Federal Home Loan Bank of Boston v Moody's Corp.
2019 NY Slip Op 30921(U)
March 25, 2019
Supreme Court, New York County
Docket Number: 656707/2017
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOEL M. COHEN** **PART** **IAS MOTION 3EFM**

Justice

----------X

FEDERAL HOME LOAN BANK OF BOSTON,

Plaintiff,

- v -

MOODY'S CORPORATION, MOODY'S INVESTORS SERVICE, INC.

Defendants.

----------X

INDEX NO.	656707/2017
MOTION DATE	07/06/2018
MOTION SEQ. NO.	001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 53, 54

were read on this motion to DISMISS.

Upon the foregoing documents:

This is a common law fraud case. Plaintiff Federal Home Loan Bank of Boston ("the FHLBB") alleges that Defendants Moody's Corporation and Moody's Investors Service, Inc. (collectively, "Moody's") committed fraud by intentionally understating the risk and overstating the creditworthiness of certain Private Label Mortgage-Backed Securities (PLMBS) sold to the FHLBB. Moody's moves to dismiss under CPLR §§ 213(8), 3211(a)(1), and 3211(a)(7). For the reasons described below, the motion is denied with respect to the FHLBB's First Cause of Action (Fraud) and granted without opposition with respect to the FHLBB's Second Cause of Action (Violations of NY Gen. Bus. L. § 349).

The case is well traveled, to say the least. First, the FHLBB filed an action against Moody's and other defendants in Massachusetts Superior Court on April 20, 2011. (NYSCEF 1 at 9) ("*Moody's I*"). On May 27, 2011, the case was removed to the United States District Court for the District of Massachusetts ("*Moody's II*"). The district court denied Moody's' motions to dismiss the case for failure to state a viable claim of fraud and for lack of personal jurisdiction.

However, after the Supreme Court's decision in *Daimler AG v. Bauman,* 134 S. Ct. 748 (2014), the district court reconsidered its decision with respect to personal jurisdiction and granted Moody's' motion to dismiss on that ground. *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 2014 WL 4964506 at *2 (D. Mass. Sept. 30, 2014). The court further found that it was required to dismiss the claims against Moody's outright rather than to transfer them to another district pursuant to 28 U.S.C. § 1631 because it concluded that such a transfer was permissible only if there is a want of *subject matter* (not personal) jurisdiction. *Id.* at *3-*4. The latter holding was reversed on appeal ("*Moody's III*"). The United States Court of Appeals for the First Circuit held that a transfer is permitted under 28 U.S.C. § 1631 when there is an absence of subject matter *or* personal jurisdiction, and it remanded to the district court for a determination whether such a transfer would be "in the interest of justice." *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 821 F.3d 102 (1st Cir. 2016). On remand, the Massachusetts district court transferred the case to the United States District Court for the Southern District of New York ("the SDNY"). *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 2016 WL 7493960 (D. Mass. Dec. 30, 2016)

That leads us to *Moody's IV*. Having finally landed in a federal court in which Moody's was subject to *personal* jurisdiction, yet another intervening United States Supreme Court decision torpedoed the FHLBB's case, this time on the question of *subject matter* jurisdiction. In *Lightfoot v. Cendant Mortgage Corp.,* 137 S. Ct. 553 (2017), the Supreme Court held that the federal charter for Fannie Mae, which is substantially similar to the charter for the FHLBB, did not give rise to federal subject matter jurisdiction. In the wake of *Lightfoot*, the SDNY dismissed the action for lack of subject matter jurisdiction. *Federal Home Loan Bank of Boston v. Moody's Investors Service, Inc.*, 17 Civ. 134, slip op. (S.D.N.Y. May 19, 2017).

Finally, the FHLBB commenced the instant action in this Court on November 2, 2017 ("*Moody's V*"). (NYSCEF 1).

Moody's moves to dismiss the FHLBB's complaint on two grounds. First, it claims that the FHLBB's claims are barred by the six-year statute of limitations governing fraud claims under New York law.[1] Second, it claims that FHLBB has failed to plead fraud with the particularity required under CPLR § 3016(b). The Court will deal with each issue in turn.

