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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

---x

CREDIT SUISSE FIRST BOSTON,

Plaintiff,

-against-

UTRECHT-AMERICA FINANCE CO. and COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., RABOBANK NEDERLAN.

Defendants.

---x

INDEX NO. 601123/2004

MOTION DATE _____

MOTION SEQ. NO. 001

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 _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: August 23 2005

KARLA MOSKOWITZ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

----------x

CREDIT SUISSE FIRST BOSTON,

Index No. 601123/2004

Plaintiff,

-against-

DECISION and ORDER

UTRECHT-AMERICA FINANCE CO. and COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., RABOBANK NEDERLAN,

Defendants.

----------x

KARLA MOSKOWITZ, J:

This case concerns whether or not defendants had the right to terminate an oral agreement with plaintiff to sell $15 million of bank debt. On October 28, 2003, plaintiff Credit Suisse First Boston ("CSFB") offered to purchase from defendant Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Rabobank Nederlan ("Rabobank") a claim it had against an entity called Choctaw Investors, B.V. ("Choctaw") for $15 million. This transaction involved "distressed debt." Distressed debt is generally debt of a borrower or guarantor that has defaulted or filed for bankruptcy protection. (Complaint ¶ 9).

On November 5, 2003, defendant Utrecht-America Finance Co. ("Utrecht"), allegedly an affiliate of Rabobank, and CSFB documented their agreement in a written trade confirmation. (Complaint ¶ 11). About November 10, 2003, the parties began to exchange closing documentation. (Id. ¶ 17). On Friday, November 21, 2003, CFSB learned that Choctow had dissolved by March 13, 2003. CSFB claims that Choctaw's dissolution was "highly material to the transaction" because it impacted the nature of the representations and warranties that CFSB wanted from Rabobank. (Id. ¶ 19).

CSFB therefore allegedly sought information from Rabobank about Choctaw. However, it was not until December 17, 2003 that CFSB received documentation from Rabobank addressing some of CFSB's concerns about the legal effect of Choctaw's dissolution. (Id. ¶ 23). During the first week of 2004, Rabobank requested that CSFB create a list of "open issues." (Id. ¶ 24). CSFB forwarded that list to Rabobank on January 8, 2004. Later that day, Rabobank responded to most of those issues and stated "the settlement date has long past [sic] and we expect [sic] complete this in the next few days." (Id. ¶ 25).

However, the transaction with CFSB never closed. On January 14, 2004, defendants terminated the deal. (Id. ¶ 29) The ostensible grounds for the termination was that the settlement date had passed. (Id.) CFSB believes that defendants manufactured this excuse because the market value of the Choctaw debt began to increase significantly starting on January 12, 2004 and defendant wanted to sell to someone else at a higher price.

By this motion, (sequence no. 1), defendants seek, by order to show cause, to compel plaintiff to produce documents it has withheld or redacted on the grounds of privilege. Defendants wish to explore plaintiff's contention that the reason for the delay in the closing was so that it could obtain additional information concerning Choctaw's dissolution in order to prepare adequately for the closing. To that end, defendants seek, inter alia: (1) all documents concerning communications between plaintiff and its lawyer about the November 5, 2003 confirmation and the transactions it contemplated; (2) all documents concerning the efforts of plaintiff's lawyers to obtain information about the dissolution of Choctaw and (3) all notes and memoranda relating to the transactions alleged in the complaint.

Plaintiff predictably withheld many documents responsive to this request on the grounds

of privilege. The privilege log reflects that most of the documents plaintiff has withheld concern written communications between plaintiff and its transactional attorney.

Defendants do not contest that these documents are privileged. Rather, they contend that invasion of the privilege is necessary because "by claiming that the closing of the Choctaw trade could not go forward because its counsel needed additional information to draft the appropriate closing documents, plaintiff has put the advice, the opinions, the work and the decision-making of its counsel directly into issue." (Def. Reply Mem. a t 4). Defendants point to paragraph 19 of the complaint that states "While this information [concerning Choctaw's dissolution] did not bear on CFSB's decision whether or not to settle the Trade Agreement, as it intended to do so at all relevant times, it did bear on the nature of the representation and warranties that CSFB would seek from Rabobank/UAFC." Defendants also point to the deposition testimony of Leigh Dworkin, a CSFB employee involved with the failed deal who testified that during the end of 2003 he was "doing nothing" to close the transaction because the attorneys "had issues with the documents and other stuff that I don't really understand and I was waiting for the attorneys to resolve the issues." (Affirmation of Robert M. Kaplan, dated June 29, 2005,. Ex. H, pg. 122). Dworkin testified that the attorney told him there were "issues." (Id.).

Defendants' argument is misplaced. Whether there were "issues" with the documents such that plaintiff could not draft appropriate closing documents is a matter that was between the plaintiff and defendants. If plaintiff is to back up its contention that it needed the documentation, it will point to communications between the parties indicating those problems. There is no reason to invade the privilege to find out the nature of the internal machinations of plaintiff's attorney or between plaintiff and its attorney. However, counsel should take heed that anything

plaintiff will rely upon at trial must be produced according to the discovery schedule.

The cases defendants cite are not relevant. For example, *A. Weis Real Estate Corp., v. Katz*, 295 AD2d 547 (2d Dep't 2002), involved an action to recover a real estate broker's commission. The appeal was from a nonjury verdict in favor of the plaintiff broker. The Appellate Division, Second Department, first found that the testimony from the defendants' lawyer did not even concern a confidential communication. Here, the parties do not contest that the information was originally privileged.

In *A Weis*, the defendants had refused to execute a real estate contract of sale. The court also held that, because the defendants had various excuses for refusing to execute the sale, the defendants had placed their attorneys' testimony regarding those excuses squarely at issue. Here, it is possible that defendants stalled in getting the documentation to plaintiff because they wanted to cancel the deal and gain a higher price for the Choctaw debt. Thus, *A Weiss* actually supports invading the defendants' privilege as they were the ones who refused to close on the Choctaw transaction. The other cases defendants cite are equally distinguishable.

Indeed, the logical outcome of defendants' argument would be that privileged materials are fair game in any failed transaction. This is an obviously absurd result.

Accordingly, it is

ORDERED THAT Defendants Rabobank's and Utrect's motion to compel is denied; and it is further

ORDERED THAT the parties are directed to appear for a status conference on September 8, 2005 at 10 a.m. in the courtroom, room 248, 60 Centre Street.

Dated: August 23, 2005