

**U.S. Bank N.A. v DLJ Mtge. Capital, Inc.**

2020 NY Slip Op 31329(U)

March 27, 2020

Supreme Court, New York County

Docket Number: 651563/2013

Judge: O. Peter Sherwood

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

**PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM**

*Justice*

**U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Trustee of the HOME EQUITY ASSET TRUST 2007-3 (HEAT 2007-3),**

**INDEX No.: 651563/2013**

**MOT. DATE: 11/29/2019**

**Plaintiff,**

**MOT. SEQ. No.: 001**

**-against-**

**DECISION + ORDER ON  
MOTION**

**DLJ MORTGAGE CAPITAL, INC.,**

**Defendant.**

The following e-filed documents, listed by NYSCEF document number (Motion 011) 299, 300, 301, 302, 305 were read on this motion to/for PERMISSION TO APPEAL

Plaintiff U.S. Bank National Association, in its capacity as Trustee of the Home Equity Asset Trust 2007-3 (the "Trustee"), moves for permission to appeal this court's order granting in part the motion of defendant DLJ Mortgage Capital, Inc. ("DLJ") to strike allegations in the Trustee's Second Amended Complaint (motion sequence 008).

This case arises from a residential mortgage-backed securitization ("RMBS") in which DLJ conveyed approximately 2,674 mortgage loans to the Trust (Pl. Br. at 2 [NYSCEF Doc. No. 300]; Second Amended Compl. ¶¶ 4, 20 [NYSCEF Doc. No. 157]). In the Pooling and Servicing Agreement ("PSA") that governs the securitization, DLJ made a series of representations regarding the quality of the loans, promising to provide "prompt notice" to the Trustee if it discovered, or was notified of, a material breach in these representations, and to cure or repurchase any materially nonconforming mortgage loan (Compl. §§ 28, 30; Pooling and Servicing Agreement ("PSA") § 2.03(d) [NYSCEF Doc. No. 161]). DLJ conveyed to the Trustee a pool of loans in which 99% were found to breach one or more of DLJ's representations and warranties and, despite receiving notice of breaches affecting at least half of the Trust's loans, DLJ refused to repurchase or provide notice of a single breaching loan (Compl. ¶¶ 35, 57–58, 60–66). As a result, the Trust sustained losses in excess of \$206 million (*id.* ¶ 5). Trustee

initiated this suit, alleging in its complaint that DLJ was grossly negligent towards its contractual duties by knowingly conveying “garbage” mortgage loans to the Trustee (*id.* ¶¶ 72, 74; Pl. Br. at 3).

Instead of filing a motion to dismiss Trustee’s gross negligence allegations, DLJ filed a motion to strike pursuant to CPLR § 3024 (b) which authorizes a party to strike scandalous or prejudicial matters inserted in a plead (CPLR § 3024 (b)). DLJ focused almost entirely on the legal adequacy and relevance of the Trustee’s gross negligence allegations, arguing the allegations were immaterial to the Trustee’s breach of contract claims. In response, plaintiff argued that a party cannot insulate itself from damages caused by grossly negligent conduct which is what the sole-remedy clause of the PSA purports to do (*Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 [2012]). The court here granted DLJ’s motion in part from the bench at an April 26, 2018 hearing, reasoning that the motion, described as a motion to dismiss, should be granted because the gross negligence allegations had no proper place in the complaint (Transcript of Proceedings at 41–42, 44 [NYSCEF Doc. No. 297]). In a supplemental written opinion, this court further found that the gross negligence allegations, even if proven, would not render the sole-remedy clause unenforceable because the allegations would not affect the Trustee’s potential recovery or excuse it from offering loan by loan proof (Decision and Order on Motion 008 at 2 [NYSCEF Doc. No. 221]). In its written opinion, the court also directed the parties to submit proposed orders to settle its decision, and the court later approved the Trustee’s proposed order in part in July 2019 (NYSCEF Doc. No. 273). Trustee filed a timely notice of appeal which remains pending (NYSCEF Doc. No. 295).

