

**Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge.
Capital, Inc.**

2014 NY Slip Op 32020(U)

July 28, 2014

Supreme Court, New York County

Docket Number: 653787/2012

Judge: Melvin L. Schweitzer

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

-----X
HOME EQUITY MORTGAGE TRUST SERIES :
2006-5, :

Plaintiff, :

-against- :

DLJ MORTGAGE CAPITAL, INC., and :
SELECT PORTFOLIO SERVICING, INC., :

Defendants. :

Index No. 653787/2012

DECISION AND ORDER

Motion Sequence No. 010

-----X
HOME EQUITY MORTGAGE TRUST SERIES :
2006-1, HOME EQUITY MORTGAGE TRUST SERIES :
2006-3, and HOME EQUITY MORTGAGE TRUST :
SERIES 2006-4, :

Plaintiffs, :

-against- :

DLJ MORTGAGE CAPITAL, INC., and :
SELECT PORTFOLIO SERVICING, INC., :

Defendants. :

Index No. 156016/2012

DECISION AND ORDER

Motion Sequence No. 012

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MELVIN L. SCHWEITZER, J.:

DLJ Mortgage Capital, Inc. (DLJ) and Select Portfolio Servicing, Inc. (SPS) have moved to compel the production of documents from non-parties, Fir Tree Partners, Inc. (Fir Tree), Euphrates G1 LLC, Euphrates G2 LLC, Euphrates G3 LLC, and Euphrates G4 LLC (collectively, the Euphrates Entities and, with Fir Tree, the Directing Certificateholders). In light of New York law on compelling discovery, the information that defendants seek is either privileged material or irrelevant to the breach of contract issue ultimately animating this action.

Background

This is a breach of contract action based on DLJ's alleged breaches of representation and warranties (R&Ws) made under the Pooling and Servicing Agreements (Agreements) pertaining to Home Equity Mortgage Trust (HEMT) 2006-1, HEMT 2006-3, HEMT 2006-4, and HEMT 2006-5 (collectively, the HEMT Trusts). The HEMT Trusts contain residential mortgage-backed securities (RMBS), which were securitized and sold by DLJ. Section 2.03(g) of the Agreements contains a provision that requires DLJ, upon discovery or receipt of notice of any breach of the R&Ws, to repurchase the affected mortgage loans from the respective HEMT Trusts, if the breaches are not remedied within 120 days. The gravamen of this litigation is defendants' failure to repurchase loans or cure breaches. The Agreements permit the Trustee to act on its own accord, but require the Trustee to bring litigation after it has been directed and indemnified by certificateholders who hold no less than 25% of the Certificates' voting rights. With breach rates of reviewed loans allegedly exceeding 98%, the Directing Certificateholders directed and indemnified the Trustee, U.S. Bank, to sue on behalf of each of the HEMT Trusts.

The defendants have served discovery requests on the Directing Certificateholders. Defendants contend that the Directing Certificateholders have played a central role in spurring the current action and seek documents and information relevant to the claims asserted on the Directing Certificateholders' behalf. These requests are categorized in the following fashion: (1) documents relating to the Directing Certificateholders' investment in and ownership of the Certificates, (2) documents concerning the Directing Certificateholders' role in compelling the Trustee to litigate and their indemnification arrangement with the Trustee, and (3) documents pertaining to the allegations of the complaint, which are allegedly based on the investigation and analysis conducted or encouraged by the Directing Certificateholders.

Plaintiff argues that the Directing Certificateholders played no role in any operative issue in these actions, as they did not buy the loans, negotiate the contracts, make the R&Ws, or analyze the loans for repurchase. Plaintiff concedes the only differentiating element about the Directing Certificateholders is that they directed and indemnified the Trustee to bring these actions pursuant to the Agreements. Plaintiff argues that under New York Law, directing a Trustee to enforce claims held by the Trust does not warrant discovery on the non-party Directing Certificateholders. In sum, plaintiff maintains that defendants' requests are irrelevant, too broad in scope, and seek privileged information.

Discussion

As stated in *Spectrum Sys. Int'l Corp. v Chem. Bank*, “[t]he CPLR directs that there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action.” 78 NY2d 371, 376 (1991). The party requesting disclosure must evince that “the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims.” *Crazytown Furniture, Inc. v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 (2d Dept 1989). CPLR 3101 creates three types of protected materials: “privileged matter, absolutely immune from discovery[,] . . . attorney’s work product, also absolutely immune[,] . . . and trial preparation materials, which are subject to disclosure only on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means.” *MBIA Ins. Corp v Countrywide Home Loans, Inc.*, No. 602815/08, 2011 WL 7640152, at *3 (NY Sup Ct Jan 25, 2011). “Privilege, once found, must not be withdrawn for the mere reason that the documents at issue were created toward a multi-faceted goal and were used for purposes other than solely for litigation.” *Id.* at *6.

The information defendants' demand from the Directing Certificateholders, which can be characterized by its focus on the Directing Certificateholders' investment strategies and motives precipitating this lawsuit, is not relevant to the breach of contract issues central to this action. The documents and communications from the Directing Certificateholders, will not proffer evidence relevant for plaintiff's claims. The case rests on whether the loans that DLJ sold to the RMBS Trusts were of the quality that DLJ represented they were, namely a breach of contract issue. The Directing Certificateholders' actions or internal thoughts are divorced from this lawsuit. *See Assured Mun. Guar. Corp v DB Structured Prods. Inc.*, No. 650705/2010, at *6-8 (NY Sup Ct July 7, 2014); *Crazytown Furniture*, 150 AD2d at 420-21 (prohibiting discovery disclosure because "unsubstantiated bare allegations of relevancy are insufficient to establish the factual predicate regarding relevancy"); *Steinbrenner v Esquire Reporting Co. Inc.*, No. 90 CIV. 6419, 1991 WL 102540, at *6 (SDNY June 3, 1991) (interpreting a contract "naturally depends not on the understanding of potential third party beneficiaries, but rather on the intent of the parties themselves"); *MBIA Ins. Corp v Patriarch Partners VIII, LLC*, 950 FSupp2d 568, 616 (SDNY 2014) (concluding that a non-party to the contract's "own personal understanding is not relevant to the contract interpretation analysis; rather, what matters is the intent of MBIA, the corporate entity that was a party to the [contract at issue]").

Courts have rejected similar discovery requests concerning directing certificateholders. In *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v UBS Real Estate Secs., Inc.*, the court denied an RMBS defendant's attempt to compel U.S. Bank, a plaintiff-trustee, to produce "any and all communications [with the certificateholders of the trusts]." No. 12 Civ 7322, ECF No. 87, at *3 (SDNY June 24, 2013); *Maitland v Int'l Registries LLC*, No. 3699, 2008 WL 2440521, at *2 (Del Ch June 6, 2008) (denying motion for non-party commission when requesting party

was unable to demonstrate “materials [sought were] relevant or would lead to the discovery of materials relevant”).

Defendants’ request for documents and communications relating to the Directing Certificateholders’ instruction that the Trustee sue is not relevant, as the court has already held that the Trusts and Trustees have standing to bring this action regarding all of the affected loans in the HEMT Trusts. *See 2006-1 Action*, Order Granting in Part and Denying in Part Defendant SPS’ Motion to Dismiss at 5-7, Dkt No. 223 (Oct 18, 2013); *see also 2006-1 Action*, Order Denying in Part and Granting in Part Defendants’ Motion to Dismiss, Dkt No. 262, at 7 (Jan 15, 2014) (holding that “[h]ere, the Complaint leaves no doubt that the Trusts’ rights are being enforced by the Trustee”) (citing *MARM Trust 2006-0A2 v UBS Real Estate Secs., Inc.*, No. 12 Civ. 7322, 2013 WL 4399210, at *2 (SDNY Aug 15, 2013)). The direction and indemnity by the Directing Certificateholders only speaks to whether the Trustee is required to exercise its powers to sue; it does not relate to whether the Trustee has standing or its own discretion to sue. As there is no issue of standing to sue or the validity of the Trustee’s actions in bringing this suit, the documents and communications relating to the Directing Certificateholders’ direction, indemnity, and proof of ownership are not relevant to defend against the breach of contract claims.

Defendants’ request for documents and communications relating to legal fees and expenses is also irrelevant because this information does not impact whether DLJ is liable under the breach of contract claim. An accounting can be conducted at the conclusion of this case to determine the precise amount of indemnification. *See Happy Kids, Inc. v Glasgow*, 01 CIV. 6434, 2002 WL 72937, at *5 (SDNY Jan 17, 2002) (holding that “subsidiary litigation over Glasgow’s legal bills while the case proceeds would not only be distracting and wasteful, but

would threaten disclosure of confidential attorney-client information,” and in the event Glasgow “prevails on the fiduciary duty claims, Happy Kids will be entitled to seek a more precise accounting, at which Glasgow will have the burden to demonstrate the appropriateness of all fees advanced”). Defendants’ discovery request would potentially implicate work product information and does not offer any new evidence on the actual indemnification claim.

Defendants’ request for documents and communications from the Directing Certificateholders relating to the allegations in the complaint is irrelevant. As non-parties to the events underlying the claims and defenses in this case, the Directing Certificateholders’ internal thoughts and beliefs are irrelevant for determining defendants’ liability in this action. Defendants request for documentation concerning the Directing Certificateholders’ investigation and loan analysis is either irrelevant to the breach of contract claim or protected under attorney-client privilege and the work-product doctrine. In *MBIA*, the court resolved that materials prepared by and on behalf of litigation consultants who were hired to perform forensic reunderwriting of RMBS loans and deduce whether the loans complied with the R&Ws in the transaction documents were privileged and immune from discovery under the attorney-client and work product doctrines. 2011 WL 7640152, at *5 (holding that “communications and documents relating to the investigations . . . are protected by the attorney-client and work product privileges”); CPLR 3101 (b)-(c).

Such material is also subject to the “trial preparation privilege” of CPLR 3101 (d) “if it is prepared primarily for purposes of litigation.” *MBIA*, 2011 WL 7640152, at *6. The court reasoned that Countrywide did not display a substantial need for documents relating to the plaintiff’s repurchase analysis because “to the extent that MBIA attempts to prove that Countrywide has not met its obligations under the Securitizations, MBIA must present factual

evidence supporting its claims. Countrywide will thus be in full possession of materials necessary for their defense.” *Id.* at *7. The same conclusion applies to the current action.

Defendants’ request concerning the Directing Certificateholders’ investment strategies has no bearing on the merits of the breach of contract claim asserted against DLJ. *See Guadagno v Diamond Tours & Travel, Inc.*, 59 AD2d 685 (1st Dept 1977) (holding that interrogatory requesting identity, location, and value of assets of defendant and two non-parties was immaterial and irrelevant for issues presented at trial and, therefore, was outside the bounds of discovery); *Palumbo v Shulman*, No. 97 Civ-4314, 1998 WL 436367, at *3 (SDNY July 27, 1998) (denying discovery of investment documents of defendants’ non-party clients because such requests were “not relevant to the subject matter of this lawsuit, will expand the scope of discovery needlessly, and will invade the privacy of the non-parties unnecessarily” and “permitting plaintiffs to delve into the non-parties’ investment portfolios for the purposes articulated by the plaintiffs would be tantamount to permitting them to ‘roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so’”) (citing *Surety Ass’n of America v Republic Ins. Co.*, 388 F2d 412, 414 (2d Cir 1967)); *In re Alliance Pharm. Secs. Litig.*, No. M-8-85, 1995 WL 51189, at *1 (SDNY Feb 9, 1995) (denying plaintiff’s motion to compel production of trading records from non-party investment bank-underwriters when “plaintiff [attempted] to obtain stacks of trading documents from non-parties on the basis they *might* substantiate a theory of materiality and the scienter of a party”) (emphasis in original).

The information that defendants have requested does not bear upon its potential liability under the Agreements for failing to repurchase the loans or remedy the RMBS defects and will not assist defendants in defending this litigation.

Conclusion

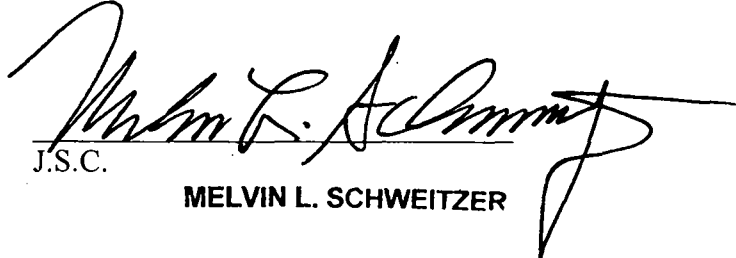
For the foregoing reasons, defendants' motion to compel discovery is denied in its entirety.

Accordingly, it is

ORDERED that defendants' motion to compel the production of documents from Directing Certificateholders is denied.

Dated: July 28, 2014

ENTER:


J.S.C. MELVIN L. SCHWEITZER