

Tradewinds Financial Corp. v REFCO Securities, Inc.
2006 NY Slip Op 30064(U)
March 23, 2006
Supreme Court, New York County
Docket Number: 0606052/6052
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 14

Innovative Financial

INDEX NO.

606052/01

MOTION DATE

- v -

Refa Services

MOTION SEQ. NO.

004

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 ACCOMPANYING MEMORANDUM DECISION

Dated: 3/28/06

WALTER B. TOLUB

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: PART 15

----- X
TRADEWINDS FINANCIAL CORPORATION,
a California corporation, TRADEWINDS DEBT
STRATEGIES FUND, L.P., a California limited
partnership, TRADEWINDS OFFSHORE FUND,
LIMITED, a Cayman Islands Exempted Company,
TRADEWINDS CLIPPER FUND LTD., a California
limited partnership, and TRADEWINDS SECURED
DEBT FUND LTD., a Cayman Islands Exempted
Company,

Index No. 606052/01

Plaintiffs,

- against -

REFCO SECURITIES, INC., a New York Corporation,
REFCO CAPITAL MARKETS, LTD., a Bermuda
corporation, and MARTIN LOFTUS, an individual,

Defendants.

----- X
WALTER B. TOLUB, J.:

Plaintiffs Tradewinds Financial Corporation, Tradewinds Debt Strategies Fund, L.P.,
Tradewinds Offshore Fund, Limited, Tradewinds Clipper Fund, Ltd., and Tradewinds Secured
Debt Fund Ltd. (collectively, Tradewinds or the Tradewinds entities) move for an order (1)
pursuant to CPLR 603, severing the action against defendant Refco Capital Markets, Ltd. (Refco
Capital), a debtor-in-possession in a pending Chapter 11 action, so as to enable the action to
continue as against nonbankrupt co-defendant Refco Securities, Inc. (Refco Securities), and (2)
pursuant to CPLR 2104, entering judgment against Refco Securities, and in favor of Tradewinds,
in accordance with the terms of a settlement agreement that attorneys for Refco Securities are
holding in escrow.

The essential facts and issues underlying this action are set forth in a prior decision
rendered by the Honorable Herman Cahn, dated September 15, 2003. What matters most now,

however, is that the parties sought to resolve their dispute through the execution of a settlement agreement, dated as of September 29, 2005 (Settlement Agreement), but not yet executed as of that date. The parties to the Settlement Agreement include (1) the Tradewinds entities, (2) non-party Refco Group Ltd., LLC (Refco Group), (3) Refco Securities, (4) Refco Capital, and (5) Martin Loftus (Refco Group, Refco Securities, Refco Capital, and Loftus, collectively, the Refco entities).

On September 29, 2005, the parties submitted to the Appellate Division, First Department, a stipulation setting forth their agreement seeking to have the Appellate Division hold their then-pending appeal and cross appeal in abeyance pending execution of the Settlement Agreement, which the Court granted by order dated September 30, 2005. Approximately one week later, on October 5, 2005, the Tradewinds entities executed the Settlement Agreement.

By letter to the Honorable David B. Saxe of the Appellate Division, First Department, also dated October 5, 2005, counsel for Tradewinds, on behalf of Tradewinds and the Refco entities, requested that the Appellate Division's order, holding the appeal in abeyance until October 7, 2005, be amended to hold the appeal in abeyance until October 21, 2005. Counsel stated that the parties had agreed upon all material terms of their settlement, and that the Tradewinds entities had executed the Settlement Agreement and other related documents, with the expectation that the Refco entities would be executing the Settlement Agreement and other required documents "imminently." On October 17, 2005, Refco Capital filed a petition in bankruptcy pursuant to Chapter 11 of the United States Bankruptcy Code that stayed all actions and proceedings against it.

The parties did not implement the terms of the Settlement Agreement. Tradewinds

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contends that all parties duly executed the Settlement Agreement, and it now seeks an order severing its claim against the nonbankrupt entity, Refco Securities, pursuant to CPLR 603, and granting it judgment against Refco Securities enforcing the terms of the Settlement Agreement, pursuant to CPLR 2104.

As for the branch of the motion seeking severance, CPLR 603 provides:

“In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.”

Severance pursuant to CPLR 603 is warranted to prevent prejudice to Tradewinds stemming from the delay caused by the co-defendant’s bankruptcy proceeding (*see Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d 94 [1st Dept 2001]). A bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankruptcy defendants that do not involve the bankrupt’s property (*Golden v Moscowitz*, 194 AD2d 385 [1st Dept 1993]; *Rosenbaum v Dane & Murphy, Inc.*, 189 AD2d 760 [2^d Dept 1993]). Thus, the court has discretion to order a severance (*id.*).

