

**Natixis Real Estate Capital Trust 2007-HE-2 v Natixis
Real Estate Capital, Inc.**

2019 NY Slip Op 33438(U)

November 21, 2019

Supreme Court, New York County

Docket Number: 153945/2013

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

-----X
NATIXIS REAL ESTATE CAPITAL TRUST 2007-HE2, by
Computershare Trust Company, solely in its capacity as
Separate Securities Administrator,

INDEX NO. 153945/2013

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 017

- v -

NATIXIS REAL ESTATE CAPITAL, INC.,
Defendant.

**DECISION + ORDER ON
MOTION**

-----X
NATIXIS REAL ESTATE CAPITAL, INC.

Third-Party
Index No. 595610/2015

Third-Party Plaintiff,

-v-

WELLS FARGO BANK, N.A., et al

Third-Party Defendants.

-----X

HON. MARCY S. FRIEDMAN:

The following e-filed documents, listed by NYSCEF document number (Motion 017) 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 552, 553 were read on this motion to/for Appeal of Ruling of the Special Master

Defendant/third-party plaintiff Natixis Real Estate Capital, Inc. (Natixis) appeals the ruling of Special Master Katz, dated March 4, 2019 (the Ruling).¹ Natixis sought approval of commissions to a non-party certificateholder, CXA Corp. (CXA), and its principal Daniel

¹ It is noted that the Ruling gives a date of March 4, 2018, but it is undisputed that the year of issuance is 2019.

Adashek, seeking deposition testimony as to: “Any ongoing involvement in this litigation, including communications with Computershare or its counsel, the receipt of documents filed or produced in the litigation, attorney’s fees incurred by Computershare in connection with the litigation, and communications with other investors in the Securitization.” (Proposed Commissions, Matters for Examination, Topic 7 [Cioffi Aff. in Supp., Exs. B and C].)² Natixis claims that this testimony is relevant to its defense that plaintiff Computershare Trust Company, N.A. (Computershare) lacks standing to maintain the action. (Natixis Memo. in Supp., at 1-2.)³

More particularly, Natixis argues that the no action clause in the Pooling and Servicing Agreement (PSA), section 12.08, bars a certificateholder from exercising “control” over the Trust Fund, including repurchase litigation. Citing well settled authority that a certificateholder does not have standing to commence an action in its own name, Natixis contends that if a certificateholder that has directed the commencement of the action (a directing certificateholder) is in fact controlling the litigation, then it is “effectively” the plaintiff, and the action must be dismissed for lack of standing. (See Natixis Memo. In Supp., at 1, 6-9.) Natixis thus argues: “[I]f, as Natixis contends, certain certificateholders (the ‘Directing Holders’) are in fact making all substantive litigation decisions for nominal plaintiff Computershare Trust Company, N.A. (‘Computershare’), this action must be dismissed for lack of standing given that the Directing

² Natixis does not seek document discovery on this subject matter, except to the extent witnesses refer to documents during deposition testimony. It no longer seeks information regarding the attorney’s fees.

³ Natixis argued that Computershare lacks standing or capacity to sue because it was not appointed as Separate Securities Administrator pursuant to the PSA. The Appellate Division of this Department held that this defense is maintainable at this juncture in the action. (Part 60 RMBS Put-Back Litig. [Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital], 155 AD3d 482, 483-484 [1st Dept 2017].) By decision on the record on December 4, 2018, this court accordingly authorized the issuance of commissions seeking discovery from CXA and Mr. Adashek concerning the appointment of Computershare as Separate Securities Administrator. The commissions were not issued, as the parties had continuing disputes as to their scope. These disputes are resolved by this decision.

Holders would effectively be the plaintiffs (the ‘No-Action Clause Defense’).” (*Id.* at 1.)

The Special Master held that the PSA does not on its face limit the scope of proper communications between directing certificateholders and the Securities Administrator, that Natixis has not cited any case that supports its no action clause defense, and that the defense lacks “plausible viability” under the terms of the PSA or New York law. (Ruling at 8.) The Special Master further concluded that there was no support for the champerty defense as a matter of law. (*Id.* at 9.) He accordingly denied Natixis’s request for discovery under these defenses.⁴

The court reviews the Ruling under a de novo standard. The court holds that even under the liberal standard governing disclosure in New York (*Forman v Henkin*, 30 NY3d 656, 661 [2018]), the disclosure that Natixis seeks is not reasonably calculated to lead to information relevant to Natixis’s claim that this action is not being prosecuted by a plaintiff with standing. Natixis cites no authority in support of its contention that a certificateholder, or other trust beneficiary, may be considered the “effective” plaintiff in an action brought by a trust representative. Put another way, Natixis fails to show how, in the event Computershare demonstrates that it was a duly appointed trust representative, and therefore authorized to prosecute this action, Computershare can be deprived of this status—i.e. its status as a plaintiff with standing—by virtue of communications with a directing certificateholder as to the conduct of the litigation. This contention is not only unsupported by any legal authority, but also ignores that a trustee or securities administrator acts on behalf of the trust and its beneficiaries and would

⁴ It is noted that Natixis does not expressly plead a “no action clause defense.” It does assert that Computershare may lack standing based on the violation of the no action clause discussed in the text. Natixis also did not, in terms, plead a champerty defense. It pleaded a twelfth affirmative defense that Computershare’s claims are barred “to the extent the certificateholder or certificateholders participating in directing this litigation or directing plaintiff’s counsel purchased the certificates believing that breaches of representations or warranties had (or possibly had) occurred.” By decision dated July 8, 2019, issued after the Special Master’s Ruling, this court dismissed the so-called champerty defense. (*Part 60 RMBS Put-Back Litigation [Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital]*, 2019 WL 2995784, at *14 [July 8, 2019].)

reasonably be expected to communicate with them in order to insure the protection of their interests. (See Part 60 RMBS Put-Back Litig. [Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital], 161 AD3d 436, 437 [1st Dept 2018] [holding that “[d]ue to the ‘no-action’ clause in the applicable pooling and servicing agreement, the allegedly injured certificateholders may not directly pursue their claims, and must rely on the securities administrator and separate securities administrator to litigate on behalf of the trust”].)⁵

The discovery sought is similarly unwarranted based on Natixis’s champerty theory. As noted above, this court previously held that this defense was not viable. (Part 60 RMBS Put-Back Litigation [Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital], 2019 WL 2995784, at *14 [July 8, 2019] [dismissing the twelfth affirmative defense].) Nor does Natixis explain how, even if such a defense were maintainable, the beliefs or motivations of non-party certificateholders at the time of purchase of certificates could bear on the standing of plaintiff Computershare. This defense, like the defense based on the no action clause, appears to rest on nothing more than the unsupported contention that directing certificateholders are effectively the plaintiffs.

Natixis is accordingly directed to submit proposed commissions for CXA and Adashek, seeking disclosure limited to the issue of Computershare’s appointment. At the oral argument of this motion, Natixis stated that the CXA and Adashek commissions on Computershare’s appointment would include all deposition topics in the proposed commissions, except Topic 7 of the Matters for Examination. Computershare asserted that only deposition Topics 4 and 6 are relevant to Computershare’s appointment. The court will approve Topics 4 and 6 on consent (4.

⁵ Indeed, this Department has recognized that the common interest privilege applies to protect documents shared by the directing certificateholders and the securities administrator in this action. (Part 60 RMBS Put-Back Litig. [Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Capital], 161 AD3d at 437.)

“Your knowledge concerning the purported appointment of Computershare as the ‘Separate Securities Administrator’”; 6. “Your knowledge concerning the purported ratification of Computershare’s appointment as the ‘Separate Securities Administrator,’ as referenced in the November 14 Letter, including, without limitation, any response by You to the November 13, 2017 ‘Notice to Holders,’ which is attached as an exhibit to the November 14 Letter”). The court will also approve Topic 3, as limited to the Separate Securities Administrator. This Topic will therefore read: “Your knowledge concerning and/or role in selecting which person should serve as Separate Securities Administrator in the Action.” The court will not approve Topic 1 (“Your knowledge concerning the commencement of litigation relating to the Securitization”) and 2 (“Your communications with Natixis prior to the commencement of the Action”). These topics are related to the commencement of the action, and not to the post-commencement appointment of the Separate Securities Administrator. At this time the court will not approve Topic 5 (“Your ownership of Certificate[s]”). In the event discovery shows that certificateholder(s) took any action to direct or otherwise effectuate the appointment of the Separate Securities Administrator, the court will entertain a request, supported by legal authority, for disclosure of the certificateholder(s)’ holdings.

Document requests in the CXA commission in conformity with the approved deposition topics will also be approved. The Adashek commission does not seek documents.

It is accordingly ORDERED that Natixis’s motion to reject the March 4, 2019 Ruling of the Special Master is denied to the extent that the Ruling recommended that commissions for non-party certificateholders CXA and Adashek issue only insofar as they request discovery related to Computershare’s appointment as Separate Securities Administrator; and it is further

ORDERED that Natixis shall submit proposed commissions attaching subpoenas seeking documents and testimony as limited by this decision.

11/21/2019
DATE


MARCY S. FRIEDMAN, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	