

<b>Zittman v Bank of N.Y. Mellon</b>
2022 NY Slip Op 31527(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 656037/2021
Judge: Andrew Borrok
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

MARK A. ZITTMAN, NOELLE ZITTMAN, IRA FBO MARK  
ZITTMAN, AND MARK A. ZITTMAN AS BENEFICIARY  
OF IRA FBO MARK ZITTMAN,

Plaintiff,

- v -

THE BANK OF NEW YORK MELLON, AS TRUSTEE  
(AND ANY PREDECESSORS OR SUCCESSORS  
THERETO).,

Defendant.

-----X

INDEX NO. 656037/2021

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 80, 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

were read on this motion to/for DISMISSAL.

The Bank of New York Mellon’s (the **Trustee**) motions to dismiss are granted solely to the extent of (i) dismissing claims brought on behalf of Trusts CWL 2005-13 and CWALT 2006-OA2 as time-barred and (ii) granting judgment that the Trustee may not indemnify itself with funds from Trusts CWALT 2006-OA2, CWHL 2006-3, and CWL 2005-13 in Action 1 (hereinafter defined) and Trusts CWALT 2006-OC1, CWALT 2006-OC2, CWALT 2006-OC3, CWALT 2006-OC5, CWALT 2006-OC6, CWALT 2006-HY10, CWALT 2006-HY13, CWHL 2006-HYB4, and FHASI 2006-AR3 in Action 2 (hereinafter defined) because the Governing Agreements (hereinafter defined) for those Trusts explicitly provide that the Trustee may seek indemnification from the Master Servicer, not the Trust.

The two actions at issue are between the same Plaintiffs and the same Trustee: **Action 1** (Index No. 656037/2021) concerns three Trusts. – CWL 2005-13, CWHL 2006-3, and CWALT 2006-OA2, and **Action 2** (Index No. 657115/2021) concerns twelve Trusts – CWALT 2006-OC3, CWALT 2006-OC5, CWALT 2006-HY13, CWHL 2006-HYB4, ECR 2005-2, ECR 2005-1, CWALT 2006-OC1, CWALT 2006-OC2, CWALT 2006-HY10, CWALT 2006-OC6, FFML 2005-FF1, and FHASI 2006-AR3.

The statute of limitations with respect to claims like those at issue here generally presents an issue of fact not properly resolved at this stage because a plaintiff need not plead precisely when the alleged breach of a trustee's obligation to enforce a trust's right to cure document defects occurred (*Pacific Life Ins. Co. v Bank of NY Mellon*, 2018 WL 1382105, \* 7 [SD NY 2018, Failla, J.]). Dismissal is appropriate, however, where it is clear that, even if the breach occurred at the end of the six year window when a trustee could no longer enforce such rights and the court were to permit an additional six years to bring claims for a trustee's failure to enforce such rights, the claims are untimely brought and not saved by applicable class action tolling (*MLRN LC v US Bank NA*, 2019 WL 5963202, \* 4 [Sup Ct, NY County 2019, Borrok, J.]). In these actions, even taking all of the allegations in the complaints as true and affording the Plaintiffs the benefit of every favorable inference, the claims brought on behalf of Trusts CWL 2005-13 and CWALT 2006-OA2 are not timely and must be dismissed. Issues of fact remain as to the claims brought on behalf of the remaining Trusts, and dismissal is therefore not appropriate.

The Trustee is also not entitled to dismissal on the ground that it was not obligated to enforce the Trusts' right to cure document defects because the Plaintiffs sufficiently allege that such an

obligation existed and that the Trustee did not meet its obligation to cure document defects. The documentary evidence does not conclusively establish otherwise.

The Plaintiffs are entitled to a judgment declaring that the Trustee may not indemnify itself with funds from the Trusts whose Governing Agreement explicitly provide for indemnification from the Master Servicer, not the Trust.

