

MBIA Ins. Corp. v Residential Funding Co., LLC

2011 NY Slip Op 34229(U)

May 9, 2011

Supreme Court, New York County

Docket Number: 603552/2008

Judge: Bernard J. Fried

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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: BERNARD J. FRIED

HON. BERNARD J. FRIED Justice

E-FILE

PART 60

MBIA Insurance Corp., Plaintiff,

- v -

Residential Funding Co., LLC, Defendant.

INDEX NO. 603552/2008
MOTION DATE
MOTION SEQ. NO. 007
MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

With this motion, Motion Sequence 007, Plaintiff MBIA Insurance Corp. (MBIA) moves for an Order, pursuant to CPLR §§ 3101(a)(3), 3102(a), 3108, 3111, 3120, and 3122-a, directing the issuance of a Commission in each of certain specified jurisdictions to obtain or issue subpoenas duces tecum and ad testifandum requiring the production of documents and, where necessary, testimony regarding the employment status and income of certain Mortgage Borrowers who are or were employees of those business entities to whom the subpoenas are addressed (the Employers). I have read the papers submitted regarding this motion and heard oral argument. For the reasons set forth below, Plaintiff's motion is granted and the attached Order is hereby entered.

Defendant Residential Funding Co., LLC (RFC) opposes this motion on the principal grounds, inter alia, that the Commissions sought are unduly burdensome to obtain and execute and that they are unnecessarily broad in scope. Neither

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

argument is persuasive. Regarding the burden argument, because MBIA will bear the burden of obtaining and executing the Commissions, with no effort required by RFC, so long as MBIA does not object to incurring the burden, there is no basis upon which to allow RFC to object to it doing so. That MBIA will share the discovery produced in response to its subpoenas with RFC and that RFC will chose to review this discovery does not have any effect on this proposition.

Neither am I convinced by RFC's argument that the Commissions sought are broader than is necessary and seek certain discovery that may or may not be contained within the document production that RFC made to MBIA. New York law is liberal in permitting parties to take discovery. . *See Kavanaugh v. Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954 (1998)(describing the scope of disclosure as "open and far-reaching")(internal citation omitted); *Anonymous v. High Sch. for Envt'l. Studies*, 32 AD3d 353, 358 (1st Dep't 2006) ("It is beyond cavil that New York has long favored open and far-reaching pretrial discovery.") The standard for permissible discovery under this broad rule is relevance; discovery of any material that is relevant to the question(s) before the court will be permitted. *See Hall v. 130-10 Food Corp.*, 254 AD2d 22, 22 (1st Dep't 1998) ("Disclosure should be permitted as long as the information sought bears on the controversy and will assist in the preparation for trial")(internal citation omitted).

This case concerns an alleged breach of five contracts for the provision of financial guaranty insurance (pertaining to five separate mortgage-backed securities) and of certain representations and warranties made in connection with those contracts. There can be no question that the discovery that MBIA seeks to obtain through the requested Commissions – information regarding the employment status

and incomes of RFC's Mortgage Borrower customers – is relevant to MBIA's allegation that RFC breached certain of those warranties and representations by neglecting to verify those Borrowers' employment status and incomes, in violation of RFC's standard operating procedures, with which MBIA believed RFC had complied.

RFC's additional arguments, such as that MBIA's request for this information will give a negative impression of RFC's customers, the Mortgage Borrowers who are or were employees of the Employers to whom the subpoenas are directed, to their respective employers, thereby damaging RFC's relationship with those customers, are also not compelling. Accordingly, it is

ORDERED that this motion is GRANTED; and it is further

ORDERED that Commissions sought shall issue in accordance with the attached Order.

Dated: 5/9/2011



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

At the IAS Part 60 of the Supreme Court of the State of New York, held in and for the County of New York, on the 9 day of May, 2011.

PRESENT:

Honorable Bernard J. Fried

<p>MBIA INSURANCE CORPORATION,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>RESIDENTIAL FUNDING COMPANY, LLC,</p> <p style="text-align: right;">Defendant.</p>
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Index No. 603552/2008

IAS Part 60
(Fried, J.)

PROPOSED ORDER
DIRECTING ISSUANCE OF
COMMISSION

Plaintiff MBIA Insurance Corporation ("MBIA") having moved this Court for an Order pursuant to Rules 3101(a)(3), 3102(a), 3108, 3111, 3120 and 3122-a of the Civil Practice Law and Rules (the "CPLR"), directing the issuance of a Commission (Exhibit 1 to this Order) to duly authorized persons in the states and jurisdictions listed on Exhibit 2 to this Order to obtain or issue *subpoenas duces tecum* and *ad testificandum* as designated by attorneys for MBIA to employers in the respective states and jurisdictions listed on Exhibit 3 (including any amendments to said Exhibit) to this Order (the "Mortgage Borrower Employers") requiring each Mortgage Borrower Employer to produce and permit discovery of the documents and things in its possession, custody or control that are identified on Exhibit A to the form of *subpoena duces tecum* and *ad testificandum* attached as Exhibit 4 to this Order, and, if necessary, requiring Mortgage Borrower Employers designated by attorneys for MBIA to submit to examination under oath either orally or by written questions, because all such Mortgage Borrowers Employers are located without the State of New York.

Now, upon plaintiff MBIA's motion, and upon all papers submitted and considered in connection with such motion and the pleadings and prior proceedings in the above-captioned

litigation (the "Action") and upon argument before the Court on March 3, 2011, and it appearing that: (i) the production of documents by Mortgage Borrower Employers; (ii) the certification of business records by Mortgage Borrower Employers and, if necessary, (iii) the taking of Mortgage Borrower Employers' examinations under oath either orally or by written questions by such Custodian of Records or other qualified witnesses of the business records of Mortgage Borrower Employers will be relevant and necessary to this Action and are requested pursuant to discovery proceedings mandated by the Supreme Court of the State of New York, County of New York, it is hereby:

ORDERED, that pursuant to CPLR 3101(a)(3), 3102(a), 3108, 3111, 3120 and 3122-a, a Commission (annexed as Exhibit 1 to this Order) be issued in this Action to any duly authorized persons in the states and jurisdictions listed on Exhibit 2 to this Order who may issue subpoenas *duces tecum* and *ad testificandum* or who may apply to the appropriate judicial authority in the states and jurisdictions listed on Exhibit 2 hereto for the issuance of subpoenas *duces tecum* and *ad testificandum* in the form of Exhibit 4 to this Order, or as otherwise permitted or required by the local laws of the aforesaid states and jurisdictions, to enable MBIA to obtain certain documents and, if necessary, testimony from the Mortgage Borrower Employers listed in Exhibit 3 to this Order designated by attorneys for MBIA as witnesses in this Action, *provided, however*, that such subpoenas shall not be issued to those Mortgage Borrower Employers who satisfy any one of the following characteristics:

- (i) are located in the State of New York (because a Commission is not necessary for these Mortgage Borrower Employers and MBIA may seek the requested information from New York Mortgage Borrower Employers pursuant to a subpoena issued in compliance with CPLR 2301 *et seq.*);
- (ii) whose name and address in the mortgage loan file is missing or incomplete and cannot otherwise be determined by MBIA;
- (iii) are employers of wage-earning borrowers for which the mortgage loan file includes both (a) complete paystub(s) showing income (for both the applicable pay period and year-to-date) for the thirty days prior to the loan application date, and (b) complete W-2 form(s) for the entire requisite time period (because this is,

generally, one of the ways for Borrowers to qualify for a loan on the basis of such documentation pursuant to RFC's guidelines); or

(iv) of borrowers who are non-wage earners, such as Borrowers who are self-employed or on a fixed income (because they do not have employers from which employment and income information can be sought); and *further provided*,

that these exclusions shall be made without prejudice to MBIA's right to seek a further order for discovery of such Mortgage Borrower Employers or of Borrowers.

ORDERED, that all authorized persons appointed Commissioner obtain or issue subpoenas *duces tecum* and *ad testificandum* in the form annexed as Exhibit 4 to this Order, or separately as subpoenas *duces tecum* and subpoenas *ad testificandum*, or as otherwise permitted or required by the local laws of the states and jurisdictions listed on Exhibit 2 to this Order, to compel Mortgage Borrower Employers, as provided herein, designated by attorneys for MBIA to produce the documents and information requested in the subpoenas *duces tecum* and, as to those Mortgage Borrower Employers served with subpoenas *ad testificandum*, to come before you or a duly authorized person who can administer oaths to be placed under oath and examined orally or by written questions concerning certain matters in controversy in this Action; and it is further

ORDERED, that from time to time as available, attorneys for MBIA may provide all such persons appointed Commissioner, and all parties to this Action, with corrected or updated addresses and other information for those Borrowers and Mortgage Borrower Employers listed on Exhibit 3 to this Order ("the New Information") and that all such Commissioners who receive such New Information shall then modify or reissue the subpoenas authorized by this Order and accompanying Commission to incorporate the New Information; and it is further

ORDERED, that all authorized persons appointed Commissioner request each Mortgage Borrower Employer served with a subpoena *duces tecum* to provide a Certification of Business Records in the form of Exhibit 5 to this Order, or in such other form as permitted or required by the local laws of the states and jurisdictions listed on Exhibit 2 to this Order; and it is further

ORDERED, that all authorized persons appointed Commissioner provide each Mortgage Borrower Employer served with a subpoena *duces tecum* with a copy of the November 23, 2009 Amended Stipulation and Order for the Production and Exchange of Confidential Information Order (Exhibit 6 to this Order); and it is further

ORDERED, that MBIA notify each Borrower, whose Mortgage Borrower Employer is being subpoenaed, by letter to his or her last known address, or as otherwise required by local state law, that a subpoena is being sent to his or her Mortgage Borrower Employer requiring production of the Borrower's pay stubs; W-2 and 1099 forms; salary, income, bonus and any other compensation records; and title, position, and job description; and it is further

ORDERED, that all authorized persons appointed Commissioner do cause the documents and things produced by Mortgage Borrower Employers, together with the Certification of Business Records and, where applicable, the testimony of the witness once said testimony has been reduced to writing, subscribed by the witness and certified to be correct, and any exhibits produced and proven during the examination of the witness, to be sent to the attorneys for MBIA who provided you with the Commission authorized by this Order; and it is further

ORDERED, that said Commission shall, by the Clerk of this Court, be delivered to counsel for MBIA, who are permitted to transmit said Commission to the appropriate duly authorized persons in the states and jurisdictions listed on Exhibit 2 to this Order.

ENTER:


HON. BERNARD J. FRIED
Hon. Bernard J. Fried

5/9/2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

<p>MBIA INSURANCE CORPORATION,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>RESIDENTIAL FUNDING COMPANY, LLC,</p> <p style="text-align: right;">Defendant.</p>
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Index No. 603552/08

IAS Part 60
(Fried, J.)

COMMISSION

THE PEOPLE OF THE STATE OF NEW YORK

**To: ANY DULY AUTHORIZED PERSON WHO MAY OBTAIN OR ISSUE
SUBPOENAS DUCES TECUM AND AD TESTIFICANDUM AND TO ANY DULY
AUTHORIZED PERSON WHO CAN ADMINISTER OATHS PURSUANT TO
THE LAWS OF THE STATES AND JURISDICTIONS LISTED ON EXHIBIT 2
TO THE ANNEXED ORDER**

GREETINGS:

Upon motion by MBIA Insurance Corporation (“MBIA”), pursuant to Rules 3101(a)(3), 3102(a), 3108, 3111, 3120 and 3122-a of the Civil Practice Law and Rules of the State of New York (the “CPLR”), for the issuance of this Commission, the movant having informed this Court that the employers identified on the list of employers for the states and jurisdictions (“Mortgage Borrower Employers”) on Exhibit 3 (including any amendments to said Exhibit) to the annexed Order Directing Issuance of Commission dated _____, 2011 (the “Order”), and as modified by such Order, are located in or have actual places of business within said states and jurisdictions and do or may have documents and information relevant to the adjudication of the above-captioned litigation (the “Action”) pending in our Supreme Court of the State of New York, New York County, between MBIA and Residential Funding Company, LLC (“RFC”), and movant wishing for the issuance of subpoenas *duces tecum* and *ad testificandum* to compel the production by Mortgage Borrower Employers of certain documents

and, where necessary, to compel Mortgage Borrower Employers' examinations under oath orally or by written questions,

KNOW YE, that we, with full faith in your prudence and competency, have appointed you Commissioner, and by these presents do authorize you, in accordance with the terms of the annexed Order, to do all things necessary and required to be done by the Order, including, without limitation: (i) issuing subpoenas *duces tecum* and *ad testificandum* or, where necessary, applying to the appropriate judicial authority in the states and jurisdictions listed on Exhibit 2 to the annexed Order for the issuance of subpoenas *duces tecum* and *ad testificandum* in the form of Exhibit 4 to the annexed Order, or separately as subpoenas *duces tecum* and *ad testificandum*, or as otherwise permitted or required by the local laws of the states and jurisdictions on Exhibit 2 of the annexed Order, to compel those nonparty Mortgage Borrower Employers, as provided in the Order, designated by MBIA's attorneys to produce documents and things requested in the subpoenas *duces tecum*; (ii) providing each Mortgage Borrower Employer served with a subpoena *duces tecum* and *ad testificandum* a copy of the November 23, 2009 Amended Stipulation and Order for the Production and Exchange of Confidential Information (Exhibit 6 to the annexed Order); (iii) requesting each Mortgage Borrower Employer to whom you issue a subpoena *duces tecum* and *ad testificandum* to complete a Certification of Business Records in the form of Exhibit 5 to the annexed Order, or as otherwise permitted or required by the local laws of the states and jurisdictions on Exhibit 2 to the annexed Order, and (iv) if necessary, directing those Mortgage Borrower Employers designated by MBIA's attorneys as nonparty witnesses in the above-captioned Action to come before you or a duly authorized person who can administer oaths pursuant to the subpoenas for the purpose of being examined under oath orally or by written questions.

WE REQUEST THAT YOU, at a certain time and place to be noticed by you, do cause those Mortgage Borrower Employers, as provided in the Order, designated by MBIA's attorneys to produce and permit discovery of the documents and things in their possession,

custody or control that are identified on Exhibit A to the subpoena *duces tecum* and *ad testificandum* (Exhibit 4 to the annexed Order) relating to the matter in controversy in the Action and that you provide to each Mortgage Borrower Employer designated by attorneys for MBIA a copy of the November 23, 2009 Amended Stipulation and Order for the Production and Exchange of Confidential Information (Exhibit 6 to the annexed Order), and that you request said Mortgage Borrower Employers to complete a Certification of Business Records in the form of Exhibit 5 to the annexed Order, or as otherwise permitted or required by the local laws of the states and jurisdictions listed on Exhibit 2 to the annexed Order, and, if necessary, at a certain time and place to be by you appointed, do cause those Mortgage Borrower Employers designated by attorneys from MBIA to come before you or a duly authorized person who can administer oaths to be then and there placed under oath and examined orally or by written questions concerning certain matters in controversy in the Action pending in the Supreme Court of the State of New York, New York County.

WE FURTHER REQUEST THAT YOU, in accordance with the annexed Order, modify or reissue any subpoena authorized by this Commission so as to incorporate any New Information (as defined in the annexed Order) pertaining to the Borrowers and Mortgage Borrower Employers listed on Exhibit 3 to the annexed Order.

WE FURTHER REQUEST THAT YOU, with all convenient speed, do cause the documents and things produced by the designated Mortgage Borrower Employers, together with the Certification of Business Records and, where applicable, the testimony of the witness, once said testimony has been reduced to writing, subscribed by the witness and certified to be correct, and any exhibits produced and proven during the examination of the witness, be returned to the attorneys for MBIA who provided you with this Commission.

WITNESS, the Honorable Bernard J. Fried, a duly authorized officer of our
Supreme Court, this 9 day of May, 2011.


HON. BERNARD J. FRIED
Hon. Bernard J. Fried