

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 651786/2011
BANK OF NEW YORK MELLON
vs.
FOR AN ORDER PURSUANT TO
SEQUENCE NUMBER : 043
PREL INJUNCT / TEMP REST ORDER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ *for a stay is denied for*
the reasons set forth on the record on 2/19/14.
This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 2/14/2014



HON. SALIANN SCARPULLA, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART: 39
-----X

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,

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

-----X

Index No. 60 Centre Street
651786/11 New York, New York
February 19, 2014

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HONORABLE SALIANN SCARPULLA,
Justice of the Supreme Court

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OFFICIAL COURT REPORTER

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M O R N I N G S E S S I O N

THE COURT: Good morning.

I have an order to show cause.

11:03:03

MR. ZAUDERER: It is our order to show cause, your

Honor.

THE COURT: Yes, to stay entry of a judgment.

Okay.

MR. ZAUDERER: May I proceed?

11:03:10

THE COURT: Yes.

MR. ZAUDERER: Good morning, your Honor. My name

is Mark Zauderer, Flemming Zulack Williamson Zauderer, in

support of the order to show cause.

I'd like to introduce my co-counsel, Daniel

11:03:24

Reilly.

MR. REILLY: Good morning, your Honor.

MR. ZAUDERER: And to his right, Michael Rollin.

MR. ROLLIN: Good morning, your Honor.

MR. ZAUDERER: With the Court's permission, I'm

11:03:31

going to ask Mr. Reilly, who participated in the hearing

throughout before Judge Kapnick, to begin to address the

Court on the motion.

THE COURT: Okay.

MR. ZAUDERER: Thank you.

11:03:40

MR. REILLY: May it please the Court.

THE COURT: Yes.

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MR. REILLY: Your Honor, I have a slide deck that I think will help us move more quickly through this. I provided a copy to counsel.

11:03:55

THE COURT: Say that again?

MR. REILLY: I have a deck of slides that I'm going to move through with you.

THE COURT: For what purpose?

MR. REILLY: Well, I was going to try and --

11:04:04

THE COURT: This is a pretty straight forward motion. I don't need any slides.

MR. REILLY: Okay.

THE COURT: Okay?

MR. REILLY: All right.

11:04:09

Let me start with a fundamental point. The Decision and Order was entered on January 31st, 2014, and there isn't any dispute about that. We are not trying to delay the appellate process. Anyone could have, in fact, filed a note of entry and served the order and moved that process along.

11:04:26

Our request today is that the entry of the judgment not occur because there are still open issues to be resolved.

11:04:36

THE COURT: I don't understand what you mean by the judgment -- the order was entered. The order which -- let's look at Judge Kapnick's order. Her judgment is on an

Proceedings

Article 77 which is, obviously, a special proceeding --

MR. REILLY: Right.

THE COURT: -- Petition/Answer/Judgment. So she's entered. She says: Enter judgment. Stay five days. That's it. Her decision is a judgment that is stayed five days. So I don't know what you're talking about. There's no split there. What I have to do is the sort of ministerial thing of signing the judgment.

11:04:55

MR. REILLY: Okay.

MR. ZAUDERER: May I address that point --

THE COURT: Sure.

MR. ZAUDERER: -- the procedure? If I may.

As the Court knows, there are orders and there are judgments. The decision, as your Honor says, provided for entry of an order and judgment. She stayed the judgment portion leaving to whoever succeeded her or anybody taking over the case the decision as to whether to continue the stay or not enter the --

11:05:22

THE COURT: That is not what she tells me.

Judge Kapnick tells me that the five-day stay that she put in was merely a convenience to the parties because there are several parties out of town, out of city, out of state. That she had no intention of leaving anything open.

11:05:42

MR. ZAUDERER: May I address that?

THE COURT: No. Let me finish saying what I

11:06:00

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say --

MR. ZAUDERER: Sorry.

THE COURT: -- because clearly Barbara Kapnick issued, and it says, "Ordered and Adjudged." An entry of the judgment stayed five days as a convenience. I spoke to her personally about it. That was her intent in the five-day stay. It was not to allow anyone to do anything else.

11:06:07

MR. ZAUDERER: I think we're, with due respect, on the wrong issue here.

11:06:26

THE COURT: Okay.

MR. ZAUDERER: I'll tell you why.

THE COURT: Okay. Wait a second. Who's -- I have the two of you.

11:06:35

MR. REILLY: I'll sit down while Mr. Zauderer addresses this narrow issue.

THE COURT: Good. In fact, you may sit down. You may all sit down. If it makes you feel better to stand, go right ahead.

11:06:48

MR. ZAUDERER: I'm used to standing out of respect, so I'd like to continue to stand.

THE COURT: It doesn't matter to me either way. I understand.

11:06:53

MR. ZAUDERER: Okay.

I was not a party to -- obviously, whatever

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11:07:06

conversation you had is not part of the record. I can't address that. But the issue today is not what Judge Kapnick, with all respect, not what she intended. Even if she had said I'm going to enter judgment, stay it for three days then I want it entered, it's still up to this Court to decide what to do about that. It's not what Judge Kapnick intended. It's what this Court does --

11:07:21

THE COURT: I don't think it is up to me. Her decision says what it says. I'm not her Appellate Division. All I can do is effectuate what she did.

11:07:34

MR. ZAUDERER: But you have the discretion in a case in which judgment has not been entered to consider whether to stay entry of the judgment, and I'd like --

11:07:51

THE COURT: Show me where I have that discretion. What section of the CPLR permits me, when a judge says enter judgment and then goes up to the Appellate Division, that the next judge can, in effect, change her order without a motion to reargue or a motion to renew?

11:08:01

MR. ZAUDERER: Okay. We, by the way, have made last night a motion to reargue.

THE COURT: I saw that. I saw that you did.

MR. ZAUDERER: And under the case law that should be looked at and determined first, by the way, before any judgment is entered. That's what the case law says.

THE COURT: That is not the practice in this

Proceedings

1 county and it's not my practice.

2
3 MR. ZAUDERER: Well, I can't speak to your
4 practice, your Honor, but that is what the case law says.

11:08:12

5 With respect to entry of the judgment, I submit to
6 you in response, the issue is not where does it say you can
7 do it, it's where does it say you cannot. You have the
8 inherent power until judgment has been entered, as the
9 Judge who is the Judge on this case to, in your discretion

11:08:31

10 for reasons we'd like to present to you if you'll let us
11 get to that, why you should stay entry of judgment, because
12 if you don't stay entry of judgment and keep things under
13 this tent with respect to all the matters that are going to
14 occur. Judge Kapnick approved in part and disapproved in
15 part the settlement. That has created a lot of issues
16 about what will happen. And there are issues of
17 allocations. She approved a procedure and a method, but
18 not the computations.

11:08:46

19 If there are things that are going to happen, and
20 if it's not kept under one tent, with 530 trusts there's
21 going to be litigation all over and there are going to be
22 issues about inconsistent judgments, there are going to be
23 issues about where litigation is going to be. And what the
24 essence of our motion is, keep this under one tent. Don't
25 delay appeal processes or issues that have to be appealed
26 from that 50-page decision, I'm sure. The other side's

11:08:58

11:09:15

Proceedings

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2 going to appeal. We may appeal.

3 THE COURT: I'm not really sure why you think the
4 entry of the judgment would do anything. If you're telling
5 me --

6 MR. ZAUDERER: Yes.

7 THE COURT: -- that everybody can appeal, what
8 would the non-entry of the judgment do, number one; and
9 number two, why not just go up to the Appellate Division
10 and ask the Appellate Division for a stay? Because really
11 that's where I'm headed. That's really where I'm headed in
12 this.

13 MR. ZAUDERER: I appreciate your Honor's candor,
14 but I will address it.

15 THE COURT: Yes.

16 MR. ZAUDERER: Your Honor, I have the misfortune
17 of being on the committee for 22 years that writes the
18 CPLR. So I don't mean to correct you, but there's a
19 distinction --

20 THE COURT: You know what? I have been practicing
21 for 25 years. More than 25. I probably read the CPLR
22 every single day.

23 MR. ZAUDERER: I respect that.

24 THE COURT: So I have no problem with discussing
25 the CPLR with you.

26 MR. ZAUDERER: So let's delve into that, okay.

Proceedings

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2 The problem is that there can only be one judgment
3 in a case. There can be many orders, but the final
4 judgment and judgment are the same thing in New York
11:10:20 5 parlance. So we have a final judgment. At that point
6 we're going to be -- yes, we can appeal it, but that does
7 not deal with all the things that are going to happen here
8 over the next months and years. We don't know what we're
9 going to do with the settlement.

11:10:34 10 THE COURT: Let's stop for a second.

11 I don't think anything is going to happen here. I
12 think what's going to happen is that the Settlement
13 Agreement was approved in part and that part is going to
14 effectuate according to the terms of the Settlement
11:10:48 15 Agreement.

16 MR. ZAUDERER: No.

17 THE COURT: The Settlement Agreement says what it
18 says, and if you are unhappy with it, which you obviously
19 are, and you're unhappy with Judge Kapnick's decision about
11:10:57 20 it, which you obviously are, your remedy is to go up to the
21 Appellate Division, seek a stay from the Appellate Division
22 on the judgment and appeal it. That's your remedy. Not to
23 come before me and say there are going to be supplementary
24 proceedings. The Settlement Agreement settles those issues
11:11:17 25 that are settled within it.

26 For example, allocation. When I looked, it says

Proceedings

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2 that it's in the Trustee's discretion, correct?

3 MR. ZAUDERER: You know what? I'm going to ask
4 Mr. Reilly to address this issue.

11:11:28 5 THE COURT: Sure. Does not the Settlement
6 Agreement say it is in the Trustee's discretion?

7 MR. REILLY: Yes, your Honor, but --

8 THE COURT: So that's settled. If you're unhappy
9 with that provision your right is to go up on appeal and
11:11:42 10 tell the Appellate Division that part of the Settlement
11 Agreement is an abuse of the Trustee's discretion. It is
12 not for me to sit around and do allocation. That's not
13 what the Settlement Agreement contemplated.

14 MR. REILLY: I understand. Let me start with the
11:11:58 15 more fundamental question.

16 THE COURT: Okay.

17 MR. REILLY: The more fundamental question is
18 whether there is a settlement at all in light of the order
19 of the Court. This settlement was conditioned upon court
11:12:08 20 approval and that court approval was premised on a Proposed
21 Final Order and Judgment, a very detailed Proposed Final
22 Order and Judgment. Justice Kapnick rejected the majority
23 of that Proposed Final Order and Judgment. So we now have
24 here a very unclear situation as to whether or not a
11:12:26 25 settlement has been approved.

26 They didn't have a situation in which they said if

Proceedings

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2 the Court approved some of it we may be able to treat it as
3 a final decision. They had, it must be conforming in all
4 material respects to the Proposed Final Order. And
5 specifically on a loan modification claim, that was
6 included in the release that Bank of America was seeking.

7 They wanted two things. Bank of America wanted a
8 release for all of the claims that might be brought and the
9 Trustee wanted a release for its settlement conduct, for
10 engaging in settlement and everything that happened there.
11 They didn't get either one of those. Justice Kapnick said
12 no on Paragraph 9 release, and Justice Kapnick said no on
13 the particular release for the Trustee. What we have here
14 now is a rejection of the settlement as they came and
15 brought it.

16 THE COURT: One second. One second. That's not
17 what Judge Kapnick said. That's not what she intended.
18 That's not what she said. So your interpretation of it is
19 not mine. It is not mine.

20 MR. REILLY: All right. I understand.

21 THE COURT: And it's not hers.

22 MR. REILLY: I'm going to try to make it yours.

23 THE COURT: It is not, but let me -- all right.
24 Let me hear -- this is an important part, so let me hear
25 from the proponents of entering the judgment on that piece.

26 MR. INGBER: Good morning, your Honor. Matthew

Proceedings

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2 Ingber for the Trustee, The Bank of New York Mellon, Hector
3 Gonzales and Christopher Houpt.

4 THE COURT: Good morning.

11:13:49

5 MR. INGBER: I have nothing to say beyond what
6 your Honor has already said. Once the judgment is entered
7 the world is not going to come to an end. There was a
8 process. It started with the filing of the petition.
9 There was discovery. There was a nine-week evidentiary
10 hearing with 22 witnesses and hundreds of documents. There
11 was a decision. That was called Decision/Order/Judgment.
12 It was ordered and adjudged. Those were the words that the
13 Judge used.

11:14:06

14 THE COURT: I agree.

11:14:20

15 MR. INGBER: It was called a Final Disposition.
16 Very straight forward.

11:14:35

17 The only question before this Court is whether the
18 judgment should be entered, and we think the answer is yes,
19 of course. That's what Justice Kapnick said. We think she
20 meant what she said and we think it's time to move on. We
21 shouldn't be staying under this tent.

22 There's been a lot of procedural motions filed by
23 the Objectors in this case, and your Honor missed a lot of
24 the fun here. There was a --

11:14:52

25 THE COURT: I think we're on Motion 43 now.

26 MR. INGBER: Right. There was a removal to

Proceedings

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2 federal court and then it bounced back.

3 THE COURT: Yes.

4 MR. INGBER: There was a jury trial demand made.
5 That was struck. There was a motion to stay the Article 77
6 evidentiary hearing. That was denied by Justice Kapnick
7 and the Appellate Division. There was a motion to convert
8 this case, this special proceeding into a plenary
9 litigation. That was denied. This we've never heard of
10 before. Of all the unusual procedural moves, we never
11 heard of a motion to stay entry of a judgment. To stay
12 enforcement of a judgment? Maybe. To stay trial court
13 proceedings? Maybe. But to stay entry of a judgment?
14 That's not something we've ever heard of before. And your
15 Honor, respectfully, we don't think this is the first time
16 that should happen.

17 THE COURT: I agree. I think that this is very
18 clearly an Order and Judgment. In fact it says, "It is
19 hereby ordered and adjudged." The only thing that was
20 stayed was the entry of this judgment. It is not two
21 separate documents, because in that case it would have said
22 settle judgment, or settle judgment on notice or something
23 more. This is an Order and Judgment. The only thing that
24 was stayed on it was entry of it, which is a ministerial
25 thing that the clerk does. And as far as I am concerned,
26 it's very clear that Judge Kapnick did this. She looked at

Proceedings

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2 the Settlement Agreement, the proposed Settlement
3 Agreement. She found that the Trustee did not abuse its
4 discretion. That's all she's doing is determining whether
5 or not the Trustee abused its discretion in entering into
6 the Settlement Agreement. She found that except with
7 respect to the loan modification parts, that the Trustee
8 did not abuse its discretion and that therefore she found
9 that the Settlement Agreement is approved. That's all she
10 had to do. And the Settlement Agreement contains all sorts
11 of methodologies by which to determine claims, who gets
12 claims, who doesn't get claims.

13 So, the only thing that is here now before me is
14 your motion to stay this, and I am telling you I'm not
15 going to stay it. If you are unhappy with Judge Kapnick's
16 decision or her judgment approving this Settlement
17 Agreement except for the loan modification claims, your
18 remedy is to go up to the Appellate Division. And I don't
19 see -- if you think that there are going to be plenary
20 proceedings or supplementary proceedings, those
21 supplementary proceedings, I can't -- I don't know what
22 they are and I can't -- I don't have a crystal ball, but
23 this is a judgment. There was a courtesy to the parties
24 for five days and it has become -- somehow it is sort of
25 being massaged into something which Judge Kapnick tells me,
26 and from the objective intent of this opinion, had no

Proceedings

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2 intention of happening.

3 You filed a motion to reargue and renew. There it
4 is. So, if you are unhappy with -- you think that she got
5 the wrong standard, you think abuse of discretion is not
6 the right standard, then that's for you to argue on your
7 motion to reargue. If she got the facts wrong, then that's
8 for you to argue in your motion to reargue. But this sort
9 of stretching out the stay is not what she intended, not
10 what the judgment intends and not what I intend to do,
11 either. I think your remedy is to go up on appeal. It's a
12 complicated case; I agree with you, but it is not for me to
13 stay entry of judgment. I don't see any purpose whatsoever
14 in doing it.

11:18:04
15 MR. ZAUDERER: May I respond?

16 THE COURT: Yes.

17 MR. ZAUDERER: Thank you.

18 With respect, I don't think what the Honorable
19 Judge Kapnick may have said to you about her intention in a
20 conversation is the guideline for the Court because we
21 can't address that as lawyers.

22 THE COURT: It's true.

23 MR. ZAUDERER: Okay.

24 THE COURT: But I heard the objective intent of
25 her decision. I'll leave it at that. How about that?

11:18:59
26 MR. ZAUDERER: That's why I'm pointing that out.

1 Proceedings

2 Let me address the objection and I'll come back to my
3 original point.

4 It is a matter of discretion for you, as the Judge
11:19:09 5 on the case, whether you should or shouldn't, we can debate
6 the reasons or you'll express yourself, but you have --
7 it's not correct, I would submit, to say you cannot stay
8 this judgment. You can stay this judgment. You absolutely
9 have that power to do it. With respect, it is an incorrect
11:19:28 10 proposition that you cannot stay this judgment. You have
11 the authority to do it. So the issue is should you, which
12 we're prepared to address.

13 THE COURT: I agree with you that I have authority
14 to stay any judgment: my judgment, somebody else's
11:19:40 15 judgment, except maybe not an appellate judgment. I'm not
16 saying that I don't have the authority to do it.
17 Essentially, what you are asking me to do is to extend the
18 stay. That's what your motion was.

19 MR. ZAUDERER: Yes.

11:19:55 20 THE COURT: To extend Judge Kapnick's stay. That
21 I don't have the authority to do. You want me to stay
22 entry of her judgment.

23 MR. ZAUDERER: Yes.

24 THE COURT: That's a different thing.

11:20:02 25 MR. ZAUDERER: Yes. That's exactly what we want
26 you to do.

1 Proceedings

2 THE COURT: And I'm telling you, I don't know what
3 supplementary proceedings you're talking about.

4 MR. ZAUDERER: I'd like to address what --

11:20:11 5 THE COURT: Sure. Go ahead.

6 MR. ZAUDERER: I think we need to understand what
7 is going to happen in light of the rejection of a very
8 significant part of what the Trustee asked for, and
9 Mr. Reilly --

11:20:20 10 THE COURT: I disagree that it's a significant
11 part.

12 MR. ZAUDERER: How would you know that?

13 THE COURT: Well, because I read the Settlement
14 Agreement. I've looked at the claims. But maybe that's
11:20:31 15 just me and it's not something I need to decide or even
16 think about right now.

17 Go ahead.

18 MR. REILLY: The reason it's significant is
19 twofold. First of all, mathematical issue. There's
11:20:41 20 potentially \$31 billion in loan modification claims.

21 THE COURT: Let me stop you for one second.

22 What I want you to focus on is why not just go up
23 on appeal. Whether you like or dislike what she carved out
24 is not my point here. I'm saying to you, what is the
11:20:59 25 problem with going up on appeal?

26 MR. REILLY: Because right now, your Honor, under

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11:21:10 5

the Settlement Agreement submitted to the Court for approval, which they did. It was a private agreement. They did not have to come to the Court and get approval for it. They have the right under that agreement, and actually the obligation, I think, to treat this order by the Judge as not creating a settlement. That the consequence -- all we're talking about here is what is the consequence of the Judge's order. They came in. It's almost like the Holy

11:21:28 10

Trinity, your Honor. They came in. You got to get them all right. They went two for three. On the loan mod claims the Judge said no, I'm not going to find that you met your obligations there. And when you settle those claims or nothing and didn't investigate, you violated your duties.

11:21:44 15

When you look at Section 2 of the Agreement --

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11:21:59 20

THE COURT: Yeah, let's look at it together because I don't know where you see that this could not be a settlement. And then I want to have the proponents address it.

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MR. REILLY: So, Section 2 is "Final Court Approval," and Subsection (a), the title, "Requirement of Final Court Approval." The first sentence says in order to have a settlement, we must have court approval.

11:22:11 25

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Our fundamental point is here, they didn't get court approval as defined in the Settlement Agreement.

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THE COURT: And I agree with you that that part of the Settlement Agreement I'm not entering judgment on. That's all there is to it. No doubt about it. I'm not going to enter a judgment on the part of the Settlement Agreement in which they sought to settle or not settle or just waive the loan modification claims. No problem with that.

MR. REILLY: I don't think you can do that. If you look to Paragraph 26 of the Settlement Agreement --

THE COURT: Let's look at 26.

MR. REILLY: -- that's the severability provision. Remember what Bank of America wanted was a release, a full release set in Section 9 of the Settlement Agreement; a release for all repurchase claims, for all servicing claims, for all loan modification claims. They say if any provision of this Agreement other than the settlement payment contained in Paragraph 3 or - this is the key language - the release and waiver contained in Paragraph 9, and that's what we're talking about here.

Justice Kapnick did not approve Paragraph 9 as they submitted it. For any reason or to any extent be invalidated or be ruled to be unenforceable, the remainder of the Settlement Agreement shall be enforced to the fullest extent permitted by law. The corollary of that is, if in fact the Paragraph 9 release is not granted, then the

Proceedings

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2 Agreement is not enforceable. It's invalidated.

3 THE COURT: I don't think that's what it says.
4 I don't think it says that at all. It does not say that if
5 11:23:42 Paragraph 9 is not approved then the Settlement Agreement
6 is unenforceable. It does not.

7 MR. REILLY: No, but you can --

8 THE COURT: It doesn't say it at all. It says the
9 only things that you cannot -- let's read it again.

10 11:23:55 MR. REILLY: Sure. It says --

11 THE COURT: You're saying the opposite of what it
12 says. I'm saying I don't think it says that.

13 MR. REILLY: It says if, in fact -- I think -- I
14 understand what you're saying, but that particular issue,
15 11:24:05 your Honor, is a critical issue for the Court and I think
16 it's this Court, because you have to decide what is the
17 meaning of Justice Kapnick's decision.

18 THE COURT: I think it's clear that she said enter
19 a judgment as to every single part of the Settlement
20 11:24:21 Agreement -- no, I'm sorry -- approving every single part
21 of the -- I am entering a judgment approving every single
22 part of this Settlement Agreement or, more accurately, I am
23 finding that the Trustee did not abuse its discretion in
24 entering into this Settlement Agreement as to every single
25 11:24:41 part of the Settlement Agreement except for the loan
26 modification parts. That is clear. That judgment can be

Proceedings

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2 entered today. If you are unhappy with that, if you
3 believe that the Trustee abused its discretion, then you go
4 up on appeal.

11:24:56

5 MR. REILLY: It's not that -- every part of the
6 Settlement Agreement includes the Proposed Final Order and
7 Judgment. Exhibit B to the Settlement Agreement. They
8 said this is what, when you talk about it in Paragraph 2(a)
9 here, the steps for final court approval include approving
10 the Proposed Final Order and Judgment. That's Exhibit B.

11:25:15

11 The Court didn't do that. The Court rejected multiple
12 portions of the Proposed Final Order and Judgment,
13 including the release for Bank of America. So you have to
14 read Paragraph 2 and Paragraph 26 together.

11:25:31

15 THE COURT: I am reading them together and I don't
16 agree that they say what you think they say.

17 MR. REILLY: Okay.

18 THE COURT: All right? That's one. But let me
19 hear from the other side now.

11:25:38

20 Go ahead.

21 MS. PATRICK: Your Honor, Kathy Patrick. May it
22 please the Court. I represent the Institutional Investors
23 who have advocated for this settlement.

11:25:51

24 The Court has it exactly right. Justice Kapnick
25 ruled that this judgment should be entered. There were two
26 issues in the Article 77 proceeding. One, did the Trustee

Proceedings

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2 own the claims it settled; two, did it act reasonably in
3 settling the claims. Did it not abuse its discretion in
4 settling the claims. As to the first, Justice Kapnick's
11:26:07 5 answer was clear. Yes, the Trustee owns the claims, it can
6 settle them. As to the remainder, Justice Kapnick's answer
7 in her judgment is overwhelmingly clear. Yes, except as to
8 this small issue the Trustee did not abuse its discretion.
9 That does not declare the Settlement Agreement
11:26:26 10 unenforceable or not in effect.

11 The only thing that has to happen now is the
12 judgment gets entered. People who are unhappy with that
13 portion of the opinion or some other portion can appeal.
14 That's what happens to every losing litigant. We don't
11:26:42 15 have endless reargument of proceedings that have been
16 resolved by trial judges after a nine-week trial. Judgment
17 should enter. We ask that it enter forthwith so that this
18 process can move forward.

19 Their motion to reargue, whatever they're going to
11:26:56 20 do they do. But Justice Kapnick ruled and her ruling is
21 entitled to deference from them, from this Court, from the
22 system.

23 MS. KASWAN: Your Honor, if I could just address
24 one very narrow point, and that is --

11:27:11 25 THE COURT: Just state your name, please.

26 MS. KASWAN: Beth Kaswan for Chicago Police.

1 Proceedings

2 The problem with Section 2(a) and the severability
3 clause is it permits any party to the Settlement Agreement
4 to withdraw from the settlement if there is not the form of
11:27:31 5 the Proposed Final Order and Judgment entered. So that
6 certificate holders do not know whether or not there is a
7 settlement because the final approval of the settlement is
8 defined to be the form of the Proposed Final Order and
9 Judgment unless there is a written agreement to accept
11:27:56 10 Judge Kapnick's opinion as a final order. And the reason
11 this is important is because BOA, right now we don't know
12 whether or not BOA is going to pay \$8.5 billion for a
13 narrower release. That is a question that is open for this
14 Court. So this Court will not know if it enters judgment
11:28:24 15 whether this settlement is approved, or in the next section
16 under 2, it in fact is a nullity. Because unless there is
17 a written agreement between BOA and the Institutional
18 Investors and the Trustee to accept the narrower release
19 provided by Judge Kapnick, this settlement has been
11:28:49 20 nullified. And the problem is that we, as the certificate
21 holders, are being asked to wait indefinitely to see
22 whether or not a settlement exists.

23 A settlement agreement is just a contract. And
24 when you have four terms of a contract accepted between the
11:29:12 25 parties and the fifth material part of the contract
26 rejected, it's not that you have --

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Proceedings

THE COURT: No, I disagree with that. This contract says if I disapprove this one part, the rest of it is enforceable. And what Judge Kapnick says -- let me ask. Let him respond to that.

MS. PATRICK: Your Honor, if I could just correct what Ms. Kaswan said, briefly, before we go there.

Final court approval is defined as final court approval after all appeals have been exhausted. There is no right to walk away now on the part of anybody.

And importantly, while Justice Kapnick found that the Trustee abused its discretion with regard to the loan modification claim, the claim is covered by the Settlement Agreement. The Trustee settled. That's an issue for the Trustee, but there is a Settlement Agreement. That Settlement Agreement was not declared to be unenforceable. And importantly, the judgment says what it says and the judgment says it should be entered. And all of these arguments about uncertainty derive from efforts to torture the language of the Settlement Agreement to say what it emphatically does not say.

I point the Court to Paragraph 2(a) which defines: "Final Court Approval shall have occurred only after" -- and go to little item (vi) -- "either the time for taking any appeal of the Final Order and Judgment has expired without such an appeal being filed," et cetera. Okay.

1 Proceedings

2 So, as it stands now, nothing is invalid. The
3 Settlement Agreement says what it says. The judgment
4 enters. The remedy contemplated by the Settlement
11:31:01 5 Agreement and by the judgment is appeal. That's what they
6 need to do. They don't get to remake the Settlement
7 Agreement because they're unhappy with part of Justice
8 Kapnick's ruling.

9 MS. KASWAN: Your Honor, the part that was skipped
11:31:16 10 over was Subsection (v) which says that the judgment has to
11 be in the form of the Proposed Final Order and Judgment for
12 there to be a final approval. The reason why --

13 THE COURT: Just a second. Let's look at that.
14 Where are you saying?

11:31:33 15 MR. REILLY: At the top of page 6, your Honor.

