

conclude that plaintiffs' contract and Trust Indenture Act claims are barred by a release previously executed by plaintiffs as part of a bankruptcy settlement with Loewen and that no fiduciary duties exist. However, because negligence claims are not barred by the release, and because there is an issue of fact as to whether State Street owed and violated a duty of care to plaintiffs, we reinstate the cause of action for negligence brought by plaintiffs against State Street.

FACTS¹

In May 1996, Loewen and collateral trustee Bankers Trust entered into a Collateral Trust Agreement (CTA). As relevant here, the CTA permitted holders of future debt offerings to acquire secured-creditor status with respect to the same pool of collateral. Specifically, the CTA provided that future

"trustees or like representatives acting on behalf of Holders of any proposed Additional Secured Indebtedness . . . may become Secured Party Representatives under this Collateral Trust Agreement and be entitled to the benefits of the security interests in the Collateral as set out herein and in the other Collateral Documents. To become a Secured Party Representative hereunder each such representative or Holder must deliver to the

¹ The facts concerning the transactions at issue are largely set forth in a prior decision of this Court (see AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 5 NY3d 582 [November 2005] [In a related third-party action commenced by State Street, the Court reinstated its claims for negligence and contribution]). We restate and augment the facts only to the extent necessary to resolve the instant appeal (which concerns the main action).

Trustee, for acceptance and registration in the Secured Indebtedness Register, an Additional Secured Indebtedness Registration Statement"

(emphasis added).

In the late 1990s, in an effort to raise capital, Loewen issued a series of debt securities.² Three of the debt securities, the Pass-Through Asset Trust Securities (PATs), issued in September 1997, and the Series 6 and 7 Notes (Notes), issued in May 1998, are relevant here. Under the indenture for each transaction, Loewen engaged State Street to serve as indenture trustee and administer the debt issue. Plaintiffs -- various insurance companies, mutual funds and investment funds -- are holders of the PATs and Notes, which were valued at approximately \$750 million when issued. For each transaction, Loewen and State Street executed an Additional Secured Indebtedness Registration Statement (ASIRS) as set forth in the CTA. Each ASIRS, incorporating by reference the CTA between Loewen and Bankers Trust, provided:

"By executing and delivering this Additional Secured Indebtedness Registration Statement and, upon the acceptance and recordation hereof by the Trustee in accordance with Section 2.3 of the Collateral Trust Agreement, State Street . . . as trustee under the indenture . . . hereby agrees on behalf of itself and the Holders it represents to be bound by all the terms and

² The document setting the terms and conditions of a debt issuance is a corporate indenture (see Black's Law Dictionary 784 [8th ed 2004]).

provisions of the [CTA] applicable to a Holder and a Secured Party Representative"

(emphasis added).³ It is undisputed that no ASIRS for the PATS or the Notes was ever delivered to or received by Bankers Trust.

In June 1999, Loewen filed for chapter 11 bankruptcy protection. Because no ASIRS was delivered for the subject debt securities, uncertainty arose as to whether the holders of those instruments had secured-creditor status. In the bankruptcy proceeding, plaintiffs approved Loewen's fourth reorganization plan and settled their claims against Loewen by accepting a discounted value for the notes. Plaintiffs also agreed to "release" State Street in accordance with Loewen's reorganization plan, which provided that:

"each holder of a CTA Note, each Indenture Trustee and each Principal CTA Creditor will be deemed to forever release, waive and discharge State Street . . . from any claims, demands, rights, causes of action or liabilities that, if enforced against State Street, entitle State Street to an Allowed Claim for indemnification from [Loewen]."

³ UBS Warburg, LLC (UBS) was lead underwriter in the PATS transaction, and its counsel, Skadden, Arps, Slate, Meagher & Flom LLP, hosted and ran the closing. Salomon Smith Barney, Inc. (Salomon) was lead underwriter in the Notes transaction, and its counsel, Davis Polk & Wardwell, hosted and ran the closing. Thelen, Reid & Priest LLP (Thelen) represented Loewen and drafted the ASIRS for both transactions. Our prior decision provides a detailed exposition of the foregoing (see AG Capital, 5 NY3d at 588-589). State Street alleges that after the respective closings, Thelen made numerous representations through, among other things, the issuance of opinion letters to Bankers Trust, that the subject debt was fully secured and ranked equally with the other secured debt previously issued by Loewen.

The Indentures for the subject transactions required that Loewen

"shall indemnify [State Street] for, and hold it harmless against, any loss or liability incurred by it arising out of or in connection with the administration of this trust and its rights or duties hereunder, including the costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder. . . . [Loewen] need not reimburse any expense or indemnify against any loss or liability to the extent incurred by [State Street] through its negligence, bad faith or willful misconduct"

(emphasis added). Thus, State Street was not indemnified by Loewen, and therefore not released by plaintiffs, as to any claim based on its negligence.

