

MBIA Ins. Corp. v Countrywide Home Loans, Inc.

2012 NY Slip Op 33962(U)

May 15, 2012

Supreme Court, New York County

Docket Number: 602825/08

Judge: Eileen Bransten

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

-----X
MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08
Motion Date: 3/20/12
Motion Seq. No.: 049

COUNTRYWIDE HOME LOANS, INC.,
COUNTRYWIDE SECURITIES CORP.,
COUNTRYWIDE FINANCIAL CORP.,
COUNTRYWIDE HOME LOANS
SERVICING, LP AND BANK OF AMERICA
CORP.,

Defendants.
-----X

The following papers, numbered 1 to 3, were read on this motion to compel

	<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: May 15, 2011


_____, J.S.C.

Hon. Eileen Bransten

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMITORDER/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

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MBIA INSURANCE CORPORATION,

Plaintiff,

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Index No.: 602825/08
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PRESENT: HON. EILEEN BRANSTEN

In motion sequence number 049, MBIA Insurance Corporation moves, pursuant to CPLR 3124, to compel defendants Countrywide Home Loans, Inc., Countrywide Securities Corporation, Countrywide Financial Corporation and Countrywide Home Loans Servicing, LP (collectively, "Countrywide" or the "Countrywide Defendants") to produce certain discovery. MBIA seeks documents relating to the MBIA-alleged fraud by Countrywide in Countrywide's mortgage origination process; alleged fraud investigations; the termination by Countrywide of two of their employees, documents relating to three senior management committee meetings; and financial modeling files relating to the securitizations at issue in this matter. Countrywide opposes.

The base facts of this matter have been discussed extensively in previous decisions of this court. Thus, only details necessary to this motion are referenced herein.

This action stems out of fifteen residential mortgage-backed securitizations (the “securitizations”). The securitizations were collateralized by residential mortgages, home equity line of credit (“HELOC”) and closed-end, second-lien (CES) loans, that were originated and purchased by defendant Countrywide Home Loans, Inc. (“CHL”). MBIA insured the securitizations, guaranteeing payments to the securitizations’ investors.

Analysis

1. Standard of Law

As the court has reiterated numerous times in this matter, New York embraces a liberal discovery standard, requiring full disclosure of all evidence material and necessary to the prosecution or defense of an action. *Spectrum Sys. Int’l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 376 (1991) quoting CPLR § 3101 (a). “Material and necessary” facts are those that “will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406-07 (1968). CPLR § 3101 embodies the policy determination that expansive discovery is encouraged in New York in order to provide fair and effective resolution of disputes on the merits. *Id.*, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶¶ 3101.01-3101.03. The requirements of pretrial disclosure extend not only to directly admissible proof, but to that which may lead to the disclosure of admissible proof, including that which may only be used in cross-exam. *See Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 341 (1st Dep’t 2007).

2. Potentially Agreed-Upon Productions

Prior to full submission of this motion, the parties came to at least part resolution on the following issues:

a. *Fraud Hotline Documents*

MBIA first moves for Countrywide documents relating to its “Fraud Hotline.” The Fraud Hotline is alleged to be an email, fax, mail and telephone hotline through which Countrywide was able to receive complaints about illegal behavior by Countrywide employees. Memorandum of Law in Support of Plaintiff’s Motion to Compel Discovery (“MBIA Memo.”), pp. 5-6. MBIA has moved to compel Countrywide to produce all documents relating to all HELOC and CES loans referred to in Countrywide’s Fraud Hotline.

Countrywide contests MBIA’s description of the Fraud Hotline. Countrywide asserts that the purpose of the hotline was not to receive complaints about internal Countrywide fraud, but to prevent fraud on Countrywide by vendors and borrowers. Countrywide asserts that the majority of information is not relevant to MBIA’s claims.

Countrywide further asserts that all of the calls Countrywide received on the Fraud Hotline for loans in the securitizations at issue are contained in its FACTS database, an internal fraud tracking database. Countrywide states that it has produced or will produce to MBIA information regarding the relevant loans that is in the FACTS database, as well as all supporting documents relating thereto. *See* The Countrywide Defendants’ Memorandum of Law in Opposition to Plaintiff MBIA’s Motion to Compel Fraud-Related Disclosures (“Countrywide Memo”), pp. 2-3; Transcript of March 23, 2012 Argument (“Tr.”), pp. 8-9.

MBIA argues in reply that it is entitled to all documents relating to the Fraud Hotline involving mortgage fraud in any HELOC or CES loans, as well as any documents relating to the Fraud Hotline that are not contained in the FACTS database. Plaintiff's Reply Memorandum of Law in Further Support of its Motion to Compel Disclosure ("MBIA Reply Memo."), pp. 8-11.

Countrywide asserts that it has no way to determine the location of an alleged fraud complaint that is not in the FACTS database. Tr., p. 39. Countrywide further argues that, to the extent that MBIA seeks information related to loans beyond the securitizations at issue, this court has consistently held that such information was beyond the scope of discovery in this action.

The court agrees that only documents related to the loans in the securitizations at issue are relevant here, and only those documents need be produced. This has been the view of the court from the onset of this litigation, and it will not change at this late date.

Countrywide agreed to produce documents and information for relevant loans in the FACTS database. The court finds that to the extent any loan contained in the securitizations at issue were raised in any communication to the Fraud Hotline, those materials are relevant and discoverable. Countrywide is directed to make a good faith effort to locate and produce any such materials. Should Countrywide be unable to locate documents outside of the FACTS database related to the Fraud Hotline, Countrywide is directed to produce an affidavit of a person with knowledge stating the steps taken to locate relevant materials.

b. *Alleged Fraud Investigations*

MBIA next moves to compel production of material related to loans in the securitizations at issue that were referred to Countrywide's Fraud Risk Management Group or its Fraud Prevention and Investigation Department. MBIA contends, based on Countrywide's production, that Countrywide referred at least two thousand loans in the securitizations for investigation. MBIA Memo., pp. 7-8.

Countrywide has agreed to produce a FACTS database spreadsheet, with supporting documents, which contains its Fraud Risk Management department's data on investigations the department conducted. Countrywide Memo., p. 3.

MBIA contends that it is unable to determine whether additional material exists on the loans in the securitizations that were referred for fraud investigation but which were not contained in the FACTS database. MBIA further argues that Countrywide has not agreed to, but should, produce summary reports aggregating statistics and other information relating to loans in the securitizations that were referred for fraud investigation. Tr., pp. 12-13; MBIA Reply Memo., pp. 11-13.

The court finds that loans included in the securitizations that were referred for investigation are relevant to MBIA's claims. As with the Fraud Hotline documents, Countrywide is directed to make a good faith effort to locate and produce any material concerning any loans in the securitizations at issue that were referred to Countrywide's Fraud Risk Management Group or its Fraud Prevention and Investigation Department. Summary

reports are to be included in Countrywide's production to the extent they contain data related to the loans at issue. Upon conclusion of Countrywide's production, Countrywide is directed to produce an affidavit of a person with knowledge stating the steps taken to locate relevant materials and averring that it has undertaken all best efforts to obtain all materials relevant to the requested discovery.

c. *Meeting Minutes*

MBIA further seeks documents relating to three Countrywide senior management committees: the Executive Strategy Committee; the CSC Risk Management Committee; and the Responsible Lending Committee (here, the "Committees"). MBIA contends that the meeting minutes are relevant to MBIA's requests for production pertaining to compliance, risk management and underwriting policies and procedures; discussions of relevant trusts, securitizations and mortgage loans; and Countrywide's market share in relation to its underwriting guidelines. MBIA Memo., pp. 19-21.

Countrywide contends that it and MBIA negotiated extensively to determine the Countrywide committees for which Countrywide would produce documents. Countrywide asserts that the Committees were not included in those to which the parties agreed, and MBIA's request is both tardy and not targeted to relevant discovery. However, Countrywide agreed to produce all meeting minutes of the Committees for the 2004-2007 time period that were previously collected in other matters. Countrywide Memo., p. 4. Countrywide has further agreed to produce backup information for materials it determines are relevant to this matter. Tr., p. 45.

MBIA contends that Countrywide's agreed-upon production is insufficient. MBIA seeks documents presented to the Committees beyond the meeting minutes, including presentations, agendas and memos, and documents of the Committees that have not been collected for other matters.

The Committees' meeting minutes for the period of 2004 to 2007 are relevant to the instant dispute. The meeting minutes from 2004 through 2007 are to be collected in full and produced. To the extent that the meeting minutes refer to materials relevant to the securities at issue, either specifically or generally, those additional materials are also to be produced. Materials wholly unrelated to the securitizations at issue are not relevant to the instant dispute, and need not be produced.

d. *Modeling Files*

MBIA has requested files related to statistical modeling that Countrywide completed on the securitizations. MBIA argues that Countrywide's production to date is incomplete, and is missing such documents as the full range of "assumption" files for the securitizations for the entire relevant time period, and the assumption and output files for Countrywide's cash flow, default, prepayment and loss models. MBIA Memo., pp. 23-24; Tr., pp. 17-18.

