Ambac Assur. Corp. v Countrywide Home Loans, Inc.
2015 NY Slip Op 32703(U)
October 22, 2015
Supreme Court, New York County
Docket Number: 651612/2010
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN **PART** 3

Justice

AMBAC ASSURANCE CORP.

INDEX NO. 651612/2010

MOTION DATE 07/15/2015

- V -

COUNTRYWIDE HOME LOANS

MOTION SEQ. NO. 027

The following papers, numbered 1 to 3, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits	No(s)	3
Cross Motion		No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

DATED: 10/22/2015

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE :		☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION			
2. CHECK AS APPROPRIATE :	MOTION IS :	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER	
3. CHECK IF APPROPRIATE :		☐ SETTLE ORDER	☐ SUBMIT ORDER			
		☐ DO NOT POST	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE		

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* -

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

Defendants.

Index No.: 651612/2010
Motion Date: 07/15/2015
Motion Seq.: 027, 029

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BRANSTEN, J.

Motion sequence numbers 027 and 029 are herein consolidated for disposition. In these two motions, the parties seek summary judgment relating to Plaintiffs' fraud and breach of contract claims (the "primary liability claims") against Defendants Countrywide Home Loans, Inc. ("CHL"), Countrywide Securities Corp. ("CSC"), and Countrywide Financial Corp. ("CFC") (collectively "Countrywide"). Both motions are opposed. For the reasons stated below, motion sequence 027, brought by Countrywide for summary judgment, is granted in part and denied in part; and motion sequence 029, brought by Plaintiffs Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation (together, "Ambac") for partial summary judgment, is also granted in part and denied in part.

I. Background

The instant action stems from 17 securitizations consisting of over 375,000 pooled residential mortgage loans with an original principal balance totaling approximately $25 billion ("Securitizations").[1] Countrywide either originated or acquired the 375,000 loans and then conveyed them to trusts. These trusts then sold residential mortgage-backed securities ("RMBS") to investors. The Securitizations contain between 3,000 and 50,000 mortgage loans. The documents creating the Securitizations were executed between September 29, 2004 and September 29, 2006.

All of the Securitizations were governed by various transaction documents. The transaction documents for the HELOC Securitizations included a Mortgage Loan Purchase Agreement ("MLPA"), a Sale and Servicing Agreement ("SSA"), a Prospectus Supplement, an Administrative Agreement, and a Trust Indenture. The transaction documents for the CES and First-Lien Securitizations included a Pooling and Servicing Agreement ("PSA") and a Prospectus Supplement.

Ambac entered the picture as the insurer of the Securitizations. For each Securitization, Ambac executed an Insurance and Indemnity Agreement ("I&I

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[1] The 17 Securitizations consist of the following: (1) ten home equity line of credit securitizations ("HELOC"): (i) CWABS 2004-K; (ii) CWABS 2004-L ; (iii) CWABS 2004-M; (iv) CWABS 2004-N; (v) CWABS 2004-O; (vi) CWABS 2004-T; (vii) CWHEQ 2005-F; (viii) CWHEQ 2005-L; (ix) CWHEQ 2006-B; and (x) CWHEQ 2006-C; (2) three closed-end second securitizations ("CES"): (i) CWHEQ 2006-S1; (ii) CWHEQ 2006-S4; and (iii) CWHEQ 2006-S6 ("2006-S6"); and four first-lien subprime securitizations ("First Lien"): (i) CWABS 2005-16; (ii) CWABS 2005-17; (iii) CWABS 2006-11); and (iv) CWABS 2006-13.

Agreement"), whereby Ambac agreed to insure payments of principal and interest due to the RMBS certificateholders.

In the I&I Agreements and other documents, Countrywide made representations and warranties ("R&Ws") about, among other things, the accuracy of information that it had provided to Ambac, the quality of the mortgage loans, and Countrywide's operations. If these R&Ws were incorrect, then under certain circumstances, the documents governing the Securitizations required Countrywide to repurchase non-conforming mortgage loans. The repurchase remedy could only be triggered by a breach of an R&W that "materially and adversely affects the interests of" Ambac.

Starting in 2007, the Securitizations at issue here, like many RMBS, did not perform well. Ambac, as the insurer, had to pay more insurance claims than it had anticipated and consequently entered statutory rehabilitation. Ambac filed this action on September 28, 2010, alleging that Countrywide fraudulently induced it to insure the Securitizations, and that Countrywide breached various R&Ws. Ambac filed the operative complaint, the Second Amended Complaint, on May 28, 2013.

Countrywide now seeks summary judgment dismissing the Second Amended Complaint in its entirety. Ambac also seeks summary judgment, but only on certain issues. To the extent the motions overlap, they will be considered together below.

II. Discussion

The issues presented on these motions are nearly identical to those covered in prior decisions on summary judgment motions in a similar case and will be considered in light of those decisions. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, No. 602825/08, 39 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cnty. April 29, 2013) ("*MBIA*").

1. Standard of Law on Motion for Summary Judgment

On a motion for summary judgment, the movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

2. Justifiable Reliance on a Fraudulent Inducement Claim

First, the parties dispute whether, in order to state a claim for fraudulent inducement, Ambac must demonstrate that it justifiably relied on Countrywide's R&Ws when issuing the insurance policies. Second, if justifiable reliance is required, the parties dispute whether Ambac has shown justifiable reliance.

A. Justifiable Reliance is Not Required Under Insurance Law § 3105

Countrywide argues that in order for Ambac to state a cause of action for fraudulent inducement, Ambac must demonstrate that justifiably relied on Countrywide's R&Ws. Countrywide contends that after this Court held that reliance was not required in the insurance context in *MBIA*, the Courts of Appeals held that a fraud claim brought by a financial guaranty insurer, such as Ambac, must demonstrate justifiable reliance. *See ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1044 (2015).

However, the parties in *ACA Financial* did not raise the issue of New York Insurance Law § 3105, under which Ambac seeks recovery here. As stated in *MBIA*, the only "pertinent question under Section 3105 is whether the information allegedly misrepresented by Countrywide induced MBIA to take action that it might otherwise not have taken," also called "materiality." *See MBIA*, at *3 (citing *Interested Underwriters at Lloyd's v. H.D.I. III Assoc.*, 213 A.D.2d 246, 247 (1st Dep't 1995) ("A fact is material so

as to avoid ab initio an insurance contract if, had it been revealed, the insurer or reinsurer would either not have issued the policy or would have only at a higher premium.")).

Therefore, Countrywide's motion should be denied, as in *MBIA*, regarding the justifiable reliance requirement on a fraudulent inducement claim.

B. Regardless, Ambac Has Raised an Issue of Fact as to Reliance

Further, even if justifiable reliance were an element of a fraudulent inducement claim under Insurance Law § 3105, Ambac has raised an issue of fact precluding summary judgment. Countrywide contends that unlike in *MBIA*, Ambac had access to loan files before the securitizations at issue closed, and that Ambac failed to review third-party due diligence reports. Ambac disputes that it had actual access to the loan files before the securitizations closed, and alleges that it conducted due diligence on the securitizations that it insured. Specifically, Ambac contends that it visited Countrywide's headquarters numerous times to review Countrywide's underwriting practices and that it performed loan-level computer analysis of the various securitizations.

Under New York law, it is well established that if the facts represented are not matters peculiarly within the defendant's knowledge, and the plaintiff has the means available to it of knowing, by the "exercise of ordinary intelligence," the truth or the real quality of the subject of the representation, the plaintiff must make use of those means, or it will not be heard to complain that it was induced to enter into the transaction by

misrepresentations. *See DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 N.Y.3d 147, 154 (2010).

Countrywide argues that, as a matter of law, justifiable reliance cannot be shown where an RMBS investor fails to review loan files. Citing *Phoenix Light SF Ltd. v. Goldman Sachs Group, Inc.*, 43 Misc. 3d 1233(A) (Sup. Ct. N.Y. Cnty. June 13, 2014), Countrywide argues that Ambac's failure to review loan files defeats its cause of action for fraudulent inducement. In *Phoenix*, the plaintiffs stated that the only information available to them was the loan files. *Id.* at *7. Therefore, to the extent that the only due diligence possible was based on loan file review, failure to perform any due diligence whatsoever can be considered a failure to "exercise [] ordinarily intelligence," precluding a fraudulent inducement claim. *See ACA Fin. Guar. Corp. v. Goldman Sachs & Co.*, 25 N.Y.3d 1043 (2015).

Here, as in *MBIA*, there are issues of fact as to what due diligence Ambac actually performed and whether it was sufficient so as to be denominated "reasonable" or "justified." *See DDJ Mgmt., LLC v. Rhone Grp. L.L.C.*, 15 N.Y.3d 147, 155 (2010) ("The question of what constitutes reasonable reliance is always nettlesome because it is so fact intensive."). Further, as the Court of Appeals has stated, "where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry." *See DDJ Mgmt., LLC*, 15 N.Y.3d at 154.

This Court cannot say, as a matter of law, that Ambac was required to review the loan files in addition to its other due diligence efforts. Therefore, even if Ambac is required to demonstrate its justifiable reliance on Countrywide's R&Ws, issues of fact preclude summary judgment on this issue.

3. Repurchase is Not the Sole Remedy

As in *MBIA*, Countrywide argues that Ambac's sole remedy for all alleged breaches is the repurchase of non-performing loans. Countrywide attempts to distinguish *MBIA* by arguing that Section 2.01(*l*) of the contracts at issue in *MBIA* stated that the remedy restriction only applied to "any breach of this paragraph," while the parallel section here does not contain the "of this paragraph" language.

This argument is unavailing because, as in *MBIA*, the I&I Agreements here also contain language that expressly state the sole remedy provision does not apply beyond Section 2.01(*l*). Specifically, Section 5.02(b) states that "[u]nless otherwise expressly provided, no remedy herein conferred upon or reserved is intended to be exclusive of any other available remedy, but each remedy shall be cumulative." Further, Section 5.02(b) allows Ambac to take any "action at law or in equity as may appear necessary." Therefore, because the sole remedy provision only applies to breaches of Section 2.01(*l*), to the extent that Ambac can prove breaches of other sections of the I&I Agreements, it is not limited to the sole remedy of repurchase.

4. Sampling is Permitted

Countrywide next seeks a determination that Ambac is barred from using statistical sampling of the loan pools to demonstrate liability and damages. Countrywide argues that the repurchase protocol is only applicable on a loan-by-loan basis. Without loan-specific proof, Countrywide argues it cannot prove that a loan did not materially breach a R&W or that it cannot calculate damages properly.

Countrywide has failed to distinguish this case from *MBIA*, or to present any new arguments entitling it to a ruling that Ambac is barred from using sampling as a vehicle of proof at trial. Countrywide's citation to *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 PKC, 2015 WL 764665 (S.D.N.Y. Jan. 9, 2015) ("*MARM*"), is not persuasive. In *MARM*, the Court denied summary judgment to the plaintiff because "the proposed statistical sampling does not adequately distinguish between breaches that are material and adverse as to a particular loan and those that are not." *Id.* at *10. The *MARM* court also noted that "there is no broad carve-out providing that the enumerated remedies are not exclusive of others available to the parties." *Id.* at *12.

Here, in contrast, there is a broad carve-out in I&I Section 5.02(b), noted above, stating that the remedial limitation in Section 2.01(*l*) is not exclusive of any other remedy outside the R&Ws that Section 2.01(*l*) covers. Further, Countrywide is not assailing the validity of the specific sampling methodology employed here, as in *MARM*, but rather

seeks a ruling that Ambac may not present its evidence a trial using a statistical sample at all.

As in *MBIA*, "Plaintiff's possible use of sampling does not change Plaintiff's ultimate burden of proof, only how Plaintiff may present that proof. Thus, to the extent that [Ambac] uses sampling at trial, it will have the burden of establishing breaches on a pool-wide basis." *MBIA* at *10.

5. Statute of Limitations Does Not Warrant Dismissal

Countrywide contends that many of the put-back claims at issue here are barred by the statute of limitations, which requires that a demand for repurchase be made within six years of a securitization's closing date. Specifically, Countrywide argues that Ambac's repurchase demands covering 2,900 loans in seven securitizations, and all loans in two other securitizations, are time barred because Ambac did not explicitly demand their repurchase within six years of closing.

Countrywide's motion for summary judgment on this point must be denied. As Countrywide acknowledges, its awareness that loans breach R&Ws trigger its repurchase obligation under the applicable contractual documents. *See MBIA* at *10. Although Countrywide correctly notes that it is ultimately Ambac's burden to prove Countrywide's awareness of R&W breaches at trial, it is Countrywide's burden on a motion for summary judgment to tender proof that it is entitled to judgment. *See* CPLR 3212(b);

Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Countrywide has not attempted to do so here. Further, Ambac raises issues of fact regarding Countrywide's knowledge of its underwriting process generally.

Ambac also seeks summary judgment on the notice issue, arguing that "loan-by-loan notice is not required." Ambac's motion must likewise be denied because the contractual language requires either that Ambac provide notice or that Countrywide be aware of a breach in order to trigger the repurchase obligation. Simply put, Ambac must prove one or the other.

The cases cited by Ambac holding that notice to a securitization sponsor that a sample of loans was sufficient are critically different in one of two important ways. First, some of the cases Ambac relies upon were determined at the motion to dismiss and thus were being considered under the notice pleading standard on a motion to dismiss. *See Ace Securities Corp. v. DB Structured Products, Inc.*, 2014 WL 1384490, at *5 (Sup. Ct. N.Y. Cnty. April 4, 2014) ("The CPLR requires only notice pleading, liberally construed, which puts an adversary on notice of the transactions and occurrences giving rise to a claim"). Second, in the remaining cases cited by Ambac, the plaintiff had demanded that, in addition to the loans specifically cited, all other breaching loans be repurchased. *See Assured Guar. Mun. Corp. v. Flagstar Bank, FSB*, 920 F. Supp. 2d 475, 512-13 (S.D.N.Y. Feb. 5, 2013) (deeming that plaintiff satisfied the contractual notice

requirement "by informing Flagstar 'of pervasive breaches'" in the pre-suit repurchase demand).

Here, at the summary judgment stage, Ambac admits that it never made a pre-suit demand for the repurchase of all breaching loans. Therefore, to the extent Ambac did not provide notice of a breaching loan, it must show at trial that Countrywide had some awareness of an R&W breach. Accordingly, Ambac's motion for summary judgment as to the operation of the repurchase protocol, seeking an order that neither notice nor awareness is required, must be denied.

6. The Meaning of Certain R&Ws

Ambac and Countrywide dispute the meaning of several R&Ws. First, the parties dispute whether the "No Default" representation is breached where there is any borrower misrepresentation, or if it applies only to a material monetary default by the borrower. Next, the parties dispute the meaning of the "Qualified Appraiser" R&W. Finally, the parties dispute whether the "Title Insurance" R&W could be breached for loans under $100,000. The meaning of each R&W will be considered in turn below.

A. ***No Default R&W***

There are two versions of the "No Default" R&W at issue here. The first version of the "No Default" R&W is found in the HELOC securitizations. The second version of the "No Default" R&W is found in the first-lien securitizations and the CES securitizations.

i. HELOC Securitizations

The first version of the "No Default" R&W is identical to the one considered in *MBIA*, which is present in the HELOC securitizations. This version states that "[a]s of the Closing Date . . . no default exists under any Mortgage Note or Mortgage Loan and no event that, with the passage of time . . . would constitute a default . . . has occurred." *See* Sandick Affirm. Ex. 58 (MLPA § 3.02(xxxv)). Ambac seeks a ruling that any borrower default, not just a monetary one, constitutes a breach of this R&W. Countrywide seeks a ruling that the "No Default" R&W applies only to a monetary default by a borrower on the underlying loan.

Countrywide submits that this Court's decision, on materially similar language in *MBIA*, was wrongly decided. According to Countrywide, Ambac could have negotiated for a "no fraud" R&W, like all other market participants did, but instead received only a "No Default" R&W. This arguments fails for the same reason as in *MBIA*. Here, as in *MBIA*, the language of the representation is not ambiguous, and therefore the Court

cannot consult extrinsic evidence. *See NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, 51 A.D.3d 52, 58 (1st Dep't 2008) ("A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous . . ."). Accordingly, Countrywide's motion is denied, and Ambac's motion seeking a ruling that any borrower default, not just a monetary one, constitutes a breach of this R&W is granted.

ii. First-Lien and CES Securitizations

The second version of "No Default" R&W is slightly different than the one considered in *MBIA*. This version states that:

> There is no material monetary default existing under any Mortgage or the related Mortgage Note and, to the best of CHL's knowledge, there is no material event that, with the passage of time or with notice and the expiration of any grace or cure period, would constitute a default, breach, violation or event of acceleration under the Mortgage or the related Mortgage Note; and no Seller has waived any default, breach, violation or event of acceleration.

See Sandick Affirm. Ex. 34 (PSA § 2.03(b)(40)). Further, the related mortgage loans state that "Borrower shall be in default if during the Loan application process Borrower . . . gave materially false, misleading, or inaccurate information . . ." *See* Sandick Affirm. Ex. 140, ¶ 8. Taken together, these provisions state that "there is no material event that, with

the passage of time . . . would constitute [misleading or inaccurate information from the Borrower]." *See id.* Ex. 34 § 2.03(b)(40).

Countrywide argues that the word "default" in this clause refers not just to any default, but only to a "material monetary default." The support for this interpretation is derived from the timing aspect of a monetary default, where a borrower may have a grace period to repay a delinquency. Countrywide contends that non-monetary defaults do not have grace periods, and therefore this provision can only refer to monetary defaults.

However, as Ambac highlights, there are, in fact, non-monetary borrower defaults that involve timing issues, such as occupying the property within 60 days and for at least one year, properly maintaining the property, and refraining from storing hazardous materials on site. Further, the same "timing" language is contained in the HELOC securitization and the language considered in *MBIA*.

Ambac acknowledges that some of the CES loans do not contain the same "No Default" R&Ws, but argues that these second-lien mortgages contain "cross-default" provisions. Ambac indicates that some CES loans state that the "Borrower shall perform all of Borrower's obligations under any [first-lien] mortgage," and that, as noted above, borrower fraud constituted a breach of obligations under the first-lien mortgages. Countrywide contends that this provisions is not titled a "cross-default" clause and that the parties could have included a true "cross-default" clause if they so desired.

The language of the clause is not ambiguous. Under the CES loans, the borrowers must comply with their obligations on more senior loans. Giving the words their ordinary meaning, if borrowers are in "default" on a senior loan, they are not "performing their obligations" on that senior loan. *See Horse Shoe Capital v. Am. Tower Corp.*, 30 Misc. 3d 1220(A), at *3 (Sup. Ct. N.Y. Cnty. Jan. 28, 2011) (Fried, J.). Accordingly, as in *MBIA*, a material borrower misrepresentation constitutes a breaches of the "No Default" R&W in the HELOC, first-lien, and CES securitizations. Countrywide's motion is denied, and Ambac's motion is granted on this point.

B. ***Qualified Appraiser***

Ambac next moves for summary judgment on the meaning of the "Qualified Appraiser" R&W, and the 107 loans that it submits breached that R&W. Specifically, Ambac argues that a "stated-value loan" does fall within any reasonable interpretation of a "qualified appraiser." Countrywide acknowledges that this Court ruled on this exact issue in *MBIA*, and found that "stated-value loans" violated this R&W as a matter of law. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A), at *22 (Sup. Ct. N.Y. Cnty. April 29, 2013) ("The Court concludes that no reasonable interpretation of "qualified appraisal" would include this reading").

Countrywide offers no basis to overturn *MBIA*, merely rehashing its argument that Ambac "knew" of the stated-value program. Because Countrywide has not shown that

there is another possible interpretation of "qualified appraiser" that could include a stated-value appraisal, the language is not ambiguous and the Court cannot resort to extrinsic evidence in interpreting this phrase. *See Greenfield v. Phillies Records*, 98 N.Y.2d 562, 569 (2002) (noting that "[e]xtrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous"). Ambac's unrefuted interpretation that "stated-value appraisals," which involve the borrower stating the value of the property personally, are not performed by a "qualified appraiser," allows this Court to grant Ambac's motion for summary judgment as to the meaning of this R&W.

Further, to the extent that Countrywide does not contest that 85 of the loans contained only "stated-value appraisals," Ambac is entitled to summary judgment that these loans breached that R&W. Countrywide has, however, raised an issue of material fact as to the remaining 22, by demonstrating that their expert found evidence of electronic appraisals for these loans. Accordingly, Ambac's motion is granted as to the fact that 85 loans breached the "Qualified Appraiser" R&W, but Ambac's motion is denied as to the other 22.

C. ***Title Insurance***

Ambac seeks summary judgment with respect to 1,342 loans where there is no evidence of a title insurance policy. Countrywide argues that any loan with a balance under $100,000 is exempt from the requirement that it have title insurance. However,

Countrywide cites only to its own underwriting guidelines, and not to the actual language of the R&W, which does not contain the $100,000 exclusion for title insurance. Accordingly, Countrywide has failed to raise a material issue of fact, and Ambac is entitled to summary judgment that 1,342 loans breached the title insurance R&W.

Throughout its, briefs, Ambac acknowledges that it still must show that any breach of any R&W was material. Neither party seeks summary judgment on the materiality issue.

7. Ambac Has Not Mitigated Its Damages Through Bond Purchases

In a topic not covered in *MBIA*, Countrywide alleges that Ambac has purchased RMBS it insured and that are issue in this case, and that Countrywide is therefore entitled to mitigation on the amount of damages. Countrywide argues that if Ambac "made gains by purchasing bonds in the Securitizations at discounted prices attributable to the alleged breaches, Countrywide is entitled to a damages offset" by the amount of that gain.

Initially, Countrywide has not put forth evidence regarding the loss mitigation sufficient to make out a prima facie case. The only evidence cited by Countrywide regarding Securitizations in this case is that one of Ambac's experts stated that it is his "understanding" that the purchased bonds include "the securitizations at issue in this case." Such a statement by an expert witness, not a fact witness, does not suffice to carry Countrywide's burden to establish its entitlement to summary judgment. Countrywide

criticizes Ambac for "not provid[ing] any evidence showing it would have bought these . . . bonds" in the regular course of its business. However, on Countrywide's motion for summary judgment, Countrywide, not Ambac, bears the burden of putting forth prima facie evidence establishing that it is entitled to summary judgment as a matter of law. *See Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

Finally, Countrywide is not entitled to mitigation related to Ambac's RMBS bond purchases. "Gains made by the injured party on other transactions after the breach are never to be deducted from the damages that are otherwise recoverable, unless such gains could not have been made, had there been no breach." *See Fertico Belgium S.A. v. Phosphate Chemicals Exp. Ass'n, Inc.*, 70 N.Y.2d 76, 84 (1987). "If the person relieved of his or her duties is *thereby* enabled to earn additional income, such additional income will mitigate the damages." *See Donald Rubin, Inc. v. Schwartz*, 191 A.D.2d 171, 172 (1st Dep't 1993) (emphasis in original). New York law requires that there be a direct connection between the breach and the mitigation.

Here, Ambac has not been relieved of any duties as a result of Countrywide's purported breaches that have enabled it to earn additional income. New York courts emphasize the necessity of a causal connection between the harm suffered and the benefit derived. Ambac did not use resources that were made available by Countrywide's alleged breaches, because there were no resources that were made available by the breach.

Ambac actually had to expend additional funds paying insurance claims it otherwise would not have had to pay.

Moreover, "[t]his duty to mitigate arises from 'the principle that damages which the plaintiff might have avoided with reasonable effort are not caused by the defendant's wrong and, therefore, are not to be charged against him.'" *See Cary Oil Co., Inc. v. MG Refining & Marketing, Inc.*, 257 F. Supp. 2d 751, 763 (S.D.N.Y. April 24, 2003) (quoting *M. Golodetz Export Corp. v. S/S Lake Anja*, 751 F.2d 1103, 1112 (2d Cir. 1985). Countrywide does not argue that Ambac had a duty to buy its bonds. There must be some direct connection between the harm and the alleged mitigation. Here, the hypothetical connection, unsupported by evidence, is too attenuated because the alleged mitigation has occurred years after the alleged breaches.

8. Measure of Damages

Ambac acknowledges that under First Department precedent it is not entitled to rescission or rescissory damages, even though it disagrees with such a ruling. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 413 (1st Dep't 2013) ("Here, rescission is not warranted"). Nevertheless, Ambac argues that it is entitled to compensatory damages that are effectively equivalent to rescissory damages. According to Ambac, it is entitled to damages in the form of all past and future claims payments that Ambac makes arising from the securitizations at issue here, regardless of whether the

claims payments arise from a breach of an R&W or not. According to Ambac, the harm that it suffered was issuing the insurance policy in the first place, and giving the loans that breach R&Ws even purported coverage, when these breaching loans should never have been entitled to receive any insurance coverage.

Ambac's argument is appealing, but unpersuasive. Ambac is correct that the First Department held that Ambac may "recover[] payments made pursuant to an insurance policy without resort to rescission." *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 412 (1st Dep't 2013). This Court also held that, to the extent Ambac is "not contractually limited to the repurchase remedy[,] . . . [its recovery] may include monetary relief, such as compensatory damages." *MBIA*, at *9. However, Ambac's argument fails because of the distinction between rescissory and compensatory damages.

Rescissory damages, which are not available to Ambac, would put Ambac in the same position as if it had never agreed to insure the securitizations. This would be accomplished by repaying Ambac for all claims payments that it makes, regardless of their relation to any misrepresentation. In contrast, compensatory damages, which are available to Ambac, would put Ambac in the same position it would have been in if Countrywide had never breached in the first instance. *See* 36 N.Y. Jur. 2d Damages § 6 (citing *Reid v. Terwilliger*, 116 N.Y. 530 (1889)). This means that although causation is not necessary to demonstrate Countrywide's liability, Ambac's damages can only be calculated by reference to claims payments made because of the breach of the R&Ws.

Moreover, as this Court stated in its January 2012 summary judgment opinion, "[i]n order to prove its claims for fraud and breach of warranty, [Ambac] must prove all elements of its claims." *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc. 3d 895, 906 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012). This Court held that Ambac "must [] prove that it was damaged as a direct result of the material misrepresentation." *Id.* The First Department affirmed this portion of the opinion. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 412 (1st Dep't 2013).

To the extent a claims payment is made unrelated to a breach of an R&W, Countrywide persuasively argues that "Ambac cannot recover for the very risk it assumed—losses stemming from conforming loans." Countrywide's Reply Br. at 18; *See Assured Guar. Mun. Corp. v. DLJ Mortg. Capital, Inc.* 44 Misc.3d 1206(A), at *9 (Sup. Ct. N.Y. Cnty. July 3, 2014) ("a monoline cannot recover for the very risk it assumed"). This Court finds persuasive the court's ruling in *Assured Guaranty Municipal Corp. v. RBS Sec. Inc.,* which held that the monoline-insurer plaintiff could not recover "rescissory damages . . . by having them masquerade as compensatory damages." *See Assured Guar. Mun. Corp. v. RBS Sec. Inc.*, No. 13 CIV. 2019 JGK, 2014 WL 1855766, at *3 (S.D.N.Y. May 8, 2014). Accordingly, to the extent that Ambac is entitled to receive an award of damages unrelated to the repurchase protocol, the amount of damages must be calculated in reference to claims payments made due to loans breaching R&Ws. Ambac motion for summary judgment on this point is denied, and Countrywide's motion is granted.

9. No Need to Show Proximate Causation for Purposes of Liability

The parties next seek cross-summary judgment rulings regarding proximate cause. In *MBIA*, this Court held that "[f]or a fraud claim, the insurer must prove that it issued the insurance policies based on the representations made by Countrywide, and that it would not have issued the same policies on the same terms had the alleged misrepresentations not been made." *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc. 3d 895, 903 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012). "For a claim of breach of warranty, the insurer must prove that Countrywide's alleged misrepresentations materially increased the risk of loss to the insurer." *Id.* at 904.

Countrywide argues that the First Department erred in holding that New York Insurance Law applies here. Countrywide contends that, as a matter of law, Ambac cannot show that any R&W breach proximately caused its harm, as opposed to the risks disclosed in the transaction documents or the general economic downturn. However, as the First Department affirmed, "pursuant to Insurance Law §§ 3105 and 3106, plaintiff was not required to establish causation in order to prevail on its fraud and breach of contract claims." *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 105 A.D.3d 412, 412 (1st Dep't 2013).

Accordingly, to establish Countrywide's primary liability, Ambac

> must prove that Countrywide made misrepresentations that were material to its decisions to issue the Insurance Policies. In order to show materiality, as defined by N.Y. Insurance Law § 3105(b) and case law, [Ambac] must

> show that it relied on Countrywide's alleged misrepresentations in that the alleged statements induced [Ambac] to take action which [Ambac] might otherwise not have taken, or would have taken in a different manner.

MBIA Ins. Corp. v. Countrywide Home Loans, Inc., 34 Misc. 3d 895, 906 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012) (citing *Geer v. Union Mutual Life Ins. Co.*, 273 N.Y. 261, 269 (1937)). Ambac's motion for summary judgment on this point is granted, and Countrywide's motion is denied.

10. Indemnification and Reimbursement

Countrywide next seeks summary judgment on Ambac's causes of action for Indemnification and Reimbursement arising under the I&I Agreements. Ambac acknowledges that this Court previously ruled on its indemnification claims, but insists that such rulings were incorrect. Ambac admits that the pertinent language at issue here is identical to the language in *MBIA*.

Accordingly, this Court finds that the same ruling should apply. In *MBIA*, this Court found that there was no material difference between the two sections in terms of reimbursement for attorneys' fees. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A) (N.Y. Sup. Ct. 2013) ("Whether a request for indemnification or reimbursement, the claim is barred"). Further, as in *MBIA*, the language "falls short of satisfying the exacting standard" outlined in *Hooper Associates*. *See Gotham Partners, L.P. v. High River Ltd. P'ship*, 76 A.D.3d 203, 207 (1st Dep't 2010). Under *Hooper*, the

court "should not infer a party's intention to waive the benefit of the [American] rule unless the intention to do so is unmistakably clear from the language of the promise." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 492 (1989).

The language of the provisions at issue dos not meet *Hooper*'s strict standard, because it does not "exclusively or unequivocally" refer to claims brought between the parties themselves. Therefore, Countrywide's motion for summary judgment, as to the causes of action for indemnification and reimbursement, is granted.

11. "Undisputed" Loans

Ambac next seeks summary judgment on certain loans that it characterizes as "undisputed." For 3,542 loans, Ambac argues that Countrywide's expert has not raised an issue of fact by failing to "clear" them, and so Ambac is entitled to summary judgment. Ambac bases its motion on this Court's finding in *MBIA*, where Countrywide's failure to specifically address certain loans required that summary judgment be granted as to a finding of breach on those loans. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 39 Misc. 3d 1220(A), at *26 (Sup. Ct. N.Y. Cnty. April 29, 2013) ("For 610 loans at issue, Countrywide offers no proof in its briefing or in its opposition to MBIA's Rule 19–a Statement as to the existence of material issues of fact requiring a trial.").

However, unlike in *MBIA*, where Countrywide simply did not address certain loans at all, here Countrywide has addressed each loan individually. Although Ambac

contends that failing to "clear" a loan is akin to failing to "address" the loan, *MBIA*'s holding was not based on a failure to "clear" loans. Unlike the 610 completely undisputed and unaddressed loans in *MBIA*, here Countrywide has addressed each loan specifically and asserted factual issues and reasons as to why it did not "clear" each loan of a breach of R&W. Accordingly, because Countrywide has raised issues of fact, Ambac's motion must be denied.

12. The Meaning of "Materially and Adversely Affects" Language

Finally, Ambac seeks a determination that an R&W breach materially and adversely affects Ambac's interest if the R&W breach increased Ambac's risk of loss at the time the securitizations closed, a so-called "time zero." Countrywide responds that some sort of actual loss is required, and that the loss must be assessed when the repurchase demand is made.

In *MBIA*, this Court held that the "materially and adversely affects" language was ambiguous. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 34 Misc. 3d 895, 906 (Sup. Ct. N.Y. Cnty. Jan. 3, 2012). Since that time, according to Ambac, the Court of Appeals has held that a cause of action for the breach of an R&W accrues at the time it is made. *See ACE Sec. Corp. v. DB Structured Products, Inc.*, 25 N.Y.3d 581, 599 (2015). Ambac argues that *ACE* requires that the materially of a breach also be determined at the time of the contract closed, otherwise the statute of limitations would begin to run

without an ability to assess whether the breach was material and if a claim could be brought. Further, if materiality must be determined at the time a contract is executed, no actual loss can be required, because it could not yet have happened, therefore only an increased risk of loss must be shown.

Ambac's argument is appealing, but does not render its interpretation the only reasonable meaning. For example, a court recently held that "the determination of whether the breach 'materially and adversely affect the interests of the Certificateholders' is assessed as of the cure-repurchase period." *MASTR Adjustable Rate Mortgages Trust 2006-OA2 v. UBS Real Estate Sec. Inc.*, No. 12-CV-7322 PKC, 2015 WL 764665, at *10 (S.D.N.Y. Jan. 9, 2015). Therefore, because the contractual language is subject to more than one reasonable meaning, summary judgment must be denied. *See NFL Enterprises LLC v. Comcast Cable Commc'ns, LLC*, 51 A.D.3d 52, 58 (1st Dep't 2008) (contracts "are reasonably susceptible to more than one interpretation, rendering summary judgment inappropriate").

The Court has considered the parties' remaining arguments and finds them unavailing.

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

III. Conclusion

Accordingly, it is hereby

ORDERED that Countrywide's motion for summary judgment is granted in part and denied; and it is further

ORDERED that Ambac's motion to for partial summary judgment is granted in part and denied in part.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 22, 2015

ENTER:

Hon. Eileen Bransten, J.S.C.