

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

J.S.C.

PART 39

PRESENT

Index Number : 650335/2009

MORPHEUS CAPITAL ADVISORS LLC

vs

UBS AG

Sequence Number : 001

DISMISS ACTION

INDEX NO.

650335/09

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 1/2/11

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39

-----x  
MORPHEUS CAPITAL ADVISORS LLC,

Plaintiff,

-against-

UBS AG, and UBS REAL ESTATE SECURITIES  
INC.,

Defendants.

-----x  
**BARBARA R. KAPNICK, J.:**

**DECISION/ORDER**

Index No. 650335/09

Mot. Seq. No. 001

This action arises out of a written agreement dated September 19, 2008 (the "Engagement Agreement") by which defendant UBS Real Estate Securities Inc. ("UBSRE") engaged plaintiff Morpheus Capital Advisors LLC ("Morpheus" or "MCA") as its financial advisor and investment banker in the proposed sale of certain student loan "toxic assets" with a face value of \$510 million.<sup>1</sup>

Section 1 (Scope of Engagement) of the Engagement Agreement sets forth ten specific services to be provided by Morpheus in the course of its engagement as UBSRE's financial advisor, including identifying, introducing and assessing appropriate investors and providing general corporate finance and investment banking advice. In addition, UBSRE agreed that Morpheus would have "the exclusive right to solicit counterparties for any potential Transaction

---

<sup>1</sup> These assets included student loan auction rate certificates, variable rate demand obligations and asset backed securities.

involving the Student Loan Assets during the term of this Agreement."

Section 5 of the Engagement Agreement provides, in relevant part, as follows:

It is expressly agreed that following the expiration or termination of this Agreement, MCA will continue to be entitled to receive fees as described above that have accrued prior to such expiration or termination but are unpaid. It is also expressly agreed that if the Company [i.e. UBSRE] completes any Transaction with a party or parties ("Investor") (1) introduced to the Company by MCA, (2) introduced to the Company by another party other than MCA, but MCA performed substantially all the services set forth herein in Section 1 prior to the termination of this Agreement, then MCA shall be entitled to its full fees as described above, until March 31, 2009 [emphasis supplied].

On October 16, 2008, in response to the worldwide financial meltdown which had occurred in September and October 2008, the Swiss National Bank ("SNB") announced its intentions to strengthen the Swiss financial system and created a special fund entity (the "Stabilization Fund"). Defendant UBSRE's parent company, defendant UBS AG, in turn, announced an agreement with the SNB, to transfer up to \$60 billion of then-illiquid securities and other assets from UBS' balance sheet to the Stabilization Fund. Under this bailout deal, defendants were relieved of the risk of any further loss with respect to those assets.

Defendants made three transfers totaling \$38.7 billion to the Stabilization Fund, the third of which was made pursuant to a Master Assignment Agreement which was "dated and effective as of April 3, 2009."

Plaintiff claims that UBSRE delayed the third and final transfer of the student loan assets to the Stabilization Fund until April 3, 2009, three days after the expiration of the term of the Engagement Agreement on March 31, 2009, in order to create an excuse to avoid payment of the fee to Morpheus.

Plaintiff further claims that the transaction was, in fact, essentially completed during the exclusive period and that it is thus entitled, under Section 5 of the Agreement, to a Success Fee in the amount of \$2,887,500.00, which UBSRE has refused to pay.

The Complaint seeks to recover damages for:

(a) breach of contract; namely, (i) breach of the exclusivity provision of the Engagement Agreement (first cause of action), and (ii) breach of the obligation to pay the Success Fee (second cause of action);

(b) breach of the duty of good faith and fair dealing (third cause of action); and

(c) attorneys' fees incurred (fourth cause of action).

Defendants now move for an order pursuant to CPLR 3211(a) (1) and (7) dismissing the Complaint.

The motion was granted on the record on January 13, 2010 to the extent of dismissing plaintiff's claims against defendant UBS AG, the parent company, which was not a party to the Engagement Agreement.

Defendants argue that plaintiff's claims must also be dismissed against defendant UBSRE on the grounds, *inter alia*, that the purpose of the Agreement was frustrated; i.e., the private contract to find a buyer for the student loan assets was dissolved and no longer required once the Swiss National Bank created the Stabilization Fund, thus relieving USBRE of any duty to pay the Success Fee.

Frustration of purpose arises when "[b]oth parties can perform but, as a result of unforeseeable events, performance by party X would no longer give party Y what induced him to make the bargain in the first place. Thus frustrated, Y may rescind the contract." [citation omitted]. "The basic test is whether the parties contracted on a basic assumption that a particular contingency would not occur ... An analysis of the facts is crucial for the proper application of this doctrine." [citation omitted].

*Profile Publishing and Management Corp. APS v Musicmaker.Com, Inc.*,  
242 FSupp2d 363, 365 (SDNY 2003).

Thus, in *Marks Realty Co. v Hotel Hermitage Co.*, 170 AD 484 (2<sup>nd</sup> Dep't 1915), the Appellate Division, Second Department found that a defendant who had agreed to pay for an advertisement of its business in a 'Souveneir and Program of International Yacht Races', was not liable for the contract price even though the plaintiff actually printed a program containing the advertisement, because the race, an implied condition of the contract, was cancelled as a result of the European War. The Court found that "the situation, as it turns out, has frustrated the entire design on which is grounded the promise," and held that "[t]he object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment." *Marks Realty Co. v. Hotel Hermitage Co.*, *supra* at 485.<sup>2</sup>

Plaintiff argues that the dismissal of the Complaint based on frustration or impossibility would be premature, because there are factual disputes as to whether defendant's own conduct necessitated any need for government intervention, whether defendant UBSRE anticipated such intervention when the contract was signed, and

---

<sup>2</sup> In the alternative, defendants argue that even if the Contract remained in effect, Morpheus has failed to state a claim for breach of contract because the Complaint fails to allege facts showing that Morpheus earned a Success Fee under either (i) Section 5(1) of the Agreement, since neither SNB nor the Stabilization Fund was "introduced" to UBSRE by Morpheus or any other party; or (ii) under Section 5(2) of the Agreement, since the Complaint does not specifically allege which of the ten services delineated in Section 1 of the Agreement were "performed substantially" by Morpheus, and the transaction was completed after March 31, 2009.

whether the transaction with the Stabilization Fund was compelled by the Swiss government, which require discovery.

Defendants argue in reply that there is no need for discovery because there can be no factual dispute that the worldwide financial meltdown of 2008 was unprecedented and that the intervention by the Swiss government was unanticipated by the parties to the contract. *See, In re Kramer & Uchitelle*, 288 NY 467 472 (1942) in which the Court of Appeals found that “[b]y act of government there was complete frustration of performance excusing the seller from performance as [a] matter of law.”

Based on the papers submitted and the oral argument held on the record on January 13, 2010, this Court finds that the creation of the Stabilization Fund by the SNB as a result of the unprecedented worldwide financial events which occurred in September and October 2008 constituted an unforeseeable event which undermined the basic assumption and purpose of the Engagement Agreement, i.e., the introduction of UBSRE by Morpheus to a third party buyer.

Accordingly, defendants’ motion to dismiss is granted in its entirety.

The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: January 3, 2011



---

Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**