddie Mac, Ginnie Mae, FHA, and VA.

Further, under section 3.1(m), Defendant warranted that:

All Mortgage Loan Documents . . . are genuine, accurate, and complete and meet the requirements and specifications established by Fannie Mae/Freddie Mac and product descriptions and underwriting guidelines listed in the Guide.

If Defendant breached any of the above provisions, then under section 4.1(a), it agreed to:

indemnify and hold harmless Flagstar . . . from any and all losses, liabilities, claims, damages, or costs of any nature, including without limitation attorneys' fees and costs, and actions suffered or incurred by Flagstar which arise out of, result from, or relate to . . . [t]he breach by [Defendant] of any covenant, condition, term, obligation, representation or warranty contained in this Agreement, the Guide, or in any written statement, certificate, or Mortgage Loan Document furnished by [Defendant] pursuant to this Agreement

Further, under section 5.1, Defendant was also required to repurchase any mortgage loan if Plaintiff uncovered any evidence of fraud, if Defendant failed to perform any of its other obligations, or if Plaintiff was required to repurchase said loan from Fannie Mae.

With respect to the defaulted loan, in its demand letter to Plaintiff, Fannie Mae concluded that the borrowers had not occupied the property, which was to be delivered as an owner-occupied purchase. Because of this misrepresentation, Plaintiff was required to reimburse Fannie Mae for its loss.

1. Time Barred?

Defendant's first argument is the action is time-barred because the complaint was not filed until December 10, 2013, more than six years after the November 7, 2007 closing. Inherent in Defendant's argument is its belief that the breach was its submission of the non-conforming loan documents.

In response, Plaintiff argues that the breach is not the submission of the loan documents. Instead, the breach is Defendant's refusal to indemnify as the parties agreed. Since Plaintiff did not suffer the losses until it paid Fannie Mae back on the loan, it could not have invoked the indemnification provision before that time.

In support, Plaintiff cites *Insurance Co of North America v Southeastern Electric Co, Inc*, 405 Mich 554, 557; 275 NW2d 255 (1979) (holding that, with respect to a promise to indemnify, the limitations period runs from "when the indemnitee sustained the loss") and *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008). These cases support Plaintiff's argument that "indemnity claims only accrue after there is an identifiable loss." (emphasis in original).

This Court has also similarly ruled on this precise issue, holding:

While supplying the non-conforming loan documents may be the trigger to Plaintiff's ability to invoke the indemnification clause, the breach only occurred when Defendant failed to indemnify. Defendant's refusal to indemnify is "the wrong upon which the claim is based" under MCL 600.5827, and this was the breach on which Plaintiff bases its Complaint. *Flagstar v K&B Equity*, Opinion and Order re: Summary Disposition, issued November 20, 2013 (Case No. 13-134793-CK).

For the same reasons, the Court rejects Defendant's statute of limitations argument in this case. More than six years have not passed since Defendant refused to indemnify Plaintiff for its losses.

2. Other errors?

Next, Defendant argues that a question of fact still remains as to who occupied the property. Defendant relies on Affidavits of the borrowers, which state each borrower resided in the home during the term of the loan and the property was not utilized as a rental property as alleged. But the occupancy of the property is not what is at issue here. Fannie Mae already determined the issue of occupancy, which resulted in a loss to Plaintiff – the subject of the current action. Once this happened, Defendant’s obligation to indemnify was triggered.

Defendant also argues it is not responsible for Plaintiff’s losses because: (1) the appraisal of the property was reasonable under existing market conditions; (2) the appraiser was “pre-approved” by Flagstar; (3) Defendant was not granted the opportunity to defend its position to Fannie Mae or Plaintiff; and (4) the Fannie Mae exhibits are inadmissible as hearsay evidence. Again, Defendant’s arguments are irrelevant because the parties’ obligations are controlled by their agreement. This agreement makes it clear that Defendant must reimburse Plaintiff for any losses resulting from or arising out Fannie Mae’s determination that the loan did not meet its guidelines.

The parties entered into a contract. In it, Defendant not only warranted that the loan documents would be “in every respect valid and genuine,” it also warranted that the loan documents would meet Fannie Mae’s guidelines. Due to the misrepresentation by the borrower that it would occupy the property, Fannie Mae determined that the loan did not meet its guidelines, which then made the subject mortgage ineligible for delivery to Fannie Mae. This wasn’t even Plaintiff’s decision to make. Defendant contracted to assume this risk in such an event, and now it wants to avoid that responsibility. The Court will not so allow.

3. Mitigation.

Finally, Defendant argues that the Plaintiff has remained silent as to the disposition of the subject property, and as a result, Plaintiff has failed to mitigate its damages, or its damages are uncertain. In other words, Defendant appears to argue that it's unclear if Plaintiff obtained title to the home from Fannie Mae or if Fannie Mae sold the property.

The Court agrees that Plaintiff's pleadings lack clarity on this issue. But attached to an Affidavit filed in support of its motion, a "Loss Calculation" statement claims that the "Property was sold on 8/10/12 for \$174,000." This was before Fannie Mae's October 19, 2012 demand to Plaintiff.

As a result, Plaintiff has provided evidence that Fannie Mae sold the property and applied the sale proceeds as a set-off to its damages. Therefore, Plaintiff could not have acted unreasonably when it was not the party that sold the home, and as a result, there is no issue about mitigation of Plaintiff's loss. The original loan amount was \$320,625, and Plaintiff is requesting a judgment for \$166,348.07, plus attorney fees, for its losses.

4. Attorney Fees/Costs.

Finally, Plaintiff requests \$8,236.22 in costs and attorney fees, and the Court notes that Defendant voices no objection on this issue. In support of its claim, Plaintiff also attaches the affidavit of counsel and invoice and payment record that support the request – as well the 2011 Michigan Economics of Law Practice survey – showing that counsel's rates are appropriate. Based on its review of these exhibits and Defendant's failure to object, the Court will GRANT Plaintiff's request as to attorney's fees.

For the above reasons and viewing all evidence in the light most favorable to Defendant, the Court finds that there are no material questions of fact in dispute and Plaintiff is entitled to judgment as a matter of law. As a result, the Court GRANTS Plaintiff's motion for summary disposition and enters judgment in Plaintiff's favor in the amount of \$174,584.29.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

October 22, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge