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

[redacted]

Index Number : 603151/2003

PART 49

DEVENTER, JOHN M.

vs

CS SCF MANAGEMENT

Sequence Number : 016

PSJ

INDEX NO. _____

MOTION DATE 2/27/06

MOTION SEQ. NO. 016

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

[redacted]

FILED

JUL 14 2006

COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....**

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

Dated: 7/6/06

_____ 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 49

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JOHN M. VAN DEVENTER, JAMES R. CLARK, and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against- Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE FIRST BOSTON, CREDIT SUISSE FIRST BOSTON (USA), CS CAPITAL PARTNERS, LTD., CS STRUCTURED CREDIT FUND, LTD., CREDIT SUISSE FUND ADMINISTRATION LIMITED, and QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

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**Herman Cahn, J.:**

Plaintiffs John M. Van Deventer, James R. Clark, and C2C Consultants, Ltd., move for partial summary judgment as to liability on the amended complaint's second cause of action for breach by defendants CS Structured Credit Fund, Ltd., (the Fund), CS Capital Partners, Ltd., (Holdco), and CS SCF Management Limited (the Manager), (collectively, the CS defendants), of an agreement to pay C2C Consultants certain consulting fees.

The underlying facts and procedural history of this action are more fully set forth in this court's September 14, 2005 order, and will not be repeated here, except as is necessary for clarification.

Briefly, this action arises out of the termination of a joint venture formed in

December 1995 by Van Deventer and defendant Credit Suisse First Boston (CSFB) to create and operate a structured credit investment funds business in which Van Deventer would manage a family of investment funds sponsored and supported by CSFB. Plaintiffs commenced the action to enforce the terms of a series of restructuring agreements into which the parties entered in 1999 to encourage investments by new investors, including non-parties Coller International Partners III, Limited, and Cornell University. While originally investors would purchase shares in the Fund directly, after the restructuring investors would purchase shares in Holdco, which had been created in 1999 as the sole owner of the Fund.

In part, plaintiffs seek to recover certain consulting fees pursuant to the strategic consulting agreement into which the parties entered in 1999 (the 1999-SCA), including a fee based on the sale of Fund assets following the end of the term of the 1999-SCA (the break-up fee).

C2C alleges that, in 2002, over its objections, CSFB changed the investment objective of the Fund and Holdco from building the Fund's assets and maximizing their value, to recouping CSFB directly's own investment as quickly as possible, even at the expense of returns. In 2001 and 2002, plaintiffs several times requested that the term of the 1999-SCA be extended past the January 31, 2003, termination date specified in section 9.1 of that agreement in order to permit C2C additional time in which to sell the remaining Fund assets. Plaintiffs do not allege that the 1999-SCA empowers them to modify the duration of the term of the agreement or of the Fund or Holdco.

In January 2003, 85% of the participating shareholders passed special resolutions reducing the duration of the Fund's term from October 31, 2006, to February 28, 2003, and extending the duration of Holdco's term from January 31, 2003, to February 28, 2003. In so doing, the shareholders were acting under authority accorded them by the articles of incorporation of the Fund and Holdco (see Fund Restated Arts. of Assoc., §§ 100 [2], 145 [1] [a], 145 [b]; Holdco Restated Arts. of Assoc., §§ 100 [2], 145 [1]). On February 28, 2003, the participating shareholders passed another special resolution, formally putting the Fund into liquidation.

The practical effect of the modifications of the original termination dates was that the Fund and Holdco terminated on the same day and prior to the sale of all of the Fund's assets. There is no dispute that, once the Fund and Holdco terminated, the 1999-SCA also terminated, and C2C lost its position as the Fund's exclusive strategic consultant and also its ability to earn fees by actively selling the remaining assets. A CSFB wholly owned subsidiary, rather than C2C, was appointed as the Fund liquidator to dispose of the remaining assets.

By letter dated June 30, 2003, C2C demanded payment of a break-up fee, totaling approximately $16 million. It was calculated in accordance with the evaluation procedures set forth in the break-up fee provision. There is no dispute that the 1999-SCA provides for survival of the break-up fee provision after termination of the agreement. "The parties acknowledge and agree that their respective rights and obligations under clause[ ] . . . 9.2 . . . shall survive and continue in full force and effect after the

termination of this Agreement or the cessation of [C2C] to act under this Agreement for any reason whatsoever" (1999-SCA, § 9.3).

The CS defendants have refused to pay the fee, on the ground that the natural expiration of the term, as modified, of the 1999-SCA on February 28, 2003, does not trigger their contractual obligation to pay a break-up fee to C2C.

C2C now seeks partial summary judgment as to liability against the CS defendants on the second cause of action of the amended complaint and a judgment declaring the CS defendants liable for the payment of a break-up fee, pursuant to 1999-SCA § 9.2. C2C contends that it is entitled to a break-up fee on grounds that, for purposes of this motion (see plaintiffs' reply brief at 2), there is no dispute that the 1999-SCA was no longer in effect after February 28, 2003; that the termination or expiration of the agreement was not based on misconduct by C2C; and that the termination or expiration occurred without C2C's written consent. C2C requests that the court determine what effect, if any, the agreement's expiration had under 1999-SCA § 9.2.

In opposition, the CS defendants contend, first, that the branches of the motion for summary judgment against the Fund and Holdco must be denied because the second cause of action has already been dismissed against these defendants.

It is axiomatic that one party cannot obtain summary judgment on a claim that has not been asserted against the party against whom summary judgment is sought (Peripheral Equipment, Inc. v Farrington Mfg. Co., 29 AD2d 11 [1st Dept 1967]). By decision and order dated September 14, 2005, this court granted the CS defendants' motions and, in

relevant part, dismissed the second cause of action asserted against the Fund and Holdco and the branches of the second cause of action asserted by Van Deventer and Clark against the CS defendants. Therefore, those branches of the motion seeking a judgment declaring the Fund and Holdco liable on the second cause of action asserted in the first amended complaint are denied.

In the remaining branch of the motion, C2C seeks partial summary judgment on the second cause of action asserted against the Manager.

The CS defendants contend in opposition that the Manager cannot be held liable because 1999-SCA § 9.2 obligates the Manager to pay a break-up fee based on the value of Fund assets unsold by the termination date only if the agreement is affirmatively terminated early and wrongfully and that, here, the agreement naturally expired through the passage of time.

The parties, thus, dispute whether 1999-SCA § 9.2 requires payment of a break-up fee upon termination in all circumstances, other than because of C2C's own misconduct or written agreement to the termination, or whether the payment obligation is triggered when the termination is early and wrongful and is not triggered by the natural expiration of the agreement's term.

The well-established rule of contract interpretation provides that:

> In interpreting a contract, the intent of the parties governs. A contract should be construed so as to give full meaning and effect to all of its provisions. Words and phrases are given their plain meaning. Rather than rewrite an unambiguous agreement, a court should enforce the plain meaning of that agreement. Where the intent of the parties can be determined

> from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment. On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact, and summary judgment should be denied.

(American Express Bank Ltd. v Uniroyal, Inc., 164 AD2d 275, 277 [1st Dept 1990], appeal denied 77 NY2d 807 [1991] [internal citations omitted]). Further, "[w]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (W.W.W. Associates, Inc. v Giancontieri, 77 NY2d 157, 162 [1990]).

C2C argues that, contrary to the CS defendants' contention, whether the 1999-SCA naturally expired by the passage of time or was affirmatively terminated, the break-up fee provision was triggered. C2C further contends that the terminated "for whatever reason" language used in 1999-SCA § 9.2 encompasses any conceivable end of the 1999-SCA, and that "termination" and "expiration" are terms of art having identical meanings, citing Carilion Healthcare Corp. v Ball, 2001 WL 1262362 (Va Cir Ct 2001); Perruccio v Allen, 156 Conn 282 [1968]; Black's Law Dictionary 619, 1511 [8th Ed 2004], defining "termination" as "The end of something in time; the conclusion" and "expiration" as A" coming to an end; esp., a formal termination on a closing date."

Rather than relying on dictionary definitions of particular words taken out of context, the court should determine the intent of the parties by review of the entire agreement. Indeed, in the decisions upon which plaintiffs rely, the courts emphasize that concept (see e.g. Carilion Healthcare Corp. v Ball, 2001 WL 1262362 supra., [holding that it is clear that a determination of the meaning of the terms "expiration" and

"termination" cannot be based upon definitions alone, and that the court must consider the manner in which the words are employed in the parties' agreements]; Perruccio v Allen, 156 Conn at 285 supra., ["The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances surrounding the parties at the execution of the instrument . . . the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible"]). New York law is to the same effect.

The break-up fee provision provides in relevant part that:

> Upon termination of this Agreement for whatever reason[,] other than pursuant to clause 9.1(a), [C2C] shall be entitled to receive all fees and other moneys due to it and unpaid up until the effective date of the termination. Upon the wrongful termination of this Agreement or termination other than pursuant to clauses 9.1(a), (b) or (c) of this Agreement . . . , [C2C] shall be entitled to payment of an amount equal to the value of this Agreement had the termination not occurred.

(1999-SCA, § 9.2 [emphasis added]).

Section 9.1, referenced in the section 9.2 excerpt above, sets forth the circumstances in which the 1999-SCA may be terminated. In relevant part, section 9.1 provides that "[t]his Agreement shall continue in effect until the later of January 31, 2003 or termination of the [later of the Fund or Holdco] to terminate in accordance with the provisions of the Fund [and Holdco] Instruments" (1999-SCA, § 9.1). Subsection 9.1 (a) provides that the Manager may terminate the 1999-SCA upon written notice, if the Fund auditor certifies that C2C has wilfully or consistently materially breached the agreement and the breach is not cured within 60 days. Subsection 9.1 (b) provides that the Manager

may terminate the agreement upon written notice of C2C's uncured breach of the agreement, C2C's bankruptcy, a drop in the value of the Fund assets below a specified threshold amount, or the death or permanent disability of both Van Deventer and Clark. Subsection 9.1 (c) authorizes termination of the agreement by written consent of both the Manager and C2C.

The first sentence of section 9.2, including the reference to section 9.1 (a), clearly demonstrates the parties' intent that, at the natural end of the term of the 1999-SCA, C2C would receive all fees due and owing through the termination date, unless C2C had forfeited its right to those fees through its own material breach of the agreement.[1] The first sentence, therefore, supports the Manager's interpretation of the provision.

However, the second sentence of the section supports C2C's interpretation. There is no dispute that the termination did not occur as the result of occurrences listed in subsections 9.1 (b) (ii - vii) or 9.1 (c). With reference to those subsections then, the second sentence clearly demonstrates the parties' intent that, if the termination occurred other than pursuant to the subsections of section 9.1, then C2C would be entitled to the fees that it would have earned, had termination not occurred at all and had C2C been permitted to sell all the Fund assets. The second sentence, thus, requires the Manager to pay C2C a fee for the sale, after the end of the term of the 1999-SCA, of Fund assets not

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[1] The court notes that, in the counterclaims, the CS defendants allege that C3C materially breached the 1999-SCA and contend that, therefore, pursuant to 1999-SCA subsections 9.1 (a) and 9.1 (b) (i), C2C forfeited any right it may otherwise have had to receive a break-up fee.

sold by C2C. This is much more favorable to C2C.

The first and second sentences of section 9.2 contradict each other. To interpret section 9.2 as entitling C2C to a break-up fee at the end of the agreement in all circumstances, (unless that end came as the result of C2C's own misconduct or agreement), would be to create logical inconsistencies within the provision and to render much of the rest of the section superfluous. It would be contrary to logic to interpret the 1999-SCA as requiring the Manager to compensate C2C in "an amount equal to the value of [the 1999-SCA] had termination not occurred" (1999-SCA, § 9.2), if the agreement naturally expired on the termination date set forth in the provision. The value to C2C of the naturally expired agreement would be zero because, once the 1999-SCA was no longer in effect, there was no contractual obligation to compensate C2C further, pursuant to the first sentence of section 9.2.

The break-up fee provision is thus internally inconsistent and, therefore, ambiguous.

Therefore, C2C's motion for partial summary judgment as to liability against the Manager is denied.

Accordingly, it is

ORDERED that motion sequence number 016 is granted to the limited extent that summary judgment on the second cause of action asserted in the first amended complaint is granted against plaintiff C2C Consultants, Ltd., and in favor of defendants CS Structured Credit Fund Ltd. and CS Capital Partners, Ltd., in accordance with the prior

decision and order dated September 14, 2005, and is otherwise denied; and it is further

ORDERED that the remainder of this action shall continue.

Dated: July 6, 2006

ENTER:

J.S.C.