

<b>LaSalle Bank Natl. Assn. v ICP Sec., LLC</b>
2007 NY Slip Op 31182(U)
May 8, 2007
Supreme Court, New York County
Docket Number: 0603518/2006
Judge: Bernard J. Fried
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED  
*Justice*

PART 60

LASALLE BANK NATIONAL ASSOCIATION  
as Trustee,

INDEX NO. #803518-2006  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

Plaintiffs,

-against-

ICP SECURITIES, LLC,  
ICP ASSET MANAGEMENT, LLC,  
CIBC WORLD MARKETS CORP.,  
CIBC WORLD MARKETS INC.,  
CANADIAN IMPERIAL BANK  
OF COMMERCE,  
TRIAXX PRIME CDO 2006-1, LTD.,  
TRIAXX PRIME CDO 2006-1, LLC,

Defendants,

**RECEIVED**  
MAY 10 2007  
IAS MOTION  
SUPPORT OFFICE

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

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 THE ACCOMPANYING MEMORANDUM  
DECISION.

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/8/07

Bernard J. Fried  
J.S.C. **BERNARD J. FRIED**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

*M. D. A. J.*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

-----X  
LASALLE BANK NATIONAL ASSOCIATION  
as Trustee,

Plaintiffs,

INDEX NO.: 603518-2006

-against-

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OF COMMERCE,  
TRIAXX PRIME CDO 2006-1, LTD.,  
TRIAXX PRIME CDO 2006-1, LLC,

Defendants.

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**APPEARANCES:**

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**FRIED, J.:**

On December 18, 2007, Plaintiff, LaSalle Bank National Association (“LaSalle”), a national banking association, moved for interpleader and related relief due to the existence of conflicting claims to funds presently in its possession. LaSalle holds the funds in connection with a complex set of transactions involving, among other things, the issuance of investment notes and it has moved for an order, pursuant to CPLR §3212 and §1006(f): (1) authorizing LaSalle to pay into Court the disputed funds described in its interpleader complaint; (2) discharging LaSalle from this action and enjoining any further claims with regards to such disputed funds; (3) granting summary judgment in LaSalle’s favor on the counterclaim filed by CIBC; and (4) awarding LaSalle its expenses, costs and disbursements under CPLR §1006(f), as well as such other or further relief as may be just and proper.

In addition to LaSalle, the parties involved in the underlying transaction are as follows: Defendant, ICP Securities, LLC and Defendant ICP Asset Management, LLC (collectively “ICP” or the “Placement Agent”); Defendant, CIBC World Markets Inc. and Defendant, Canadian Imperial Bank of Commerce (“Canadian Imperial”) (collectively, “CIBC” or the “Co-Placement Agent”); and Defendant Triaxx Prime CDO 2006-1, Ltd. (the

“Issuer”) and Defendant, Triaxx Prime CDO 2006-1, LLC (the Co-Issuer”), (collectively “Triaxx”).

Pursuant to a Placement Agency Agreement (the “PMA”), the Triaxx Issuer and Co-Issuer appointed ICP as Placement Agent and CIBC Co-Placement Agent, CIBC. In connection with the closing of the underlying transaction (the “Closing”), which occurred on or about September 7, 2006, LaSalle, as Trustee, received a document (the “Flow of Funds”), that instructed LaSalle to distribute the closing proceeds to various parties and to the specified accounts established under the Indenture. (Plaintiff’s 19-A Statement at ¶10). The Flow of Funds document, was confirmed after the Closing, by a Funding Certificate (the “Funding Certificate”), which attached a document similar to the Flow of Funds. (*Id.* ¶10; Sumser Affidavit ¶6). The Flow of Funds document also listed a line item wire transfer in the amount of \$3,930,000.00, “Reserve for Placement Fee Expenses”(the “RPFE”), but did not instruct the Trustee to wire the RPFE to a particular party. (Plaintiff’s 19-A Statement ¶¶ 11-12). Neither the Indenture nor the Offering papers provided any guidance regarding the transfer of the RPFE, and neither ICP nor CIBC provided LaSalle with documentation memorializing their agreement, if any, on how the RPFE was to be distributed. (Plaintiff’s 19-A Statement at ¶14; Sumser Affidavit ¶6).

Also at or around the Closing, ICP advised LaSalle by e-mail that the funds should not be released until ICP and CIBC settled certain “warehouse” agreement and related expenses amongst themselves. (Plaintiff’s 19-A Statement at 15; Sumser Affidavit at ¶8; Sumser Exhibit 1). Despite LaSalle’s suggestion that CIBC and ICP resolve their differences between themselves, they were unable to do so. (Plaintiff’s 19-A Statement at ¶17; Sumser

Affidavit ¶9).

Subsequent events are disputed by CIBC, ICP and LaSalle, however, LaSalle admits that it wired \$716,688.00 to ICP based on the belief that CIBC did not dispute ICP's right to receive those funds. (Plaintiff's response to Additional Material Facts alleged by the ICP Defendants in their response to Plaintiff's Rule 19-A Statement.). It is also undisputed that LaSalle subsequently sent an e-mail to ICP informing ICP that LaSalle had been notified by CIBC that "the warehouse agreement and related expenses [had] been settled," and requesting that ICP return the \$716,688.00 "if this is incorrect." The e-mail further informed ICP "If we do not receive a response to this email or have not been provided a Fed Reference Number by 5pm EST Monday, October 2, 2006, LaSalle will release the remaining amount of \$3,213,312.00 to CIBC." (Exhibit A to Priore Affidavit, October 2, 2006 e-mail). Finally, it is undisputed that ICP returned the funds to LaSalle.

On October 5, 2006, LaSalle filed a complaint seeking interpleader relief, after which a series of answers, counterclaims and cross-claims were filed by CIBC, ICP and Triaxx, including a counterclaim, raised by CIBC in its Answer, suing LaSalle for conversion.

On December 18, 2006, LaSalle filed a notice of motion, seeking the relief previously described in its interpleader complaint and attaching the affidavit of Robert Christmas, Esq., plaintiff's attorney, and exhibits thereto, as well as its Memorandum of Law in support of the motion.

CIBC opposed both LaSalle's motion for discharge and its motion to dismiss the conversion counterclaim. ICP also opposed LaSalle's motion, but only with respect to the portion that seeks costs and expenses. Triaxx has filed no opposition to LaSalle's motion,

although its answer included a request that, among other things, Plaintiff be denied costs and expenses related to bringing the action.<sup>1</sup>

First, I must determine whether LaSalle is entitled to summary judgment, pursuant to CPLR §3212, on CIBC's conversion claim.

CIBC asserts that it has raised material issues of fact<sup>2</sup> which preclude summary judgment.<sup>3</sup> It further argues that LaSalle violated its obligations under the Placement Agency Agreement by not paying CIBC upon the closing of the transaction and contends that the Trustee "improperly exercised dominion and control over the \$3,213,312 placement agent fee due CIBC." (CIBC's Memorandum of Law, p. 8; CIBC's Answer, ¶34).

LaSalle contends that it acted properly, as Trustee, by indicating that it would not pay any party, when it became aware that there was a dispute as to the division of payment between CIBC and ICP. Plaintiff also notes that it has no interest in the RPFE, makes no claim to the funds, and has attempted, unsuccessfully, to assist the parties in resolving the competing claims to these moneys. Finally, LaSalle claims that, as Trustee, it is not only permitted but required to hold the funds, "given the parties' undisputed lack of agreement

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<sup>1</sup> In their November 29, 2006 Answer, Triaxx requested and demanded: (1) that the parties to this action be enjoined from instituting any action against Triaxx for the recovery of the disputed funds; (2) that the Court enter judgment in favor of Triaxx; (3) that Triaxx be awarded costs and attorney's fees; (4) denying plaintiff its costs and expenses related to bringing this action; and (5) granting such further and other relief as may be proper.

<sup>2</sup> In support of its Counterclaim, CIBC submitted an affidavit of CIBC's Managing Director, John Rozario and exhibits thereto.

<sup>3</sup> CIBC also argues that summary judgment is particularly inappropriate, when LaSalle made its motion prior to any discovery being taken.

as to their disbursement.” (See Plaintiff’s Memorandum of Law, at p. 5, *citing, Takayama v. Schaefer*, 240 A.D.2d 21, 25 [2nd Dept. 1998]); *E.S.P. Adj. Services, Inc. v. Asta Group* 125 A.D.2d, 849, 850 [3rd Dept. 1986]).

Neither ICP nor CIBC have submitted any evidence that an agreement was reached or that LaSalle was instructed, in any detail, how to distribute the RPFE.<sup>4</sup>

CIBC argues that LaSalle was obligated to release CIBC’s placement agent fee when the transaction closed.<sup>5</sup> Citing *Takayama*, which states that escrow funds should not be released “until the conditions of the escrow agreement are fully performed,” CIBC claims the converse - that it was entitled to payment because conditions of the Placement Agency Agreement were fulfilled and the transaction closed. (*Takayama* at 25). CIBC alleges that LaSalle converted the funds by acting in accordance with ICP’s ‘improper’ instruction, that LaSalle hold the placement agent fee pending settlement of the warehouse and related

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<sup>4</sup> At oral argument, Plaintiff’s counsel also noted that there is no written escrow agreement between the parties (Tr. p. 8).

<sup>5</sup> CIBC relies on §5 of the Placement Agency Agreement, which states that:

In consideration of the placement services to be provided by each of the Placement Agent and the Co-Placement Agent hereunder with respect to the Offered Securities, the Co-Issuers agree to pay each of the Placement Agent and the Co-Placement Agent a placement fee, in Federal (same day) funds simultaneously with the issuance of the Offered Securities *on the Closing Date*, as separately agreed prior to the date hereof with the Placement Agent and the Co-Placement Agent, regardless of whether the Offered Securities were placed with investors identified by the Placement Agent, the Co-Placement Agent or another party. [Placement Agency Agreement, §5 (emphasis added)].

It should be noted, however that the language cited by CIBC does not provide LaSalle with specific instructions on how to pay the money or a means of making that determination.

expenses between CIBC and ICP. (CIBC's Memorandum of Law p. 9).<sup>6</sup>

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law. (*Ayotte v. Gervasio* 619 N.E.2d 400, 401 [1993]; *See also Santiago v. Filstein* 35 A.D.3d 184, 185-186 [1st Dept. 2006], *citing Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). LaSalle has made such a showing, with regards to CIBC's conversion claim, by demonstrating: that it holds funds to which ICP and CIBC both claim rights; that it did not receive adequate instructions to distribute the funds under the circumstances; and, that it claims no interest in the disputed funds. (Sumser Affidavit, ¶¶10, 12, 14).

Once the proponent has made such a showing, the burden shifts to the party opposing the motion to produce proof sufficient to establish the existence of material issues of fact or tender an acceptable excuse for its failure to do so. (*Zuckerman v. City of New York* 49 N.Y.2d 557, 560 [1980]; *See also Flores v. City of New York* 29 A.D.3d 356, 358 [1st Dept. 2006]). CIBC has presented no evidence that LaSalle was provided with clear instructions specifying, among other things, how much was to be paid to each party or what, if any, agreement had been reached. CIBC's mere allegation that the Trustee "improperly exercised dominion and control over the placement agent fee" is insufficient to preclude summary judgment. (*Zuckerman* at 562).

Even assuming the truth of CIBC's allegations, for the purpose of this motion, the

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<sup>6</sup> CIBC also argues that it provided documentation that the expenses related to the warehouse were settled to ICP's specification (*See Rozario Aff. Exs. G,H,J,L*). Nevertheless, e-mails discussing particulars of the underlying transaction cannot substitute for a clear instruction to LaSalle as to how the RPFE was to be distributed.

conversion claim is without merit. (David D. Siegel, *New York Practice* §281 [4th ed., West Group Online Edition, Current through 2007]). At no point did LaSalle's retention of the funds constitute 'unauthorized' exercise of dominion or control, as is necessary for a conversion claim. [Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David C. Cook, *New York Practice Series - New York Law of Torts* Chapter 2, §2:12 [Online Database updated August 2006]). Instead, it acted appropriately by declining to release the disputed funds and by seeking interpleader. In *Takayama*, the Second Department stated that an interpleader action is appropriate, and perhaps the safest course where ownership of funds held in escrow is disputed. (*Takayama* at 26). Alternately, "...the [escrow agent] may attempt to facilitate a settlement of the dispute, or hold the funds indefinitely." (*Id.*). Consequently, CIBC's conversion claim is without merit and summary judgment is granted in favor of LaSalle under §3212.

In addition to the reasons already discussed, LaSalle is entitled to interpleader relief because, as defined in §1006(a), it is a stakeholder, i.e. "a person who is or may be exposed to multiple liability as the result of adverse claims. (*See also, Fischbein, Badillo, Wagner v. Tova Realty Co.*, 193 A.D.2d 442, 444 [1st Dept. 1993]). LaSalle qualifies as a stakeholder under this definition, and as provided by §1006(f), it seeks to pay the disputed funds to the court and thereby be released from liability to any of the claimants.

CPLR §1006(f) "sets up a procedure whereby [a] stakeholder can move to be discharged...when it is established that the stakeholder is no more than that, and that the sole

battle is between the claimants.” (Siegel’s at §149).<sup>7</sup> When the court grants the stakeholder’s action for interpleader, the resulting judgment between the claimants discharges the stakeholder from liability, in whole or in part, from any party and protects the stakeholder from any further suit by any of those claimants. (CPLR §1006[f], *See also Siegel’s supra; David Day Realty, Inc. v. Arthur Stein* 178 A.D.2d 374, 374 [1st Dept 1991]). The court may also impose such terms relating to payment of expenses, costs and disbursements as may be just and which may be charged against the subject matter of the action. (CPLR §1006[f]).

Moreover, as the Second Department has held, where the party seeking interpleader is a neutral stakeholder, forced to participate in a dispute between two defendants, it is an “improvident exercise of discretion” and reversible error to deny the interpleading party’s request for an award of costs, disbursements, and reasonable attorney’s fees. (*American International Life Assurance v. Ansel*, 273 A.D.2d 421, 422 [2nd Dept. 2000]).

LaSalle has asserted no ownership to the funds. However, CIBC, citing *Involotska v. Greenpoint Bank* (8 A.D.3d 623, 625 [2d Dept 2004]), argues that, even where a party seeking interpleader claims no interest to the disputed funds, it still might not qualify as a “mere stakeholder.” Relying on *Involotska*, CIBC asserts that discharge is an inappropriate remedy where there is an independent basis of liability against the stakeholder and further contends that an allegation that the stakeholder acted improperly or inconsistently with its obligations is sufficient to deny interpleader relief and discharge. (*Id.* at 624-25); *See also*,

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<sup>7</sup> §1006(f) instructs that the stakeholder seeking discharge “...shall submit proof by affidavit or otherwise of the allegations in his pleading.” LaSalle has submitted this proof in the Sumser affidavit and exhibits thereto.

*Birnbaum, v. Marine Midland Bank*, 96 A.D.2d 776, 777 [1st Dept. 1983]). Obviously, because the conversion claim is without merit, this argument is moot.<sup>8</sup>

The final question is whether LaSalle is entitled to expenses, costs and disbursements, including attorneys fees. CPLR §1006(f) provides for the award of expenses, costs and disbursements “as may be just” to the stakeholder, which “may be charged against the subject matter of the action.”

LaSalle cites several cases in support of its argument that expenses, costs and disbursements, including attorneys’ fees, are warranted. In *American International Life Assurance v. Ansel*, the Second Department held that it was an improvident exercise of discretion for the court below to have denied plaintiff’s motion for costs, disbursements and an award of a reasonable attorney’s fee when plaintiff, “a neutral stakeholder with no interest in the disputed matter, was forced to participate in a dispute between the two defendants.” (*supra* at 422).

In *Fischbein, Badillo, Wagner v. Tova Realty Co.* (193 A.D.2d 442, 442-443, 445 [1st Dept. 1993]), the First Department held that the trial court erred in charging only one of two parties disputing funds in an escrow account with payment of attorneys fees to a law firm that had been holding those funds and was granted interpleader relief, holding that the fees should have been imposed equally against the two claimants, neither of whom had shown a superior right to the funds. (*Id.* at 444-445). It noted, however, that, as set forth clearly in §1006, the court has discretion to award such expenses. (*Id.*).

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<sup>8</sup> Moreover, *Inovlotska* is distinguishable because, in that case, the bank was aware who owned the funds.

In *Lincoln Life Annuity* (31 A.D.3d 1, \*8 [1st Dept. 2006]), the First Department held that the court below had correctly granted a plaintiff insurance company's motion for interpleader relief when it was faced with "conflicting demands made upon it for payment of the policy proceeds, neither of which was 'patently without substance.'" Furthermore, referring to *American International* and *Fischbein*, the Court also held that the motion court did not improvidently exercise its discretion in ordering a framed issue hearing on plaintiff's claim for costs, disbursements and reasonable attorneys' fees.<sup>9</sup>

CIBC's first argument, that LaSalle should not be awarded expenses, costs and disbursements because it is not entitled to discharge, is obviously moot.

CIBC argues that I should exercise my discretion and deny LaSalle's motion because LaSalle has not acted equitably. (*See, e.g., Amarant v. D'Antonio*, 197 A.D.2d 432 [1st Dept. 1993]).<sup>10</sup> In support of this argument, CIBC states only that "it is LaSalle's failure to act in accordance with its duties and disburse the funds to CIBC that caused the filing of the instant lawsuit." I find this argument unpersuasive for the same reasons I have granted Plaintiff's request for discharge.

CIBC further contends that if fees and costs should be imposed against any party, they should be imposed against ICP alone for the reason that ICP's claim to the funds is not only "less than compelling" but non-existent. (*Lincoln Life* at \*11-12 (McGuire, J.

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<sup>9</sup> The Court qualified its holding by noting that any award of attorneys fees should be limited, given that the plaintiff had no interest in the underlying dispute and was required to establish only its entitlement to interpleader relief as a neutral stakeholder. (*Lincoln Life* at \*8-9).

<sup>10</sup> *Amarant*, however, neither involves an interpleader situation nor discusses attorneys fees.

concurring). Because the Placement Agency Agreement does not provide, among other things, the amount that LaSalle is to pay CIBC, I cannot conclude, as CIBC suggests, that this agreement unequivocally establishes that ICP has no claim to the funds.

Finally, CIBC argues, in a footnote, that even if, LaSalle is granted attorneys fees, that these fees should be limited to those directly incurred in the interpleader action, specifically, in “effecting a deposit and discharge.” CIBC argues that an interpleading party may not recover expenses in defending against an independent claim, and cites *Nat’l Cold Storage Co. v. Tiya Caviar Co.* (52 Misc.2d 289, 290 [N.Y. Sup 1966]). This case, however, is distinguishable, because here, unlike in *Nat’l Cold Storage*, LaSalle was only charged with the conversion counterclaim after bringing the interpleader action.<sup>11</sup> Moreover, because the conversion counterclaim is without merit, the equities lie with LaSalle.

Next, I turn to ICP’s opposition to attorney’s fees. ICP emphasizes that 1006(f) permits the court to “impose such terms relating to payment of expenses, costs and disbursements *as may be just*” [emphasis added] and refers to a Third Department case for the well understood interpretation of the phrase “as may be just” in subdivision (f) as indicative that it is a matter of the Court’s discretion whether payment of such expenses shall be granted. (See *Merrimack Mut. Fire Ins. Co. v. Moore* 91 A.D.2d 759 [3rd Dept. 1982]). ICP also cites Justice McGuire’s concurrence from *Lincoln Life* in support of the argument that I should take into account the “less than compelling nature of either claimants claim to the funds at issue. (*Lincoln Life* 31 A.D.3d 1, 11-12 [1st Dept. 2006]).

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<sup>11</sup> It should be noted that, at oral argument, CIBC asserted that it had prepared papers and had planned to file against LaSalle and ICP. (Tr. p. 17).

ICP argues that LaSalle acted inequitably because it demanded the return of \$716,688.00 it had released to ICP, after LaSalle realized that ICP and CIBC disputed how the funds should be distributed. ICP further argues that, LaSalle knew CIBC had no claim to those funds, a fact they claim CIBC confirmed, and that LaSalle only demanded return of the funds in order to avoid revealing to CIBC that it had disbursed the funds in the first place and thereby avoid a lawsuit by CIBC. As previously discussed, it is evident that, under the circumstances, LaSalle lacked clear guidance to enable it to distribute the RPFE fund. Consequently, I am not persuaded either that LaSalle acted inequitably upon learning of the dispute between ICP and CIBC or that I should relieve ICP of any obligation to contribute to expenses, costs and disbursements awarded LaSalle.

For the foregoing reasons, it is ORDERED that:

Plaintiff is DISCHARGED from this action, pursuant to CPLR §1006(f), and I hereby enjoin any further claims against LaSalle with regards to the disputed funds described in the interpleader complaint;

Plaintiff is to deposit these disputed funds with the Court, pursuant to CPLR §1006(f);

Summary judgment is GRANTED in favor of Plaintiff with regards to Defendant's counterclaim for conversion, which is hereby DISMISSED; and

The issue of expenses, costs and disbursements, including attorneys fees is hereby referred to a Special Referee to hear and report with recommendations pursuant to CPLR §4317(b), except that, in the event of and upon the filing of a stipulation of the parties, as

permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue.

Plaintiff is entitled to attorneys' fees from both Defendants; however, only CIBC and not ICP shall be charged with those expenses relating solely to the conversion counterclaim raised by CIBC.

DATED: 5/8/07



J.S.C.

**BERNARD J. FRIED**  
J.S.C.