New York Supreme Court

Appellate Division—First Department

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, NA, 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,

Appellate Division No. 2020-02716

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

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENTS GMO OPPORTUNISTIC FUND AND GMO GLOBAL REAL RETURN IN OPPOSITION TO TILDEN PARK'S MOTION FOR REARGUMENT OR FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

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New York County Clerk's Index No. 657387/17

Appellants-Respondents

AEGON USA INVESTMENT MANAGEMENT, LLC, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, FEDERAL HOME LOAN BANK OF ATLANTA, FEDERAL HOME LOAN MORTGAGE CORP., FEDERAL NATIONAL MORTGAGE ASSOCIATION, GOLDMAN SACHS ASSET MGMT L.P., VOYA INVESTMENT MGMT LLC, INVESCO ADVISERS, INC., KORE ADVISORS, L.P., METROPOLITAN LIFE INS. CO., PACIFIC INVESTMENT MGMT COMPANY LLC, TEACHERS INS. AND ANNUITY ASSOC. OF AMERICA, TCW GROUP, INC., THRIVENT FINANCIAL FOR LUTHERANS and WESTERN ASSET MGMT. CO.
(the "Institutional Investors")

- and -

Appellants-Respondents

AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
(the "AIG Parties")

-and-

Appellants-Respondents

ELLINGTON MANAGEMENT GROUP, L.L.C. and DW PARTNERS LP
(the "Ellington and DW Parties")

-and-

Appellants-Respondents

TILDEN PARK INVESTMENT MASTER FUND LP on behalf of itself and its advisory clients, TILDEN PARK MANAGEMENT I LLC on behalf of itself and its advisory clients and TILDEN PARK CAPITAL MANAGEMENT LP on behalf of itself and its advisory clients
("Tilden Park")

- and -

Appellants-Respondents

PROPHET MORTGAGE OPPORTUNITIES LP, POETIC HOLDINGS VI LLC, POETIC HOLDINGS VII LLC and U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Indenture Trustee for the Prophet and Poetic Trusts
(the "Prophet and Poetic Parties")

- and -

Appellant-Respondent

AMBAC ASSURANCE CORPORATION
("Ambac")

- and -

Appellants-Respondents

U.S. BANK NATIONAL ASSOCIATION, as NIM Trustee, U.S. Bank, solely in its capacity as Indenture Trustee for the HBK Trusts
(the "HBK Parties")

- against -

Respondent

NOVER VENTURES, LLC
("Nover")

- and -

Respondent

D.E. SHAW REFRACTION PORTFOLIOS, L.L.C.
("D.E. Shaw")

- and -

Respondent

STRATEGOS CAPITAL MANAGEMENT, LLC
("Strategos")

- and -

Respondents

OLIFANT FUND, LTD., FFI FUND LTD. and FYI LTD.
(the "Olifant Parties")

- and -

Respondents

GMO OPPORTUNISTIC INCOME FUND
and GMO GLOBAL REAL RETURN
(the "GMO Funds")

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INTRODUCTION

The GMO Funds[1] oppose the motion filed by Tilden Park on September 30, 2021 (the "Tilden Park Motion" or "Mot.") seeking reargument of, or, in the alternative, permission to appeal to the Court of Appeals the Court's August 19, 2021 Decision and Order (the "Decision").

Specifically, Tilden Park seems to be challenging the sections of the Decision in which the Panel correctly affirmed the IAS Court's ruling in favor of the GMO Funds and a group of the Institutional Investors who negotiated the disputed Settlement Agreement, holding, among other things, that: (i) "Section 3.06(b) of the settlement agreement is a 'gap filler' intended only to apply where the governing agreement is silent as to write-up mechanics and does not supersede or override the governing agreements," Decision at 5, and (ii) "[h]ad the drafters intended Section 3.06(b) to be an exception to the Section 7.05 mandate that the settlement agreement not amend any term of the governing agreement, they would have expressly said so," *id*. at 6 (together, the "Ruling").

[1] Unless otherwise noted, terms and abbreviations used herein carry the same meaning as those used in the Brief for Respondents GMO Opportunistic Fund and GMO Global Real Return, filed December 2, 2020 (NYSCEF Doc. No. 78) ("GMO Response Br.")

ARGUMENT

I. The Court Should Deny Tilden Park's Motion for Reargument

Under First Department law, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Setters v. Al Props. and Devs. (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dep't 2016) (citations, quotation marks omitted). But that is exactly what Tilden Park seeks. In repeating arguments that have already been presented, the Tilden Park Motion fails to carry its burden to "demonstrate that the . . . court overlooked or misapprehended the facts or law." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992).

First, the Tilden Park Motion argues that the Court must have overlooked Sections 3.06(a), 3.07, 1.16 and 3.05 of the Settlement Agreement in order to conclude that, "[h]ad the drafters intended Section 3.06(b) to be an exception to the Section 7.05 mandate that the settlement agreement not amend any term of the governing agreement, they would have expressly said so." Mot. at 9 (quoting Decision at 6). But those are the same provisions that Tilden Park already identified and briefed exhaustively to the IAS court and this Court. *See* Opening Brief for Tilden Park, filed November 2, 2020 (NYSCEF Doc. No. 58) ("Tilden Park Opening Br.") at 18–21; 26–27. Those arguments and their implications were

addressed in detail in GMO's Response Brief and discussed at oral argument. *See* GMO Response Br. at 14–18.

Second, the Tilden Park Motion disputes the Court's interpretation of Section 7.13, Mot. at 11–12, even though (i) that provision was also extensively briefed and argued and (ii) the Ruling explains the textual reason it rejected Tilden Park's position. Decision at 6 ("More importantly, Section 7.13 is explicitly made '[s]ubject to Section 7.05,' which, as discussed, provides that the settlement agreement does not amend the governing agreements."). The Tilden Park Motion complains that the Ruling does not specifically address one particular argument that Tilden Park first raised in a footnote to its Opening Brief. *See* Mot. at 12 (citing Tilden Park Opening Br. at 29 n.9). But the Decision states that the Court appropriately "considered and rejected" each of Tilden Park's contentions. Decision at 12. So, the fact that the Court did not expound on this subsidiary point does not mean it was overlooked.

The Tilden Park Motion also alleges that this Court erred in a secondary, alternative basis for its interpretation of Section 7.05, that "[t]he governing agreements were negotiated among parties other than those defined as 'parties' to the settlement agreement, and therefore those agreements were not 'between the Parties' as set forth in Section 7.13." Decision at 6. We believe the Court was considering the correct fact that most beneficiaries of the trusts subject to the

Governing Agreements and made parties to the Settlement Agreement through Article 77 proceedings did not themselves negotiate those Governing Agreements (or the Settlement Agreement). And, even if that point were factually incorrect, that would not change this Court's ruling because the "[m]ore important[]" reason that this Court rejected Tilden Park's reading of Section 7.13—that Section 7.13 is expressly made "subject to" Section 7.05, *id*.—would remain unaffected. *See People v. Morrison*, 195 N.Y. 116, 118 (1909) (denying motion for reargument based on alleged mistake where "[t]he mistake was not material in any possible view of the case, and obviously could have had no influence upon the result"); *cf. Edge Mgmt. Consulting, Inc. v. Irmas*, 306 A.D.2d 69, 69 (1st Dep't 2003) ("[D]isagreement with certain dicta in the order does not furnish a basis to take an appeal." (citations omitted)).

The fact that the Court was not persuaded by Tilden Park's arguments does not mean the Court misapprehended them or erred, so Tilden Park's motion for reargument should be denied.

II. The Court Should Deny Tilden Park's Motion for Leave to Appeal to the Court of Appeals

The Tilden Park Motion also fails to carry its heavy burden of justifying leave to appeal by showing "why the questions presented merit review . . . such as that the issues are novel or of public importance, present a conflict with prior

decisions of [the Court of Appeals], or involve a conflict among the departments of the Appellate Division." 22 NYCRR 500.22(b)(4).

The Tilden Park Motion's first effort to manufacture a conflict between the Ruling and other New York decisions leads to an irrelevant foray into decisions considering "whether contract parties can settle contractual disputes without 'amending' their contracts." Mot. at 13–18. That legal question was never before this Court and the Ruling did not decide it. Rather, the Ruling considers the language and meaning of this particular Settlement Agreement and interprets the meaning of specific language in Section 3.06(b) to serve a gap-filling function. The contract interpretation Ruling about the meaning of this Settlement Agreement's provisions is not a ruling about what the Settlement Agreement could or could not do as a matter of law.

The Tilden Park Motion's next purported conflict—that the Ruling conflicts with the "plain meaning" rule and other fundamental canons of contract interpretation, *see* Mot. at 18–22—just reframes interpretation arguments that were already rejected. *See* Tilden Park Opening Br. at 17 (harmonization); *id*. at 31 (the specific controls the general); *id*. at 17–18 (*expressio unius*); Reply Brief for Tilden Park, filed December 18, 2020 (NYSCEF Doc. No. 79) at 24 n.20 (rule against superfluity). The Court is obviously well aware of the rules of contract

interpretation and appropriately read Section 3.06(b) in its context and so as not to render Section 7.05 meaningless. Decision at 5–6.

There is also no issue of public importance. Tilden Park's arguments address only one disputed term in a single Settlement Agreement. Indeed, that term affects only a small handful of parties in this appeal. The Tilden Park Motion alludes to the existence of "countless other RMBS trusts not involved here" that "could be affected *if* they have similar language to the language this Court interpreted." Mot. at 22 (emphasis added). But Tilden Park does not explain why RMBS trusts would be affected by interpretation of a particular settlement agreement or identify any such trusts. The mere fact that this ruling relates to a relatively small piece of a large RMBS settlement does not automatically elevate it to the necessary level of public interest.

CONCLUSION

For the foregoing reasons, this Court should deny Tilden Park's motion for reargument or leave to appeal the August 19 Decision.

Dated: New York, New York
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