

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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AMBAC ASSURANCE CORPORATION, THE
 SEGREGATED ACCOUNT OF AMBAC ASSURANCE
 CORPORATION,

Plaintiff,

- v -

COUNTRYWIDE HOME LOANS, INC., COUNTRYWIDE
 SECURITIES CORP., COUNTRYWIDE FINANCIAL
 CORP., BANK OF AMERICA CORP.

Defendant.

INDEX NO. 653979/2014

MOTION DATE N/A

MOTION SEQ. NO. 006

**DECISION + ORDER ON
 MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 474, 475, 476, 477

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

This case must be tried. Material issues of fact exist such that summary judgment is denied

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Briefly, Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation (hereinafter, collectively, **Ambac**) was the insurer of the securitizations at issue and Countrywide Home Loans, Inc., Countrywide Securities Corp., and Countrywide Financial Corp. (hereinafter, collectively, **Countrywide**) was the originator (Joint 19-A Statement, ¶ 25

[NYSCEF Doc. No. 321]). Ambac alleges that it was fraudulently induced to provide credit

enhancement to the securitized obligations and that as a result of Countrywide's fraudulent representations, it suffered damages of over \$600 million by 2014 and that it would continue to suffer damages (Complaint, ¶ 271 [NYSCEF Doc. No. 2]). To be clear, and unlike in *Ambac I* (hereinafter defined), critically, it is undisputed that Ambac and Countrywide did not enter into an I&I Agreement (NYSCEF Doc. No. 249, at 1; NYSCEF Doc. No. 423, at 4-5) and in this case Ambac does not assert breach of contract claims.

In *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288 (1st Dept 2003), the Appellate Division held a fraud claim can *only* be dismissed as duplicative against a defendant against whom a related breach of contract claim is viable:

Moreover, while a false statement of intention can be sufficient to support a claim of fraud...the fraud alleged here is based on the same facts underlying the contract claim and merely duplicated it.... And, although a fraud claim may be dismissed *as duplicative* only as against a defendant against whom the related contract claim is viable...the fraud claim was properly dismissed as to all the defendants, including those who were not parties to the AGIT note, since in any event their alleged fraud liability was essentially accessory only, so that once the main fraud claim against the direct actor falls, so does the claim against the remaining defendants

(*id.*, at 305 [internal citations omitted, emphasis in original]).

This is the law in the State of New York.¹ Countrywide's reliance on *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 194 AD3d 474 (1st Dept 2021) (*Ambac I*), *Page v Muze, Inc.*, 270 AD2d 401 (2d Dept 2000), and *Khodeir v Sayyed*, 323 FRD 193 (SD NY 2017) to argue otherwise fails. All three cases involved both a breach of contract and a fraud claim. These

¹ To be clear, this is not to say that just because contract claims fail, it does not mean that the fraud claims necessarily survive

cases do not stand for Countrywide's argument that "contract-style" relief cannot be obtained under a cause of action sounding in fraud where there is no contract and no alleged breach.

Ambac I involved RMBS transactions similar to those at issue here. In *Ambac I*, the trial court held that the fraud damages were duplicative of the contract damages because they did not address a different "species" of harm. In other words, the proposed damages for the breach of contract claims and the fraud claims were essentially two ways of calculating the same thing, and the distinction that *Ambac* attempted to draw between the two was legally irrelevant. As such, the trial court dismissed the fraud (but not the contract) claims. The Appellate Division affirmed.

Page also involved an alleged breach of contract and fraud claim. In *Page*, the plaintiff asserted that the defendant breached an oral employment agreement that he was entitled to an equity interest in the defendant company. The trial court granted the defendants' motion for partial summary judgment and dismissed the plaintiff's breach of contract claims because they were barred by the Statute of Frauds which was in effect at the time of the alleged agreement (*i.e.*, UCC 8-601). The court also dismissed the fraud claims as impermissibly duplicative of the breach of contract claim. In other words, the fraud claims were dismissed as an attempted end run around the Statute of Frauds. The Appellate Division affirmed holding that "an action to recover damages for fraud may not be maintained when the only fraud alleges relates to a breach of contract" (*Page*, 270 AD2d at 402, citing *Jim Longo, Inc. v Rutigliano*, 251 AD2d 547 [2d Dept 1998], *Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d 643 [2d Dept 1997] and *Weitz v*

Smith, 231 AD2d 518 [2d Dept 1996]). As discussed above, in this case, there is no contract or breach at issue. Thus, under *Richbell*, this is the beginning and end of this story.

Putting aside that *Khodeir* is not binding on this Court, it also does not change the analysis.

Khodeir involved alleged violations of the Fair Housing Act. As relevant, the defendants asserted counterclaims sounding in breach of contract and fraud. To wit, the defendants argued that the plaintiffs breached their contract by having more people live in the apartment than was agreed and committed fraud because they knew that seven people would reside in the apartment but fraudulently represented a lower number in order to secure the use of the apartment. The court (Gorenstein, J.) dismissed the breach of contract counterclaims because the defendants failed to allege how they were damaged by virtue of the occupancy violation. The court then dismissed the fraud counterclaim because the complaint failed to allege a duty that was separate and independent of the contract itself and the alleged misrepresentation at issue was not “collateral” to the contract (*Khodeir*, 323 FRD at 203, citing *Fairway Prime Estate Management, LLC v First American Intern. Bank*, 99 AD3d 554, 557 [1st Dept 2012]; accord *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012]; *Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank, N.A.*, 84 AD3d 588, 589 [1st Dept 2011]). For the reasons discussed above, this also does not compel a different result.

Countrywide is also not entitled to summary judgment because it can cherry pick a few statements which present issues of fact as to the degree upon which Ambac relied on Countrywide’s representations in conducting its own due diligence. Ambac met with representatives of Countrywide and conducted due diligence on the transactions, including by

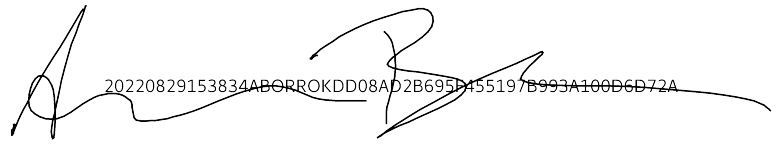
studying Countrywide's loan tapes and other materials that Countrywide provided to other parties in connection with these transactions (NYSCEF Doc. No. 437, ¶¶ 78-79). The statements upon which Countrywide relies are material for cross-examination. Nothing more.

It is also of no moment that the parties' experts disagree (i) as to the effect of the market downturn and Countrywide's contribution to the market downturn occasioned by its allegedly faulty underwriting practices or (ii) about whether Ambac's expert models were properly constructed (*id.*, ¶ 171). Indeed, this highlights the need for a trial (*Alvarez*, 68 NY2d at 324).

Finally, Countrywide's argument that the alleged misrepresentations cannot be relied on because they are non-actionable statements of opinion or puffery fails. The statements on which Ambac alleges it relied on are statements concerning the quality of Countrywide's practices, including the strength of Countrywide's underwriting and origination guidelines and Countrywide's adherence thereto (*see, e.g.*, NYSCEF Doc. No. 2, ¶¶ 34, 45-51, 101-102). These statements, far from being puffery, are material as to Countrywide's obligations and performance as the originator in the RMBS transactions at issue and may well have provided a basis for Ambac's level of due diligence.

The Court has considered Countrywide's remaining arguments and finds them unavailing.

It is hereby ORDERED that Countrywide's motion for summary judgment is denied. A pre-trial conference is scheduled for August 30, 2022, at 9:30am.



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8/29/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE