

Supreme Court of the State of New York

Appellate Division, First Judicial Department

Singh, J.P., Kennedy, Rodriguez, Pitt-Burke, JJ.

2375- 2376 & M-2040	WELLS FARGO BANK, NATIONAL ASSOCIATION, Petitioner-Appellant-Respondent, -against-	Index No. 154984/21 Case Nos. 2023-05665 2023-06440
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ALL RESPONDENTS FOR THIS SPECIAL
PROCEEDING,
Respondents-Respondents-Appellants,

DEER PARK ROAD MANAGEMENT COMPANY, LP, et
al.,
Counter-Petitioners-Respondents-
Appellants,

SOLULA, LLC, et al.,
Respondents-Respondents.

Faegre Drinker Biddle & Reath LLP, New York (Clay J. Pierce of counsel), for appellant-respondent.

MoloLamken LLP, New York (Justin M. Ellis of counsel), for Axonic Capital LLC and Axonic Funds, respondents-appellants.

Sadis & Goldberg LLP, New York (Samuel J. Lieberman of counsel), for Deer Park Road Management Company, LP, STS Master Fund Ltd., Deer Park 1850 Fund, LP, Northern Lights Fund Trust- Deer Park Total Return Credit Fund, One William Street Capital Master Fund Ltd., OWS ABS Master Fund II, LP and 1 WS Credit Income Fund, respondents-appellants.

Akin Gump Strauss Hauer & Feld LLP, New York (Uri A. Itkin of counsel), for HBK Master Fund L.P., respondent-appellant.

McKool Smith, P.C., New York (Robert Scheef of counsel), for respondents.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered on or

about October 23, 2023, which, insofar as appealed from as limited by the briefs, in ruling on the parties' motions in limine, determined that (a) the Deferred Principal Payments are Subsequent Recoveries and, as a result, the procedure outlined in a separate action (*JPM* action) had to be followed, which required that write-ups be done in favor of subordinated certificateholders only and not senior certificateholders; (b) any write-ups done in favor of senior certificateholders after the date of Supreme Court's decision in the *JPM* action were not done in good faith; and (c) unpaid deferred principal balances should not be included in the contractual Overcollateralization Amount, and order, same court and Justice, entered on or about November 30, 2023, which, insofar as appealed from as limited by the briefs, inter alia, reiterated the rulings made in the aforementioned October 23 order, unanimously modified, on the law, to vacate the determinations that (a) the Deferred Principal Payments are Subsequent Recoveries and (b) the Trustee did not act in good faith as a matter of law and remand for a trial on these issues, and otherwise affirmed, without costs.

Issues of fact preclude summary determination of whether the Deferred Principal Payments are Subsequent Recoveries under the operative Pooling and Servicing Agreements (PSAs). The prior rulings by this Court and Supreme Court in the *JPM* action did not address or resolve this issue (*see Matter of Wells Fargo Bank, N.A.*, 2020 NY Slip Op 30453[U], *1-2, 7, 31-35 [Sup Ct, NY County 2020], *affd* 198 AD3d 156, 162-163, *lv dismissed* 38 NY3d 998 [2022]). The PSAs are ambiguous with respect to whether Deferred Principal Payments constitute Subsequent Recoveries, and guidance issued by the United States Department of the Treasury (Treasury) did not definitively resolve this ambiguity. Furthermore, the extrinsic evidence of the parties' course of

performance is not conclusive. In view of our disposition of this issue, we need not reach the parties' arguments with respect to the procedural impropriety of this ruling.

Issues of fact also preclude summary determination of whether the Trustee acted in good faith when it continued, in the wake of Supreme Court's decision in the *JPM* action, to apply Deferred Principal Payments to write up senior certificates.

We reject counter-petitioners' argument that unpaid deferred principal balances should be included in the contractual Overcollateralization Amount – specifically, as part of the aggregate mortgage loan balance. Treasury guidance requires treating the deferred principal as a Realized Loss “such that, for purposes of calculating distributions to securityholders, such forborne amount is no longer outstanding.”

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Motion to strike granted to the extent of deeming Parts II and III of the Trustee's reply brief stricken.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 28, 2024



Susanna Molina Rojas
Clerk of the Court