Syncora Guar. Inc. v J.P. Morgan Sec. LLC
2012 NY Slip Op 33215(U)
May 2, 2012
Supreme Court, New York County
Docket Number:
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS
Justice

PART 53

Index Number : 651566/2011
SYNCORA GUARANTEE
vs
J.P. MORGAN SECURITIES LLC
Sequence Number : 001
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ______ **No(s).** ______
Answering Affidavits — Exhibits ______ **No(s).** ______
Replying Affidavits ______ **No(s).** ______

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with accompanying Memorandum Decision.

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

Dated: May 2, 2012

______, **J.S.C.**
CHARLES E. RAMOS

1. **CHECK ONE:** ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE: MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

SYNCORA GUARANTEE INC., formerly known as XL CAPITAL ASSURANCE INC.,

Plaintiff,

-against-

J.P. MORGAN SECURITIES LLC, formerly known as BEAR STEARNS & CO., INC.,

Defendant.

Decision and Order

Index No. 651566-11

Motion Seq. 001

Charles Edward Ramos, J.S.C.:

This is the second civil lawsuit brought by plaintiff Syncora Guarantee, Inc. (Syncora), a monoline insurance company, for damages related to claims it paid or will pay under a financial guaranty insurance policy issued for the benefit of investors in a residential mortgage-backed securities transaction known as the GreenPoint Mortgage Funding Trust-HE1 (the Transaction), which closed on March 6, 2007 with EMC Mortgage LLC, f/k/a EMC Mortgage Corporation (EMC Mortgage), an affiliate of Bear Stearns & Company.

Defendant J.P. Morgan Securities, LLC (JP Morgan) moves for an order granting (1) summary judgment, pursuant to CPLR 3212, on res judicata principles, and (2) dismissal of the complaint, pursuant to CPLR 3211(a)(4), on the ground that this action is duplicative of a first-filed federal action.

For the reasons that follow, JP Morgan's motion is denied.

[* 3]

Background

Syncora, formerly known as XL Capital Assurance Inc., is incorporated in New York State, and its corporate headquarters is located in New York City. EMC Mortgage is a Delaware corporation with its principal place of business in Texas. At the time of the Transaction, EMC Mortgage was a wholly-owned subsidiary of The Bear Stearns Companies, Inc. (Bear Stearns), a holding company that provided investment banking services and derivative trading securities to clients through its subsidiaries. On May 30, 2008, JP Morgan became the successor in interest by merger to the now defunct Bear Stearns. EMC Mortgage remains a wholly-owned subsidiary of JP Morgan.

Syncora contends that the Transaction is one of hundreds of securitization that Bear Stearns effectuated between 2004 and 2007 as part of a scheme to generate huge profits from the origination, collection and securitization of faulty mortgage loans, while passing the risk of those loans to investors and financial guarantors. The Transaction was backed by nearly 10,000 loans called home-equity lines of credit (HELOCs). EMC Mortgage, acting as the Transaction sponsor, purchased the HELOCs from a single origator, GreenPoint Mortgage Inc., and sold them into a trust, which, in turn, issued securities to investors through various classes of notes that were to be paid down by the cash flow from the loans. Syncora agreed to insure payments of

[* 4]

interest and principal for the benefit of the note holders. The insurance policy made the securities more attractive to investors, guaranteeing payments to them.

Syncora entered into an Insurance & Indemnity Agreement (the I & I Agreement) with EMC Mortgage, pursuant to which Syncora agreed to issue a Financial Guaranty Policy (the Policy). Thus, Syncora assumed the risk that underlying mortgage loans might default. Bear Stearns, which acted as the Transaction's deal manager and underwriter, allegedly made certain representations and warranties to Syncora concerning the safety of the underlying loans and the company's internal policies and procedures used to originate, underwrite and service the loans. These representations were allegedly made to induce Syncora to insure the Transaction's senior class of notes, and to enhance their value and marketability as insured bonds. Syncora allegedly relied on these representations when analyzing the risks associated with the Transaction.

The I & I Agreement includes a series of broad warranties made by EMC Mortgage as a condition to, and as consideration for, Syncora's risk in issuing the Policy. Those warranties, in part, pertain to the quality of the loan collateral, as well as EMC Mortgage's and GreenPoint's policies and procedures related to underwriting, due diligence and quality control. The I & I Agreement also contains a provision that requires EMC Mortgage to

[* 5]

disclose, and thereafter cure, repurchase or provide adequate substitutes for, each loan that fails to conform to EMC Mortgage's warranties (the repurchase protocol).

After the Transaction closed, the residential housing market collapsed, mortgage delinquencies soared, and securities backed with mortgages lost value. The underlying loans started defaulting, which resulted in significant write-offs and required Syncora to make payments of more than $320 million under the Policy to cover the shortfall in payments due investors, which was created by borrowers' defaults. A third-party consultant was hired by Syncora to perform a review of a subset of the loan pool. That review allegedly revealed that more than 85% of a randomly-selected sample of loans contained defects that failed to conform to EMC Mortgage's contractual warranties, and that an even higher percentage of loans in adverse samples, which contained only defaulted or delinquent loans, were non-conforming.

Consequently, Syncora invoked its rights, under the repurchase protocol, for 1,315 breaching loans and demanded that EMC Mortgage comply with its obligation to cure the breaches, repurchase or substitute the breaching loans. EMC Mortgage refused to repurchase the vast majority of these loans. EMC Mortgage allegedly agreed to repurchase 32 loans. On March 31, 2009, Syncora filed five contract-based claims related to the

[* 6]

Transaction in the District Court for the Southern District of New York, naming EMC Mortgage as defendant. Federal jurisdiction was based on diversity of citizenship, pursuant to 28 USC § 1332. The federal action, captioned *Syncora Guarantee Inc. v EMC Mortgage Corp.*, No. 09-CV-3106 [Crotty, J.], asserts claims for EMC Mortgage's breach of the repurchase protocol and breach of warranties. On May 6, 2009, the District Court issued a scheduling order, setting June 12, 2009, as the deadline for joining additional parties or amending the pleadings. That date was extended to July 13, 2009.

On November 22, 2010, 17 months past the deadline set in the scheduling order, and 20 months after commencing the federal action, Syncora moved to add fraudulent inducement and federal securities fraud and tortious interference claims to the complaint, and to add these new defendants. Finding that Syncora had failed to demonstrate good cause for the undue delay in seeking leave to amend the complaint, Judge Paul A. Crotty, on March 25, 2011, denied the motion as untimely. Judge Crotty found that Syncora was unjustified in waiting to file the motion because "the intricacies of the fraud are not necessary to bring the claim," and that Syncora was aware of the "gist" of Bear Stearns's fraud before it filed suit against EMC Mortgage (plaintiff's exhibit 2, Crotty Order, at 6-7).

Undeterred, on June 6, 2011, Syncora filed this state court

[* 7]

action against JP Morgan, as successor by merger to Bear Stearns, in which Syncora set forth the claims it had unsuccessfully sought to add against Bear Stearns in the federal complaint.[1] Syncora maintains that it had learned that EMC Mortgage was prepared to honor its repurchase obligations, but that JP Morgan reversed those decisions in summer 2008, after its acquisition of Bear Stearns. That reversal is the basis for the tortious interference claim. The District Court action remains ongoing, and trial is scheduled for November 2012.

In its motion to dismiss, JP Morgan argues that the District Court's denial of Syncora's motion for leave to amend constitutes res judicata, or, more precisely, claim preclusion of the present state court claims.[2] JP Morgan insists that Syncora filed the state court complaint in an attempt to rectify the consequences of its own delay, and to circumvent the federal court's denial of the motion for leave to amend.

Syncora's response is three-fold. First, Syncora argues that no final judgment on the merits exists because the denial of its motion to amend the complaint was not on the merits. In

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[1] It should be noted that the denial of a motion for leave to amend the complaint is not appealable in the Second Circuit (*see Kahn v Chase Manhattan Bank, N.A.*, 91 F3d 385 [2d Cir 1996]).

[2] In *Migra v Warren City School Dist. Bd. of Educ.* (465 US 75 [1984]), the United States Supreme Court expressed its preference for the use of the term "claim preclusion" rather than the more traditionally used term "res judicata" (*Id.* at 77, n 1).

effect, Judge Crotty denied leave to amend. Additionally, it argues that this is a suit against a different defendant, and res judicata is inappropriate because JP Morgan has failed to establish that it is in privity with EMC Mortgage. Syncora insists that JP Morgan and EMC Mortgage are not in privity because "corporate affiliation, by itself, is insufficient to establish privity" (Def. Opp. at 13-16). Even if privity can be established, Syncora asserts that the "jurisdictional competency" exception to claim preclusion applies since Syncora could not have litigated its claims against Bear Stearns and JP Morgan in the federal action due to the District Court's lack of subject matter jurisdiction over non-diverse Bear Stearns and JP Morgan.[3]

Lastly, Syncora contends that JP Morgan waived its request for dismissal under CPLR 3211(a)(4) based on the first-filed rule, because it failed to raise that defense in either its answer or in a pre-answer motion to dismiss, and because this is

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[3] When Syncora filed its complaint in the District Court, a litigation involving similar contract claims by financial guarantor Ambac Assurance Corp. (Ambac) was already pending against EMC Mortgage. The judge in that action initially permitted the amendment of the complaint to add a fraudulent inducement claim against EMC Mortgage and Bear Stearns. However, the court ruled that Ambac's federal securities claims were futile for lack of standing, and that, absent the federal claims, the court did not have subject matter jurisdiction over non-diverse Bear Stearns. Thus, the court granted Ambac's motion to add the fraudulent inducement claims against Bear Stearns and EMC Mortgage and then immediately dismissed the case for lack of jurisdiction. The Ambac action was re-filed in New York state court, and it is currently pending before this court (*see Ambac Assurance Corp. v EMC Mortgage Corp.*, No. 650421-01).

a substantially different action.

Discussion

JP Morgan has structured its motion as both a summary judgment motion under CPLR 3212, and a motion to dismiss under CPLR 3211. Certain legal principles apply equally to a summary judgment motion and a motion to dismiss.

In reviewing a complaint on a motion to dismiss, the court must accept the complaint's allegations as true, and accord plaintiff the benefit of every reasonable inference (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). A motion to dismiss pursuant to CPLR 3211(a)(4) requires "the pendency of another action between the parties which was instituted earlier in time and has not yet been terminated" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Jordache Enters.*, 205 AD2d 341, 343 [1st Dept 1994], *lv denied*, 1994 NY App Div LEXIS 8780 [internal citations omitted]).

Summary judgment may be granted only if it appears from the pleadings, depositions, and admissions on file, together with the affidavits in the record, that there is no genuine issue of material fact in dispute, and that the moving party is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The non-moving party must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact, or to tender an acceptable excuse for its failure to do so (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d at 324). In reviewing a motion for summary judgment, the evidence presented by the non-moving party must be construed liberally in favor of the non-moving party, and must be given the benefit of every reasonable favorable inference (*see Rought v Price Chopper Operating Co., Inc.*, 73 AD3d 1414 [3d Dept 2010]).

It is against these legal standards that the court has scrutinized Syncora's two complaints and the parties' respective arguments.

Res judicata is motivated by the interest in avoiding repetitive litigation, conserving judicial resources, and preventing the moral force of court judgments from being undermined (*see Insurance Co. of State of Pa. v HSBC Bank USA*, 10 NY3d 32, 38 [2008]).

"[F]ederal law incorporates the rules of preclusion applied by the State in which the rendering court sits" (*Taylor v Sturgell*, 553 US 880, 891 n 4 [2008], citing *Semtek International Inc. v Lockheed Martin Corp*, 531 US at 508). Therefore, New York res judicata rules apply.

Under New York's transactional approach to the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439, 441 [1st Dept 1998]).

If the party against whom res judicata is invoked had a fair and full opportunity to litigate the claim in a prior proceeding based on the same transaction, but failed to raise the claim, that party is barred from raising it in a subsequent action (*Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263, 264-265 [1st Dept 1994]). The burden of proof required to establish the conclusive effect of a prior judgment in another jurisdiction is upon the party asserting it (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 275 [1970]).

The three-prong test for the application of res judicata requires: (1) a final judgment on the merits in a court of competent jurisdiction in the earlier case; (2) the assertion of the same claim in the two cases at issue; and (3) the presence of the same parties or their privies in both lawsuits (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert denied*, 555 US 1136 [2009]). The most contentious issues here are whether there was a final adjudication on the merits and whether privity exists between the parties.

[* 12]

Syncora's failed attempt to add a new defendant and new claims to the District Court action carries limited consequence here.

Several Second Circuit cases provide guidance. The Second Circuit has suggested that, for the most part, the denial of leave to bring in new defendants does not have any preclusive effect with respect to the claims against those different defendants (*see Northern Assur. Co. of America v Square D Co.*, 201 F3d 84, 87 [2d Cir 2000][reversing the District Court's res judicata-based dismissal because "(w)hile denial of leave to amend a complaint may have preclusive effect in some cases, claim preclusion is unavailable here because the claims sought to be added to the first suit were against an independent party and were not required to be brought in that suit"]). However, in *Northern Assurance*, the Second Circuit stated that "[w]here the plaintiff is seeking to add additional claims against the same defendant and leave to amend is denied, claim preclusion is appropriate" (*Id.* at 88). The Second Circuit recognized that the decision to amend may not be on the merits, but may be based on "factors such as timeliness or convenience ..." (*id.*). The Court based its decision on whether to apply claim preclusion on the requirement that a plaintiff must bring all claims at the same time against the same defendant relating to the same transaction (*id.*).

In addition, this matter involves a plaintiff seeking to add new claims against a new defendant, assuming no privity.

A compelling reason for the rejection of res judicata is that the state law issues present in this proceeding could not, as a matter of law, have been resolved by Judge Crotty. Res judicata is inapplicable where a plaintiff is "unable to ... to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain ... multiple remedies or forms of relief in a single action ..." (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting Restatement [Second] of Judgments § 26 [1] [c]). Federal courts are courts of limited jurisdiction. As a general principle, federal courts are unable to decide state law issues unless complete diversity of citizenship exists between plaintiffs and defendants (*see* 28 USC § 1332[a]). In the District Court action, diversity jurisdiction could not have existed if Bear Stearns had been added to the case. Simply put, Syncora could not have asserted its state law claims in the federal forum, thereby preventing Syncora from any opportunity to litigate those claims there.

On the other hand, it is clear that the facts alleged in the present state action arise from the same cause of action as the District Court case. As part of New York's transactional methodology, a set of facts will be viewed as a single transaction if the facts of each action are closely related in time, space, motivation or origin, especially if treating them as a unit would be convenient for trial and would conform to the parties' expectations (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981]; *see also Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005] [terming the transactional approach a "pragmatic test" that focuses on factual grouping]).

Another test for determining what constitutes the same cause of action has been expressed in different ways by the courts, including whether a different judgment in the second action would impair or destroy any rights or interests established in the first action, whether the same evidence is needed for the second action and whether the essential facts are present in both causes of action (*see Schuykill Fuel Corp. v Nieberg Realty Corp*, 250 NY at 307). "[A] claim will be barred by the prior adjudication of a different claim arising out of the same 'factual grouping' even if the claims 'involve materially different elements of proof'" (*Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005] [internal citation omitted]), and even if the claims "would call for different measures of liability or different kinds of relief" (*Smith v Russell Sage Coll.*, 54 NY2d at 192 [internal quotation marks and citation omitted]).

