Syncora Guar. Inc. v Countrywide Home Loans, Inc.
2012 NY Slip Op 33478(U)
May 21, 2012
Sup Ct, NY County
Docket Number: 650042/09
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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SYNCORA GUARANTEE INC.,

Plaintiff,

-against-

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., and BANK OF AMERICA CORPORATION,

Defendants.

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Index No.: 650042/09
Motion Date: 3/20/12
Motion Seq. No.: 016

PRESENT: HON. EILEEN BRANSTEN

In motion sequence number 016, defendants Countrywide Home Loans, Inc., Countrywide Securities Corporation and Countrywide Financial Corporation (collectively, "Countrywide" or the "Countrywide Defendants") move pursuant to CPLR 3124 and New York Insurance Law ("NYIL") § 3105 to compel plaintiff Syncora Guarantee, Inc. ("Syncora") to produce documents relating to Syncora's insuring securitizations of home equity line of credit loans and closed-end, second-lien loans, other than the securitizations at issue in this matter, from January 1, 2004 through July 31, 2007 (the "Similar Risks"). Syncora opposes.

BACKGROUND

Syncora brought this action on January 28, 2009, against the Countrywide defendants. On May 6, 2010, Syncora amended its complaint to add additional claims and Bank of

America Corporation as a defendant. Syncora alleges that Countrywide fraudulently induced Syncora to insure five securitizations of mortgage loans originated by Countrywide (the "securitizations"): four securitizations of home equity mortgage loans ("HELOCs") and one securitization of "closed-end seconds" loans ("CES") (together, the "Mortgage Loans").

Syncora alleges that Countrywide made representations and warranties in the documents supporting Syncora's insuring of the securitizations at issue, that it relied upon those misrepresentations and that Syncora has been damaged as a result.

From the onset of this litigation Countrywide has sought from Syncora information related to Similar Risks. Syncora has consistently objected to producing documents concerning its financial guarantees of residential mortgage-backed securities other than the securitizations at issue here. O'Connell Affirm.,[1] ¶¶ 5-11.

On August 16, 2011, Syncora filed a motion for partial summary judgment (motion sequence number 015). Syncora sought a declaration that in order to prevail on its claims it need only prove that an alleged misrepresentation by Countrywide induced Syncora to issue financial guarantee insurance policies on terms to which it would not have agreed had it known the true facts, and that it did not need to show a causal connection between Countrywide's alleged misrepresentations and Syncora's claims made pursuant to its insurance policies. Syncora, like MBIA Insurance Corporation in *MBIA Insurance*

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[1] Affirmation of Justin O'Connell in Support of the Countrywide Defendants' Motion to Compel Production of Documents Concerning Plaintiff's Practice of Insuring Similar Risks ("O'Connell Affirm.").

Corporation v. Countrywide Home Loans, et al., Index No. 602825/08 (Bransten, J.) (hereinafter "*MBIA v. Countrywide*"), supported its argument with N.Y. Insurance Law §§ 3105 and 3106. Syncora had not asserted or raised these sections of the New York Insurance Law prior to its motion.

Following Syncora's filing for partial summary judgment based in part on NYIL §§ 3105 and 3106, Countrywide renewed its discovery requests for information relating to MBIA's insuring of Similar Risks—HELOC and CES securitizations other than those at issue in this matter. Countrywide contended, and contends in this motion, that under NYIL § 3105 it is entitled to information concerning Syncora's practice of accepting or rejecting risks similar to the securitizations at issue. O'Connell Affirm., ¶ 14. Syncora refused to provide additional documents. *Id.* at ¶ 15.

This court issued its decision on Syncora's motion for partial summary judgment on January 3, 2012. The court held that Syncora's claims may be informed by New York common law and NYIL §§ 3105 and 3106. The court found that Syncora may show materiality on its claims by showing that it relied on Countrywide's alleged misrepresentations when it decided to insure the securitizations, when, had it known the allegedly true facts, it might not have taken the same action, or would have taken action in a different manner. *See* Decision and Order of January 3, 2012 (the "1/3/12 Order").

Following the court's 1/3/12 Order, Countrywide renewed its requests to Syncora for documents related to Syncora's practice of insuring Similar Risks. Syncora again refused to produce the requested documents. O'Connell Affirm., ¶¶ 17-20.

Countrywide asserts that in order to identify Similar Risks, Countrywide must receive documents showing: (i) applications for financial guarantee insurance; (ii) transaction documents governing the deals; (iii) any credit enhancement considered or used for the deals; and (iv) information concerning the underlying mortgage loans found in loan tapes and models.

Countrywide further argues that in order to assess Similar Risks, it is entitled to documents showing: (i) credit memoranda; (ii) risk assessments fo the deals or underlying mortgage loans such as results of loan file due diligence; (iii) pricing determinations made on the premiums to be charged for the deals; and (iv) documents concerning the decision to accept or reject the application for financial guaranty insurance.

Countrywide asserts that this discovery is necessary for its defense based upon the issue of materiality.

ANALYSIS

I. Standard of Law

New York embraces a liberal discovery standard, requiring full disclosure of all evidence material and necessary to the prosecution or defense of an action. *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 376 (1991) quoting CPLR § 3101 (a). "Material and necessary" facts are those that will "will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406-07 (1968). CPLR § 3101 embodies the policy determination that

expansive discovery is encouraged in New York in order to provide fair and effective resolution of disputes on the merits. *Id.*, citing 3A Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶¶ 3101.01-3101.03. The requirements of pretrial disclosure extend not only to directly admissible proof, but to that which may lead to the disclosure of admissible proof, including that which may only be used in cross-examination. *See Polygram Holding, Inc. v. Cafaro*, 42 A.D.3d 339, 341 (1st Dep't 2007).

II. Analysis

1. Countrywide's Motion to Compel is Properly Considered

The court first notes that it is proper for the court to decide Countrywide's motion at this time. Syncora brought its motion for partial summary judgment in August of 2011. Decision was rendered, after full response, reply and oral argument, on January 3, 2012. Syncora's motion, and the court's decision thereon, considered for the first time Syncora's specific reliance on New York Insurance Law. Countrywide's current requested discovery related to New York Insurance Law has therefore not been considered by this court, and Countrywide has not abandoned a request based upon a factor which had not before been raised by Syncora.

The early 2012 conference call between the parties and the court did not result in denial of Countrywide's requests brought in this motion, and the court's principal court attorney did not, as asserted, advise the parties that the court saw no merit in Countrywide's position. *See* Plaintiff's Memorandum of Law in Opposition to the Countrywide Defendants'

Motion to Compel ("Syncora Memo."), p. 13. The court, through its principal court attorney, did provide Countrywide leave to file the instant motion.

2. Contentions

Countrywide asserts that it is entitled to documents that will allow it to identify and assess Similar Risks. Countrywide contends that under NYIL § 3105, evidence of Syncora's practice in insuring or rejecting Similar Risks is not only relevant, but is directly admissible under NYIL § 3105(c) in support of Countrywide's materiality defense. Countrywide therefore asserts that the documents it now seeks are the only manner in which it may assess Similar Risks for the January 1, 2004 through July 31, 2007 time period.

Countrywide further asserts that the documentary evidence sought will show that Syncora ignored its own underwriting policies and guidelines when it insured the securitizations and Similar Risks. Countrywide contends that it must therefore be allowed the discovery requested in this motion to enable it to show Syncora's actual practices in insuring Similar Risks.

In opposition, Syncora mirrors and expands on MBIA's arguments in *MBIA v. Countrywide*. Syncora argues that the standard of materiality stated in NYIL § 3105 is the same thereunder as defined in common law and that Syncora has already produced more than is required under NYIL § 3105, including its underwriting policies and procedures as well as documents from its consideration of over twenty-five Countrywide transactions that

Syncora did not undertake. Syncora further assert that it would be "severely" prejudiced should it be forced to produce the material which Countrywide again requests.

For an insurer to present evidence of materiality of misrepresentations under NYIL § 3105(c), the insurer "must present documentation concerning its underwriting practices, such as underwriting manuals, bulletins or rules pertaining to similar risks, to establish that it would not have issued the same policy if the correct information had been disclosed in the application." *Curanovic v. New York Cent. Mut. Fire Ins. Co.*, 307 A.D.2d 435, 437 (3d Dep't 2003).

This court has held that an insurer may present evidence of materiality of representations or misrepresentations by an insured by providing "underwriting manuals, bulletins, or rules pertaining to similar risks, which show that it would not have issued the same policy if the correct information had been disclosed in the application." *East 115th Street Realty Corp. v. Focus & Struga Bldg.*, 27 Misc.3d 1206(A), *7 (N.Y. Sup. Ct., N.Y. Co. March 9, 2010) citing *Roudneva v. Bankers Life Ins. Co. of New York*, 35 A.D.3d 580, 581 (2d Dep't 2006).

This case differs from *East 115th Street Realty Corp.* in that the insured seeks to present a defense based upon materiality. However, the court finds that the standard remains the same. Countrywide may posit its defense based on materiality through Countrywide's underwriting guidelines and the testimony of Syncora's underwriters and employees.

Countrywide bases its argument for disclosure on the assertion that New York courts require full disclosure of an insurer' practices with respect to applicants with similar histories. However, this court does not find the issue as clear cut as Countrywide asserts. For example, the recent First Department case *Ashkenazi v. AXA Equitable Life Ins. Co.*, 91 A.D.3d 576 (1st Dep't 2012) is not dispositive.

In *Ashkenazi*, the First Department held that the plaintiff had demonstrated that additional discovery was needed on whether the defendant's underwriting guidelines are complete, whether the defendant ignored its own underwriting requirements and whether certain information was material to defendants's underwriting. The First Department based its decision on trial transcripts that were not provided to this court, and are not freely available. That court ordered additional discovery, but did not order discovery of all similar policies issued by, or not issued by, the defendant.

In this matter, Syncora contends that it has produced underwriting policies and procedures, as well as documents concerning twenty-five transactions it considered undertaking with Countrywide, but did not. These twenty-five transactions are in addition to the five securitizations at issue. Countrywide asserts that Syncora's production is piecemeal, "is insufficient to its proof of materiality" and that Syncora must produce documents concerning non-Countrywide deals. Countrywide Reply Memo.,[2] p. 6. The court will not extend *Ashkenazi* as argued by Countrywide. Countrywide is in possession of

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[2] Reply Memorandum of Law in Support of the Countrywide Defendants' Motion to Compel Discovery from Plaintiff Syncora Concerning its Practice of Insuring Similar Risks ("Countrywide Reply Memo.").

relevant underwriting guidelines and procedures, testimony of persons familiar with those procedures and guidelines and has received the full files of the policies at issue. The court is not in a position to determine whether the documents pertaining to the additional twenty-five securitizations are complete. However, under *Ashkenazi,* the court does not find that Syncora's production is incomplete.

Further, instructive case law does not show that Countrywide must receive all documents concerning Syncora's insuring, or declining to insure, all similar risks. For instance, in *Sonkin Assocs., Inc. v. Columbian Mut. Life Ins. Co.*, 150 A.D.2d 764 (2d Dep't 1989), a decision upon motion for summary judgment, the Second Department stated that the defendant insurance company could prove that it would have rejected the insured's application by showing "proof as to its underwriting practices with respect to applicants with similar histories." *Id.* at 764. The court did not state that the required proof must be of comparative case studies, and the court finds nothing showing that underwriting practices and polices are insufficient to prove standards used for all applicants for insurance.

Similarly, in *Lenhard v. Genesee Patrons Co-Op Ins. Co.*, 31 A.D.3d 831 (3d Dep't 2006), the third department held that the movant therein was required to meet their burden by "clear and substantially uncontradicted evidence [citation omitted], which could include documentation showing that the insurer had refused coverage in the past under similar circumstances." *Id.* at 833. The quoted language reflects the court restating the standard of law for summary judgment, and notes that the movant could have met their burden *on*

summary judgment by showing that it had refused house insurance coverage in situations similar to the insured at issue. The Third Department did not state that the only manner in which the insured was able to meet its burden was by direct comparison, and this court will not extend the holding in that manner.

The court finds that Syncora has produced the relevant information for Countrywide to present a defense based upon materiality under common law and NYIL § 3105. The alleged materiality of statements made by Countrywide hinges on the securitizations at issue in this matter and whether any statements Countrywide made caused Syncora to insure the securitizations when, had it known the alleged true facts, it would not have insured the securitizations or would have insure them on different terms. *See Process Plants Corp. v. Beneficial Natl. Life Ins., Co.*, 53 A.D.2d 214, 216–217 (1st Dep't1976); *see also Equitable Life Assur. Soc. of U.S. v. Schusterman*, 255 A.D. 54, 56 (1st Dep't 1938). Syncora's actual practice in insuring the securitizations may be determined from the securitizations, documents, including underwriting procedures and guidelines, or lack thereof, that Syncora has produced as well as relevant witness testimony.

Further, equity does not dictate that Syncora produce eight categories of documents across securitizations that Syncora did not insure between January 1, 2004 and July 31, 2007. The burden and delay in completing discovery in this action outweighs the probative value of the material. *Andon ex rel. Andon v. 302-304 Mott Street Assocs.*, 94 N.Y.2d 740, 747 (2000).

Order

For the above reasons, it is hereby:

ORDERED that defendants Countrywide Home Loans, Inc., Countrywide Securities Corporation and Countrywide Financial Corporation's motion to compel is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 21, 2012

ENTER

Hon. Eileen Bransten, J.S.C.