PROCEDURAL HISTORY

In 2002, plaintiffs commenced this action against State Street, alleging six causes of action: (1) breach of the PATS ASIRS and the Notes ASIRS, (2) breach of the PATS indenture and the Notes indenture, (3) violation of the federal Trust Indenture Act, (4) breach of fiduciary duty as an indenture trustee, (5) breach of fiduciary duty as a secured party representative and (6) negligence. In sum, plaintiffs alleged that State Street's failure to deliver the ASIRS to Bankers Trust for registration as required under the CTA and the ASIRS caused plaintiffs to settle their claims in Loewen's bankruptcy for "tens of millions of dollars" less than if State Street had delivered the ASIRS. In its answer, State Street denied the complaint's allegations and asserted various affirmative defenses, including release. State

Street further countered that the subject notes were secured, whether or not they were registered.⁴ In January 2005, State Street moved for summary judgment dismissing the complaint, and plaintiffs moved for partial summary judgment on their contract claims (i.e., breach of the ASIRS and breach of the indentures), as well as their breach of fiduciary duty as indenture trustee and negligence claims. Plaintiffs also sought an award of damages.

In July 2005, Supreme Court (1) granted State Street's motion to the extent of dismissing plaintiffs' claims for breach of contract and violation of the Trust Indenture Act, (2) granted plaintiffs' motion to the extent of granting them summary

⁴ In 2003, State Street commenced a third-party action asserting claims for common-law indemnification, contribution and unjust enrichment against third-party defendants Salomon, UBS and Thelen, and negligent misrepresentation and attorney malpractice against Thelen. State Street alleged that if it is liable to plaintiffs in the main action, the third-party defendants should ultimately be held liable to it because they assumed State Street's delivery obligation and breached that duty by failing to deliver the ASIRS. The third-party defendants moved to dismiss the third-party complaint under CPLR 3211(a)(7). Supreme Court dismissed the unjust enrichment, indemnification, attorney malpractice and negligent misrepresentation claims. However, the court let State Street's negligence and contribution claims go forward. In August 2004, the Appellate Division granted third-party defendants' motions in their entirety and dismissed State Street's third-party complaint, holding that "State Street assumed the contractual obligation to deliver to Bankers Trust a registration statement for any additional secured indebtedness." We reinstated the contribution and negligence claims (5 NY3d at 582). In so holding, we "express[ed] no opinion on the merits of the underlying claims against State Street" (id. at 590).

judgment as to liability on their breach of fiduciary duty as indenture trustee and negligence claims and (3) otherwise denied the motions. Specifically, the court held that the release plaintiffs executed as part of the Loewen bankruptcy settlement barred their contract and violation of the Trust Indenture Act claims, but did not affect their breach of fiduciary duty and negligence claims.

Further, the court, relying on the Appellate Division's 2004 decision dismissing State Street's third party claims, held that plaintiffs were entitled to summary judgment as to liability on their breach of fiduciary duty as indenture trustee and negligence claims. However, in our November 2005 decision reversing the dismissal of the third party negligence and contribution claims, we noted that the Appellate Division's comments on the merits of the main claim were "premature and beyond the scope of the appeal" (5 NY3d at 590 n 3).

After our November 2005 decision, State Street moved to vacate certain portions of Supreme Court's July 2005 decision and to renew its summary judgment motion as to the remaining claims, arguing that this Court rejected the Appellate Division's conclusion that plaintiffs could predicate tort claims on State Street's failure to perform ministerial tasks. In May 2006, Supreme Court (1) vacated so much of its prior order that granted plaintiffs summary judgment on the breach of fiduciary duty as indenture trustee and negligence claims, (2) granted State

Street's motion to renew and (3) upon renewal, denied State Street's motion for summary judgment dismissing plaintiffs' breach of fiduciary duty (as indenture trustee and secured party representative) claims and their negligence claim. The parties appealed from Supreme Court's July 2005 and May 2006 orders to the extent they were aggrieved.

The Appellate Division dismissed plaintiffs' claims for breach of contract and violation of the Trust Indenture Act, explaining that because these claims were not predicated upon State Street's negligence, bad faith or wilful misconduct, they are clearly barred by the release (40 AD3d 393, 393-394 [1st Dept 2007]). The court further concluded that the remaining claims for breach of fiduciary duty and negligence "should have been dismissed since they are essentially duplicative of the claims for breach of contract" (id. at 394). The court stated that, "[n]otwithstanding the wording of" such claims, "it is apparent that plaintiffs have not alleged the breach of an extra-contractual duty redressable in tort" (id.). We granted plaintiffs leave to appeal and now modify and reinstate the negligence claim against State Street.

DISCUSSION

Plaintiffs argue that the Appellate Division decision immunizes State Street's failure to perform its most basic and fundamental obligations as an indenture trustee. Specifically, plaintiffs contend that: (1) Loewen's indemnification

obligations to State Street, consistent with the Trust Indenture Act, did not relieve State Street from any claims or liability resulting from its own misconduct or failure to perform its express contractual obligations; as such, the release has no effect on plaintiffs' breach of contract claims; and (2) prior to the issuer's default, State Street owed plaintiffs an extra-contractual duty to perform basic, non-discretionary ministerial tasks (e.g., delivery of the ASIRS) and that breach of such duty supports a tort claim against State Street. State Street counters that (1) plaintiffs' breach of contract and Trust Indenture Act claims are barred by the release; (2) plaintiffs have not alleged the breach of an extra-contractual duty redressable in tort; and (3) in any event, plaintiffs' tort claims are duplicative of the breach of contract claims.

Under the plain terms of the release, its scope is based on the terms of the indemnification provision set forth in each Indenture. In short, the Indentures provide that Loewen shall indemnify State Street for and hold it harmless against all claims except those based on State Street's negligence, bad faith or willful misconduct.⁵ As plaintiffs' breach of contract and Trust Indenture Act claims against State Street are not based on

⁵ This provision is consistent with the Trust Indenture Act, which states: a corporate indenture "shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct" (15 USC § 7700o[d][1]).

State Street's negligence, bad faith or willful misconduct, these claims fall under the category of "allowed claim for indemnification" and are barred pursuant to the release. Therefore, the Appellate Division properly concluded that, based on the release, State Street is entitled to summary judgment dismissing plaintiffs' first three claims.

We turn next to plaintiffs' contention that State Street may be held liable in tort for its failure to perform the basic, non-discretionary ministerial function of delivering the ASIRS (prior to the event of default) and that, accordingly, plaintiffs' fourth and fifth claims, sounding in breach of fiduciary duty as an indenture trustee and as a secured party representative, respectively, should be reinstated.

The Trust Indenture Act of 1939, which is applicable "to notes, bonds, debentures, and other evidence of indebtedness, whether or not secured, and to all certificates representing such an interest" (5 Hazen, Securities Regulation § 19.2, at 261), was enacted because "previous abuses by indenture trustees had adversely affected the national public interest and the interest of investors in notes, bonds [and] debentures (see 15 USC § 77bbb[a]), and Congress sought to address this national problem in a uniform way (S.Rep. No. 248, 76th Cong., 1st Sess. 3 [1939])" (Bluebird Partners, L.P., v First Fidelity Bank, N.A., 85 F3d 970, 974 [2d Cir 1996] [internal quotation marks omitted]). In short, "[t]he Act is designed to vindicate a

federal policy of protecting investors" (id.). As relevant here, the Act states that an indenture "shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to provide that, prior to default . . . the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture" (id. § 77000[a][1] [emphasis added]).

New York state and federal case law are consistent with section 77000(a)(1) of the Act. In Hazzard v Chase Natl. Bank of City of New York, Supreme Court, New York County explained that

"[t]he corporate trustee has very little in common with the ordinary trustee The trustee under a corporate indenture . . . has his [or her] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement. His [or her] status is more that of a stakeholder than one of a trustee"

(159 Misc 57, 83-84 [1936], affd no opn 257 App Div 950 [1st Dept 1939], affd no opn 282 NY 652 [1940], cert denied 311 US 708 [1940]; see Elliott Assoc. v J. Henry Schroder Bank & Trust Co. (838 F2d 66, 71 [2d Cir 1988] [holding that as long as trustee fulfills obligations under the express terms of indenture, no pre-default duties owed to debt holders except to avoid conflicts of interest]; Meckel v Continental Resources Co., 758 F2d 811, 816 [2d Cir 1985] [same as Hazzard]; Craig v Bank of N.Y., 2002 WL 1543893 [SDNY 2002]; Magten Asset Mgt. Corp. v Bank of N.Y., 15 Misc 3d 1132(A) [Sup Ct, NY County 2007] [same as Hazzard]; AMBAC Indem. Corp. v Bankers Trust Co., 151 Misc 2d 334, 338-339

[Sup Ct, NY County 1991] [same as Hazzard and Elliott Assoc.]).

We further note that a number of courts have held that prior to default, indenture trustees owe note holders an extra-contractual duty to perform basic, non-discretionary, ministerial functions redressable in tort if such duty is breached (see LNC Inv. v First Fid. Bank, N.A., 935 F Supp 1333, 1347 [SDNY 1996];⁶ Philip v L.F. Rothschild & Co., 1999 WL 771354, at *1 [SDNY 1999]; Dresner Co. Profit Sharing Plan v First Fidelity Bank, N.A., 1996 WL 694345, at *4 [SDNY 1996], Williams v Continental Stock Transfer & Trust Co., 1 F Supp 2d 836, 840 [ND Ill 1998]). These decisions are consistent with section 77000(a)(1) of the Trust Indenture Act, Elliott Assoc. and Hazzard.

