

Hudson ES LLC v Deutsche Bank Natl. Trust. Co.
2020 NY Slip Op 30165(U)
January 22, 2020
Supreme Court, New York County
Docket Number: 159687/2018
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 60

HUDSON ES LLC

INDEX NO. 159687/2018

Petitioner,

MOTION DATE 10/11/2019

- v -

DEUTSCHE BANK NATIONAL TRUST COMPANY,

MOTION SEQ. NO. 001

Respondent.

DECISION AND ORDER ON
 COUNTER-PETITION FOR
 JUDICIAL INSTRUCTION

HON. MARCY S. FRIEDMAN:

The following documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 41, 46, 47, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 185, 186, 187, 188, 189, 190, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203 were e-filed in connection with the Petition and Counter-Petition.

In this CPLR Article 77 proceeding, respondent/counter-petitioner Deutsche Bank National Trust Company (Deutsche Bank or Trustee), solely in its capacity as the trustee of First Franklin Mortgage Loan Trust 2006-FF11 (Trust), seeks judicial approval of its decision to accept a settlement of the Trust's claims against First Franklin Financial Corporation (First Franklin), alleging that First Franklin breached representations and warranties concerning mortgage loans that were deposited into the Trust. (See Counter Pet. ¶ 73.) The proposed Trust Settlement Agreement between the Trust and First Franklin (Settlement or Agreement) provides for an aggregate settlement payment to the Trust of \$39,888,000 (Settlement Payment), together

with reimbursement of the Trustee's reasonable fees, costs, and expenses associated with the settlement and this proceeding up to \$750,000. (See Counter Pet. ¶ 73 and Exh. J.)¹

This proceeding was originally commenced by petitioner Hudson ES LLC (Hudson), a beneficial owner of certificates issued by the Trust, seeking judicial instruction, under CPLR Article 77, directing the Trustee to reject the Settlement, on the ground that the Settlement provided inadequate consideration for the release of the Trustee's claims. (Pet. ¶¶ 1, 11, 41.) The Trustee responded by answer and counter-petition seeking judicial approval of the Settlement. (See Answer and Counter Pet.) By order dated December 21, 2018 (NYSCEF Doc. No. 17), this court directed that notice of the proceedings and the preliminary conference be given to all interested parties. By stipulation so ordered on January 9, 2020, Hudson withdrew its petition and discontinued its claims with prejudice. This withdrawal followed the New York Court of Appeals decision in Deutsche Bank Natl. Trust Co. v Barclays Bank PLC, 2019 NY Slip Op 08519 (Nov. 25, 2019) (Barclays). The decision involved cases brought by Deutsche Bank as trustee of residential mortgage-backed securities (RMBS) trusts for breaches of representations and warranties, and held, based on Deutsche Bank's California residence, that its claims accrued in California for purposes of the New York borrowing statute, CPLR 202. The decision further held that the trustee's claims were time barred under California law.

As Hudson was the sole objector to the Trustee's acceptance of the Settlement, the Trustee's counter-petition for CPLR Article 77 judicial approval is now unopposed. The court

¹ First Franklin's initial August 31, 2018 settlement proposal provided for a payment of \$25,600,000 to be allocated to certificates backed by Group II Mortgage Loans. (Counter Pet. ¶ 66.) This proposal was amended by a proposal dated October 2, 2018, which provided for reimbursement of the Trustee's reasonable fees, costs, and expenses associated with the settlement and this proceeding up to \$750,000 (Initial Settlement Proposal). (Id. ¶ 101.) On January 8, 2019, First Franklin provided a further amended settlement agreement, the Agreement for which the Trustee now seeks judicial approval, which retains the terms of the Initial Settlement Proposal and provides for an additional \$14,288,000 payment to be allocated to certificates backed by Group I Mortgage Loans. (Id. ¶ 115.)

previously held that the approved Notice Program was the best notice practicable, was reasonably calculated to put interested parties on notice of this special proceeding, and constitutes due and sufficient notice of this special proceeding in satisfaction of federal and state due process requirements and other applicable law. (Dec. 21, 2018 Order ¶ 4.) The court adheres to that holding, and further finds that the Trustee has diligently complied with the Notice Program. (See DiCicco Aff. of Compliance, dated Feb. 6, 2019 [NYSCEF Doc. 30-35].)

The court also holds that the Trustee acted reasonably, in good faith, and in the proper exercise of its discretion in accepting the Settlement Payment provided for in the Agreement. The Trustee is sophisticated and experienced in the administration of RMBS trusts. The Trustee's initial evaluation of the Settlement included distributing notice and seeking written direction from certificateholders with voting rights to either accept the Initial Settlement Proposal or reject the Initial Settlement Proposal and provide direction and indemnity to the Trustee to pursue the claims against First Franklin. (Counter Pet. ¶ 104 and Informational Notice and Request for Direction [Counter Pet. Exh. G].) In response, certificateholders representing a majority of the outstanding voting rights directed the Trustee to accept the Initial Settlement Proposal. No voting certificateholders directed the Trustee to reject the Initial Settlement Proposal or otherwise provided direction and indemnity to the Trustee to pursue the litigation against First Franklin. (Counter Pet. ¶ 108; see also Memo. in Support of Counter Pet. at 6.)

In assessing the reasonableness of the Settlement Proposal, the Trustee also weighed the risk of uncertainty that the Trust's claims may be time barred based upon the Appellate Division's decision in Deutsche Bank Natl Trust Co. v Barclays Bank PLC (156 AD 3d 401 [1st Dept 2017]), which reached the same holding as the Court of Appeals' affirmance discussed above. (Counter Pet. ¶¶ 90-92.) In addition, at the direction of this court after the

commencement of this proceeding, the Trustee retained a qualified and experienced expert, Daniel R. Fischel, to evaluate the settlement. (3/7/2019 Hearing Tr. 36:12-18; see Fischel Report [DiCicco Aff. Exh. B].) Mr. Fischel concluded that the Settlement Proposal was reasonable and adequate based, among other things, upon the uncertainty of a potential recovery in litigation, taking into account the statute of limitations risk posed by Barclays, and upon consideration of comparable RMBS settlements. (See Fischel Report ¶¶ 32-52 [DiCicco Aff. Exh. B].) The expert report supports the Trustee's decision to accept the settlement, particularly under these circumstances in which the Court of Appeals ruling in Barclays likely renders the Trust's claims against First Franklin time barred.

On the papers submitted by the Trustee in this proceeding, including the affirmations in support of the Trustee's counter-petition, and in the absence of any remaining objection, the court finds that the Trustee exercised its discretionary power reasonably and in good faith in evaluating and accepting the Settlement, including the amount of the Settlement Payment. (See generally Matter of Bank of N.Y. Mellon, 127 AD3d 120, 125-126 [1st Dept 2015].)

In determining this uncontested proceeding, the court need not and does not make a finding as to the proper interpretation of the PSA provisions regarding distribution and allocation of the Settlement Payment. It is noted that in the Prayer for Relief of the counter-petition, the Trustee requested an instruction "regarding the proper construction of the relevant provisions of the PSA" and relief "in connection therewith[.]" including "instructions regarding proper allocation and distribution of" the Settlement Payment. (Counter Pet. Prayer for Relief ¶ B[1].) An Article 77 proceeding was subsequently brought by the Trust's securities administrator for instructions as to certain distribution issues. (See In re Wells Fargo Bank, N.A. (as Securities Administrator of First Franklin Mortgage Loan Trust 2006-FF11), Index No. 650886/2019).

This proceeding was withdrawn without prejudice. (See Order dated [Index No. 650886/2019 NYSCEF Doc. 42].) The Trustee has clarified that the counter-petition does not address distribution and that any distribution issues will be the subject of a separate proceeding. (See Jan. 3, 2020 Hearing Tr. 19:4-23.)

It is accordingly ORDERED that the counter-petition is granted to the extent set forth in this decision.

This constitutes the decision and order of the court. Submit judgment.

Dated: New York, New York
January 22, 2020


MARCY FRIEDMAN, J.S.C.