

Mark A. Zittman, IRA v U.S. Bank, N.A.

2024 NY Slip Op 32813(U)

August 5, 2024

Supreme Court, New York County

Docket Number: Index No. 656964/2021

Judge: Joel M. Cohen

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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 03M

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MARK A. ZITTMAN, IRA FBO MARK ZITTMAN AND
MARK A. ZITTMAN AS BENEFICIARY OF IRA FBO
MARK ZITTMAN, MARK A. ZITTMAN, MARK A. ZITTMAN
REVOCABLE TRUST,

Plaintiffs,

- v -

U.S. BANK, NATIONAL ASSOCIATION, AS TRUSTEE
(AND ANY PREDECESSORS OR SUCCESSORS
THERE TO),

Defendants.

-----X

INDEX NO. 656964/2021
MOTION DATE 10/20/2023
MOTION SEQ. NO. 012

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 283, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 334, 335, 337, 347, 349, 350, 351, 352, 353, 354, 355, 356, 357

were read on this motion to DISMISS.

Defendant U.S. Bank National Association’s (“Defendant” or the “Trustee”) motion to dismiss, in part, Plaintiffs Mark A. Zittman’s, IRA FBO Mark Zittman’s and Mark A. Zittman as Beneficiary of IRA FBO Mark Zittman’s, Mark A. Zittman’s and Mark A. Zittman Revocable Trust’s (“Plaintiffs”) Amended Complaint pursuant to CPLR 3211(a)(1), (5), and (7) is **granted in part**.

In post-oral argument submissions, Plaintiffs have requested leave to amend their Amended Complaint to address, among other things, the Court’s decision in (*Finkelstein v U.S. Bank*, 2024 N.Y. Slip Op. 30796[U] [N.Y. Sup Ct, New York County March 11, 2024] [Borrok,

J.]. The Court believes it will, in the long run, be more efficient to permit Plaintiffs to do so rather than undertaking now a detailed trust-by-trust analysis of the timeliness and merits of the breach of contract claims contained in the present version of the complaint. Accordingly, the motion to dismiss the first and second causes of action is **denied** without prejudice, on the condition that Plaintiffs file a second amended complaint within thirty (30) days of this order.

The motion to dismiss is **granted** with respect to Plaintiffs' third cause of action for breach of the implied covenant of good faith.¹

A. Background

This case involves twenty-seven (27) residential mortgage backed securities ("RMBS") trusts (the "Trusts"). Defendant is the Trustee of the Trusts. Each of the Trusts is governed by a Pooling and Servicing Agreement ("PSA") or similar agreement ("Governing Agreements"). The Trusts closed between 2005 and 2007.

Plaintiffs' original Complaint (NYSCEF 2) asserted a single breach of contract claim. Specifically, the Complaint alleged that U.S. Bank, as Trustee, failed to "enforce the Trusts' right to have the Document Defects cured. . ." by obligated parties to the Governing Agreements. Relevant here, to avoid "no action" clauses in the Governing Agreements, the Complaint provided that Plaintiffs did *not* seek damages based on any potential Event of Default ("EOD") (Cplt. ¶45). The Complaint also sought a declaratory judgment that U.S. Bank was not entitled to indemnification under the terms of the Governing Agreements.

Defendant U.S. Bank moved to dismiss the Complaint. While Defendant's motion was pending, the Court of Appeals issued its decision in *IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40

¹ Defendant does not seek dismissal of Plaintiffs' fourth cause of action for a declaratory judgment on the issue of indemnification (NYSCEF 192 at 6).

NY3d 277 [2023] (“*IKB*”). In *IKB*, the Court of Appeals held that there was no “implied contractual duty on the part of the trustee to enforce the repurchase protocol obligations of other parties” in the RMBS agreement at issue in that case (*id.* at 282). In light of the *IKB* decision, the parties stipulated for Plaintiffs to withdraw their breach of contract claims as to certain Trusts, for the Plaintiffs to file an amended complaint, and for Defendant to file a renewed motion to dismiss (NYSCEF 184).

Plaintiffs filed an Amended Complaint (NYSCEF 188 [“Am. Cplt.”]) asserting four causes of action: (1) breach of contract for failing to identify document defects or representation and warranty breaches for pre-event of default breaches; (2) breach of contract for post-event of default breaches; (3) breach of the covenant of good faith and fair dealing; and (4) declaratory judgment. Defendant moved to dismiss based on documentary evidence, the statute of limitations, and for failure to state a viable cause of action.

After Defendant’s motion was fully submitted, counsel for Defendant filed a letter to advise the Court of the decision in (*Finkelstein v U.S. Bank*, 2024 N.Y. Slip Op. 30796[U] [N.Y. Sup Ct, New York County March 11, 2024] [Borrok, J.] [“*Finkelstein*”). In *Finkelstein*, Justice Borrok denied the plaintiff’s motion to amend without prejudice where the plaintiff’s original complaint, as in this case, had alleged that “this action does not allege an Event of Default. . .” (*id.* *3). Justice Borrok found that the proposed pre-EOD claims based on representation and warranty breaches and post-EOD claims would be untimely and did not “relate back” to the original complaint because that earlier pleading expressly disclaimed any claim based on an EOD (*id.*).

The Court heard oral argument on April 30, 2024 (NYSCEF 348 [Transcript]). Following oral argument, on May 6, 2024, the Court issued an Interim Order (NYSCEF 349)

requesting supplemental briefing on the impact of *Finkelstein* and also identifying which of Plaintiffs' claims would survive should Defendant's motion be granted.

Plaintiffs' Supplemental Submission (NYSCEF 350), requests that the Court deny Defendant's motion with leave for Plaintiff to replead to clarify which arguments apply to which trusts. Defendant's Amended Supplemental Memorandum (NYSCEF 356) identifies pre- and post-EOD claims in thirteen Trusts that are not subject to dismissal.

B. Discussion

a. Legal Standard on a Motion to Dismiss Based on the Statute of Limitations

Dismissal based on a statute of limitations defense under CPLR 3211(a)(5) is warranted if the moving defendant establishes that the time to commence an action has expired and the plaintiff cannot raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable (*MLRN LLC v U.S. Bank Nat. Ass'n*, 2019 N.Y. Slip Op. 33379[U] [N.Y. Sup Ct, New York County 2019] *3, *affd sub nom.* 190 A.D.3d 426 [1st Dept 2021]). When considering a motion to dismiss based on the statute of limitations, the Court "must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff" (*Benn v Benn*, 82 AD3d 548 [1st Dept 2011] quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2008] [citations omitted]). "Further, plaintiff's submissions in response to the motion 'must be given their most favorable intendment'" (*id.* quoting *Arrington v New York Times Co.*, 55 NY2d 433, 442 [1982], *cert denied* 459 US 1146 [1983]).

b. Relation Back is Not Available to Plaintiffs

Under New York law, absent tolling, Plaintiffs' claims under the Governing Agreements must have been asserted within twelve years of the closing of the relevant Trust (*Zittman v HSBC Bank USA, N.A.*, 224 AD3d 638, 639 [1st Dept 2024] citing CPLR 213[2] ["the outer limit for

timeliness for plaintiffs' claims that defendant failed to enforce the obligor's repurchase obligation to repurchase a loan that had missing or defective documents is 12 years after the expiration of the obligor's cure period. That is, six years for the statute of limitations on the underlying repurchase claims to expire, plus six years for the statute of limitations on the repurchase enforcement claims to expire"). However, if a claim accrued outside of New York, a different limitations period may apply (*MLRN LLC v U.S. Bank, N.A.*, 217 AD3d 576, 578 [1st Dept 2023] [noting that California "has a four-year limitation period and does not recognize class-action cross-jurisdictional tolling"]).

The last of the Trusts at issue in this case closed in 2007. Thus, absent tolling, claims for breach of the Governing Agreements must have been filed no later than 2019. This action was filed in 2021 but, though Plaintiffs allege that certain tolling agreements had been entered. Defendant submits that all relevant tolling agreements have been accounted for and produced to Plaintiff and that many claims are untimely (Tr. 6-7, 50-31; NYSCEF 268 [Tolling Agreement Spreadsheet]).

CPLR 203(f) provides:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

As the Court concluded in *Finkelstein*, relation back is not available when the original pleading expressly disclaimed the theory that is sought to be added by way of an amendment (*Finkelstein*, 2024 N.Y. Slip Op. 30796[U], *3).

As in *Finkelstein*, Plaintiff's original Complaint made clear that it did not seek damages relating to an EOD. Accordingly, Plaintiff's new pre- and post-EOD claims do not relate back to

the filing date of the original complaint. However, it is not entirely clear at this juncture what portions of the first and second causes of action are time barred, including the extent to which tolling may apply. The Court will permit Plaintiffs to amend the complaint, if they can, to include allegations that would save some or all claims from dismissal.

c. The Implied Covenant Claim is Dismissed

Defendant's motion to dismiss Plaintiffs' third cause of action for breach of the implied covenant of good faith and fair dealing is granted as the Court may not disregard the specific provisions of the Governing Agreements that specify U.S. Bank's obligations as trustee (*IKB Intl., S.A. v Wells Fargo Bank, N.A.*, 40 NY3d at 287). Justice Borrok reached the same result in *Finkelstein* (2024 N.Y. Slip Op. 30796[U], *5).

d. Plaintiffs are Granted Leave to Replead

Plaintiffs seek leave to amend in their Supplemental Memorandum. Consistent with the findings in *Finkelstein*, the Court finds that Plaintiff should be afforded an opportunity to do so (2024 N.Y. Slip Op. 30796[U], *6. Discovery is stayed, other than with respect to the statute of limitations defense, pending the amendment and any subsequent motion to dismiss.

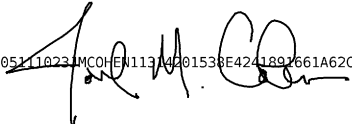
* * * *

Accordingly, it is

ORDERED that Defendant's motion to dismiss is **GRANTED** with respect to the third cause of action for breach of the implied covenant and otherwise **DENIED without prejudice** to renewal after Plaintiffs amend their complaint within thirty days of this decision and order; it is further

ORDERED that discovery remains stayed, other than with respect to the statute of limitations defense, pending the filing of a second amended complaint.

This constitutes the decision and order of the Court.

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JOEL M. COHEN, J.S.C.

8/5/2024
DATE

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: