Home Equity Mtge.Trust Series 2006-1 v DLJ Mtge. Captial, Inc.
2014 NY Slip Op 31923(U)
July 16, 2014
Supreme Court, New York County
Docket Number: 156016/2012
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

HOME EQUITY MORTGAGE TRUST SERIES 2006-1, HOME EQUITY MORTGAGE TRUST 2006-3, and HOMEEQUITY MORTGAGE TRUST 2006-4, Plaintiffs, -against- DLJ MORTGAGE CAPITAL, INC., and SELECT PORTFOLIO SERVICING, INC., Defendants.	Index No. 156016/2012 DECISION AND ORDER Motion Sequence No. 010
HOME EQUITY MORTGAGE TRUST SERIES 2006-5, By U.S. BANK NATIONAL ASSOCIATION, solely in its Capacity as Trustee, Plaintiff, -against- DLJ MORTGAGE CAPITAL, INC., and SELECT PORTFOLIO SERVICING, INC., Defendants.	Index No. 653787/2012 DECISION AND ORDER Motion Sequence No. 008

MELVIN L. SCHWEITZER, J.:

Home Equity Mortgage Trust Series (HEMT) 2006-1, HEMT 2006-3, HEMT 2006-4, HEMT 2006-5, and U.S. Bank National Association (U.S. Bank), acting solely in its capacity as Trustee (together, plaintiffs or Home Equity) move to compel DLJ Mortgage Capital, Inc. (DLJ) and Select Portfolio Servicing, Inc. (SPS) (together, defendants) to produce documents and answer interrogatories.

Background

DLJ, a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. (Credit Suisse), is primarily engaged in the purchase of mortgage loans. SPS is also a wholly owned subsidiary of Credit Suisse and is the servicer for HEMT 2006-3 and HEMT 2006-4 and a Special Servicer for HEMT 2006-1 and HEMT 2006-3. The HEMT Trusts contain residential mortgage-backed securities (RMBS) which were securitized and sold by DLJ.

When DLJ sold securities in the HEMT Trusts, it represented that all loans in the trusts met applicable underwriting guidelines. DLJ also guaranteed in its Servicing Agreement (PSA) that if any loans were found in breach of any representation or warranty, it would rectify the breach or repurchase the affected loans. Section 2.03(g) of the PSA states, "the Seller hereby covenants that within 120 days of the earlier of discovery or its receipt of written notice from any party of a breach" it shall cure that breach or repurchase the affected loans.

In 2011, DLJ received the first of several letters from plaintiffs requesting that DLJ repurchase loans from the HEMT Trusts. The letter accused DLJ of breaching several representations and warranties with respect to the loans at issue. DLJ retained Orrick, Herrington & Sutcliffe LLP (Orrick) to handle the repurchase demands made by plaintiffs and advise DLJ of any legal liability that may result. Orrick performed a repurchase analysis in relation to plaintiffs' demands in order to advise DLJ whether it should repurchase the loans. After performing the analysis, Orrick advised DLJ that it should not repurchase the loans. DLJ followed Orrick's advice. Shortly after, plaintiffs instituted the above-captioned actions.

In early 2013, plaintiffs served requests for production seeking documents regarding Defendants' responses to plaintiffs' repurchase requests. DLJ refused to produce any repurchase analysis on the basis that it is protected from disclosure by the attorney-client privilege and the

attorney work product doctrine. Plaintiffs intend to prove their claim that DLJ breached representations and warranties by re-underwriting a sample of the loans in the HEMT Trusts. On November 19, 2013, this court approved plaintiffs' use of sampling to "prove liability and damages."

On March 25, 2014, plaintiffs served defendants with interrogatories, requesting, for the 2,000 loans in the plaintiffs' proposed sample, that defendants identify by Bates-number: (1) all documents that constitute any part of a loan file, and (2) the guideline(s) applicable to each sample loan. In their answer to the interrogatories, defendants referred plaintiffs to the documents and Bates-range previously disclosed and refused to provide specific ranges for individual loan files and guidelines. Defendants maintain they turned over all documents within their possession or control as they are maintained in the ordinary course of business. Plaintiffs now move to compel defendants to turn over documents relating to their repurchase analysis and to answer interrogatories.

Discussion

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution and defense of an action. . . ." "Items that are relevant to the allegations in a complaint are subject to disclosure." 44A NY Jur 2d 175 (2010) (citing *Kern v City of Rochester*, 261 AD2d 904, 905 (4th Dept 1999). The court may require the disclosure of any facts, "which will assist [in] preparation for trial by sharpening the issues and reducing delay. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ'g Co.*, 21 NY2d 403, 406 (1968).

The Repurchase Analysis

Where a party seeks to invoke any privilege protection to avoid disclosing information, the burden of establishing that protection is on the party asserting it. *See MBIA Ins. Corp v Countrywide Home Loans, Inc.*, No. 602815/08, 2011 WL 7640152, at *4 (NY Sup Ct Jan 6, 2011). The attorney-client privilege protects communications between a client and its lawyer when it concerns legal advice. *See Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 378 (1991). In order for the attorney-client privilege to apply, the document must be "primarily prepared in anticipation of litigation. . . ." *MBIA* at *1.

The attorney work product doctrine applies only to documents "prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy. *Brooklyn Union Gas Co. v American Assur. Co.*, 23 AD3d 190, 191 (1st Dept 2005) (citing *ACWOO Intl. Steel Corp. v Frenkel & Co.*, 165 AD2d 752, 753 (1990). "Documents prepared in the ordinary course of. . . . [business] are not privileged and are, therefore, discoverable." *Id.* (citing *Spectrum Sys. Intl. Corp v Chemical Bank*, 78 NY2d 371, 379 (1991).

Plaintiffs argue that any repurchase analysis performed by defendants was created pursuant to a contractual obligation and is thus not privileged. Plaintiffs further contend that defendants' use of attorneys to meet their contractual obligation does not bring the repurchase analysis under the attorney work product doctrine. Defendants do not dispute their contractual obligation to repurchase loans. However, defendants contend that the repurchase analysis performed by Orrick was done in anticipation of litigation and is protected by both the attorney-client privilege, and the attorney work product doctrine.

The First Department has made clear that repurchase analyses are not privileged when they are conducted pursuant to a contractual obligation. In *MBIA*, over an RMBS-sponsor's privilege objections, the Appellate Division held that "documents and information concerning defendants' repurchase review, generated in response to plaintiff's repurchase requests, are discoverable." *MBIA*, 93, AD3d at 575. The Appellate Division noted that "processing repurchase requests was an inherent . . . part of defendants' business" because "defendants were, and always had been contractually obligated to conduct repurchase reviews." *Id.* at 575 (citing *Brooklyn Union Gas Co.*, 23 Ad3d at 191).

Courts applying *MBIA* have similarly held that RMBS repurchase analyses are not privileged. *See Assured v UBS Real Estate Sec. Inc.*, No. 12 CIV 1579, 2013 WL 1195545, at **7-8 (SDNY Mar. 25, 2013) (holding that repurchase analyses were not privileged because defendant was "contractually obligated to conduct repurchase reviews under the PSAs governing the Transactions" and the analysis would "have been performed . . . . even had there been no threat of litigation"). Although DLJ anticipated litigation and retained counsel to perform the repurchase analysis, DLJ was still "contractually obligated to conduct repurchase reviews" and such analysis "would have been performed even had there been no threat of litigation." Immunity does not attach to Orrick's repurchase analysis merely because it anticipated litigation. It attaches only to analyses that were created "primarily, if not solely, in anticipation of litigation." *JP Foodservice Dist,, Inc. v Sorrento, Inc.*, 758 NYS2d 805, 805 (1st Dept 2003).

Defendants try to distinguish the instant action from *MBIA* by arguing the DLJ does not have a long-standing business unit to deal with repurchase demands. DLJ notes that prior to 2008, members of their due-diligence staff would be pulled to deal with the few repurchase demands it received. In 2008, when DLJ received its first large-scale repurchase demand, DLJ

retained Orrick as legal counsel and gave Orrick independent discretion about how to handle the repurchase demands. Defendants maintain this shows that responding to repurchase demands is not an inherent part of defendants' business and as such are not performed in the ordinary course of business.

Although defendants may not have a dedicated business *unit* to deal with repurchase demands that does not mean that repurchase demands are not a long-standing business *practice*. In fact, defendants admit that members of their staff had performed repurchase analyses prior to 2008. Additionally, the fact that members of defendants' due diligence department, who are not attorneys, were capable of performing repurchase analyses highlights that these analyses are not legal in nature. Such analyses do not become privileged "merely because an investigation was conducted by an attorney." *Brooklyn Union Gas Co.*, 23 AD3d at 191. The court holds that any repurchase analysis conducted by Orrick as a result of the repurchase demand made by plaintiffs is not immune from disclosure.

Answer to Interrogatories

Plaintiffs' Loan File and Guideline Interrogatories request that defendants identify by Bates-number, for the loans in the plaintiffs' proposed re-underwriting sample: (1) all documents in defendants' possession that constitute any part of a loan file, and (2) the guideline(s) applicable to that loan. Defendants object on the basis that (1) it would be an "enormous burden of time, resources, and expenses" for defendants to identify the loan files or the corresponding guidelines, (2) any such burden is on the plaintiffs, and (3) the information is equally available to the plaintiffs.

Correctly identifying loan files and applicable guideline(s) is important to ensure plaintiffs' re-underwriting is done correctly and with full information. Both sides will need

complete loan files and applicable guidelines as both sides will likely re-underwrite plaintiffs' sample. Credit Suisse has previously recognized the need to perform its own re-underwriting. *See e.g. Fed. Hous. Fin. Agency v JP Morgan Chase & Co.*, 11 CIV. 6188 DLC, 2012 WL 600885, at *3 (SDNY Dec. 3, 2012) (Noting defendants' need for "identification of the [sample] loans chosen by plaintiff [as it] will permit the defendants to conduct their own re-underwriting of the plaintiff's loan samples, and to evaluate just how well or poorly the originators, and indeed the underwriters of the securities, performed their work.").

Plaintiffs argue defendants are in the best position to compile Bates-ranges for individual loan files and applicable guidelines because DLJ sold the loans and SPS is the current servicer. Defendants argue that they do not have a document containing this information and that producing such document would an enormous burden. Defendants maintain they produced the loan files and guidelines as they are maintained in the ordinary course of business.

Defendants argue the plaintiffs already possess the information requested in their interrogatories, and plaintiffs cannot shift the burden of analyzing the produced documents to the defendants. Defendants cite several cases, including *Durham Medical* and *American Steamship*, to support their argument that they should not be required to create a document not already in their possession from documents and information previously produced. *Durham Med. Search, Inc. v Physicians Int'l Search, Inc.*, 122 AD2d 529 (4th Dept 1986); *Am. Steamship v Alcoa* Steamship, 21 NY2d 403 [1968]). In the cases cited by the defendants neither party had a more efficient means of gathering the information at issue. In *Durham Medical*, *both* parties would have had to sort through ledgers relating to the accounts receivable of the defendant in order to create a customer list. The Appellate Division held that because the defendant did not already have a customer list, it was the plaintiff's responsibility to create the list. Similarly, in *American*

Steamship, both parties would have had to sort through financial documents already produced by defendants in order to answer the interrogatories.

Here, plaintiffs have not asked defendants to create a new document to comply with discovery. Plaintiffs asked defendants to identify specific Bates-ranges for loans in their re-underwriting sample. Furthermore, defendants and plaintiffs are not in the same position with respect to their ability to gather the requested information. Plaintiffs would need to comb through each page to find the loan files and guideline(s). Defendants have a more efficient system for identifying the Bates-range for each loan file and applicable guideline.

In fact, defendants advertised this system when they securitized and sold the HEMT Trusts. Credit Suisse, as part of their Third Party Servicing Guide, requires Third-Party Servicers, such as SPS, to perform a quality control audit on roughly three to five percent of the loans it services. Part of that quality control audit consists of reviewing loan files in order to "validate data, as well as ensure complete, consistent and accurate documentation that adheres to Credit Suisse Standards." Ex. O , Affirmation of Erica P. Taggart in Further Support of Plaintiff's Motion. Defendants undoubtedly have an efficient system for identifying applicable Bate-ranges for loans files going through the quality control audit as it must transfer complete loan files to the quality control firm performing the audit.

When DLJ wanted to conduct due diligence on a sample of loans from HEMT 2006-3, it emailed SPS, explaining that, in "selecting its due diligence sample [for the HEMT 2006-3 Trust it] . . . . want[s] to avoid choosing loans for which the loan file is not available" and requesting SPS to "review th[e attached] list and let [Credit Suisse] know if any loans are not on hand or not available for review" through SPS's document imaging system. Ex K to Affirmation of Erica P. Taggart in Further Support of Plaintiffs' Motion. Three hours later, SPS responded with loan-

by-loan responses as to which loan files were available. *Id.* Although defendants may not have the document in front of them, they surely have a system for easily accessing this information. This differentiates the instant action from the cases cited by defendants. The court holds defendants must respond to plaintiffs' interrogatories requesting Bates-ranges for loan files in plaintiffs' proposed sample.

In addition, in order to properly conduct their quality control analysis, Credit Suisse, and thereby its affiliates, must know which guideline is applicable to each loan being re-underwritten. By merely providing guidelines "that may be applicable to the Mortgage Loans" without any indication which guideline corresponds to which loan, defendants have effectively told plaintiffs to find the needle in the haystack. The court and both parties have an interest in efficiently and properly identifying loan files and guidelines for plaintiffs' re-underwriting sample. Because these guidelines are used to re-underwrite loans during quality-control audits, defendants must have developed a system for identifying which guidelines correspond to each loan. The court holds that defendants must respond to plaintiffs' interrogatories requesting applicable guidelines to loans in plaintiffs' proposed re-underwriting sample.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiffs' motion to compel the production of documents is granted; and it is further

ORDERED that plaintiffs' motion to compel answers to interrogatories is granted.

Dated: July 16, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER