

**Credit Agricole Corp. v BDC Fin., LLC**

2016 NY Slip Op 31931(U)

October 11, 2016

Supreme Court, New York County

Docket Number: 651989/10

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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CREDIT AGRICOLE CORPORATE and  
INVESTMENT BANK NEW YORK BRANCH,  
f/k/a CALYON NEW YORK BRANCH, *et al.*,

Index No. 651989/10

Mot. seq. no. 025

Plaintiffs,

**DECISION AND ORDER**

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X

UBS AG, STAMFORD BRANCH AND UBS LOAN  
FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X

AND RELATED COUNTERCLAIMS

-----X

BARBARA JAFFE, JSC:

Based on defendants' conduct as bidders in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1<sup>st</sup> Dept 2016]) and after, plaintiffs assert contract and other claims against them. Defendants and counterclaim plaintiffs, BDC Finance, LLC, Black Diamond Capital Management, LLC and Black Diamond CLO 2006-1 (Cayman), Ltd. (together, Black Diamond), seek damages for plaintiffs' alleged breach of a security agreement during the bankruptcy proceeding. Specifically, Black Diamond alleges that plaintiffs interfered with its rights to direct the action of an agent that controlled the collateral

pledged under a security agreement (the Security Agreement). The facts of this case have been discussed in prior motions in this case, with which familiarity is assumed.

Plaintiffs move, pursuant to CPLR 3212, for an order summarily dismissing the counterclaims, one alleging a breach of the security agreement, and the other for a breach of the implied duty of good faith and fair dealing concerning that agreement.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “[W]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do.” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). The opposing party must “lay bare” its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [2d Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d at 562).

Plaintiffs deny having breached the security agreement as (1) the contract provision on which Black Diamond relies does not prohibit plaintiffs’ conduct in the bankruptcy court proceeding; (2) plaintiffs’ actions conduct in the bankruptcy proceeding did not constitute an effort to enforce rights of the collateral agent under the agreement; and (3) Black Diamond incurred no damages. Plaintiffs submit copies of Black Diamond’s interrogatory responses, and legal argument in support of their obligation to demonstrate entitlement to summary judgment on the ground that Black Diamond incurred no contract damages.

In opposition, Black Diamond seeks to discontinue its counterclaims without prejudice

(CPLR 3217). It argues that as the Successor Trustee of the GSC Liquidating Trust (the Successor Trustee) in a separate action before me against plaintiffs in this action (index No. 162372/14) seeks as damages the loss of value to a bankruptcy debtors' estate (GSC Estate), and as its own claim against plaintiffs here is derivative of the GSC Estate's claim, the Successor Trustee's claim for damages is more immediate and proximate than the counterclaims asserted here. Thus, Black Diamond asserts, a discontinuance is appropriate and would promote judicial efficiency. Although the Successor Trustee's case was dismissed after Black Diamond filed this motion, Black Diamond has not altered its position.

In reply, plaintiffs argue that Black Diamond's claims should be dismissed with prejudice, and that they should be awarded costs, expenses, and attorneys' fees. Plaintiffs argue that Black Diamond must seek leave to discontinue by motion, pursuant to CPLR 3217(b). They also assert, based on CPLR 3217(b), that they should be awarded attorney fees given the frivolous and dilatory nature of the counterclaims.

Black Diamond does not oppose plaintiffs' motion to the extent that it offers no factual issues. Thus, I need not consider plaintiffs' remaining arguments. In any event, pursuant to CPLR 3217(b), a court may order a discontinuance upon just and proper terms. At this late date, where the case commenced in 2010 and where the note of issue has been filed, any discontinuance granted should be with prejudice, and with statutory costs and disbursements for the motion to the prevailing party. (CPLR 8106).

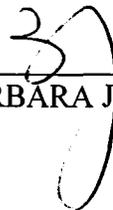
Plaintiffs, however, do not demonstrate their entitlement to the fees they seek in reply as they did not seek such fees or argue that the counterclaims were frivolous in their initial motion papers. (*See* 22 NYCRR § 130-1.1[c][1], [2] [court may award sanctions against any party who

engages in frivolous conduct, which includes conduct that is “completely without merit in law” or is “undertaken primarily to delay or prolong”]; *Martinez v Estate of Carney*, 129 AD3d 607, 610 [1<sup>st</sup> Dept 2015]). Nor have they sufficiently shown that any delay relating to the counterclaims is significantly divorced from the time involved in prosecuting or defending this complex action, in which there are multiple plaintiffs and defendants, as well as defenses interposed by the various defendants. And there is no showing that Black Diamond has abandoned its defenses. (See *Providian Natl. Bank v Forrester*, 277 AD2d 582, 584 [3d Dept 2000]). When plaintiffs filed this motion, they crafted sophisticated arguments for dismissal, based on the complex contractual loan documents governing the relationship between the parties, and the extensive facts of this case, an indication that the counterclaims are not patently and completely without merit.

In light of the foregoing, it is

ORDERED that the plaintiffs’ motion for summary judgment dismissing the counterclaims is granted and the counterclaims are dismissed with prejudice and with statutory costs and disbursements to plaintiff as taxed by the Clerk upon the plaintiffs’ submission of an appropriate bill of costs.

ENTER:

  
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BARBARA JAFFE, JSC

Dated: October 11, 2016  
New York, New York