

Royal Park Invs. SA/NV v Morgan Stanley, Morgan Stanley & Co. LLC

2017 NY Slip Op 30732(U)

April 12, 2017

Supreme Court, New York County

Docket Number: 653695/2013

Judge: Charles E. Ramos

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

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ROYAL PARK INVESTMENTS SA/NV,

Plaintiff,

Index No. 653695/2013

- against -

MORGAN STANLEY, MORGAN STANLEY & CO. LLC,
MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS
LLC, MORGAN STANLEY ABS CAPITAL I, INC.,
and MORGAN STANLEY CAPITAL INC.,

Defendants.

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Hon. C. E. Ramos, J.S.C.:

Defendants¹ jointly move to dismiss plaintiff Royal Park Investments SA/NA's ("RPI") amended complaints in multiple unconsolidated actions pursuant to CPLR 3211(a)(1), (3), (5), and (7) ("MS Amended Complaint") (Index No. 653695/2013), ("DB Amended Complaint") (Index No. 652732/2013), ("CS Amended Complaint") (Index No. 653335/2013) ("UBS Amended Complaint") (Index No. 653901/2013) (Collectively, the "Amended Complaints").

¹ Defendants are Morgan Stanley, Morgan Stanley & Co. LLC, Morgan Stanley Mortgage Capital Holdings LLC, Morgan Stanley ABS Capital I Inc., and Morgan Stanley Capital I Inc. ("Morgan Stanley Defendants"), Credit Suisse AG, Credit Suisse Securities (USA) LLC, DLJ Mortgage Capital, Inc. and Credit Suisse First Boston Mortgage Securities Corp. ("Credit Suisse Defendants"), Deutsche Bank AG, Deutsche Bank Securities Inc., DB Structured Products, Inc., Deutsche Alt-A Securities, Inc. and ACE Securities Corp. ("Deutsche Bank Defendants"), UBS AG, UBS Securities LLC, Mortgage Asset Securitization Transactions, Inc. and UBS Real Estate Securities, Inc. ("UBS Defendants"), Merrill Lynch, Pierce, Fenner & Smith Inc., Merrill Lynch & Co, Inc., Merrill Lynch Mortgage Lending, Inc., Merrill Lynch Mortgage Investors, Inc., Bank of America Corporation, Bank of America Securities LLC and Banc of America Funding Corporation ("Merrill Lynch Defendants").

Pursuant to a stipulation, the parties agreed to a common briefing schedule limited to the issue of RPI's standing to sue as assignee of claims of the original purchasers of securities.

The Defendants motions to dismiss are consolidated for disposition, and granted in their entirety for the reasons set forth below.

Background

The following factual allegations are set forth in the Amended Complaints in each action, and for the purposes of this motion are accepted as true.

The Parties

RPI is a limited liability company incorporated under the laws of Belgium, with its principal place of business in Brussels, Belgium.

Fortis Bank ("Fortis Bank") is a Belgian limited liability company with its principal place of business in Brussels, Belgium. Fortis Bank was the banking arm of Fortis Holdings SA/NV ("Fortis Holdings").

RPI is a special purpose vehicle created to acquire a portion of Fortis Bank's structured credit portfolio ("RPI Assets") and to minimize the downside risk and maximize recoveries on the RPI Assets (MS Amended Complaint, ¶ 4).

According to the Amended Complaints, RPI was created by the Belgian State, BNP Paribas ("BNPP"), and Fortis Holdings, prior to BNPP's acquisition of Fortis Bank in 2008.

Defendant Morgan Stanley ("Morgan Stanley") is a global financial services firm and financial holding company, and Morgan Stanley Capital Holdings LLC, Morgan Stanley ABS Capital I, Inc.,

and Morgan Stanley Capital Inc., are its wholly-owned subsidiaries (MS Amended Complaint, ¶¶ 12-17).

Defendant UBS AG ("UBS AG") is the parent corporation of all of the other UBS Defendants. UBS AG serves as a global provider of wealth management, individual bank, and investment banking services, and is based in Zurich, Switzerland (UBS Amended Complaint, ¶ 12).

Defendant Deutsche Bank AG ("Deutsche Bank") raises money in debt and equity markets, allowing the proceeds to fund the rest of its operations. Deutsche Bank is the parent company of the other Deutsche Bank Defendants (DB Amended Complaint, ¶ 12).

Defendant Credit Suisse AG ("Credit Suisse") is a multi-national company that provides international banking and financial services. Credit Suisse is the parent company of Credit Suisse Defendants (CS Amended Complaint ¶¶ 12-13).

Background

This action arises out of RPI's purchase of residential mortgage-backed securities ("RMBS"). The RMBS at issue are referred to as certificates ("Certificates"), which back a large number of residential real estate loans, entitling certificate holders to receive monthly distributions from payments made on the loans (MS Amended Complaint, ¶ 1).

The claims at issue arise out of the sale of 146 certificates in 102 different offerings, which were originally purchased by Fortis Bank, Fortis Bank SA/NV Cayman Islands, affiliates of Fortis Bank S.A./N.V., or Scaldis Capital Limited ("Scaldis"), a special purpose commercial paper conduit initiated, sponsored, and fully controlled by Fortis Bank,

between January 12, 2005 and July 27, 2007 (MS Amended Complaint, ¶ 1).

Fortis Bank was a sophisticated financial institution that extensively invested in the RMBS market. In 2007, Fortis Bank began to experience significant financial trouble, as a result of its exposure to U.S. structured credit assets. On May 12, 2009, RPI, as buyer, Fortis Bank, and several of Fortis Bank's subsidiaries, and Societe Anonyme, as sellers, entered into a Portfolio Transfer Agreement ("PTA"), wherein RPI acquired from Fortis Bank and its subsidiaries 146 certificates from 102 different offerings, all of which were allegedly structured, marketed, and/or sold by Defendants from 2005 to 2007. It is undisputed that Scaldis was not a party to the PTA.

According to the Amended Complaints, RPI acquired the RPI Assets for approximately €3.5 billion more than the assets' market value (MS Amended Complaint, ¶ 10). RPI alleges that the Certificates were already severely damaged on or before the date that they were transferred to RPI (MS Amended Complaint, ¶ 10).

In its Amended Complaints, RPI maintains that Defendants' offering documents failed to disclose and affirmatively misrepresented material information regarding the nature and credit quality of the Certificates and underlying loans (MS Amended Complaint, ¶ 3). RPI further alleges that Defendants used offering documents to defraud RPI and its assignors into purchasing "investment grade" Certificates at inflated prices (*Id.*).

On July 27, 2012, RPI, as an alleged assignee of litigation rights, commenced an action against the Merrill Lynch Defendants

alleging fraud, fraudulent inducement, aiding and abetting, negligent misrepresentation, and rescission.

On March 15, 2013, the Merrill Lynch Defendants moved to dismiss the complaint.

Between August and November 2013, RPI commenced an action against the remaining Defendants asserting six causes of action sounding in fraud and negligent misrepresentation.

On December 1, 2015, RPI amended its complaints and agreed to produce the PTA to the Defendants. RPI purports to be an assignee of Fortis Bank with the same rights in the Certificates as Fortis.

Standing

Defendants move to dismiss the Amended Complaints on the ground that RPI lacks standing to maintain these actions because the PTA did not assign RPI any non-contractual claims.

Defendants also contend that RPI has failed to establish that RPI's assignor, Fortis Bank, ever held any claims relating to the Scaldis Certificates, which was not a party to the PTA that purportedly effectuated an assignment to RPI. According to Defendants, Fortis Bank could not possibly assign claims that it did not own.

Defendants allege that standing is a procedural matter to be determined under New York law. Defendants also maintain that although the PTA is governed by Belgian law, Belgian law is materially identical to New York law, and therefore New York law should apply.

In response, RPI alleges that, pursuant to governing Belgian law, all claims, including non-contractual claims, were assigned

to RPI through the PTA. RPI further asserts that a conflicts of law issue exists due to the significant difference between New York law and Belgian law with regard to the transfer of legal claims.

Section 2.1 of PTA provides that the "Sellers hereby irrevocably sell, assign, transfer, and deliver to the Buyer, and the Buyer hereby irrevocably purchases and acquires from the Sellers, all of the Seller's *right, title, and interest in and to the Portfolio Property*" (Rouhandeh Aff., Ex 6, p. 4) (emphasis added).

Portfolio Property is defined as "all of the Instruments and all of the Portfolio Contractual Rights and Obligations" (Rouhandeh Aff., Ex 6, p. 3). Portfolio Contractual Rights and Obligations are defined as "any right or obligation of any of the Sellers under any agreement relating to an Instrument" (Rouhandeh Aff., Ex 6, p. 3).

Section 10A of the Governing Obligations portion of the PTA provides that "[t]his agreement and the legal relations among the parties shall be governed by and construed in accordance with Belgian law" (Rouhandeh Aff., Ex 6, p. 16).

RPI alleges that the thirty-six certificates originally owned by Scaldis were transferred to Fortis Bank prior to the execution of the PTA (Frans Decl., ¶¶ 10-15) ("Scaldis Certificates"). Therefore, according to RPI, the PTA also transferred the Scaldis Certificates.

In addition, on April 30, 2013, BNPPF, Fortis Bank's successor, sent a letter to RPI, stating, in relevant part ("April 2013 Letter"):

BNPPF hereby confirms that it intended and did transfer and assign to RPI all litigation rights, causes of action and claims arising out of, in connection with, and/or relating to such securities and other assets purchased by and transferred to RPI under the PTA... including without limitation... any breach of duty claims, tort claims, malpractice claims, fraud claims, negligent misrepresentation claims, securities law claims or any other legal claims.

(Rouhandeh Aff., Ex. 7).

At the outset, The question of whether RPI has capacity to sue is a procedural matter (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 281 [1st Dept 2007]). Under New York law, procedural issues, such as standing and the capacity to sue, are governed by the law of the forum (*Mertz v Mertz*, 271 NY 466, 473 [1936]). As such, this Court need not engage in a conflicts of law analysis.

Even if New York law did not automatically apply to the issue of standing, RPI has failed to sufficiently establish that Belgian law governs the instant action. RPI's argument that the PTA expressly provides that the instant litigation is to be governed by Belgian law is without merit (*Verbist Opinion*, ¶ 7). As previously stated, Section 10(d) of the PTA provides that the PTA and the legal relations among the parties shall be governed by Belgian law. However, it is undisputed that Defendants were not a party to the PTA, and that RPI is the only party of the PTA involved in the instant action.

As such, Section 10(d) of the PTA has no bearing on the applicability of Belgian law to the instant matter. The Court is not persuaded by RPI's flawed argument that because Belgian law governs the PTA, it also governs Defendants' standing to challenge RPI's interpretation of that Agreement.

Pursuant to CPLR 3211[a][3], "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has not legal capacity to sue."

It is well settled in New York, that the right to assert a fraud claim related to a contract or note does not automatically transfer with the respective contract or note (*Dexia SA/NV v Morgan Stanley*, 135 AD3d 497, 497 [1st Dept 2016]). There must be some language that evinces an intent to transfer fraud claims (*Commonwealth of Pennsylvania Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc.*, 25 NY3d 543, 550 [2015]).

The threshold issue of standing hinges on this Court's interpretation of the PTA. A complete, clear, and unambiguous written agreement must be enforced according to the plain meaning of its terms (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Extrinsic evidence demonstrating the intent of the parties should only be considered if the agreement is ambiguous (*Nachem v Property Mkts. Group, Inc.*, 82 AD3d 573, 573 [1st Dept 2011]).

Here, it is undisputed that the PTA transfers to RPI all *rights, title, and interest in and to the Portfolio Property*, which is expressly limited to contractual rights and obligations (Rouhandeh Aff., Ex 6, p. 4). RPI has failed to persuade this Court that the plain terms of the RTA are ambiguous. Absent evidence of ambiguous language, this Court need not look beyond the four corners of the PTA to determine the issue of standing (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

There is simply no language in the documents evidencing an outward expression of an intent to assign the tort claims at issue. Contrary to RPI's assertions, the above-mentioned language of *rights, title, and interest in and to the Portfolio Property* reveals no verifiable intention to include tort claims (accord *Sealink Funding Ltd. v Stanley*, 133 AD3d 458, 459 [1st Dept 2015]).

RPI cannot rely on extrinsic evidence such as the April 2013 Letter to create an ambiguity in the PTA when none exists (*Sterling Resources Intl., LLC v Leerink Swann, LLC*, 92 AD3d 538, 539 [1st Dept 2012]). As sophisticated parties represented by counsel that are routinely involved in complex financial transactions, the Court can presume that if they intended to assign non-contractual claims, they would have done so through express language (*Sealink Funding v UBS AG*, 44 Misc3d 1209[A] [Sup Ct, NY County 2014]).

Thus, this Court will not consider the April 30 Letter, because extrinsic evidence cannot be offered to alter or add to the plain terms of the PTA (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]).

Additionally, this Court finds RPI's argument that the April 2013 Letter expressly confirms that the parties to the PTA intended to transfer fraud claims to be without merit. As previously mentioned, the April 2013 letter, written after the commencement of litigation, is inadmissible to alter the clear and unambiguous terms of the PTA (*One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1 [1st Dept 2011]).

The April 2013 Letter appears to be an attempt to salvage the litigation after the Merrill Lynch Defendants first moved to dismiss RPI's claims on March 15, 2013 for lack of standing. In addition, the April 2013 letter was not signed by all of the parties to the PTA. Regardless, analyzing such extrinsic evidence is not warranted, as interpretation of an unambiguous contract provision is a function of the court (*Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 68 [1st Dept 1999]).

This Court has also evaluated RPI's additional evidence, including a press release from April 26, 2009 ("April Press Release"), and finds that they do not provide any guidance as to the issue of standing (*Olts Aff.*, Ex. 12).

RPI has failed to show that Scaldis assigned its extracontractual claims as to the Scaldis Certificates to Fortis Bank, who could have subsequently assigned it to RPI.

Most significantly, the precise issue of whether Scaldis validly transferred the Scaldis Certificates to Fortis Bank has been litigated and decided on the merits (*In Re Countrywide Financial Corp. v Mortgage-Backed Securities Litigation*, 2014 WL 3529677 [CDCA 2014]). Defendants argue that the doctrine of collateral estoppel bars RPI from relitigating the validity of the transfer of the Scaldis Certificates because it was previously decided against RPI in a proceeding in which it had a full and fair opportunity to litigate (*Feinberg v Boros*, 99 AD3d 219, 226 [1st Dept 2012]).

In *In Re Countrywide*, the District Court held that RPI failed to establish standing on the Scaldis Certificates (*Id.*) The court reasoned that absent an explicit written agreement, it

cannot imply a transfer of fraud claims, particularly when dealing with such sophisticated parties (*Id.* at 3). Because this precise issue has already been litigated and decided on the merits, the Court need not address the validity of the transfer of the Scaldis Certificates.

Notwithstanding the *In Re Countrywide* decision, RPI has failed to establish that the claims related to the Scaldis Certificates were transferred to Fortis Bank and subsequently to RPI. RPI's argument that Belgian law does not require a written assignment to establish that the Scaldis Certificates were transferred by Scaldis to Fortis Bank prior to the PTA is irrelevant and unpersuasive (Verbist Opinion, ¶ 70).

Contrary to RPI's argument, absent an express written assignment of fraud claims, the Court finds that RPI lacks standing to sue for losses stemming from the Scaldis Certificates, regardless of whether Fortis Bank had an ownership interest in Scaldis (Verbist Opinion, ¶ 70). Even if the Scaldis Certificates were validly transferred, RPI's claims would still fail for lack of standing, as the PTA did not assign the right to assert fraud claims.

The Court has evaluated RPI's remaining arguments regarding the applicability of Belgian law and finds them unavailing. Accordingly, it is

ORDERED in action bearing Index No. 653695/2013, Morgan Stanley Defendants' motions to dismiss is granted in its entirety; and the Amended Complaint is dismissed with prejudice with costs and disbursements to Morgan Stanley Defendants as taxed by the Clerk of the Court; and it is further ordered

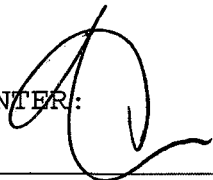
ORDERED in action bearing Index No. 652732/2013, Deutsche Bank Defendants' motions to dismiss is granted in its entirety; and the Amended Complaint is dismissed with prejudice with costs and disbursements to Deutsche Bank Defendants as taxed by the Clerk of the Court; and it is further ordered

ORDERED in action bearing Index No. 653901/2013, UBS Defendants' motions to dismiss is granted in its entirety; and the Amended Complaint is dismissed with prejudice with costs and disbursements to UBS Defendants as taxed by the Clerk of the Court; and it is further ordered

ORDERED in action bearing Index No. 653335/2013, Credit Suisse Defendants' motions to dismiss is granted in its entirety; and the Amended Complaint is dismissed with prejudice with costs and disbursements to UBS Defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: April 12, 2017

ENTER: 

J.S.C.

CHARLES E. RAMOS