

Zittman v Bank of N.Y. Mellon

2023 NY Slip Op 31153(U)

April 11, 2023

Supreme Court, New York County

Docket Number: Index No. 650599/2022

Judge: Andrew Borrok

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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, 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
THERE TO),

Defendant.

-----X

INDEX NO. 650599/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 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

were read on this motion to/for DISMISS.

The Bank of New York Mellon’s (the **Trustee**) motion to dismiss must be denied and the Plaintiffs are entitled to judgment that the Trustee is not entitled to indemnify itself with funds from the Trust (hereinafter defined). This is the third lawsuit filed by the same Plaintiffs against the same Trustee. **Action 1** (Index No. 656037/2021) concerns three Trusts – CWL 2005-13, CWHL 2006-3, and CWALT 2006-OA2. **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. **Action 3**, the instant action, concerns one Trust – CWALT 2006-OA6 (the **Trust**).

Reference is made to a Decision and Order of this Court (the **Prior Decision**; *Zittman v The Bank of New York Mellon*, 2022 WL 1471264 [Sup Ct, NY County 2022] [Index No. 657115/2021, NYSCEF Doc. No. 91]). In the Prior Decision, this Court assumed that claims were untimely if not brought within twelve years of closing, *i.e.*, that the six year statute of limitations period began to run when the Trustee could no longer enforce the Trusts' document cure rights, which was six years after the Trusts closed absent any tolling (*Zittman*, 2022 WL 1471264 at * 3, citing *MLRN LLC v US Bank N.A.*, 2019 WL 5963202, ** 3-4 [Sup Ct, NY County 2019, Borrok, J.], *affd* 190 AD3d 426 [1st Dept 2021]; *Pacific Life Ins. Co. v Bank of NY Mellon*, 2018 WL 1382105 [SD NY 2018]) and otherwise held that the timeliness of the claims asserted were not properly resolved at the nascent stage of the lawsuit. Thus, this Court dismissed claims brought on behalf of two Trusts as time-barred and granted judgment that the Trustee could not indemnify itself with funds from certain Trusts where the Governing Agreements in those Trusts explicitly provided that the Trustee could seek indemnification from the Master Servicer, not the Trust. Capitalized terms used but not otherwise defined shall have the meaning ascribed thereto in the Prior Decision.

As discussed in the Prior Decision, the Trust in this case was governed by certain Governing Agreements which required the Sellers to provide Mortgage Files to the Trust and required the Trustee to or its agent to review the Mortgage Files to determine if any of the documents were missing or defective. If documents were missing or defective, the Trust was entitled to have such defects cured by having the missing documents replaced or having the defective loans repurchased and replaced by complaint loans. The Trustee was obligated to execute certifications identifying defects in the Mortgage Files and to notify the Obligor of such defects.

The Plaintiffs allege that the Trustee notified the Obligors but, upon the failure of the Obligors to cure defects in the Mortgage Files, the Trustee was obligated to enforce the Trust's rights to cure and failed to do so.

The Trust in this case closed in 2006. Thus, absent any tolling, the Plaintiffs' claims would have expired in 2018. The summons was filed on February 7, 2022 and the complaint was filed on April 19, 2022 (NYSCEF Doc. Nos. 1, 8). As discussed below, the Trust is entitled to more than four years of tolling, and the Plaintiffs' claims are therefore not time barred.

The Trust in this case was one of the Trusts on behalf of which the Trustee engaged in settlement negotiations with Countrywide and Bank of America and ultimately entered into the Settlement Agreement.

As part of these negotiations, the Trust was included in the Forbearance Agreements that tolled the statute of limitations for claims brought under the Governing Documents. The Trust was also included in the Settlement Agreement that tolled the statute of limitations until the Settlement Agreement was approved and which took effect upon court approval (*Zittman*, 2022 WL 1471264 at * 2, citing *In re Bank of New York Mellon*, 42 Misc3d 1237[A] [Sup Ct, NY County 2014], *affd as modified*, 127 AD3d 120 [1st Dept 2015]). As discussed in the Prior Decision, the Forbearance Agreement and the Settlement Agreement entitle the Trust to tolling of over four years (*Zittman*, 2022 WL 1471264 at * 4). Thus, the claims in the instant action are not time barred. This Trust was also one of the Trusts involved in the Policemen case, but it was dismissed from that case because the plaintiffs in that case never invested in the Trust. For the

reasons set forth in the Prior Decision, the Trust is only entitled to tolling of 242 days as a result of the Policemen case (*id.*).

The Plaintiffs also sufficiently state a claim that the Trustee was obligated to enforce the Trust's cure rights. As the Court held in the Prior Decision, where, as here, the Trustee agreed to hold the Mortgage Files and exercise the rights of the Trusts for the benefit of Certificateholders so that the interests of the Certificateholders would be adequately protected, the alleged failure of the Trustee to enforce the Trusts' cure rights is sufficient grounds to state a claim (*Zittman*, 2022 WL 1471264 at * 5). As discussed in the Prior Decision:

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***¹

(*id.*, [emphasis added]).

¹ The Court notes that in *Western and Southern Life Ins. Co. v U.S. Bank N.A.*, 209 AD3d 6 [1st Dept 2022]), the Appellate Division took a contrary view. Days later, however, the Appellate Division further clarified its position in *IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 208 AD3d 423 [1st Dept 2022] consistent with the result reached here.

The Trustee now argues that dismissal is required because among other things (i) pre-Settlement Agreement based claims are not timely, and (ii) the Settlement Agreement is CPLR 3211 (a)(1) evidence that the Trustee did in fact pursue the cure of document defects and post-Settlement Agreement claims are barred by the doctrine of res judicata because the Settlement Agreement was approved by the IAS court and that approval was affirmed by the Appellate Division when the claimants argued that the Settlement Agreement was inadequate.

As an initial matter, the Court notes that as discussed above, the Trustee is simply not correct that the pre-Settlement claims can be dismissed as untimely at this stage of the litigation. The Trusts closed in 2006, the statute of limitations began running when the Trustee could no longer enforce the buy-back which was in 2012, the statute of limitations is six years and the claims were subject to over four years of tolling, thus as of 2022 the claims were timely.

The doctrine of res judicata bars future actions between the same parties on the same cause of action following the entry of a valid final judgment based on all claims arising out of the same transaction or series of transactions, even if based on different theories or seeking a different remedy (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]).

Simply put, res judicata does not bar this lawsuit. The Settlement Agreement settled the Trusts' claims against Countrywide and Bank of America for failing to cure document defects among other things. This in no way implicated the Trustee's own failure to cause Countrywide or Bank of America to do the same. Thus, it does not matter that under the circumstances and against the obligor the settlement was approved and that the Appellate Division held that the Trustee settled

the claims against the obligors in good faith and whether, at that time, the settlement was a good settlement of those claims. The issue was “whether the trustee’s discretionary power was exercised reasonably and in good faith” (*In re Bank of New York Mellon*, 127 AD3d 120, 125 [1st Dept 2015]) and the Appellate Division affirmed the trial court’s approval of the settlement set forth in the Settlement Agreement because “the trustee did not abuse its discretion or act unreasonably or in bad faith in embarking on the settlement here. The trustee acted within its authority throughout the process, and there is no indication that it was acting in self-interest or in the interest of [Bank of America] rather than those of the certificateholders” (*id.*, at 126). This however does not provide an escape hatch for the Trustee as it relates to its own failure to act and its own alleged negligence. As the court (Failla, J.) recently observed:

Yet the Court is unpersuaded that the Countrywide Settlement and the Article 77 proceeding preclude Plaintiffs' claims. Plaintiffs here allege injuries over and above whatever injuries were directly caused by Countrywide and its successor, Bank of America, and whatever injuries may have been covered by the Countrywide Settlement. And they assert claims against Defendant not for the Trustee's conduct in negotiating and executing the Settlement Agreement, and not for Countrywide's own misconduct, but rather for the Trustee's conduct in performing its substantive duties under the PSA. Plaintiffs' claims were not extinguished by the Countrywide Settlement, and the damages sought are distinct from those for which Plaintiffs have recovered. Critically, the present action pertains to conduct not directly at issue in the Countrywide Settlement; accordingly, the facts necessary for Plaintiffs to substantiate their claims are distinct from those that were relevant to the Countrywide Settlement. There, it was Countrywide's conduct that was primarily at issue. Here, by contrast, Defendant's own performance under the PSA is squarely at issue

(*Pacific Life Ins. Co. v Bank of New York Mellon*, 2018 WL 1382105, * 12 [SD NY 2018]).

For the avoidance of doubt, this also is why the Settlement Agreement is not documentary evidence that the Trustee acted appropriately in causing the buy-back. The Settlement Agreement was vetted at a particular moment in time and was determined to be fair and

reasonable as of that time as to claims against the obligor. The issue as to whether the Trustee should have required buy-back previously simply was not before the court.

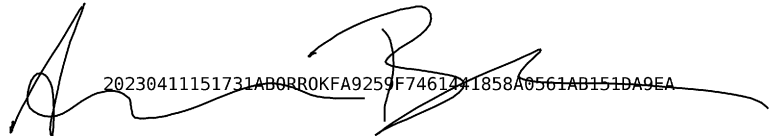
Finally, the Plaintiffs are entitled to a judgment that the Trustee may not indemnify itself with funds from the Trust. As discussed in the Prior Decision, where the Governing Documents state that the Trustee may seek indemnification from the Master Servicer, not the Trusts, the Trustee may not indemnify itself from the Trusts' funds (*Zittman*, 2022 WL 1471264 at * 5). The PSA for the Trust states that the Trustee may be indemnified by the Master Servicer, and the Trustee therefore may not indemnify itself with Funds from the Trust.

It is hereby ADJUDGED AND DECLARED that the Trustee may not indemnify itself with funds from the Trust; and it is further

ORDERED that the motion to dismiss is denied.

4/11/2023

DATE



ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: