

**330 Acquisition Co., LLC v Regency Savings Bank,
F.S.B.**

2004 NY Slip Op 30022(U)

August 22, 2004

Supreme Court, New York County

Docket Number: _300109/2831

Judge: Leland G. DeGrasse

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

PRESENT: ELAND DeGRASSE
J.S.C.

PART 25

0109283/1998

330 ACQUISITION CO., LLC
vs
REGENCY SAVINGS BANK, F.S.B.

INDEX NO. _____

MOTION DATE MAR 29 2004

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 25

SUMMARY JUDGMENT

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

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 ACCOMPANYING MEMORANDUM DECISION

AUG 22 2004



Dated: _____

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

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

PRESENT: LELAND DeGRASSE
Justice

PART 25

0109283/1998

330 ACQUISITION CO., LLC
vs
REGENCY SAVINGS BANK, F.S.B.

SEQ 26

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE MAR 29 2004

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

which disposes of motion sequence no. _____

decided per the memorandum decision dated AUG 22 2004
which disposes of motion sequence no. 25

AUG 22 2004

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

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

-----X
330 ACQUISITION CO., LLC

Plaintiff,

-against-

Index No. 109283/98

REGENCY SAVINGS BANK, F. S. B.

Defendant.
-----X

DeGrasse, J.:

Motion sequence nos. 25 and 26 are consolidated. Plaintiff moves for summary judgment on its first cause of action (tortious interference with contract) and cross-moves for summary judgment on the second counterclaim (breach of contract) interposed by defendant, Regency Savings Bank, F. S. B. Regency moves for summary judgment on its first counterclaim for declaratory relief.

Plaintiff's predecessor, John Hancock Mutual Life Insurance Company, and American Savings Bank, FSB ("ASB") were parties to a March 15, 1989 agreement by which each owned 50 percent participating interest in a loan which was secured by a mortgage on commercial premises located at 330 Seventh Avenue in New York County. The agreement requires each of the owners to offer its interest to the other before transferring or otherwise disposing of it. In June 1992, the Federal Deposit Insurance Corporation ("FDIC") was appointed as ASB's receiver and thereby acquired all of ASB's rights and obligations under the participation agreement. On or about May 30, 1997, Hancock notified the FDIC of an offer by plaintiff to purchase Hancock's participation interest for \$6 million. The deal was completed in July 1997 and plaintiff acquired Hancock's interest in the loan upon the FDIC's failure to exercise its right

of first refusal pursuant to the agreement.

In December 1997, the FDIC auctioned certain pools of its receivables through sealed bids. On December 5, 1997, the FDIC confirmed that Regency was the successful bidder for several loan pools. One such pool included the FDIC's participation interest. Upon learning of the pending sale, plaintiff wrote to the FDIC seeking to exercise its right of first refusal. The FDIC then asked Regency to permit the agency to offer the participation interest to plaintiff. Upon Regency's refusal to do so, the FDIC obtained from Regency a letter agreement dated December 15, 1997 by which Regency acknowledged its position as well as its willingness to "respond to any litigation that might be commenced with respect to the asset." Plaintiff tortious interference with contract cause of action is based upon the FDIC's transfer of the asset to Regency on December 17, 1997. Regency's first counterclaim is for a judgment declaring its rights under the participation agreement.

The borrower defaulted in its payment of the loan. Foreclosure proceedings were brought by the FDIC in the United States District Court for the Southern District of New York and by plaintiff in this court. On January 27, 2000, the borrower filed a voluntary petition in bankruptcy. On or about March 31, 2000, the bankruptcy court confirmed the borrower's plan of reorganization. Under its second counterclaim, Regency asserts that plaintiff breached the participation agreement by: (i) voting to approve the reorganization plan without Regency's consent; (ii) failing to give Regency its fair share of monies received under the loan and mortgage; (iii) entering into stipulations in the state foreclosure action, without Regency's consent, which, among other things, permitted the borrower to stop making payments of principal and interest under the loan; (iv) not retaining counsel satisfactory to Regency; and (v)

not keeping Regency informed of steps taken in connection with the foreclosure actions.


The elements of tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). Each element of the cause of action is established by Regency's December 15, 1997 letter agreement. Regency argues that plaintiff's contractual rights were preempted by operation of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (12 USC § 1821 (d)(2)(G)(i)(II) [FIRREA]). *Resolution Trust Corporation v Charles House Condominium Association, Ltd.* 853 F Supp 226 [1994] and other authorities cited by Regency involve the agency's right to repudiate a contract upon a determination that it is burdensome. Such a determination was never made by the FDIC. In any event, the FDIC's passing of an asset free of contractual encumbrances constitutes a breach of contract by the agency (*see McCarron v Fed. Deposit Ins. Corp.*, 111 F3d 1089, 1095 [1997], *cert. denied* 522 US 1046). Accordingly, plaintiff is entitled to summary judgment on its first cause of action. This determination does not affect Regency's status as an equal party to the participation agreement. To that extent, Regency is entitled to summary judgment on its first counterclaim.

Section 3.1 of the participation agreement provides that neither participant shall be liable to the other for any loss not due to its own gross negligence or willful misconduct. Regency has made no showing that any of plaintiff's alleged breaches rises to the level required by the agreement. Moreover, Regency's allegations of such breaches are conclusory. Regency's

remaining arguments have been considered and lack merit.

Accordingly, plaintiff's motion for summary judgment on its tortious interference with contract claim is granted. An assessment of damages shall be conducted at the time of trial. Plaintiff's cross motion for summary judgment is granted to the extent that Regency's breach of contract counterclaim is dismissed. Regency's motion for summary judgment is granted to the extent that it is adjudged and declared that Regency has acquired all of the rights enjoyed by ASB under the participation agreement. It is further adjudged and declared that Regency is entitled to 50 percent of the proceeds of the transaction subject to an offset of plaintiff's recoverable damages. Settle judgment and order.

Dated: August 22, 2004



J. S. C.