

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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| <p>SYNCORA GUARANTEE INC.,</p> <p style="text-align: center;">Plaintiff-Appellant and Cross-Respondent,</p> <p style="text-align: center;">-against-</p> <p>COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE SECURITIES CORP., COUNTRYWIDE FINANCIAL CORP., and BANK OF AMERICA CORP.,</p> <p style="text-align: center;">Defendants-Respondents and Cross-Appellants.</p> | <p>Index No. 650042/09 IAS Part 3</p> <p>Hon. Eileen Bransten</p> <p><u>CIVIL CROSS-APPEAL PRE-ARGUMENT STATEMENT</u></p> |
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Defendants-Respondents and Cross-Appellants Countrywide Home Loans, Inc., Countrywide Securities Corp., and Countrywide Financial Corp. (“Countrywide”) respectfully submit this Cross-Appeal Pre-Argument Statement under Rule 600.17 of the Rules of this Court:

1. The title of this action is accurately set forth in the caption above.
2. The parties to this action are:
 - a. Plaintiff-Appellant and Cross-Respondent: Syncora Guarantee Inc. (“Syncora”).
 - b. Defendants-Respondents and Cross-Appellants: Countrywide Home Loans, Inc., Countrywide Securities Corp., and Countrywide Financial Corp.
 - c. Defendant: Bank of America Corp. (“BAC”).
3. The name, address, and telephone number of counsel for Defendants-Respondents and Cross-Appellants Countrywide is:

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4. The name, address, and telephone number of counsel for Defendant BAC is:

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5. The name, address, and telephone number of counsel for Plaintiff-Appellant and Cross-Respondent Syncora as to claims against Countrywide:

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6. The name, address, and telephone number of counsel for Plaintiff-Appellant and Cross-Respondent Syncora as to claims against BAC:

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7. This cross-appeal is taken from the Order of the Supreme Court, New York County, I.A.S. Part 3 (per Justice Eileen Bransten) dated January 3, 2012, and duly entered with the Clerk of the Court on January 5, 2012, granting in part and denying in part Syncora's Motion for Partial Summary Judgment (Mot. Seq. No. 15) (the "Order"). A true and correct copy of the Order is attached hereto as Exhibit A.

8. This case was brought by Syncora, a monoline bond insurer that issued financial guaranty insurance policies in connection with certain securitizations of residential second-lien mortgage loans. Countrywide sponsored the securitizations and contributed the mortgage loans underlying the securitizations. Syncora alleges that a significant percentage of the mortgage loans underlying each of the five securitizations at issue failed to comply with representations and warranties in the governing agreements and alleges claims for fraudulent inducement and breach of contract. Syncora seeks to recover monies paid out on its financial guaranty policies as a result of allegedly noncompliant mortgage loans.

9. On August 16, 2011, Syncora filed a Motion for Partial Summary Judgment (Mot. Seq. No. 15), seeking a declaration that: (i) to prevail on its claim that Countrywide was required to repurchase allegedly defective mortgage loans under its contract claims under the governing agreements for the Securitizations, Syncora need only establish that a loan breached a representation or warranty in a way that materially and adversely affected Syncora by increasing the risk profile of the insurance at the time of making the allegedly inaccurate representation or warranty, and nothing about what caused the loan to default (and therefore caused a claims payment under the policy) or even that the loan ever defaulted (*i.e.*, Syncora contends that it is entitled to seek repurchase even of loans that have always been fully performing to date); (ii) to be entitled to what it terms “rescissory damages” on its fraudulent inducement claim (measured, in Syncora’s view, by the total claims it has paid or may pay on the insurance it issued, less premiums it received), Syncora need only establish that it was induced to insure the Securitizations by fraudulent misrepresentations or omissions, and nothing about what may have caused a loan to default; and (iii) to prevail on its claim of breach of the Insurance and Indemnity Agreement, Syncora need only establish that an alleged misrepresentation was untrue or

misleading in a material respect at the time it was made, and nothing about what may have caused the loan to default.

10. On September 14, 2011, Countrywide filed its opposition papers, arguing that: (i) to prevail on its claim that Countrywide breached its obligation to repurchase certain allegedly defective loans in the Securitizations, Syncora must establish that it has suffered actual, material harm as a result of each alleged representation or warranty breach, *i.e.*, Syncora must show that a representation or warranty breach “materially and adversely affects” Syncora (under the terms of the governing agreements) by causing a loan to default—and forcing Syncora to pay more in claims—for repurchase to be required under the governing agreements; and (ii) Syncora cannot evade its burden of proving causation on its claims for fraudulent inducement and breach of the Insurance and Indemnity Agreement, because (a) to recover damages at law, Syncora must prove that its losses were caused by Countrywide’s actual wrongdoing, and not by other causes, such as the intervening housing and financial markets collapse, and (b) under New York law, Syncora may not recover “rescissory damages.”

11. The Supreme Court of the State of New York, County of New York (the “IAS Court”) granted in part and denied in part Syncora’s Motion for Partial Summary Judgment by a decision and order dated January 3, 2012, entered in the Clerk’s Office of the Supreme Court, New York County, on January 5, 2012.

a. The IAS Court denied Syncora’s motion seeking a declaration that to prevail on its claim that Countrywide was required to repurchase certain allegedly defective loans in the securitizations, Syncora need only establish that a loan breached a representation or warranty in a way that materially and adversely affected Syncora by increasing the risk profile of the insurance at the time of making the allegedly inaccurate

representation or warranty. The IAS Court concluded that summary judgment was not appropriate because, among other reasons, the relevant provisions of the governing agreements “are subject to varying interpretations.” The IAS Court found that Syncora failed to show that “the language of the contract is unambiguous and reasonable minds could not differ as to its meaning.”

b. The IAS Court granted Syncora’s motion seeking a declaration that to be entitled to rescissory damages on its claims of fraudulent inducement and breach of the Insurance and Indemnity Agreement, Syncora need only establish that it was induced to insure the Securitizations by Countrywide’s alleged misrepresentations, and does not need to show a direct causal link between Countrywide’s alleged misrepresentations and Syncora’s claims payments. The IAS Court placed several key limitations on this holding, finding that Syncora must prove that: (i) “Countrywide made misrepresentations that were material to [Syncora’s] decisions to issue the Insurance Policies”; (ii) “[Syncora] relied on Countrywide’s alleged misrepresentations in that the alleged statements induced Syncora to take action which Syncora might otherwise not have taken, or would have taken in a different manner”; (iii) “[Syncora] was damaged as a direct result of the material misrepresentations”; and (iv) “[u]pon reaching its burden of proof for each claim . . . the amount of its damages.”

12. The IAS Court erred in law and fact and in the exercise of its discretion in granting Syncora’s motion in part. Defendants-Respondents and Cross-Appellants seek the reversal of the Order to the extent that it declares that:

a. Syncora may seek “rescissory damages” upon proving all elements of its claims for fraudulent inducement and breach of the Insurance and Indemnity Agreement;

b. To be entitled to rescissory damages on its claims of fraudulent inducement and breach of the Insurance and Indemnity Agreement, Syncora need not establish a direct causal link between Countrywide's alleged misrepresentations and the claims payments made by Syncora pursuant to the insurance policies and, instead, need only establish (i) that it was induced to insure the securitizations on terms to which it otherwise would not have agreed, and/or (ii) that Countrywide made misrepresentations that increased the risk profile of the issued insurance policies; and

c. Such other issues that may become apparent upon review of the papers on appeal.

13. The following related actions are pending:

a. *MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et al.*, Index No. 602825/08, is pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York, County of New York. The *MBIA* case has been designated as related to this action by the Court below. On January 3, 2012, the Supreme Court of the State of New York, County of New York also granted in part and denied in part MBIA's substantially similar motion for partial summary judgment. Defendants-Respondents and Cross-Appellants have noticed an appeal from the IAS Court's Order on MBIA's substantially similar motion.

b. *Financial Guaranty Insurance Company v. Countrywide Home Loans, Inc., et al.*, Index No. 650736/09, is pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York, County of New York. The *Financial Guaranty* case has been designated as related to this action by the Court below.

c. *Ambac Assurance Corporation, et al. v. Countrywide Home Loans, Inc., et al.*, Index No.: 651612/2010, is pending before Hon. Eileen Bransten, J.S.C. in the Supreme Court of the State of New York. The *Ambac* case has been designated as related to this action by the Court below.

14. Another appeal currently is pending in this action. A notice of appeal, dated November 3, 2011 and attached hereto as Exhibit B, was filed by BAC with this Court appealing the order of Justice Eileen Bransten, dated and entered on October 31, 2011, denying BAC's motion to sever and consolidate successor liability claims.

Dated: January 25, 2012
New York, New York

Respectfully submitted,

By: /s/Mark Holland
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