With respect to the remaining Trusts, the issue of whether the Plaintiffs are entitled to a judgment that the Trustee could not reimburse itself for defending this action can not be reached at this stage because it is dependent on a determination as to whether the Trustee engaged in willful misfeasance, bad faith, or negligence, such that it cannot be indemnified by the Trusts.

### **The Relevant Facts and Circumstances**

The Plaintiffs are certificateholders in residential mortgage-backed security (**RMBS**) trusts (the **Trusts**) for which the Trustee is the Trustee. Each Trust is governed by either a Pooling and Service Agreement (**PSA**), an Indenture, or a Trust Agreement, each of which impose similar obligations on the Trustee (the PSAs, Indentures, and Trust Agreements, hereinafter collectively, the **Governing Agreements**). The Governing Agreements required that the loan sellers (the **Sellers**) provide certain documents related to the mortgages in the Trusts (the **Mortgage Files**) to the Trust, and the Trustee or its agent was required to review the Mortgage Files to determine if any of the documents were missing or defective. If documents in the Mortgage Files were missing or defective, the Trusts were entitled to have the defects cured, either by having missing documents replaced or by having defective loans repurchased and replaced by compliant loans.

The Trustee was required to execute certifications that identified defects in the Mortgage Files. The Trustee was then required to notify the party obligated to cure defects in the Mortgage Files (each an **Obligor**, and collectively, the **Obligors**). The Plaintiffs do not dispute that the Trustee provided such notice. Rather, the Plaintiffs allege that, upon the failure to the Obligor to cure defects in the Mortgage Files, the Trustee was obligated to enforce the Trusts' rights to cure such defects and failed to do so.

In October 2010, holders of over \$100 billion in RMBS began pursuing claims against Countrywide and its parent, Bank of America. The Trustee on behalf of 530 trusts, including one of the Trusts at issue in Action 1 and eight of the Trusts at issue in Action 2 (CWHL 2006-3, CWALT 2006-HY10, CWALT 2006-HY3, CWALT 2006-OC1, CWALT 2006-OC2, CWALT 2006-OC3, CWALT 2006-OC5, CWALT 2006-OC6, and CWHL 2006-HYB4, hereinafter, collectively, the **Settlement Trusts**), engaged in settlement negotiations with Countrywide and Bank of America. These negotiations included a series of forbearance agreements (the **Forbearance Agreements**) that tolled the statute of limitations for claims brought under the Governing Documents: (i) a forbearance agreement dated December 9, 2010 (NYSCEF Doc. No. 32), which tolled the statute of limitations from December 16, 2010 through January 30, 2011, (ii) a forbearance agreement dated January 28, 2011 (NYSCEF Doc. No. 33), which tolled the statute of limitations through March 1, 2011, (iii) a forbearance agreement dated February 28, 2011 (NYSCEF Doc. No. 34), which tolled the statute of limitations through March 31, 2011, (iv) a forbearance agreement dated March 31, 2011 (NYSCEF Doc. No. 35), which tolled the statute of limitations until April 22, 2011, (v) a forbearance agreement dated April 19, 2011 (NYSCEF Doc. No. 36), which tolled the statute of limitations until May 2, 2011, (vi) a forbearance

agreement dated May 2, 2011 (NYSCEF Doc. No. 37), which tolled the statute of limitations until May 9, 2011, (vii) a forbearance agreement dated May 9, 2011 (NYSCEF Doc. No. 38), which tolled the statute of limitations until May 26, 2011, (viii) a forbearance agreement dated May 25, 2011 (NYSCEF Doc. No. 39), which tolled the statute of limitations until June 14, 2011, (ix) a forbearance agreement dated June 13, 2011 (NYSCEF Doc. No. 40), which tolled the statute of limitations until June 30, 2011. A Settlement Agreement was signed on June 28, 2011 (the **Settlement Agreement**; NYSCEF Doc. No. 30) which tolled the statute of limitations until the date the Settlement Agreement was approved, and which took effect upon court approval (*In re Bank of New York Mellon*, 42 Misc.3d 1237[A] [Sup Ct, NY County 2014], *affd as modified*, 127 AD3d 120 [1st Dept 2015]).

Certain of the Trusts were also involved in various class action cases: (i) the Settlement Trusts and the remaining Trusts in Action 1 (CWL 2005-13 and CWALT 2006-OA2) were involved in *Retirement Bd. Of the Policemen's Annuity & Benefit Fund v Bank of NY Mellon*, 914 F.Supp.2d 422 (SD NY 2012) (**Policemen**), (ii) ECR 2005-2 (the **Royal Park Trust**) was involved in *Royal Park Investments SA/NV v Bank of NY Mellon*, No. 14-cv-6502 (SD NY 2014) (**Royal Park**), and (iii) ECR 2005-1, ECR 2005-2, FFML 2005-FF1, and FHASI 2006-AR3 (the **BlackRock Trusts**) were involved in *BlackRock Allocation Target Shares: Series S Portfolio v Bank of NY Mellon*, No. 14-cv-9372 (SD NY 2014) (**BlackRock**). The Plaintiffs assert that they are entitled to class action tolling with respect to these actions.

Action 1 was commenced by summons and complaint dated October 19, 2021. The Plaintiffs assert causes of action in Action 1 for breach of contract against the Trustee for failure to enforce

the Trusts' right to cure document defects (first cause of action) and for a declaratory judgment that the Trustee is not entitled to indemnify itself from the Trusts' funds (second cause of action). Action 2 was commenced by summons and complaint dated December 22, 2021. The Plaintiffs assert causes of action in Action 2 for breach of contract against the Trustee for failure to enforce the Trusts' right to cure document defects (first cause of action), breach of contract against the Trustee for improperly indemnifying itself from the Trusts' funds (second cause of action), and a for a declaratory judgment that the Trustee is not entitled to indemnify itself from the Trusts' funds (third cause of action).

The Trustee now moves to dismiss both complaints, arguing that the claims are time-barred and that, in any event, it did not have an obligation under the Governing Agreements to enforce the Trusts' rights to cure document defects.

### **Discussion**

On a motion to dismiss, the pleading must be afforded a liberal construction, and the court must accept the facts as alleged as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 97-88 [1994]).

#### ***The Timeliness of Most of the Plaintiffs' Claims is Not Properly Resolved at this Stage***

In *MLRN*, this Court previously addressed similar claims to those at issue here brought by certificateholders against the trustee of the relevant trusts for failure to cure document defects.

The Court, following precedent in *Pacific Life Ins. Co. v Bank of NY Mellon*, 2018 WL 1382105

(SD NY 2018), found that, at this stage, the plaintiffs were not required to specify precisely when the trustee breached its duties (*MLRN*, 2019 WL 5963202, \*\* 3-4). The Court thus declined to dismiss claims that were timely brought within 12 years of closing, *i.e.*, claims that were brought within six years of the statute of limitations where the claims would have accrued when the trustee could no longer enforce the trusts' document cure rights, which was six years after closing (*id.*). This 12-year time period was extended where claims were tolled by relevant class action tolling (*id.*, \* 4). However, claims that were brought more than 12 years after the trusts closed that were not subject to class action tolling were dismissed (*id.*).

For purposes of this motion and accepting the facts as alleged as true, the accrual date of the claims against the Trustee for failure to cure defects in the Mortgage Files began at latest six years after the Trusts closed. The Trusts closed in 2005-2006. Thus, the accrual date of the Plaintiffs' claims occurred at latest in 2011-2012. The statute of limitations, barring any tolling, would therefore have expired in 2017-2018. These actions were commenced by summons and complaint dated October 19, 2021 and December 22, 2021. Thus, to the extent any of these claims are subject to no or insufficient class action tolling, as with the claims brought on behalf of Trusts CWL 2005-13 and CWALT 2006-OA2, those claims must be dismissed. At this stage, however, where Trusts are entitled to three or four years of class action tolling, dismissal is inappropriate.

