

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

In the matter of the application of

WELLS FARGO BANK, NATIONAL ASSOCIATION, U.S. BANK NATIONAL ASSOCIATION, THE BANK OF NEW YORK MELLON, THE BANK OF NEW YORK MELLON TRUST COMPANY, N.A., WILMINGTON TRUST, NATIONAL ASSOCIATION, HSBC BANK USA, N.A., and DEUTSCHE BANK NATIONAL TRUST COMPANY (as Trustees, Indenture Trustees, Securities Administrators, Paying Agents, and/or Calculation Agents of Certain Residential Mortgage-Backed Securitization Trusts),

Petitioners,

For Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment.

Index No. 657387/2017
(Friedman, J.)

Motion Sequence No. 10

PRE-ARGUMENT STATEMENT

Appellant HBK Master Fund, L.P. (“HBK”) respectfully submits the following Pre-Argument Statement pursuant to Section 600.17(a) of the Rules of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department:

I. TITLE OF PROCEEDING

The title of this proceeding is as set forth in the above caption.

II. PARTIES

This is an Article 77 proceeding, brought by the parties as set forth in the above caption as Petitioners. After the filing of the petition in this action, there have been appearances by numerous interested parties as Respondents in this action, including HBK, set forth below:

- HBK Master Fund, L.P.

- Institutional Investors AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Teachers Insurance and Annuity Association of America, the TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Management Company
- Nover Ventures, LLC
- American General Life Insurance Company, American Home Assurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pa., The United States Life Insurance Company in the City of New York, The Variable Annuity Life Insurance Company (the “AIG Parties”)
- Axonic Capital, LLC
- Strategos Capital Management LLC
- Tilden Park Investment Master Fund LP, Tilden Park Management I LLC and Tilden Park Capital Management LP
- Olifant Fund, Ltd., FFI Fund Ltd. and FYI Ltd.
- Prophet Mortgage Opportunitie L.P., Poetic Holdings VI LLC and Poetic Holdings VII LLC
- Ambac Assurance Corporation
- DW Partners LP
- D.E. Shaw Refraction Portfolios LLC
- Ellington Management Group LLC
- GMO Opportunistic Income Fund and GMO Global Real Returns (UCITS) Fund
- FT SOF IV Holdings, LLC, Fir Tree Capital Opportunity Master Fund, L.P., and Fir Tree Capital Opportunity Master Fund III, L.P.

III. COUNSEL

Counsel for Appellant HBK:

SCHLAM STONE & DOLAN LLP

John M. Lundin
Niall D. O'Murchadha
Seth D. Allen
Alexandra M.C. Douglas
26 Broadway
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
E-mail:
nomurchadha@schlamstone.com
sallen@schlamstone.com
adouglas@schlamstone.com

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004
Telephone: (646) 771-7377
E-mail: jmc@mcFerrin-clancy.com

Counsel for Respondents:

McKOOL SMITH
Gayle R. Klein, Esq.
David Schiefelbein, Esq.
One Bryant Park - 47th Floor
New York, New York 10036
Attorneys for Nover Ventures, LLC

BINDER & SCHWARTZ
Neils. Binder, Esq.
Lindsay A. Bush
166 Madison Avenue - 6th Floor
New York, New York 10017
Attorneys for Axonic Capital, LLC

AXINN, VELTROP, HARKRIDER, LLP
Donald W. Hawthorne
Felix Gilman, Esq.
114 West 47th Street
New York, New York 10036
Attorneys for Poetic and Prophet

GIBBS & BRUNS, LLP

Kathy Patrick, Esq.
David Sheeren, Esq.
1100 Louisiana - Suite 5300
Houston, Texas 77002
Attorneys for Institutional Investors PIMCO, BlackRock, et al.

QUINN EMANUEL
Kevin S. Reed, Esq.
51 Madison Avenue
New York, New York 10010
Attorneys for AIG

KRAMER, LEVIN, NAFTALIS & FRANKEL, LLP
Philip Bentley, Esq.
Andrew Pollack, Esq.
1177 Avenue of the Americas
New York, New York 10036
Attorneys for Tilden Park Capital Management

PATTERSON, BELKNAP, WEB & TYLER, LLP
Henry J. Ricardo, Esq.
1133 Avenue of the Americas
New York, New York 10036
Attorneys for Ambac Assurance Corporation

PATTERSON, BELKNAP, WEB & TYLER, LLP
Daniel Friedman, Esq.
1133 Avenue of the Americas
New York, New York 10036
*Attorneys For Olifant Funds, FYI Ltd.
and FFI Fund Ltd.*

SCHINDER, COHEN & HOCHMAN
Jonathan L. Hochman, Esq.
100 Wall Street - 15th Floor
New York, New York 10005
Attorneys for Tilden Park

GOULSTON & STORRS
Charles R. Jacob, Iii, Esq.
Nicholas Cutaia, Esq.
885 Third Avenue - 18th Floor
New York, New York 10022
Attorneys for D.E. Shaw Retractor Portfolios, LLC

DECHERT, LLP
Mauricio Espana, Esq.
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
Attorneys for Strategos Management

ALSTON & BIRD
Alexander Lorenzo, Esq.
90 Park Avenue - 15th Floor
New York, New York 10016
Attorneys for Wilmington Trust Co.

JONES DAY
Nina Yadava, Esq.
Keith Kollmeyer, Esq.
250 Vesey Street
New York, New York 10281
Attorneys for US Bank National Association

DOGRAMACI KUSHNER, LLP
Amiad Kushner, Esq.
1120 Avenue of the Americas - 4th Floor
New York, New York 10036
Attorneys for DW Partners

FAEGRE, BAKER & DANIELS, LLP
Ryan G. Milligan, Esq.
311 S. Wacker Drive - Suite 4300
Chicago, Illinois 60606
Attorneys for Wells Fargo

IV. COURT AND ORDER APPEALED FROM

This appeal is taken from the Order of the Supreme Court of the State of New York, County of New York (Freidman J.) (the “IAS Court”), dated August 6, 2018 and entered August 7, 2018 (Dkt. No. 490), denying HBK’s motion for leave to amend its answer.

V. NATURE AND OBJECT OF THE PROCEEDING

This is an Article 77 proceeding brought by the trustees of numerous residential mortgage-backed securities (“RMBS”) trusts (the “Settlement Trusts”) seeking direction from

the IAS Court regarding the distribution of settlement proceeds held by the trustees for the benefit of the Settlement Trusts.

Pursuant to the IAS Court's December 19, 2018 Order to Show Cause, and the IAS Court's January 23, 2018 Clarifying Order, on January 29, 2018, HBK filed its Answer to the Petition in this proceeding as an Interested Person pursuant to the IAS Court's order and Article 77. In its Answer, HBK alleged that it was "an investor in 59 securities issued by 20 NIM trusts; which NIM trusts hold certificates issued by 21 RMBS trusts that are among the trusts to which the Petition relates." (Dkt. 78 ¶ 1.) As Exhibit 2 to the Answer, HBK submitted the Affidavit of Beauregard A. Fournet, listing the specific NIM trusts in which HBK holds an interest. (Dkt. 80.)

On March 3, 2018, certain Interested Parties (the "Challenging Respondents") filed a motion to limit standing in this proceeding to certificateholders in the Settlement Trusts (the "Standing Motion"). (Dkt. No. 251). The Challenging Respondents argued that parties such as HBK whose interest in the Settlement Trusts was through another vehicle, such as a NIM trust (the "Challenged Respondents"), had no standing to appear in this action. (*Id.*) HBK and the other parties whose standing was challenged opposed this severe limitation of Article 77 standing. That motion was fully submitted on April 26, 2018, and oral argument was held on May 7, 2018. During oral argument, counsel for the Challenging Respondents indicated that while they continued to challenge HBK's standing to appear, they would not oppose the Indenture Trustee for the NIMS Trusts, U.S. Bank, substituting in for HBK, and thus the Challenging Respondents conceded that HBK's position would be heard in this action in some manner, whether by HBK itself or by U.S. Bank as directed by HBK.

After submission of the Standing Motion, HBK became aware that, in addition to its holdings in the NIMS Trusts, HBK also directly held certificates issued by certain of the HBK Trusts as to which HBK had previously appeared pursuant to its status as an investor in the NIMS Trusts. Additionally, HBK purchased yet other certificates issued by certain other of the HBK Trusts. On May 16, 2018, HBK moved for leave to amend its answer to assert these additional holdings as a basis for its appearance as an interested party in this action, which amounts to certificates directly issued by 17 of the 21 HBK Trusts. The IAS Court denied HBK's motion for the reasons stated below. Moreover, by Order dated August 7, 2018, and entered on August 8, 2018, the IAS Court granted the Challenging Respondents' Standing Motion, but held that HBK and the other Challenged Respondents could be substituted for by the trustees of their "indirect" holdings—in HBK's case, U.S. Bank National Association as NIM Trustee.

VI. RESULT REACHED BELOW

The IAS Court denied HBK's motion for leave to amend its answer for the reasons set forth on the record on June 19, 2018. The IAS Court stated that "applying the liberal standard for determining merit on a motion for leave to amend, the Court cannot find that the proposed amended answer is palpably insufficient or plainly lacking in merit." (Ex. A at 29.) However, the IAS Court held that "Leave to amend will not, however, be authorized as the Court finds that HBK's delay in asserting an interest in the Settlement Trusts based on its ownership of the certificates has caused significant prejudice to the other respondents." (*Id.*)

VII. GROUNDS FOR APPEAL

The IAS Court erred in denying HBK's motion for leave to amend on the grounds that HBK's delay caused significant prejudice to the other respondents. The IAS Court correctly

recognized that “[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side.” (*Id.* at 27 (quoting *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983).) Moreover, the IAS Court correctly acknowledged that “[p]rejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.” (*Id.* (quoting *Kocourek v. Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 (1st Dep’t 2011)).) However, the IAS Court incorrectly ignored that the Challenging Respondents did not allege any prejudice that resulted from the delay, nor did they even attempt to do so. Instead, the IAS Court stated that the other respondents would be prejudiced because “[t]his Article 77 proceeding has been scheduled on an expedited basis,” and “[b]y delaying its motion for leave to amend, HBK has effectively prevented the other respondents from seeking timely discovery on its holdings.” (*Id.* at 29 – 30.)

However, the IAS Court’s concerns were entirely unfounded and, even if they were correct, do not serve as the type of prejudice required to warrant denial of a motion for leave to amend. Under the schedule recently agreed to by the parties to this action, and to be so-ordered by the Court, briefing regarding the merits of this Article 77 proceeding are to be filed on or before September 14, 2018. HBK’s motion for leave to amend was filed on May 16, 2018, and the Court heard argument and made its decision on the record on June 19, 2018. Thus, there were approximately *four months* between the time HBK filed its motion and the time for parties to submit merits briefing, and approximately *three months* between the time the Court effectually denied HBK’s motion and the time for parties to submit merits briefing. During this time, nothing of substance has occurred in this action. Thus, had the IAS Court granted HBK’s

motion, the parties easily could have conducted any necessary discovery, and could have fully briefed any motions challenging HBK's proposed amended holdings in the Settlement Trusts.

More fundamentally, the IAS Court erred in holding that the other parties would be prejudiced by HBK's proposed amendment, because the proposed amendment would have had no substantive impact on this action. Following its denial of HBK's motion, the IAS Court held that HBK and the other Challenged Respondents did not have standing to appear directly in this proceeding, but that they could continue to be heard through the trustees of the "indirect" assets that they owned—in HBK's case, by U.S. Bank National Association, as NIM Trustee. Thus, HBK's position on the merits will continue to be heard in this action through U.S. Bank—all that the IAS Court's decision did was make it more difficult and more costly for HBK to be heard.

For these and other reasons to be set forth more fully in HBK's appeal, the IAS Court erred in denying HBK's motion for leave to amend.

Dated: August 28, 2018
New York, New York

Respectfully Submitted,

SCHLAM STONE & DOLAN LLP

By: _____ /S/

John M. Lundin
Niall D. O'Murchadha
Seth D. Allen
Alexandra M.C. Douglas
26 Broadway
New York, New York 10004
Telephone: (212) 344-5400
Facsimile: (212) 344-7677
E-mail: jlundin@schlamstone.com
nomurchadha@schlamstone.com
sallen@schlamstone.com
adouglas@schlamstone.com

-and-

John J.D. McFerrin-Clancy
17 State Street, 40th Floor
New York, New York 10004
Telephone: (646) 771-7377
E-mail: jmc@mcferrin-clancy.com

Attorneys for Respondent HBK Master Fund L.P.

To: All counsel of record (via NYSCEF)