ANALYSIS

A. Statute of Limitations

This case presents a vexing question regarding the application of CPLR § 205(a). The parties agree that the FHLBB's claim in this Court, viewed in isolation, would be time barred because the alleged fraud occurred more than six years before the case was filed on November 2, 2017. The FHLBB's claim can be saved from dismissal only if its filing date is deemed to relate back to the timely filing date of *Moody's I* (April 20, 2011), or at least to the removal date of *Moody's II* (May 27, 2011). That is where section 205(a) comes in.

CPLR § 205(a), sometimes referred to as the "saving" statute, provides in relevant part that:

> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff … may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action."

[1] The parties do not dispute that New York law applies in the case filed in this Court. The Massachusetts district court also applied New York law in addressing the FHLBB's fraud claims. *Federal Home Loan Bank of Boston v Ally. Financial, Inc.*, No. 11-10952-GAO, slip op. (D. Mass. Sept. 30, 2013).

As the Court of Appeals recently observed, section 205(a) "implements the Legislature's 'policy preference for the determination of actions on the merits.' The statute is remedial in nature and, where applicable, 'allow[s] plaintiffs to avoid the harsh consequences of the statute of limitations and have their claims determined on the merits where... a prior action was commenced within the limitations period, thus putting defendants on notice of the claims." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 2019 WL 659355, at *2 (N.Y. Feb. 19, 2019) (citations omitted); *see also Norex Petroleum Ltd. v. Blavatnik*, 23 N.Y.3d 665, 668 (2014) ("New York's 'savings' statute, section 205(a), allows a plaintiff to refile claims within six months of a timely prior action's termination for reasons other than the merits or a plaintiff's unwillingness to prosecute the claims in a diligent manner.").

The Appellate Division has determined that "an out-of-state action is not a 'prior action' within the meaning of [section 205(a)]." *Deadco Petroleum v. Trafigura AG* 151 A.D.3d 547, 547 (1st Dep't 2017); *see also Guzy v. New York City*, 129 A.D.3d 614, 615 (1st Dep't 2015); *Midwest Goldbuyers, Inc. v. Brink's Global Servs. USA, Inc.*, 120 A.D.3d 1150, 1151 (1st Dep't 2014); *Lehman Bros. v. Hughes Hubbard & Reed, L.L.P.*, 245 A.D.2d 203, 203 (1st Dep't 1997), *aff'd on other grounds*, 92 N.Y.2d 1014 (1998). The rule appears to have been first announced in *Baker v. Commercial Travelers Mutual Accident Ass'n of Am.*, 3 A.D.2d 265, 266 (4th Dep't 1957), in which the Fourth Department, addressing a precursor to section 205(a), explained:

> "Limitations of actions are matters within the concern of the forum. Commencement of suit in another State will not toll or otherwise affect the provisions for limitation of actions in the State of the forum. It follows therefore that, assuming an action was commenced in the United States District Court in Florida where the cause of action arose within the contractual time limit, still that does not make available to the plaintiff the saving statute of New York."

3 A.D.2d at 266 (citation omitted).

This case presents the unusual (perhaps unique) situation in which the prior action was *commenced* outside of New York (*Moody's I*) but *terminated* within New York (*Moody's IV*). The parties have not cited, nor has the Court found, a case addressing the applicability of CPLR § 205(a) in that context. In the absence of binding authority on point, the Court finds that the most natural reading of the text of section 205(a) is that the FHLBB's complaint in this case is timely because it was filed within six months of the termination of its prior action by a federal court sitting in New York. That conclusion is bolstered by the Court of Appeals' admonition that "the provision's 'broad and liberal purpose is not to be frittered away by any narrow construction." *U.S. Bank*, 2019 WL 659355 at *2 (citation omitted).[2]

Here, there is a direct – albeit tumultuous – path from *Moody's I* through *Moody's IV*. Despite its travels between and among state and federal courts, it was one continuous action. Under federal law, the removal of the case from Massachusetts state court (*Moody's I*) to Massachusetts federal court (*Moody's II*) did not affect the filing date, which remains "the time it was filed in state court." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 360 (1998). In turn, after the transfer of the action from Massachusetts federal district court to the SDNY (*Moody's IV*), 28 U.S.C. § 1631 provides that "the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred."

