

**Financial Guaranty Ins. Co. v Countrywide Home
Loans, Inc.**

2011 NY Slip Op 34109(U)

October 31, 2011

Sup Ct, New York County

Docket Number: 650736/2009

Judge: Eileen Bransten

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: HON. EILEEN BRANSTEN, JUSTICE PART 3

FINANCIAL GUARANTY
INSURANCE COMPANY,

Plaintiff,

-against-

Index No.: 650736/09
Motion Date: 10/5/11
Motion Seq. Nos.: 013

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE BANK, F.S.B.,
and BANK OF AMERICA CORP.,

Defendants.

The following papers, numbered 1 to 3, were read on this motion to sever and consolidate.

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: Yes No

Upon review of the foregoing papers, this motion is decided in accordance with the accompanying memorandum decision.

Dated: October 31, 2011


Hon. Eileen Bransten

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
FINANCIAL GUARANTY
INSURANCE COMPANY,

Plaintiff,

-against-

Index No.: 650736/09
Motion Date: 10/5/11
Motion Seq. No.: 013

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE BANK, F.S.B. and
BANK OF AMERICA CORP.,

Defendants.

-----X
PRESENT: HON. EILEEN BRANSTEN

In motion sequence number 013, defendant Bank of America Corporation (“BAC”) moves to sever and consolidate allegedly identical successor liability claims asserted against it by Financial Guaranty Insurance Company’s (“FGIC”) and by the plaintiffs in three other cases pending in this court: *MBIA Insurance Corporation v. Countrywide Home Loans, et al.*, Index no. 602825/2008 (“*MBIA*”); *Syncora Guarantee Inc. v. Countrywide Home Loans, et al.*, Index No. 650042/2009 (“*Syncora*”); and *Ambac Insurance Corp., et ano v. Countrywide Home Loans, Inc. et al.*, Index No. 651612/2010 (“*Ambac*”, together with the instant matter, (“*Syncora*”), the “Monoline Actions”).¹

¹ The court has carefully considered all arguments in this matter. Due to the overlapping arguments and effect of BAC’s motion herein, this decision is largely based upon the reasoning stated in this court’s decision upon BAC’s same motion in *MBIA, supra*, dated October 31, 2011.

MBIA is the first-filed of the Monoline Actions, and leads the other cases in completing discovery. *Syncora*, *FGIC* and *Ambac* follow, respectively, in terms of filing dates.

BACKGROUND

The facts are discussed only as pertinent to the instant motion.

This is an action for fraud and breach of contract against defendants Countrywide Home Loans, Inc. (“CHL”), Countrywide Financial Corporation (“CFC”), Countrywide Securities Corporation (“CSC”) and Countrywide Bank, F.S.B (“CB,” and, collectively with CHL, CFC and CSC, “Countrywide”) and for successor liability against BAC (“BAC”, together with Countrywide, “Defendants”). The action stems out of five residential mortgage-backed securitizations (the “securitizations”), which were collateralized by residential mortgages originated and/or purchased by Countrywide. FGIC insured notes issued in connection with the securitizations, guarantying payments to the securitizations’ investors.

FGIC brought the instant action against the Countrywide defendants by complaint dated December 11, 2009. FGIC alleged, and alleges, that Countrywide fraudulently induced FGIC to insure the securitizations and that Countrywide breached representations and warranties in the transaction documents.

On April 30, 2010, FGIC filed an amended complaint. Rosenberg Affirm.,² Ex. 4 (the “Amended Complaint). The Amended Complaint added, *inter alia*, a cause of action alleging successor and vicarious liability against BAC. Amended Complaint, ¶¶ 466-472.

Facts Relevant to all Monoline Actions in BAC’s Motion to Sever and Consolidate

Plaintiffs in each of the Monoline Actions assert a claim against BAC for successor liability.³ BAC contends, and plaintiffs generally do not contest, that each Monoline Action plaintiff asserts very similar bases for their successor liability claim.⁴

Each Monoline Action plaintiff asserts that, upon BAC’s July 1, 2008 acquisition of Countrywide, BAC became Countrywide’s successor-in-interest. Plaintiffs contend that BAC must therefore bear joint and several liability for Countrywide’s alleged wrongdoing.

² Affirmation of Jonathan Rosenberg, Esq. in Support of Defendant Bank of America Corporation’s Motion to Sever the Successor-Liability Claims in *Ambac*, *FGIC* and *Syncora* and Consolidate Identical Successor-Liability Claims Pending in Four Actions Before This Court (“Rosenberg Affirm.”).

³ Rosenberg Affirm., Exs. 1 (*MBIA* Amended Complaint, ¶¶ 200-07), 2 (*Ambac* Complaint, ¶¶ 204-10), 3 (*Syncora* Amended Complaint, ¶¶ 136-46), 4 (*FGIC* Amended Complaint, ¶¶ 466-72).

⁴ See Defendant Bank of America Corporation’s Memorandum of Law In Support of its Motion to Sever the Successor Liability Claims in *Ambac*, *FGIC* and *Syncora* and Consolidate Identical Successor Liability Claims Pending in Four Actions Before This Court (“BAC Memo.”); Plaintiff’s Opposition to Defendant Bank of America Corporation’s Motion to Consolidate Identical Successor Liability Claims Pending in Four Actions Before This Court (“MBIA Opp. Memo. (038)”); Memorandum of Law In Opposition to Defendant Bank of America Corporation’s Motion to Sever and Consolidate the Successor Liability Claims Against Bank of America (“Syncora Opp. Memo.”); Plaintiff FGIC’s Opposition to Defendant Bank of America’s Motion to Sever and Consolidate the Successor Liability Claim (“FGIC Opp. Memo.”); and Plaintiff’s Memorandum in Opposition to Motion to Sever and Consolidate (“Ambac Opp. Memo.”).

Plaintiffs' assertions are first based on an alleged *de facto* merger between BAC and Countrywide. Amended Complaint; ¶¶ 467-68; *see* BAC Memo., pp. 4-5. Further, each plaintiff, and, here, FGIC, argues their respective successor liability claim on the transfer of assets from CFC's subsidiaries to BAC subsidiaries (Amended Complaint, ¶ 470); public statements of BAC representatives (Amended Complaint, ¶¶ 469, 471); allegations that BAC discharged or assumed pre-merger Countrywide liabilities (Amended Complaint, ¶ 471); and BAC's rebranding of "legacy" Countrywide businesses with BAC trade names. Amended Complaint, ¶ 469; BAC Memo., pp. 5-6 (citing to specific paragraphs of each Monoline Action), Ex. A (chart of the Monoline Actions' complaints' allegations in support of their claims against BAC for successor liability).

BAC also asserts that the Monoline Action plaintiffs' primary liability claims against the Countrywide defendants are divorced from plaintiffs' claim against BAC for successor liability. Whereas plaintiffs assert claims against the Countrywide defendants for breach of contract, breach of the implied covenant of good faith and fair dealing and fraud (*see* BAC Memo., p. 9, n.30), plaintiffs assert against BAC only a claim for successor liability.

BAC contends that, because the Monoline Actions' successor liability claims are so similar, "discovery on all four claims will be identical." BAC Memo., p. 6. Evidence pertaining to the primary liability issue will focus upon Countrywide and the Securitizations, including representations about the loans, and the loans themselves, which underlie the Securitizations. Evidence relevant to the successor liability claim will involve only whether and to what extent BAC assumed Countrywide's liabilities.

BAC further argues that plaintiffs, with the exception of Syncora, have requested many, if not all, of the same documents pertaining to Countrywide's merger into BAC and the continuing operation of Countrywide. *See* BAC Memo., pp. 6-8, n.16 (detailing MBIA's, FGIC's and Ambac's document requests to BAC). BAC has produced or may produce the same document universe to all four plaintiffs. *See* Transcript of October 5, 2011, p. 11 ("MBIA, Ambac and FGIC all have exactly the same set of successor liability documents from Bank of America at this point."). BAC has further answered eighteen MBIA interrogatories and fifteen MBIA requests for admission, and has agreed to answer interrogatories from the other Monoline Action plaintiffs. *Id.*, p. 51.

The Monoline Action plaintiffs note that while the evidence proving or disproving the primary and successor liability claims may differ, it does not necessarily follow that discovery on the two types of claims is completely divergent and will only stem from different sources. *See* FGIC Opp. Memo., pp. 12-15. It is without question that current BAC employees were formerly involved with Countrywide. MBIA, for instance, has alleged that BAC witnesses, for whom BAC seeks by this motion to postpone deposition, have information relevant to both the primary- and successor liability claims. *See* Transcript of October 5, 2011, pp. 27-28. BAC aptly argues against MBIA's contention, claiming that the plaintiffs merely seek to confuse the issue of disparate discovery between the primary and successor-liability claims. *Id.*, p. 52. Ultimately, the possible overlap will be determined upon further discovery and deposition questioning.

FGIC, in turn, contends that BAC's defenses to FGIC's successor-liability claim will necessarily involve Countrywide, and that the *de facto* merger doctrine requires that the two defendants be tried together. FGIC Opp. Memo., pp. 12-14.

ANALYSIS

I. Standards of Law

Pursuant to CPLR § 602(a):

[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation is generally favored by the courts where common issues of law and/or fact exist, unless the party opposing consolidation demonstrates that consolidation will prejudice a substantial right. *Amcan Holdings, Inc. v. Torgys LLP*, 32 A.D.3d 337, 339 (1st Dep't 2006) citing *Amtorg Trading Corp. v. Broadway & 56th St. Assocs.*, 191 A.D.2d 212, 213 (1st Dep't 1993). "The mere fact that a case may be somewhat delayed by such consolidation" does not alone bar the consolidation. *Amtorg Trading Corp.*, 191 A.D.2d at 213. The decision to consolidate, however, rests soundly in the discretion of the trial court. *Amcan Holdings, Inc.*, 32 A.D.3d at 339.

CPLR § 603 states that:

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

As with consolidation, severance rests in the sound discretion of the trial court. *See Seay v. Stateside Const. Corp.*, 282 A.D.2d 268, 268 (1st Dep't 2001).

II. Arguments

BAC argues that consolidation of the Monoline Actions' successor liability claims will promote judicial economy and the interests of justice. BAC asserts that all four claims in the separate actions turn on common legal theories and issues of fact and that one trial thereon will prevent undue burden on the court and will further guard against the possibility of inconsistent verdicts. BAC further contends that consolidation of the successor liability claims will neither prejudice plaintiffs nor unduly delay trial on the successor-liability issue.

FGIC asserts that the primary and successor liability claims do not warrant consolidation or severance. FGIC contends that the claims are only "superficially similar," and that likely BAC defenses prevent consolidation. FGIC further contends that due to the different procedural posture of the Monoline Actions, consolidation would significantly prejudice FGIC by significantly delaying their action. On the same basis of procedural time differences, FGIC argues that the complications inherent in bringing the Monoline Actions together will thwart CPLR § 602's purpose of preventing unnecessary costs and delays.

1. Common Issues of Fact and Law Exist

It is apparent that common issues of law and fact predominate in the Monoline Action plaintiffs' claims for successor liability. BAC has shown that each of the Monoline Actions' successor liability claims rests upon the same allegations of fact and upon the same legal

theory. Plaintiffs, and, here, FGIC, do not dispute BAC's contention. The burden therefore rests upon FGIC to here show prejudice that would result from the consolidation. *Amcan Holdings, Inc.*, 32 A.D.3d at 339.

2. The Monoline Plaintiffs Will Suffer
Prejudice to a Substantial Right Upon Consolidation

FGIC asserts that consolidation of the Monoline Actions' successor liability claims will cause it significant prejudice by delaying its claim. FGIC's arguments reflect those of MBIA, which were addressed in the *MBIA* decision. See Decision and order of October 31, 2011, *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.*, Index No. 602825/2008 (the "*MBIA* Decision and Order"). The analysis in the *MBIA* Decision and Order applies, and is decisive, to the other Monoline Actions, including this matter.

FGIC has begun discovery on its successor liability claim against BAC, but is not nearly as advanced in its discover as is MBIA. To sever and consolidate the successor liability claim in *FGIC* with the other Monoline Actions would force FGIC to play "catch up" and either rush or change its litigation strategy in order to allow it to align its discovery requests and deposition questioning with MBIA or slow its pace to align it with Ambac.

The court finds the prevention of undue delay, or the corresponding forcing of action, to be decisive in this matter. While the Monoline Actions are all at the discovery phase, and are thus not at markedly differently procedural stages, the actions markedly differ within their respective discovery processes. MBIA asserted its claim against BAC on August 24, 2009.

FGIC asserted its claim over eight months later, on April 30, 2010. Ambac brought its claim against BAC only on September 28, 2010, while Syncora, due to stipulation, has undertaken no discovery on its successor liability claim. Thus, whereas *MBIA* nears discovery completion, discovery in the three other Monoline Actions lag far behind. The Monoline Actions are simply at too drastically of different stages of litigation to fairly allow for consolidation of discovery. *See Abrams v. Port Authority Trans-Hudson Corp.*, 1 A.D.3d 118 (1st Dep't 2003); *see also Ahmed v. C.D. Kobsons, Inc.*, 73 A.D.3d 440, 440-41 (1st Dep't 2010) (affirming denial of consolidation motion when one case was scheduled for trial and the other in its initial stages).

Thus, in the discretion of this court, a sound basis exists mandating the denial of consolidation of the successor liability claims in the Monoline Actions at this time. *See Barnes v. Cathers and Dembrosky*, 5 A.D.3d 122, 122 (1st Dep't 2004), affirming *Barnes v. Cathers*, 2003 WL 25627188, Index No. 600241/2002 (Sup. Ct., New York County, 2003) (on the basis that the matters were at distinct stages of discovery; trial court also denied consolidation based upon differing facts).

3. **BAC Has Not Shown that it Will Suffer Prejudice
to a Substantial Right Absent Consolidation of Discovery**

BAC argues that should the Monoline Actions move forward separately, BAC will face the risk that different jury factfinders may draw different conclusions from the facts presented to them. BAC Memo., pp. 13-14. BAC further contends that if it were to prevail

in *MBIA*, should *MBIA* be the first Monoline Action to trial, then the next Monoline Action plaintiff would be able to refine its case and attempt again to reach a verdict for successor liability. BAC also argues that should *MBIA* prevail, the other Monoline Actions would claim collateral estoppel and attempt to prevent BAC from defending against the claim in following actions. *Id.*

BAC further argues that without consolidation it will suffer prejudice by having its employees, many of whom are in key management positions, deposed multiple times. BAC states that it will also suffer prejudice should those same key employees be forced to testify multiple times in separate trials of the Monoline Actions. *See* Transcript of October 5, 2011, p. 16.

Finally, BAC contends that it will suffer prejudice should the primary and successor liability claims be tried together, as any wrongdoing of Countrywide may be imputed by the finder of fact to BAC.

The court finds that consolidation of the successor liability claims at this point in the Monoline Actions' timeline will neither promote judicial economy nor prevent substantial prejudice and/or risk to BAC.

The court holds that discovery in the Monoline Actions, including expert reports and discovery, is to move forward at this time.⁵ Each Monoline Action plaintiff has significant interest in continuing and completing discovery in full, including its claim for successor

⁵ Syncora has elected to opt out of successor liability discovery at this time, an issue the court addresses in the *Syncora* decision on BAC's motion to sever and consolidate.

liability. The court find that the Monoline Action plaintiffs will be prejudiced in their litigation if ordered to take discovery on their respective successor liability claims at the same time, either from delay, as in *MBIA* and *FGIC*, or by forcing a change in litigation schedule and/or strategy, as in *Ambac*.

The court is cognizant that multiple depositions of BAC employees interrupts the normal course of business. However, business often, and unfortunately, also includes litigation. As the parties were instructed to approach the multiple depositions of Countrywide employees, the Monoline Action plaintiffs are to also take all due care to build upon, and not repeat, prior deposition testimony of BAC witnesses and witnesses pertinent to the successor liability claims.

Thus, to the extent that successor liability discovery is not stayed, BAC's motions to sever and consolidate is denied.

The court holds that portion of BAC's motion to sever and consolidate trial of the Monoline Actions' successor liability claims in abeyance. The court recognizes that different Monoline Action plaintiffs will approach the successor liability actions in different manners. The court thus declines to have all Monoline Action plaintiffs move as one for summary judgment. The court will therefore entertain requests to lift the abeyance at or after argument on the first Monoline Action case to move for summary judgment on the claim, or, should the foremost case decide against summary judgment motions on the issue, after the note of issue in that case is filed and the trial date set.

For the reasons stated above, and in the decision and order of October 31, 2011, in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.*, Index No. 602825/2008, which reasoning the court incorporates in and considers a part of this decision, it is the court's discretion and decision that allowing discovery in the Monoline Actions' successor liability claims to move forward, while holding the issue of trial thereon for later decision, will serve the economy of the parties and minimize prejudice to the parties in this action.

Amcan Holdings, Inc., 32 A.D.3d at 339.

ORDER

Accordingly, it is hereby

ORDERED that Bank of America Corporation's motion to sever and consolidate the successor liability claims in this matter and in *MBIA Insurance Company v. Countrywide Home Loans et al.*, Index No. 602825/2008, *Syncora Guarantee Inc. v. Countrywide Home Loans, et al.*, Index No. 650042/2009 and *Financial Guaranty Insurance Co. v. Countrywide Home Loans, et al.*, Index No. 650736/2009 is denied as to the separate actions' discovery on the successor liability claims, but for *Syncora*, and it is further

ORDERED that the portion Bank of America Corporation's motion to sever and consolidate the successor liability claims in this matter and in *MBIA Insurance Company v. Countrywide Home Loans et al.*, Index No. 602825/2008, *Syncora Guarantee Inc. v. Countrywide Home Loans, et al.*, Index No. 650042/2009 and *Financial Guaranty Insurance Co. v. Countrywide Home Loans, et al.*, Index No. 650736/2009 pertaining to trial of the

FGIC v. Countrywide, et al.

Index No. 650736/09


Page 13

separate actions' successor liability claims is held in abeyance until final submission of the first summary judgment motions on the successor liability claim in this action or in *MBIA*, *Syncora* or *FGIC* or upon the filing of the first note of issue in either the instant matter or in *MBIA*, *Syncora* or *FGIC*.

This constitutes the decision and order of the court.

Dated: New York, New York
October 31, 2011

ENTER


Hon. Eileen Bransten, J.S.C.