### ***Tolling Does Not Save All of the Plaintiffs' Claims***

Relying on *NECA-IBEW Health & Welfare Fund v Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012) and *Chavez v Occidental Chem. Corp.*, 35 NY3d 492 (2020), the Plaintiffs argue that all of

the Trusts even those that were not part of the class (*i.e.*, because the claims are similar to the class members) are entitled to class action tolling. The argument fails. These cases merely stand for the proposition that having similar claims is a requirement for class standing. They do not stand for the unsupportable proposition that class action tolling applies to potential plaintiffs that never joined the class. The result is not changed by the other cases relied on by the Plaintiffs where the court held that newly added members of the class are entitled to class action tolling. Therefore, dismissal is required as to the Trusts which otherwise would need to avail itself of class action tolling to have its claims be timely but can not because those Trusts were never part of the class.

The Forbearance Agreements by their terms only applied, as relevant to the Trusts at issue in this case, to the Settlement Trusts. The Forbearance Agreements tolled the statute of limitations starting in December 2010. That tolling was extended by the Settlement Agreement until it was approved and affirmed by the Appellate Division on March 5, 2015. Thus, the class action tolling for the Settlement Trusts is equal to just over four years. At this stage, the Plaintiffs sufficiently allege that the claims brought with respect to the Settlement Trusts are therefore timely.

The Plaintiffs argue that the Settlement Trusts and Trusts CWL 2005-13 and CWALT 2006-OA2 are entitled to ongoing class action tolling in *Policemen* because, although they were dismissed in 2012 because the plaintiffs in that action never invested in the Settlement Trusts and therefore lacked standing, the plaintiffs included the Settlement Trusts in their amended complaint. After the amended complaint was filed in *Policemen*, the Second Circuit affirmed the dismissal of the

Settlement Trusts for lack of standing (*Retirement Bd. Of the Policemen's Annuity and Benefit Fund of the City of Chicago v Bank of NY Mellon*, 775 F.3d 154, 159 [2d Cir. 2014] ["We conclude that Plaintiffs lack standing to assert claims against BNYM related to trusts in which they did not invest, and we therefore affirm the district court's dismissal of those claims"]).

Thus, the argument that these trusts are entitled to continued tolling under the amended complaint is unavailing.<sup>1</sup> The Settlement Trusts and Trusts CWL 2005-13 and CWALT 2006-OA2 are thus only entitled to 242 days of class action tolling. As discussed above, the Plaintiffs sufficiently allege that the claims brought with respect to the Settlement Trusts are timely. The 242 days, however, is insufficient to save the claims brought with respect to Trusts CWL 2005-13 and CWALT 2006-OA2, and they must be dismissed as untimely.

The Plaintiffs assert, and the Trustee does not dispute, that the Royal Park Trust is entitled to 1,896 days of tolling. Accepting that as true, the Royal Park Trust would be entitled to tolling of just over five years. At this stage, the Plaintiffs sufficiently allege that the claims brought with respect to the Royal Park Trust are timely.

The Plaintiffs argue that the BlackRock Trusts are entitled to ongoing class action tolling because class certification was not denied prior to a final settlement. The argument fails. The BlackRock Trusts are not entitled to indefinite class action tolling. Alternatively, the Plaintiffs argue that the BlackRock Trusts are entitled to 1,794 days of class action tolling. Accepting that as true, the Black Rock Trusts would be entitled to tolling of just under five years. At this stage,

---

<sup>1</sup> It does not matter that the Second Circuit decision was on an appeal of the original complaint rather than the amended complaint. The Second Circuit found that the plaintiffs lacked standing as to the Settlement Trusts, and the parties had a full and fair opportunity to be heard. The issue is res judicata (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455-456 [1985]).

the Plaintiffs sufficiently allege that the claims brought with respect to the BlackRock Trusts are timely.

***The Plaintiffs Sufficiently Allege that the Trustee was Obligated to Cure Document Defects***

To the extent that the Trustee argues that the Plaintiffs fail to state a cause of action because the Trustee had no obligation to enforce the Trusts' right to cure document defects, that argument fails. The Trustee does not dispute that it had an obligation to enforce the Trusts' cure rights for defects in the Mortgage Files for Trusts ECR 2005-1 and ECR 2005-2. For the remainder of the Trusts, the Trustee agreed to hold the Mortgage Files and exercise the rights of the Trusts for the benefit of the Certificateholders so that the interests of the Certificateholders would be adequately protected. As this court (Friedman, J.) found in *IKB Intern., SA v LaSalle Bank NA*:

As to the Trusts in the first category, the PSAs provide that the Trustee agrees to hold the Trust Fund and “exercise the rights referred to above” for the benefit of the certificateholders... It is undisputed that repurchase rights are among the rights of the Trusts. ***The silence of the Governing Agreements as to the particular party that is to enforce this specific remedy on behalf of the Trusts does not relieve the Trustees of their obligation to enforce remedies pursuant to the broader charge of the Governing Agreements.*** Other courts addressing the effect of similar PSA provisions have reached the same conclusion. (*See Royal Park Investments SA/NV v Deutsche Bank Natl. Trust Co.*, 2016 WL 439020, \*4 [SD NY 2016]; *Western*, 2020 WL 6534496, at \*5.)

(2021 WL 358318, \* 11 [Sup Ct, NY County 2021] [emphasis added]). Were this not so, the Certificateholders would have no recourse and the Trustee's obligation to review and hold the Mortgage Files would be meaningless.

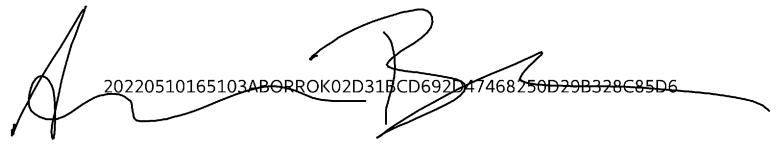
***The Plaintiffs are Entitled to a Judgment that the Trustee May Not Indemnify Itself with Respect to Certain Trusts***

As discussed above, certain of the Governing Agreements explicitly state that the Trustee may seek indemnification from the Master Servicer, not the Trusts. With respect to those Trusts, the Plaintiffs are entitled to a judgment declaring that the Trustee may not indemnify itself from the Trusts' funds. Under the Governing Agreements for the remaining Trusts, the Trustee could seek indemnification from the Trusts except for expenses incurred by reason of willful misfeasance, bad faith, or negligence. In order to obtain a judgment that the Trustee acted negligently or in bad faith, the Plaintiffs must first prevail on their cause of action for breach of the Governing Agreements for failure to enforce the Trusts' rights to have document defects cured. While this issue cannot yet be determined, discovery shall proceed.

It is accordingly hereby ADJUDGED AND DECLARED that the Trustee may not indemnify itself with funds from the Trusts CWALT 2006-OA2, CWHL 2006-3, CWL 2005-13, CWALT 2006-OC1, CWALT 2006-OC2, CWALT 2006-OC3, CWALT 2006-OC5, CWALT 2006-OC6, CWALT 2006-HY10, CWALT 2006-HY13, CWHL 2006-HYB4, and FHASI 2006-AR3; and it is further

ORDERED that the motions to dismiss are granted to the extent of dismissing the claims brought on behalf of Trusts CWL 2005-13 and CWALT 2006-OA2; and it is further

ORDERED that the parties shall appear for a preliminary conference on July 12, 2022 at 11:30am.



20220510165103ABORROK02D31FCD692D47468250D29B328C85D6

5/10/2022

DATE

ANDREW BORROK, JSC

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE