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

| | |
|---|---|
| In the Matter of the Application of<br><br>THE BANK OF NEW YORK MELLON, in its Capacity as Trustee or Indenture Trustee of 530 Countrywide Residential Mortgage-Backed Securitization Trusts,<br><br>Petitioner,<br><br>For Judicial Instructions under CPLR Article 77 on the Distribution of a Settlement Payment. | Index No. 150973/2016<br><br>IAS Part 39<br><br>Hon. Saliann Scarpulla<br><br>Mot. Seq. #002 |

**BRIEF OF TILDEN PARK CAPITAL MANAGEMENT LP AND PROSIRIS CAPITAL MANAGEMENT LP IN OPPOSITION TO REARGUMENT**

Steven F. Molo
Justin M. Ellis
MoloLamken LLP
430 Park Avenue
New York, NY 10022
Tel: (212) 607-8160
Fax: (212) 607-8161
smolo@mololamken.com
jellis@mololamken.com

*Attorneys for Respondents Tilden Park Capital Management LP and Prosiris Capital Management LP*

May 16, 2017

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

BACKGROUND ..... 1

STANDARD OF REVIEW ..... 4

ARGUMENT ..... 5

I. There Is No Error of Fact or Law To Justify Reargument ..... 5

II. The Institutional Investors Are Barred from Seeking Reargument ..... 8

CONCLUSION ..... 9

# TABLE OF AUTHORITIES

Page(s)

## Cases

*Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1 (1st Dep't 2012) .....1, 5

*In re Bank of N.Y. Mellon*, 127 A.D.3d 120 (1st Dep't 2015) .....1

*Bergan v. Home for Incurables*, 124 A.D.2d 517 (1st Dep't 1986) .....7

*Chittick v. Thompson Hill Dev. Corp.*, 232 A.D. 818 (2d Dep't 1931) .....7

*Da Silva v. Musso*, 76 N.Y.2d 436 (1990) .....9

*In re Evans' Will*, 65 A.D. 610 (1st Dep't 1901) .....4, 5

*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dep't 1984) .....4, 5

*Rostant v. Swersky*, 79 A.D.3d 456 (1st Dep't 2010) .....5

*Ruben v. Am. & Foreign Ins. Co.*, 185 A.D.2d 63 (4th Dep't 1992) .....9

*Setters v. AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492 (1st Dep't 2016) .....4

*Vision Dev. Grp. Of Broward Cnty., LLC v. Chelsey Funding, LLC*, 43 A.D.3d 373 (1st Dep't 2007) .....4

*W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990) .....4

## Other Authorities

CPLR § 2221(d)(2) .....4, 5

## INTRODUCTION

The institutional investors already tried – and failed – to evade the governing contracts' plain text by citing irrelevant parol evidence about the parties' supposed intent. Now, they are attempting to further delay the distributions to which Prosiris and Tilden Park are entitled by claiming that the Court wrongly considered *other* parol evidence about intent at the August 2016 merits hearing. But the Court did no such thing – as it explicitly ruled, what controls this case is "the objective meaning of [the] contract[s'] language, not . . . the parties' individual subjective understanding of it." Dkt. #193 (opinion) (citing *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 6 (1st Dep't 2012)). That ruling is plainly correct and should not be disturbed.

The institutional investors offer no legitimate basis for reargument and cite nothing demonstrating that the Court's ruling overlooked any issues of fact or law. Their motion for reargument is a transparent attempt to delay and to avoid the cost of posting a bond immediately now that they have appealed. The motion should be denied.

## BACKGROUND

Litigation over this settlement is now in its sixth year. In 2011, the Trustee filed the prior Article 77 proceeding asking for approval of its settlement agreement with Bank of America. Verified Petition, *In re Bank of N.Y. Mellon*, No. 651786/2011, Dkt. #1 (Sup. Ct. N.Y. Cnty. June 29, 2011). That proceeding was extensively litigated and was affirmed on appeal. *See In re Bank of N.Y. Mellon*, 127 A.D.3d 120, 128 (1st Dep't 2015). Nonetheless, the Trustee filed this petition seeking instructions on how to allocate the settlement payments' "Allocable Share" after unnamed investors raised conflicting interpretations of the governing contracts. Verified Petition, *In re Bank of N.Y. Mellon*, No. 150973/2016, Dkt. #1 (Sup. Ct. N.Y. Cnty. Feb. 5, 2016).

In its petition papers, the Trustee explained that it had no "economic stake" in the outcome of the instruction proceeding. *See, e.g.*, Verified Petition, Dkt. #1, at ¶45. But the Trustee

had received "conflicting investor correspondence" about how to pay settlement funds. *Id.* ¶41. The Trustee thus sought binding instructions from the Court that would resolve the issue and shield the Trustee from further litigation. *See id.* at 16 (prayer for relief (iii)).

Prosiris and Tilden Park appeared and requested that the Trustee pay settlement funds according to Section 3(d)(i) of the Settlement Agreement, which required the Trustee to apply a pay first, write-up second approach while following the trusts' "Pooling and Servicing Agreements" ("PSAs"). Dkt. #31 (answer) at 12 (prayer for relief (a)); *see also* Dkt. #193 at 3-4 (describing the "pay first" approach). By contrast, several institutional holders, including AIG, AEGON, and BlackRock, asked the Court to ignore the PSAs' text and instead apply a third-party software company's model (the "Intex Standard Method") that would give the institutional investors' bonds more money than they would receive under the PSAs. *See* Dkt. #193 at 4-5 (describing the institutional investors' arguments). The parties had extensive opportunity to brief their positions.

The Court heard oral argument on the Trustee's petition on August 31, 2016. At that hearing, the Court asked two questions of Michael Ware, counsel for the Trustee, about which the institutional investors now complain – eight months later. First, the Court asked Mr. Ware what testimony in the prior Article 77 hearing might bear on the payment priorities for these trusts; in response, Mr. Ware pointed out that under Section 3(d)(i) of the Settlement Agreement, the Trustee was required to "distribute [those funds] to investors in accordance with the distribution provisions of the governing agreements." Dkt. #181 (transcript) at 65:5-6, 66:12-15; *see also* Dkt. #3 (Settlement Agreement) §3(d)(i). Second, the Court asked Mr. Ware whether "people anticipated that the senior-most bondholders [would] not get paid first." Mr. Ware

responded that they would be paid depending on "[w]hatever the PSA or indenture said." Dkt. #181 at 66:26-67:21. None of the institutional investors ever objected to Mr. Ware's statements.

At the end of that hearing, the Court invited the parties to submit transcripts of the sworn testimony in the prior Article 77 proceeding that might bear on the intent of the parties to the Settlement Agreement. Dkt. #181 at 78:14-23. In response, Tilden Park and Prosiris submitted numerous sworn statements showing that the settlement parties' intent was to distribute the settlement funds according to the PSAs. Tilden Park and Prosiris offered, for example, the testimony of Jason Kravitt, lead negotiator for the Trustee: "[W]hat was agreed was that the cash payments to each trust would go through the waterfall" contained in each PSA. No. 651786/2011, Tr. 1642:26-1643:2. Robert Bailey, in-house counsel for the Trustee, echoed that language, agreeing that the settlement was meant to follow the PSAs "to [a] tee." No. 651786/2011, Tr. 2308:14-22. And that decision was meant precisely to address the fact that "different groups of certificate holders could be competing for the same dollars" available from the settlement; as Loretta Lundberg, managing director of the Trustee's Corporate Trust Division, testified, "the PSAs set forth how money is to flow to different classes of certificate holders and certificate holders should understand that when they bought the securities." No. 651786/2011, Tr. 4589:19-4590:5. AIG, BlackRock, and AEGON did not offer the Court any testimony from the prior Article 77 proceeding suggesting that the Trustee or other parties to the settlement ever meant to diverge from the PSAs' plain meaning.

In its ruling, however, the Court did not rely on the settlement parties' intent. Instead, it recognized that "the general intent of the Governing Agreements . . . *does not operate to override the plain and unambiguous terms of the Settlement Agreement.*" Dkt. #193 (opinion) at 14 (emphasis added). The Court found that the Settlement Agreement's plain text dictated that

settlement "Allocable Shares" "must be distributed as a Subsequent Recovery" as "set forth in the differing PSAs." *Id.* at 14, 17. Under the fourteen trusts' PSAs, the Court held in turn, the funds must be distributed based on the PSAs' definition of "Principal Distribution Amount" – a definition that was the "same formula put forth by Tilden Park, Prosiris, and Blue Mountain." *Id.* at 12. And while AIG, AEGON, and Blackrock all argued that the PSAs' plain text should not control, the Court recognized that those arguments were barred by black-letter New York law: "While I understand that the plain language of the Settlement Agreement and Governing Agreements" do not pay the institutional investors as they would have liked, the Court held, "I *may not look beyond the four corners of the relevant agreement to determine the parties' intent, when the contract language itself is clear.*" *Id.* at 16 (emphasis added) (citing *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990); *Vision Dev. Grp. Of Broward Cnty., LLC v. Chelsey Funding, LLC*, 43 A.D.3d 373, 374 (1st Dep't 2007)).

On May 4, 2017, AIG, AEGON, and BlackRock all filed notices of appeal from the Court's order. Dkt. #196, 199.

## STANDARD OF REVIEW

A motion for reargument "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR 2221(d)(2). "'Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted.'" *Setters v. AI Props. & Devs. (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dep't 2016). Reargument is appropriate only if the Court "overlooked or misapprehended the *relevant facts*." *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dep't 1984). Matters that were "merely incidental" are not sufficient. *In re Evans' Will*, 65 A.D. 610, 610 (1st Dep't 1901). Even if a party does show

that a matter of fact or law has been overlooked, whether to grant reargument is "committed to the sound discretion of the court." *Rostant v. Swersky*, 79 A.D.3d 456, 456 (1st Dep't 2010).

## ARGUMENT

### I. There Is No Error of Fact or Law To Justify Reargument

The institutional investors do not raise "matters of fact or law allegedly overlooked or misapprehended by the court . . . ." CPLR 2221(d)(2). Despite having access to pages upon pages of sworn testimony from the settlement parties about their intent – and having quoted that testimony at length to this Court in their post-argument submissions, *see* Dkt. #164-180 – they offer not a *single line* of testimony that diverges in the least from Mr. Ware's statements during the August 31 hearing. Nor do they offer a single case, statute, or rule that would suggest that the Court's ruling was in any way "improper[ ]" on the law. *Cf.* Dkt. #232 at 9. Their failure to offer anything that the Court "overlooked or misapprehended" is, by itself, fatal to their motion.

On the law – the Court's decision *did not rely on the parties' intent.* When, as here, "the contract language itself is clear," the Court "may not" and did not "look beyond the four corners" of that language. Dkt. #193 at 16. Instead, the Court acknowledged, it was bound by controlling New York law to interpret the contracts based on "the objective meaning of contractual language, not . . . the parties' individual subjective understanding of it." Dkt. #193 (opinion) at 17 (citing *Ashwood Capital, Inc.*, 99 A.D.3d at 6). And the Court expressly held that the "objective meaning" of the contracts' language "direct[s] the Trustee" to "us[e] the pay first, write up second method, which includes the calculation of the Principal Distribution Amount pursuant to the terms of the Governing Agreements." *Id.* The institutional investors are not entitled to reargument based on a supposed error the Court made regarding something *irrelevant* to its decision. *See Pro Brokerage*, 99 A.D.2d at 971 (only an error involving "*relevant facts*" warrants reargument); *In re Evans' Will*, 65 A.D. at 610.

On the facts – Mr. Ware's statements were accurate. In the prior Article 77 proceeding, witness after witness testified that the PSAs' plain text, and not some general desire to benefit senior-most holders, was what motivated the Settlement Agreement. "[W]hat was agreed" was for the Allocable Share to "go through the waterfall" of each PSA, No. 651786/2011, Tr. 1642:6-1643:2; the Trustee intended to follow each PSA "to [a] tee," No. 651786/2011, Tr. 2308:14-22. And if some PSAs' waterfalls were different from others, "certificate holders should understand that when they bought the securities." No. 651786/2011, Tr. 4589:19-4590:5. Mr. Ware's comments at the August 31 hearing were consistent with the unequivocal intent of the settlement parties explored through six months of trial in the prior Article 77 hearing – the Settlement Agreement is meant to follow the PSAs' plain text.[1]

The institutional investors claim that Mr. Ware's comments "contradict[]" the Trustee's statement in its petition that following the PSAs' explicit directions "could be viewed as contrary" to the general goal of overcollateralization in RMBS deals. Dkt. #232 at 10 (citing Dkt. #1 (petition) ¶28). But no "contradiction" exists. The Trustee acknowledged that the PSAs "could be viewed" that way because investors *had viewed* it that way and had argued to the Trustee against calculating the Principal Distribution Amounts as written. *See, e.g.*, Dkt. #1 ¶41. The fact that certain *investors* could view the PSAs one way does not at all conflict with the *Trustee*'s intention to follow the PSAs. And if there were a contradiction – so what? The fact that a party had changed its arguments would not make the *Court's* decision any less correct, let alone show

[1] The institutional investors also complain about Mr. Ware's comment that, other than certain "residual" bonds, the Settlement Agreement does not prevent any other class of certificates from receiving Allocable Shares. Dkt. #232 at 7 (citing Aug. 31 Tr. at 66:26-67:24). But Mr. Ware's comments there were also obviously correct, because he was merely *quoting the Settlement Agreement. See* Aug. 31 Tr. 66:26-67:24 (quoting Settlement Agreement § 3(d)(1)).

that the Court "overlooked or misapprehended" any relevant fact that might justify reargument. The institutional investors' purported "contradiction" simply does not matter.

The institutional investors also complain that the Trustee was not "neutral on the merits." Dkt. #232 at 6-8. Of course, while the Trustee was neutral on the payment methods to be applied here, it had its own obvious, and legitimate, interests in fulfilling its duties as a trustee and in avoiding suit from investors who had argued against applying the PSAs despite the Settlement Agreement's explicit instructions. Mr. Ware's factually correct statements in no way made the Trustee biased towards one side in this case. Regardless, had the Trustee advocated for one side or the other, it would not matter. The Court never claimed to rely on the Trustee's "neutrality" in reaching its decision, nor would there be any reason to do so. *The plain text of the PSAs controlled*. Whether the Trustee was "neutral" is beside the point.

The institutional investors further argue that Mr. Ware's statements were "unsworn," that he supposedly lacked personal knowledge of the prior Article 77 proceeding, and that he was not subject to cross-examination. Dkt. #232 at 8-9. Because the Court relied – as it must – on the contracts' plain text, and not on parol evidence, whether Mr. Ware's statements were taken like trial testimony has no bearing on the Court's decision. Moreover, this claim rings hollow given that the institutional investors did not object at the time or seek to put Mr. Ware under oath or cross-examination. Arguments like these that "could have been raised on . . . earlier motions" are "not a permissible ground for [the] discretionary grant of reargument or renewal." *Bergan v. Home for Incurables*, 124 A.D.2d 517, 519 (1st Dep't 1986); *see also Chittick v. Thompson Hill Dev. Corp.*, 232 A.D. 818, 818 (2d Dep't 1931) ("The laches of the moving party . . . preclude[s] the granting of a reargument"). In any event, if the institutional investors wished to consult

sworn trial testimony about the Article 77 proceeding, they had *months* of testimony from that case to draw on. They offered none.

Finally, the institutional investors argue that they were surprised by Mr. Ware's statements, and that the Court supposedly denied them a chance to respond at the August 31 hearing or a chance to seek discovery from the Trustee. Dkt. #232 at 9. That argument is also too little, too late. If the institutional investors had truly felt blindsided by what Mr. Ware said, or if they felt those comments warranted a corporate deposition, they have had *eight months* to raise that issue with the Court. Instead, they did nothing. The institutional investors should not be allowed to sandbag the Court and the parties by raising this supposed "error" only after they lost.

**II. The Institutional Investors Are Barred from Seeking Reargument**

The institutional investors' motion should also be denied because it is brought to delay proceedings and thereby gain a substantial economic advantage. As Tilden Park and Prosiris have already pointed out, AIG by itself earns roughly $400,000 at the expense of other certificateholders on one trust alone for each month that this proceeding continues. *See* Dkt. #131 (Ellis Decl. Ex. F) at 15:4-14. Overall, *millions of dollars* transfer to the most senior bonds because of this delay each month. *See* Dkt. #124 (Smith Aff.) ¶49. This transfer harms Tilden Park, Prosiris, and every other certificateholder who owns bonds in the "senior support" classes. It is no surprise that the institutional investors have thus consistently tried to drag out proceedings in this case, first by asking for irrelevant discovery into Intex and now, months after the hearing, asking for irrelevant discovery into the Trustee's intent.

The institutional investors' tactics smack of bad faith given that each of the parties moving for reconsideration filed notices of appeal at the same time they moved for reconsideration. Purported errors can be raised with the Appellate Division. But the institutional investors' parallel motion for reconsideration serves only to put off the enforcement of the Court's judg-

ment without having to seek a stay. To stay the judgment below pending appeal, they would have to show that the merits are on their side – and they could hardly convince a court that they will be likely to reverse a contract decision based on the contract's plain text. *Da Silva v. Musso*, 76 N.Y.2d 436, 443 n.4 (1990) (the "merits" are relevant to whether to stay a judgment).

New York law does not allow reargument pending appeal to be abused in that way. Such relief "should not be granted merely at the request of the parties to the action . . . and the issuing court should take whatever means it deems necessary to satisfy itself that the relief is not being sought for ulterior motives and does not unjustly alter the rights of those who are indirectly affected by the vacatur of the judgment." *Ruben v. Am. & Foreign Ins. Co.*, 185 A.D.2d 63, 69 (4th Dep't 1992). This motion serves only to enrich the institutional investors at the expense of Tilden Park, Prosiris, and every other investor who holds bonds in the same classes of certificates. The Court should not allow that type of gamesmanship.

## CONCLUSION

The motion for reargument should be denied.

Dated: May 16, 2017
New York, New York

/s/ Steven F. Molo
Steven F. Molo
Justin M. Ellis
MoloLamken LLP
430 Park Avenue
New York, NY 10022
Tel: (212) 607-8160
Fax: (212) 607-8161

*Attorneys for Respondents Tilden Park Capital Management LP and Prosiris Capital Management LP*