

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

In the matter of the application of

WELLS FARGO BANK, NATIONAL
ASSOCIATION, U.S. BANK NATIONAL
ASSOCIATION, THE BANK OF NEW YORK
MELLON, THE BANK OF NEW YORK MELLON
TRUST COMPANY, N.A., WILMINGTON TRUST,
NATIONAL ASSOCIATION, HSBC BANK USA,
N.A., and DEUTSCHE BANK NATIONAL TRUST
COMPANY (as Trustees, Indenture Trustees, Securities
Administrators, Paying Agents, and/or Calculation
Agents of Certain Residential Mortgage-Backed
Securitization Trusts),

Petitioners,

For Judicial Instructions under CPLR Article 77 on the
Distribution of a Settlement Payment.

Index No. 657387/2017
IAS Part 60
Justice Friedman

Mot. Seq. 12

**MEMORANDUM OF
LAW IN OPPOSITION TO
ASSURED GUARANTY'S
MOTION FOR LEAVE TO
APPEAR AND
PARTICIPATE**

PRELIMINARY STATEMENT

The Institutional Investors submit this Memorandum of Law in Opposition to Assured Guaranty Corp.'s ("Assured") July 26, 2018 Motion for Leave to Appear and Participate (Dkt. No. 463) (the "Motion").

SUMMARY OF ARGUMENT

The Motion should be denied. Pursuant to Paragraph 9 of the Court's December 19, 2017 Order to Show Cause (Dkt. No. 30), all potentially interested persons were required to serve an answer to the Petition by January 29, 2018. Assured, a highly sophisticated certificate insurer, willfully chose not to do so. Assured has not identified a reasonable excuse for its six-month delay in seeking to appear. Rather, Assured admits that in late April 2018, it became aware of orders entered on other trusts that apparently gave it concern. Assured has not identified anything in those April 2018 orders that should have come as a surprise; the Petition and extensive Trustee notices made clear that this Article 77 proceeding would determine how the settlement proceeds would be distributed. That is precisely what those April 2018 orders accomplished.

Assured's Motion should also be denied because its belated appearance would prejudice the other investor parties who timely appeared and would encourage other investors to belatedly seek to appear. This would undermine the purpose of this Article 77 and interfere with the orderly and efficient resolution of the issues raised in the Petition. That is particularly true here, because Assured admits it "takes no position" on the specific issues identified in the Petition concerning the settlement distribution methodology. Assured's appearance would therefore not assist the Court in resolving the merits of the issues raised by the Trustees in the Petition.

STANDARD OF REVIEW

The Court is vested with broad discretion to control its calendar in order to facilitate the resolution of cases. *See, e.g., Alveranga-Duran v. New Whitehall Apartments, L.L.C.*, 40 A.D.3d 287, 289 (1st Dep't 2007). Article 77 proceedings are summary in nature. *See* C.P.L.R. § 409(b). In that regard, Paragraph 9 of the Court's December 19, 2017 Order to Show Cause (Dkt. No. 30) states:

[A]ny Interested Person who wishes to be heard on the merits of the questions presented by the Petition may appear . . . at the Final Hearing and present such evidence or argument as may be proper and relevant; provided, however, that, except for good cause shown, no Interested Person shall be heard and nothing submitted by any Interested Person shall be considered by the Court unless such Interested Person serves an answer to the Petition together with any supporting papers (a 'Submission'), on or before January 29, 2018 . . .

In the same vein, C.P.L.R. 3012(d) addresses the legal standard relevant to requests like Assured's to extend the time to appear or answer a pleading: "(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (emphasis added). In determining whether to extend the time to answer "upon such terms as may be just," courts have discretion to balance various factors, including "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense." *Emigrant Bank v Rosabianca*, 156 A.D.3d 468, 473 (1st Dept 2017).

ARGUMENT

I. ASSURED WILLFULLY CHOSE NOT TO APPEAR BY THE JANUARY 29, 2018 DEADLINE.

Assured submitted a sworn affidavit with the Motion in which Assured expressly admits that it willfully “did not originally seek to appear” in this proceeding because it “takes no position on the specific issues raised in the Petition . . .” Affidavit of Errol Uhr at ¶ 5 (Dkt. No. 465). It must now live with that decision. Assured’s failure to appear on January 29, 2018 is particularly inexplicable – and inexcusable – because Assured alleges it “has paid approximately \$43.6 million under Assured’s Financial Insurance Policy . . . to cover losses on the Insured Notes.” *Id.* at ¶ 4. Assured’s *willful* choice not to timely appear by the January 29, 2018 deadline strongly weighs against permitting its appearance six months later. *See Emigrant Bank*, 156 A.D.3d at 473.

II. ASSURED HAS NOT OFFERED A REASONABLE EXCUSE FOR ITS SIX-MONTH DELAY IN APPEARING.

The only excuse Assured now offers for the six-month delay in seeking to appear is that it became aware of orders entered in April 2018 on various trusts that “detailed the distribution of the Settlement Payment funds, including addressing issues about potential distribution to subordinate tranches of certificates.” Affidavit of Errol Uhr at ¶ 6 (Dkt. No. 465).

This excuse is not reasonable. Nothing in the April 2018 orders should have come as a surprise to Assured. As the Petition and the extensive Trustee notices made clear, the very purpose of this Article 77 Proceeding was to provide the Trustees judicial guidance on how to distribute the settlement proceeds. The April 2018 orders accomplished precisely that.¹

Nor was Assured’s apparent concern about “subordinate tranches” hidden in the Petition or in the Trustee notices. To the contrary, Paragraphs 45 to 48 of the Petition specifically detail

¹ Assured does not even *attempt* to explain the three-month delay between when it learned that the April 2018 orders addressed subordinate tranches and its July 26, 2018 Motion.

the Trustees' concerns related to subordinate tranches. The Petition's request for relief also contemplates that the distribution methodology might occur using the Pay First Method, Write Up First Method, "or a different method authorized by this Court." Petition, Request for Relief, at ¶ 5. Even a cursory review of the Petition would have made clear to Assured that (i) the Article 77 proceeding would determine how the settlement would be distributed, and (ii) one of the key issues on which the Trustees were seeking guidance was the treatment of "subordinate tranches."

Likewise, the Trustees' extensive notice program also put Assured on notice that this Article 77 proceeding would determine how the settlement proceeds would be distributed and made clear that Assured would be bound by the results of the Article 77 if it did not timely appear. The Trustees' Notice stated plainly: "The Court's disposition of the Article 77 Proceeding will affect the rights and interests of the Interested Persons and their successors-in-interest and assigns. All Interested Persons will be bound by the Article 77 Proceeding whether or not they appear in the matter or file a Submission or any other response to the Petition." See Dkt. No. 14 (Proposed Notice to Certificateholders) (emphasis added). Despite receiving this notice, Assured made a willful decision not to appear.

III. ASSURED'S BELATED APPEARANCE WILL PREJUDICE THE INVESTOR PARTIES WHO TIMELY APPEARED.

As the Court has previously noted, this Article 77 proceeding "has been scheduled on an expedited basis at the request of all parties, given the potentially substantial economic impact of delays in resolving the proceeding." Decision Denying Nover's Motion to Reargue the Repo Decision (Dkt. No. 475).

Many months ago, investor parties who timely appeared exchanged proof of their standing to appear and briefed any standing challenges. The Court has now ruled on the standing challenges, and the case is on the eve of merits briefing. Allowing Assured to appear at this

juncture would prejudice the parties who timely appeared for two reasons. First, they will be deprived of an opportunity to challenge Assured's standing without further delaying merits briefing. Second, if Assured's belated appearance is permitted, it would open the doors for other interested persons to seek to appear and be heard at this late stage. In both ways, Assured's belated attempt to appear threatens to interfere with the orderly and efficient resolution of this Article 77 Proceeding.

IV. ASSURED'S BELATED APPEARANCE WILL NOT ASSIST IN THE RESOLUTION OF THE PETITION ON THE MERITS.

Finally, the Motion should be denied because Assured admits it "takes no position on the specific issues raised in the Petition" Affidavit of Errol Uhr at ¶ 5 (Dkt. No. 465). By its own admission, Assured's voice will not assist the Court in resolving the Petition on its merits. For this additional reason, Assured's Motion should be denied.

CONCLUSION

Assured is a sophisticated party that willfully chose not to appear by the January 28th deadline. That decision had consequences. The breadth of the distribution issues discussed in the Petition put Assured on notice that this Article 77 would determine how the settlement proceeds would be distributed, and that the treatment of "subordinate tranches" would be determined by this proceeding. Having allegedly paid out over \$40 million in insurance payments on the Notes, Assured was well aware that its rights would be affected by this Article 77. Assured has offered no reasonable excuse for its six-month failure in attempting to appear. The efficient resolution of this summary and expedited Article 77 requires that Assured's Motion be denied.

Dated: New York, New York
August 9, 2018

WARNER PARTNERS, P.C.

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