Based on the foregoing, we hold that an indenture trustee owes a duty to perform its ministerial functions with due care, and if this duty is breached the trustee will be subjected to tort liability. However, contrary to plaintiffs' arguments, the alleged breach of such duty neither gives rise to fiduciary duties nor supports the reinstatement of plaintiffs' fourth and fifth causes of action.

⁶ In support of its holding in LNC Inv., the Southern District cited New York State Med. Care Facilities Fin. Agency v Bank of Tokyo Trust Co. (163 Misc 2d 551 [Sup Ct, NY County 1994], affd on different grounds 216 AD2d 126 [1st Dept 1995], lv dismissed 87 NY2d 892 [1995]). In that case, as here, the ministerial task defendant trustee was required to perform was set forth in an agreement executed by the debt issuer and the indenture trustee. Put differently, the duty to perform the required ministerial task clearly arose under the terms of the agreement.

Plaintiffs' fourth cause of action alleging that State Street had a fiduciary duty as an "Indenture Trustee" is not viable. First, they cannot point to any provision in the indentures that places fiduciary obligations on State Street prior to an event of default.⁷ Second, as will be made clear below, fiduciary obligations are wholly different from the performance of ministerial functions with due care. Finally, mere allegations that a fiduciary duty exists, with nothing more, are insufficient to withstand summary judgment.

Plaintiffs' fifth cause of action alleging that State Street had a fiduciary duty as a "Secured Party Representative" is not viable under the general principles governing fiduciary relationships. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, comment a). Determining whether a fiduciary relationship exists

⁷ This is consistent with the Trust Indenture Act, which distinguishes between an indenture trustee's pre- and post-default duties. Thus, while an indenture trustee, prior to default, is liable for obligations specifically set forth in the indenture, once the issuer defaults, the trustee "shall exercise . . . such of the rights and powers vested in it by such indenture, and [use] the same degree of care and skill in their exercise, as a prudent [person] would exercise or use under the circumstances in the conduct of his [or her] own affairs" (15 USC § 7700o[c]).

necessarily involves a fact-specific inquiry (see id.). "[E]ssential elements of a fiduciary relation are . . . 'reliance, . . . de facto control and dominance'" (Northeast General Corp. v Wellington Advertising, Inc., 82 NY2d 158, 173 [1993] [citations omitted]). Stated differently, "[a] fiduciary relation exists when confidence is reposed on one side and there is resulting superiority and influence on the other" (id.).

Here, State Street never became a Secured Party Representative, as defined by the CTA, in the first instance. Accordingly, State Street never undertook "a duty to act for or to give advice for the benefit of another" in that capacity.

Finally, we conclude that the Appellate Division erred in dismissing plaintiffs' negligence claim as duplicative of plaintiffs' breach of the ASIRS (contract) claim. At the outset, we reiterate that the release executed by plaintiffs only applied to claims for which Loewen would have to indemnify State Street under the respective indentures, which specifically exclude acts of negligence from Loewen's indemnification obligations. Therefore, the release does not shield State Street from its own acts of negligence.

Here, it is undisputed that State Street and Loewen executed the ASIRS, that the ASIRS called for State Street to deliver same to Bankers Trust and that State Street failed to deliver the ASIRS or ensure that the ASIRS were delivered. Accordingly, there are issues of fact as to whether State Street,

separate and apart from its contractual duty under the ASIRS, undertook and breached a duty of care, "connected with and dependent upon the [ASIRS]" (Clark-Fitzpatrick, Inc. v Long Is. R.R. Co. (70 NY2d 382, 389 [1987] [citation omitted]), to act in accordance with the ASIRS and the CTA registration requirements to protect plaintiffs' security rights in the CTA collateral and whether plaintiffs sustained significant losses as a result of this alleged breach. These questions should be resolved at trial.

State Street's reliance on various representations and opinions of Loewen's counsel (Thelen) stating that the PATS and the Notes were, or would be, entitled to secured status is misplaced and, in any event, does not alter our holding on plaintiffs' negligence claim. Because State Street did not advise Thelen that it had failed to deliver the ASIRS as it agreed to do, State Street cannot, in good faith, rely upon Thelen's representations.

Accordingly, the order of the Appellate Division should be modified, without costs, by remitting to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

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Order modified, without costs, by remitting to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Jones. Chief Judge Kaye and Judges Graffeo, Read, Smith and Pigott concur. Judge Ciparick took no part.

Decided June 25, 2008