Countrywide contends that it has produced all modeling files relating to the securitizations, including all inputs to and outputs from the modeling files. It argues that it has been able to direct MBIA to Countrywide-produced documents upon claims of failure to produce. Countrywide further states that it will search again for "relevant and responsive"

modeling files, and will produce any found documents. Countrywide Memo., p. 4; Tr., pp. 46-48.

The court finds Countrywide's production and searching again for relevant documents sufficient to meet MBIA's requests. To the extent that Countrywide contends that it has produced all documents related to the models sought, and MBIA contends the production is incomplete, the court will hear further argument from the parties, and will consider requiring a *Jackson* affidavit.

3. Contested Productions

Three additional categories of documents are requested by MBIA.

a. Terminated Countrywide Employees

i. Eileen Foster

Eileen T. Foster was an employee of Countrywide Financial Corporation from September of 2005 through September of 2008. Foster held several positions with Countrywide. Pertinent to this matter, from March, 2007 through July, 2008, Foster was an Executive Vice President of Fraud Risk Management. From July to September, 2008, when her employment was terminated, Foster was a Senior Vice President, Mortgage Fraud Investigations, for Bank of America. Sheth Affirm.,¹ Ex. 28 (Declaration of Eileen T. Foster ("Foster Decl.")), ¶ 5.

¹ Affirmation of Manisha M. Sheth in Support of Plaintiff's Motion to Compel Disclosure ("Sheth Affirm.").

MBIA contends, based on Ms. Foster's declaration in an unrelated matter, that Foster was responsible for overseeing internal and external mortgage fraud investigations, including fraud reported through the Fraud Hotline. MBIA further argues that Foster "obtained evidence" regarding "blatant violations of credit policy and procedure." MBIA Memo, p. 9, citing Sheth Affirm., ¶¶ 26-27 and the Foster Decl., ¶¶ 10-11. MBIA contends that it is entitled to certain documents, defined as the Foster Fraud Documents, *see* MBIA Memo., pp. 10-11, as the documents are related to Foster's alleged fraud investigations and her subsequent termination of employment. MBIA contends the documents are relevant to its claims of Countrywide's alleged coverup of fraud. MBIA further contends that the documents are relevant to the situation regarding Countrywide's alleged retaliatory termination of Foster's employment. MBIA alleges that Foster was fired upon attempting to investigate fraudulent loan-origination practices at Countrywide, including investigations covering the time period relevant to this litigation. MBIA Memo., p. 12.

Countrywide correctly asserts that Foster joined its Fraud Risk Management department in March 2007, only two months before the last securitization in this case closed. Countrywide further contends that Foster's alleged knowledge, if existing, was gained only second, third and fourth-hand, and that she has no personal knowledge of the securitizations or loans at issue. Countrywide argues that Foster was terminated not because she investigated fraud, but because of poor job performance. Countrywide Memo., p. 20.

Determining whether Foster was terminated for her alleged fraud investigation or for insufficient management skills, if for any reason at all, is not the issue before this court. However, this issue would necessarily take on importance should MBIA attempt to use Foster's termination as evidence of an alleged fraud cover-up. For purposes of this motion, the court therefore does not find the materials relevant to the claims in this action and declines to order Countrywide to produce materials related to Foster's termination.

The court does find certain of the Foster Fraud Documents to bear relevance upon the MBIA's asserted claims. MBIA has presented evidence that Foster was involved in an oversight role in fraud investigations, *see* Sheth Affirm., Ex. 30, and that Foster may have relevant information related thereto. *Id.*; *see also* Foster Decl., ¶¶ 10, 11. While these investigations may have been completed upon loans outside of the securitizations, the issue here is not conduct within the securitizations, but conduct in investigating alleged fraud in upon or in loans in general. These documents are relevant to MBIA's claims and are therefore discoverable. CPLR § 3101; *Polygram Holding, Inc.*, 42 A.D.3d at 341. Countrywide is to produce documents are limited to fraud investigations conducted or overseen by Foster as well as those specifically requested by MBIA in bullets 1, 2 and 6 on pages 10-11 of the MBIA Memo.

ii. Mark Zachary

MBIA also moves for production of documents concerning the alleged fraud accusations concerning Countrywide's loan origination process by Countrywide former

employee Mark Zachary. MBIA also seeks documents relating to Countrywide's termination of Mr. Zachary's employment. Specifically, MBIA has requested documents related to Zachary's allegations of fraud, Countrywide's investigations into the allegations and concerning Countrywide's termination of Mr. Zachary's employment as a Countrywide regional vice president. Similar to MBIA's argument with regard to the Foster Fraud Documents, MBIA contends that the requested discovery is relevant to its claims, including that the documents may show Countrywide's alleged cover-up of fraud. MBIA argues that Zachary personally witnessed fraud, reported the practice to his superiors and Countrywide's Fraud Risk Management Group and that he was terminated as a result.

Countrywide contends in opposition that Zachary's knowledge does not extend to any loans in the securitizations, but was limited to a specific joint venture between Countrywide and a third party in Texas. *See* Concannon Affirm.,² Ex. 5, Deposition Testimony of Anthony Mark Zachary dated January 25, 2012 ("Zachary Tr.).

As with Foster, the court finds documents related to Zachary's termination to be outside of the issues before this court. The court will not order production of documents related thereto.

The court finds documents related to any investigation of fraud in loan origination by Zachary and any reports to any person or group by Zachary of perceived fraud in loan

² Affirmation of Sarah Heaton Concannon in Support of the Countrywide Defendants' Memorandum of Law in Opposition to Plaintiff MBIA's Motion to Compel Fraud-Related Disclosures ("Concannon Affirm.").

origination to be relevant to MBIA's claims. The admissibility of such documents is not here at issue, only the "discoverability" of the documents under New York's broad rules for disclosure. The court therefore orders production of those specified documents, should they exist. CPLR § 3101; *Polygram Holding, Inc.*, 42 A.D.3d at 341.

b. *Alleged Fraud Investigations*

MBIA further seeks documents allegedly related to allegations that Countrywide employees actively engaged in fraud cover-up. MBIA contends that it has learned from various news reports and public filings that Countrywide knew that some of its mortgage loans were fraudulent, and that Countrywide's employee relations department interfered with fraud investigations to "protect 'high-performing' employees." MBIA Memo., p. 15. MBIA seeks (1) documents which allegedly evidence fraud and allegations of fraud; and (2) investigations conducted by Countrywide's employee relations department. MBIA argues that these documents, described and exhibited in the Sheth Affirmation in support of MBIA's motion, show Countrywide's knowledge of mortgage fraud and other mortgage-related misconduct and are relevant to its claims that Countrywide breached its representations and warranties and that the documents evidence actual and potential fraud.

Countrywide contends that MBIA's reliance on "recent news reports and public filings" is misguided and points to documents that do not exist. Countrywide asserts that it has made a good faith attempt to locate the requested documents based on MBIA's descriptions, and, to the extent it has been able to locate such documents, the documents have been produced. See Countrywide Memo, pp. 23-24; Concannon Affirm., Exs. 57-60.

The court finds MBIA's requested documents in this category relevant to its claims and discoverable. As stated, this court does not have before it any issue of employment termination. To the extent that Countrywide's employee relations department investigated Nick Markopoulos and Michael Eckhard, the court finds that such an investigation may be related to fraud. Countrywide is directed to produce any employee relations file regarding those two Countrywide employees. Countrywide is further directed to produce an affidavit of a person with knowledge stating the steps taken to locate relevant materials and averring that it has undertaken all best efforts to obtain all materials relevant to the requested discovery as listed on page sixteen of MBIA's motion to compel.

c. *Conclusion*

The court further notes that Countrywide has objected to the production of the Foster, Zachary and fraud investigation documents as untimely, based on discovery agreements between the parties. The court considers this argument without merit. While discovery must conclude at some point, should either party become aware of possibly relevant information during the course of discovery, the discovering party is entitled to discover that material under CPLR § 3101. An original agreement as to custodians will necessarily change throughout discovery. CPLR § 3101(h).

Finally, the court acknowledges, and is sympathetic with, Countrywide's statements regarding the volume of documents it has produced. However, past production bears no relation to current and ongoing discovery obligations, and, while colorful, recitations of

numbers of pages and volumes of documents produced is unpersuasive and is not considered.

Discovery, though expensive and exhaustive, must be completed in full.

Order

For the above reasons, it is hereby:

ORDERED that plaintiff MBIA Insurance Corporation's motion to compel is granted in part, as defined herein, and is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 15, 2012

ENTER

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.