

Matter of HSBC Bank USA, N.A.
2020 NY Slip Op 34332(U)
December 29, 2020
Supreme Court, New York County
Docket Number: 657301/2019
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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In the Matter of the Application of

INDEX NO. 657301/2019

HSBC BANK USA, NATIONAL ASSOCIATION, as
 Trustee of Merrill Lynch Alternative Note Asset Trust,
 Series 2007-OAR5,

MOTION DATE _____

Petitioner,

MOTION SEQ. NO. 001

For Relief under CPLR Article 77.

**DECISION & ORDER ON
 CPLR ARTICLE 77 PETITION**

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HON. MARCY S. FRIEDMAN:

In this CPLR Article 77 proceeding, petitioner HSBC Bank USA, National Association (Trustee), in its capacity as trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 (Trust) seeks a declaration under CPLR Article 77 that the Trustee will have no liability to any certificateholder in the Trust if it complies with a direction from the majority certificateholder in the Trust to terminate litigation brought by the Trustee on behalf of the Trust. (Verified Petition, ¶ 1 [NYSCEF Doc. No. 1].)

The Trust is a residential mortgage-backed securities (RMBS) trust that holds a securitized pool of mortgage loans. (Verified Petition, ¶¶ 9, 10.) The Trustee brought two separate actions on behalf of the Trust in 2016 against the sponsor of the transaction as well as the servicer and originator of the underlying mortgage loans (Subject Actions).¹ (Verified

¹ See HSBC Bank USA, N.A., in its capacity as trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 v Merrill Lynch Mortg. Lending, Inc., Index No. 652793/2016 and HSBC Bank USA, N.A., in its capacity as trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5 v Countrywide Home Loans, Inc., Index No. 656015/2016. The Subject Actions are among the actions consolidated before this court under In re Part 60 RMBS Put-back Litigation, Index No. 777000/2015.

Petition, ¶ 2.) These actions were initiated at the direction of a certificateholder that, according to the Trustee, “holds in excess of 75% of the Trust’s outstanding certificates and more than 93% of voting rights.” (Id., ¶¶ 3, 4.)

In September 2019, the same majority certificateholder that directed the initiation of the Subject Actions sent the Trustee a written direction to: (i) “immediately coordinate with the defendants to stay the Subject Actions”; (ii) “minimize the further expenditure of Trust funds” in connection with the Subject Actions; and (iii) “coordinate with the defendants to cause the Subject Actions to be dismissed with prejudice” (the Termination Direction). (Id., ¶¶ 5, 6; id., Ex. B [Termination Direction] [NYSCEF Doc. No. 3].)

In response to the Termination Direction, the Trustee retained an investor communications firm to distribute notice and a request for further direction regarding the Termination Direction to the certificateholders in the Trust. (See Affidavit of Robert A. Stevens and Ex. A [Certificate of Tabulation Agent including a copy of the notice sent to certificateholders and certificateholder responses] [NYSCEF Doc. No. 24].) The notice included a copy of the Termination Direction and requested that certificateholders review the notice and “indicat[e] whether they direct the Trustee to act, or not act, in accordance with the Litigation Termination Direction.” (Id., at 68.) The solicitation remained open for 30 days. (Verified Petition, ¶ 16.) In response, “certificateholders holding 95.13% of the Trust’s outstanding securities directed the Trustee to implement the Termination Direction.” (Id., ¶ 17; Affidavit of Robert A. Stevens and Ex. A.) The certificateholders representing the remaining interests did not respond and no certificateholder has objected. (Id.)

In this proceeding, the Trustee seeks a “judgment declaring that compliance by the Trustee with the Termination Direction will fall within the safe-harbor protections of PSA

[Pooling and Servicing Agreement] § 9.01(d)(iii).” (Verified Petition, Wherefore Clause.) The PSA provision states in relevant part:

“(d) No provision of this Agreement shall be construed to relieve the Trustee or the Securities Administrator from liability for its own negligent action, its own negligent failure to act or its own willful misconduct; provided, however, that: . . . (iii) Neither the Trustee nor the Securities Administrator shall be liable with respect to any action taken, suffered or omitted to be taken by it in good faith in accordance with the directions of the Holders of Certificates evidencing Percentage Interests aggregating not less than 25% of the Trust Fund, if such action or non-action relates to the time, method and place of conducting any proceeding for any remedy available to the Trustee or the Securities Administrator, respectively, or exercising any trust or other power conferred upon the Trustee or the Securities Administrator, respectively, under this Agreement . . .”

(Affidavit of Christopher J. Mikesh, Ex. A [PSA] § 9.01 [d] [iii] [NYSCEF Doc. No. 9].)

Both the original Termination Direction and certificateholder responses to the solicitation exceed the 25% interest threshold required for directions under section 9.01 (d) (iii) of the PSA.

(Verified Petition, ¶ 20; Stevens Aff.) As the Trustee correctly contends, notwithstanding that requirement, the “safe-harbor will immunize acceptance of the Termination Direction, but only if the Trustee acted in ‘good faith.’” (Verified Petition, ¶ 21.) According to the Trustee, “it is possible to imagine that acceptance of the Termination Direction could lead to claims by an investor alleging an absence of good faith and seeking substantial damages.” (Id., ¶ 22.) In order to avoid such claims, the Trustee seeks the requested declaration from this court and to provide certificateholders who did not respond to the solicitation with additional notice and a final opportunity to be heard in this proceeding. (Id., ¶ 23.)

The order to show cause, dated December 12, 2019, directed that notice of this proceeding be given to all interested persons (Notice Program). (Order to Show Cause, ¶¶ 1-5 [NYSCEF Doc. No. 13].) Pursuant to the order to show cause, this court ordered that the Notice Program “is approved, is the best notice practicable, is 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.” (Id., ¶ 4.) The court adheres to that holding and further finds that the Trustee has diligently complied with the Notice Program. (See Affidavit on Compliance with the Notice Provisions of the Order to Show Cause and Exs. 1-3 [NYSCEF Doc. Nos. 14-17].)

In accordance with the order to show cause, the initial hearing on the Verified Petition was held on March 3, 2020. (Order to Show Cause, at 1-2.) As stated by the court on the record at the initial hearing, no interested persons filed an appearance prior to the hearing or appeared at the hearing to assert an objection to the petition. (March 3, 2020 Hearing Transcript, at 2, 3 [NYSCEF Doc. No. 22].) Nor has any interested person appeared in this proceeding or filed an objection to the petition since the initial hearing. In addition, by affidavit sworn to on May 21, 2020, the Trustee represented: “At no point has any investor in MANA 2007-OAR5 ever expressed to the Trustee any objection to the direction we have received to terminate the two lawsuits the Verified Petition calls the ‘Subject Actions.’” (Affidavit of Thomas G. McKay, ¶ 3 [NYSCEF Doc. No. 23].)

RMBS trustees routinely rely on Article 77 proceedings in this court to seek judicial approval to enter into settlement agreements on behalf of the trusts to resolve claims or potential claims held by the trusts. (See, e.g. Matter of U.S. Bank, 51 Misc3d 273 [NY Sup, NY County 2015] [a prior Article 77 proceeding heard in this Part].) Here, however, there is no proposed settlement of the Subject Actions for the court to evaluate. Rather, the Trustee in effect seeks a declaration that dismissal of the Subject Actions, absent any settlement, at the direction of a certificateholder is an action within the safe harbor provision of the PSA. As the Trustee has acknowledged, the declaration sought by the petition is an unusual application of Article 77. (March 3, 2020 Hearing Transcript, at 4-5.) The Trustee has not identified an Article 77

proceeding in which analogous relief was sought. Nor has the court. CPLR 7701, however, provides that “[a] special proceeding may be brought to determine a matter relating to any express trust. . . .” Given the broad scope of this statute, the court is persuaded that the Trustee may maintain this proceeding for the requested declaration.

In determining whether an RMBS trustee has properly entered into a settlement of claims on behalf of a trust, the “ultimate issue for determination [] is whether the trustee's discretionary power was exercised reasonably and in good faith.” (In re Bank of N.Y. Mellon, 127 AD3d 120, 125 [1st Dept 2015].) In making this determination, “[i]t is not the task of the court to decide whether [it] agree[s] with the trustee’s judgment; rather, [its] task is limited to ensuring that the trustee has not acted in bad faith such that [its] conduct constituted an abuse of discretion.” (Id., at 126.)

While the issue raised by the petition here is different as there is no proposed settlement, the result of a settlement and the Termination Direction is the same—namely, release or dismissal with prejudice of claims held by the trust at issue. The court accordingly finds that the same good faith analysis is relevant to the court’s determination as to whether the Trustee’s contemplated compliance with the Termination Direction is in good faith, as required by PSA section 9.01 (d) (iii).

It is unquestionably within the Trustee’s authority under the PSA to act pursuant to the Termination Direction. As noted above, certificateholders representing 95.13% of the Trust’s outstanding securities have directed the Trustee to act in accordance with the Termination Direction. (Verified Petition, ¶ 17; Affidavit of Robert A. Stevens and Ex. A.) Thus, dismissing the Subject Actions is an action “in accordance with the directions of the Holders of Certificates evidencing Percentage Interests aggregating not less than 25% of the Trust Fund.” (PSA § 9.01

[d][iii].) In addition, the Termination Direction concerns the Trustee's pursuit of remedies on behalf of the Trust and thus "relates to the time, method and place of conducting any proceeding for any remedy available to the Trustee" under the PSA. (Id.)

Further, there is no indication that the Trustee is acting in its own self-interest. The Trustee has submitted evidence to show that compliance with the Termination Direction is not undertaken in the Trustee's self-interest. (See Affidavit of Thomas G. McKay, ¶ 5 ["The Trustee is not party to any agreement regarding the disposition of the Subject Actions. HSBC is not being paid or compensated to comply with the directions to terminate the Subject Actions. HSBC has no economic interest in the Subject Actions or their disposition."].)

These factors support a finding of good faith. (See Bank of N.Y. Mellon, 127 AD3d at 126 [holding that the "trustee did not abuse its discretion or act unreasonably or in bad faith in embarking on the settlement" where the trustee "acted within its authority throughout the process, and there is no indication that it was acting in self-interest . . ."].)

Here in addition, as discussed above, the Termination Direction is provided by certificateholders representing a majority of the interests in the Trust. More importantly, despite a vigorous notice program, there has been no objection. Moreover, notice of this proceeding specifically included a disclosure that failure to appear would result in a waiver of rights. (See Order to Show Cause, ¶ 6.)

The court will accordingly approve the requested declaration.²

² This holding should not be construed as a finding as to whether or not the Termination Direction is economically fair and reasonable to the Trust and the certificateholders. The Trustee has not submitted any evidence as to the viability of the claims and potential defenses. The court holds, however, that it is not required to do so in order to demonstrate the Trustee's good faith in seeking to comply with the Termination Direction.

It is hereby ORDERED that the petition of HSBC Bank USA, National Association (HSBC), in its capacity as trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5, for relief under CPLR Article 77 is granted to the following extent:

It is hereby ORDERED, ADJUDGED, and DECLARED that compliance by HSBC, in its capacity as trustee of Merrill Lynch Alternative Note Asset Trust, Series 2007-OAR5, with the Termination Direction (Verified Petition P5 [NYSCEF Doc. No. 1]; Ex. B [NYSCEF Doc. No. 3]) will fall within the safe harbor protections of PSA § 9.01 (d) (iii); and it is further ORDERED that the Clerk shall enter judgment accordingly.

Dated: New York, New York
December 29, 2020

ENTER:



Marcy S. Friedman, J.S.C.