

**Ambac Assur. Corp. v Countrywide Home Loans,
Inc.**

2015 NY Slip Op 30950(U)

June 3, 2015

Supreme Court, New York County

Docket Number: 651612/2010

Judge: Eileen Bransten

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

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AMBAC ASSURANCE CORPORATION and
THE SEGREGATED ACCOUNT OF AMBAC
ASSURANCE CORPORATION,

Plaintiffs,

- *against* -

Index No.: 651612/2010
Motion Date: 05/05/2015
Motion Seq. No.: 025

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

Defendants.

-----X
BRANSTEN, J.

This residential mortgage-backed securities case comes before the Court on motion sequence number 025, in which Defendants Countywide Home Loans, Inc., Countrywide Securities Corp., and Countrywide Financial Corp. (collectively, "Countrywide") seek an order compelling Plaintiffs Ambac Assurance Corp. and The Segregated Account of Ambac Assurance Corp. (collectively "Ambac") to produce documents or provide interrogatory responses after the close of fact discovery.

Specifically, Countrywide seeks an order compelling Ambac to produce alleged "mitigation" discovery regarding Ambac's purchase of residential mortgage-backed securities that Ambac insured. For the reasons stated below, Countrywide's motion is denied.

I. Background

Ambac alleges that Countrywide fraudulently induced Ambac into insuring twelve residential mortgage-backed securities. Ambac asserts that Countrywide made representations and warranties in the securitization transaction documents regarding Countrywide's underwriting practices in issuing mortgage loans to borrowers that comprised the securities. Ambac alleges these representations and warranties were false.

Since 2008, Ambac has been purchasing securities that it had insured, similar to the securities at issue in this action. Countrywide seeks discovery showing the identity and face value of the securities purchased, the purchase price, the dates of the purchases, whether Ambac still holds each security, and the sale price, if sold. Countrywide's damages expert, Professor Christopher James, stated in his April 1, 2015, expert rebuttal report that these purchases would constitute mitigation of Ambac's losses. Ambac disputes that the purchases mitigate its damages in this case.

In March 2009, Ambac disclosed in an SEC filing that it had purchased some residential mortgage-backed securities that it had insured, though not which securities specifically. *See* Affirmation of Harry Sandick ("Sandick Affirm.") Ex. 7. Again in May 2013, Ambac disclosed its purchase of Ambac-insured securities in an SEC filing. Also in May 2013, Ambac disclosed an email to Countrywide that described Ambac's plan to purchase securities it insured. *See* Sandick Affirm. Ex. 11. Using the May 2013 email in a November 2013 deposition, Countrywide questioned a former Ambac executive

regarding Ambac's strategy to purchase Ambac-insured securities at a discount. *See* Sandick Affirm. Ex. 11.

In July and August 2013, Countrywide requested documents and issued an interrogatory relating to Ambac's attempt to mitigate damages. *See* Affirmation of Joseph M. McLaughlin ("McLaughlin Affirm.") Ex. C. Ambac objected on the grounds that the term "mitigate" was vague and subject to interpretation. *See* Sandick Affirm. Ex. 14.

In October 2013, after a discussion between the parties, Countrywide issued an amended interrogatory requesting that Ambac "[d]escribe in detail any steps taken . . . to minimize or reduce the potential harm or damages that it contends resulted from Defendants' conduct." *See* McLaughlin Affirm. ¶ 4, Ex. B. Ambac again objected to the interrogatory as vague, but nevertheless provided an answer. Ambac's answer discussed reinsurance and specific mortgage loan repurchase requests, but did not mention Ambac's purchase of Ambac-insured securities. *See* Sandick Affirm. Ex. 18.

Fact discovery closed on April 14, 2014.

II. Discussion

A. Ambac Need Not Produce Further Discovery

The essential dispute underlying this motion is whether Countrywide timely requested information related to the alleged mitigation discovery it now seeks.

Countrywide posits that it properly served discovery demands encompassing Ambac's securities purchases and that Ambac has an ongoing duty to supplement discovery responses.

Countrywide points to CPLR section 3101(h), which states that "[a] party shall amend or supplement a response previously given to a request for disclosure promptly upon the party's thereafter obtaining information that the response was incorrect or incomplete when made" Countrywide argues that it requested discovery related to Ambac's mitigation of damages in its amended Interrogatory 17, dated October 14, 2013. Countrywide further contends that Ambac's response is now incomplete because Ambac has purchased additional Ambac-insured securities since it responded to that request.

Ambac maintains that its purchase of Ambac-insured securities does not constitute mitigation. In line with its position, Ambac's response to the mitigation discovery requests did not include any information about its purchase of Ambac-insured securities.

Ambac has no duty to supplement its response to Interrogatory 17 because there was no specific request in the first instance. Countrywide does not dispute that it knew about the repurchase program prior to the close of fact discovery. The parties had a discussion after Ambac's first response, and during that meeting Countrywide never objected to Ambac's lack of production regarding securities purchases.

It was incumbent on Countrywide to object to Ambac's responses that failed to include the information now sought or to raise the issue with the Court before the close of fact discovery.

CPLR section 3101(h) requires parties to supplement discovery responses. However, the duty to supplement is no greater than the original duty to produce. *See* Siegel, N.Y. Prac. § 362, at 617 (5th ed. 2011). If Countrywide thought it was entitled to securities purchase information based upon its prior discovery requests, it should have objected to Ambac's lack of production to those requests before the close of fact discovery.

In a pre-motion letter, Countrywide stated it "was aware of Ambac's public disclosures during the period Countrywide's interrogatories to Ambac were outstanding." *See* Sandick Affirm. Ex. 4 (Countrywide's letter to the Court, Apr. 3, 2015). When Countrywide received Ambac's response, Countrywide neither objected nor asked for the information regarding Ambac's securities purchases that it now seeks. Instead, Countrywide raised the issue of Ambac's purportedly inadequate discovery response with the Court in February 2015, ten months after fact discovery closed and sixteen months after Ambac's response.

Countrywide argues that it did not know about the purchase of any Ambac-insured securities relating to specific securities at issue in this case. Without knowledge of

purchases specific to this case, Countrywide contends, it could not have known to request the specific information now being sought.

Countrywide raises this issue now because its experts brought the possibility of mitigation to Countrywide's attention. As Countrywide stated in its letter to the Court, "[i]n working with our damages expert consultants, we have learned that Ambac has been purchasing Ambac-insured RMBS securities at discounted prices." *See Sandick Affirm. Ex. 3* (Countrywide's letter to the Court, Mar. 26, 2015).

Countrywide indicates that Ambac's purchase of securities has recently accelerated. However, this acceleration does not explain what has changed since the close of fact discovery when Countrywide failed to object Ambac's lack of production on this issue. Before the close of fact discovery, as now, Countrywide knew that Ambac was purchasing Ambac-insured securities. Countrywide still does not know whether any of Ambac's purchases involve securities at issue in this litigation.

Countrywide knew that Ambac was purchasing securities well before the fact-discovery deadline and chose not to pursue the information it now argues is "critical" to its case. Discovery deadlines must be enforced to allow for the orderly resolution of disputes. *See Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscapes Architects, P.C.*, 5 N.Y.3d 514, 521 (2005) ("Litigation cannot be conducted efficiently if deadlines are not taken seriously").

B. *Depositions After Fact Discovery Closed are Not Relevant*

Countrywide also argues that the Court re-opened fact discovery on two other issues, and so should re-open fact discovery on this issue as well.

The first order that Countrywide cites involved the Court granting a commission that allowed Ambac to depose a witness one week after fact discovery closed.

Countrywide's argument is unavailing for three reasons. First, Ambac requested the deposition before the close of fact discovery. Second, the deponent was not available before the close of fact discovery and so the deposition could not take place before the deadline. Third, Countrywide's counsel stipulated to the issuance of the commission.

The second order that Countrywide cites involves another deposition, although requested by Ambac after the discovery deadline. The Court granted this second deposition because Countrywide produced a document, after the close of fact discovery, which had been incorrectly marked as privileged. This document identified the deponent for the first time. The Court granted a one-hour deposition that was extremely limited in scope. Despite the issuance of a commission, the deposition never occurred.

Here, Countrywide knew that Ambac was purchasing Ambac-insured securities before the close of fact discovery. Despite this knowledge, Countrywide failed to request information related to these purchases. There are no concerns over convenience of a

deponent, nor are there previously undisclosed documents. As the Court has done in situations similar to this one, post-deadline discovery must be denied.

C. *The Court Has Denied Discovery After the Close of Fact Discovery*

Unlike the two depositions outlined above, Countrywide's request here is similar to the Court's denial of a prior Ambac request. Three months after the close of fact discovery, Ambac requested the deposition transcripts of Bank of America employees who had testified during an SEC investigation.

Defendant Bank of America Corp. argued that fact discovery had closed and that Ambac was not entitled to the depositions transcripts. The Court agreed and denied Ambac's request. Akin to the instant request, there was no compelling reason to grant an exception to the fact-discovery deadline.

As Defendants persuasively noted in arguing against Ambac's SEC deposition transcript request, the Court of Appeals has stated that discovery deadlines are important to the integrity of the litigation process. *See Gibbs v. St. Barnabas Hosp.*, 16 N.Y.3d 74, 83 (2010) quoting *Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscapes Architects, P.C.*, 5 N.Y.3d 514, 521 (2005) (“[W]e make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated”).

D. *Countrywide's Other Arguments are Not Relevant*

Finally, Countrywide argues that Ambac's discounted securities purchases are critical to determining mitigation and that Ambac will not be burdened by the production. These arguments do not relate to the basis for this decision—that Countrywide missed the deadline for fact discovery—and will therefore not be considered.

In sum, Countrywide may not reopen fact discovery over one year after it closed. Accordingly, Countrywide's motion is denied.

(The order of the Court appears on the following page.)

III. Conclusion

Accordingly, it is hereby

ORDERED that Countrywide's motion sequence 025 is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York

June 3, 2015

ENTER:

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

Hon. Eileen Bransten, J.S.C.