Bank of N.Y. Mellon v WMC Mtge., LLC
2017 NY Slip Op 30139(U)
January 18, 2017
Supreme Court, New York County
Docket Number: 654464/2012
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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THE BANK OF NEW YORK MELLON, solely as Securities Administrator for J.P. Morgan Mortgage Acquisition Trust 2006-WMC4,

Index No.: 654464/2012

DECISION & ORDER

Plaintiff,

-against-

WMC MORTGAGE, LLC, J.P. MORGAN MORTGAGE ACQUISITON CORPORATION, and J.P. MORGAN CHASE BANK, N.A.,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 007 and 008 are consolidated for disposition.

Before the court are two motions to quash subpoenas by non-party current and former certificateholders[1] of the RMBS trust (the Trust) at issue in this put-back case. Familiarity with this case, and RMBS cases in general, is presumed. *See Bank of N.Y. Mellon v WMC Mort., LLC*, 41 Misc3d 1230(A) (Sup Ct, NY County 2013), *rearg. denied* 2014 WL 3738083 (Sup Ct, NY County 2014), *aff'd* 136 AD3d 1 (1st Dept 2015), *aff'd* 28 NY3d 1039 (2016).

The Certificateholders seek to quash subpoenas served by the originator of the loans in the Trust, defendant WMC Mortgage, LLC (WMC). Neither plaintiff nor the other defendants take a position on these motions, which were originally filed on June 17, 2016 and have since been narrowed by virtue of numerous discovery conferences. To explain, WMC seeks ESI from the Certificateholders and their counsel at Quinn Emanuel Urquhart & Sullivan LLP (Quinn Emanuel) regarding loan reunderwriting performed by non-party Digital Risk, LLC (Digital

[1] The two groups of movants are: (1) Glenview Capital Management, LLC; Glenview Master Fund II, LLC, EP Structured Credit Strategies Fund, Ltd., Eton Park Capital Management, L.P.; and (2) Värde Partners, Inc. and Värde Partners Structured Products, LLC (collectively, the Certificateholders).

Risk). The Certificateholders hired Digital Risk to perform this work prior to demanding that plaintiff commence this action. In an RMBS put-back case, pre-suit reunderwriting is not ordinarily discoverable. *See Assured Guar. Mun. Corp. v DB Structured Prods., Inc.*, 111 AD3d 478, 479 (1st Dept 2013); *Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 (1st Dept 2012).

The parties have reached an impasse on the remaining issues. WMC filed opposition to the motions on November 23, 2016, and the Certificateholders replied on December 16, 2016. On a January 10, 2017 conference call, the court indicated that the balance of the motions was being granted, and directed the parties to draft an implementing ESI protocol before the next conference on February 1, 2017.

The instant motions come before this court in a unique posture. Unlike any case found by the court or any case cited by the parties,[2] the plaintiff's reunderwriting expert report is not based exclusively on that expert's independent analysis and methodology. Rather, plaintiff's expert relied heavily on the work and methodology of Digital Risk's pre-litigation reunderwriting.[3] WMC explains:

> [Plaintiff's] re-underwriting expert Mr. Ira Holt, Jr. 'adopted' wholesale the pre-suit re-underwriting commissioned by the [] Certificateholders, even though Mr. Holt had little, if any, knowledge of what Digital Risk did to reach its conclusions or of the assumptions upon which they were based.

Dkt. 322 at 5.

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[2] To be sure, the issues giving rise to this motion (i.e., Mr. Holt's work, discussed herein) have arisen in at least one other case in which he was involved. However, no court has ever decided a discovery motion based on these circumstances.

[3] This is the subject of heated dispute between the parties [*see* Dkt. 312], but resolution of that dispute is not at issue on the instant motions. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

Digital Risk's methodologies were based on specific directions given by the Certificateholders and Quinn Emanuel. According to WMC, the only way for it to vet the credibility of plaintiff's expert and the methodologies he relied on is to vet the methodologies employed by Digital Risk. While Digital Risk witnesses have been deposed, by virtue of the laxity of its document retention policies, the communications between Digital Risk and the Certificateholders cannot be retrieved from Digital Risk's ESI custodians. Therefore, WMC seeks these documents from the Certificateholders.[4]

Under these circumstances, the discovery sought by WMC is warranted. Such discovery is material and necessary for the purpose of cross-examining plaintiff's expert on a critical issue in this case – plaintiff's expert testimony regarding the existence of material breaches of the applicable reps and warranties. *See Kapon v Koch*, 23 NY3d 32, 38 (2014) ("The words 'material and necessary' as used in [CPLR] 3101 must 'be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'") (citation omitted). "An application to quash a subpoena should be granted '[o]nly where the futility of the process to uncover anything legitimate is inevitable or obvious' ... or where the information sought is '**utterly irrelevant** to any proper inquiry.'" *Id.* (emphasis added; citations omitted); *see Harold Levinson Assocs., Inc. v Wong*, 128 AD3d 566, 567 (1st Dept 2015) ("Defendants failed to establish that the records sought were 'utterly irrelevant' to the instant action and they had sufficient notice of 'the circumstances or reasons' underlying the subpoena request. Contrary to defendants' contention, the motion court's prior denial of plaintiff's motion to compel discovery as overbroad does not require granting the motion to quash, as the discovery sought in the

[4] The court held on the January 10 call that both Certificateholder and Quinn Emanuel internal communications regarding Digital Risk are to be included in the ESI protocol.

subpoena at issue was narrower than the material previously sought.") (internal citations omitted).

It should be noted that the discovery sought by WMC is not duplicative and is not available from another source. The burden on the Certificateholders is relatively minimal since WMC, in requesting ESI from a non-party, will have to defray the Certificateholders' reasonable document collection, review, and production costs, including certain legal fees. *See* CPLR 3111 & 3122(d); 22 NYCRR 202.70, Rule 11-c, Appendix A ("Fees charged by outside counsel and e-discovery consultants ... include "[t]he costs incurred in connection with the identification, preservation, collection, processing, hosting, use of advanced analytical software applications and other technologies, review for relevance and privilege, preparation of a privilege log (to the extent one is requested), and production."). This was discussed with the parties on the January 10 call. WMC understands and is willing to undertake the financial obligation to defray these costs. An ESI protocol is being drafted to establish reasonable de-duplicated hit count totals so WMC will know, ahead of time, approximately how much this will cost. In light of foreseeable privilege disputes (which are not ripe for a ruling prior to the document review and service of a privilege log), it was agreed that, although certain internal Quinn Emanuel communications regarding their directions to Digital Risk will be reviewed, a categorical privilege log, in the first instance, will be employed for the sake of cost efficiency. Once WMC is made aware of the hit count totals associated with the Certificateholders' privilege designations, it will elect whether it wants to pursue such purportedly privileged documents in light of the legal fees necessary to do so.

To be sure, disputes over the final version of the ESI protocol, the merits of any potential privilege issues, and the complete extent of WMC's cost shifting obligations are not ripe for resolution. At this juncture, the court is simply ruling that the ESI sought by WMC must be produced, with cost shifting, because WMC needs such documents to properly cross-examine plaintiff's reunderwriting expert, an expert who based his opinion on Digital Risk's work. Accordingly, it is

ORDERED that, to the extent provided herein, the balance of the Certificateholders' motions to quash WMC's subpoenas seeking ESI, to the extent not resolved, is denied, the Certificateholders' shall produce ESI in response to the subpeonas in accordance with a forthcoming ESI protocol, and WMC shall defray the Certificateholders' costs in accordance with 22 NYCRR 202.70, Rule 11-c, Appendix A; and it is further

ORDERED that a telephone conference will be held on February 1, 2017 at 4:30 p.m. to discuss the status of the parties' ESI protocol.[5]

Dated: January 18, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[5] Counsel for Digital Risk also must participate in this call and must be prepared to explain why they felt the redactions in the Certificateholders' reply brief are warranted. While the cited deposition testimony may warrant sealing, many of the redactions in the brief seem questionable.