Ambac Assur. Corp. v Countrywide Home Loans, Inc.
2016 NY Slip Op 31748(U)
September 20, 2016
Supreme Court, New York County
Docket Number: 652321/2015
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

AMBAC ASSURANCE CORPORATION and THE SEGREGATED ACCOUNT OF AMBAC ASSURANCE CORPORATION,

Plaintiffs,

– against –

COUNTRYWIDE HOME LOANS, INC.,

Defendant.

Index No.: 652321/2015

Seq. Nos.: 001, 002

DECISION/ORDER

This fraud action arises out of the issuance by plaintiff monoline insurer, Ambac Assurance Corporation (Ambac), of five policies insuring residential mortgage-backed securities transactions (RMBS). The five policies have since been allocated to plaintiff, The Segregated Account of Ambac Assurance Corporation (Segregated Account). The complaint pleads a sole cause of action for fraudulent inducement, based on allegations that defendant Countrywide Home Loans, Inc. (Countrywide), the loan originator, made misrepresentations and omissions that induced Ambac to issue the policies.[1] Plaintiffs now move for an order staying this action, pursuant to CPLR 2201, while they litigate an earlier-filed Wisconsin action alleging the same fraud claim against the same defendant (the Wisconsin Action). Countrywide opposes plaintiffs' motion for a stay and separately moves to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), (7), and 3016 (b) on the grounds, among others, that the action was untimely commenced

[1] The alleged misrepresentations and omissions concern Countrywide's origination practices and the underwriting guidelines it used to assess the quality of loans, as well as the quality and characteristics of the underlying mortgage loans, including loan to value ratios and owner occupancy rates. (See e.g. Compl. ¶¶ 49, 64.)

and that the complaint is defectively pleaded. This decision addresses plaintiffs' motion for a stay.[2]

Relevant Facts

Plaintiffs commenced the Wisconsin Action on December 30, 2014, six months prior to their commencement of the instant action. The fraudulent inducement claim asserted by plaintiffs in that action is substantively identical to the claim pleaded in the instant action. (See generally Compl., The Segregated Account of Ambac Assur. Corp. v Countrywide Home Loans, Inc., Index No. 14CV3511, filed Dec. 30, 2014 [Wis Cir Ct, Dane County], annexed as Exh. 2 to Aff. of Peter W. Tomlinson [Counsel for Pls.] In Supp. [Tomlinson Aff.].) In February 2015, Countrywide moved in the Wisconsin Action to dismiss the complaint, arguing, among other things, that it is not subject to personal jurisdiction in Wisconsin. (Wis. Countrywide Memo. In Supp., at 11-22 [Tomlinson Aff., Exh. 3].) Countrywide also argued that the Wisconsin borrowing statute requires the Wisconsin court to apply the New York statute of limitations, under which plaintiffs' claim is time-barred. (Id. at 26.) In a decision on the record at the conclusion of oral argument, the Wisconsin court held that the case would be dismissed, without prejudice, for lack of personal jurisdiction.[3] (Wis. Tr. of Oral Arg. on June 23, 2015 [Wis. Tr.], at 72-74 [Tomlinson Aff., Exh. 4].) The court accordingly did not reach the timeliness issue.

Plaintiffs appealed the trial court's decision. They also commenced the instant action on June 30, 2015, by filing a Summons With Notice (NYSCEF No. 1), assertedly "to preserve their rights under the New York statute of limitations should the Wisconsin courts refuse to hear their

[2] By Order of the Administrative Judge, dated May 23, 2013, this court was designated to hear "all actions hereafter brought in this court alleging misrepresentation or other wrong in connection with or arising out of the creation or sale of residential mortgage-backed securities."

[3] The Wisconsin court subsequently issued an order, dated July 2, 2015, to that effect. (Tomlinson Aff., Exh. 5.)

claim on the merits." (Pls.' Memo. In Supp., at 1.) Following the submission of the instant motions to stay and to dismiss this action, the Court of Appeals of Wisconsin reversed the trial court's decision in the Wisconsin Action and remanded for further proceedings. The appellate court concluded, based on Wisconsin Supreme Court precedent, that Countrywide had consented to general personal jurisdiction by maintaining a registered office and registered agent in the state. (The Segregated Account of Ambac Assur. Corp. v Countrywide Home Loans, Inc., 2016 WL 3448707, * 1 [Wis Ct App June 23, 2016, No. 2015AP1493].)[4]

Contentions

Plaintiffs contend that a stay of this action in favor of the Wisconsin Action "would promote judicial economy and avoid potentially inconsistent rulings." (Pls.' Memo. In Supp., at 1.) According to plaintiffs, "a stay would promote judicial comity by allowing the first-filed Wisconsin Action to proceed to judgment, which may eliminate the need for this Court to address Plaintiffs' claims at all." (Id. at 5.) Plaintiffs further contend that "the absence of a stay would prejudice Plaintiffs because it could deprive them of the benefit of litigating in their chosen forum." (Pls.' Reply Memo., at 1.) More specifically, plaintiffs argue that, "[i]f this Court moves forward to decide the merits of the case before the Wisconsin courts do so, the winner here is sure to argue that further litigation in Wisconsin is barred by res judicata, effectively mooting the Wisconsin Action." (Id. at 5.)

Countrywide contends that plaintiffs are engaged in "ongoing gamesmanship" and "stall tactics to avoid a ruling on the New York statute of limitations," under which, Countrywide contends, the action is time-barred. (Def.'s Memo. In Opp., at 1.) According to Countrywide, a stay will not promote judicial efficiency or prevent unnecessary costs to the parties, given that

[4] By order dated July 14, 2016 (NYSCEF No. 84), this court permitted the parties to file supplemental briefs addressing the impact of this reversal on plaintiffs' motion for a stay.

the only issue presently being litigated in Wisconsin concerns personal jurisdiction. (See id. at 9-10.) Countrywide further argues that this court "possesses a greater familiarity and expertise with the key legal and factual issues" involved in this RMBS fraud action than do the Wisconsin courts. (See id. at 10 [internal quotation marks and citation omitted].) In its supplemental memorandum, Countrywide also asserts that it has petitioned the Wisconsin Supreme Court for review of the appellate court's personal jurisdiction decision, and that the Wisconsin trial court is thus unlikely to reach the merits of plaintiffs' claim until sometime next year. (Def.'s Suppl. Memo., at 2, 3-4.) Countrywide argues that this court "should decline to stay this case in perpetual deference to Wisconsin proceedings over which it has no control." (Id. at 4.)

Discussion

CPLR 2201 provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." The determination as to whether to grant a stay involves an exercise of discretion. (GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C., 140 AD3d 582 [1st Dept 2016].) Generally, however, a stay will not be granted unless "[t]he issues, relief sought, and parties in the two actions are substantially identical." (E.g. OneBeacon Am. Ins. Co. v Colgate-Palmolive Co., 96 AD3d 541, 541 [1st Dept 2012]; AIG Fin. Prods. Corp. v Penncara Energy, LLC, 83 AD3d 495, 495-496 [1st Dept 2011].)[5] Courts also consider the potential prejudice to the parties

[5] There is some authority that a stay is justified only where there is "complete identity of the parties, the causes of action and the judgment sought." (952 Assocs., LLC v Palmer, 52 AD3d 236, 236-237 [1st Dept 2008].) However, there is substantial authority holding that a stay is provident exercise of discretion, even absent complete identity of the parties and issues where there are "overlapping issues and common questions of law and fact, and the determination of the prior action may dispose of or limit issues which are involved in the subsequent action." (Belopolsky v Renew Data Corp., 41 AD3d 322 [1st Dept 2007] [internal quotation marks and citations omitted]; accord Uptown Healthcare Mgt., Inc. v Rivkin Radler LLP, 116 AD3d 631, 631 [1st Dept 2014] [affirming stay of action pending motion in related federal action even though "there is not complete identity of parties and claims," as there was a common, dispositive question of law and fact]; National Mgt. Corp. v Adolfi, 277 AD2d 553, 554-555 [3d Dept 2000] [finding sufficient similarity between New York foreclosure action and federal fraud action "such that the goals of preserving judicial resources and preventing an inequitable result are properly served" by a stay]; Goodridge v Fernandez, 121 AD2d 942, 945 [1st Dept 1986] [holding that "[t]here is similarity of parties since it is

resulting from ordering or denying a stay. (See OneBeacon, 96 AD3d at 541 [holding that stay of New York action pending related state court action was proper where "[t]he duplication of effort, waste of judicial resources, and possibility of inconsistent rulings in the absence of a stay outweigh[ed] any prejudice to plaintiff [there, the party opposing the stay] resulting from" the stay]; accord Uptown Healthcare Mgt., Inc., 116 AD3d at 631 [citing same factors in upholding stay of New York action pending resolution of dispositive legal issue in federal court action].) "[I]ssues of comity, orderly procedure, and judicial economy" are related factors that will be considered where the other action is pending in another state or in a federal jurisdiction. (E.g. Trinity Prods., Inc. v Burgess Steel LLC, 18 AD3d 318, 319 [1st Dept 2005]; Asher v Abbott Labs., 307 AD2d 211, 211 [1st Dept 2003].)

In determining whether to grant stays pursuant to CPLR 2201, the courts also consider the order in which the actions were commenced. (Trinity Prods., Inc., 18 AD3d at 319; Asher, 307 AD2d at 211.) In the analogous context of motions to dismiss pursuant to CPLR 3211 (a) (4) on the ground of another action pending, courts have more explicitly articulated a "first-in-time rule." Under this rule, "'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." (Ace Property & Cas. Ins. Co. v Federal-Mogul Corp., 55 AD3d 479, 479 [1st Dept 2008], quoting White Light Prods., Inc. v On The Scene Prods., Inc., 231 AD2d 90, 96-97 [1st Dept 1997]. See also City Trade & Indus., Ltd. v New Cent. Jute Mills Co., Ltd., 25 NY2d 49, 58 [1969] [applying the same first-in-time rule to a defendant's request for an order "staying" (i.e.

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not necessary that the parties in the instant action and the [related] Federal action be identical or that the respective parties in each action assume identical positions"].) In any event, it is undisputed that there is complete identity of the parties and claims in the instant action and those in the Wisconsin Action.

enjoining) the plaintiff from proceeding against the defendant in an allegedly related federal action].)

This general rule is "'not to be applied in a mechanical way'" (AIG Fin. Prods. Corp., 83 AD3d at 496, quoting White Light Prods., Inc., 231 AD2d at 97), "especially when commencement of the competing actions has been reasonably close in time." (Flintkote Co. v American Mut. Liab. Ins. Co., 67 NY2d 857 [1986], affg for reasons stated below 103 AD2d 501, 505 [2d Dept 1984].) Thus, courts have considered whether the first-in-time action was commenced "preemptively," in order "to deprive [the other party] of its choice of forum and to gain a tactical advantage." (AIG Fin. Prods. Corp., 83 AD3d at 496; White Light Prods., Inc., 231 AD2d at 98-99; L-3 Communications Corp. v SafeNet, Inc., 45 AD3d 1, 8-10 [1st Dept 2007].) Courts also have considered whether New York or the alternative jurisdiction has a "significant nexus" to the dispute." (See AIG Fin. Prods. Corp., 83 AD3d at 496.) The "inquiry is similar to that undertaken in applying the doctrine of forum non conveniens – whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system." (Flintkote Co., 103 AD2d at 506; see also Ace Property & Cas. Ins. Co., 55 AD3d at 480 [in declining to order stay, the court reasoned that the plaintiffs (the parties opposing the stay) "fail to show that the first-filed New Jersey action is vexatious, oppressive or was instituted to obtain some unjust advantage, that New York's interests in this dispute predominate over New Jersey's, or other reason for deviating from the generally followed first-in-time rule"].)

Applying these discretionary factors to the instant case, the court holds that a stay is warranted. Given the identity of the claims and the parties in the two actions, there can be no dispute that resolution of the merits of the Wisconsin Action would dispose of the fraudulent

inducement claim in the instant action. Although Countrywide's objection to personal jurisdiction has delayed litigation of the merits in Wisconsin, there is a significant risk, moving forward, of duplication of effort, waste of resources, and inconsistent decisions. Even if this court were to deny a stay and to dismiss plaintiffs' claim on timeliness grounds, plaintiffs' inevitable appeal would place the New York appellate courts in the position of reviewing the issues at or around the same time as the Wisconsin courts.

Principles of comity also favor a stay. As previously noted, the Wisconsin Action was commenced six months prior to the instant suit. The parties have previously briefed the key threshold issues there. The parties and the Wisconsin courts have thus already expended significant resources in addressing plaintiffs' claim.

Countrywide has not articulated any special circumstances or prejudice that outweighs application of the first-in-time rule in these circumstances. The Wisconsin Action was not commenced preemptively in order to deprive Countrywide of its choice of forum, as Countrywide, not surprisingly, does not claim that it announced an intention to commence, or would have commenced, an action in New York to test the timeliness of plaintiffs' fraud claim. Countrywide complains of plaintiffs' gamesmanship in commencing their action in Wisconsin in order to take advantage of Wisconsin's longer statute of limitations. Countrywide itself, however, seeks a tactical advantage in having the statute of limitations issue decided in this New York action, as it is undisputed that New York's statute of limitations for fraud claims is shorter than Wisconsin's.[6] Significantly also, although Countrywide argues here that "[a]djudication of

[6] Countrywide has argued on its motion to dismiss that the fraud claim here is substantially similar to fraud claims that this court has dismissed in other RMBS actions on timeliness grounds. (See IKB Intl. S.A. v Morgan Stanley, 2014 WL 5471650 [Sup Ct, NY County, Oct. 28, 2014, No. 653964/2012], affd on other grounds 142 AD3d 447 [1st Dept 2016]; Commerzbank AG London Branch v UBS AG, 2015 WL 3857321 [Sup Ct, NY County, June 17, 2015, No. 654464/2013]; Deutsche Zentral Genossenschaftsbank AG v Credit Suisse, No., 650967/2013, Decision on the Record, May 1, 2014; Deutsche Zentral-Genossenschaftsbank AG, New York Branch v Morgan Stanley, No.

this suit by this Court will not in any way interfere with the Wisconsin courts" (Def.'s Memo. In Opp., at 8), Countrywide argued before the Wisconsin trial court that a dismissal of this action based on the New York statute of limitations would preclude plaintiffs from returning to Wisconsin to litigate. (See Wis. Tr., at 37-38.)

Nor is a stay unwarranted under these circumstances in which plaintiffs commenced this action solely to preserve their ability to sue in this state, should the jurisdictional issue ultimately be decided against them in Wisconsin. To the extent that New York authorities have addressed this issue, they have recognized that New York permits plaintiffs to bring a "kind of holding action" as a "precautionary back-up to an action elsewhere, lest the statute of limitations or a problem of jurisdiction be held to bar the action in that other place . . . ." (Siegel, NY Prac § 262 [5th ed]; see SafeCard Servs., Inc. v American Exp. Travel Related Servs. Co., Inc., 203 AD2d 65, 66 [1st Dept 1994] [holding that New York action should have been stayed rather than dismissed pursuant to CPLR 3211 (a) (4), pending resolution of action in another state, the court noting that "the within action was commenced for the purpose of protecting plaintiff from losing its right to pursue its claim in New York should a prior action for the same relief be dismissed by the Florida courts"]; Flintkote Co., 103 AD2d at 507-508.)

The court rejects Countrywide's assertion that this litigation should take priority over the Wisconsin Action because "New York possesses greater familiarity and expertise with the key legal and factual issues . . . namely, the timeliness of [plaintiffs'] fraudulent inducement claims." (Def.'s Memo. In Opp., at 10.) Although this court has extensive experience in applying the New York statute of limitations to RMBS fraudulent inducement claims brought in this state,

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654035/2012, Decision on the Record, June 10, 2014.) The court reaches no determination on this motion for a stay as to the timeliness of plaintiffs' claim under the New York statute of limitations.

Wisconsin has both the authority and capacity to apply the New York statute of limitations if called upon to do so.[7] To the extent that Countrywide asserts that New York has a greater interest than Wisconsin in the litigation, or that its interests "predominate" over Wisconsin's (see Ace Property & Cas. Ins. Co., 55 AD3d at 480, quoted supra), Countrywide fails to identify Ambac's contacts with New York or to make any factual showing in support of this claim.

Countrywide correctly points out that plaintiffs have brought numerous other RMBS actions in New York, including RMBS actions against Countrywide. Countrywide also claims that in December 2014, when plaintiffs filed the Wisconsin Action, they also filed a New York action (Sup Ct, NY County, Index. No. 653979/2014), and that the claims in the New York action benefit from a tolling agreement between the parties, whereas the parties dispute whether the tolling agreement applies to the claims in the Wisconsin Action. (Def.'s Memo. In Opp., at 3-4.) Contrary to Countrywide's contention, however, there is nothing inherently vexatious or improper in plaintiffs seeking to litigate the former action in Wisconsin, a state which affords a fraud cause of action a longer limitations period than does New York. The recent reversal by the Wisconsin Court of Appeals of the lower court's dismissal indicates that plaintiffs have a colorable basis on which to litigate their claim there.

Finally, the court rejects Countrywide's assertion that a stay pending resolution of the Wisconsin Action is the type of "open-ended" or "perpetual" stay disfavored by New York courts. (Defs.' Suppl. Memo., at 4.) This case is not analogous to Haenel v November & November (144 AD2d 298 [1st Dept 1988]), relied upon by Countrywide. In Haenel, this Department vacated an order staying an action pending the expiration of an administrative order

[7] The parties dispute whether Wisconsin's borrowing statute will apply to require the Wisconsin court to apply New York's statute of limitations as well as Wisconsin's. The court makes no finding on this issue, as it has not been briefed here. The court notes, however, that state courts routinely are called upon to apply the laws of other states.

of suspension against the defendants' malpractice insurer. The court noted that the stay had already been in effect for two years, the order of suspension had not been lifted when expected, and the "delay threaten[ed] to make it impossible for [the plaintiffs] to reconstruct facts necessary to prove their case . . . ." (Id. at 299.) No such concerns are raised in this case. In the event that the Wisconsin courts hold that the substantive issues in the Wisconsin and New York actions are not determinable in Wisconsin, or that plaintiffs fail to promptly appeal such a holding, this action may proceed in this court.

It is accordingly hereby ORDERED that the motion of plaintiffs Ambac Assurance Corp. and The Segregated Account of Ambac Assurance Corp. for an order staying this action pursuant to CPLR 2201 is granted to the extent that it is

ORDERED that this action, including the pending motion by defendant Countrywide Home Loans, Inc. to dismiss the complaint, is stayed, pursuant to CPLR 2201, pending the resolution of the action entitled The Segregated Account of Ambac Assur. Corp. v Countrywide Home Loans, Inc. (No. 14CV3511, filed Dec. 30, 2014 [Wis Cir Ct, Dane County]).

This constitutes the decision and order of the court.

Dated: New York, New York
September 20, 2016

MARCY FRIEDMAN, J.S.C.