

111 A.D.3d 478
Supreme Court, Appellate Division, First
Department, New York.

ASSURED GUARANTY MUNICIPAL CORP.,
formerly known as Financial Security Assurance
Inc., Plaintiff–Respondent,

v.

DB **STRUCTURED PRODUCTS**, INC., et al.,
Defendants.

DB **Structured Products**, Inc., Third–Party
Plaintiff,

v.

GreenPoint Mortgage Funding, Inc., Third–Party
Defendant–Appellant.

Nov. 14, 2013.

Synopsis

Background: Insurer that issued a policy guaranteeing payment of certain classes of securities created in the securitization of home equity lines of credit brought action for fraudulent inducement and breach of representations and warranties. The Supreme Court, New York County, [Shirley Werner Kornreich](#), J., granted insurer’s motion for a protective order, and appeal was taken.

Holding: The Supreme Court, Appellate Division, held that insurer did not waive any trial preparation privilege by referencing the pre-litigation repurchase review conducted by its consultants in its complaint.

Affirmed.

West Headnotes (1)

[1] **Pretrial Procedure** — Insurance policies and related documents

Insurer that issued a policy guaranteeing payment of certain classes of securities created in the securitization of home equity lines of credit did not waive any trial preparation privilege by referencing the pre-litigation

repurchase review conducted by its consultants in its complaint; those references were not made as elements of its claims for fraudulent inducement and breach of representations and warranties, but as a good-faith basis for the allegations based on defects discovered during the repurchase review of the loans.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

****456** Murphy & McGonigle, P.C., New York ([James K. Goldfarb](#) of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York ([Robert W. Lehrburger](#) of counsel), for respondent.

[GONZALEZ](#), P.J., [FRIEDMAN](#), [SWEENY](#), [MOSKOWITZ](#), [CLARK](#), JJ.

Opinion

***478** Order, Supreme Court, New York County ([Shirley Werner Kornreich](#), J.), entered July 16, 2012, which granted plaintiff Assured Guaranty Municipal Corp.’s motion for a protective order preventing the discovery of documents and information concerning its pre-complaint repurchase review, unanimously affirmed, with costs.

In this action arising from the securitization of home equity lines of credit originated by third-party defendant GreenPoint, and sold to defendants DB Structured Products, Inc. and ACE Securities Corp., plaintiff insurer issued a policy guaranteeing payment of certain classes of the securities issued and when the loans began to default at what it considered to be a high rate, it retained a law firm that hired consultants to conduct a forensic re-underwriting review of the loans. Based on the consultant’s findings, plaintiff commenced the instant action alleging, inter alia, fraudulent inducement and breach of representations and warranties. Thereafter, defendants served demands seeking any and all records surrounding the loan review conducted by the consultants and plaintiff provided the consultants’ conclusions and the raw data used in their analysis but asserted the attorney work product and trial preparation privileges in objecting to the remainder of the demands, including the

demand for correspondence between the consultants and plaintiff's counsel and documents concerning the methodology employed by the consultants. Plaintiff moved for a protective order preventing the discovery of these documents and defendants and GreenPoint objected on the ground that plaintiff had placed the consultants' findings "at issue."

The motion for a protective order was properly granted. Plaintiff did not waive any privilege by referencing the pre-litigation repurchase review conducted by its consultants in the complaint (*Ambac Assur. Corp. v. DLJ Mtge. Capital, Inc.*, 92 A.D.3d 451, 452, 939 N.Y.S.2d 333 [1st Dept.2012]; *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 93 A.D.3d 574, 574–575, 941 N.Y.S.2d 56 [1st Dept.2012]). Those references were not made as elements of the claims, but as a good-faith basis for the allegations that are based on defects discovered during the repurchase review of the loans (*see Ambac*, 92 A.D.3d at 452, 939 N.Y.S.2d 333). Further, plaintiff does

not need the documents relating to the pre-litigation investigation to sustain **457 its causes of action or prove them at trial, and upholding the privilege with respect to the pre-litigation review materials will not deprive defendants of information vital to their defense since plaintiff disavows any intention to use such materials to help establish its claim (*see IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 107 A.D.3d 451, 967 N.Y.S.2d 51 [1st Dept.2013]; *480 *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 62 A.D.3d 581, 582, 880 N.Y.S.2d 617 [1st Dept.2009]).

All Citations

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