Matter of Nomura Asset Acceptance Corp. Alternative Loan Trust, Series 2007-1 v Nomura Credit & Capital, Inc.
2018 NY Slip Op 30161(U)
January 29, 2018
Supreme Court, New York County
Docket Number: 777000/2015
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK -- PART 60

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

IN RE: PART 60 RMBS PUT-BACK LITIGATION	Index No. 777000/2015
NOMURA ASSET ACCEPTANCE CORPORATION ALTERNATIVE LOAN TRUST, SERIES 2007-1, by HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee v NOMURA CREDIT & CAPITAL, INC.	Index No. 652842/2014 Motion Seq. 003 Decision/Order
HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as Trustee of MERRILL LYNCH ALTERNATIVE NOTE ASSET TRUST, SERIES 2007-A3 v MERRILL LYNCH MORTGAGE LENDING, INC.	Index No. 652727/2014 Motion Seq. 003

In Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2007-1 v Nomura Credit & Capital, Inc. (Nomura), plaintiff Trustee HSBC Bank USA, National Association (HSBC) appeals Special Master Katz's ruling, dated June 27, 2017 (Nomura Ruling). In HSBC Bank USA, National Association v Merrill Lynch Mortgage Lending, Inc. (Merrill Lynch), Trustee HSBC appeals Special Master Katz's ruling, dated September 19, 2017 (Merrill Lynch Ruling). These appeals are brought pursuant to the Part 60 RMBS Putback and Monoline Case Management Order, dated December 7, 2015 (CMO).

In both Rulings, the Special Master directed the Trustee to produce "all documents that are responsive to the Parties' agreed-upon search terms, but for any document that reasonably appears to be a 'clear mishit', or is subject to a claim of privilege." (Merrill Lynch Ruling at 2; see Nomura Ruling at 2.) As discussed further below, both Rulings are based on the Special

Master's reasoning that, under the circumstances of these cases, the parties' arms-length negotiations of ESI search terms reflect an agreement as to broad relevance, and that further "subjective relevance and responsiveness determinations are generally inappropriate." (Merrill Lynch Ruling at 2, quoting Nomura Ruling at 2.) The Merrill Lynch Ruling does not involve the production of certificateholder documents, whereas the Nomura Ruling does.

The court holds that the Special Master's Rulings should be affirmed. The parties' ESI search terms were agreed upon following extensive negotiations that occurred after the Trustee served its responses and objections to Nomura's and Merrill Lynch's document requests, respectively. The negotiation of the search terms occurred under the general supervision of Special Master Katz, and with the benefit of guidance provided in his numerous rulings in the coordinated Part 60 RMBS Put-Back Litigation.

In a prior ruling, dated November 7, 2016, in RMBS putback cases involving SURF and Ownit Trusts, in which Merrill Lynch was also a defendant (Merrill Lynch [Malloy] Aff. In Opp., Ex. 6), the Special Master explained that "agreed-upon [ESI] search-terms inherently represent U.S. Bank's [i.e., the Trustee's] ESI-based document requests. Thus, the results of Merrill Lynch's ESI searches pursuant to those agreed-upon search-terms form a corpus of documents that are responsive to U.S. Bank's document requests ipso facto." (Id. at 1.) The Special Master also rejected Merrill Lynch's claim that it should be permitted to perform a further relevance review of documents responsive to the ESI search terms. In precluding such further review, the Special Master reasoned that issues of relevance, as well as the burden of production resulting from proposed ESI search terms, had already been addressed through arms-

length negotiation of the search terms. As the Special Master explained, "with the issues of burden and broad relevance having been addressed through the agreed-upon search terms that resulted from arms-length negotiations, any further winnowing of documents based on one party's or the other's subjective views [of relevance] is generally inappropriate." (Id. at 2.)[1] This ruling provided, however, that a producing party may appropriately undertake a post-ESI search review to exclude any document which is "(1) privileged; (2) a 'clear mishit'; or (3) otherwise 'not requested.'" (Id. at 1.)

In another prior ruling, dated April 11, 2017, made in the Merrill Lynch action at issue here, but which was not the subject of an appeal, the Special Master adopted this standard in the context of a dispute over the disclosure of certificateholder materials. In this ruling, the Special Master held that such materials were not "categorically irrelevant under New York law," and that HSBC must "promptly produce any non-privileged Certificateholder Materials that are otherwise responsive to the Parties' negotiated ESI search-terms—except where HSBC determines in good faith that a responsive document or communication is a clear mishit or was not requested." (Nomura [Kahn] Aff. In Opp., Ex. 1.)

The court finds that the circumstances in which the ESI search terms were negotiated support the Special Master's Merrill Lynch and Nomura Rulings that a further relevance review of documents responsive to the search terms is not appropriate. If the Rulings are viewed as procedural rulings as to the scope of discovery, they are subject to review for abuse of discretion. (See CMO ¶ III [E].) If the Rulings are viewed as based on a conclusion of law, they are subject

[1] The Special Master further explained that, in the specific context of custodial ESI, "an effort [was made] to balance the burden of the proposed search against the broad relevance of the documents being sought. . . . [T]hat balancing was negotiated at arms-length by the parties—in some cases with the Special Master's assistance—resulting in the parties' agreement on search terms." (Nov. 7, 2016 ruling at 2.)

to de novo review. (Id.) Under either standard, the Rulings should be affirmed.

Merrill Lynch Ruling

The authorities on which HSBC relies do not support its claim that the Special Master erred in holding that a further relevance review was not appropriate. In Chen-Oster v Goldman, Sachs & Co. (2014 WL 716521 * 1 [SD NY, No. 10 Civ 6950, Feb. 18, 2014] [Francis, Magistrate Judge]), as in the cases at issue on these appeals, the parties had served document demands and responses prior to negotiating ESI search terms. The Court permitted a relevance review of search results prior to production, reasoning that the parties had not agreed, and it had not ordered, that all documents responsive to the terms must be produced. The Court noted that the parties could have agreed to another "model," in which they would "simply agree on the search methodology, for example by stipulating to search terms, with the understanding that all documents [except privileged documents] shall be produced." (Id.) Similarly, in Royal Park Investments SA/NA v HSBC Bank USA N.A. (SD NY, No. 14 Civ 08175, Aug. 26, 2016 [Netburn, Magistrate Judge]), the Court permitted the producing party to conduct a responsiveness review of search results, based on a finding that the parties had agreed on ESI search terms but not on how to produce documents that contained those terms. The Court specifically noted that the dispute would have been avoided had the parties agreed "on both the ESI Search protocol used and the process for producing the documents captured by that protocol" before beginning discovery. (Id. at 3 [emphasis in original].)

Here, in contrast, the parties' ESI search terms were not finalized until after the Special Master's November 7, 2016 ruling, in which he elucidated his position that the negotiated search terms capture relevant documents and that a further relevance review is generally not

appropriate.[2] Although the November 7, 2016 ruling was issued in a group of actions to which HSBC was not a party, HSBC does not claim that it was unaware of that ruling. Nor could it do so. These actions are among the dozens of Part 60 RMBS actions that have been coordinated, with the assistance of liaison counsel, for discovery before the Special Master pursuant to the December 7, 2015 Case Management Order. The CMO provides for the appointment of a Special Discovery Master "[i]n order to facilitate the fair, orderly and expeditious disposition of the Putback and Monoline Cases." (CMO ¶ III [A].) It also expressly requires that even where the Special Master makes a decision in a case in which a party to another case has not participated, the party will "determine whether and how the reasoning underlying the Special Discovery Master's decision on the issue guides [it]" in order to avoid litigation of the same issue before the Special Master. (Id. ¶ III [B].)[3] Indeed, liaison counsel addressed the issues determined by the November 7, 2016 ruling. (See Oct. 25, 2016 Letter to Special Master Katz [HSBC [Scheef] Aff. In Supp. of Merrill Lynch Appeal [Scheef Aff.], Ex. 15].) Moreover, the Ruling that is the subject of this appeal is consistent with the Special Master's April 11, 2017 ruling on certificateholder materials in this very case.

[2] At oral argument, HSBC stated that "the primary search terms" had been negotiated prior to the November 7, 2016 ruling. (Nov. 30, 2017 Oral Argument Transcript at 24 [Tr.].) HSBC did not dispute Merrill Lynch's assertion that the ESI search terms primarily at issue on this motion—the originator search terms—were negotiated in February and March 2017. (See Tr. at 18-19, 44; see also id. at 50-57 [HSBC Reply].)

[3] Paragraph III (B) of the CMO provides:

> "The Special Discovery Master's decisions shall not be binding on any party in any Putback or Monoline Case unless the party participates in the dispute by submitting a Discovery Brief or Supplemental Brief . . . , in which case the decision shall be binding on such party. However, where the Special Discovery Master in a particular case or cases rules on an issue that has arisen or subsequently arises in other cases, it is expected that the parties in such other case(s) will in good faith determine whether and how the reasoning underlying the Special Discovery Master's decision on the issue guides them without the need of litigating substantially the same issue before the Special Discovery Master."

Even assuming arguendo that the April 11, 2017 ruling does not control, the instant Ruling should be upheld. HSBC asserts that it negotiated the ESI terms subject to Merrill Lynch's December 2015 requests for production (RFPs) and HSBC's objections as to relevance asserted in its January 19, 2016 "Responses and Objections" (R&Os). (See Sept. 11, 2017 Letter to Special Master Katz [Scheef Aff., Ex. 4]; HSBC's Brief In Supp. of Merrill Lynch Appeal at 2-3.) In support of this assertion, however, HSBC does not point to anything in the record of those negotiations in which it purported to preserve objections to production of documents which it had set forth in its R&Os. (See id.) In the absence of any explicit reservation of rights made at the time the search terms were agreed to, and the parties' negotiation of the terms under the general supervision of the Special Master and with knowledge of his November 7, 2016 ruling (see n 4, supra), the court finds that Special Master Katz did not err in holding that a further relevance review by HSBC was not appropriate.

While the Special Master's procedure limiting relevance reviews of documents responsive to ESI search terms may result in production of some documents that are not relevant, this court finds that the procedure is not an unreasonable mechanism for avoiding disputes over subjective review criteria in these numerous coordinated cases, and that the Special Master therefore did not abuse his discretion in adopting the procedure. Nor does the court find that the procedure is contrary to law. (See supra at 4.)

Finally, it is noted that Merrill Lynch represented at the oral argument of the motions that it does not know the full universe of documents that HSBC is withholding. (Tr. at 47.) HSBC outlined certain categories of documents that it objects to producing based on relevance. These documents included transaction documents for other trusts, legal notices relating to properties, and invoices and fee reports. (Id. at 18-22.) While the documents were not described with any

specificity, HSBC stated that the "bulk" of the objected to documents are transaction documents for other trusts. (Id. at 18-19.) Significantly, Merrill Lynch agreed that these documents are "mishits" which, by the terms of the Ruling, need not be produced. (Id. at 47.) It appears that the parties failed to confer in advance of the appeal about whether these documents were mishits. To the extent that there is confusion, as HSBC claims, about whether other types of documents are mishits, the parties must meet and confer in an effort to resolve any dispute and may seek further guidance, if necessary, from the Special Master.

HSBC also objected to producing legal department reports, which it claimed are privileged. (Id. at 22.) As Merrill Lynch correctly argues, the Special Master's Ruling explicitly provides for withholding of privileged documents, and a privilege log for such documents must be prepared.

Nomura Ruling

Applying the reasoning of his prior rulings discussed above, the Special Master ruled in Nomura that HSBC must "produce documents and communications related to certificateholders for the trusts at issue in this case that are otherwise responsive to the parties' negotiated ESI search terms." (Nomura Ruling at 3.)

Significantly, HSBC itself appears to acknowledge the relevance of, and represents that it has produced, certificateholder documents relating to breaches of representations and warranties. (See HSBC's Brief In Supp. of Nomura Appeal at 8; Tr. at 9, 54.) HSBC disputes the relevance of other categories of certificateholder documents, identifying documents concerning certificateholders' directions to and indemnification of the Trustee in connection with litigation against defendant-securitizer; documents concerning certificateholders' financial status and holdings; and documents concerning non-disclosure agreements between the Trustee and

certificateholders in connection with the Trustee's provision of nonpublic information to certificateholders. (HSBC's Brief In Supp. of Nomura Appeal at 8-9.)

The court does not find that these other categories of certificateholder documents lack relevance in light of the Appellate Division's holding that a trustee may assert breach of contract claims based not only on allegations as to a defendant-securitizer's breaches of representations and warranties but also on allegations as to the defendant's failure to notify the trustee of the defendant's discovery of such breaches. (See Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc., 133 AD3d 96, 108 [1st Dept Oct 13, 2015] [Nomura I], mod on other grounds, — NY3d —, 2017 WL 6327110 [Ct App 2017]; Morgan Stanley Mtge. Loan Trust 2006-13ARX v Morgan Stanley Mtge. Capital Holdings LLC, 143 AD3d 1, 3-4 [1st Dept 2016]; Bank of N.Y. Mellon v WMC Mtge., LLC, 151 AD3d 72, 81 [1st Dept 2017].)

At the oral argument of these appeals, this court inquired extensively as to the relevance of the objected to certificateholder documents. In response to Nomura's arguments, HSBC generally objected to the above categories of documents and broadly asserted that it had "produced all documents that we have, other than privileged documents . . . relating to breaches of representations [and] warranties." (Tr. at 9.) HSBC did not make any showing that the withheld documents, which relate to HSBC's own potential obligation to commence litigation against Nomura based on Nomura's alleged breaches of representations and warranties, do not contain any discussion of such breaches or any information relevant to the timing of HSBC's acquisition of notice of such breaches. Further, HSBC generally asserted that its own breach of its obligations to certificateholders is not relevant to its claims against Nomura. (See Tr. at 55.) However, it is not apparent that the existence of an obligation on HSBC's part to commence litigation against Nomura and the timing of this obligation, if one arose, would not have an

impact on the damages HSBC can recover on its independent failure to notify claim against Nomura.[4]

The court further holds that the authority on which HSBC relies is not to the contrary. Although HSBC cites several cases which held that certificateholder documents were not relevant, those cases were decided prior to the Appellate Division's recognition in Nomura I of the failure to notify claim or, if decided post-Nomura I, considered the relevance of certificateholder documents to different claims: (See e.g. Home Equity Mtge. Trust Series 2006-5 v DLJ Mtge. Capital, Inc., 2014 WL 3853657 [Sup Ct, NY County July 28, 2014] [Schweitzer, J.] [HEMT 2006-5] [pre-Nomura I case, which held that documents relating to the certificateholder's holdings and its directions to and indemnification of the trustee were not relevant, as there was no issue as to the standing of the trustee to sue][5]; Bank of New York Mellon v WMC Mtge., LLC, SD NY, No. 12 Civ 7096, Sept. 16 2014 [Cote, J.] [pre-Nomura I case which, without discussion, declined a letter application for an order compelling discovery on a failure to notify defense, and otherwise followed HEMT 2006-5]; SACO I Trust 2006-5 v EMC Mtge. LLC, Sup Ct, NY County, Index No. 651820/2012, Decision on the Record dated March 1, 2016 at 6-13 [Bransten, J.] [post-Nomura I case, which did not address the relevance of certificateholder documents to a failure to notify claim, and following HEMT 2006-5, quashed as irrelevant a subpoena to a certificateholder for documents which apparently included, among

[4] Given the relatively recent recognition by the Appellate Division of the failure to notify claim, the parties to the RMBS litigation have yet to articulate with any specificity their theories as to the damages recoverable on proof of such claim. On the instant appeal, Nomura asserts, but without discussion, that HSBC's failure to perform its contractual obligations would preclude contractual claims for specific performance. (Nomura's Brief In Opp. at 8.) HSBC asserts in conclusory fashion that the obligations are not relevant, but fails to discuss the bearing of an obligation to commence litigation on the damages recoverable on the failure to notify claim. (HSBC's Brief In Supp. of Nomura Appeal at 9-10; Tr. at 55.)

[5] This decision also held that the certificateholder's internal analyses of the loans were either irrelevant or privileged. Such analyses are not at issue in the instant appeal, as Nomura seeks certificateholder documents within the trustee's possession, and not documents in the certificateholder's possession, as in HEMT 2006-5.

others, documents regarding the certificateholder's directions to the trustee and its other RMBS lawsuits and loan analysis] [HSBC [Scheef] Aff. in Supp. of Nomura Appeal, unpublished orders annexed as Ex. 4].)

In contrast, even pre-Nomura I, at least one case, which HSBC cites as persuasive authority, recognized the relevance of certificateholder documents to the issue of whether the trustee gave prompt notice of breaches of representations and warranties. (See Tr. at 54; ACE Secs. Corp. Home Equity Loan Trust, Series 2007-HE3 v DB Structured Products, Inc., SD NY, No. 13 Civ 01869, Decision on the Record dated May 22, 2015 at 32 [Gorenstein, Magistrate Judge] [case decided on a letter application by the defendant-securitizer to enforce a subpoena against the certificateholder, which held that "communications between the trustee and [certificateholder] that go to the issue of whether the trustee gave prompt notice to the defendant should be produced," but that the certificateholder's loan analyses were not relevant].)

On this record, the court does not find that the Special Master erred in ruling that the certificateholder documents are not "categorically irrelevant." For the reasons stated above, the court further holds, on a de novo review of the Nomura Ruling, that the particular categories of certificateholder documents to which HSBC objects are not irrelevant as a matter of law to the failure to notify issue.[6]

The court also notes that HSBC acknowledges that the production required by the Ruling consists of between 300 and 600 certificateholder documents and is therefore "not extensive." (Tr. at 14-16.) Finally, the court is satisfied that the broad confidentiality order in place in the

[6] Nomura also argues that HSBC is bound by the Special Master's unappealed April 11, 2017 ruling, made in Merrill Lynch in which HSBC is also the trustee, requiring HSBC to disclose certificateholder materials. HSBC argues that it is not bound by that ruling as it is the trustee for a different trust in that action. In view of the above holding, the court need not and does not reach this issue. The court notes that neither party has cited the extensive legal authority discussing the preclusion doctrine, or has addressed the impact of CMO ¶ III (B) on the application of that doctrine.

Part 60 RMBS actions will provide ample protection against misuse of sensitive information regarding certificateholders' holdings or other financial information.

It is accordingly hereby ORDERED that the motion of plaintiff Trustee HSBC Bank USA, National Association in Nomura Asset Acceptance Corporation Alternative Loan Trust, Series 2007-1 v Nomura Credit & Capital, Inc. (Index No. 652842/2014) for reversal of the Ruling of the Special Master is denied; and it is further

ORDERED that the motion of plaintiff Trustee HSBC Bank USA, National Association in HSBC Bank USA, National Association v Merrill Lynch Mortgage Lending, Inc. (Index No. 652727/2014) for reversal of the Ruling of the Special Master is denied.

Dated: New York, New York
January 29, 2018

MARCY FRIEDMAN, J.S.C.