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), *et al.*,

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Scarpulla, J.

Motion Sequence 43

PETITIONERS' RESPONSE IN OPPOSITION TO
AIG'S MOTION TO STAY ENTRY OF FINAL JUDGMENT

GIBBS & BRUNS LLP
Kathy Patrick (*pro hac vice*)
Robert J. Madden (*pro hac vice*)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

WARNER PARTNERS, P.C.
Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

Attorneys for Intervenor-Petitioners the Institutional Investors

MAYER BROWN LLP
Matthew D. Ingber
Christopher J. Houpt
1675 Broadway
New York, New York 10019
(212) 506-2500

DECHERT LLP
Hector Gonzalez
James M. McGuire
Mauricio A. España
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Attorneys for Petitioner The Bank of New York Mellon

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

AIG lost on every objection it raised in the nine-week, 22-witness evidentiary hearing in this proceeding, as well as on its relentless efforts to extend discovery and then adjourn the hearing. AIG now seeks further delay, contending that it would be prejudiced by entry of Justice Kapnick's adverse "Decision/Order/Judgment" (the "Judgment"). Not true. AIG has a fully adequate legal remedy available: it can appeal the judgment. What AIG cannot do is avoid the effect of an unfavorable judgment by staying its entry, thereby extending the mandatory, statutory, jurisdictional period in which it must file notice of appeal. Not surprisingly, AIG does not cite a single precedent remotely supporting its claim that, in these circumstances, a court has the power to forestall an appeal of a judgment indefinitely by granting the losing party a stay of the entry of the adverse judgment. *See* Part I. below. Moreover, all of the issues that AIG claims were "left open" were raised, litigated, and expressly decided against AIG in the Judgment. Justice Kapnick's designation of her ruling as a "final disposition" clearly reflects and confirms that fact. *See* Part II. below. If AIG believes that it has meritorious appellate arguments, it should pursue an appeal promptly. The Court should not permit AIG to nullify the Judgment and hold the entire settlement hostage indefinitely.

In the unlikely event that a stay is granted, AIG should be required to post an undertaking equivalent to the $1 million per day in costs that a stay would impose on certificateholders who have already waited over two years to receive the benefits of this landmark settlement. Such an undertaking is necessary and appropriate to ensure that a single holder does not prolong these proceedings through its incessant quest for delay, in an effort to advance its independent interests at the expense of all other certificateholders. *See* Part IV. below.

BACKGROUND

This is an Article 77 special proceeding[1] in which Petitioner The Bank of New York Mellon ("BNYM"), as trustee for 530 residential mortgage backed securities (RMBS) trusts, sought approval of a settlement of certain trust claims. Under the settlement, certificateholders in the trusts will receive $8.5 billion in cash, as well as more than $2 billion in landmark servicing improvements for the mortgages still held in the trusts, upon entry of a final, non-appealable judgment finding that BNYM acted reasonably and within the scope of its discretion and authority in entering into the settlement.

Twenty-two of the largest certificateholders—denominated the Institutional Investors in this proceeding and collectively holding 24% of the outstanding securities—intervened in support of BNYM's request for relief.[2] On August 8, 2011, movant AIG sued Bank of America for $10 billion on unrelated securities fraud claims, which are not released by the settlement. On

---

[1] C.P.L.R. Section 7701 provides that "[a] special proceeding may be brought to determine a matter relating to any express trust . . . ."

[2] The "Institutional Investors" are BlackRock Financial Management Inc., Kore Advisors, L.P., Maiden Lane, LLC, Maiden Lane II, LLC, Maiden Lane III, LLC, Metropolitan Life Insurance Company, Trust Company of the West and affiliated companies controlled by The TCW Group, Inc., Neuberger Berman Europe Limited, PIMCO Investment Management Company LLC, Goldman Sachs Asset Management, L.P., as adviser to its funds and accounts, Teachers Insurance and Annuity Association of America, Invesco Advisers, Inc., Thrivent Financial for Lutherans, Landesbank Baden-Wuerttemberg, LBBW Asset Management (Ireland) plc, Dublin, ING Bank fsb, ING Capital LLC, ING Investment Management LLC, New York Life Investment Management LLC, as investment manager, Nationwide Mutual Insurance Company and its affiliated companies, AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc.; Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio, Federal Home Loan Bank of Atlanta, Bayerische Landesbank, Prudential Investment Management, Inc., and Western Asset Management Company.

the same day, AIG intervened in this proceeding to object to the settlement.[3] Following a world-wide, court-ordered notice program, and over two years of litigation, only a few objectors remain and they hold less than 7% of the securities.

