

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

2013 NY Slip Op 34056(U)

April 29, 2013

Supreme Court, New York County

Docket Number: 602825/08

Judge: Eileen Bransten

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

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MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

Index No.: 602825/08
Motion Date: 1/10/13
Motion Seq. Nos.: 65, 72

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

Defendants.

-----X

BRANSTEN, J.

Motion sequence numbers sixty-five and seventy-two are consolidated for disposition.

This matter comes before the Court on Plaintiff MBIA Insurance Corporation's ("MBIA") motions to strike four affidavits submitted by Defendant Bank of America Corp. ("BAC") in support of BAC's motion for summary judgment (motion sequence number 60) and in opposition to MBIA's summary judgment motion (motion sequence number 61). Both motions are opposed.

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I. **Background**

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

This action stems from fifteen residential mortgage-backed securitizations (the “securitizations”). The securitizations were collateralized by residential mortgages that were originated and purchased by Countrywide. MBIA insured the securitizations, guaranteeing payments to the securitizations’ investors.

MBIA brought this action on September 30, 2008 against the Countrywide Defendants.¹ MBIA alleged, and alleges, that Countrywide fraudulently induced MBIA to insure fifteen residential mortgage-backed securitizations (“Securitizations”) and that Countrywide breached the representations and warranties in the transaction documents related to the Securitizations. On August 24, 2009, MBIA filed an amended complaint (the “Amended Complaint”). The Amended Complaint added, among other things, a cause of action alleging successor liability against BAC.

MBIA and BAC each filed motions for summary judgment on MBIA’s successor liability claim. In connection with these summary judgment motions, MBIA now seeks to

¹ The “Countrywide Defendants” or “Countrywide” are Countrywide Home Loans, Inc. (“CHL”), Countrywide Securities Corporation (“CSC”), Countrywide Financial Corporation (“CFC”) and Countrywide Home Loans Servicing, LP (“CHLS”).

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strike portions of the following affidavits filed by BAC in support of BAC's motion and in opposition to the motion filed by MBIA:

- Affidavit of Edward J. Ofcharsky, dated September 27, 2012;
- Affidavit of William Stokes, dated September 28, 2012;
- Affidavit of William Stokes, dated November 7, 2012 (the "Second Stokes Affidavit"); and,
- Affidavit of Joseph Loevner, dated November 7, 2012.

MBIA argues that portions of each affidavit should be stricken as improper and inadmissible, since they: are not based on the affiants' personal knowledge, as required by CPLR 3212(b); are based on hearsay; and, are otherwise conclusory. In addition, MBIA asserts that the Second Stokes Affidavit contains information that should be stricken because BAC refused to produce the same information to MBIA during discovery.

BAC opposes MBIA's motion and asserts that each affidavit derives from the witnesses' "first-hand knowledge learned in the course of performing their job duties." (BAC Brief in Opposition to MBIA's Motion to Strike ("BAC Opp. Br.") at 1.) BAC also notes that the parties negotiated to limit the scope of BAC's interrogatory response and that the information included in the Second Stokes Affidavit is outside the bounds of that agreement.

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II. Analysis

CPLR 3212(b) requires that a motion for summary judgment be supported by an affidavit. Such affidavit shall be submitted by a “person having knowledge of the facts” and “it shall recite all the material facts.” *Id.* Affidavits “devoid of evidentiary facts and consisting of mere conclusions, speculation and unsupported allegations,” lack probative value and are insufficient to sustain or defeat a motion for summary judgment. *Castro v. New York University*, 5 A.D.3d 135, 136 (1st Dep’t 2004); *see also Mejia v. Roosevelt Island Med. Assoc.*, 95 A.D.3d 570, 571 (1st Dep’t 2012). This is particularly so where an affidavit fails to assert personal knowledge of the facts asserted. *Castro*, 5 A.D.3d at 136.

A. *Request to Strike Ofcharsky, Loevner, and Stokes Affidavits as Insufficient Under CPLR 3212(b)*

MBIA argues that the Ofcharsky, Loevner, and Stokes Affidavits should be stricken because each affiant lacks personal knowledge of the proffered facts. Even if MBIA’s contention is correct, its argument is aimed at the sufficiency of the affidavits, not their admissibility. Therefore, striking the affidavits is not the proper remedy. Instead, assuming the correctness of MBIA’s assertions, the affidavits, at most, should be

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deemed insufficient to establish BAC's prima facie burden or to establish a genuine issue of material fact for trial.

The cases cited by MBIA demonstrate that affidavits found conclusory or not based on personal knowledge are not stricken but instead are deemed insufficient on summary judgment. See *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373, 384-85 (2005) (finding that "conclusory affidavit" that "relied entirely on the memorandum of law prepared by [plaintiff's] attorney" did not establish the proponent's prima facie burden on summary judgment); *Barraillier v. City of New York*, 12 A.D.3d 168 (1st Dep't 2004) (affirming denial of summary judgment motion where proponent's supporting affidavit "did not indicate the sources (e.g., documents he may have searched or reviewed, or persons he consulted) of his familiarity with the construction project at issue"); *Republic Nat'l Bank of N.Y. v. Luis Winston, Inc.*, 107 A.D.2d 581, 582 (1st Dep't 1985) (noting that affidavit "lacks any probative value" and "cannot justify a grant of summary judgment" where affiant's knowledge obtained "either from unnamed and unsworn employees or from unidentified or unproduced work records.").

Likewise, affidavits containing hearsay information are considered insufficient on summary judgment. See *Lapin v. Atlantic Realty Apts. Co.*, 48 A.D.3d 337, 338 (1st Dep't 2008) (affirming granting of summary judgment motion where opposition affidavit based on hearsay evidence was "insufficient to raise a triable issue of fact").

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Thus, MBIA has not demonstrated that the affidavits at issue should be stricken, merely that, at best, they should be accorded less weight. Accordingly, MBIA's motions to strike the Ofcharsky, Loevner, and Stokes Affidavits as insufficient under CPLR 3212(b) are denied.

B. Request to Strike Second Stokes Affidavit as a Discovery Sanction

In addition, MBIA seeks to strike paragraph 6 of the Second Stokes Affidavit to sanction BAC for offering information to the Court on summary judgment that it refused to disclose to MBIA in discovery. MBIA contends that the Second Stokes Affidavit lists the names of certain employees employed by BAC subsidiaries after the July 1, 2008 merger that were responsive to MBIA's Interrogatory No. 13. Since BAC objected to that Interrogatory as "vague, ambiguous, overbroad, and unduly burdensome," MBIA contends that BAC cannot now offer names responsive to that Interrogatory in support of its motion for summary judgment. (Affirmation of Jonathan B. Oblak in Support of MBIA's Motion to Strike the Stokes and Louvner Affidavits ("Oblak Affirm.") ¶ 8, Ex. 8 at 25-26.)

BAC points to its Supplemental Response to Interrogatory No. 13 ("BAC's Supplemental Response"), which MBIA submitted with this motion. *See* Affirmation of Jonathan B. Oblak in Support of MBIA's Motion to Strike the Stokes and Louvner

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Affidavits ¶ 8, Ex. 8 at 27.) BAC's Supplemental Response states that "MBIA agreed that BAC could satisfy Interrogatory No. 13 by providing the aggregate total number of former Countrywide employees employed by BAC-legacy entities." *See id.* Accordingly, the parties appear to have agreed to narrow the interrogatory, allowing BAC to give a baseline number instead of the names of certain employees. Given the parties' agreement regarding Interrogatory No. 13's scope, the Court will not strike paragraph 6 on the basis that it provides names not listed in BAC's response.

III. Conclusion

For the foregoing reasons, MBIA's motions to strike are denied. As discussed above, MBIA's arguments principally addressed the weight, not the admissibility, of each affidavit. Accordingly, MBIA's arguments would have been better presented in its voluminous summary judgment papers, instead of in two separate motions.

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ORDER

Accordingly, it is

ORDERED that Plaintiff MBIA Insurance Corporation's motions to strike (motion sequence numbers 065 and 072) are denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 29 2013

ENTER:



Hon. Eileen Bransten, J.S.C.