Further, claims arising out of the same contract are presumed to constitute the same claim for res judicata purposes (*see e.g. Dorsey v Medical Socy. of State of N.Y.*, 294 AD2d 129 [1st Dept 2002][the Court dismissed a cause of action for fraud on res judicata grounds on the basis of a prior order of dismissal of a related breach of contract claim]). A comparison of the two complaints in each action is the best approach to determining the sameness of the two causes of action.

Both complaints are based on the same chain of events, which focus on the same underlying Transaction, the same financial guaranty insurance policy, and the same injury (*see UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011] [Court found that the new claims "implicate events alleged to have taken place before the filing of the original complaint", and "form(ed) a single factual grouping"]; *Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 8 [1st Dept 2000] ["the fundamental gravamen of the wrong is precisely the same"]). Thus, the fraud and tortious interference claims relate to the same contract involved in the District Court action, and constitute a single transactional grouping (*see Krepps v Reiner*, 377 Fed Appx 65, 67 [2d Cir 2010] [fraud claim arose out of same contract and relied on same factual allegations]).

While dressed in different legal theories of liability, the claims also seek the same relief, namely, monetary damages for all insurance claims that have been, or will be, paid by Syncora under the financial guaranty insurance policy (*see* Initial State

Compl. at 89 ¶ 205; Fed. Compl. at 30 ¶ 73). As well, substantially the same evidence would be presented in both actions. The only difference between the two actions is an intervening change in defendants.

For a previous judgment to have res judicata effect under New York law, the parties must be the same as those in the first action or persons in privity with them. For Syncora's claims in this case to be barred by claim preclusion, JP Morgan must stand in privity with EMC Mortgage. While the concept of privity was traditionally applied to a narrow class of relationships,[4] New York has adopted a broader view of privity (*see Northern Assur. Co. of Am. v Square D Co.*, 201 F3d at 89; *Evergreen Bank N.A. v Dashnaw*, 246 AD2d 814, 816 [3d Dept 1998] [privity "requires a flexible analysis of the facts and circumstances of the actual relationship between the party and non-party in the prior litigation"]).

Privity has been held to exist where there is a relationship between the litigant in the current suit and the party to the

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[4] Restatement (Second) of Judgments defines a limited set of circumstances in which the representative capacity of the litigant in the prior proceeding is sufficient to bind a non-party to the final outcome of that proceeding, such as where the litigant in the prior case was acting in the capacity of a fiduciary for the non-party (*see* Restatement [Second] of Judgments § 41[1][a] and [c]), or invested with express representational authority (*id.*, § 41 [1][b]), or was a court-approved representative in a class action on behalf of a class of which the non-party was a member (*id.* § 41[1][e]).

[* 17]

prior suit "such that the interests of the non-party can be said to have been represented in the prior proceeding" (*Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). The Court of Appeals also has used the following guidelines to assess whether parties are in privity: "It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly co-parties to a prior action" (*Watts v Swiss Bank Corp.*, 27 NY2d at 277; *see also Bay Shore Family Partners, L.P. v Foundation of Jewish Philanthropies of Jewish Fedn. of Greater Fort Lauderdale*, 270 AD2d 374, 375 [2nd Dept 2000]; *Castellano v City of New York*, 251 AD2d 194, 194 [1st Dept 1998]).

Under well-settled New York law, a corporation that acquires the assets of another may be held liable for the torts of its predecessor as a successor-in-interest if it: (1) impliedly assumed the predecessor's tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction was entered into fraudulently to escape such obligations (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

Obviously, EMC Mortgage and JP Morgan have an interest in disproving the same set of facts. However, this alone does not establish privity since the two corporate entities do not share all of the same interests. The fact that JP Morgan in this case has the same attorney that represented EMC Mortgage in the District Court also "is of 'singular significance'" (*Ruiz v Commissioner of Dept. of Transp. of City of New York*, 858 F2d 898, 903 [2d Cir 1988], quoting *Watts v Swiss Bank Corp.*, 27 NY2d at 278), but it does not establish privity. The record contains no evidence that JP Morgan assumed any liability for EMC Mortgage. Following the merger, JP Morgan, as the surviving corporation, stands solely in the shoes of Bear Stearns, not EMC Mortgage.

The traditional federal court rule is that an extreme application of state-law res judicata principles may be inconsistent with the constitutional requirements of due process (*see Postal Telegraph Cable Co. v City of Newport, Ky.*, 247 US 464, 476 [1918]). Under federal law, "one is not bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process" (*Taylor v Sturgell*, 553 US at 884 [internal quotation marks and citation omitted]). Of course, there is an exception from these principles when there is "privity" between a party to the second matter and a party who is bound by an earlier judgment.

Previously, federal courts had adopted a theory that allowed

[* 19]

another party to be the "virtual representative" of a non-party, therefore permitting a non-party to be bound to the result of that litigation (*see e.g. Merchant and Stone v Williams*, 970 F2d 1043, 1058 [2d Cir 1992], *cert denied* 508 US 906 [1993]; *United States v ITT Rayonier, Inc.*, 627 F2d 996 [9th Cir 1980]). While *Taylor v Sturgell*[5] rejected "virtual representation," it acknowledged six exceptions to the general "same parties" rule, holding that non-parties may be bound by a judgment where (1) the non-party agreed to be bound; (2) there is a substantive legal relationship between the party to be bound (the non-party) and the party to the judgment; (3) the non-party is adequately represented by a party to the suit; (4) the non-party assumes control of the litigation prior to judgment; (5) the non-party later brings the same suit as the designated representative of a party bound by the initial judgment; or (6) a "special statutory scheme" imposes claim preclusion on non-parties and limits lawsuits (*Taylor v Sturgell*, 553 US at 893-895). In this case, the "virtual representative" exception is not justified on the basis of a close relationship between EMC Mortgage and JP Morgan.

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[5] Two friends brought separate Freedom of Information Act suits against the Federal Aviation Administration. The same attorney represented both plaintiffs. The first lawsuit was unsuccessful. The second lawsuit was dismissed on the basis that plaintiff's friend and close associate, who had brought the first lawsuit, qualified as his virtual representative despite no evidence that plaintiff "controlled, financed, participated in, or even had notice of [the] earlier suit (*Taylor v Sturgell*, 553 US at 885).

[* 20]

Specifically, the first, fourth, fifth and sixth exceptions have no application to this case. The record does not indicate that JP Morgan agreed to be bound by the outcome of the District Court action. Nor is there a statutory scheme that binds JP Morgan to the outcome of the District Court action. The fourth exception applies when a non-party assumes control of the prior litigation, and then acts to file its own case on the same grounds. Here, this exception is plainly inapplicable.

The second exception requires a substantive legal relationship such as that arising between preceding and succeeding owners of property, bailees and bailors, and assignees and assignors, none of which apply to the facts of this case (*see* *Taylor v Sturgell*, 553 US at 894). The only basis that can possibly be asserted for affording the District Court order preclusive effect is the corporate affiliation relationship between EMC Mortgage and JP Morgan. Despite the fact that EMC Mortgage and JP Morgan have a parent corporation and wholly-owned subsidiary relationship, however, there is no substantive legal relationship between these two parties. No preexisting "substantive legal relationship" exists between EMC Mortgage and JP Morgan that is akin to a "bailee and bailor" or "assignee and assignor."

The third exception relates to whether a third party was adequately represented by a party with the same interests.

[* 21]

Again, EMC Mortgage and JP Morgan have very different interests. "Liability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary," but instead, there must be "direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors and officers are completely ignored" (*SUS, Inc. v St. Paul Travelers Group*, 75 AD3d 740, 743 [3d Dept 2010] [internal quotation marks and citations omitted]; *Town of Smithtown v National Union Fire Ins. Co.*, 191 AD2d 426, 428 [2d Dept 1993] [liability of the parent company for the contractual obligations of its subsidiary may not be imposed]). That showing has not been made here.

Accordingly, the Court concludes that none of the *Taylor* exceptions apply in this case. Because none of the required *Taylor* circumstances are present, the Court finds that affording the order denying the motion for leave to amend res judicata or claim preclusion effect would violate the due process rights of JP Morgan.

New York courts follow the first-in-time rule, which provides that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 58 [1969] [internal quotations mark and citation omitted]; *see also L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 5 [1st Dept 2007]). The rule against duplicative litigation, codified in CPLR 3211(a)(4), permits a party to move for dismissal of a complaint where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States."

Syncora contends that the first-filed rule does not compel dismissal because defendant: (1) waived this defense, and (2) has failed to demonstrate identity of the parties and causes of action. CPLR 3211(e) provides that certain enumerated defenses, including one based on res judicata, are waived unless asserted in an answer to the complaint, or raised in a pre-answer motion to dismiss (*see Mayers v D'Agostino*, 58 NY2d 696, 698 [1982]; *Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010]).

In this case, JP Morgan did preserve its "first-filed" defense when it asserted in its answer that "Syncora's claims are barred, in whole or in part, because they are duplicative of certain contractual provisions that form the basis of Syncora's contract claims in the Federal Action" (Def. Answer, Eighteenth Affirmative Defense, at 41). This language is sufficient because it gave Syncora notice of defendant's position that this action duplicated the District Court action (*Curry v City of Syracuse*, 316 F3d 324, 331 [2d Cir 2003] [primary purpose of requiring an

[* 23]

affirmative defense is to provide notice and an opportunity to respond to the opposing party]; *see also Mt. Sinai Med. Ctr. v Empire Blue Cross & Blue Shield*, 282 AD2d 207, 208 [1st Dept 2001][Court found that similar defense in answer "gave plaintiffs clear notice of defendant's position"]).

Analysis under CPLR 3211(a)(4) does not mandate strict identity between the parties and issues in the two actions. Instead, the court is to examine whether the parties and claims are substantially alike, so that the New York case need not proceed because the other, earlier, litigation will dispose of all the same issues (see *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 93 [1st Dept 1997]; *see also Koren-DiResta Constr. Co. v Albert B. Ashforth Inc.*, 100 AD2d 760, 761 [1st Dept 1984]).

The "first-filed" rule is inapplicable since there is no pending litigation against JP Morgan. JP Morgan is named as the individual defendant in this action, but not in the District Court action. Therefore, the two actions are not truly duplicative. Contrary to JP Morgan's argument, the fact that JP Morgan is indirectly implicated in the District Court action as the parent corporation of EMC Mortgage does not mean that there is an identity of the parties. Moreover, in this matter, Syncora can pursue a remedy against JP Morgan, whereas in the District Court, it could not. Because there is no identity of the parties, there is no further need to address whether there is an identity of the issues. Accordingly, JP Morgan's motion to dismiss the complaint on the basis of the first-filed rule is denied.

Conclusion

Syncora, in this case, deserves its day in court against JP Morgan. As the foregoing opinion indicates, two independent reasons exist why the doctrine of res judicata is inapplicable. The state law claims now being asserted were not within the limited jurisdiction of the District Court and there is an absence of identity or privity between the parties.

Accordingly, it is hereby

ORDERED that the portion of the motion of the defendant JP Morgan Securities, LLC for summary judgment, pursuant to CPLR 3212, dismissing the complaint is denied; and it is further

ORDERED that the portion of the motion of defendant JP Morgan Securities, LLC, pursuant to CPLR 3211(a)(4).

Dated: May 2, 2012

ENTER:

CHARLES E. RAMOS