

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

E-FILE

IRB-BRASIL RESSEGUROS S.A.,
Plaintiff,

INDEX NO. 604449-2006

- v -

MOTION DATE _____

PORTOBELLO INTERNATIONAL LIMITED,
REFINADORA CATARINENSE S.A.,
MARIA HELENA RAMOS GOMES and
CESAR BASTOS GOMES,
Defendant.

MOTION SEQ. NO. 11

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 _____

RECEIVED

MAY 28 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH

ACCOMPANYING MEMORANDUM DECISION.

Dated: 5/27/2010

J.S.C.

HON. BERNARD J. FRIED

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):

Handwritten signature/initials

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 60

E-FILE

-----X
IRB-BRASIL RESSEGUROS S.A.,

Plaintiff,

Index No. 604449/06

-against-

PORTOBELLO INTERNATIONAL LIMITED,
REFINADORA CATARINENSE S.A.,
MARIA HELENA RAMOS GOMES and
CESAR BASTOS GOMES,

Defendants.
-----X

APPEARANCES:

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FRIED, J.:

In this action for failure to pay on a note, plaintiff IRB-Brasil Resseguros S.A. (IRB) moves, pursuant to CPLR 3212, for summary judgment on its complaint (mot. seq. no. 011). Defendants Portobello International Limited (Portobello), Refinadora Catarinense S.A. (Refinadora), Maria Helena Ramos Gomes and Cesar Bastos Gomes (these three together,

Guarantor defendants) move, pursuant to CPLR 3025 (b), for leave to amend their answers to (1) consolidate the answers filed by Portobello and the Guarantor defendants; and (2) add counterclaims for fraud, aiding and abetting fraud, and negligent misrepresentation against IRB (mot. seq. no. 012). The two motions are here consolidated for disposition. This action has witnessed considerable litigation, and familiarity with the action is presumed.

According to IRB, defendant Portobello, a Bahamian corporation, issued a "Permanent Global Note" (Note), part of a \$50,000,000 Guaranteed Euro Medium-Term Note Program (Note Program). IRB Memorandum of Law, at 2. The Note was purchased by IRB, an insurance company partially owned by the Brazilian government, in return for a loan by IRB to an affiliate of defendants, Usati-Portobello ABPS Ltda (Usati), of \$16 million, payable in U.S. dollars. Defendants claim that the idea for the Note Program which Portobello instituted was suggested to it by two banks, Banco Boavista Brazil and Paxton Securities Ltda. (together, the Banks), who approached defendants with the idea of arranging the loan, claiming that they spoke for an unnamed investor with US\$100 million to invest; defendants, as they claim, assumed, at the time, that the investor was not a Brazilian company.¹ They later claim that they came to believe that the investor was IRB, only when IRB contacted defendants after their default after 2003. Defendants claim that the Banks were agents of IRB. IRB claims that the Banks were agents of defendants.

The loan for \$16 million was subject to a discount of 25.9% (called by defendants an "Original Issue Discount")(OID), by which means Portobello would only receive

¹

Under Brazilian law, Brazilian companies may not enter into dollar-denominated loans with other Brazilian companies.

\$11,856,000 of the proceeds of the loan. Defendants claim that the Banks represented that the unnamed foreign investor required the OID. Portobello only received the discounted amount, although IRB claims to have loaned the full \$16 million to Portobello. It is unclear who received the discount of more than \$4.2 million, although the implication is that it went to the Banks.

IRB claims that a "Fiscal Agency Agreement" (Fiscal Agreement) executed on January 22, 1997 governs the Note Program, and, as part of the Agreement, IRB's "[i]nterests [in the Note] would be assigned a unique identification number and deposited on behalf of [IRB] in a common depository, Euroclear Bank S.A./N.V. (Euroclear)." IRB Memorandum of Law, at 3. IRB asserts that, in 1997, Lehman Brothers and Smith Barney (not the Banks) acquired the Note on IRB's behalf, and that BB Securities Limited (BB Securities) was designated as custodian of the Euroclear account, holding the Note solely in that capacity for IRB, with no right of ownership. Since this action was commenced, BB Securities has executed a "Disavowal of Rights and Assignment Agreement" (BB Assignment Agreement), assigning any right BB Securities might have in the Note to IRB.

According to IRB, there is no question of fact that Portobello issued the Note; that IRB loaned Portobello \$16 million, which was guaranteed by the Guarantor defendants; that Portobello made several interest payments, pursuant to the terms of the Note, until January 24, 2003, when all payments ceased; and that Portobello is in default under the terms of the Note, entitling IRB to collect principal and interest on the Note, which amount is now far in excess of \$16 million.

Defendants' main argument is that IRB cannot produce the original, physical Note (which they only call a "bearer note"), and so, cannot collect on it. It is admitted in this action that IRB cannot produce the Note. As IRB points out, however, defendants, in their Brazilian declaratory judgment action, admit to the existence of the Note, and that IRB is the holder of that Note, by producing what they refer to as an "illustrative reference" to a note similar to the Note.² Transcript, at 54. Defendants also admit that the form note was an attachment to the Fiscal Agreement, while still arguing that it is only an example of a global bearer note.

However, defendants, in order to prove that there is no Note upon which to collect, rely on an undated, and almost unintelligible letter from JP Morgan Chase, as fiscal agent, which they claim to have received, to their surprise, in 2005, which states, in a single line, that the "notes" had been "fully paid" and "destroyed on maturity date." Nolan Aff., Ex 5. Despite the fact that defendants had been in default for several years before receiving this letter, and were actively discussing adjustment of the loan with IRB at the time, defendants claim the JP Morgan Chase letter is uncontroverted proof that the Note was, in fact, fully paid and destroyed.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law."

Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New*

²

In a prior order, Justice Herman Cahn of this court enjoined defendants from pursuing the Brazilian action; this order was affirmed by the Appellate Division, First Department. Thereafter, I found the defendants in contempt of court for failing to abide by Justice Cahn's order.

York University Medical Canter, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Gross v Amalgamated Housing Corporation*, 298 AD2d 224 (1st Dept 2002).

IRB has made out “a prima facie case for a right to payment of [the Note] and the debtor’s failure to make the payments called for therein.” *Cicconi v McGinn, Smith & Co., Inc.*, 35 AD3d 292, 292 (1st Dept 2006); *see also Bonds Financial, Inc. v Kestral Technologies, LLC*, 48 AD3d 230 (1st Dept 2008). Similarly, IRB has made out a right to payment under the guarantees. *See Superior Fidelity Assurance, Ltd. v Schwartz*, 69 AD3d 924 (2d Dept 2010).

Defendants do not deny that the “illustrative” note, as provided to the court in the Brazilian action, provides that

[e]ach person who is shown in the records or Euroclear ... as entitled to a particular number of Notes by way of an interest in this Permanent Global Note (each, a “Note Holder” or “Holder”) will be treated by the Issuer, the Fiscal Agent and any paying agent as the holder of such number of Notes. ... For purposes of this Permanent Global Note, the securities account records of Euroclear ... shall, in the absence of manifest error, be conclusive evidence of the identity of the Holders of the Notes credited to the securities accounts of such Holders.

Aff. of Acquarone, Ex. 13.

That note further provides that a Holder may

file any claim, take any action or institute any proceeding to enforce, directly against the Issuer, the obligation of the Issuer hereunder to pay any amount due in respect of each Note represented by the Permanent Global Note that is credited to such person's securities account with Euroclear ... *without the production of this Permanent Global Note ...* [emphasis added].

Id.

Because defendants have chosen to rely on the form note in the Brazilian action (and as attached to the Fiscal Agreement) as illustrative of the Note, I find that, under the language of that instrument, IRB's failure to produce the physical Note is irrelevant.

Further, defendants cannot claim that BB Securities has a greater right to the Note than does IRB, or that the BB Assignment Agreement is champertous. As recently found in a case of great similarity, the Appellate Division, First Department, determined that an agreement substantially similar to the BB Securities Assignment Agreement herein "established [IRB's] exclusive entitlement to sue under the note" therein. *IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577 (1st Dept 2009). Certainly, the BB Securities Assignment Agreement comports with the agreement that BB Securities executed in *IRB-Brasil Resseguros S.A. v Eldorado Trading Corporation Ltd* (*supra*), and IRB, rather than BB Securities, has the right to collect under the unpaid Note .

The letter to Portobello from JPMorgan Chase, which defendants claim conclusively proves that the Note was "paid" and "destroyed," to be only tenuously related to this action, if it is related at all, and any interpretation of it by defendants is speculative. The letter does not reference the Note in any recognizable fashion; in fact, it only refers to "notes." It is, furthermore, hearsay, the truth of which defendants have made no effort to investigate

throughout this litigation.³ As defendants have failed to refute the existence of the Note, and IRB's right to rely on the Note, IRB is entitled to summary judgment.

Defendants seek leave to amend their answers to consolidate their answers, and to add counterclaims for fraud, aiding and abetting fraud and negligent misrepresentation. The motion is denied.

Leave to amend pleadings should be "freely given" absent prejudice to the opposing party. CPLR 3035 (b); *Briarpatch Ltd. v Briarpatch Film Corp.*, 60 AD3d 585 (1st Dept 2009). "Nevertheless, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." *Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 (1st Dept 2009). A motion to amend a pleading will be denied if the proposed claims lack merit. *See Sepulveda v Dayal*, 70 AD3d 420 (1st Dept 2010).

Fraud⁴ requires a showing of a representation of "a material existing fact, falsity, scienter, deception and injury [internal quotation marks and citation omitted]." *New York University v Continental Insurance Company*, 87 NY2d 308, 318 (1995); *see also Serino v Lipper*, 47 AD3d 70 (1st Dept 2007). Each of these elements must be pled with particularity.

3

Hearsay statements may be used in opposition to summary judgment, but are insufficient where they are the only evidence submitted in opposition to the motion. *See Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 (1st Dept 2010). The JPMorgan Chase letter is the only piece of evidence produced to show that the Note was paid or destroyed, and so, is insufficient to oppose the motion.

4

Defendants' answers alleged affirmative defenses claiming that IRB made misrepresentations to defendants, apparently, through the Banks, so that the issue has been open to discovery prior to this motion to amend.

CPLR 3016 (b); *Papp v Debbane*, 16 AD3d 128 (1st Dept 2005); *La Salle National Bank v Ernst & Young LLP*, 285 AD2d 101 (1st Dept 2001).

The bases of defendants' claim for fraud are not misrepresentations made to them directly by IRB (indeed, no such misrepresentations have ever been alleged at any time), but, misrepresentations allegedly made by the Banks, as IRB's alleged representatives, that IRB was the anonymous, foreign party interested in investing in the Note Program; that the OID was required by the then-anonymous lender; that IRB knew that, as a result of the IRB, it had paid \$16 million when defendants only obtained some \$11 million; that over \$4.2 million of the \$16 million IRB loaned to defendants was somehow "diverted" to some unknown party; and that these facts amount to fraud. Defendants admit that "precise details" of the alleged fraud, including the whereabouts of the \$4.2 million, are not yet known to them. Defendants' Memorandum of Law to Amend, at 6.

Defendants do not allege that IRB made any representations to them. While implying throughout their arguments that the Banks were IRB's agents (even though IRB did not buy its investment in defendants' Note Program through the Banks), defendants only invoke the law of agency in their reply memorandum, in an effort to solidify a case against IRB based on the Banks' alleged misrepresentations.

All of defendants' claims for fraud rest on the proposition that the Banks were IRB's agents, rather than agents for defendants seeking investors for defendants' Note Program, or for some other party (such as themselves). However, defendants' claim that the Banks were IRB's agents is unsupported by any admissible evidence. The only connection between IRB and the Banks was the Banks' representations at the time defendants issued the Note that

there was an anonymous lender, presumably non-Brazilian, who required the OID. The Banks never mentioned IRB, and it is undisputed that IRB was only one of several parties which invested in defendants' Note Program. As such, the mere fact that the Banks referred to an investor that might have been IRB is insufficient to develop an agency relationship.

In the affidavit of Valerio Gomes (Gomes) (Notice of Motion to Amend, Ex. 3), Gomes explains his understanding of the transaction to include the fact that defendants were not aware that IRB was their lender on the Note until years after the loan had been made. *Id.* at 3. Gomes makes clear that, according to his investigation,⁵ all representations concerning the instigation of the investment, including the requirement for the OID, were made by the Banks.

Decidedly, there is no evidence that the Banks were actual agents for IRB. IRB obtained its interest in the Note through Lehman Brothers and Smith Barney. Defendants cannot base their amendment on such a bare conclusion.

As for the doctrine of apparent authority, upon which defendants rely, it is true that “[g]enerally, principals are liable for the acts of their agents performing within the scope of their apparent authority.” *News America Marketing, Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 148 (1st Dept 2005). However,

[e]ssential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his own acts imbue himself with apparent authority. Rather, the existence of apparent authority depends on a factual showing that the third party relied upon the misrepresentation of the agent because of some

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Gomes's affidavit is based solely on his “investigations,” and, as such, is hearsay.

misleading *conduct of the principal* - not the agent [interior quotation marks and citation omitted][emphasis added].

Hallock v State of New York, 64 NY2d 224, 231 (1984); *see also Standard Funding Corp. v Lewitt*, 89 NY2d 546 (1997).

According to defendants, they did not even know that IRB was the investor on the Note until long after any misrepresentations concerning its issuance had been made. Gomes specifically alleges that, from his investigations, it was *the Banks* that told defendants that “they were acting on behalf of an investor who has US\$100 million to invest,” not IRB. Gomes Aff., ¶ 6. There is no allegation that *IRB* ever said or did anything at the time the representations were made (or, for that matter, any time thereafter) that would reasonably allow defendants to infer that the Banks were acting as IRB’s agents. Hence, no representations made by the Banks can be attributed to IRB, and there is no basis to hold IRB responsible in fraud, or in aiding and abetting fraud, for anything the Banks did.

There is also no valid counterclaim for negligent misrepresentation. Negligent misrepresentation requires a showing of a “special or privity-like relationship imposing a duty on the defendant to impart correct information” to the claimant. *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 (2007). No such relationship exists here, in what can only be called an “arm’s length commercial” relationship between the parties. *ESE Funding SPC Ltd. v Morgan Stanley*, 68 AD3d 676, 677 (1st Dept 2009).

In consequence, defendants have failed to set forth any valid claims for fraud, aiding and abetting fraud, or negligent misrepresentation, and the motion is denied.

As a result of the foregoing, there is no need to address the question of whether IRB is required to post a bond under the Uniform Commercial Code.⁶

Accordingly, it is

ORDERED that the motion brought by plaintiff IRB-Brasil Resseguros S.A., for summary judgment on its complaint (mot. seq. no. 011), is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff, and against defendants, in the amount of \$29,219,753.87, together with interest at the rate of 10.75% per annum from August 3, 2009 until the entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion brought by defendants Portobello International Limited, Refinadora Catarinense S.A., Maria Helena Ramos Gomes and Cesar Bastos Gomes, pursuant to CPLR 3025 (b) (mot. seq. no. 012), for leave to consolidate and amend their answers, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 3/27/2010

ENTER:


J.S.C. **HON. BERNARD J. FRIED**

⁶

This issue has only been raised and disputed in oral argument, and in a flurry of letters submitted after the present motion was fully submitted.