16 THE COURT: 6.

17 MS. KASWAN: It says --

18 MR. REILLY: There's a six-step process for the
19 final court approval and this is the fifth step. You see
11:31:52 20 it? At the top it says -- "manner as the Settlement Court
21 may direct" --

22 MS. KASWAN: It's (v).

23 THE COURT: Where does it say that the Final Order
24 and Judgment has to be the one that's attached?

11:32:18 25 MR. REILLY: It says it right here, your Honor.
26 Section (v) says, "the Settlement Court enters in the

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2 Article 77 Proceeding (including in a subsequent proceeding
3 following an appeal and remand) the Final Order and
4 Judgment." That Final Order and Judgment is Exhibit B that
5 they submitted to Justice Kapnick for review which she
6 rejected. In fact, they then have to find that the order
7 does not -- they have to show that the Settlement Court
8 enters an order that does not conform in all material
9 respects to the form of order attached as Exhibit B.
10 That's the Proposed Final Order. There is no way they can
11 straight-faced tell you that the Justice's order conforms
12 to Exhibit B. It rejects multiple portions of it. It
13 rejects the release, Paragraph 9.

14 THE COURT: But what does that got to do with me
15 entering this judgment? Nothing. It has nothing to do
16 with me entering the judgment.

17 MR. REILLY: Sure. If you enter this --

18 THE COURT: Please don't speak over me.

19 MR. REILLY: I'm sorry, Judge.

20 THE COURT: That's really the one thing. I'm a
21 very collegial person and I will let you speak and have
22 your time.

23 MR. REILLY: I apologize.

24 THE COURT: But let me do the same, okay?
25 Good. Go ahead.

26 MR. REILLY: Because if you enter the judgment as

1 Proceedings

2 it is now there will be chaos. They will not -- they have
3 to decide whether or not they have an order that conforms
4 in all material respects to the form of the order they
11:33:37 5 submitted. They do not. If they do not, the parties -
6 them - may, by written agreement, deem that order, meaning
7 they have to deem Justice Kapnick's order as the final
8 order. We don't know if they're going to do that.

9 THE COURT: They may or may not. They don't know
11:33:52 10 if you're going to appeal. Chaos is a very broad term.

11 Left me ask counsel.

12 Is there going to be chaos if I enter this
13 judgment, and if so why not?

14 MR. INGBER: Your Honor, we are not -- we as
11:34:03 15 Trustee do not intend to create any chaos if this judgment
16 is entered.

17 THE COURT: What do you intend to do?

18 MR. INGBER: I have no idea what the Objectors
19 have in mind if the judgment is entered. They filed their
11:34:17 20 motion for reargument and renewal. We'll look at it.
21 We'll respond to it. There will be a decision on that.

22 MR. REILLY: Your Honor, they're not answering
23 your question. Is there a settlement or not? What are
24 they going to do?

11:34:27 25 MR. INGBER: Actually, I don't think that was your
26 Honor's question. The question was will there be chaos. I

Proceedings

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don't know --

MR. REILLY: Is there a settlement, your Honor?
They have to decide one way or the other by written
agreement.

11:34:38

THE COURT: Yes. But I am saying to you my entry
of this judgment isn't going to affect that one way or
another.

MR. INGBER: That's exactly right. We want to get
past this gate and we want to move on. And that's why we
want the judgment to be entered.

11:34:48

THE COURT: If you are correct in your
interpretation, simply entering this judgment is not going
to matter one way or another as to that part of your
discussion.

11:35:00

MR. REILLY: I think it could, your Honor,
because --

THE COURT: Tell me how you think it could.

MR. REILLY: Well, first of all, if you enter
judgment, I think the consequence of that is going to be
that we're going to try and come back to you and say what
they won't answer today, which is, is there a settlement or
not. This Court has continuing jurisdiction over that by
their agreement and request to you.

11:35:08

THE COURT: Let me say this to you. Why do I
decide whether there is a decision or not? All the Court

11:35:22

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2 does in an Article 77 proceeding is look at the settlement
3 and see if there was an abuse of discretion. I am not the
4 queen of the world here. I wish I was. Believe me, I wish
11:35:41 5 I was. I have a very simple job and so did Judge Kapnick.
6 She did it. If you're unhappy with how she did it, your
7 remedy is appeal. It's not for you to come back to me and
8 say what does this Settlement Agreement mean. That's not
9 part of my job under Article 77.

11:35:58 10 MR. REILLY: But the investors who both objected
11 and who haven't participated in this are entitled to know
12 whether or not the Trustee is going to treat what Justice
13 Kapnick did as a settlement or not, or whether they're
14 going to negotiate a new settlement because they didn't get
11:36:15 15 what they got.

16 THE COURT: Why don't you ask them?

17 MR. REILLY: We have and they won't answer.

18 THE COURT: Okay.

19 MR. INGBER: Your Honor, this is premature. We
11:36:21 20 are at stage one. There is a decision. There's a
21 judgment. That should be entered and then we go through
22 the appellate process. And what they don't mention is that
23 in Settlement Agreement --

24 THE COURT: Let me ask you. Do you agree with
11:36:36 25 them that you may treat this as a nullity?

26 MS. PATRICK: No.

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MR. INGBER: Your Honor --

THE COURT: Straight out. Do you agree with that interpretation of the Agreement? It's a yes or no. Believe me, I'm on trial right now and I just want a yes or no.

MR. INGBER: Yes. If the parties view this as a material deviation they can decide that the Final Order and Judgment is not in conformity with the Proposed Final Order and Judgment, or they can decide --

THE COURT: Okay. That's your answer.

They agree with you that they may decide that this is not what they want.

MS. KASWAN: Your Honor, we submitted a letter and we cited a case, *State of New York v. Philip Morris, Inc.* And what that decision says is the settlement court, the court evaluating whether or not a proposed settlement is fair and reasonable, cannot modify or delete terms from the settlement. That it only has an up or down decision.

THE COURT: That's your appellate argument. That's not for me. This is done. Your argument, your reargument motion. The issue before me today is not all of that. The only issue is should I continue a stay, a stay that in my objective reading of this decision was a nice thing that the Judge did because there are lawyers all over the country. It had nothing to do with supplementary

Proceedings

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2 proceedings or anything else. And if you believe that
3 Judge Kapnick was incorrect, you have appellate remedies,
4 you have a motion to reargue. I don't see how any of that
5 is going to be affected by the mere entry of judgment.

11:38:13

6 MS. KASWAN: Your Honor, if I could just address
7 that specific point.

8 THE COURT: Yes.

9 MS. KASWAN: Our firm often submits proposed
10 settlement for fairness hearings. And what commonly
11 happens with courts is they won't say things like, well, we
12 think the release is too broad. That doesn't end the
13 proceeding. What happens then is that the settling parties
14 go back and decide whether or not to narrow the release and
15 then they come back to the Judge and say here is our
16 amended proposed settlement.

11:38:27

11:38:45

17 THE COURT: Let me stop you a second.

18 That's not what Judge Kapnick did and I can't go
19 back and redo that now. I have to move forward with what
20 she did. And if you disagree with how she did it your
21 remedy is not for me to stay entry of the judgment; your
22 remedy is to appeal or to make a motion to reargue. You
23 already made a motion to reargue. You've already done
24 that. Or you go up on appeal. But what you're asking me
25 for today solves none of what your concerns are. It just
26 doesn't to me seem like the appropriate thing for me to do.

11:39:00

11:39:18

1 Proceedings

2 So, is there anything that anybody else wants to
3 say? Because I really -- I hear what you're saying. I
4 hear what you want. But this is not the way, in my view,
5 to do it. My view is, you've made your motion to reargue.
6 You've made your motion to -- you know, I'm sure you filed
7 a notice of appeal. You have appellate remedies. You have
8 a remedy to reargue right now. The parties can go back and
9 decide whether or not this is their Settlement Agreement.
10 All that Judge Kapnick was asked to do was approve or not
11 approve this, or to find whether or not I should -- using
12 loose language -- whether or not this was an abuse of
13 discretion. For a large part of it she said it was not.
14 For some of it she said it was. She said enter a judgment
15 approving this settlement except to those parts. If you
16 disagree that she had the authority to do that, then your
17 remedy is to come back to me in a motion to reargue or to
18 go up on appeal. Okay.

19 MR. ZAUDERER: Judge, with all respect, we
20 respectfully disagree, but we want to thank you very much
21 for your time and attention.

22 THE COURT: That's okay. I take no offense with
23 people disagreeing with me.

24 MR. ZAUDERER: We want to thank you, if we may,
25 for your time and considerable attention to this serious
26 matter. We thank you.

Proceedings

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2 MS. PATRICK: And, your Honor, one clerical point.
3 We understand that in order for the judgment to be entered
4 expeditiously the Court will need to mark your direction
11:40:48 5 forthwith, and we ask that you do that. That was Justice
6 Kapnick's intention.

7 THE COURT: Right.

8 So what I will do is, I will say that for the
9 foregoing reasons, and having read the papers and the
11:40:59 10 letter briefs that were sent to me, the papers in support,
11 the papers in opposition, and having heard oral argument
12 today, the motion for a stay of entry of the judgment is
13 denied.

14 And the foregoing constitutes the Decision and
11:41:15 15 Order of the Court.

16 Let's go off the record a second.

17 (Discussion off the record.)

18 THE COURT: Let's go back on the record.

19 And the clerk is directed to enter judgment
11:42:04 20 accordingly.

* * *

C E R T I F I C A T I O N

21
22 I, Vicki K. Glover, CSR, an official
23 court reporter of the State of New York, do
24 hereby certify that the foregoing is a true and
accurate transcript of my stenographic notes.

25 **SO ORDERED**
26 **HON. SAHANN SCARPUSSA**

Vicki K. Glover
VICKI K. GLOVER,
OFFICIAL COURT REPORTER

VICKI K. GLOVER, OFFICIAL COURT REPORTER