SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Melvin L. Schweitzer, *Justice* **PART** 45

Nomura Asset Capital and Asset Securitization Corporation,
Plaintiffs,

-v-

Cadwalader, Wickersham & Taft LLP,
Defendant.

INDEX NO. 116147/2006
MOTION DATE ______
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is granted in part to the extent that the second cause of action is dismissed, and is otherwise denied as set forth in the attached Decision and Order of the Court;

Defendant is directed to serve an answer to the complaint within 20 days after service of a copy of the Decision and Order with Notice of entry.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ J.S.C.
DATED: ______

Dated: April 28, 2009 ______ J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 45

NOMURA ASSET CAPITAL CORPORATION and ASSET SECURITIZATION CORPORATION, Plaintiffs,	:	
- against -	:	Index No. 116147/2006
CADWALADER, WICKERSHAM & TAFT LLP, Defendant.	:	

MELVIN L. SCHWEITZER, J.:

In this action alleging legal malpractice, defendant moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1), (5) and (7), on the grounds, respectively, that plaintiffs' claims are barred by documentary evidence, barred by the applicable statute of limitations and fail to state a cause of action.

FACTUAL ALLEGATIONS

Plaintiffs allege that defendant Cadwalader, Wickersham & Taft LLP (Cadwalader) represented them and committed legal malpractice in connection with the origination, pooling and securitization of certain commercial mortgage loans. The loans in question (each, individually, a Loan) were included in a group of 156 such loans that totaled approximately $1.8 billion (the D5 Securitization). Fractional participations in the pool ultimately were sold to investors as commercial mortgage pass-through certificates.

Plaintiff Nomura Asset Capital Corporation (Nomura) originated or acquired each of the Loans, and then sold them in the pool to its wholly-owned subsidiary, plaintiff Asset

Securitization Corporation (ASC), pursuant to a Mortgage Loan Purchase and Sale Agreement (the MLPSA) dated as of October 24, 1997. In the MLPSA, Nomura made various representations and warranties concerning the Loans to ASC. ASC, in turn, entered into a Pooling and Servicing Agreement (the PSA) with LaSalle Bank National Association, formerly known as LaSalle National Bank (LaSalle), also dated as of October 24, 1997, pursuant to which ASC deposited the Loans into a trust fund (the D5 Trust), of which LaSalle was the trustee; made certain representations and warranties concerning the Loans to LaSalle; and assigned to LaSalle all of its right, title and interest in and to the Loans and its rights under the MLPSA, including the representations and warranties contained therein, indicating its intent to sell fractional interests in the D5 Trust to investors. In the PSA, ASC also warranted that all of the representations and warranties made by Nomura in the MLPSA with respect to each of the Loans were true and correct as of the date when the PSA was executed (*see* PSA, § 2.03 [b] [v]). The MLPSA and the PSA each provided that if there was a breach of certain of the representations and warranties concerning a Loan, Nomura and/or ASC were required within 90 days of notice thereof either to promptly cure the breach or to repurchase the Loan at a "Repurchase Price," which included the unpaid principal and interest on the Loan and any expenses arising out of the enforcement of the repurchase obligation (PSA, § 1.01 at 52-53; *see also* PSA, § 2.03 [d], [e]; MLPSA, ¶ 3 [b]).

After various defaults in repayment of the Loans occurred, LaSalle commenced two actions against Nomura and ASC in which it alleged breaches of certain of the representations and warranties contained in the MLPSA. The first action, commenced in the United States District Court for the Southern District of New York on or about November 14, 2000 (the

Federal Action) concerned a mortgage Loan in the amount of $50 million (the Doctors Hospital Loan) which was secured by Doctors Hospital in Chicago, Illinois. The second action, commenced in the Supreme Court of the State of New York on October 23, 2003 (the State Action), concerned each of the 155 other Loans which comprised the D5 Trust.

In the action here, Nomura and ASC assert three causes of action which allege that Cadwalader committed malpractice in connection with, respectively: (1) the Doctors Hospital Loan; (2) four Loans involving properties leased by Kmart Corporation and/or its affiliates; and (3) a Loan in the amount of $2.55 million to the owner of a Best Western Old Hickory Inn.

DISCUSSION

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026)" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.* at 88). "In assessing a motion under CPLR 3211 (a) (7), however, ... the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.* [citation and internal quotation marks omitted]).

"In order to prevail on a claim for legal malpractice, a party must establish that the attorney failed to exercise that degree of care, skill and diligence commonly possessed and exercised by a member of the legal community, that such negligence was a proximate cause of

the loss in question, and that actual damages were sustained" (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [1st Dept 2007]). "Proximate cause requires a showing that 'but for' the attorney's negligence, the plaintiff would either have been successful in the underlying matter or would not have sustained any ascertainable damages" (*id.*; *see also Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]).

The Doctors Hospital Loan

The D5 Trust was intended to be operated as a Real Estate Mortgage Investment Conduit (REMIC), in order that it would qualify for an exemption from having to pay federal income tax at the trust level. Plaintiffs' first cause of action alleges that Cadwalader committed malpractice in connection with the Doctors Hospital Loan relating to two representations and warranties contained in the MLPSA which were intended to ensure the D5 Trust satisfied Internal Revenue Service requirements for classification as a REMIC.

Each of the mortgage loans in a REMIC trust must be a "qualified mortgage," a term which subsection 860G (a) (3) (A) of the Internal Revenue Code (26 USC § 860G [a] [3] [A]) defines to include "any obligation ... which is principally secured by an interest in real property," and which satisfies certain other criteria not relevant here. A mortgage loan is deemed to be "principally secured by an interest in real property," in general terms, only if (a) the fair market value of the real property securing the loan is equal to at least 80% of the amount of the loan or (b) substantially all of the proceeds of the loan are used to purchase or improve the underlying real property (*see* 26 CFR 1.860G-2 [a] [1]).

Plaintiffs allegedly engaged Cadwalader to represent them in connection with the D5 Securitization and, more specifically, to advise Nomura as to how to originate certain of the Loans in order to comply with REMIC regulations, to draft the MLPSA and the PSA, and to render a legal opinion that the D5 Trust qualified as a REMIC. Cadwalader allegedly advised Nomura that it needed to obtain an MAI appraisal of each of the properties securing the Loans in order to demonstrate the values of the properties were sufficient to satisfy REMIC regulations. Nomura obtained an appraisal for the property which secured the Doctors Hospital Loan, dated August 28, 1997 (the Appraisal), which concluded that the property had a total market value of $68 million, comprised of components attributable to land, improvements, equipment and intangibles. Cadwalader allegedly issued an opinion letter (the First Opinion Letter) on October 24, 1997, the date of the closing on the D5 Securitization (Closing Date), stating that the D5 Securitization was REMIC-qualified for federal income tax purposes. The complaint alleges Cadwalader issued the First Opinion Letter without having reviewed the Appraisal.

The MLPSA contains two representations and warranties relating to the D5 Trust's qualification as a REMIC which warrant that:

> (1) each Loan "is directly secured by a Mortgage on a commercial property or multifamily residential property," and "the fair market value of such real property as evidenced by an MAI appraisal conducted within 12 months of the origination of the Mortgage Loan, was at least equal to 80% of the principal amount of the Mortgage Loan" (MLPSA, ¶ 2 [b] [xxix]; hereinafter, the 80% Warranty); and

(2) "[e]ach Mortgage Loan constitutes a 'qualified mortgage' within the meaning of Section 860G (a) (3) of the [Internal Revenue] Code ..." (*id.*, ¶ 2 [b] [xxxi]; hereinafter, the Qualified Mortgage Warranty).

The borrower on the Doctors Hospital Loan filed a bankruptcy petition and defaulted on that Loan. On June 1, 2000, LaSalle provided ASC with written notice of breach of representation and warranty claiming that the Loan was not a "qualified mortgage" because the value of the real property set forth in the Appraisal for REMIC purposes was only $30.96 million, or approximately 60% of the amount of the loan proceeds paid to the borrower at the closing, rather than the required 80%; and the proceeds of the Loan had not been used to purchase or improve the underlying real property.

Cadwalader then allegedly issued to ASC another opinion letter dated June 29, 2000 (the Second Opinion Letter) which ASC, in turn, provided to LaSalle. Cadwalader stated it had reviewed the Appraisal and a supplemental letter from the appraiser dated June 29, 2000 (the Appraisal Supplement) which was attached to the Second Opinion Letter. The Appraisal Supplement set forth the meaning of the term "real property" under the REMIC regulations and indicated that of the $68 million total market value ascribed to the Doctors Hospital property in the Appraisal, $45.08 million was attributable to property qualifying as real property under the REMIC regulations (*see* Stovall Affirm., Ex. C). In the Second Opinion Letter Cadwalader opined that, based upon its review of the Appraisal and the Appraisal Supplement, the Doctors Hospital Loan was a "qualified mortgage" under subsection 860G (a) (3) of the Internal Revenue Code both at the time when it was contributed to the D5 Trust and as of the date of the Second Opinion Letter (*see id.*).

LaSalle commenced the Federal Action on or about November 14, 2000, which alleged that Nomura and ASC had breached three of the representations and warranties in the MLPSA regarding the Doctors Hospital Loan, the 80% Warranty; the Qualified Mortgage Warranty; and a third warranty which provides that, "[w]ith respect to each Mortgage Loan originated by [Nomura], no fraudulent acts were committed by [Nomura] during the origination process of such Mortgage Loan and the origination, servicing and collection of each Mortgage Loan is in all respects legal, proper and prudent in accordance with customary industry standards (MLPSA, ¶ 2 [b] [xix] [A]; hereinafter, the Origination Warranty).

The District Court granted a motion by Nomura and ASC for summary judgment dismissing LaSalle's claim for breach of the three representations and warranties. The court found there had been no breach of the Qualified Mortgage Warranty because, first, Nomura and ASC were entitled to the benefit of a "safe harbor" provision contained in the REMIC regulations in that, based on Cadwalader's advice, they reasonably and in good faith believed the Doctors Hospital Loan satisfied the applicable REMIC requirements; and, second, Nomura and ASC had cured the breach by furnishing to LaSalle the Second Opinion Letter (*see LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp.*, 2004 WL 2072501, *7-*8 [SD NY Sept. 14, 2004], *affd in part, vacated in part and remanded* 424 F3d 195 [2d Cir 2005]). The court also found the 80% Warranty did not have any significance distinct from, nor did it warrant anything more than, the Qualified Mortgage Warranty (*see id.* at *8-*9).