Although the automatic stay as against Refco Capital may be applied to a nonbankrupt entity, such as Refco Securities, generally this is done only when a claim against that entity will have an immediate adverse economic consequence for the bankrupt entity’s estate (*Queenie, Ltd. v Nygard Intl.*, 321 F3d 282, 286 [2^d Cir 2003]; *Variable-Parameter Fixture Dev. Corp. v Morpheus Lights Inc.*, 945 F Supp 603 [SD NY 1996]). Examples are a claim to establish an obligation of which the bankrupt entity is a guarantor, a claim against the bankrupt’s insurer, and actions where there is such identity between the bankrupt entity and a third-party defendant that the bankrupt entity may be deemed to be the real party defendant (*Queenie, Ltd. v Nygard Intl.*,

321 F3d at 286-87).

Refco Securities has not demonstrated that application of the stay to it is warranted. Indeed, the balance of the equities lies with the plaintiff when one defendant has received an automatic stay pursuant to the federal bankruptcy laws, and co-defendants request a stay of the entire action (*Rosenbaum v Dane & Murphy, Inc.*, 189 AD2d 760, *supra*).

Refco Securities' counsel states in paragraph 2 of his affirmation that any decision that this court makes regarding the enforceability of the Settlement Agreement would have a collateral estoppel or stare decisis effect as to Refco Capital and nonparty Refco Group, which is also a debtor in bankruptcy. Thus, counsel argues, the court cannot take such action without impairing the rights of the debtors in bankruptcy. Notwithstanding this conclusory assertion, severance is warranted because none of the Refco entities have presented evidence that a severance would result in prejudice to these entities (*Torre v Fay's Inc.*, 259 AD2d 896 [3d Dept 1999]).

Rather, considering that Tradewinds commenced the action in 2001, which has been through discovery, trial, and partially through an appellate proceeding, it is Tradewinds that would be prejudiced by being required to await the conclusion of lengthy and complex reorganization proceedings before obtaining a remedy (*Golden v Moscovitz*, 194 AD2d 385, *supra*). Indeed, public policy favors enforcing settlements, and doing so according to their terms (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934 [1998]; *Wien & Malkin, LLP v Helmsley-Spear, Inc.*, 307 AD2d 808 [1st Dept 2003]).

Moreover, collateral estoppel would not likely be applicable to the Refco entities, other than Refco Securities, because they did not have a full and fair opportunity to litigate issues of

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liability or damages (*Holt v Holt*, 262 AD2d 530 [2d Dept 1999]; *Woodson v Mendon Leasing Corp.*, 259 AD2d 304 [1st Dept 1999]).

Refco Securities also argues, in its memorandum of law, that severance could cause Refco Securities to eventually seek contribution against Refco Capital or Refco Group, and that it will prejudice the rights of the debtors in bankruptcy by diverting their principal's attention from its reorganization. Notably lacking are any specific assertions of probative value as to actual prejudice. These unsworn allegations of fact in the memorandum of law are without probative value (*Zawatski v Cheektowaga-Maryvale Union Free School Dist.*, 261 AD2d 860 [4th Dept], *lv denied* 94 NY2d 754 [1999]).

Turning now to the branch of the motion seeking summary judgment, Tradewinds argues that Refco Securities failed to perform its remaining obligations under the Settlement Agreement including (1) delivering fully executed copies of the Settlement Agreement and accompanying documentation to it, and (2) paying the contractually specified settlement sum.

CPLR 2104 provides in relevant part:

“An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered.”

It is undisputed that all parties executed the Settlement Agreement (*see* Affirmation of Gregory E. Galterio, Esq., dated November 7, 2005, at ¶ 4 and Affirmation of Grant R. Cornehl, Esq., dated December 9, 2005, ¶ 12). At the moment that Refco Securities signed the agreement, it assumed a binding obligation (*Calavano v New York City Health & Hosp. Corp.*, 246 AD2d 317, 319 [1st Dept 1998]), notwithstanding that it had not physically delivered the agreement to Tradewinds (*Schoenfeld v Masucci*, 205 AD2d 749 [2d Dept], *lv denied* 84 NY2d 807 [1994];

Bohlen Indus. of N. Am. v Flint Oil & Gas, 106 AD2d 909 [4th Dept 1984]). Hence, the argument that CPLR 2104 requires that stipulations of settlement be in writing and signed by the party to be charged does not warrant denial of the motion, because the situation here complies with the requirements of the statute.

Refco Securities contends, however, that it never delivered the Settlement Agreement, because certain corporate resolutions were not executed. Relying on paragraph 4 of the Settlement Agreement, Refco Securities argues that, absent an appropriate resolution approving and authorizing the execution of the Settlement Agreement and related documents, there could be no binding settlement because a condition precedent to its enforcement was not satisfied. This argument is unpersuasive.

When commercial parties expressly agree that a specified occurrence or event shall be a condition precedent to the creation or enforceability of a right or obligation, and there is no ambiguity arising out of other language in the contract, the only question for the court is compliance with the condition (*David Fanarof, Inc. v Dember Constr. Corp.*, 195 AD2d 346 [1st Dept 1993]; *Adams v Suozzi*, 340 F Supp 2d 279, 283 [ED NY 2004], *aff'd* 433 F3d 220 [2005]). Such is not the case here.

The language of the contract must expressly condition the formation of an agreement on the performance of a condition (*Adams v Suozzi*, 340 F Supp 2d 279, *supra* [agreement expressly stated that it would be inoperative unless certain conditions were satisfied]). Paragraph 4 of the Settlement Agreement provides:

"4. **Corporate Resolutions.** Each of the parties to this Agreement shall submit, concurrently with the execution of this Agreement, a corporate resolution (or similar document in the case of limited partnerships) indicating that such party authorizes the execution of this Agreement and the Releases on its behalf and that

the signatory for that party is vested with the authority to bind that party for purposes of this Agreement and the Releases.”

The failure to deliver the corporate resolutions does not make the agreement unenforceable because the delivery of those documents was not a condition precedent to the enforcement of the agreement. That this is so is because paragraph 4 did not expressly condition performance or validity of the agreement upon that occurrence (*David Fanarof, Inc. v Dember Constr. Corp.*, 195 AD2d 346, *supra*; *Adams v Suozzi*, 340 F Supp 2d 279, *supra*). Here, the apparent purpose of paragraph 4 was to confer a benefit upon the receiver of the corporate resolution. For example, possession of that resolution could enable the bearer to more easily refute a claim that a contract was not duly authorized or executed, and thus, not binding upon the purported corporate signatory. But not possessing the executed resolution does not then mean that the agreement was not duly authorized or executed, although it might make litigating that issue more difficult. A party may waive performance of a condition inserted for its own benefit under an agreement (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157 [1990]; *Tucek v Hoffman*, 161 AD2d 588 [2d Dept 1990]; *Adams v Suozzi*, 340 F Supp 2d at 283).

Moreover, the argument that the delivery of corporate resolutions was a condition precedent to enforcement of the Settlement Agreement is inconsistent with Paragraph 3 of the agreement which provides:

“3. Authority to Bind Parties. Each of the parties to this Agreement represents and warrants that it has the full authority to settle and resolve the disputes among them, execute the Agreement and the Releases, and to bind itself and its shareholder and members, if any, to the Agreement and the Releases.”

Refco Securities’ interpretation would violate the basic principal that a contract should be interpreted to give full meaning and effect to all of its provisions (*Two Guys from Harrison-NY v*

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S.F.R. Realty Assoc., 63 NY2d 396 [1984]; *Ronbet 366 LLC v Tobias*, 309 AD2d 602 [1st Dept 2003]).

Furthermore, Refco Securities' reliance upon paragraph 7 of the Settlement Agreement is also unconvincing to demonstrate the existence of a condition precedent. It provides:

"7. Settlement Payment. The Refco Parties shall pay to the TRADEWINDS parties, in full and final settlement of the TRADEWINDS Action and the Guaranty Action, the total sum of four million two hundred fifty thousand dollars (\$4,250,000), within five business days of the receipt by Herrick, Feinstein LLP, attorneys for Refco Group, RSL and RCM, of this Agreement and the Releases duly signed by all parties, together with the documents referred to in paragraph 4, with the Release to be held in escrow as set forth in paragraph one of this Agreement. The payment set forth herein shall be made by wire transfer pursuant to the following wire transfer instructions: City National Bank, ABA No. 122-016-066, f/b/o TRADEWINDS Investment Partners, LLC, Acct. No. 432-685-365."

This paragraph merely sets forth a time and manner of payment, but does not manifest a clear intent to make receipt of the documentation a condition precedent. At best, this provision can be deemed ambiguous. Where there is ambiguity in a contractual term, the law does not favor a construction that creates a condition precedent (*Lui v Park Ridge at Terryville Assn.*, 196 AD2d 579 [2d Dept 1993]).

Finally, as for Tradewinds' request that the court enter judgment against Refco Securities, and in favor of Tradewinds, in accordance with the terms of the Settlement Agreement, the parties have not addressed those terms, aside from the issue of the enforceability of the agreement. Thus, the parties are hereby directed to settle an order.

Settle Order.

Dated: 3/23/06

ENTER:



Hon. Walter B. Tolub J.S.C.