Ambac Assur. Corp. v Nomura Credit & Capital, Inc.
2015 NY Slip Op 30930(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 651359/13
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Index No.: 651359/13

Plaintiffs,

DECISION/ORDER

– against –

NOMURA CREDIT & CAPITAL, INC. and NOMURA HOLDING AMERICA, INC.,

Defendant.

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This is a breach of contract action brought by Ambac Assurance Corporation (Ambac), a monoline insurer which issued financial guaranty insurance policies that guaranteed payments due on certain certificates for residential mortgage-backed securities (RMBS), issued by non-parties Nomura Asset Acceptance Corporation (NAAC), Alternative Loan Trust, Series 2007-1 and Series 2007-3.[1] Defendants Nomura Credit & Capital, Inc. (NCCI), the sponsor of the securitizations, and Nomura Holding America Inc. (Nomura Holding), its parent and alleged alter ego, move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

As alleged in the complaint, defendant NCCI was the sponsor of the securitizations and purchased from originators the loans that served as collateral for the certificates issued by the Trusts. NCCI sold the loans to NAAC, the depositor, pursuant to Mortgage Loan Purchase

[1] The action is also brought by The Segregated Account of Ambac Assurance Corporation, an entity to which Ambac's claims were "allocated" in connection with a statutory rehabilitation. (Compl., ¶ 14.)

Agreements (MLPAs). NAAC then sold the loans and assigned its rights in the loans to the Trusts, pursuant to Pooling and Servicing Agreements (PSAs). The Trusts then issued certificates to investors, backed by the expected cash flows from the loans. Ambac issued insurance policies that guaranteed payments due on certain certificates in the event the loans did not provide sufficient payments of principal and interest. (Compl., ¶ 3.)

According to the complaint, "[t]here have been an extremely high number of defaults among the Mortgage Loans. As of March 6, 2013, 49.2% in original principal balance of the Group II loans in the NAAC 2007-1 Transaction (the Group Ambac insured) had defaulted or were severely delinquent . . . ." (Compl., ¶ 38.) As of the same date, "53.3% in original principal balance of the loans in the NAAC 2007-3 Transaction had defaulted or were severely delinquent." (Id.) As a result of the high default rates, Ambac performed a forensic review of the loans underlying the insured certificates. (Id., ¶ 39.) The results were "staggering": Of the 1038 loans from the NAAC 2007-1 Transaction that were reviewed, 983 failed to comply with sponsor NCCI's mortgage loan representations, made pursuant to the MLPA and incorporated in the PSA. (MLPA § 8, PSA § 2.03[b][vii].) Of the 811 loans from the NAAC 2007-3 Transaction, 778 failed to comply with such representations. The breach rate was thus approximately 95% for each Transaction. (Id., ¶¶ 39-40.)

Ambac pleads two causes of action against NCCI and Nomura Holding as its alter ego. The first is for breach of the mortgage loan representations made in the PSAs. The second is for breach of the repurchase protocol, based on defendants' failure to cure or repurchase any of the mortgage loans that allegedly breached the representations.

In moving to dismiss the complaint, defendants contend, as a threshold matter, that Ambac lacks standing to enforce its claims for breaches of representations regarding the

mortgage loans or failure to cure or repurchase such loans. Ambac seeks to assert such claims as a third-party beneficiary of the PSAs.

This Department has recently considered similar claims by monoline insurers of RMBS certificates seeking to enforce repurchase protocols as third-party beneficiaries of PSAs. In Ambac Assurance Corp. v EMC Mtge. LLC (121 AD3d 514 [2014]) (Ambac [EMC]), the Court held, based on the terms of the PSAs, that Ambac did not have standing to enforce the PSAs. As summarized by the Court, the PSAs named Ambac "as a third-party beneficiary with respect to the rights of the insured certificateholders." (Id. at 516.) Moreover, "under section 2.03 of the PSAs, the trustee [was] expressly named as the party with authority to enforce the repurchase protocol. Also under that section, the depositor, 'on behalf of the Trust for the benefit of the Certificateholders and the Certificate Insurer [Ambac],' assigned to the trustee all of its rights under the MLPAs." (Id.) As the Court emphasized, section 2.03 "provide[d] that the depositor's 'right, title and interest' in the MLPAs, including the repurchase protocol, [was] assigned into the securitization trust 'on behalf of' both the certificateholders and the certificate insurer and confers upon the trustee the full responsibility for enforcing the repurchase protocol on their behalf." (Id. at 519.) The Court did not quote PSA section 2.03 (a) at length. This section, of which the court takes judicial notice from the electronically maintained court files, expressly provided for the Trustee to carry out the enforcement of the sponsor's repurchase obligation on behalf of the certificate insurer as well as the certificateholders, thus stating:

> "The Depositor hereby assigns to the Trustee, on behalf of [the] Trust for the benefit of the certificateholders and the Certificate Insurer, all of its right, title and interest in the Mortgage Loan Purchase Agreement. The obligations of the Sponsor to substitute or repurchase, as applicable, a Mortgage Loan shall be the Trustee's and the Certificateholders' sole remedy for any breach thereof. At the request of the Trustee, the Depositor shall take such actions as may be necessary to enforce the above right, title and interest on

> behalf of the Trust and the Certificateholders or shall execute such further documents as the Trustee may reasonably require in order to enable the Trustee to carry out such enforcement."

(emphasis supplied) (Series 2006-AR2 PSA § 2.03 (a), Ambac Assur. Corp. v EMC Mtge. LLC, Supreme Court, NY County, Index No. 651013/12, NYSCEF Doc. No. 25.)

In Assured Guaranty Municipal Corp. v DLJ Mtge. Capital, Inc. (117 AD3d 450 [2014], modifying 2012 WL 5192752, Supreme Court, NY County, Index No. 652837/11 [Oct. 11,'12]) (Assured Guar. [DLJ]), the First Department concluded, also based on the terms of the PSAs, that a monoline insurer had the right to seek their enforcement. There, the PSAs, as quoted in the trial court decision, expressly provided that "the Certificate Insurer shall be deemed a third-party beneficiary of this Agreement to the same extent as if it were a party hereto, and shall have the right to enforce the provisions of this Agreement." (2012 WL 5192752, at * 4.) The PSAs also contained a provision (section 13.01) that "unless a Certificate Insurer Default has occurred and is continuing, the Certificate Insurer shall have the right to exercise all rights of the Holders of the Insured Certificates under this Agreement. . . ," including the right to require the Seller to repurchase the loans pursuant to PSA § 2.03. (Id.) The First Department held that the insurer's remedies were not restricted by section 13.01, which it described as "merely comprising acknowledgement of the certificate insurer's right to exercise the rights of the certificate holders without their further consent." (117 AD3d at 451.) The PSAs also contained a provision under which the certificate insurer's sole remedy for defects in mortgage documentation was cure or repurchase of the affected loan, whereas it was not one of the parties limited by the sole remedy provision applicable to breaches of the representations and warranties regarding the loans. (Id. at 450-451.)

The terms of the PSAs at issue here are similar in certain respects to the PSAs in Ambac [EMC] and Assured Guar. [DLJ], but also differ from those PSAs in significant respects. The PSAs here provide in section 2.01 that the Depositor "sells, transfers, [and] assigns . . . to the Trustee for the use and benefit of the . . . Certificateholders and the . . . Certificate Insurer . . . all the right, title and interest of the Depositor in and to" the specified portion of the Trust Fund relating to specified mortgage loans.[2] PSA section 2.01 separately transfers the Depositor's rights and interest under the MLPA to the Trustee. But, unlike the Ambac [EMC] PSAs, it does not state that the transfer under the MLPA is for the benefit of the Certificate Insurer.

Further, PSA section 2.03 (c), the repurchase protocol for breaches of representations and warranties, provides that "within ninety (90) days of the discovery of a breach of any representation or warranty set forth therein that materially and adversely affects the interests of the related Certificateholders or the . . . Certificate Insurer, as applicable, in any Mortgage Loan, [the Sponsor] shall cure such breach in all material respects and, if such breach is not so cured," substitute or repurchase the affected Mortgage Loan. Unlike the Ambac [EMC] PSAs, this PSA section does not expressly provide for the Trustee to carry out the enforcement of the repurchase protocol under the MLPA. This section does, however, also provide that "[t]he Sponsor shall promptly reimburse the Trustee for any expenses reasonably incurred by the Trustee in respect of enforcing the remedies for such breach." Section 2.03 of the PSAs at issue thus contemplates that the Trustee may enforce the repurchase protocols. But unlike the Ambac [EMC] PSAs, section 2.03 (c) does not affirmatively delegate to the Trustee the sole responsibility for enforcing the repurchase protocol for breaches of the representations and warranties.

[2] All quotations and citations are to the PSA for the Series 2007-1 certificates. There is no claim that the PSA for the Series 2007-3 certificates differs in any material respect.

Unlike the PSAs in Assured Guar. [DLJ], the PSAs here do not expressly authorize Ambac to enforce them. Like the Assured Guar. [DLJ] PSAs, the PSAs here provide, in section 12.01, that the certificateholders agree that "unless a . . . Certificate Insurer Default exists, the . . . Certificate Insurer shall have the right to exercise all consent, voting, direction and other control rights of the" certificateholders without their further consent. These rights include the right to commence suit under specified conditions pursuant to the no action clause (section 11.08). As held in Assured Guar. [DLJ], however, this language confers rights on the insurer, but does not restrict its remedies. (117 AD3d at 451.) Also like the Assured Guar. [DLJ] PSAs, the sole remedy provisions of the PSAs expressly list the insurer among parties bound by the sole remedy provision pertaining to repurchase of loans with defective documents, but do not list the insurer among parties bound by the sole remedy provision pertaining to repurchase of loans that breach representations or warranties. PSA section 2.02 (d), the repurchase protocol for loans as to which a defect in a document exists, thus states that the repurchase protocol provides the "sole remedies" available to the Certificateholders and the Certificate Insurer or the Trustee on their behalf. In contrast, section 2.03 (d) provides that the obligation of the Sponsor to cure or repurchase any mortgage loan "as to which a breach has occurred or is continuing shall constitute the sole remedies against the Sponsor respecting such breach available to each Certificateholder, the Depositor or the Trustee."

As noted above, the PSAs in Ambac [EMC] named Ambac "as a third-party beneficiary with respect to the rights of the insured certificateholders." (121 AD3d at 516.) Here, in contrast, the PSAs do not by their terms limit Ambac's rights to those of the certificateholders. Rather, section 11.13 provides that the "Certificate Insurer is intended to be and shall have all rights of a third-party beneficiary of this Agreement."

Finally, in section 2.03 (b) of the PSAs here, the Sponsor makes representations directly to the Certificate Insurer, and not only to the Depositor, Servicer, Master Servicer, Securities Administrator and Trustee. These representations include that the representations and warranties in section 8 of the MLPAs as to the quality and characteristics of the mortgage loans (among them, that the loans were originated in accordance with the originator's underwriting guidelines), were true as of the Closing Date of the securitization. (PSA § 2.03 [b] [vii].) There is no indication in Ambac [EMC] or Assured Guar. [DLJ] that under the PSAs there the sellers made such representations directly to the insurer.

As the PSAs at issue neither expressly authorize Ambac to enforce the remedies for breaches of representations and warranties, nor bar it from doing so, the court must interpret the PSAs to determine whether Ambac has standing to maintain this action. It is well settled that "a contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. Thus, clear, complete writings should generally be enforced according to their terms." (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995] [internal quotation marks and citations omitted].) The determination of whether a contract is ambiguous is one of law to be resolved by the court. (Id.) A contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation." (Chen v Yan, 109 AD3d 727, 729 [1st Dept 2013], quoting Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].)

Applying these precepts, this court holds that the PSAs are reasonably susceptible of more than one interpretation and are therefore ambiguous. On the one hand, they provide for the depositor's transfer of rights to the Trustee for the benefit not only of certificateholders but also of the certificate insurer, and contemplate that the Trustee may enforce the repurchase protocol. On the other, they contemplate enforcement by Ambac as well. They do not contain language

expressly delegating responsibility for enforcement to the Trustee, and they identify Ambac as a third-party beneficiary, without qualification. Moreover, they address the remedies available to Ambac for breaches of contract, limiting both the Trustee's and Ambac's remedies to the repurchase protocol in the sole remedy provision for defects in loan documentation, while limiting the Trustee's remedies, but not Ambac's, to the repurchase protocol for breaches of the representations regarding the mortgage loans.

In holding that the PSAs are ambiguous as to Ambac's right of enforcement, the court rejects defendants' contention that Ambac's rights are limited to rights it may have as subrogee of the certificateholders. (Ds.' Memo. In Supp. at 9.) Where the parties intended to afford Ambac rights as a subrogee, they knew how to do so. The PSAs thus expressly provide that Ambac will be subrogated to the rights of the insured certificateholders "to the extent [it] makes payments, directly or indirectly, on account of principal of or interest on" the insured certificates to such holders. (PSA § 12.03.) Further, as discussed above, the PSAs do not by their terms limit Ambac's rights to those of a subrogee but, rather, afford it "all rights of a third-party beneficiary of this Agreement." (PSA § 11.13.)

Contrary to defendants' further contention, Ambac's enforcement of the PSAs is not precluded because a "Certificate Insurer Default exists" – i.e., because it has failed to make payments due on certain loans or certain events of bankruptcy or insolvency have occurred. (See PSA Definitions, Class II-A-M Certificate Insurer Default.) This claim is based solely on PSA section 12.01, which provides that unless a "Certificate Insurer Default" exists, the insurer shall have the right to exercise all consent, voting, direction and other control rights of the certificate holders with respect to certain loans. As held above, based on First Department authority, this provision confers rights on Ambac, such as rights to sue under the no action clause. It does not

limit Ambac's rights, and it is not the basis on which the court finds that the PSAs are susceptible to the interpretation that the parties intended to confer enforcement rights on Ambac.

To the extent that defendants further contend that Ambac lacks the right to enforce the PSAs because the PSAs do not expressly state that it has such right, this contention is based on a misapprehension of New York law. As explained by the First Department, courts have rejected "monoline insurers' attempts to enforce repurchase obligations where the relevant contracts conferred the right to enforce those obligations on other parties." (Ambac [EMC], 121 AD3d at 519-520.) In order to convey that the enforcement right is conferred on the trustee and not on the insurer, the PSA need not use "identical language" that the trustee "shall enforce" the repurchase protocol. (Id. at 520.) However, under New York law the contract also need not contain an express term conferring the right of enforcement on the third-party beneficiary. It is sufficient that the language of the contract "clearly evidence[] an intent to permit enforcement by the third party . . . ." (See Fourth Ocean Putnam Corp. v Interstate Wrecking Co., Inc., 66 NY2d 38, 45 [1985].)

Thus, in many third-party beneficiary cases in which a third-party is not even mentioned in the contract, the courts have undertaken a threshold analysis to determine whether the third-party was an "intended beneficiary" with the right of enforcement, or an "incidental beneficiary" without such right. (See e.g. Fourth Ocean, 66 NY2d at 43-46; 243-249 Holding Co., LLC v Infante, 4 AD3d 184 [1st Dept 2004]; LaSalle Natl. Bank v Ernst & Young LLP, 285 AD2d 101, 108 [1st Dept 2001].)

Similarly, in the context of claims by monoline insurers to enforce agreements governing RMBS securitizations, the courts have undertaken a contractual analysis to determine whether the contract evidenced the intent to confer a right of enforcement on the insurers. (See e.g.

Ambac [EMC], 121 AD3d 514, supra [discussed at length above]; Assured Guar. [DLJ], 117 AD3d 450, supra; U.S. Bank Natl. Assn. v GreenPoint Mtge. Funding, Inc., 105 AD3d 639, 640 [holding that insurer lacked standing to enforce loan sale agreements in "[t]he absence of any clear language on the face of the sale agreements regarding any third-party beneficiary rights"]; Assured Guar. Mun. Corp. v UBS Real Estate Secs., Inc., 2012 WL 3525613, * 4 [SD NY 2012] [Baer, J.] [holding, under New York law, that "contracting parties may simultaneously elect to confer a benefit or right upon a third party and to limit that right, including by limiting the third party's enforcement powers," and concluding that insurer did not have a direct right to enforce the PSAs given a provision which, as paraphrased by the court, "explicitly state[d] that Assured may give notice to the Trustee so that the Trustee can enforce the repurchase obligations"].)

Here, there is no question that the Trustee is an intended beneficiary, as it is expressly named as a third-party beneficiary in the PSAs. Rather, as held above, the issue is whether Ambac has a right of enforcement. As the PSAs are reasonably susceptible to conflicting interpretations in this regard, this issue cannot be determined as a matter of law. An evidentiary record must be developed on whether the parties intended to confer such right on Ambac. The issue of whether Ambac's right of enforcement, if any, is limited by the PSAs' sole remedy provisions should also be determined on a fully developed record. In so holding, the court recognizes that the First Department has held that insurers were not bound by sole remedy provisions where they were not included in the list of parties bound by such provisions. (Ambac [EMC], 121 AD3d at 519; Assured Guar. [DLJ], 117 AD3d at 450-451.) In those cases, however, the Court decided as a matter of law whether the insurers had rights of enforcement. Here, in contrast, all relevant provisions of the contract must be construed in light of parol

evidence as to whether the parties intended to confer enforcement rights on the insurer and, if so, whether the intent was to limit the remedies available.

The branch of the motion for dismissal of the first cause of action for breach of representations regarding the mortgage loans, based on lack of standing, will therefore be denied.

For the reasons and on the authority cited in this court's prior decisions in the RMBS litigation, the court rejects defendants' contention that the breach of contract cause of action is not stated as to liquidated loans because they are not subject to repurchase. (See Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2006-S4 v Nomura Credit & Capital, Inc., 2014 WL 2890341 [Sup Ct, NY County, June 26, 2014] [Nomura] [interpreting substantially similar PSA Definitions of "Purchase Price" and "Mortgage Loan"].) Nor does the court find that the complaint fails to plead sufficient details as to the specific representations that were breached or as to identity of the loans affected by the breaches. As previously held, courts have repeatedly upheld pleadings alleging misrepresentations about loan characteristics notwithstanding the absence of allegations identifying specific nonconforming loans where, as here, the complaints alleged widespread abandonment of underwriting guidelines. (See Nomura, 2014 WL 2890341 at * 17.)

Defendants also seek dismissal of any claim in the complaint for rescissory damages. The complaint does not specifically request rescissory damages, but does seek "damages sufficient to place Ambac in the position it would have been in had it never issued the Policies." (Compl., ¶ 75.) Although Ambac contends that dismissal of a claim for rescissory damages would be premature, it does not dispute that it issued irrevocable policies. Rescissory damages are therefore unavailable. (See MBIA Ins. Corp. v Countrywide Home Loans, Inc., 105 AD3d

412, 413 [1st Dept 2013] [holding that insurer should not be permitted "to reclaim a right it voluntarily contracted away or to obtain relief it never actually requested"].)

The second cause of action for breach of the repurchase protocol will also be dismissed based on ACE Secs. Corp. v DB Structured Prods., Inc. (112 AD3d 522 [1st Dept 2013], lv granted 23 NY3d 906 [2014].) There, the Court held that a remedial provision similar to the PSA provisions at issue does not give rise to an independent cause of action for breach of contract.

Finally, the complaint fails to state a cause of action against Nomura Holding based on alter ego liability. In order to establish an alter ego claim, a plaintiff must "establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." (ABN AMRO Bank, N.V. v MBIA Inc., 17 NY3d 208, 229 [2011], quoting Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 142 [1993].) Put another way, the plaintiff must show that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (Id. at 141.) In order to plead an alter ego claim, however, it is insufficient for a plaintiff to allege merely that a corporate parent "directed and dominated" its subsidiary. Plaintiff's allegations must support the inference that the control resulted in a fraud or wrong, i.e. that "through its domination [the parent] misused the corporate form for its personal ends so as to commit a fraud or wrongdoing or avoid any of its obligations." (TNS Holdings, Inc. v MKI Securities Corp., 92 NY2d 335, 339-340 [1998]; see also Pritchard v 164 Ludlow Corp., 49 AD3d 408, 409 [1st Dept 2008] [dismissing veil piercing

claim for failure to allege that defendant owners used "the corporation for their own personal benefit or that they abused the corporate form to injure plaintiffs"].)

Here, the complaint alleges that Nomura Holding "exercised complete domination and control over NCCI" and caused it to breach its obligations under the PSAs and the repurchase protocol. (Compl., ¶¶73, 80.) In support of this contention, the complaint alleges that Nomura Holding and its subsidiary NCCI shared the same address and had "substantial overlap in the top tiers of management." (Id., ¶ 58.) The sole remaining factual allegation is that Nomura Holding's Managing Director and Head of Litigation wrote a letter to Ambac on Nomura Holding's letterhead, "on behalf of Nomura Asset Acceptance Corp. . . . and Nomura Credit & Capital, Inc.," rejecting Ambac's repurchase demands. (Id., ¶ 61; Letter [Craner Aff., Ex. P].) This letter is dated March 6, 2012, nearly five years after the closing date of the transaction at issue.

The complaint thus does not contain any allegations as to Nomura Holding's abuse of the corporate form for its own gain. Nor does it allege "self-dealing, commingling of funds, lack of corporate formalities or other veil-piercing indicia" – critical elements of an alter ego claim. (See Hartej Corp. v Pepsico World Trading Co. Inc., 255 AD2d 233, 233 [1st Dept 1998]; see also Morpheus Cap. Advisors LLC v UBS AG, 105 AD3d 145, 153 [1st Dept 2013], revd on other grounds 23 NY3d 528 [2014] [dismissing claims alleging alter ego liability of parent corporation for failure to state a cause of action where complaint fails to plead such indicia of abuse of the corporate form].)

Nor are the conclusory allegations of domination and control and the existence of overlapping management sufficient, without more, to warrant discovery on the claim. (Pritchard, 49 AD3d at 409; Hartej, 255 AD2d at 233.) The court accordingly holds that the claims against

Nomura Holding should be dismissed. In the event Ambac recovers a judgment against NCCI, this holding will not preclude Ambac from seeking recovery, if appropriate, in post-judgment enforcement proceedings against Nomura Holding.

It is accordingly hereby ORDERED that defendants' motion to dismiss is granted to the following extent: The second cause of action for breach of the repurchase protocol and the claim for rescissory damages are dismissed; and the first and second causes of action, for alter ego liability, as against Nomura Holding America Inc. are dismissed; and it is further

ORDERED that the remaining claims are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
June 2, 2015

MARCY FRIEDMAN, J.S.C.