

**DZ Bank v KLK Capital, B.V.**

2005 NY Slip Op 30138(U)

November 17, 2005

Supreme Court, New York County

Docket Number: 0601560/2005

Judge: Richard B. Lowe

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

DECENT.

Index Number : 601560/2005

DZ BANK AG DEUTCHEZENTRAL-

vs  
KLK CAPITAL, B.V.

Sequence Number : 001

DISMISS ACTION

C

PART 56

INDEX NO. \_\_\_\_\_

MOTION DATE 8/3/05

MOTION SEQ. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED  
MEMORANDUM DECISION.

**FILED**

NOV 23 2005

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/17/05

  
\_\_\_\_\_  
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: IAS PART 56

-----X

DZ BANK AG DEUTSCHE  
ZENTRAL-GENOSSENSCHAFTSBANK,  
f/k/a DG BANK DEUTSCHE  
GENOSSENSCHAFTSBANK AG,

Plaintiff,

Index No. 601560/05

-against-

KLK CAPITAL, B.V., and LIFE CAPITAL, B.V.,

**FILED**

Defendants.

NOV 23 2005

-----X  
RICHARD B. LOWE, III, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff DZ Bank Deutsche Zentral-Genossenschaftsbank brings this action for a declaratory judgment against defendants KLK Capital, B.V. (KLK Capital) and Life Capital, B.V. (Life Capital), arising out of an alleged default under a credit agreement. Defendants move, pursuant to CPLR 3211 (a) (10), to dismiss the amended complaint for failure to join two necessary parties, Autobahn Funding Company LLC (Autobahn) and Edward Stone. Plaintiff cross moves, pursuant to CPLR 3025, to amend the amended complaint to add Autobahn as a party plaintiff to the action.

**FACTUAL ALLEGATIONS**

This action involves the sale of "life settlements." Under a life settlement agreement, an insured consumer over age 65 assigns life insurance policy death benefits to a purchaser. The purchaser pays the consumer an amount that is less than the face value of the policy.

Plaintiff, formerly known as DG Bank Deutsche Genossenschaftsbank AG, is a credit institute of the German cooperative banking system. Autobahn is a company that is administered, but not owned, by plaintiff. Defendants are Dutch private limited liability

companies. KLK Capital owned all or substantially all of the shares of Life Capital as of August 2000.

On April 25, 2000, plaintiff, Life Capital, KLK Capital, and Autobahn entered into a credit agreement to fund the purchase by Life Capital, as the borrower, of assigned life insurance policies with face values of up to \$645 million. The policies were intended to be pooled and ultimately securitized. Autobahn and plaintiff were the lender and agent for the lender, respectively. KLK Capital served as the sponsor, and was responsible for managing the policy portfolio. Under the terms of the agreement, Life Capital was required to provide plaintiff with certain supplemental legal opinions regarding the portfolio's compliance with applicable state law. On the same date, plaintiff, defendants, and certain other parties also executed a supplemental agreement and a collateral trust and security agreement.

As part of the consideration for the transaction, on April 25, 2000, KLK Capital issued a warrant convertible into common stock, representing 6% of KLK Capital's equity, to Edward Stone. Stone is a professional who assisted the parties in structuring the transaction.

Following execution of the credit agreement, Autobahn commenced funding the credit facility, and Life Capital began purchasing life insurance policies. On October 4, 2001, plaintiff demanded that defendants provide the required legal opinions. However, on November 14, 2001, defendants allegedly repudiated this obligation. Plaintiff declared an event of default on January 7, 2002 after a written demand to cure the default. The credit facility was subsequently terminated on March 26, 2002.

On April 1, 2003, plaintiff exercised its right under the credit agreement to declare itself the successor sponsor following the event of default. Plaintiff retained Stone to administer the

portfolio following plaintiff's assumption of the role of successor sponsor.

In this action, plaintiff seeks a declaration that an event of default occurred under the credit agreement on January 7, 2002, that the termination date occurred on March 26, 2002, and that plaintiff complied with all of its contractual obligations. This declaration will enable plaintiff to exercise its foreclosure remedies provided by the agreement.

### DISCUSSION

CPLR 1001 provides that compulsory joinder of a party is required in two situations. First, joinder is required if complete relief is to be accorded between the persons who are parties to the action. Second, an unnamed party is required to be joined where it might be inequitably affected by a judgment in the action (CPLR 1001 [a]; *Town of Brookhaven v Marian Chun Enters., Inc.*, 71 NY2d 953, 954 [1988]; *City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]; *Castaways Motel v C.V.R. Schuyler*, 24 NY2d 120, 125, *adhered to on rearg* 25 NY2d 692 [1969]). In the second category, the definition of a necessary party has been strictly construed to limit it to those cases in which the court's determination would adversely affect the rights of the nonparty (*Llana v Town of Pittstown*, 245 AD2d 968, 969 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998]).

An action is subject to dismissal if the plaintiff has failed to join a necessary party (CPLR 1003). The principal reasons for requiring dismissal are: (1) serving judicial economy by preventing a multiplicity of suits; and (2) ensuring fairness to third parties who ought not to be prejudiced or "embarrassed by judgments purporting to bind their rights or interests when they have had no opportunity to be heard" (*see Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 820, *cert denied* 540 US 1017 [2003]; *see generally* 3 Weinstein-Korn-

Miller, NY Civ Prac ¶ 1001.01 [2005]). However, the compulsory joinder provision is to be employed to avoid dismissal (*Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Stds. and Appeals*, 2005 NY LEXIS 2700, \*6 [2005]). Pursuant to CPLR 1001, “[w]hen a person who should be joined . . . has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned” (CPLR 1001 [b]).

“A declaratory judgment serves a legitimate purpose only when all interested persons who might be affected by the enforcement of rights and legal relations are parties, but not otherwise. A court may and ordinarily must refuse to render a declaratory judgment in the absence of necessary parties” (*J-T Assocs. v Hudson Riv. – Black Riv. Regulating Dist.*, 175 AD2d 438, 440 [3d Dept 1991], *appeal denied* 79 NY2d 753 [1992]; *see TIC Holdings, LLC v HR Software Acquisition Group, Inc.*, 194 Misc 2d 106, 109 [Sup Ct, New York County 2002], *affd* 301 AD2d 414 [1st Dept 2003]).

Defendants argue that Autobahn is a necessary party to this action, because it is a party to the April 25, 2000 credit agreement, and because its rights and obligations will be affected by any declaration rendered in this action. By its cross motion, plaintiff seeks to add Autobahn as a plaintiff to the action, conceding that Autobahn is a necessary party. Defendants’ only opposition to adding Autobahn as a party is that it is premature, i.e., that it should await the resolution of the motion to dismiss. Thus, the cross motion for leave to amend the amended complaint, to add Autobahn as a plaintiff, is granted.

Next, defendants argue that Edward Stone is a necessary party considering that he was appointed a successor sponsor under the credit agreement after the default, and has received substantial fees in that capacity. In the reply, defendants concede that Stone may not be the

successor sponsor, but maintain that Stone effectively acts as the sponsor. Defendants further point out that Stone played a central role in structuring the credit facility.

Joinder of Stone is unnecessary to accord full relief among the present parties. Plaintiff seeks a declaratory judgment that an event of default occurred under the credit agreement. Although Stone may have played a role in structuring the transaction, Stone is not a party to the credit agreement. A declaration that defendants breached the credit agreement does not require Stone to be a party to the action (Am. Compl., Exh. A).

Defendants have also failed to show that Stone will be inequitably affected by a judgment rendered in this action. Initially, defendants have failed to demonstrate that Stone is the successor sponsor, or that he acts as the successor sponsor. Plaintiff alleges in the amended complaint that, on April 1, 2003, plaintiff, not Stone, became the successor sponsor following the event of default (Am. Compl., ¶ 43). The amended complaint further states that plaintiff thereafter “retained Edward Stone to administer the Portfolio” of life settlement policies (Am. Compl., ¶ 44). In addition, plaintiff’s April 1, 2003 appointment letter makes no mention of Stone (Brennan Aff., Exh. A). Contrary to defendants’ contention, a limited liability company, Stone International, LLC, of which Stone is president, is compensated for these administrative services (Brennan Aff., Exh. B, § 7).

Nor have defendants shown that Stone is a necessary party because of his warrant to purchase 6% of KLK Capital’s equity. There is no evidence that Stone has exercised the warrant. In any event, a shareholder is not a necessary party merely by virtue of the shareholder’s interest in a corporation (*see Mizrahi v Chanel, Inc.*, 193 Misc 2d 1, 8 [Sup Ct, New York County 2001]). Defendants have also not argued for the joinder of other shareholders of KLK Capital.

Finally, defendants argue that joinder of Stone is necessary, because they plan to assert a tortious interference with contractual relations claim against Stone. Stone, however, would be a necessary party to defendants' third-party claim, and not plaintiff's claim. Even if Stone were a necessary party here, the proper recourse would be to order Stone joined rather than dismiss the action, given that he has consented to jurisdiction in section 13.9 of the warrant and in section 11 (h) of the supplemental agreement (Am. Compl., Exhs. C, D; see *Banco do Comercio e Industria de Sao Paulo S.A. v Esusa Engenharia e Construcoes S.A.*, 173 AD2d 340, 341 [1st Dept 1991]).

#### **CONCLUSION and ORDER**

Based upon the foregoing, it is hereby

ORDERED that the motion to dismiss the amended complaint is denied; and it is further

ORDERED that the plaintiff's cross motion for leave to amend the amended complaint herein is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that defendants shall serve an answer to the second amended complaint within 20 days from the date of said service; and it is further

ORDERED that the action shall bear the following caption:

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

-----X

DZ BANK AG DEUTSCHE  
ZENTRAL-GENOSSENSCHAFTSBANK,  
f/k/a DG BANK DEUTSCHE  
GENOSSENSCHAFTSBANK AG and  
AUTOBAHN FUNDING COMPANY LLC,

Plaintiffs,

-against-

KLK CAPITAL, B.V., and LIFE CAPITAL, B.V.,

Defendants.

-----X

And it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the  
Clerk of the Court and the Clerk of the Trial Support Office (Room 158).

Dated: November 17, 2005

ENTER:



J.S.C.

**FILED**  
NOV 23 2005  
NEW YORK  
COUNTY CLERK'S OFFICE