After pre-hearing proceedings and discovery, and a nine-week evidentiary hearing involving thousands of exhibits and the testimony of 22 witnesses, Justice Kapnick entered the Judgment that upheld BNYM's decision in virtually every respect. The Judgment also overruled, in *every* respect, all of the objections asserted by AIG—including those that AIG now claims Justice Kapnick "left open" and did "not resolve[]."

ARGUMENT

I. An Open-Ended Stay of Entry Is Not a Substitute for Appeal.

AIG's new post-trial counsel has threatened that AIG will cause this case to "continue for years to come at both the trial and appellate levels."[4] This motion is plainly an attempt (undoubtedly not AIG's last) to create the extraordinary and highly prejudicial delay it has promised to impose on the 93% of certificateholders who favor the settlement. In furtherance of that effort, AIG begins with this motion: one in which it seeks an indefinite stay of the *entry* of the Judgment. AIG has cited no authority to support its request for such extraordinary relief, no case in which a court has granted such relief, and no legal rule, procedure, or principle that would justify it in this case. Even if, as AIG wrongly claims, there were issues "left open" by the Judgment (and there are not, as explained below), AIG's remedy is to appeal, not to indefinitely delay the appeal process. The sole authority that AIG cites is *Slewett & Farber v. Board. of*

---

[3] AIG has made clear that it is using its objection in this proceeding as leverage in its attempt to obtain a separate settlement from Bank of America on its unrelated individual securities claims. *See, e.g.*, Doc. No. 479 at 2 (Nov. 10, 2011 letter from AIG General Counsel acknowledging that "AIG has stated that it would agree not to pursue its objection in the Article 77 proceeding if there is an agreement to resolve its fraud and other claims against BofA . . . .").

[4] *See* New York Law Journal, February 3, 2014, p. 8 (quoting AIG counsel).

Assessors, which it claims holds that "final judgment 'will issue only after all factual and legal issues have been decided.'" Motion 3 (quoting 80 A.D.2d 186, 200 (2d Dep't 1981)). In fact, however, *Slewett & Farber* held only that an order granting "partial summary judgment" was not a "final determination" for purposes of deciding whether a new statute applied retroactively to the case. *Id.* at 201. The court did not, as AIG implies, enjoin entry of that order, and the case does not in any way support AIG's request for a stay of entry here. And for good reason. AIG's unprecedented motion would create a precedent with broad potential for mischief: it would permit the losing party to postpone, indefinitely, the effectiveness of a judgment *after* it lost on the merits of all of its claims or defenses. Justice delayed—or, as AIG would have it, postponed indefinitely—is justice denied. AIG's request to stave off entry of an unfavorable judgment seeks to do obliquely what the Court lacks authority to do directly, namely, extend the time to take an appeal. The 30-day period in which to take an appeal is jurisdictional: "the court cannot, nor can even the parties by stipulation, extend the time to appeal beyond the statutory allotment." *Siegel*, New York Practice § 533 (4th ed.) (citing *Ocean Acc. & Guar. Corp. v. Otis Elevator Co.*, 291 N.Y. 254 (1943)). The "time in which to take an appeal is one of the exceptions, and it's rigid," to the authority conferred by CPLR 2004 to extend time periods for good cause shown. *Id.* § 534.

No provision of the CPLR authorizes the extraordinary and indefinite stay AIG seeks. CPLR 5519(c) permits a court to grant a discretionary stay of proceedings to *enforce* the judgment "pending the appeal or determination on the motion for permission to appeal." But CPLR 5519(c) is premised on the obvious fact that a judgment has, at that point, been entered. It is also irrelevant here: the Judgment contains no provision that now can be enforced and it does *not* require AIG to do *anything*. The general stay provision, CPLR 2201, provides no support for a stay, either. This provision gives discretion to "the court in which an action is pending [to] . . .

grant a stay of proceedings in a proper case, upon such terms as may be just," but AIG does not seek to stay the trial-court proceeding: that proceeding is over. Instead, AIG seeks an indefinite tolling of the statutory period in which it must file a notice of appeal, even as it endeavors to create new proceedings in this Court. *See generally Landmark Ins. Co. v. Virginia Sur. Co.*, 2007 WL 2727773 (Sup. Ct., N.Y. Cnty. 2007) ("'Proper' cases for a stay in civil actions include those where a change of venue is under consideration, an issue *is being appealed* or where related criminal proceedings are being litigated.") (emphasis added) (citations omitted).

II. There Are No "Open Issues."

Even if the Court could grant the type of relief that AIG seeks, it should not do so. The Judgment does not leave any issue undecided. Exactly the issues that AIG now claims are "open" were, in fact, raised by AIG as objections in the Article 77 proceeding. Justice Kapnick expressly overruled all of those objections.

Allocation among trusts: AIG argues that entry of the Judgment should be stayed so it can engage in "years" of litigation over the allocation of the $8.5 billion settlement payment across the 530 trusts. Yet it has been publicly disclosed since June 29, 2011 that the Settlement Agreement provided that the Trustee's third-party expert, NERA, is not required to calculate the allocation shares for each trust until after Final Court Approval (defined as the resolution of all appeals, or the expiration of the time to take appeals, from a favorable judgment). *See* Settlement Agreement ¶ 3(c). Like every other term of the Settlement, that provision was in evidence.[5] As the Trustee pointed out repeatedly, there is nothing unusual about a court approving a settlement before fixing individual allocations. *See In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987).

---

[5] *See* Respondents' Hearing Ex. 1 (Settlement Agreement).

Before, during, and after the hearing, AIG raised the precise objection that it makes now. In its first appearance in the case, it argued that the Court should reject the settlement because "BoNY has not revealed what each individual trust and therefore each trust beneficiary can expect to receive from the settlement *as the figures are to be calculated after the settlement has been approved*." Doc. 131 at ¶ 48 (emphasis added).[6] It raised this objection in discovery motions, which were denied.[7] It raised it in a motion to convert the proceeding into a "plenary action," which was denied.[8] It raised it in pre-trial briefs[9] and post-trial briefs.[10] In fact, AIG chastised the Trustee for overlooking its pre-trial brief on this very point: "BNYM's claim that no one has challenged the allocation method is wrong." Doc. 814 at 9, Objectors' Consolidated Reply in Opposition to the Proposed Settlement (May 20, 2013). AIG's expert parroted the

---

[6] Doc. 55, Federal Home Loan Banks of Chicago, Boston, and Indianapolis Petition to Intervene (July 13, 2011) [subsequently withdrawn], at 4 ("the Banks need more information about the way in which the settlement fund would be allocated").

[7] Doc. 213-1, The Steering Committee of Intervenor-Respondents and Objectors' Replacement Memorandum of Law in Support of the Order to Show Cause Why the Court Should Not Compel Discovery (April 4, 2012), at 2 ("Neither do the Intervenors know how—or how much of—the $8.5 billion settlement will be allocated among the Covered Trusts."); Doc. 278, The Steering Committee of Objectors' Reply Memorandum of Law in Support of its Motion to Compel Discovery (April 19, 2012), at 9 ("The Settlement Agreement Is Ambiguous as to How Much Money Any Trust Will Receive").

[8] Doc. 220, Steering Committee of Intervenor –Respondents and Objectors' Memorandum of Law in Support of Order to Show Cause Why the Court Should Not Convert this Special Proceeding to a Plenary Action (April 3, 2012), at 10 (objecting to "the vague allocation of the settlement amount that BNYM proposes").

[9] Doc. 588, Objectors' Joint Memorandum of Law in Opposition to the Proposed Settlement (May 3, 2013) ("The remaining undisclosed information includes: . . . how the net amount of the settlement will be allocated to any individual trust"); Doc. 814, Objectors' Consolidated Reply in Opposition to the Proposed Settlement (May 20, 2013) ("Allocation—as this Court is aware—occurs *after* the settlement is approved and payment is made.").

[10] Doc. No. 953, Respondents' Joint Brief in Opposition to Approval of Proposed Settlement and Entry of Proposed Final Order and Judgment (October 29, 2013) at 48-50.

objection.[11] AIG called the NERA economist who will perform the allocation, and there are pages and pages of testimony from her and others on the methodology, as well as the negotiation and rationale for the Settlement's treatment of the allocation.[12]

This issue was also resolved by the Judgment. AIG's objection, as well as the arguments presented by its counsel (Judgment 52), were considered and overruled, on the merits, by Justice Kapnick. *Id.* at 52-53 (adopting paragraph (t) of the Proposed Final Order and Judgment that overrules all objections).

Exclusion of trusts: AIG argues that "the *Decision* does not address which trusts will be covered by the Settlement." Motion 3 (emphasis added). But the Settlement Agreement plainly does, and the Decision approves the Settlement in this respect. The trusts that are covered are listed in an exhibit to the agreement, *see* Settlement Agreement, Ex. A, and paragraph 4(a) gives Bank of America the right to exclude a defined subset of trusts under specified conditions. "Exclude" means what it sounds like—excluded trusts, if any, will not receive a settlement payment, but they will also not release any claims. *See* Settlement Agreement ¶ 4(a). Thus, the exclusion language could not leave excluded trusts worse off than they are without the Settlement, nor could it alter the benefits of the Settlement for the remaining trusts, each of which will get exactly what they would otherwise get. Justice Kapnick had this evidence before her and, "after reviewing the voluminous record" (Judgment at 52), concluded that the Settlement Agreement—including the terms providing for the possible exclusion of some trusts—was reasonable. *Id.*

---

[11] Doc. No. 570, Expert Rebuttal Report of Adam J. Levitin at ¶¶ 76-87.

[12] Tr. (Kravitt) 1399:9-1401:2; 1404:16-1405:10; 1438:2-1439:8; Tr. (Bailey) 2215:17-2216:12; Tr. (Lin) 3979:23-3981:8; Tr. (Cowan) 4119:17-4120:24; Tr. (Sabry) 4343:18-4374:24.

Like the allocation objection, this issue was raised many times over the last several years.[13] Further litigation will reveal nothing new, because the Settlement states plainly that these provisions will be implemented after court proceedings are over.[14]

* * *

Both of these issues are governed by the Settlement Agreement and were actually litigated before Justice Kapnick for over two years. In words that could not be any clearer, she ruled that:

> *All* objections to the Settlement have been considered and are overruled and denied in *all* respects.

Judgment 13, 53 (approving paragraph (t) of the Proposed Final Order and Judgment as to this objection) (emphasis added).

Nothing in the Judgment even hints that Justice Kapnick decided anything less than *all* outstanding issues. The cover page of the Judgment identifies it as a "Final Disposition" of the proceeding. Her orders on motion sequence numbers 24 and 42, decided the same day, both state "Case Disposed." Thus, when given a choice between "Final Disposition" / "Case Disposed" and "Non-Final Disposition," Justice Kapnick chose the former three times. In the face of those

---

[13] Doc. No. 588, Joint Memorandum of Law in Opposition to the Proposed Settlement (May 3, 2013) at 49 ("The Trustee agreed to two provisions in the Settlement Agreement that allow BofA, at its discretion, to exclude Covered Trusts from the proposed settlement…"); Doc. No. 953, Respondents' Joint Brief in Opposition to Approval of Proposed Settlement and Entry of Proposed Final Order and Judgment (October 29, 2013) at 49 ("the Settlement Agreement affords Bank of America complete discretion to exclude any Covered Trust in its entirety where just one bond is insured by a financial guaranty company, unless the insurer afrees not to pursue its rights against BofA."); Tr. (summation) 5816:3 ("Bank of America can still exclude trusts"); Tr. (Waterstredt) 952:13-954:10); Tr. (Kravitt 1812:12-1822:14).

[14] The "Second" issue raised by AIG (Motion 2) is the same as the first. The Settlement provides that the share, if any, that will be retained by Bank of America is the share allocable to any excluded trusts. *See* ¶ 4(a). Thus, the assertion that AIG does not know how much, if any, of the settlement payment will be held back is nothing more than a restatement of its irrelevant assertion that it does not know which, if any, trusts will be excluded.

orders, AIG cannot seriously contend that "[f]urther proceedings will be required to resolve these and other open questions." Motion 3.

AIG does not even try to explain what "resolv[ing]" these questions would mean, or what relief they would seek after the "years to come." The Settlement Agreement provides for allocation *after* Final Court Approval, and it gives Bank of America the right to exclude certain trusts *after* Final Court Approval, meaning *after* appeals. Despite AIG's objections to these provisions, Justice Kapnick's Judgment confirmed the reasonableness of BNYM in entering into a settlement agreement containing these terms. Thus, when AIG argues that "BNYM should be required" to perform the cross-trust allocation, as well as the intra-trust distributions, before Final Court Approval (Motion 4-5), it is simply re-arguing the very objections that were overruled by the Judgment.

III. The Loan Modification Finding Is No Reason to Stay Entry.

In a footnote, AIG claims that the resolution of the allocation issues "could affect the decisions by AIG and other investors regarding whether to pursue the Loan Modification Claims." Motion at 5 n.4. This is nonsense. The loan modification claims belong to BNYM, as trustee for the trusts, not to individual investors. *See* Judgment 23; *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 (1st Dep't 2012). In addition, these claims are the subject of the Settlement Agreement and release. Settlement Agreement ¶¶ 2, 9. Thus, there is no decision to be made, by anyone, about any action to take with respect to these claims until it is determined whether the Settlement Agreement is finally approved and appeals are exhausted.

Moreover, unlike the objections above, AIG never showed any interest in these claims at trial—it did not raise them in its briefs, it did not examine witnesses on them, and it did not argue

them in opening or closing. The objectors who did address them have almost all dropped out. AIG's newfound passion for the loan modification claims further demonstrates that it is desperately casting about for some reason—any reason—to arrest the final resolution of this proceeding.

IV. AIG Should Be Required to Post an Undertaking If the Court Orders a Stay.

While a stay would be impermissible for the reasons set forth above, if the Court were to determine that some valid reason supports granting AIG's unprecedented motion to stay entry of the Judgment, it should require AIG to provide an undertaking. "Ordinarily, the movant will be required to post an undertaking when granted a stay." Davies, Stecich & Gold, 8 N.Y. Prac., Civil Appellate Practice § 9:4 (2d ed. 2013). Each day of delay in finalizing the Settlement costs the Trusts and their certificateholders $1 million in lost settlement benefits.[15] AIG has had its day in court and it lost; if it is to be permitted, now, to interpose further delay, AIG should be required to post an undertaking equivalent to the $1 million per day that a stay will impose on certificateholders. That undertaking should continue until such time as the Judgment is entered and appeals may be taken.

[15] This calculation holds true even with the conservative assumption that the settlement proceeds would earn only 4.5% in interest ($8,500,000,000 * 0.045 / 365 = $1.05 million a day).

CONCLUSION

For all of these reasons, the Court should deny AIG's request to stay entry of the final judgment.

Dated: February 14, 2014
New York, New York

Respectfully submitted,

s/Kathy Patrick
GIBBS & BRUNS LLP
Kathy Patrick (*pro hac vice*)
Robert J. Madden (*pro hac vice*)
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

WARNER PARTNERS, P.C.
Kenneth E. Warner
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

Attorneys for Intervenor-Petitioners the Institutional Investors

s/Matthew D. Ingber
Matthew D. Ingber
Christopher J. Houpt
MAYER BROWN LLP
1675 Broadway
New York, New York 10019
(212) 506-2500

Hector Gonzalez
James M. McGuire
Mauricio A. España
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Attorneys for Petitioner The Bank of New York Mellon