Although the Court is not bound to take account of federal court procedural rules in its application of CPLR § 205(a), doing so in this case is consistent with the overarching remedial

---

[2] The Court recognizes that *Guzy*, 129 A.D.3d at 614 and *Baker*, 3 A.D.2d at 266 make reference to their respective prior actions having been "commenced" outside New York. Given that those cases did not involve the unusual circumstance in which the commencement and termination took place in different states, one of which was New York, the Court does not view the language used in those cases (arguably dicta for these purposes) to be determinative.

purpose of the New York statute. The federal rules serve the same remedial purpose of avoiding the harsh application of the statute of limitations when the plaintiff is seeking to continue its timely-filed case in the proper forum. The Defendants here plainly have been on notice of the FHLBB's claims since 2011. *See U.S. Bank*, 2019 WL 659355, at *2. Moreover, the final resting place of the action immediately prior to the initiation of the instant case was a *New York* federal court, and thus applying section 205(a) is consistent with *Baker* and its progeny.

In sum, the Court finds that the FHLBB's claim is timely, under CPLR § 205(a), because its prior action was timely commenced in 2011 and the instant case was initiated and served within six months of the termination of that action by the SDNY.[3]

B. **Failure to State a Claim of Fraud**

In assessing a motion to dismiss for failure to state a claim, the Court must give the complaint a liberal construction, accept its factual allegations as true, and provide the plaintiff with the benefit of every favorable inference. *See, e.g., Nomura Home Equity Loan, Inc. v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 582 (2017); *Myers v. Schneiderman*, 30 N.Y.3d 1, 11 (2017). In a motion brought under CPLR § 3211(a)(1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). Indeed, "such a motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002).

[3] Moody's assertion that the FHLBB breached the parties' October 2014 "tolling agreement" by failing to provide 30 days' written notice before filing the instant action is irrelevant to the motion to dismiss. The FHLBB does not rely upon the tolling agreement to establish the timeliness of its Complaint. Neither does the Court.

To state a viable claim of fraud a party must properly allege a "material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Dewar & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009).

Under CPLR § 3016(b), the "circumstances constituting the wrong [must] be stated in detail." The New York Court of Appeals has held that that "the purpose underlying the statute is to inform a defendant of the complained-of incidents." *Eurycleia*, 12 N.Y.3d at 559. Moreover, the pleading requirement of CPLR § 3016(b) "should not be confused with unassailable proof of fraud," and "section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). Section 3016(b) "should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud." *Eurycleia*, 12 N.Y.3d at 559 (citations omitted).

The Massachusetts federal court in *Moody's II* applied an analogous heightened pleading standard (Fed. R. Civ. P. 9(b)) in assessing the adequacy of the FHLBB's fraud claim and denied Moody's' motion to dismiss that claim. *See Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, No. 11-10952-GAO, slip op. (D. Mass. Sept. 30, 2013) (unpublished opinion, NYSCEF 7). While the Court does not agree with the FHLBB's position that the Massachusetts federal court's decision is binding on this Court as law of the case, it does find the federal court's reasoning to be persuasive. As the federal court found (addressing essentially the same allegations presented here): "[T]he Bank has pled with sufficient particularity that the Rating Agency Defendants issued ratings that they did not genuinely or reasonably believe. For example, the Amended Complaint alleges that the Rating Agency Defendants diluted their own standards and carried out their ratings procedures in an intentionally lax

manner as to PLMBS while maintaining higher standards in other contexts. The Bank has also sufficiently pled scienter, alleging that the Rating Agency Defendants competed for business by artificially inflating ratings, as they were only paid if they provided high ratings." (NYSCEF 7 at 4.)

