

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Ramos Justice

PART 53

Index Number : 650420/2012
SYNCORA GUARANTEE INC.
vs.
EMC MORTGAGE LLC
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with
accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated:

[Signature] J.S.C.

HON. CHARLES E. RAMOS
NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
SYNCORA GUARANTEE INC., formerly known as XL
CAPITAL ASSURANCE INC.,

Plaintiff,

-against-

Index No.
650420/12

EMC MORTGAGE, LLC (formerly known as EMC
MORTGAGE CORPORATION), BEAR STEARNS ASSET
BACKED SECURITIES 1 LLC, J.P. MORGAN SECURITIES
LLC (formerly known as BEAR, STEARNS & CO. INC.),
and JPMORGAN CHASE BANK, N.A.,

Defendants.
-----X

Charles E. Ramos, J.S.C.:

Defendants EMC Mortgage, LLC, formerly known as EMC Mortgage Corporation (EMC), Bears Stearns Asset Backed Securities I LLC (BSABS), J.P. Morgan Securities LLC (JP Morgan), formerly known as Bear, Stearns & Co. Inc. Bear Stearns & Co., and JP Morgan Chase Bank, N.A. (together, defendants) move for partial dismissal, pursuant to CPLR 3211 (a) (1) and (a) (7).

At oral argument held on the motions, the parties agreed to hold in abeyance that portion of the motion that seeks to dismiss the claim for fraudulent inducement, pending the determination by the First Department of an appeal of the May 1, 2012 decision of Justice Sherwood in *CIFG Assurance North America, Inc. v Goldman, Sachs & Co., et al* (652286/11).

Background

The allegations set forth below are taken from Syncora's

complaint, and are assumed to be true for the purposes of this disposition.

Syncora, a monoline insurer, provided financial guaranty insurance for residential mortgage-backed securities (RMBS) transactions underwritten by Bear Stearns. In this action, Syncora alleges that Bear Stearns grossly misrepresented the risk of the underlying pooled loans.

The transaction at issue, the SACO 2006-1 Trust (Saco trust), involved the sale of 4,360 home equity lines of credit (HELOCs) by EMC, a Bear Stearns affiliate, with an aggregate principal balance of \$310,097,406. EMC had previously purchased the HELOCs from three principal sub-prime mortgage originators, who are not parties to this action. The HELOCs were used as collateral for the issuance of \$303 million in debt securities of varying seniority with payments dependent on, or backed by, the cash flow received from the pooled loans.

The transaction was effectuated through a series of interlocking agreements (operative documents), including the Mortgage Loan Purchase Agreement (MLPA), the Sale and Servicing Agreement (SSA), and the Insurance & Indemnity Agreement (I&I Agreement). Syncora is a direct party only to the I&I Agreement and is an express third-party beneficiary of the MLPA and SSA.

The MLPA is a sales agreement pursuant to which EMC transferred and sold HELOCs to the purchaser, another Bear

Stearns entity. The SSA provides for the administration and servicing of the HELOCs.

The MLPA sets forth a myriad of representations and warranties pertaining to the quality of the loan pool (Loan Warranties). The MLPA also creates a repurchase protocol (Repurchase Protocol) pursuant to which certain parties to the transaction, including Syncora, can compel EMC to repurchase HELOCs that breach the Loan Warranties (Repurchase Protocol) (MLPA § 7, 16).

Pursuant to the Insurance and Indemnity Agreement (I&I Agreement), Syncora agreed to the issuance of a policy of insurance (Policy) guaranteeing certain payments of interest and principal due on the securities. The I&I Agreement expressly incorporates the Loan Warranties established under the MLPA (I&I Agreement, § 2.01 [m]), and provides that Syncora is a third-party beneficiary of the other principal operative documents, with all rights afforded thereunder (I&I Agreement, § 2.02 [j]).

Syncora maintains that the I&I Agreement contains transaction-level warranties pertaining to the information that Bear Stearns directly provided to Syncora in order to assess the risks associated with the transaction, largely set forth in sections 2.02 (k) and (l). In addition, Syncora asserts that the I&I Agreement confers even greater remedies to Syncora for breach of these warranties than those extended to the other

securitization participants, set forth in sections 5.02 (a) and (b), in addition to indemnification and reimbursement rights set forth in sections 3.03 (b) and 3.04 (a).

Widespread Fraud

According to Syncora, the loans sold to the Saco trust have failed miserably, and as of September 2011, only 653 of the 4,360 HELOCs are current, while 1,394 are in default or have been liquidated. With cumulative losses of approximately \$97 million, Syncora has correspondingly paid \$51,964,147 in claim payments to the insured noteholders.

Syncora has since re-underwritten a sampling of the loans in the trust, which has purportedly revealed that 271 out of 331 loans reviewed had a material breach of one or more of the Loan Warranties. If Syncora is correct, the material breach rate of the loans in the pool is an astonishing eighty percent.

Syncora alleges that Bear Stearns made materially false and misleading representations largely pertaining to the due diligence protocols and quality control efforts in order to induce Syncora to insure the transaction.

Bear Stearns was also purportedly aware, and failed to disclose, that its third-party due diligence firm, Clayton, was performing well below expectations because Bear Stearns was directing Clayton to disregard normal practices and protocols.

Syncora's Claims

Syncora asserts claims for breach of the I&I Agreement; fraudulent inducement; indemnification; reimbursement for certain payments made under its Policy, and attorney's fees and costs against EMC. Syncora also asserts a claim against JP Morgan, as the successor to EMC, for successor liability.

Analysis

Defendants move to dismiss Syncora's breach of contract claims on the ground that section 7 of the MLPA explicitly limits Syncora to the Repurchase Protocol as the "sole and exclusive remedy" for alleged breaches of the Loan Warranties, which must be read in tandem with the I&I Agreement. In support of this contention, defendants cite to *Assured Guar. Mun. Corp. v Flagstar Bank, FSB* (2011 WL 5335566, *11 [SD NY 2011]) (Flagstar I).

In opposition, Syncora maintains that it is suing for breach of the I&I Agreement, and thus, is not bound by the Repurchase Protocol of the MLPA. Syncora relies upon *Syncora Guarantee Inc. v EMC Mortg. Corp.* (2011 WL 1135007, *4-7 [SD NY 2011]), wherein Judge Crotty denied a motion for summary judgment that sought a finding that the repurchase protocol was the exclusive remedy for a monoline insurer's breach of representations claim.

This Court recently issued a decision in *Assured Guar. Corp. v EMC Mtg., LLC* (2013 NY Slip Op 50519[U] [Sup Ct, NY County,

2013), an action similarly brought by a monoline insurer against EMC and Bear Stearns for breaches of contract and fraud pertaining to defective HELOCs in a RMBS transaction. The parties in that action also executed interlocking agreements pursuant to which Assured, the monoline insurer, was a third party beneficiary of the MLPA and the SSA, and a direct party to the I&I Agreement. This Court granted defendants' motion to dismiss Assured's contract claims that did not strictly arise under the Repurchase Protocol. In particular, this Court was persuaded by the fact that Assured was specifically named in a list of parties for whom the Repurchase Protocol was the sole and exclusive remedy in the MLPA for breaches of Loan Warranties, and the I&I Agreement expressly provided that Assured's remedies thereunder are "limited" to the remedy established by the MLPA, e.g. the Repurchase Protocol (*accord* Flagstar I, 2011 WL 5335566, *11).

Unlike *Assured Guar. Corp.* (2013 NY Slip Op 50519[U]) and Flagstar I (2011 WL 5335566), the I&I Agreement here, the only agreement to which Syncora is a direct party, contains no language limiting Syncora's rights and remedies thereunder. Specifically, the Repurchase Protocol is excluded from the I&I Agreement altogether. The I&I Agreement makes clear that Syncora is a third party beneficiary with respect to the rights established under the operative documents, and the

representations and warranties [Loan Warranties] established under the MLPA are incorporated for the benefit of Syncora, but does not limit Syncora's remedies.

The I&I Agreement states at § 2.02 (j):

"[Syncora] shall constitute a third-party beneficiary with respects to such **rights** in respect of the Operative Documents and hereby incorporates and restates its representations, warranties and covenants as set forth therein for the **benefit** of the Insurer [Syncora]" (emphasis added).

The I&I Agreement also states at § 2.02 (m):

"Each of the representations and warranties of EMC, the Issuer and the Depositor contained in the applicable Operative Documents is true and correct in all material respects and each of EMC, the Issuer and the Depositor hereby makes each such representation and warranty to, and for the **benefit** of, the Insurer as if the same were set forth in full herein" (emphasis added).

Further dispelling the notion that the parties intended to limit Syncora's remedies to the Repurchase Protocol of the MLPA is that the I&I Agreement confers non-exclusive rights and remedies upon Syncora, that were not conferred upon the other securitization participants (e.g. I&I Agreement, §§ 5.2, 2.02 [j]).

In addition to the reasons stated above, this Court notes that the SSA also does not limit the insurer to the exclusive remedy of the Repurchase Protocol (*compare Assured*, 2013 NY Slip Op 50519[U]; *Flagstar I*, 2011 WL 5335566).

Defendants largely rely upon the inclusion of the term "Note

Insurer" in the sole remedy provision of the MLPA, an apparent reference to Syncora, to support their contention that Syncora's remedies under all the inter-locking agreements, including the I&I Agreement, are limited to the Repurchase Protocol. They also cite to section 5.02 of the I&I Agreement which states that Syncora's remedies are cumulative and shall be in addition to other remedies given "unless otherwise expressly provided." They cite to the principle that a related set of agreements executed at the same time and related to the same subject matter are contemporaneous writings and must be read together as one. To this extent, defendants urge this Court to read the limitation on Syncora's remedies set forth in section 7 of the MLPA into the opening clause of section 5.02 of the I&I Agreement.

Defendants correctly recite the law. However, although the Court must read the MLPA, SSA and I&I Agreement together, it cannot do so in a manner that would effectively rewrite the parties' agreements under the guise of contract interpretation (*see generally Reiss v Financial Performance Corp.*, 97 NY2d 195 [2001]). Nothing in the agreements compels this Court to assume that extending the exclusive remedy provision was intended or necessary to reconcile any inconsistency. In this regard, the I&I Agreement provides for the opposite result.

Section 5.02 of the I&I Agreement states in full:

"Unless otherwise expressly provided, no remedy herein conferred or reserved is intended to be exclusive of any

other available remedy, but each remedy shall be cumulative and shall be **in addition to other remedies given under this Insurance Agreement** (emphasis added)."

The fact remains that the parties did not include any language limiting Syncora's remedies under the I&I Agreement, although similarly situated parties did include such limitations in other transactions, such as in *Assured* (2013 NY Slip Op 50519[U]) and *Flagstar I* (2011 WL 5335566) (*cf Syncora Guarantee Inc.*, 2011 WL 1135007 at *4-7).

Moreover, section 6.11 of the I&I Agreement states that "[t]his Insurance Agreement and the Policy set forth the entire agreement between the parties with respect to the subject matter hereof and thereof." Consequently, to import the sole and exclusive remedy provision of the MLPA into the I&I Agreement, where it has been specifically omitted, would be to distort the meaning of the parties' written agreement, which is complete, clear and unambiguous on its face.

Alternatively, defendants argue that Syncora's claim for breach of contract must be dismissed because it is in default of its obligations under the I&I Agreement. According to defendants, as of April 2012, Syncora has failed to make more than \$11 million in payments of claims it is obligated to make to the Saco trust. Syncora disputes in full defendants' assertion, arguing that it has made over \$53 million in claims payments due under the Policy since August 2008, and that no payments remain

outstanding. Obviously, evaluating Syncora's representation raises disputed factual issues which are not suited to disposition under a pre-answer motion to dismiss under CPLR 3211. In any event, section 4.03 (a) (ix) states that the obligations of EMC "shall be absolute and unconditional ... irrespective of ... any default or alleged default of the Insurer under the Policy." Accordingly, defendants' motion to dismiss the claim for breach of contract is denied.

Defendants also seek to dismiss Syncora's claims for indemnification and reimbursement mainly because Syncora is asserting a first-party claim which is not covered by the relevant provisions, and because Syncora failed to provide requisite notice to EMC.

Section 3.04 (a) of the I&I Agreement provides:

In addition to any and all of the Insurer's rights of reimbursement, indemnification ... EMC ... agree to pay, and to protect, indemnify and save harmless ... the Insurer ... **from and against** any and all claims, losses, liabilities (...), actions, suits ... arising out of or relating to the breach by EMC ... arising out of or relating to the transactions contemplated by the Operative Documents (emphasis added)."

Section 3.04 (c) provides:

"If any **action or proceeding** (...) **shall be brought or asserted against** any Person (individually, an "Indemnified Party" ...) in respect of which the indemnity provided in Section 3.04 (a) ... may be sought from the ... Insurer [Syncora] ... hereunder, each such Indemnified Party shall promptly notify the Indemnifying Party" (emphasis added).

The claim for contractual indemnification against EMC is

dismissed. Section 3.04 of the I&I Agreement plainly limits Syncora's indemnity rights to losses that relate to third party claims only, insofar as the provisions refer to actions or proceedings which shall be "brought or asserted against" Syncora, and Syncora shall be indemnified "from and against" any applicable claims.

Although Syncora attempts to characterize its claim as arising out of third party claims, it is plainly seeking coverage for its own losses that it is pursuing on its own behalf, i.e. repayment of insurance claims payments made to the trustee. Such claims are classic first party claims and beyond the contemplation of the indemnification provision, which is subject to a strict interpretation (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Cahn v Ward Trucking, Inc.*, 101 AD3d 458, 458 [1st Dept 2012]).

Syncora also seeks reimbursement of its attorneys' fees and costs incurred in this action under section 3.03 (c) of the I&I Agreement, and reimbursement of claims payments under section 3.03 (b).

Section 3.03 (b) of the I&I Agreement provides:

"[T]he Insurer shall be entitled to reimbursement from EMC and shall have recourse against EMC for, (1) any payment made under the Policy arising as a result of EMC's failure to substitute for or deposit an amount in respect of any defective HELOC as required pursuant to section 7 of the Purchase Agreement [MLPA]).

Further, section 3.03 (c) of the I&I Agreement provides:

"EMC agrees to pay to the Insurer and all charges, fees, costs and expenses that the Insurer may reasonable pay or incur, including reasonable attorneys' and accountants' fees and expenses, in connection with (I) the enforcement, defense or preservation of any rights in respect of any of the Operative Documents, including defending ... or participating in any litigation ... relating to any of the Operative Documents."

Under the plain import of these provisions, Syncora possesses the clear contractual right to reimbursement for its reasonable attorneys' fees and costs incurred in relation to its claim for breach of contract (*accord Assured Guar. Mun. Corp. v Flagstar Bank, FSB, _F Supp 2d_, 2013 WL 440114, *40 [SD NY 2013] (Flagstar II)*)).

Section 3.03 (b) of the I&I Agreement also provides Syncora with a right to reimbursement of payments made under the Policy if EMC has failed to repurchase or substitute defective HELOCs pursuant to the Repurchase Protocol established under section 7 of the MLPA. Defendants maintain that Syncora has failed to comply with the Repurchase Protocol, namely because it did not provide EMC with the requisite notice, which Syncora disputes. Determining whether Syncora provided the requisite notice involves resolving questions of fact, which the Court cannot do at this stage.

Finally, Defendants move to dismiss the claim for successor liability, asserted against JPMorgan Securities LLC as the successor to Bear, Stearns & Co. Inc. and against JPMorgan Chase

Bank, N.A. as the purported successor to EMC. In light of the Court's denial of the motion to dismiss the claims against Bear Stearns and EMC, this portion of the motion is denied, as well.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied, in part, and granted, in part, as to the third cause of action for indemnification which is hereby severed and dismissed, and

ORDERED that defendants are directed to serve an answer within 20 days after service of a copy of this order with notice of entry.

Dated: April 15, 2013

ENTER:

J.S.C.

HON. CHARLES E. RAMOS