

**AG Capital Funding Partners, L.P. v State Street
Bank & Trust Company**

2005 NY Slip Op 30154(U)

July 19, 2005

Supreme Court, New York County

Docket Number: 0601134/2002

Judge: Helen E. Freedman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT. _____

PART _____

0601134/2002

AG CAPITAL FUNDING PARTNERS,
vs
STATE STREET BANK & TRUST CO.

SEQ 8

COMMERCIAL SUBMISSION CAL

NO. _____

ON DATE _____

ON SEQ. NO. _____

ON CAL. NO. _____

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 **IS DECIDED**

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

FILED
JUL 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/19/05

[Signature] 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: IAS PART 39

-----X

AG CAPITAL FUNDING PARTNERS, L.P.,
et. al.,

Plaintiffs,

Index No.
601134/02

-against-

STATE STREET BANK AND TRUST COMPANY,

Defendant.

-----X

Freedman, J.:

In motion sequence 008, defendant State Street Bank and Trust Company (State Street) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor, dismissing the amended complaint in its entirety.

In motion sequence 009, plaintiffs move, pursuant to CPLR 3212, for an order granting partial summary judgment in their favor on their claims for (i) breach of Additional Secured Indebtedness Registration Statement (ASIRS) contracts; (ii) breach of indentures; (iii) breach of fiduciary duty as indenture trustee; (iv) negligence; and (v) damages.

Loewen Group International, Inc. (LGII) was a funeral home and cemetery operator which was a wholly-owned subsidiary of The Loewen Group, Inc. (Loewen). From 1995 to 1998, LGII issued a series of debt securities which were guaranteed by Loewen. State Street served as indenture trustee pursuant to the respective indentures entered into between LGII and State Street. The series of

securities mentioned in the complaint are referred to as the Series 3 and 4 Notes, issued on or about October 1, 1996; the Series 5 Notes, issued on or about September 26, 1997; the Pass-Through Asset Trust Securities (PATS), issued on or about September 30, 1997; and the Series 6 and 7 Notes, issued on or about May 28, 1998. The PATS and Series 6 and 7 Notes, which were valued at approximately \$750 million in the aggregate at the time of their respective issuances, are the notes at issue in the instant action.

On June 1, 1999, LGII commenced a Chapter 11 reorganization under the United States Bankruptcy Code. Plaintiffs, who are some of the alleged holders of PATS and Series 6 and 7 Notes, bring this action against State Street in its capacity as indenture trustee. The plaintiffs allege that the secured status of the notes that they hold was rendered "uncertain" by State Street's failure to register an ASIRS with Bankers Trust Company (Bankers Trust), the collateral trustee for these transactions. According to plaintiffs, as a result of this purported "uncertainty," they were forced to settle for a lesser distribution in the bankruptcy case.

In 2002, plaintiffs commenced this action against State Street, alleging breach of contract, breach of duties under the Trust Indenture Act, breach of fiduciary duty as indenture trustee, breach of fiduciary duty as secured party representative, and negligence.

The ASIRS is a document executed in connection with the issuance of several LGII notes, including the PATS and Series 6 and 7 Notes. Pursuant to a separate Collateral Trust Agreement (CTA), that Loewen, LGII, various other subsidiaries of Loewen, and Bankers Trust, entered into in May 1996, the ASIRS was to be delivered to Bankers Trust. State Street is not a signatory to the CTA.

Certain LGII creditors, who are not parties to this litigation, took the position in the bankruptcy case that actual filing of the ASIRS with Bankers Trust was required to obtain the security covered by the CTA. Bankers Trust, however, asserted that the registration of the ASIRS was not required to secure the notes, and that the purpose of the CTA's registration provisions was merely for the convenience of Bankers Trust in relation to the giving of notices and other administrative matters.

It is State Street's position as well that the subject notes were secured, whether or not they were registered. State Street commenced a third-party action, arguing that if registration of the ASIRS was required, it was the sole or shared responsibility of certain underwriters and Loewen's counsel. The First Department dismissed the third-party complaint in its entirety. AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 10 AD3d 293 (1st Dept 2004). On February 22, 2005, the Court of Appeals granted State Street's motion for leave to appeal the First Department

decision. AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 4 NY3d 706 (2005).

The ASIRS is a two-page document, signed by State Street, Loewen and LGII.

The PATS ASIRS states, inter alia:

By executing and delivering this [ASIRS] and, upon the acceptance and recordation hereof by [Bankers Trust] in accordance with Section 2.3 of the [CTA], State Street [], as trustee under the indenture dated as of September 30, 1997 (the "Secured Party Representative") by and among, LGII, as issuer, Loewen, as guarantor, and State Street [], as trustee (the "Indenture"), providing for the issuance of \$300,000,000 aggregate principal amount of Senior Guaranteed Notes, State Street [] hereby agrees on behalf of itself and the Holders it represents to be bound by all the terms and provisions of the [CTA] applicable to a Holder and a Secured Party Representative, as applicable, of Secured Indebtedness

The ASIRS for the Series 6 and 7 Notes is similar in many respects, and the corresponding section is set forth below:

By executing and delivering this [ASIRS] and, upon the acceptance and recordation hereof by [Bankers Trust] in accordance with Section 2.3 of the [CTA], State Street [] (as trustee under the indenture dated as of May 28, 1998 (the "Indenture") by and among, LGII, as issuer, Loewen, as guarantor, and State Street [], as trustee (the "Secured Party Representative"), providing for the issuance of \$450,000,000 aggregate principal amount of Senior Guaranteed Notes ... hereby agrees on behalf of itself and the Holders it represents to be bound by all the terms and provisions of the [CTA] applicable to a Holder and a Secured Party Representative, as applicable, of Secured Indebtedness

Section 2.5 (1) of the CTA states:

From time to time after the date hereof, agents, trustees or like representatives acting on behalf of Holders of any proposed Additional Secured Indebtedness under

Section 2.4(1)(i), (ii) or (iii) (or, if such Holders are unrepresented, the Holders themselves) may become Secured Party Representatives under this [CTA] 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 Trustee, for acceptance and registration in the Secured Indebtedness Register, an [ASIRS] substantially in the form of Exhibit A, duly executed by such prospective representative or holder and the Companies. Upon such delivery, acceptance and registration, such representative or holder shall have the rights of a Secured Party Representative set out in this [CTA].

In dismissing the third-party complaint, the First Department held that, pursuant to the ASIRS and the CTA:

State Street assumed the contractual obligation to deliver to Bankers Trust a registration statement for any additional secured indebtedness. It is undisputed that no registration statement was delivered to the collateral trustee for two such additional debt issues, with the result that when the debtor declared bankruptcy, the holders of the notes were obliged to settle for less than they would have received had the notes been at par with other secured debt.

AG Capital Funding Partners, L.P. v State St. Bank and Trust Co.,

10 AD3d at 294.

The Indentures for the PATS and Series 6 and 7 Notes contain provisions concerning State Street's indemnification by Loewen.

The Indentures state, in part:

LGII and Loewen shall indemnify the Trustee [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. ... LGII and Loewen need not reimburse any expense of indemnity against any loss or

liability to the extent incurred by the Trustee through its negligence, bad faith or willful misconduct.

On December 5, 2001, the Bankruptcy Court confirmed Loewen's Fourth Amended Joint Plan of Reorganization (the Plan), the effective date of which was January 2, 2002. With certain exceptions inapplicable to this action, the Plan contains a release of all claims against State Street for which Loewen indemnified State Street under the terms of the Indentures (the Release). The Release states, in part:

As of the Effective Date, each holder of a CTA Note Claim, 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 TLGI or LGII pursuant to the terms of any Prepetition Indenture;

While it is undisputed that the Release is binding upon the plaintiffs, the parties disagree as to its meaning and scope. State Street asserts that all of plaintiffs' claims, other than those alleging negligence, bad faith or willful misconduct, have been released by plaintiffs under the Release, pursuant to the indemnification provisions in the Indentures. It also avers that the First Department's finding that State Street had a contractual obligation to register the ASIRS with Bankers Trust should be viewed in the context of the third-party action, and not as a reinstatement of the contractual claims, asserted under the Trust

Indenture Act, because plaintiffs released those claims in the Bankruptcy Plan.

State Street further contends that plaintiffs' causes of action sounding in negligence and breach of fiduciary duties should be dismissed because State Street, as indenture trustee, had no extra-contractual duties to the plaintiffs.

Plaintiffs maintain that the Release does not affect their breach of contract claim. They argue that Loewen's indemnification obligations to State Street did not relieve State Street from claims resulting from its own misconduct, or from breach of its contractual obligation. See New York State Med. Care Facilities Fin. Agency v Bank of Tokyo Trust Co., 216 AD2d 126 (1st Dept 1995)

Plaintiffs further assert that the First Department, in the instant action, found that State Street owed them extra-contractual obligations from which tort claims could arise.

State Street maintains that the Bank of Tokyo Trust Co. case has no application here because the Release in the Bankruptcy proceeding applies to all claims other than those sounding in negligence or based upon State Street's bad faith or willful misconduct.

In plaintiffs' partial summary judgment motion, they seek judgment against State Street on the first, second, fourth and sixth causes of action, sounding in breach of the ASIRS, breach of

the indentures, breach of fiduciary duty as indenture trustee and negligence, respectively. Plaintiffs also seek an award of damages in the amount of \$66,053,240 plus interest.¹ Plaintiffs argue that damages are easily calculated as the difference between the value that they would have received for their holdings of the PATS and Series 6 and 7 Notes in the LGII bankruptcy reorganization had State Street delivered the ASIRS as it agreed to do, and the value that the plaintiffs actually received for these holdings as a result of State Street's failure to deliver the ASIRS.

Plaintiffs assert that if the PATS and Series 6 and 7 Notes had been treated equally with all of the other notes that were intended to be entitled to senior secured status, the holders of those notes would have received 68.5% of the face value of the notes. As a result of State Street's failure to deliver the ASIRS for the PATS and Series 6 and 7 Notes, however, the plaintiffs received only 57% of the face value of those notes.

State Street disputes plaintiffs' calculations, and maintains that each plaintiff's damages, if any, should be reduced by any additional monies that it may have received in the Plan above pari passu for their holdings of other LGII securities. State Street

¹Plaintiffs state that the 3rd and 5th causes of action present additional issues that are not necessary for adjudication of the 1st, 2nd, 4th and 6th causes of action, all of which seek the same damages. Plaintiffs assert that the adjudication of the 3rd and 5th claims will be unnecessary if the court awards the partial summary judgment that plaintiffs seek in motion sequence 009.

asserts that plaintiffs are not entitled to judgment as a matter of law with respect to the full amount of their claimed damages. State Street argues that plaintiffs' position would result in their obtaining a huge, inequitable windfall and that, furthermore, plaintiffs have not submitted admissible evidence of their holdings of Loewen securities to demonstrate damages.

Although the First Department held that State Street breached its contractual obligation to deliver to Bankers Trust an ASIRS for the PATS and Series 6 and 7 Notes, the contractual and statutory claims set forth in the complaint are nonetheless dismissed, pursuant to the terms of the Release. The First Department did not address the issue of the effect of the Release upon plaintiffs' claims because only the third-party action was before the court.

The scope of the Release is determined pursuant to the terms of the indemnification provisions of the Indentures, which indemnify for all claims except those based on State Street's negligence, bad faith or willful misconduct. Therefore, the first cause of action, sounding in breach of the ASIRS, the second cause of action, sounding in breach of the Indentures, and the third cause of action, alleging breach of duties under the Trust Indenture Act, were waived and pursuant to the Release, State Street is entitled to summary judgment dismissing those three claims.

The fourth and fifth causes of action, sounding in breach of fiduciary duty as an indenture trustee and as a secured party representative, respectively, and the sixth cause of action, alleging negligence, are not affected by the terms of the Release.

The First Department stated that State Street was "obligated 'to perform basic non-discretionary ministerial tasks,' including filing the requisite registration statements with the collateral trustee..." AG Capital Funding Partners, L.P. v State St. Bank and Trust Co., 10 AD3d at 295, quoting LNC Invs. v First Fid. Bank, N.A., 935 F Supp 1333, 1347 (SD NY 1996). The case cited by the First Department explains that "New York courts have imposed only two extra-contractual pre-default duties on indenture trustees. First, an indenture trustee must avoid conflicts of interest. ... Second, an indenture trustee may be liable in tort for failure to perform basic non-discretionary ministerial tasks." LNC Invs. v First Fid. Bank, N.A., 935 F Supp at 1347.

Thus, by citing this language, and by stating that filing the ASIRS was a "basic non-discretionary ministerial tasks[]" that State Street was obligated to perform, the First Department held that State Street, in addition to breaching the ASIRS, also violated its extra-contractual duties to plaintiffs. The fourth and sixth causes of action seek the same damages. Thus, in light of the First Department's decision, plaintiffs are entitled to summary judgment as to State Street's liability under the fourth

and sixth causes of action. Plaintiffs, however, are not entitled to summary judgment as to the amount of damages, because there are disputes as to how damages should be measured, as well as whether all of the plaintiffs are entitled to damages.

The question of the extra-contractual duties of an indenture trustee is one of the issues the Court of Appeals has been asked to address in State Street's appeal of the First Department's decision, and this court chooses to conserve its resources by waiting for possible further guidance from the Court of Appeals on this issue before moving forward on damages determinations.

Accordingly, it is

ORDERED that State Street Bank and Trust Company's motion for summary judgment, motion sequence 008, is granted in part, to the extent of dismissing the first, second and third causes of action; and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion for partial summary judgment, motion sequence 009, is granted in part, to the extent of granting summary judgment as to State Street's liability on the fourth and sixth causes of action; and the motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the fourth through sixth causes of action.

Dated: July 19, 2005

ENTER:



Helen E. Freedman, U.S.C.

FILED
JUL 21 2005
COUNTY CLERK'S OFFICE
NEW YORK