The same is true in this case. The FHLBB has sufficiently alleged that Moody's knew that the information it received about the underlying securities was materially inaccurate, that it knew its rating process would not produce an accurate rating, and that the FHLBB reasonably relied on those representations to its detriment. (NYSCEF 39 at 14). The FHLBB alleges with requisite detail that Moody's conducted inadequate due diligence, ignored the abandonment of underwriting guidelines, and inflated ratings based on information that it knew not to be true. It further alleges that this conduct impacted the ratings Moody's gave to mortgage backed securities across the board, not only a handful of them. *See* Complaint at 43 and Exs. 7-13 ("[E]ach Statement of Facts quoted above applies to the PLMBS purchased by [the FHLBB] as the PLMBS are included on the lists of securities covered by the DOJ settlements [in related cases].").

Moody's argues that credit ratings are opinions, not facts, and that opinions are not actionable as fraud. (NYSCEF 39 at 19). Although it is generally true that opinions are not actionable as fraud, "statement[s] of opinion may nevertheless be actionable as fraud if the plaintiff can plead and prove that the holder of the opinion did not subjectively believe the opinion at the time it was made and made the statement with the intent to deceive" or if the speaker subjectively was aware that there was no reasonable basis for the opinion. *M&T Bank Corp. v. McGraw-Hill Cos., Inc.,* 126 A.D.3d 1414, 1416 (4th Dep't 2015). The FHLBB's complaint contains detailed allegations that Moody's knowingly gave inaccurate ratings to

PLMBS based on information it knew was inaccurate, used models it knew were inaccurate and outdated, failed to adhere to its own standards, and engaged in "ratings shopping" by lowering its standards in order to give better ratings and generate more business, among many other allegations. The FHLBB also cites to the comments of Moody's executives to support its allegation that Moody's knew its ratings were inaccurate. (NYSCEF 1 at 52, 55). Whether these allegations can be proven remains to be seen, of course, but the FHLBB has alleged enough to survive dismissal at this stage.

Finally, Plaintiff has sufficiently pled that it justifiably relied upon Defendants' ratings. The FHLBB alleges that it received expected ratings before trade dates and relied on those ratings in its decision to purchase PLMBS. (NYSCEF 1 at 84-85). Whether this reliance is justifiable, and whether the alleged misrepresentations in fact impacted the FHLBB's purchase decisions, are questions to be determined in litigation and should not be decided on a motion to dismiss.[4]

C. **New York General Business Law § 349**

At oral argument on June 22, 2018, the FHLBB abandoned its claim under NY Gen. Bus. L. § 349 and stated that it does not oppose the branch of Moody's' motion seeking to dismiss that claim. (Tr. at 13). Therefore, Moody's' motion to dismiss that claim is granted.

Therefore, in accordance with the foregoing, it is:

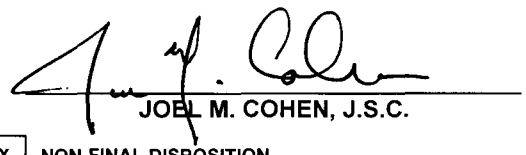
[4] In its reply brief, Moody's asserts that it made no pre-purchase statements for 82 of the 101 certificates at issue and thus the FHLBB cannot establish that it relied on any representations attributable to Moody's. (NYSCEF 54 at 11-13.) The Court does not believe that a motion to dismiss is the proper forum to parse the particular facts as to what information (even if short of final ratings) was available to the FHLBB for each purchase and how that information impacted the FHLBB's purchase decisions.

ORDERED that Defendants' motion to dismiss Plaintiff's First Cause of Action (Fraud) is Denied; and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's Second Cause of Action (Violation of New York General Business Law § 349) is Granted as unopposed; it is further

ORDERED that the parties are to appear for a preliminary conference on Tuesday April 23, 2019, at 10:00 a.m.

This constitutes the Decision and Order of the Court.



3/25/2019
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE