

Bank of N.Y. Mellon v WMC Mtge., LLC
2014 NY Slip Op 32002(U)
July 29, 2014
Sup Ct, NY County
Docket Number: 654464/2012
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
 COUNTY OF NEW YORK: PART 54

-----X
 THE BANK OF NEW YORK MELLON, solely
 as Securities Administrator for J.P. Morgan Mortgage
 Acquisition Trust 2006-WMC4,

Index No.: 654464/2012

DECISION & ORDER

Plaintiff,

-against-

WMC MORTGAGE, LLC, J.P. MORGAN
 MORTGAGE ACQUISITION CORPORATION,
 and J.P. MORGAN CHASE BANK, N.A.,

Defendants.

-----X
 SHIRLEY WERNER KORNREICH, J.:

The court assumes familiarity with its decision on the motion to dismiss, which is set forth in an order dated November 21, 2013 (the 2013 Order). *See* Dkt. 83; 41 Misc3d 1230(A).

Defendants J.P. Morgan Mortgage Acquisition Corporation and J.P. Morgan Chase Bank, N.A. (collectively, JPMorgan) move for partial reargument of the 2013 Order. Specifically, JPMorgan contends that the court erroneously held that the warranty in section 2.06(a)(iii) of the PSA (“[t]he information set forth in the Mortgage Loan Schedule and the tape delivered by the Seller to the Purchaser is true, correct and complete in all material respects”) was not merely a gap warranty.¹ Plaintiff opposes the motion. For the reasons that follow, JPMorgan’s motion is denied.

JPMorgan correctly observes that some of the information in the loan schedule can change after origination. JPMorgan further correctly concedes that if such information was false between October 30 and December 20, 2006 (the Temporal Period), JPMorgan might be obligated to put-back the affected loans. However, as plaintiff correctly responds, the majority

¹ As plaintiff noted in opposition, JPMorgan’s moving brief relies on the wrong mortgage loan schedule. In any event, JPMorgan’s arguments in its reply brief based on the correct loan schedule fare no better for the reasons discussed herein.

of information in the loan schedule was fixed at origination. For example, what the borrower's income was at the time he applied for the mortgage, as well as the loan-to-value ratio and the occupancy status of the property at the time, was immutable. This is some of the most critical information to RMBS investors since it is highly material to whether a borrower is likely to pay off the mortgage. As discussed in the 2013 Order, the truth of this information could not change over time.

Taking the complaint's allegations as true, as the court must on a motion to dismiss, the court assumes that the information in the loan schedule that was fixed at origination was false at origination and, hence, it was equally false during the Temporal Period. JPMorgan is essentially arguing that since some of the loan schedule information could have or actually did change after origination, JPMorgan is only responsible for the revisable information and not the information fixed at origination. This argument cannot be squared with the actual text of the PSA. Assuming, *arguendo*, that JPMorgan is correct about the handful of items that changed post-origination – meaning that JPMorgan is only responsible for such items if they were false during the Temporal Period – it does not follow that JPMorgan has no liability for the unalterable items. Rather, to determine if the loan schedule rep was breached, the relevant inquiry is whether any information in the loan schedule was incorrect during the Temporal Period. Whether the truth of some of the information could change over time is irrelevant. If the borrower's stated income was false at origination, it was false during the Temporal Period.²

² However, as JPMorgan correctly argues, if some other, changeable item was true during the Temporal Period, but false at origination, JPMorgan would not be liable. Of course, mortgage payment due dates (*see* Dkt. 131 at 4) are not really what this litigation is about. This case, like most put-back cases, is about the core underwriting facts being false, making the borrowers appear creditworthy. The risk of such facts being false were meant to borne by the sellers of RMBS, not the investors, since the point of using reps and warranties in RMBS transactions was

Furthermore, if JPMorgan only wanted to assume liability for loan schedule items that became false during the Temporal Period, it could have easily and clearly done so, as some other banks did. For instance (and putting aside the specific language in other banks' RMBS contracts), plaintiff proffers a simple way JPMorgan might have done so with a redline of the loan schedule rep:

~~With respect to the period from such Whole Loan Sale Date to and including the Closing Date, the Seller hereby makes the representations and warranties contained in paragraph~~ represents and warrants (a) ... [that] [t]he information set forth in the Mortgage Loan Schedule and the tape delivered by the Seller to the Purchaser is has not become untrue, incorrect and or incomplete in all any material respects during the period from such Whole Loan Sale Date to and including the Closing Date.

See Dkt. 122 at 17. The PSA, as written, says no such thing.³

Finally, it should be noted that it is of no moment that JPMorgan protests that the PSA, as written, does not accurately reflect its intent only to be liable for "gap" breaches. That may well have been JPMorgan's intent. Yet, if the converse situation was before the court, and plaintiff made arguments similar to those proffered here by JPMorgan, there is no doubt that JPMorgan would seek to hold plaintiff to the strict language of the contract. RMBS transactions, like all structured finance transactions, are entered into by extremely sophisticated parties who are represented by able counsel. When they fight over the meaning of their contract, the court must enforce the "the plain meaning of its terms." See *Greenfield v Philles Records, Inc.*, 98 NY2d

to ensure that badly originated loans were not placed in the trust, and, if they were, the seller would bear the risk.

³ The court declines to delay ruling on the meaning of the PSA. Were it to do so, expensive discovery would have to be conducted on extrinsic evidence. The court sees no reason to spend time and money conducting discovery on an issue that can clearly be resolved on a motion to dismiss.

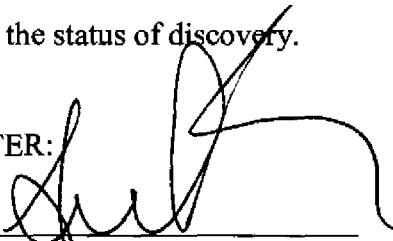
562, 569 (2002). Here, the plain meaning of section 2.06(a)(iii) is that JPMorgan is liable for any inaccurate material information in the loan schedule. Accordingly, it is

ORDERED that JPMorgan's motion for reargument of the court's order dated November 21, 2013 is denied; and it is further

ORDERED that a telephone conference will be held on August 5, 2014 at 3:00 p.m., during which the parties shall update the court on the status of discovery.

Dated: July 29, 2014

ENTER:



J.S.C.