Plaintiff begins by arguing that, as the court recognized, DLJ’s motion to strike was, in substance, a motion to dismiss that focused on the legal adequacy of the Trustee’s gross negligence allegations (Transcript of Proceedings at 44) but, because defendant brought its motion under CPLR § 3024 (b), the court’s ruling here is only appealable by permission of the issuing court or a justice of the appellate division pursuant to CPLR § 5701. Plaintiff thus brings this motion for permission to appeal (CPLR § 5701 (a)(2)(iv); Pl. Br. at 5–6). Plaintiff argues that, when considering whether to grant leave to appeal under § 5701 (b), courts assess (i) whether the decision conflicts with the decisions of other lower courts, (ii) whether the decision below addressed “important, substantive issues,” and (iii) whether an appeal would serve the interests of judicial economy (*Loevy & Loevy v NYC Police Dep’t*, 139 AD3d 598, 599 [1st Dept

2016]; *Gross v 141-30 84th Rd. Apt. Owners Corp.*, 85 AD3d 447, 448 [1st Dept 2011]; D. Siegel *et al*, *New York Practice* § 527, at 1006 [6th ed. 2018]); *cf.* 22 NYCRR § 500.22 (b)(4)). Plaintiff argues that it has satisfied all three of these standards (Pl. Br. at 6).

To the first standard, plaintiff argues that the court's decision here creates a conflict with other courts that calls for the Appellate Division's review as the issue of whether gross negligence allegations are sufficient to render a sole-remedy clause unenforceable and whether the public-policy exception applies to a sole-remedy clause in an RMBS transaction has been litigated multiple times in both state and federal courts (*id.*). To date, plaintiff argues, most cases have held, contrary to this court, that gross negligence can render unenforceable an RMBS sole-remedy clause (*see e.g. Morgan Stanley Mortg. Loan Trust 2006-13ARX v Morgan Stanley Mortg. Capital Holdings LLC*, 143 AD3d 1, 9 [1st Dept 2016]; *Deutsche Bank Nat'l Trust Co. as Trustee for the Morgan Stanley Structured Trust I 2007-1 v Morgan Stanley Mortg. Capital Holdings LLC*, 289 FSupp3d 484, 501 [SD NY 2018]). Plaintiff argues that, since this court's decision, the First Department has issued a ruling that is directly at odds with this court's reasoning in the case *Deutsche Bank National Trust Co. v Morgan Stanley Mortgage Capital Holdings, LLC*, wherein the court held that "allegations of pervasive, knowing breaches of the representations and warranties" may "render the sole remedy clause of the parties' agreements unenforceable" (169 AD3d 217, 225).

To the second standard, plaintiff argues that the issues raised in the court's ruling are important as the enforceability of the sole-remedy clause affects the scope of the Trustee's relief in a dispute involving hundreds of millions of dollars of defective loans and the precedential value of this court's decision could affect other RMBS put-back cases with similarly high stakes (Pl. Br. at 8). Plaintiff notes that whether gross negligence allegations are relevant to the trial of RMBS actions is such an important issue that it is currently before the New York Court of Appeals (*Deutsche Bank National Trust Co. v Morgan Stanley Mortgage Capital Holdings, LLC*, APL No. 2019-00127 (NY) (appeal pending)). Plaintiff argues that because the defendant in *Deutsche Bank* successfully petitioned the First Department to authorize an appeal to the Court of Appeals, it would be inequitable to deny Trustee the benefit of a favorable ruling in that matter due solely to the procedural manner in which DLJ chose to bring its motion (Pl. Br. at 8). Finally, to the third standard, plaintiff argues that permitting an appeal would not delay proceedings before this court or otherwise undermine judicial economy (*id.*).

In opposition, defendant argues that plaintiff's motion seeks permission to appeal from two documents that are not appealable—the court's oral decision and the settle order decision (Def. Br at 3 [NYSCEF Doc. No. 301]). Defendant argues that the settle order decision is a “decision directing ‘[s]ettle order,’” from which no appeal lies (*Smith v United Church of Christ*, 95 AD3d 581, 582 [1st Dept 2012]; accord e.g. *Atl. Dev. Grp., LLC v 296 E. 149th St., LLC*, 70 AD3d 528, 529 [1st Dept 2010]). Defendant further argues that the transcribed oral decision, which was never so-ordered, is also not an appealable “judgment or order” (see CPLR §§ 2219 (a), 5512 (a); see also *Smith*, 95 AD3d at 582; *Levy v Baumeister*, 170 AD2d 385, 385 [1st Dept 1991]). Consequently, defendant argues that plaintiff's motion should be denied based on this threshold issue.

Defendant next argues that an interlocutory appeal is unwarranted as there is “no compelling reason” to grant the relief sought (Def. Br. at 4). Defendant notes that orders granting motions to strike are among the limited categories of orders the CPLR has deemed not immediately appealable as of right (see CPLR § 5701 (b)(3); *Le Bel v Donovan*, 96 AD3d 415, 417 [1st Dept 2012]). Defendant argues that plaintiff has failed to demonstrate why this court should grant leave to appeal as a matter of its discretion. Defendant argues that considerations of judicial economy weigh against granting plaintiff's leave because it does not benefit judicial economy for the First Department to address a remedial question that might be irrelevant if the trier of fact concludes that DLJ did not breach its contractual obligations (Def. Br. at 5). Defendant argues that plaintiff's gross negligence arguments turn on predictions about what forms of relief may be available if plaintiff succeeds in proving DLJ's liability, which, DLJ argues, it has already shown as a meritless argument (*id.*). Defendant further argues that this court has repeatedly held that the repurchase protocol affords a “full and complete remedy” for loans as to which plaintiff proves an entitlement to purchase (Decision and Order on Motion Sequence 001 at 11, 13, 15 [NYSCEF Doc. No. 31]). Defendant argues that the First Department will be in a better position to assess whether the repurchase protocol has afforded “complete relief” on an appeal from final judgment (Def. Br. at 5).

Defendant argues that the First Department's decision in *2007-NC4* does not support plaintiff's motion as it is not, as plaintiff argues, a new precedent issued since this court's decision but, in fact, was issued in January 2019, months before the strike order was entered (*id.* at 6; 169 AD3d 217). Defendant argues that an interlocutory appeal is not plaintiff's only

opportunity to test the correctness of this court's decision in light of *2007-NC4* because plaintiff can appeal from a final judgment (Def. Br. at 6). Defendant further argues that plaintiff wrongly characterizes *2007-NC4* as being at odds with this court's reasoning because this court's decision instead considered the First Department's earlier decision in *Morgan Stanley Mortgage Loan Trust 2006-13 ARX v Morgan Stanley Mortgage Capital Holdings LLC*, which sustained such allegations because the court there could not determine whether the repurchase protocol would make investors whole as to breaching loans that had been liquidated (143 AD3d 1, 9 [1st Dept 2016]). Defendant argues the First Department's *2007-NC4* ruling turned on the same reasoning (169 AD3d at 225). Defendant argues, contrary to plaintiff's argument that this court's decision is out of step with First Department holdings on gross negligence, that any "conflict" between rulings is of limited significance because the Court of Appeals is poised to weigh in on this question in *2007-NC4*, and judicial economy would best be served by awaiting this decision (Def. Br. at 7; see *Nomura Asset Acceptance Corp., Mortg. Pass-Through Certificates, Series 2006-AD2 v Nomura Credit & Capital, Inc.*, Index No. 652614/2012, 2014 WL 10646128, at \*1 [Sup Ct New York County 2014]).

In reply, plaintiff argues that this court's decision addresses important issues that warrant immediate appellate review (Pl. Reply at 1 [NYSCEF Doc. No. 302]). Plaintiff argues that DLJ does not deny that the standards governing this motion favor granting the Trustee leave to appeal, nor does DLJ address several cases that clash with this court's ruling (*id.* at 1–2; Pl. Br. at 6–8; see *Loevy & Loevy v NYC Police Dept*, 139 AD3d 598, 599 [1st Dept 2016]; D. Siegel *at al.*, *New York Practice* § 527, at 1006 [6th ed. 2018]). Plaintiff argues that DLJ's argument, that an interlocutory appeal would undermine judicial economy, is hard to believe given DLJ's repeated attempts to pursue interlocutory appeals in other RMBS cases (*see e.g. US Bank Nat'l Ass'n. v DLJ Mortg. Capital, Inc.*, 176 AD3d 466 [1st Dept 2019]; *Home Equity Mortg. Trust Series 2006-1 v DLJ Mortg. Capital, Inc.*, 175 AD3d 1175 [1st Dept]; *US Bank Nat'l Ass'n. v DLJ Mortg. Capital, Inc.*, 121 AD3d 535 [1st Dept 2014]). Plaintiff argues, contrary to DLJ's assertion that the gross negligence issue is a mere "remedial question" that may be irrelevant, that gross negligence is not a question of remedy that can be resolved on appeal from a final judgment (Pl. Reply at 2). Plaintiff argues that an appeal from this court's decision here would only resolve the legal question of whether gross negligence allegations provide a basis to find the sole-remedy clause unenforceable and that, if that decision were reversed after trial, the factual

question of whether DLJ was grossly negligent would still need to be resolved on retrial (*see e.g. Deutsche Bank Nat'l Trust Co., solely in its capacity as Trustee for the Morgan Stanley Structured Trust I 2007-1 v Morgan Stanley Mortg. Capital Holdings LLC*, 289 FSupp3d 484, 501 [SD NY 2018]). Plaintiff reiterates that granting permission to appeal now would support judicial economy by allowing gross negligence and liability to be tried at the same time (Pl. Reply at 2–3).

Plaintiff argues that any ruling on its proposed appeal will impact trial in other ways as its gross negligence allegations may provide a basis for the Trustee to prove liability through statistical sampling (Pl. Reply at 3). Plaintiff argues it would be inequitable to force the Trustee to prove its case at trial on a loan-by-loan basis when the sole-remedy clause may be found unenforceable in light of DLJ's gross negligence and, for this reason, an appeal on this issue cannot be deferred until after trial (*id.*). DLJ's argument, that immediate appellate review is unnecessary because this court already held that repurchase protocol affords a full and complete remedy for loans DLJ is obligated to repurchase, is effectively an argument that appellate review is unnecessary because this court's decision is correct. Plaintiff argues that this argument fails because the purpose of appellate review is to decide whether a lower court's decision is correct and, just because DLJ agrees with the court's ruling is not a reason to deny review (*id.*). DLJ's assertion, that this court has already determined the sole-remedy clause provides a full and complete remedy, only shows why appellate review is necessary as this court's decision conflicts with decisions of other courts, including the First Department, regarding whether a court can determine on pleadings that a sole-remedy clause will make an RMBS trustee whole (*id.* at 3–4; *see In re Part 60 Put-Back Litigation*, 169 AD3d 217 [1st Dept 2019] [held, after the decision at hand was issued, that the actual effect of the sole-remedy clause in making investors whole cannot be ascertained on the pleadings]). Although defendant argues there is no conflict between this court's decision and *In re Part 60*, plaintiff argues that the sole-remedy clause here is indistinguishable from the one in *In re Part 60* (*compare* PSA § 2.03 (d) ["obligation . . . to cure, repurchase or substitute any Mortgage Loan" in breach "shall constitute the sole remedy . . . respecting such breach"] *with In re Part 60 Put-Back Litig.*, 169 AD3d at 221 [Morgan-Stanley's "obligation . . . to cure, repurchase or substitute any Mortgage Loan" in breach "shall constitute the sole remedies . . . respecting such breach."]). DLJ does not explain how this court could have decided on the pleadings that the remedy provided would make the Trustee whole without

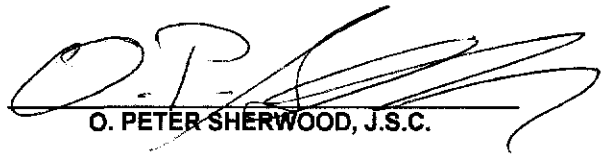
conflicting with the First Department's ruling and that that conflict, in itself, warrants appellate review (Pl. Reply at 4). DLJ is wrong to claim appeal is unnecessary as *In re Part 60* is pending before the Court of Appeals because the Court of Appeals only grants leave for issues of novel or public importance (22 NYCRR § 500.22 (b)(4)).

Plaintiff next argues that DLJ's "hypertechnical" arguments fail (Pl. Reply at 5). Plaintiff's notice of motion seeks permission to appeal this court's decisions and orders on motion sequence 008 which includes the court's settled order. DLJ does not claim any prejudice or confusion about what plaintiff's motion seeks (*id.*). DLJ's assertion, that this motion must be denied because the notice of motion explicitly refers to the court's oral and written orders but not to the settled order, fails because (i) the notice of motion is correct as the fact that plaintiff explicitly listed other orders does not change its general request to appeal all orders issued in connection with this motion (*see* CPLR § 2214 (a); *Mondello v Mondello*, 174 AD2d 712, 712 [2d Dept 1991]); (ii) plaintiff's general prayer for relief cured any possible defect and seeking permission to appeal a court's settled order is not unlike seeking permission to appeal the order laying out the court's reasoning (*see US Bank Nat'l Ass'n v Halevy*, 176 AD3d 1009, 2018 WL 5198654, at \*1 [2d Dept 2019] [a "court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party"]); and (iii) even if DLJ's reading of the notice of motion is right and the general prayer for relief was insufficient, the CPLR still forbids the hypertechnical arguments DLJ uses to evade appellate review (Pl. Reply at 5–6; CPLR § 2001 ["At any stage of an action, . . . the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded"]).

Although plaintiff cites several cases wherein the First Department has held that gross negligence can be a relevant factor in determining whether an RMBS sole-remedy clause is enforceable, permission to appeal would weigh strongly against judicial economy as the Decision and Order it seeks to appeal is now nearly *two years old*. Further, as both parties note, this very issue is currently being weighed by the New York Court of Appeals and this court will soon have guidance from the outcome of that appeal. Accordingly, plaintiff's motion for permission to appeal motion sequence 008 is hereby **DENIED**.

This shall constitute the decision and order of the Court.

3/27/2020  
DATE

  
O. PETER SHERWOOD, J.S.C.

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