On appeal, the Second Circuit affirmed the District Court's determination that there had been no breach of the Origination Warranty but vacated the District Court's judgment with regard to the 80% Warranty and the Qualified Mortgage Warranty (*see LaSalle Bank Natl. Assn.*

v Nomura Asset Capital Corp., 424 F3d at 199, 212-213). The Second Circuit determined that the 80% Warranty had significance as a warranty distinct and independent from the Qualified Mortgage Warranty; there was an issue of fact whether the 80% Warranty had been breached because it was unclear whether the fair market value of the real property which secured the Doctors Hospital Loan, as evidenced by the Appraisal, was at least 80% of the $50 million amount of the Loan; and there also was an issue of fact whether the Qualified Mortgage Warranty had been breached because the safe harbor provision was inapplicable to protect Nomura and ASC and because neither entity had cured the breach simply by providing LaSalle with the Second Opinion Letter, and finally because it remained unclear whether the fair market value of the real property satisfied the 80% Warranty (*id.* at 209-210). The Second Circuit remanded the latter issue to the District Court, noting that "the evidence submitted by both sides is at odds on the question of which of the appraisal's values for various components of the Doctors Hospital property corresponds to the fair market value of the 'real property' that is relevant for purposes of the eighty percent warranty" (*id.* at 208). Plaintiffs allege that in view of the Second Circuit's determinations they had no viable alternative but to settle the Federal Action before trial for approximately $67.5 million.

Plaintiffs' first cause of action alleges Cadwalader committed malpractice in connection with the Doctors Hospital Loan by (1) including the separate 80% Warranty in the MLPSA even though inclusion of that warranty was not necessary to ensure the D5 Trust satisfied REMIC requirements; and (2) failing to perform the necessary due diligence prior to Cadwalader's issuance of the First Opinion Letter which allegedly stated the D5 Securitization was REMIC-qualified for federal income tax purposes, and failing to advise plaintiffs that the property

appraisals which plaintiffs obtained could only include property that was defined as "real property" under the REMIC regulations.

The term "real property" is defined in REMIC regulations to include "land or improvements thereon, such as buildings or other inherently permanent structures thereon," and to exclude "assets accessory to the operation of a business, such as machinery, ... transportation equipment which is not a structural component of the building, office equipment, ... etc., even though such items may be termed fixtures under local law" (26 CFR 1.856-3 [d]). In concluding that the Doctors Hospital property had a total market value of $68 million, the Appraisal indicated $37.04 million of that amount was attributable to equipment and intangibles. Plaintiffs allege that for purposes of determining whether the Doctors Hospital Loan was a "qualified mortgage" under the REMIC regulations, the $37.04 million attributable to equipment and intangibles should have been excluded from the fair market valuation and the qualifying valuation was only $30.96 million, i.e., "approximately $10 million less than the $40 million needed for the loan to be secured 80% by the fair market value of the real property as defined under [the] REMIC [regulations]" (Complaint, ¶ 27).

Cadwalader argues the first cause of action should be dismissed because (1) plaintiffs cannot establish the alleged misconduct amounted to negligence; (2) plaintiffs cannot establish the alleged misconduct was the proximate or "but for" cause of Nomura's purported injury; and (3) the claim is barred by the applicable statute of limitations. Dismissal of the first cause of action is not warranted on any of these grounds.

According to Cadwalader, plaintiffs' claim it was negligent is precluded by the doctrine of judicial estoppel or estoppel against inconsistent positions because the claim is contradicted by

assertions and representations plaintiffs themselves made in the course of litigating the Federal Action. In the Federal Action, plaintiffs allegedly asserted to the effect that Cadwalader's conduct was not negligent in that (a) similarities in the wording of the 80% Warranty and certain REMIC regulations clearly indicated the 80% Warranty was not intended to have any independent significance from, or to warrant anything in addition to, the Qualified Mortgage Warranty; (b) inclusion of the 80% Warranty in the MLPSA was consistent with standard practice in the commercial mortgage backed securities (CMBS) industry; (c) warranties such as the 80% Warranty were understood throughout the CMBS industry not to warrant anything beyond the warranty set forth in the Qualified Mortgage Warranty; (d) the Doctors Hospital Loan was, and at all times had been, a "qualified mortgage"; (e) in determining whether a loan was REMIC-qualified, the CMBS industry generally relied on appraisals of the overall market value of properties rather than specific valuations of REMIC-qualified real property; and (f) the procedure which Cadwalader used for determining the Loan was REMIC-qualified followed standard CMBS industry practice.

"Judicial estoppel, or the doctrine of inconsistent positions, precludes a party who assumed a certain position in a prior legal proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed" (*Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept 1995]). The doctrine is not applicable to preclude a party's claim where the party did not secure a judgment in his or her favor in the prior proceeding (*see e.g. Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]; *Baje Realty Corp. v Cutler*, 32 AD3d 307, 310 [1st Dept 2006]) or, at the very least, the party did not succeed in having the allegedly inconsistent

position adopted in some manner by the court or tribunal in the prior proceeding (*see D & L Holdings v Goldman Co.*, 287 AD2d 65, 71-72 [1st Dept 2001]).

Plaintiffs ultimately did not secure a judgment in their favor in the Federal Action. More specifically, plaintiffs did not succeed in having the Second Circuit adopt the relevant positions asserted by them in that action which Cadwalader alleges to have been inconsistent with the positions they press here, *i.e.* the 80% Warranty was not intended to have any significance apart from the Qualified Mortgage Warranty; the Loan was a "qualified mortgage" under REMIC regulations; and plaintiffs had not breached either the 80% Warranty or the Qualified Mortgage Warranty. The court does not consider the doctrine of judicial estoppel as operative to preclude plaintiffs' claims here. While certain of the assertions and representations allegedly made by plaintiffs in the Federal Action and cited by Cadwalader may be informal judicial admissions and thus constitute evidence of facts allegedly admitted, such evidence is not sufficiently conclusive under CPLR 3211 (a) (1) and/or (7) to preclude plaintiffs' claim that Cadwalader was negligent in the manner alleged (*see Baje Realty Corp. v Cutler*, 32 AD3d at 310; *see also Angel v Bank of Tokyo-Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept 2007]).

Cadwalader also asserts that apart from any prior judicial admissions made by plaintiffs in the Federal Action, plaintiffs will be unable to establish Cadwalader was negligent. It argues that plaintiffs cannot establish Cadwalader's inclusion of the 80% Warranty in the MLPSA was negligent because the inclusion of the warranty was consistent with standard practice within the CMBS industry as evidenced by the language of the warranty itself, which is substantially similar to certain "sample" language contained in a Standard & Poor's publication entitled *U.S. CMBS Legal and Structured Finance Criteria.* While Cadwalader ultimately may prevail on this issue,

its support for the contention that inclusion of the 80% Warranty conformed to standard industry practice is insufficient on a CPLR 3211 (a) (7) motion to establish that plaintiffs have not alleged, or will be unable to establish, Cadwalader was negligent in including that warranty in the MLPSA. The Standard & Poor's publication submitted by Cadwalader does not constitute the sort of documentary evidence which is sufficient to "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d at 88). Insofar as the language of the 80% Warranty may be similar to "sample" language contained in the Standard & Poor's publication, this circumstance alone does not conclusively establish it was customary practice within the CMBS industry to include such a warranty in the MLPSA.

Cadwalader further argues that plaintiffs cannot establish it was negligent in failing to make sure the property valuation contained in the Appraisal was based on the REMIC definition of "real property" because plaintiffs retained counsel other than Cadwalader in connection with the origination of the Doctors Hospital Loan. According to defense counsel, it was this other law firm that was "primarily" responsible for ensuring the Loan satisfied REMIC requirements. That plaintiffs may have retained other counsel in connection with the origination of the Loan responsible for ensuring the Loan satisfied REMIC requirements at the time of origination would not necessarily relieve Cadwalader of an obligation to advise plaintiffs regarding matters material to whether the Loan was REMIC-qualified at the time of the D5 Securitization.

The complaint alleges plaintiffs engaged Cadwalader to represent them "on all aspects of the D5 Securitization"; and "[i]n connection with the D5 Securitization, Cadwalader advised [Nomura] that it would be necessary to obtain an appraisal of the Doctors Hospital property ... showing that the value of the property was sufficient under REMIC regulations"; and that after

plaintiffs obtained such an appraisal, Cadwalader "issued ... the ... First Opinion Letter ... stating that the D5 Securitization was REMIC qualified for federal income tax purposes" (Complaint, ¶¶ 11, 18, 19). The complaint also alleges Cadwalader issued the Second Opinion Letter after LaSalle provided ASC with a written notice of breach of the representation and warranty because the Loan was not a "qualified mortgage" in that only approximately 60% of the Loan, rather than 80%, was secured by the fair market value of the property (*id.*, ¶¶ 21, 22). In the Second Opinion Letter, Cadwalader allegedly stated it had reviewed the Appraisal as well as the Appraisal Supplement (*see* Stovall Affirm., Ex. C). The Appraisal Supplement, as described *supra*, sets forth the meaning of the term "real property" under the REMIC regulations and concludes that of the $68 million total market value ascribed to the Doctors Hospital property in the Appraisal, $45.08 million was attributable to property qualifying as real property under the REMIC regulations (*see id.*). Cadwalader's Second Opinion Letter allegedly stated that, based on the firm's review of the Appraisal and the Appraisal Supplement, the firm was of the opinion the Loan was a "qualified mortgage" under subsection 860G (a) (3) of the Internal Revenue Code both at the time when it was contributed to the D5 Trust and as of the date of the Second Opinion Letter (*see id.*).

Cadwalader counters that there is "documentary evidence" which refutes the allegations in the Complaint relating to Cadwalader's responsibilities regarding the REMIC qualifications for the Loan. It cites to the deposition of the head of Nomura's securitization group in one of the LaSalle litigations referred to *supra*, where he testified that the other law firm retained in connection with the origination of the Loan was "primarily" responsible to ensure the REMIC eligibility test was met, not Cadwalader (Ex. 21 at 581: 14-582; 19, 585: 7-18), and he would not

have expected Cadwalader to have read the Appraisal "in a detailed fashion" (*id.* at 590: 4-591:11). While it may turn out that Cadwalader's retention as securitization counsel did not obligate it to verify whether the Appraisal was adequate to establish REMIC eligibility, the court cannot make that determination on a motion to dismiss based on deposition testimony that is not clearly contradictory of the allegation in the Complaint. Another issue of fact is thus posed. Based on what is presently before the court, it cannot be concluded that plaintiffs will be unable to establish Cadwalader was negligent in failing to make sure the property valuation contained in the Appraisal was based on the REMIC definition of "real property" because Cadwalader lacked any responsibility for ensuring that the Doctors Hospital Loan satisfied REMIC requirements.

Cadwalader next argues plaintiffs have not alleged the requisite element of proximate cause regarding their Doctors Hospital Loan claim, *i.e.* that plaintiffs would not have suffered the damages which are alleged but for Cadwalader's alleged negligence. Cadwalader asserts that even if the Loan had been kept out of the D5 Securitization, Nomura still would have sustained a loss on the Loan it had originated equal to the unpaid principal and interest when the borrower defaulted.[1] Even if this were so, given that the Loan was included in the pool and thus a subject of the warranties plaintiffs furnished to LaSalle, plaintiffs still were obligated to cure the breach or repurchase the loan and to pay LaSalle's expenses – financial obligations plaintiffs otherwise would not have incurred (PSA, § 1.01 at 52-53). Plaintiffs' exposure in damages to LaSalle at the time when the Second Circuit remanded to the District Court at the very least would have

[1] This assertion is speculative at this juncture. During oral argument, for example, counsel for plaintiffs countered that Nomura was not primarily in the business of making real estate loans but rather in securitizing them; and that had Nomura been advised the Doctors Hospital Loan was not REMIC-qualified, not only would it not have included the loan in the D5 Securitization it also would have disposed of the Loan long before the borrower defaulted several years later.

included some component attributable to the expenses incurred by LaSalle in attempting to enforce plaintiffs' obligation to repurchase the Loan. That component -- an amount over and above the amount of the unpaid principal and interest on the Doctors Hospital Loan – also was presumably reflected as a portion of the $67.5 million settlement plaintiffs reached with LaSalle.

Cadwalader also argues plaintiffs' allegation that they were left with no viable alternative but to settle the Federal Action for approximately $67.5 million is merely conclusory, and therefore insufficient, because plaintiffs failed to allege facts to indicate how it was they had no other alternative when all the Second Circuit did was remand for trial on whether the 80% Warranty had been breached. What plaintiffs have alleged is that the valuation of real property set forth in the Appraisal for REMIC purposes was only $30.96 million, or approximately 60% of the amount of the $50 million Doctors Hospital Loan. As a result, plaintiffs allege they were left with "no viable alternative but to settle" with LaSalle presumably because the District Court, on remand from the Second Circuit, would have determined that plaintiffs had breached the 80% Warranty and/or the Qualified Mortgage Warranty. For purposes of surviving Cadwalader's motion to dismiss, these allegations suffice to satisfy the element of proximate cause. "A claim for legal malpractice is viable, despite settlement of the underlying action, if it is alleged that settlement of the action was effectively compelled by the mistakes of counsel" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430 [1st Dept 1990]; *see also Fusco v Fauci*, 299 AD2d 263, 263 [1st Dept 2002]). At this stage, plaintiffs' actual exposure in damages which can be attributed to Cadwalader's alleged negligence before the settlement cannot be quantified. But enough is alleged at this stage to get past the "but for" test.

Cadwalader's final argument for dismissal of the claim pertaining to Doctors Hospital Loan is that it is barred by the applicable statute of limitations because (1) the alleged malpractice occurred and the claim accrued no later than October 24, 1997 when the D5 Securitization transaction closed and the applicable three-year statute of limitations thus expired no later than October 24, 2000 (*see* CPLR 214 [6]); (2) although the parties entered into an agreement on October 27, 2000 which tolled the running of the statute of limitations (the Tolling Agreement), the limitations period already had expired before that date; and (3) in any event, plaintiffs cannot invoke the benefit of the Tolling Agreement because they did not abide by their promise therein not to sue during its term.

Cadwalader's statute of limitations argument fails initially by virtue of the doctrine of continuous representation. "Pursuant to the continuous representation doctrine, the statute of limitations for causes of action sounding in legal malpractice is tolled until the completion of the attorney's ongoing representation concerning the matter out of which the malpractice claim arises" (*Pellati v Lite & Lite*, 290 AD2d 544, 545 [2d Dept 2002]). The doctrine is applicable where an attorney's involvement in a matter subsequent to the alleged malpractice is for the performance of services which are the same as, or related to, those from which the malpractice allegedly arose, and "is not merely the continuation of a general professional relationship" (*id.*). The statute of limitations on the malpractice claim pertaining to the Loan was tolled at least until June 29, 2000 when Cadwalader issued its Second Opinion Letter. This is because Cadwalader's performance of legal services in connection with that opinion were the same as, or closely related to, its performance of services which gave rise to the malpractice claim. The malpractice claim is based upon Cadwalader's alleged negligence in (1) including the separate, and allegedly

unnecessary, 80% Warranty in the MLPSA; and (2) failing (a) to perform the necessary due diligence prior to Cadwalader's issuance of the First Opinion Letter which allegedly stated the D5 Securitization was REMIC-qualified for federal income tax purposes, and (b) to advise plaintiffs the property appraisals which plaintiffs obtained had to be based on the definition of the term "real property" set forth in the REMIC regulations.

Cadwalader's issuance of the Second Opinion Letter was based on the firm's review of the Appraisal and the Appraisal Supplement which ascribed $45.08 million of the total market value of the Doctors Hospital property to qualifying "real property" under the REMIC regulations. Cadwalader opined that the Doctors Hospital Loan was a "qualified mortgage" under subsection 860G (a) (3) of the Internal Revenue Code. These legal services cannot be said to have been rendered in connection with a "discrete and severable" transaction (*Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 115 [1st Dept 2002]), but rather were integrally related to the firm's role in the D5 Securitization of the Loan and Cadwalader's issuance of its First Opinion Letter from whence the alleged malpractice arose. As such, the continuous representation doctrine tolled the running of the statute of limitations on plaintiffs' malpractice claim until at least June 29, 2000 when the Second Opinion Letter was issued. The limitations period thus had not expired by October 27, 2000, the date when the parties entered into the Tolling Agreement.

Cadwalader's argument that plaintiffs should not be permitted to invoke the benefit of the Tolling Agreement because they breached it by commencing this action during its term also is without merit. The Tolling Agreement provided that any party to it "may end this Tolling Agreement, in advance of its designated termination date, by giving at least 30 days prior written

notice of its intent to do so" (Bell Affid., Ex. 5, Tolling Agreement, ¶ 6). Cadwalader does not dispute that plaintiffs gave Cadwalader notice by letter dated September 29, 2006 that they were terminating the Tolling Agreement effective October 31, 2006 (*see id.*, Ex. 7). The issue thus pertains to plaintiffs alleged breach of the Tolling Agreement by commencing this action four days prior to that date, on October 27, 2006.

A material breach of contract may discharge the non-breaching party from further performance of its obligations under the contract (*see Department of Economic Dev. v Arthur Andersen & Co.*, 924 F Supp 449, 483 [SD NY 1996] [applying New York law]; Restatement [Second] of Contracts § 237). Here, however, any party to the Tolling Agreement was free to sue another party after the agreement expired, so by commencing this action four days before the effective termination date of the agreement, plaintiffs committed a breach, albeit a *de minimis* and immaterial one. There is no indication that plaintiffs commenced this action prematurely in order to gain an undue advantage or that Cadwalader suffered any injury or prejudice as a result of the early commencement. The Tolling Agreement also did not contain a provision that an action commenced in violation or breach of the agreement should be dismissed (*cf. OneBeacon Am. Ins. Co. v NL Indus., Inc.*, 43 AD3d 716, 717-718 [1st Dept 2007]). In the absence of any such circumstances, Cadwalader has failed to establish that plaintiffs should not be permitted to invoke the benefit of the Tolling Agreement.

Cadwalader has failed to establish that the first cause of action pertaining to the Doctors Hospital Loan should be dismissed.

<u>The Kmart Loans</u>

The second cause of action alleges that Cadwalader committed malpractice by reason of its negligence in failing to properly draft a representation and warranty (the Non-Termination Warranty), contained in the MLPSA, which provides that "[w]ith respect to each Mortgage Loan secured by a Credit Lease":

> [t]he Tenant cannot terminate the Credit Lease for any reason, prior to the payment in full of or the payment of funds sufficient to pay in full: (a) the principal balance of the loan; (b) all accrued and unpaid interest on the loan; and (c) any other sums due and payable under the loan, as of the termination date, except for a default by the Landlord under the Credit Lease.

(MLPSA, § 2 [b] [xli] [F].) The D5 Trust included four "credit lease loans," *i.e.* mortgage loans made to borrowers in reliance upon the creditworthiness of their commercial tenants who leased the property. Here, the properties involved had been leased to Kmart Corporation (Kmart) and/or its affiliates. Kmart allegedly filed for bankruptcy in January 2002 and the bankruptcy court thereafter allegedly granted a motion allowing Kmart to reject the four leases.

LaSalle asserted in the State Action that Nomura and ASC had breached a Non-Termination Warranty in connection with the four credit lease Loans because Kmart's rejection of the leases in the bankruptcy proceeding constituted a termination of the credit leases by the tenant in violation of that warranty. LaSalle also asserted that plaintiffs had breached the Origination Warranty with respect to those Loans. The trial court in the State Action denied a motion by plaintiffs for summary judgment to dismiss LaSalle's claims relating to the credit lease Loans. Following the trial of that action, however, the court found there had been no breach of either the Non-Termination Warranty or the Origination Warranty with respect to the credit lease Loans and did dismiss LaSalle's claims relating to those Loans (*see LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp.*, 2007 WL 4289338, *53, *58 [Sup Ct, NY County, Sept. 6, 2007]).

Although the trial court noted the Non-Termination Warranty did not contain a tenant bankruptcy "carve out" provision which the parties should have included had they intended to allocate the risk of a tenant's rejection of a lease in bankruptcy to the certificate holders of the D5 Trust (*see id.* at *56), it nevertheless determined the Non-Termination Warranty did not warrant against a tenant's rejection of a lease in a bankruptcy proceeding. Under such circumstances it is the bankruptcy court rather than the tenant which orders the termination of the lease, the trial court said.

On appeal, the Appellate Division, First Department affirmed the trial court's determination that there had been no breach of either the Origination Warranty or the Non-Termination Warranty, finding the Non-Termination Warranty could not "properly be understood as a guarantee that the tenants would never seek a judicial declaration in the context of a bankruptcy proceeding allowing the termination of the lease due to financial insolvency, or as an implicit guarantee of the seller's liability for sums due if the tenant declared bankruptcy" (*LaSalle Bank Natl. Assn. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 [1st Dept 2007]).

Plaintiffs' second cause of action which pertains to these credit lease loans alleges that Cadwalader committed malpractice by failing to draft the Non-Termination Warranty in such a manner as to unambiguously exclude from its purview lease terminations by a tenant in a bankruptcy proceeding. Plaintiffs commenced the action here before the First Department decided the appeal in the State Action, and the second cause of action seeks to recover as damages (1) the legal fees which plaintiffs allegedly incurred as a result of Cadwalader's alleged failure to draft the Non-Termination Warranty to clearly exclude a bankruptcy termination; and (2) any additional damages which plaintiffs would suffer in the event the trial court's

determination that there had been no breach were overturned on appeal. Inasmuch as the First Department did not reverse the trial court in the latter regard and also has denied a motion for leave to appeal to the Court of Appeals, the only surviving component of plaintiffs' claimed damages are the legal fees which plaintiffs allegedly incurred in defending the State Action, allegedly caused by Cadwalader's failure to draft the Non-Termination Warranty so that it addressed the possibility of a bankruptcy termination.

Plaintiffs' second cause of action is dismissed because Cadwalader's alleged failure to properly draft the Non-Termination Warranty does not rise to the level of malpractice as a matter of law and thus plaintiffs would be unable to establish that its alleged damages in defending against LaSalle's claim were proximately caused by Cadwalader. Plaintiffs assert that Cadwalader committed malpractice by failing to draft the Non-Termination Warranty in a manner similar to bankruptcy carve outs that were contained in certain other provisions of the MLPSA (*see* MLPSA §§ 2 [a] [iii], [b] [iv]). Both the trial court and the First Department, however, determined that the Non-Termination Warranty as drafted did protect plaintiffs against liability even though Cadwalader had not included an express bankruptcy carve out. Those courts each determined that under the warranty as drafted plaintiffs were not liable for amounts due on a lease in the event a tenant terminated a lease in a bankruptcy proceeding with the approval of the bankruptcy court.

While an attorney may be liable for malpractice where he or she has failed to exercise the "ordinary and reasonable skill and knowledge commonly possessed by a member of the [legal] profession" (*Da Silva v Suozzi, English, Cianciulli & Peirez*, 233 AD2d 172, 176 [1st Dept 1996] [citation and internal quotation marks omitted]), an attorney is not held to a standard of

"infallibility" (*id.*; *see also Gray v Wallman & Kramer*, 184 AD2d 409, 413 [1st Dept 1992]), and "[t]he perfect vision and wisdom of hindsight is an unreliable test for determining the past existence of legal malpractice" (*Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000] [citation and internal quotation marks omitted]). *See Gonzalez v Ellenberg*, 2004 NY Slip Op. 51518U at *6, 5 Misc 3d 1023A, 799 N.Y.S.2d 160 (Sup Ct NY Cty Oct. 12, 2004) (dismissing malpractice complaint and stating that "actions or conduct which . . . are found to constitute one of several alternative ways in which a reasonable prudent attorney would proceed, are not actionable as legal malpractice"). Although Cadwalader did not include an express bankruptcy carve out in the Non-Termination Warranty, all this would have done was to provide plaintiffs with additional, redundant protection against liability for such lease terminations. The non-inclusion where two courts held that the warranty could not fairly be read to encompass a bankruptcy termination thus did not rise to the level of malpractice.[2]

The second cause of action is dismissed.

---

[2] The only surviving component of the damages sought by plaintiffs in the second cause of action are the legal fees which plaintiffs allegedly incurred in the State Action. Plaintiffs allege that Cadwalader's purported failure to properly draft the Non-Termination Warranty caused them to sustain these damages in defending the LaSalle claim. Since the second cause of action fails to adequately allege any negligence by Cadwalader in connection with the drafting of the warranty, plaintiffs cannot establish they would not have incurred legal fees in their defense against LaSalle's claims in the State Action but for Cadwalader's alleged malpractice (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d at 442). LaSalle's suit on these Loans also alleged that plaintiffs breached another representation and warranty of the MLPSA that the Loans were made in accordance with customary industry standards (§ 2 [b] [xx] [B]). Plaintiffs thus were compelled to defend on these four credit lease Loans regardless of the Non-Termination Warranty which is the only subject of their malpractice suit on these Loans here.

The Best Western Loan

The complaint's third cause of action alleges Cadwalader committed malpractice relating to another of the Loans in the D5 Trust, a $2.55 million first mortgage loan made to the owner of a Best Western Old Hickory Inn (the Best Western Loan). Before the Closing Date, Nomura provided an additional loan of $450,000, a so-called "mezzanine loan," to that same borrower. The MLPSA contained a representation and warranty (the No Capital Contribution Warranty) which provided that "neither [Nomura] nor any affiliate thereof has any obligation or right to make any capital contribution to any Borrower under a Mortgage Loan, other than contributions made on or prior to the Closing Date" (MLPSA, § 2 [b] [xxxvii]). According to plaintiffs, "it was the intent of the parties to the transaction that the mezzanine loan be converted into a preferred equity position at the time of the D5 closing and securitization so as to be in compliance with [the No Capital Contribution Warranty]" (Complaint, ¶ 57). The mezzanine loan was not converted into preferred equity on or before the Closing Date.

LaSalle contended in the State Action that plaintiffs had breached the No Capital Contribution Warranty, the Origination Warranty ("the origination...of each Mortgage Loan is in all respects...prudent in accordance with customary industry standards" [MLPSA, § 2 (b) (xix)]) and the No Knowledge Warranty ("[t]he seller has no knowledge that the representations and warranties made by each related Borrower in such Mortgage Loan are not true in any material respect" [MLPSA, § 2 (b) (x)]). The trial court found plaintiffs had breached the No Capital Contribution Warranty because the mezzanine loan had not been converted into preferred equity until after the Closing Date, and that plaintiffs also had breached the Origination Warranty and the No Knowledge Warranty. The trial court nevertheless dismissed LaSalle's claims on the

ground that LaSalle had failed to provide prompt notice of the breach to plaintiffs as required by subsection 2.03 (e) of the PSA, and also had failed to mitigate its damages.

On appeal, while the First Department affirmed the trial court's determination that there had been a breach of the Origination Warranty and did not disturb the court's determination that there also had been breaches of the No Knowledge Warranty and the No Capital Contribution Warranty, it vacated the trial court's determination that LaSalle's failure to mitigate damages was a complete bar to its recovery. It remanded this matter to the trial court for a calculation of damages.

Plaintiffs' third cause of action alleges Cadwalader committed malpractice in connection with the Best Western Loan "by failing to convert the mezzanine loan into preferred equity on or before the closing date" of the D5 Securitization. The complaint alleges "[Nomura] retained Cadwalader to represent it in connection with the making of [the Best Western Loan], as well as in its ultimate securitization in the D5 Trust," and that Cadwalader "closed [the Best Western Loan] on [Nomura's] behalf in May 1997 and securitized it in October 1997 when the D5 Trust closed" (Complaint, ¶ 58). Cadwalader argues plaintiffs have not properly alleged Cadwalader had been retained to convert the mezzanine loan into preferred equity on or before the Closing Date. Plaintiffs counter that the complaint alleges Cadwalader was closing counsel in connection with the Best Western Loan as well as securitization counsel for the D5 Trust, and, as such,

Cadwalader was responsible for arranging for the conversion of the mezzanine loan into preferred equity.[3]

Cadwalader also argues that the complaint fails to satisfy the required element of proximate cause because the No Capital Contribution Warranty (for which Cadwalader allegedly had responsibility) was only one of three separate warranties pertaining to the Best Western Loan which were the subject of the State Action. Plaintiffs seek (a) their legal expenses incurred in defending against the No Capital Contribution Warranty claim and (b) any other damages they may sustain as a result of an ultimate award to LaSalle on that claim. Because Nomura also has been found to have breached the No Knowledge and Origination warranties through no fault of Cadwalader, the firm asserts that plaintiffs had to incur their legal expenses to defend the State Action regardless, and that the remedies for breach of the other warranties also overlap. Given that the issue of damages for breach of the three warranties has been remanded to the trial court, it cannot be determined as a matter of law that the damages plaintiffs seek on their claim here are wholly subsumed by the damages they sustained in connection with the breaches of the other Best Western warranties. At this stage, it cannot be said that plaintiffs have not sustained any financial injury attributable to the breach of the No Capital Contribution Warranty. Accordingly, the allegations of Complaint ¶¶ 58, 62, 63 and 65 are sufficient to state the cause.

---

[3] Plaintiffs' memorandum of law elaborates on their theory of this cause of action. The documentation for the Best Western Loan which Cadwalader allegedly drafted in its role as counsel on the Loan provided that the mezzanine loan would be converted into preferred equity before the Best Western Loan was securitized; and, as securitization counsel, Cadwalader was allegedly responsible for confirming that all legal documents were in order (Pl. Mem. of Law at 19). According to plaintiffs, Cadwalader also drafted the Prospectus Supplement for the D5 Securitization in its role as counsel for the securitization and it contained a representation that Nomura had obtained a preferred equity interest in connection with the Best Western Loan; and Cadwalader thus was responsible for making certain this representation was accurate (*see id.*). Plaintiffs assert that in April 1998, when it was discovered the mezzanine loan had not been converted into preferred equity, Cadwalader was the counsel that then arranged for the conversion (*see id.*). None of these supplemental points is alleged in the Complaint itself, however.

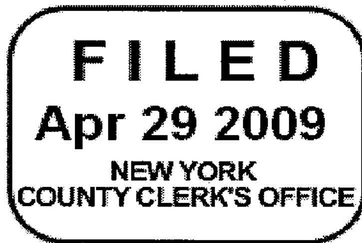
CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion to dismiss is granted, in part, to the extent that the complaint's second cause of action is dismissed, and is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: April 28, 2009



ENTER:

J.S.C.