

U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.
2017 NY Slip Op 30251(U)
February 3, 2017
Supreme Court, New York County
Docket Number: 600352/2009
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

U.S. BANK NATIONAL ASSOCIATION, as
Indenture Trustee for the Benefit of the Insurers and
Noteholders of GreenPoint Mortgage Funding Trust
2006-HE1, Home Equity Loan Asset-Backed Notes,
Series 2006-HE1, et al.,

Index No.: 600352/2009

Plaintiffs,

DECISION/ORDER

– against –

GREENPOINT MORTGAGE FUNDING, INC.,

Defendant.

X

In this RMBS putback action, defendant originator GreenPoint Mortgage Funding, Inc. (GreenPoint) moves, pursuant to the Part 60 Putback and Monoline Cases Case Management Order, dated December 7, 2015 (the CMO) (Master File Index. No. 777000/15, NYSCEF No. 17), for an order reversing an August 12, 2016 ruling of Hon. Theodore H. Katz, the Special Discovery Master for the RMBS putback and monoline cases (the Ruling). The Ruling denied GreenPoint's application to compel the plaintiff indenture trustee, U.S. Bank National Association (U.S. Bank), to produce all Custodial Files in its possession relating to the GreenPoint Mortgage Funding Trust 2006-HE1 securitization (the Trust).

The Custodial Files are maintained by U.S. Bank in its separate capacity as Custodian pursuant to a Custodial Agreement, dated as of August 1, 2006. (Aff. of Cameron R. Matheson [Counsel for GreenPoint] In Supp. [Matheson Aff.], Exh. B.) The files contain certain original documents pertaining to each of the loans in the Trust, including the original credit line agreement and title policies and, for non-MERS loans, original recorded mortgages, assignments,

and other documents. (*Id.*, § 2.)

The parties' arguments on this motion are substantially similar to the arguments they made before Judge Katz. In support of its application to Judge Katz, GreenPoint argued that production of all of the Custodial Files is required by this court's CMO. In the alternative, GreenPoint argued that the Custodial Files are highly relevant and should be produced in their entirety. For example, GreenPoint argued that "[o]ne of the most often-alleged breaches by plaintiffs' experts in RMBS putback litigation are [sic] documents missing from the loan files," and that "U.S. Bank would have its re-underwriting expert allege breaches based on alleged missing documents that could very well be hiding in U.S. Bank's possession." (Ltr. from Daniel M. Payne [Counsel for GreenPoint], dated July 29, 2016, at 2 [Matheson Aff., Exh. D].)

U.S. Bank, in opposition, disputed that the CMO makes production of the Custodial Files mandatory and argued that production of the complete files would be extraordinarily burdensome. According to U.S. Bank, there are 29,000 Custodial Files in this case, each consisting of original documents kept solely in hard copy form in a secured vault with strict access controls. (Ltr. from Constance M. Boland [Counsel for U.S. Bank], dated Aug. 4, 2016, at 1-2 [Matheson Aff., Exh. C].) U.S. Bank further argued that production of the Custodial Files would be duplicative, as copies of the documents should also be contained in the loan files produced by GreenPoint. U.S. Bank acknowledged, however, that if GreenPoint's loan file "does not contain material otherwise contained in a Custodial File, or if GreenPoint otherwise raises an issue with respect to one or more origination files, the production of, or access to, a Custodial File may be warranted." (*Id.*, at 2.)

In his Ruling, Judge Katz stated that he was "not persuaded that the en masse production" of the Custodial Files maintained by U.S. Bank was either "compulsory" under the CMO or "in

accordance with the imperative of proportionality in discovery.” (Ruling, at 1 [Matheson Aff., Exh. A].) Judge Katz further found that, “[g]iven the procedural posture of this case, the custodial files maintained by U.S. Bank are relevant only to the extent that they may contain some missing component of the loan files produced by Greenpoint that could reasonably impact upon the reunderwriting process.” (Id.) In light of this relevance finding and the “unusually-weighty burden that U.S. Bank would necessarily bear to produce those custodial files in their entirety,” due to their being maintained only in hard copy and under secure conditions, Judge Katz concluded that “a more narrow protocol is appropriate with regards to the relevant contents of the custodial files.” (Id.) He accordingly directed the parties to meet and confer and to agree upon a protocol whereby “(1) any relevant missing components of the loan files are identified with reasonable specificity; and (2) a reasonably targeted search of the custodial files is undertaken to produce those missing components.” (Id.)

Pursuant to section III (E) of the CMO, this court must review decisions of the Special Discovery Master “consistent with the standards applicable to review of orders from a ‘master’ pursuant to Federal Rule of Civil Procedure 53 (f) (3) (A), (4), (5), reviewing factual findings for clear error, conclusions of law made or recommended de novo, and rulings on procedural matters for abuse of discretion.” The parties do not dispute that the de novo review standard applies to Judge Katz’s ruling as to whether production of the Custodial Files is mandatory under the CMO, and that the clear error standard applies to his determination as to whether the requested production would violate the proportionality standard. (See Def.’s Memo. In Supp., at 4-5; Pl.’s Memo. In Opp., at 4-6.) Applying these standards of review to the Ruling, the court holds that the Ruling should be upheld.

Judge Katz did not err in ruling that this court’s CMO does not require the en masse

production of Custodial Files under these circumstances, in which the files are held by U.S. Bank in its separate capacity as Custodian and consist solely of original hard copy documents that substantially overlap with the documents contained in the electronically-stored loan origination files of GreenPoint.

This is the first dispute to reach this court regarding the meaning of the CMO's reference to "loan files," a term which the parties have been afforded latitude to define among themselves. Section V (B) (1) (a) of the CMO provides, in pertinent part, that within the specified time period, "each party will complete its production of what it understands to be the loan tapes and loan files within its possession, custody or control for all loans in the supporting loan group(s) at issue conveyed to each relevant trust"

The CMO does not provide a definition of "loan files." The CMO does, however, provide that "[l]oan files will be produced in the manner set forth in the Master ESI Order," i.e., the Stipulation and Order Regarding the Format of Document Productions, dated August 21, 2015. (*Id.*; Boland Aff., Exh. 3.) The Master ESI Order governs the format of production of hard copy documents (section II) and electronically stored information (ESI) (section III) across all the putback and monoline cases. The section of that order regarding the production of hard copy documents does not set forth a definition of loan files, although it does refer to the production of such files. (*See* Master ESI Order, § II [B] ["OCR [Optical Character Recognition] text files need not be provided for Loan Files, as defined below].) The section of the order regarding the production of ESI defines "Loan Files" as "Loan Origination Files (which may contain, *inter alia*, documents that were created or received during, and in connection with, the loan's origination, underwriting, approval and funding, including supplemental materials connected to the loan's origination and received post-funding) and/or Loan Servicing Files

(which may contain documents that were created or received in connection with the servicing of the loan).” (Id., § III [L].)

U.S. Bank argues that the documents in the Custodial Files are duplicative of the contents of GreenPoint’s Loan Origination Files, which unquestionably constitute Loan Files under the Master ESI Order. However, U.S. Bank also argues that there is an important difference between Loan Origination Files and the Custodial Files: Whereas Loan Origination Files generally are stored electronically and contain documents pertinent to the underwriting of the loans, the Custodial Files are smaller and contain original hard copy documents “to be used by the servicer in case there’s a foreclosure or a pay off of the loan and an original mortgage or an original note is required to take action.” (Transcript of Teleconference Hearing before Judge Katz on Aug. 11, 2016 [Katz Tr.], at 10-11 [Matheson Aff., Exh. E]; Transcript of Oral Argument on Dec. 6, 2016 [Tr.], at 43-44.) Due to the importance of the original documents, they are kept in a secure location and access to them is restricted.¹ Notably, GreenPoint does not dispute the substantial overlap between the hard copy Custodial Files and the electronically-stored Loan Origination Files.

As Judge Katz correctly cautioned in deciding this issue, the CMO should not be read to endorse the concept of “work that [isn’t] necessary.” (Katz Tr., at 15.) Special concerns are raised where, as here, the documents sought to be produced consist of original, sensitive, hard copy files that substantially overlap with electronically-stored documents produced by another party. In such circumstances, production of the files should be carefully limited to minimize the risk of damage to the documents and unnecessary production costs.

For these reasons, Judge Katz correctly held that the CMO does not make en masse

¹ U.S. Bank represented to Judge Katz that it had not identified any Part 60 RMBS case in which a Custodian has been required to produce copies of the original safeguarded Custodial Files. (Katz Tr., at 12; Tr., at 37.)

production of Custodial Files compulsory. Nor did Judge Katz err in balancing the relevance of the files against the burden on U.S. Bank of wholesale production. On the contrary, Judge Katz's directive that the parties meet and confer on a protocol for more targeted discovery of the Custodial Files was a practical and reasonable resolution of GreenPoint's application, designed to ensure that GreenPoint is able to review the information necessary for it to litigate this action and for the parties to commence reunderwriting, while protecting the sensitive documents at issue and avoiding undue burden. To the extent that GreenPoint seeks documents not in its possession that could reasonably affect the reunderwriting process, the Ruling establishes a protocol for the identification of, and search of the Custodial Files for, such documents. To the extent that GreenPoint contends that documents in the Custodial Files may be relevant to a breach claim by U.S. Bank based on documents that U.S. Bank may identify as missing from its loan files (see supra, at 2; see also Tr., at 33, 37-38, 42, 45-46), the Ruling does not appear to foreclose targeted discovery of such documents. Any request for clarification of the Ruling with respect to such discovery should be addressed to the Special Discovery Master.

It is accordingly hereby ORDERED that the motion of GreenPoint Mortgage Funding, Inc. to reverse the August 12, 2016 ruling of the Special Discovery Master is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
February 3, 2017


MARCY FRIEDMAN, J.S.C.