AMBAC Assur. Corp. v Countrywide Home Loans, Inc.,
2020 NY Slip Op 33998(U)
December 4, 2020
Supreme Court, New York County
Docket Number: 651612/2010
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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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.

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DECISION AND ORDER
Index No.: 651612/2010

Motion Sequence Number: 056

O. PETER SHERWOOD, J.:

In this motion, motion sequence number 056, defendants Countrywide Home Loans, Inc., Countrywide Securities Corp. and Countrywide Financial Corp. ("Countrywide"), seek dismissal of the fraudulent inducement claim or, in the alternative, summary judgment dismissing the claim (Doc. 2066).[1] Because there is a large record before the court, with the electronic docket in this case containing approximately 2100 entries, the parties having developed a massive documentary and testimonial record and having presented a substantial fact record on this motion, the motion will be decided as a motion for summary judgment pursuant to CPLR 3212.

The facts are set forth at length in multiple decisions in the New York State courts, familiarity with which is assumed, including two dated October 22, 2015, motion sequence numbers 026-029 (Docs. 1671 and 1672), and facts will not be recounted here.

I. ARGUMENTS

Countrywide argues for dismissal of plaintiff Ambac Assurance Corporation's ("Ambac") fraud claim on the ground that it is duplicative of the contract claim, as the claimed damages are essentially the same for both claims (*see* Br. Doc. 2067). Countrywide explains that the Appellate Division, First Department, relying on a decision of the New York Court of Appeals in this case, has held in two similar residential mortgage-backed securities ("RMBS")

[1] The reference "Doc." followed by a number refers to the location in the New York State Courts' electronic filing associated with this case where the record may be found.

cases that the "monoline insurers could not maintain fraud claims because their fraud and contract claims were duplicative" (*id.* at 5, citing *MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018]; ["*MBIA*"] and *Fin. Guar. Ins. Co. v Morgan Stanley ABS Capital I Inc.*, 164 AD3d 1126, 1127 [1st Dept 2018]["*FGIC*"]). Countrywide, relying on those cases, filed a dispositive motion (Motion Sequence Number 054). The First Department denied "the motion to dismiss the fraud claim, without prejudice to renewal after" Ambac's request to supplement the report of its expert Dr. Karl Snow ("Snow") had been resolved (*see id.* at 6, quoting *Ambac Assur. Corp. v Countrywide Home Loans Inc.*, 179 AD3d 518, 520 [1st Dept 2020]). Thereafter, this court granted Ambac's motion to supplement Snow's report. He provided a supplemental report which is now in the record (together with the original report, the "Report").

According to movants, the Report does not change the fact that the fraud and contract claims are duplicative, since they address the same injury, specifically, "the presence of non-conforming loans in the securitizations" (Br. at 9, 11). Minor distinctions in calculation, or the inclusion of interest or punitive damages, do not make the damages different (*see id.* at 13). Further, the damages proposed in the Report were improperly rescissionary (*see id.* at 9). The Report manipulates the use of credit enhancements to artificially inflate the injuries Ambac claims to have suffered from non-conforming loans so that Ambac could be compensated for all paid claims, not just those involving non-conforming loans (*see id.* at 19-20). Such rescissory damages are not available to the issuer of an irrevocable insurance policy (*see id.*, citing *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 581 [2018]). Movants also argue the Report proposes impermissible damages based on losses due to conforming loans, "the same losses that Ambac bargained to insure" (Br. at 20-21). Nor can Ambac claim the "erosion of Credit Enhancements" as damages for months in which it did not pay claims on non-conforming loans (*id.* at 21).

Ambac opposes the motion, arguing appellate courts have already rejected Countrywide's arguments, the damages for the fraud claim are not, as a matter of law, duplicative of the damages for the breach of contract claim, the Court of Appeals has allowed that damages for both claims should be based on nonconforming loans, and that the First Department has acknowledged the Court of Appeals has "recognized distinct measures of damages" (Opp. Br.

Doc. 2078, at 12, quoting *Ambac,*[2] 179 AD3d at 519 and citing *Ambac,* 31 NY3d at 580-81). Ambac further contends the First Department has already held Allocation Damages, as described in an affidavit of Dr. Snow presented to it, would not be duplicative under the relevant cases (*see* Opp. Br. at 15, citing *MBIA*, 165 AD3d 108 and *FGIC,* 164 AD3d 1126).

Ambac also argues the amount of damages sought for each claim and the methods of calculation are distinct, so there is, at least, an issue of fact for the jury (*see* Opp. Br. at 16). For example, Snow includes accretion damages in his calculations of damages on the fraud claim, losses incurred by Ambac "as a result of deferring a portion of its claims obligations during a court-mandated rehabilitation" (*id.* at 17). These accretion damages were not included in the calculation of contract damages. Further, Ambac argues the fraud damages it seeks are not rescissory, but are "only for claims payments and other losses attributable to nonconforming loans" (*id.* at 21). Ambac explains that the RMBS transactions here were structured with credit enhancements, or buffers, so that significant loss could accrue before Ambac would be required to pay claims (*see id.* at 22). Snow explains in the Report that the claims on nonconforming loans eroded the credit enhancements, so removed the buffer to which Ambac was entitled before it would have to pay claims on conforming loans (*see id.* at 24). The calculations in the report only exceed the total amount of payments made by Ambac at an interim step because Snow calculates the impact of nonconforming loans on the securitization trust as a whole, then "isolates the impact of the nonconforming loans on Ambac" (*id.* at 26). Ambac then contends the proper calculation of fraud damages is a question for the jury.

In reply, Countrywide disputes Ambac's interpretation of several cases, including a number of appellate decisions in this case (*see* Reply Br. Doc. 2085, at 1, 8-10). Countrywide also argues that Snow's method of calculating fraud damages is duplicative of the contract damages because the distinctions between the two are for interest and allocation of premiums, and the First Department has rejected those as bases for distinguishing damages and avoiding dismissal of fraud claims as duplicative (*see id.* at 2). The proposed damages are essentially two ways of calculating the same thing - - payments by Ambac because of the inclusion of nonconforming loans (*see id.* at 2-3). For contract and fraud damages to co-exist, they must address different "species" of harm (*see id.* at 3, citing *Mañas v VMS Assocs., LLC,* 53 AD3d

[2] The reference "*Ambac*" in italics followed by a citation to the New York Law Official Report series is to decisions in this case as found in the official reporter.

451, 454 [1st Dept, 2008]). The damages must differ in type, not just amount or method of calculation (*see id.*, citing *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 954-55 [1986]). The "accretion" damages, which Ambac claims are part of the Allocation Damages, but not Repurchase Damages, are merely a form of interest, and "the availability of different types of interest" cannot distinguish fraud and contract claims (*see* Reply Br. at 5, citing *FGIC*, 164 AD3d at 1128; and *MBIA*, 165 AD3d at 113-14, internal quotation omitted). Countrywide also contends Ambac's argument about the calculations treating premiums differently was made and rejected in *FGIC* and *MBIA* (*id.* at 6). Nor does the difference in total amount sought distinguish the damages. The issue is whether the claims seek to recover for the same harm (*see id.* at 6-7).

II. DISCUSSION

Countrywide maintains the fraudulent inducement claim is duplicative of the breach of contract cause of action (Br. Doc. 2068 at 10). Ambac responds that the motion should be denied because "controlling precedent compels denial of the Countrywide's . . . motion" (Opp. Doc. 2078 at 1). Ambac states "the Court of Appeals in this case recognized that Ambac's fraud and contract claims are subject to 'distinct measures of damages even though both reference [the same] nonconforming loans'" (*id.*). Ambac adds that the First Department set a "roadmap for Ambac's distinct fraud damages" (Doc. 2091 at 5) and held that the "allocation damages" opinion of Dr. Snow "precludes a finding that Ambac's fraud and contract damages were duplicative as a matter of law" (Opp. Doc. 2078 at 2, 14, 15; Tr. Doc. 2090 at 42:12-14). Neither decision contains the holdings Ambac ascribes to it. For the reasons discussed below, the motion for summary judgment dismissing the fraudulent inducement claim shall be granted.

In its 2018 decision in this case, the Court of Appeals rejected Ambac's effort to recover claims payments on policies that did not arise from any breach or misrepresentation (*see Ambac*, 31 NY3d at 581). The court concluded that "any compensatory damages [on the fraudulent inducement claim] should be measured only by reference to claims payments made based on nonconforming loans" *(id.)*. The court also reiterated the "well settled" policy that:

> "courts must honor contractual provisions that limit liability or damages because those provisions represent the parties' agreement on the allocation of risk of economic loss in certain eventualities"

(*id.* quoting *Nomura Home Equity Loan, Inc., Series 2006 – FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 585-86 [2013]). The admonition applies especially when the transaction at issue was entered into at arm's length between "sophisticated parties such as a monoline financial guaranty insurer" and a large lending institution (*id.* at 582).

Ambac insists the First Department already rejected the "cornerstone of Countrywide's argument" that Ambac's fraud and contract damages necessarily seek to address the same harm and are duplicative as a matter of law because both are "measured by reference to 'non-conforming loans'" (Opp. Br. at 2). It asserts that Countrywide distorts the First Department's decision in *MBIA* and *FGIC* when it claims those decisions preclude a monoline insurer from recovery of damages for fraud arising from claims payments based on non-conforming loans (*id.* at 3). In support of this argument, Ambac quotes the following language from that court's 2020 opinion in this case:

> "Put simply, **neither** *MBIA* **nor** *Financial Guar.* stands for the sweeping proposition that, in **all** residential mortgage-backed security cases, a fraudulent inducement claim brought by a monoline insurer is, as a matter of law, duplicative of contract claims **based on the same nonconforming loans**."

Opp. Br. at 3 quoting *Ambac,* 179 AD at 520 (emphasis in Opp. Br.). Although, the First Department did not accept that "sweeping proposition," the court did not reject what Ambac now characterizes as the "cornerstone" of Countrywide's argument.

The quoted passage does not support Ambac's assertion that the Appellate Division decision constitutes a "holding" that Allocation Damages as described in Snow's affidavit would not be duplicative (*see* Opp. Br. at 15, Doc. 2078). Nor, as Ambac asserts, is it "controlling law of the case that Ambac's fraud and contract claims are subject to distinct damages measures" (Opp. Br. at 12).

The Appellate Division's refusal to interpret *MBIA* and *FGIC* as precluding **all** fraudulent inducement claims brought by a monoline insurer as duplicative of the contract claim is neither a rejection of Countrywide's argument here nor a holding that Ambac's fraud claim should proceed to trial. It merely reflects a willingness to allow Ambac's expert to present his opinion on motion to a judge in the Supreme Court. It was not an endorsement of his opinion which had not yet been presented to the lower court. The First Department's statement that Ambac's "damages for the fraud and contract claims are qualitatively and quantitatively distinct" (*id.*, at 519) (internal quotation omitted) was not a finding that "Ambac's fraud and contract damages

were **not** duplicative as a matter of law" (Opp. Br. at 12) (emphasis in Ambac brief) or that the expert's methodology should or should not be presented to the finder of fact at trial. That court's holding was far less sweeping. It held that dismissal of the fraud claim was "premature" and that denial of the motion to dismiss without prejudice to renewal was "appropriate." The court counseled that *MBIA* and *FGIC* do not "require" a different result from the limited relief it approved (*see Ambac*, 179 AD3d at 520). Accordingly, Ambac's claim that Countrywide's motion is barred by appellate court rulings in this case must be rejected.

As the Court of Appeals has held, Ambac's fraudulent inducement claim must include the common law element of loss causation (*see Ambac*, 31 NY 3d at 580). The court added that "if the fraud causes no loss then the plaintiff has suffered no damages (*id.* quoting *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]). And "[w]here all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed" (*MBIA*, 165 AD3d at 114).

Ambac maintains that the "Allocation Damages" it seeks for fraud are distinct from "Repurchase Damages" that may be recovered based on the contractual repurchase protocol (*see* Opp. Br. at 16). It states Repurchase Damages "rely on . . . the contractual repurchase price" to measure the losses it could have avoided if Countrywide repurchased all nonconforming loans while Allocation Damages consist of the losses Ambac actually suffered (*see id.*). Because the former is a "but for analysis" and the latter is not, Ambac reasons the two damages calculations are non-duplicative (*see id.* at 17). This reasoning would invite parties who negotiated allocations of risk of economic loss and priced their transactions accordingly to alter unilaterally the agreed upon risk allocations without changing the price terms by simply asserting in litigation that they were duped into entering into the transactions and suffered "distinct" damages, precisely the circumstances the Court of Appeals has repeatedly cautioned against (*see e.g. Ambac*, 31 NY3d at 581). However, such reasoning is not the prevailing standard. As Countrywide argues, contract damages and fraud damages are duplicative unless they address different "species" of harm, which is not the case here (*see Mañas v VMS Assocs., LLC*, 53 AD3d 451, 454 [1st Dept 2008]).

Before the Appellate Division, Ambac asked for and successfully obtained an opportunity to show, through a factual presentation by Dr. Snow, that the damages for the fraud and contract claims are "qualitatively and quantitatively distinct" (*Ambac*, 179 AD3d at 519) (quoting Snow affidavit). Although the report Snow subsequently presented shows Ambac's contract and fraud

damages may be quantitatively distinct, it does not show they are qualitatively different. According to Ambac, the damages are calculated by Snow using different methodologies. Ambac argues that the distinct methodologies Snow used for calculating fraud vs. contract damages shows the two measures of damages are different (*see* Tr. 25:25-26:4, Doc. 2090 [Court: "[A]re you saying the methodology that is used in calculating the damages answers the question as to whether or not the fraud damages are duplicative?" Selendy: "Yes I am."]; 26:17-25 [same]; 40:13-18 [Court: "It's not that they are different. It's a different method of calculation." Selendy: "It is a different method of calculation"]; 39:9-13 [Selendy: "When we look at the fraud measure, we don't use the repurchase protocol at all. When we look at the contract measure, we are applying the contract terms. And the different methodology results in different amounts to the tunes of tens of millions of dollars"]; 55:16-18 ["The damages [are] distinct because the methodology is different"]).

Ambac concedes that, for repurchase damages, the methodology follows the parties' contract to set the repurchase price and adds up the amount of damages due to defective loans. For allocation damages (fraud), Snow's method of calculation ignored the terms of the parties' bargain but instead estimated how badly Ambac was harmed (*see* Tr. 63:11-17). In Ambac's view, the basic calculation is different because on the contract side "I add up these numbers for every loan" (Tr. at 64:6). Whereas on the fraud side "you start from the top down and you say Ambac has been harmed" (Tr. 64:11-12).

It is undisputed that the damages for the fraud claims here are measured by claims payments based on nonconforming loans, the same loans that are covered by the contractual repurchase protocol. Countrywide maintains that Snow's Allocation Damages and Repurchase Damages models have the same basic building blocks: (1) claims paid, (2) plus interest, (3) plus credit enhancements, (4) less claims payments attributable to conforming loans (*see* Reply at 3, Doc. 2085) (*see also* Br. at 15, Doc. 2068).[3] The court agrees.

As described by Ambac, Snow testified that "Allocation Damages for fraud measure Ambac's *actual* claims payments (and other out of pocket losses) and determine the portion 'arising as a result of the . . . performance of the materially defective loans.' Repurchase Damages

[3] Thus, Countrywide is not merely arguing that "Ambac's fraud and contract damages address the same harm: namely the presence of non-conforming loans in the securitization" (Opp. Br. at 13).

for Ambac's contract claim measure a different harm: the impact on Ambac *had Countrywide paid* proceeds into each transaction in order to repurchase nonconforming loans at the ***contractual repurchase price*** on the repurchase date. [U]nlike Repurchase Damages, [Allocation Damages] do not ask what *would have happened* had Countrywide . . . compl[ied] with the contractual repurchase protocol" (Opp Br. at 16-17) (emphasis in original). However, as just discussed, the inputs are the same in both methodologies (*see also,* Tr. 10:13-24; 57:21-25; 64:4-19, Doc. 2090).

The court has previously noted that the only "materially defective loans" being considered are those covered by the contractual protocol and, to the extent Snow assigned a price to those loans that was different from the contractual purchase price agreed to by the parties, the Court of Appeals has emphasized that "courts must honor contractual provisions that limit liability or damages" (*Ambac*, 31 NY3d at 581).

Snow advised the Appellate Division "that the fraud damages differ from the contract damages *because* they include additional expenses incurred by Ambac that are not recoverable in contract" (*Ambac*, 179 AD3d at 520) (emphasis added).[4] The additional expenses are explained in Snow's analysis as "accretion damages" which are "losses that Ambac incurred as a result of deferring a portion of its claims obligations during a court-mandated rehabilitation" (Opp. Br. at 17). However, such "accretion damages" are simply a form of interest as they reflect the time value of money (*see* Tr. 45:22-46:8, 36:18). This and various other measures of interest used in Snow's methodology, *e.g.*, the statutory rate of interest used in connection with Allocation Damages and the contractual Late Payment Rate of interest applied for Repurchase Damages, do not affect the underlying nature of the damages sought and are "irrelevant [because] interest is not an element of compensatory damages either in contract or in fraud" (*MBIA*, 165 AD3d at 114-115; *see also FGIC*, 164 AD3d at 1128 ["The fact that Plaintiff seeks different types of interest on its fraud claim does not save its fraud and contract claims from being duplicative"]).

Snow also represents that the Allocation Damages model and the Repurchase Damages model treat premiums differently, but he fails to explain why it matters. In both models, all premiums remain in Ambac's hands (*see* Snow Tr. 36:8 – 37:21). As Ambac concedes, how it manages premiums on its books makes no difference between whether the fraud and contract

[4] Asked at oral argument "[w]hat were those expenses?", Ambac's counsel responded "the accretion expenses . . . that's the fundamental . . . also differences . . . with respect to the treatment of premiums" [Tr. 43:17-25, Doc. 2090].

claims are duplicative (*see* Tr. 38:7 and 40:5-6). Moreover, there is no claim here, in either fraud or contract, related to the payment of premiums.

Ambac maintains these are all disputed issues which should be left to the trier of fact and that plaintiff should be given its day in court to present evidence to the jury of the distinct damages it suffered (*see* Opp. Br. at 20). However, as discussed, the principal distinctions Ambac describes fail to show they are different.

III. CONCLUSIONS

In sum, the Repurchase Damages and Allocation Damages calculations made by Snow compensate Ambac for the same harm, specifically, claims paid due to inclusion of non-conforming mortgages in the securitizations. They are the same "species" of damages and thus are duplicative (*see Mañas*, 165 AD3d at 454). To the extent they differ, it is only in respect to the methods of calculation he chose and his treatment of interest. Although, as Ambac states and Snow's Report shows, "methodologies matter" (Tr. 49:23-24), differences in the amount of damages resulting from the methods of calculation employed do not make them qualitatively distinct. And, while interest is a proper element of a damages award, it is "irrelevant" in duplication analysis (*see MBIA*, 165 AD3d at 114-115). Because the fraud damages claim duplicates the breach of contract damages claim, the former must be dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of the Countrywide Defendants is GRANTED and the first cause of action alleging fraudulent inducement (motion sequence number 056) is DISMISSED; and it is further

ORDERED that counsel meet and confer and thereafter appear for a status conference using Microsoft Teams on Tuesday, December 15, 2020 at 10:00 AM, E.S.T., to discuss whether the pre-trial and trial schedules may be revised in light of this Decision and Order. The court will issue invitations.

This constitutes the decision and order of the court.

DATED: December 4, 2020

E N T E R,

O. PETER SHERWOOD J.S.C.