

Matter of HSBC Bank USA, N.A.

2025 NY Slip Op 32809(U)

July 17, 2025

Supreme Court, New York County

Docket Number: Index No. 158633/2022

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE OF NOMURA HOME EQUITY LOAN, INC., ASSET- BACKED CERTIFICATES, SERIES 2007-3, NOMURA CREDIT & CAPITAL INC.,

Plaintiff,

- v -

NO RESPONDENT,

Defendant.

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INDEX NO. 158633/2022

MOTION DATE 03/10/2025, 05/30/2025

MOTION SEQ. NO. 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 196 were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 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, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282

were read on this motion to/for JUDGMENT - SUMMARY.

RELEVANT PROCEDURAL HISTORY

Petitioner, HSBC as Trustee, originally commenced this proceeding, pursuant to CPLR Article 77, for judicial instruction regarding its entry into a proposed settlement agreement to resolve litigation the Trustee is pursuing against the Trust’s sponsor Nomura Credit and Capital, Inc. (the “Sponsor”). This litigation is based on the Sponsor’s alleged breach of representations and warranties relating to certain mortgage loans in the Trust. After notice, one Certificate Holder, West Park Fund LLC (West Park), vociferously objected to the original proposed settlement (the “prior proposed settlement”).

On July 23, 2024, the court denied the prior petition. This was for several reasons that the court stated on the record [see Tr. of July 23, 2024 oral argument EDOC 199]. Primarily, the

court was concerned that the Trustee had merely rubber stamped the will of the majority Certificate Holders that were affiliated with Nomura. The Trustee, knowing that the majority was affiliated with its litigation adversary, had done nothing at all to evaluate whether the settlement was adequate:

Here, though, the problem is the trustee did not exercise its discretionary power at all. Instead, it merely caved to the majority vote of the certificate [holders] when it knew the majority was controlled by an affiliate of its adversary, Nomura. As an affiliate of Nomura, there was an incentive for the majority certified holder to minimize recovery.

Knowing this, however, the trustee did not undertake any independent evaluation. For example, it did not engage an expert to perform an evaluation. It merely rubber-stamped the vote of the majority where most of the certificates again were held by the Nomura affiliated entity.

(*id.* at pgs. 54-55).

Because of this close affiliation, the court had, after the Trustee's decision but prior to the hearing, asked the Trustee to obtain an independent expert to evaluate the settlement. That expert opined that the settlement amount was too low. Despite this view from its own expert, the Trustee did not even consider the report and still rubber stamped the vote:

Thus, on this record, the trustee has failed to carry its burden. It cannot be that an exercise of discretionary power means the trustee does not have to do anything. At the very least, the trustee could have taken the Lumer report into consideration and still concluded to enter into the settlement.

Instead, from start to finish, the trustee believes [its] discretion was exercised by rubber-stamping the majority vote. This is not an exercise of discretion. It is nothing at all.

(*id.* at pg. 57).

A. The Amended Proposed Settlements

After the court's decision denying the Trustee's request, Nomura increased its offer (the Amended Proposed Settlements). The new amounts are significantly higher. The proposed settlement payments increased from \$30,700,000 to \$43,700,000 in this case [NHELI 2007-3 Trust] and from \$51,700,000 to \$70,500,000 for the NHELI 2006-FM2 Trust in Index No. 158637/2022. This time also, the Trustee obtained upfront (on September 30, 2024) an independent analysis in the form of a supplemental report from its expert, Dr. Gerald B. Lumer (the "Supplemental Lumer Reports" [EDOC 261]). In the Supplemental Lumer Reports, Dr. Lumer updated his prior analysis in light of the increase in the Settlement Payments under the Amended Proposed Settlements. He concluded that comparable RMBS settlements were consistent with the Amended Proposed Settlements being reasonable and adequate (*id.* at ¶ 9).

Also, unlike last time, after receiving the Supplemental Lumer Reports, the Trustee convened a meeting of its Local Default and Discretionary Committee (the "LDDC"). The LDDC evaluated the Amended Proposed Settlements in light of the results of the Certificate Holder vote on the prior proposed settlements, the original and Supplemental Lumer Reports, and the increase in the Settlement Payment between the initial and Amended Proposed Settlements. It voted in favor of seeking court approval for the Amended Proposed Settlements. Certificate Holders were notified about the Amended Proposed Settlement on October 10, 2024. There were no objections other than West Park's continuing objection.

On November 4, 2024, the Trustee filed the Amended Petitions. They seek the following relief:

A. Declare that [the court] has exclusive jurisdiction over the subject matter of this Article 77 proceeding, all parties to this proceeding, the Petitioner, and all Certificateholders and other parties claiming rights with respect to the Trust, for the purposes of rendering such instructions as are necessary and/or appropriate in

the administration of the Trust, and further, retain jurisdiction to enforce the terms of its judgment;

B. Instruct the Trustee to accept the Proposed Settlement Agreement and implement the Proposed Settlement Agreement in accordance with its terms including the Settlement Payment distribution provisions included therein;

C. Confirm that the Trustee's compliance with such direction, and implementation of the Proposed Settlement Agreement, will entitle it to the safe harbor included in Section 9.01(d)(iii) of the PSA;

D. Find that that any actions taken (or omissions made) by the Trustee in accordance with this Court's instructions comply with all applicable duties under, and are fully authorized and protected by, the PSA and other Governing Agreements;

E. Hold that all Certificateholders and any other parties claiming rights in the Trust are barred from asserting claims against the Trustee in respect of the Trustee's acceptance and implementation of the Proposed Settlement Agreement."

(EDOC 172 [amended petition]).

On December 20, 2024, West Park filed answers and counter-petitions. On January 23, 2025, the court dismissed West Park's counter petitions.

DISCUSSION

West Park now moves for summary judgment dismissing the Amended Petition. For the following reasons, West Park's motion is denied, and the Amended Petition is granted.

"It is not the task of the court to decide whether we agree with the Trustee's judgment; rather, our task is limited to ensuring that the trustee has not acted in bad faith such that his conduct constituted an abuse of discretion" (*In re Bank of New York Mellon*, 127 A.D.3d 120, 125 [1st Dep't 2015]). This time, the Trustee did not abdicate its discretion. The Trustee exercised its discretion in good faith and reasonably in connection with the Amended Proposed Settlements.

First and foremost, this time, the Trustee obtained and considered an opinion from its independent expert, Dr. Lumer, who has now opined that the new and higher settlement amount is in line with similar settlements. This is a marked departure from Dr. Lumer's evaluation of the prior proposed settlements which was that they were low compared to similar settlements. This change is significant, especially given that Dr. Lumer: (1) evaluated the prior proposed settlement and (2) was independent enough to state last time that it was too low. Thus, he has both familiarity and independence.

In addition, this time, the Trustee had a committee evaluate the Amended Proposed Settlement. That committee voted unanimously to allow the Amended Proposed Settlement to be put to the court for approval.

It is also significant that some of the subprime settlements Dr. Lumer used for comparison occurred before the Court of Appeals decided *U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*, 38 N.Y.3d 169 (2022). In that case, the Court of Appeals held the “sole remedy repurchase protocol” provision required a trustee to provide sponsor with pre-suit, loan specific notice of any breach of representations and warranties in agreement. That case, known as *Heat 2007-1*, eviscerated claims where the trustee had failed to give loan-by-loan notice. Although West Park speculates there was notice for most of the loans involved in the underlying litigation, concerns over *Heat 2007-1* do not end with notice. The decision raises the distinct possibility that a plaintiff would have to prove breach of warranty or lack of conformity on a loan-by-loan basis, rather than by sampling. Such an undertaking would raise the cost of litigating this case, and others like it, by a massive margin. At best, what would be required to prove this case is uncertain. Therefore, the impact of *Heat 2007-1* is another good reason to settle.

With respect to settlements after *Heat 2007-1*, many involved Nomura. Dr. Lumer concluded that the Amended Proposed Settlements here were actually slightly higher than those settlements. Although the job of the court is not to second guess the Trustee, it is worth noting that the amount of the Amended Proposed Settlement compared to similar settlements is the most important factor to assess whether a settlement is adequate. Given that these settlements have the benefit of court approval, adequacy is baked in because an insufficient settlement would have given rise to objections from Certificate Holders.

In its motion, West Park makes much of the fact that Tanglewood, that owns the majority of certificates, is affiliated with Nomura. In his initial report, Dr. Lumer concluded that “overall, the behavior of Certificateholders suggests the Proposed Settlement is reasonable and adequate.” However, Dr. Lumer determined this conclusion was “weak,” because so few Certificates were owned by Unaffiliated Certificateholders who expressed a view on the Proposed Settlement” [Lumer initial report ¶ 59, EDOC 264]).

That the majority Certificate Holder is an affiliate of Nomura, the settling defendant, does not mean the Trustee failed to exercise its discretion in good faith. First of all, despite this circumstance, Dr. Lumer still found the Amended Proposed Settlement to be reasonable. Moreover, the Trustee is not affiliated with Nomura. The PSAs here place no restriction on the Sponsor’s or an affiliated Certificate Holder’s ability to vote. The Trustee considered its expert’s report and had an independent committee evaluate the settlement.

West Park also complains that Certificate Holders did not receive adequate notice of the Amended Proposed Settlement. West Park’s concerns are misplaced. First, the original solicitation notices were sent to all Certificate Holders and asked them to vote whether to accept or reject the prior settlement (see EDOC 183 in 158637/2022 [solicitation notice dated 7/27/22]).

Notice was also provided pursuant to the original Order to Show Cause (OSC) that accompanied the original petition. Under the OSC, any interested person had to oppose the petitions by 12/1/22. The OSC states:

“Any person interested in the Trust who fails to respond to the Petition [by that date] or fails to appear at the Initial Hearing shall be deemed to have knowingly, intentionally, forever, and finally waived the right to be heard on the questions presented by the Petition and . . . shall be forever and finally barred, precluded, and prevented from raising the right to be heard on such questions in this or any other action or proceeding”

(EDOC 14 [OSC] at pgs. 3-4).

Thus, all certificate holders and interested persons (including the public, as the trust websites were public and notice was posted there, too) received notice under the OSC. Consequently, all Certificate Holders were aware of these proceedings and waived their right to object if they did not file opposition by 12/1/22. West Park was the only Certificate Holder to file opposition.

Moreover, Certificate Holders certainly knew about the Amended Proposed Settlement. Certificate Holders, on notice of these proceedings, had access to NSYCEF and eCourts/eTrack. They, therefore, had and continue to have, access to the docket and appearances in this case. Apart from West Park, no new objections or letters have been received.

Most important, the Certificate Holders received actual notice about the Amended Proposed Settlement from the Trustee no later than October 11, 2024. Still, the only objection was from West Park. In addition, although the PSAs require certificate holder votes about whether to settle (see PSAs § 9.01(d)(iii); 9.02(a)(iii)), the Trustee had these votes back in 2022 when it received approval for a lower settlement. It is hard to imagine that it would amount to Trustee bad faith, having received approval from majority for a lesser amount, to fail to obtain separate approval for significantly more money.

West Park complains that there may be new unaffiliated Certificate Holders. West Park has no evidence that this is true or why a change in Certificate Holders means the Trustee acted unreasonably. Certainly, West Park does not contest that all Certificate Holders were notified of the Amended Proposed Settlement no later than October 11, 2024. The Trustee did not file its Amended Petition until November 2, 2024. This is three weeks later and certainly sufficient time for any potential unaffiliated Certificate Holder to register a complaint.

Finally, it is worth noting that West Park never formally objected to the Trustee proceeding via an Amended Petition until now. Moreover, in filing its cross petition, West Park did not bother to file a notice of petition or serve any Certificate Holders. West Park only served the NYSCEF-registered attorneys (*i.e.*, the Trustee and Nomura only) when it filed its cross petition. Under these circumstances, West Park's specious objection about the possibility of other, unaffiliated Certificate Holders rings hollow.

Because the court's analysis centers on whether the Trustee conducted a reasonable process, and not on whether the court agrees with the Trustee's judgment (*In re Bank of New York Mellon*, 127 A.D.3d at 125), it is irrelevant whether West Park's own experts' analysis was more detailed.

The court has considered West Park's remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED THAT the court denies West Park's motion for summary judgment [MS# 09]; and it is further

ORDERED THAT the court grants the relief requested in the Amended Petition [MS# 08]; and it is further

ORDERED THAT the Trustee is directed to file and email to all parties and the court a proposed judgment within ten days of the e-filed date of this decision and order.


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<u>7/17/2025</u> DATE					<hr/> MELISSA A. CRANE, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER			
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>		REFERENCE