

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner,

-against-

WALNUT PLACE LLC; WALNUT PLACE II LLC; WALNUT PLACE III LLC; WALNUT PLACE IV LLC; WALNUT PLACE V LLC; WALNUT PLACE VI LLC; WALNUT PLACE VII LLC; WALNUT PLACE VIII LLC; WALNUT PLACE IX LLC; WALNUT PLACE X LLC; and WALNUT PLACE XI LLC (proposed intervenors),

Respondents,

for an order pursuant to CPLR § 7701 seeking judicial instructions and approval of a proposed settlement.

Index No. 651786/2011

Assigned to: Kapnick, J.

**WALNUT PLACE'S MEMORANDUM OF LAW
IN SUPPORT OF ITS PETITION TO INTERVENE**

The Bank of New York Mellon filed this Article 77 proceeding to seek judicial approval of a proposed settlement of the claims of 530 trusts for which BNYM serves as trustee. Walnut Place owns certificates in three of those 530 trusts and has been actively litigating claims on behalf of two of those trusts against Countrywide and Bank of America. If approved, the proposed settlement, which BNYM negotiated in secret without the knowledge or consent of Walnut Place, would extinguish the claims that Walnut Place has brought on behalf of those trusts and their beneficiaries. Walnut Place therefore seeks an order pursuant to CPLR 401, 1012, and 1013 to intervene as an adverse party in this proceeding to protect its interests and those of its fellow certificateholders in those trusts.

PROCEDURAL BACKGROUND

Countrywide Home Loans, Inc. and its affiliates sold millions of its loans to securitization trusts that Countrywide sponsored. To raise the money to pay Countrywide for the loans, those

trusts in turn sold securities called certificates, which are backed by those mortgage loans, to investors all over the world. To assure the trusts and investors that the loans it was selling them were of good quality, Countrywide made numerous representations and warranties about those loans. And to put teeth into those representations and warranties, Countrywide agreed to repurchase from the trusts loans that did not comply with the representations and warranties.

The Walnut Place entities own securities issued by three of Countrywide's trusts. Concerned by widespread reports about the poor quality of Countrywide's loans, Walnut Place spent many months and hundreds of thousands of dollars to investigate the true quality of the loans in three of those trusts. It found that hundreds of loans in each trust were actually not of good quality and breached several of the representations and warranties that Countrywide had made about them.

The Bank of New York Mellon is the trustee for 530 of the trusts that Countrywide created, including all three of the Countrywide trusts that issued the certificates that Walnut Place owns.

On August 3, 2010, almost a year ago, Walnut Place presented to BNYM the detailed evidence that it uncovered in its investigation of one of those three trusts, Alternative Loan Trust 2006-OA10 (referred to as OA10). That evidence proved that many of the loans in that trust breached the representations and warranties that Countrywide had made about them. Walnut Place demanded that Countrywide repurchase those loans as it had agreed. When it refused, Walnut Place and other investors – which collectively owned more than 25% of the voting rights in that trust – demanded that BNYM sue Countrywide to enforce its promise to repurchase the defective loans. As it has in many cases in which it has been presented with evidence of Countrywide's breaches, BNYM did nothing. On February 23, 2011, Walnut Place then filed an action in this Court, derivatively on behalf of the OA10 Trust, to enforce Countrywide's obligation to repurchase the defective loans.

Walnut Place conducted the same investigation and made the same demands with respect to two other trusts. On April 12, 2011, Walnut Place amended its complaint to add Alternative

Loan Trust 2006-OA3 (referred to as OA3). And Walnut Place has already begun to prepare a lawsuit on a third trust, Alternative Loan Trust 2006-OA21.

Months after Walnut Place filed its action in this Court, BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent and successor by *de facto* merger, Bank of America Corporation,¹ to settle all “potential claims belonging to the [530] trusts” for which BNYM serves as trustee. On the same day, BNYM filed this Article 77 proceeding to request judicial approval of the proposed settlement. BNYM requested assignment of its proceeding to Justice Kapnick on the ground that its petition is related to Walnut Place’s lawsuit.

ARGUMENT

“As a general matter, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.” *Bernstein v. Feiner*, 842 N.Y.S. 2d 556 (App. Div. 2007). CPLR 1012(a) permits a party to intervene in an action as of right if [1] “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment” or if [2] “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” CPLR 1013 permits a party to intervene with the permission of the Court if [3] “the person’s claim or defense and the main action have a common question of law or fact . . . [and] the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party.”²

Although any one of these conditions would be sufficient to permit Walnut Place to intervene, all three are satisfied in this proceeding.

¹ On January 11, 2008, Bank of America Corporation agreed to acquire Countrywide Financial Corporation (the parent company of Countrywide Home Loans) in a reverse triangular merger. The transaction closed on July 1, 2008, and on October 6, 2008, Bank of America announced that Countrywide would transfer all or substantially all of its assets to unnamed subsidiaries of Bank of America. Walnut Place elaborates on these facts in paragraphs 154-76 of its amended complaint in *Walnut Place LLC v. Countrywide Home Loans, Inc.*, Index No. 650497/2011 (Sup. Ct. N.Y. County) (attached as Exhibit A to Walnut Place’s petition).

² Because this is a “special proceeding” under Article 77, all petitions to intervene, including as of right, require the approval of the Court. CPLR 401.

I. THIS PROCEEDING INVOLVES A CLAIM FOR DAMAGES FOR INJURY TO PROPERTY, AND WALNUT PLACE WILL BE AFFECTED BY THE JUDGMENT.

Walnut Place owns certificates in three of the trusts that are subject to the proposed Settlement Agreement. Walnut Place is also the plaintiff in an action in this Court to enforce the same breaches of Countrywide's representations and warranties that the proposed settlement purports to release. *See* Amended Complaint, *Walnut Place LLC v. Countrywide Home Loans, Inc.*, attached as Exhibit A to Walnut Place's petition. The trustee has stated expressly that "if approved, the Settlement will resolve the claims raised by the plaintiffs in *Walnut Place LLC*." (*See* BNYM Request for Judicial Intervention.) Moreover, the Order to Show Cause that the trustee obtained from this Court contemplates that "Potentially Interested Persons" like Walnut Place may have an interest in these proceedings.³

Thus, Walnut Place fits the textbook definition of a party that is permitted to intervene as of right in this proceeding under CPLR 1012.

II. BNYM MAY NOT ADEQUATELY REPRESENT WALNUT PLACE'S INTERESTS.

CPLR 1012 also permits intervention as of right where "the representation of the person's interest by the parties is or *may be* inadequate." (Emphasis added.) To intervene as an adverse party, Walnut Place need not show that BNYM's representation is necessarily inadequate; it is sufficient for Walnut Place to show merely that BNYM may not adequately represent Walnut Place's interests. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).⁴ Courts have also held that "[t]ypically, persons seeking intervention need only carry a 'minimal' burden of showing that their interests are inadequately represented by the existing parties." *U.S. v. Union Electric Company*, 64 F.3d 1152, 1168 (8th Cir. 1995).

³ "Potentially Interested Person" is defined in paragraph 4(a) of the Affirmation of Matthew D. Ingber, dated June 28, 2011, to include "holders of certificates or notes evidencing various categories of ownership interests in the Trusts."

⁴ CPLR 1012 is modeled after Rule 24 of the Federal Rules of Civil Procedure. Judicial opinions that interpret Rule 24 are thus persuasive authority for this Court.

Although BNYM ostensibly is required to protect the interests of all certificateholders in the trusts that it administers, including Walnut Place, BNYM itself has acknowledged that certificateholders may have conflicting views about the adequacy of the proposed settlement. Thus, BNYM has stated that it “recognizes the potential that some Certificateholders may disagree with the Trustee’s judgment that the Settlement is reasonable” and that “different groups of Certificateholders may wish to pursue remedies for alleged breaches in different ways, creating the potential for conflicts among Certificateholders and placing the Trustee squarely in the middle of those conflicts.” (BNYM Petition ¶¶ 13-14.) These are precisely the circumstances that CPLR 1012 was designed to address by permitting a party like Walnut Place to intervene as of right to protect its own interests.

Moreover, BNYM has at least three conflicts of interest that raise serious doubts about its motives in negotiating the settlement and therefore about the adequacy of its representation of the interests of Walnut Place.

First, under the Pooling and Servicing Agreements, BNYM is indemnified by the Master Servicer of each trust, Countrywide Home Loans Servicing, LP (another predecessor-in-interest of Bank of America Corporation), for costs and liabilities that arise out of certain duties that BNYM is to perform for the trusts. As part of the proposed settlement, BNYM negotiated for itself an indemnity from Countrywide that goes well beyond the scope of the indemnity that BNYM is otherwise entitled to under the PSAs. In particular, Countrywide agreed to indemnify BNYM for all costs and liabilities that BNYM may incur as a result of its participation in the very unusual process of negotiating the proposed settlement. This expanded indemnity is embodied in a “side letter” to the Settlement Agreement. It is very unusual, to say the least, for a trustee that says it is representing the interests of the beneficiaries of a trust, to demand and obtain an indemnity from the very party that is adverse to that trust and its beneficiaries (in this case, the certificateholders). BNYM concedes in its petition that it was concerned about its liability for the way in which it was handling (or, more accurately, ignoring) the demands of its beneficiaries that it take legal action for their benefit against Countrywide and Bank of America.

For example, BNYM referred to “reports that a group of Certificateholders has considered taking action against BNY Mellon for its participation in the Settlement process.” (Trustee Petition ¶ 13.) BNYM also states that “the Trustee also may be subject to claims by individual Certificateholders who believe that the Settlement though benefitting thousands of Trust Beneficiaries now and in the future, may not be in their individual best interests.” The proposed settlement protects BNYM from these liabilities by means of an indemnity from the party against which it was supposed to protect the interests of its beneficiaries and now anticipates that it may be liable for its failure to do so.⁵

Second, under the PSAs, BNYM is indemnified solely by Countrywide Home Loans Servicing, yet the parent and successor of that entity, Bank of America Corporation, guaranteed that indemnity to BNYM. The guarantee does nothing for the trusts or the certificateholders, but it provides a great benefit to BNYM. Indeed, BNYM states expressly in its petition that it doubts the solvency of Countrywide, so much so that it argues that Countrywide’s supposed inability to pay a large judgment is a reason to accept the proposed settlement. (*Id.* ¶¶ 78-81.) Thus, the guarantee from Bank of America puts BNYM in a substantially better position than it was in before negotiating the proposed settlement, at the direct expense of the certificateholders whose interests BNYM purports to protect.

Third, BNYM cannot objectively evaluate the fairness of the proposed settlement because BNYM has duties to – and (as BNYM itself acknowledges) is potentially liable to – the certificateholders of all 530 trusts. It is obviously in BNYM’s own interest to “settle” the claims of all 530 trusts at the same time on substantially identical terms. Otherwise, BNYM could be liable to certificateholders that believe they were treated less favorably than others. But not all of the trusts are identically situated. For example, Walnut Place is the only certificateholder in any

⁵ Walnut Place also has serious doubts about the validity of the indemnity agreement. The Court of Appeals has held that indemnity agreements that purport to provide indemnification for punitive damages are void as a matter of public policy. *See Zurich Insurance Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 316-17 (1994). Public policy also would prohibit a trustee that owes duties to the beneficiaries of a trust from enjoying an indemnity for the breach of those duties from a party that is adverse to the interests of those beneficiaries.

Countrywide trust that has yet invested the time and money to conduct an independent investigation and actually sue Countrywide and Bank of America for breaches of representations and warranties. (None of the 22 self-appointed investors has ever done so, despite their claim to represent the interests of other certificateholders.) If BNYM were not hopelessly conflicted, it would have insisted that the proposed settlement take into account the far greater recovery that all certificateholders in the OA10, OA3, and OA21 trusts can expect because of Walnut Place's diligence.

III. WALNUT PLACE SATISFIES THE REQUIREMENTS FOR INTERVENTION UNDER CPLR 1013.

Even if Walnut Place were not permitted to intervene in this proceeding as of right, still it satisfies the requirements for discretionary intervention under CPLR 1013. The Court has discretion to permit a party to intervene when “the person’s claim or defense and the main action have a common question of law or fact.” The claims that Walnut Place is litigating in this Court are literally identical to the claims that BNYM proposes to settle and release in this Article 77 proceeding. Moreover, it is particularly appropriate for the Court to exercise its discretion to permit intervention in this case, because “in the absence of the intervenors, there is, as a practical matter, no real adversary proceeding before the court.” *In re The Petroleum Research Fund*, 3 N.Y.S.2d 693 (App. Div. 1956). Under Federal Rule of Civil Procedure 24(b), on which CPLR 1013 is patterned, “intervention is appropriate where the intervenor seeks virtually the same relief as the named plaintiff and . . . is encouraged if the proposed intervenors’ claims will add to the Court’s understanding of the facts.” *Rodriguez v. Debuono*, No. 97 Civ. 0700, 1998 WL 542323, at **2-3 (S.D.N.Y. Aug. 24, 1998); *see also Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (intervenors “will bring a different perspective to the case and will contribute relevant factual variations that may assist the court in addressing the constitutional issue raised”).

Finally, permitting Walnut Place to intervene in this proceeding will not “unduly delay the determination of the action or prejudice the substantial rights of any party.” CPLR 1013.

Walnut Place filed its petition to intervene in a timely manner, well in advance of the deadline for Potentially Interested Parties to file objections in this Court. And any other interested party that wishes to participate in this proceeding is free to do so. Indeed, the 22 self-appointed investors that participated in the negotiation of the Settlement Agreement with BNYM, Countrywide, and Bank of America also filed a petition to intervene that is currently pending before this Court.

CONCLUSION

For all of these reasons, Walnut Place respectfully requests that the Court grant its petition and amend the caption to add the Walnut Place entities as intervenors-respondents in this Article 77 proceeding.

Dated: New York, New York
July 5, 2011

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