

**U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.**

2017 NY Slip Op 30861(U)

April 27, 2017

Supreme Court, New York County

Docket Number: 600352/2009

Judge: Marcy Friedman

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK – PART 60

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

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U.S. BANK NATIONAL ASSOCIATION, as  
 Indenture Trustee for the Benefit of the Insurers and  
 Noteholders of GreenPoint Mortgage Funding Trust  
 2006-HE1, Home Equity Loan Asset-Backed Notes,  
 Series 2006-HE1, et al.,

Index No.: 600352/2009

*Plaintiffs,*

DECISION/ORDER

– against –

GREENPOINT MORTGAGE FUNDING, INC.,

*Defendant.*

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In this RMBS putback action, defendant originator GreenPoint Mortgage Funding, Inc. (GreenPoint) moves, pursuant to the Part 60 Putback and Monoline Cases Case Management Order, dated December 7, 2015 (the CMO) (Master File Index. No. 777000/15, NYSCEF No. 17), for an order reversing a December 2, 2016 ruling of Hon. Theodore H. Katz (Ret.), the Special Discovery Master for the RMBS putback and monoline cases (the Ruling). The Ruling denied GreenPoint's request to compel non-party Syncora Guarantee Inc. (Syncora) to produce or deem produced in this action documents previously produced by Syncora in an adversary proceeding involving non-party Lehman Brothers Holdings, Inc. (LBHI), the sponsor of the securitization at issue in this case. Syncora issued a financial guaranty policy with respect to the senior tranche of certificates issued by the Trust in this action. Syncora opposes GreenPoint's motion for review of the Ruling.

As represented by GreenPoint, and not disputed by Syncora, the LBHI adversary proceeding was filed by LBHI against Syncora, GreenPoint, and the plaintiff trustee in this

action, U.S. Bank National Association (the Trustee). LBHI sought to reduce or eliminate a claim by Syncora for breaches of representations and warranties. GreenPoint contends that it received discovery from Syncora in the adversary proceeding and that “[t]he majority of the discovery . . . pertained to [Syncora’s] alleged losses, e.g., Syncora’s financial guaranty payments, including documents regarding actions taken by Syncora to reduce its losses.” (GreenPoint Memo., at 4.)

Judge Katz denied GreenPoint’s request to compel Syncora to produce these documents in this action, reasoning as follows:

“ . . . GreenPoint previously succeeded in having Syncora dismissed as a plaintiff in this case. As a result of that dismissal, Syncora maintains no direct claim for damages, and instead, may simply derive some financial benefit from any damages that are ultimately awarded to the Trust. Based upon that procedural posture, the Special Master is persuaded that any actions taken by Syncora with respect to mitigating its own losses are an inherently tangential consideration with respect to the claims being litigated by the Parties in this case.

Thus, assuming arguendo that the requested documents surpass the relevance threshold under New York law, the Special Master concludes that the burden Syncora will necessarily bear to produce in this case the several million documents produced in the Adversary Proceeding – including, at a minimum, a privilege review – clearly outweighs any benefit GreenPoint is reasonably likely to derive from those documents, given their tangential nature.”

(Ruling, at 2 [Matheson Aff., Exh. A].) In a footnote, Judge Katz also stated that, in view of the above conclusion, “the Special Master’s present resolution does not require a decision on the issue of relevance.” (Id., at 2 n 1.)

GreenPoint seeks de novo review of Judge Katz’s relevance holding and review under the clearly erroneous standard of his burden holding. (GreenPoint Memo., at 5, 7.) Syncora does not appear to dispute the standard urged by GreenPoint for review of the relevance holding, and agrees that the clearly erroneous standard applies to the burden holding. (See Syncora Memo., at

4-8.)

In seeking the documents produced by Syncora in the adversary proceeding, GreenPoint argues that Syncora is controlling this litigation, that Syncora will benefit from any recovery by the Trustee in this action, that the Trust has already been reimbursed by Syncora for its losses, and that the Trustee is in reality “suing to recover Syncora’s out-of-pocket losses.” (GreenPoint Memo., at 2-3, 6.) GreenPoint further argues that, in order to calculate Syncora’s losses, GreenPoint requires information which it variously describes as “information regarding Syncora’s transactions resulting in the return of insurance payments to Syncora,” and information regarding “how much Syncora paid to the Trust and how much of that was returned to Syncora.” (*Id.*, at 6.)

GreenPoint denies that it is seeking information about efforts made by Syncora to mitigate its losses. (*Id.*, at 6.) GreenPoint, however, neither specifically identifies, nor describes the types of, transactions that it claims may have “result[ed] in the return of insurance payments to Syncora.” (*Id.*) GreenPoint also does not explain how such transactions differ in any respect from mitigation transactions.

More important, GreenPoint fails to explain how these unidentified transactions by Syncora relate to the amounts recoverable by the Trustee in this action for breaches of representations and warranties. Without any supporting analysis, GreenPoint equates Syncora’s losses with the Trust’s losses. As Syncora correctly argues, plaintiff Trustee seeks in this action to recover the Trust’s damages for breaches of representations and warranties regarding the quality and characteristics of the underlying loans. Syncora is not a party to the action and is not suing to recover its own losses.<sup>1</sup> The fact that Syncora has made payments on its guaranty

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<sup>1</sup> On GreenPoint’s motion, Syncora was dismissed as a plaintiff in this action based upon lack of standing. (*U.S. Bank, N.A. v GreenPoint Mtgc. Funding, Inc.*, 2010 WL 841367 [Sup Ct, NY County, Mar. 3, 2010, Fried J.] )

policies, and will concededly benefit from a recovery by the Trustee, does not support GreenPoint's assertion that the Trustee is suing to recover Syncora's losses. Rather, Syncora's interest in the Trustee's recovery is indirect and derives from the terms of the agreements governing this securitization. Specifically, Article 5 of a Transfer and Servicing Agreement, dated as of August 1, 2006 (Craig Aff., Exh. 3) obligates the Trustee to distribute funds received by the Trust to certificateholders and insurers, including Syncora, in accordance with the priorities set forth in a waterfall provision.

At the oral argument of this motion, GreenPoint, in response to questioning by the court, stated that it was unable to provide specifics with respect to transactions by which insurance payments were returned to Syncora because it was barred from doing so by a confidentiality agreement in the LBHI adversary proceeding in which it had obtained discovery of such transactions. Nevertheless, GreenPoint does not articulate any legal theory as to the damages that are recoverable in this action and, in particular, as to how the alleged transactions and return of policy payments to Syncora relate to the amounts GreenPoint may be obligated to pay to the Trust as damages for breaches of representations and warranties.

Applying a de novo standard of review, the court accordingly holds that, as Judge Katz determined, the Trustee is suing to recover the Trust's losses, not Syncora's losses. The court further holds that evidence of return of insurance payments to Syncora or of Syncora's efforts to mitigate its losses has not been shown to be relevant to the claims being litigated in this action. Indeed, GreenPoint fails to submit any authority holding that a monoline insurer's losses and mitigation efforts are discoverable in a putback action brought by a trustee for breaches of representations and warranties. Were this court to hold otherwise, it would open the door to discovery of the actual losses and mitigation efforts of other beneficiaries of putback litigation,

including directing or even passive certificateholders in RMBS trusts, on the theory that the plaintiff trustees in effect seek recovery of their losses. Such a holding would greatly expand the proper scope of discovery in these actions.

As to the burden determination, it is noted that on the record before Judge Katz, GreenPoint sought production, or deemed production, of all documents produced by Syncora in the LBHI adversary proceeding. The parties dispute whether Syncora produced 225,000 or only 122,000 documents. (See Syncora Memo., at 3 & n 1.) On this motion for review of the Ruling, GreenPoint stated for the first time at oral argument that it seeks production only of 223 documents.


The court holds that, on the record before him, Judge Katz's burden holding was not clearly erroneous. (See Ruling, at 2.) GreenPoint's downward revision of its request for documents from Syncora was not made to Judge Katz and is beyond the scope of this appeal. In any event, the revision does not alter this court's holding that GreenPoint has not demonstrated the relevance of the requested documents.

Nothing in this decision should be construed as deciding the discoverability of a monoline insurer's efforts to mitigate damages in an action brought by the monoline insurer directly to recover its own losses for breaches of representations and warranties.

It is accordingly hereby ORDERED that the motion of defendant GreenPoint Mortgage Funding, Inc. for an order reversing the December 2, 2016 ruling of Hon. Theodore H. Katz (Ret.) is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York  
April 27, 2017

  
MARCY FRIEDMAN, J.S.C.