

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), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Maiden Lane II, LLC (intervenor), Maiden Lane III, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisers, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank BadenWuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), New York Life Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), 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 (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

-against-

TM1 INVESTORS, LLC (proposed intervenor-respondent),

Respondent,

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

Index No. 651786/2011

Assigned to: Kapnick, J.

**TM1 INVESTORS, LLC'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. TM1 Investors, LLC owns securities issued by one of those Countrywide trusts. The original principal value of those securities exceeds \$400,000,000. If approved, the proposed settlement would extinguish the claims that that trust has against Countrywide and Bank of America Corporation. TM1 therefore seeks an order pursuant to CPLR 401, 1012, and 1013 to intervene as a respondent in this proceeding to protect its interests.

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.

Since at least late 2008, there have been widespread reports that many of the loans that Countrywide sold to the trusts did not comply with the representations and warranties that it made about them. After much investigation, TM1 believes that many of the loans that Countrywide sold to the trust in which it owns securities did not comply with the representations and warranties. As a result, TM1, together with one or more investors in the same trust, is considering legal action on behalf of that trust to enforce Countrywide's obligation to repurchase those defective loans.

BNYM announced on June 29, 2011, that it had entered into an agreement with Countrywide and its corporate parent, Bank of America Corporation, 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 a lawsuit brought by other investors, the Walnut Place entities, on behalf of two other Countrywide trusts.

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.”¹

Although any one of these conditions would be sufficient to permit TM1 to intervene, all three are satisfied in this proceeding.

I. THIS PROCEEDING INVOLVES A CLAIM FOR DAMAGES FOR INJURY TO PROPERTY, AND TM1 WILL BE AFFECTED BY THE JUDGMENT.

TM1 owns securities in one of the trusts that is subject to the proposed Settlement Agreement. If approved, the Settlement Agreement would release all claims of that trust against Countrywide and Bank of America Corporation and thereby materially affect the value of TM1’s certificates in that trust. Moreover, the Order to Show Cause that the trustee obtained from this Court contemplates that “Potentially Interested Persons” like TM1 may have an interest in these proceedings.²

¹ 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.

² “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.”

Thus, TM1 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 TM1'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, TM1 need not show that BNYM’s representation is necessarily inadequate; it is sufficient for TM1 to show merely that BNYM *may* not adequately represent TM1’s interests. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).³ 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).

Although BNYM ostensibly is required to protect the interests of all certificateholders in the trusts that it administers, including TM1, 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 TM1 to intervene as of right to protect its own interests.

III. TM1 SATISFIES THE REQUIREMENTS FOR INTERVENTION UNDER CPLR 1013.

Even if TM1 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

³ 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.

common question of law or fact.” In this case, it is particularly appropriate for the Court to exercise its discretion to permit intervention, 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 TM1 to intervene in this proceeding will not “unduly delay the determination of the action or prejudice the substantial rights of any party.” CPLR 1013. TM1 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 investors that participated in the negotiation of the Settlement Agreement with BNYM, Countrywide, and Bank of America have intervened in this proceeding with the consent of BNYM.

CONCLUSION

For all of these reasons, TM1 respectfully requests that the Court grant its petition and amend the caption to add TM1 as an intervenor-respondent in this Article 77 proceeding.

Dated: New York, New York
July 13, 2011

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