

HSBC Guyerzeller Bank AG. v Chascona N.V.

2008 NY Slip Op 31510(U)

May 29, 2008

Supreme Court, New York County

Docket Number: 0114705/2003

Judge: Herman Cahn

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

PRESENT: Cahn
Justice

PART 49m

HSBC Goyenseller Bank

INDEX NO.

114725/03

MOTION DATE

MOTION SEQ. NO.

012

MOTION CAL. NO.

Chascona N.Y., et al

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

FILED

JUN 03 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 29, 2008

[Signature]

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 49

----- X

HSBC GUYERZELLER BANK AG,

Plaintiff,

- against -

Index No. 114705/03

CHASCONA N.V., MORA HOTEL CORP., N.V.,
THE STATE OF NEW YORK, THE CITY OF
NEW YORK, NEW YORK, THE CITY OF
NEW YORK, NEW YORK DEPARTMENT OF
FINANCE, CIBC MELLON TRUST COMPANY,
DAIMLERCHRYSLER CANADA INC., DAVID
SABO, and JOHN DOE 1 THROUGH JOE DOE
100, inclusive, the names of the last named
defendants being fictitious, the parties intended
being tenants or persons in possession of portions
of the mortgaged premises described in the complaint
or parties who have an interest, lien or encumbrance
on the subject premises subordinate to plaintiff's
mortgages and whose true names are unknown to
plaintiff,

Defendants,

THE HONORABLE BURTON S. SHERMAN, as
receiver of the subject property pursuant to an order
dated January 5, 2001 and entered on January 16,
2001 in CIBC Mellon Trust Company et al. v
Mora Hotel Corporation N.V. et al., Supreme Court,
New York County Index No. 602149/00,

Additional Defendant.

----- X

HERMAN CAHN, J.:

In this Motion Sequence Number 012, defendants CIBC Mellon Trust Company and
Chrysler Canada Inc. (together, Chrysler) move to dismiss the complaint of substituted plaintiff
Samuel Montagu & Co. Limited (Montagu), now known as HSBC Private Bank (UK) Limited,

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

CPLR 3211 (a) (1), (5), and (7).

The essential facts underlying this action, and the related action entitled *CIBC Mellon Trust Company v Samuel Montagu & Co.*, also pending in this Part under Index Number 602825/03 (Related Action), were discussed in a prior decision entered August 19, 2005 (Prior Decision). That decision denied the motion by Chrysler to dismiss the complaint, and it granted then nonparty Montagu's cross motion to substitute itself as the plaintiff in the action. *Aff'd* 42 AD3d 381 (1st Dept 2007).

In brief, defendants in this action, Chascona N.V. and Mora Hotel Corp. N.V., were, during the relevant time period, the owners of the Gorham Hotel (Hotel) located at 136 West 55th Street in Manhattan, New York. Guyerzeller, which commenced this action to foreclose upon the Hotel, and Montagu are part of the "HSBC" group of banks.

A foreclosure action by a prior holder of the note and mortgage on the Hotel was extinguished as a result of Montagu's purchase of the prior holder's interest by the payment of \$10,200,000. To raise the funds for Montagu's purchase, Guyerzeller lent \$10,300,000 to an entity named Chinablue, controlled by Paolo Cavazza, a defendant in the Related Action. Of that amount, Chinablue transferred \$10,200,000 to Montagu, retaining \$100,000 of the Guyerzeller loan proceeds. Another Cavazza-controlled company, Crocus, issued a note to Guyerzeller, securing \$10,200,000 of the total \$10,300,000 lent by Guyerzeller to Chinablue. As an inducement to Chinablue, to make it possible to eliminate Banque Paribas and its foreclosure action, a 75% owner of the Hotel conveyed a 50% interest in the Hotel to Cavazza.

By assignment dated August 12, 2003, Montagu assigned the note and mortgage to Guyerzeller. Guyerzeller commenced this foreclosure action on August 18, 2003. Pursuant to a

judgment of foreclosure and sale, the Hotel was sold November 18, 2003. The sale referee is holding \$23,100,000 in proceeds, to which the mortgage lien has attached.

Proceeding separately, in 1999 an English court entered a default judgment in favor of Chrysler of more than \$300,000,000 against four officers and directors of a Canadian real estate investment company in which Chrysler invested substantial amounts, Castor Holdings Ltd., and the companies that they manipulated, including Mora and Chascona. Chrysler asserted in the English action that the \$10,200,000 in Guyerzeller loan proceeds which Chinablue transferred to Montagu was subject to a judgment they had previously obtained against Chinablue. That proceeding culminated in a judgment, dated May 1, 2002, finding that Chinablue and Cavazza have an interest in those proceeds (*see CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 100 NY2d 215, *cert denied* 540 US 948 [2003]).

Because the primary asset of Mora and Chascona, against whom the English Court had rendered a judgment, was the Hotel in Manhattan, Chrysler commenced a foreign judgment recognition proceeding here to enforce the English judgment, CPLR Article 53. In January 2001, Justice Gammerman of this court rendered a judgment and order recognizing the English judgment, and directing entry of a New York judgment against Chascona and Mora in the amount of \$330,000,000. The court also appointed the Receiver, acting as post-judgment execution Receiver of all real and personal property in which Mora and Chascona have an interest, including the Hotel, with the responsibility of marshaling and selling the assets of Mora and Chascona for the benefit of judgment creditor Chrysler. Those dispositions were affirmed by the Appellate Division and Court of Appeals (*CIBC Mellon Trust Co. v Mora Hotel Corp. N.V.*, 296 AD2d 81 [1st Dept 2002], *affd* 100 NY2d 215, *cert denied* 540 US 948 [2003]). Chrysler

commenced the Related Action to aid in the execution of the \$330,000,000 final judgment against Chascona and Mora. Chrysler argues that Montagu engaged in inequitable conduct in collaborating with Mora and Chascona to put the \$10,200,000 fund in the hands of Mora's and Chascona's new 50% equity owner, Cavazza, so that Montagu, which ought normally to come last in priority, could stay ahead of *bona fide* creditors. It casts Montagu as a mere vehicle for the movement of the funds from Cavazza to Mora and Chascona, and to provide the appearance of justification for a continuation of a prior mortgage lien on the hotel, since extinguished.

In support of the instant motion, Chrysler argues that: (1) Montagu cannot pursue a foreclosure action because it has already received full repayment of its loan; (2) Montagu cannot restore its injured status through a fraudulent, hypothetical agreement; and (3) new, controlling law makes Montagu's substitution impermissible. In support of these arguments, Chrysler asserts that Montagu never sued after Mora defaulted in repayment of the loan in August 1997, because Montagu already held the full repayment amount in the cash collateral account, and it was repaid in 2003.

The motion is denied. Chrysler is moving for dismissal of the amended complaint based on CPLR 3211: (a) (1), defense founded upon documentary evidence; (a) (5), action cannot be maintained because of, among other things, payment; and (a) (7), failure to state a cause of action. Chrysler fails to demonstrate an entitlement to dismissal of the amended complaint on any of these grounds.

As for CPLR 3211 (a) (7), Montagu served an amended complaint that contains a valid cause of action for foreclosure by substituting itself in place of Guyerzeller in accordance with the Prior Decision and the Appellate Division's affirmance of that decision, reported at 42 AD3d

381. In that decision, the Appellate Division held that Mora, acting through its Receiver, was entitled to set aside the assignment of the note and mortgage from Montagu to Guyerzeller, because it had not obtained the necessary consent for the assignment. Thus, allegedly, the note and mortgage reverted back to Montagu.

Chrylser also asserts that the relatively recent decision by the Court of Appeals in *Reliance Ins. Co. v PolyVision Corp.* (9 NY3d 52 [2007]) mandates a reversal of the disposition described above. In *Reliance Ins. Co. v PolyVision Corp.*, the Court of Appeals answered in the negative, the following certified question:

[W]hether CPLR 205 (a) – which, in appropriate instances, adds a six-month grace period to the statute of limitations – permits a corporation to refile an action originally commenced in the name of a different, related corporate entity and subsequently dismissed for naming the wrong plaintiff.

In *Reliance Ins. Co. v PolyVision Corp.*, the Court of Appeals stated that, for unknown reasons, “RNY,” a wholly-owned subsidiary of “RIC” brought the action instead of the proper plaintiff, RIC. Here, however, Montagu became the “proper” plaintiff only after it was determined that Guyerzeller did not have standing to bring this action, because Montagu never received the requisite consent to assign the note and mortgage and, under applicable English law, the failure to do so voided the assignment. Thus, the situation presented here is not the same as the one addressed in *Reliance Ins. Co. v PolyVision Corp.*, and both this court and the Appellate Division relied upon CPLR 1018 in permitting the substitution, not CPLR 205 (a), which was the provision at issue there.

As for the CPLR 3211 (a) (5) ground, payment, asserted in connection with CPLR 3211 (a) (1), dismissal is warranted “only if the documentary evidence submitted conclusively

establishes a defense to the asserted claims as a matter of law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citation omitted]). Such is not the case here.

Chrysler argues that newly-obtained evidence reveals that Montagu discharged the loan and, therefore, it no longer has the right to foreclose on the property, and that the obligation could not have been “assigned” to Guyerzeller or “restored” to Montagu. According to Chrysler, the documentary evidence consists primarily of: (1) an August 13, 2003 Guyerzeller customer advice slip issued to Mora and a corresponding 2003 Mora account statement, both of which reflect that the \$14,101,781.69 paid to Montagu, which was the full outstanding amount of the loan, was a “payment in fav. of Mora Hotel Corp. N.V.”; (2) an August 18, 2003 internal Montagu memorandum entitled “Mora Hotel Corp. – Loan Repaid,” reporting that “the Mora loan was fully repaid on 13 August 2003, with USD 14,101,730.69 being received from HSBC Guyerzeller by order of Mora Hotel Corp”; and (3) a 2007 Mora account statement which shows that when the banks purported to “unwind” the assignment transaction and “restore” themselves to their 2003 pre-assignment positions through the Restoration Agreement, the \$17,000,000 payment from Montagu went directly back into Mora’s account, and not to Guyerzeller to “repay” it for the alleged assignment. Thus, according to Chrysler, Montagu removed the loan from its books, and it is improperly using this foreclosure action to pay off Guyerzeller’s unsecured loan to Cavazza/Chinablue.

In opposition, Montagu argues that the mortgage loan was assigned, not repaid. It also contends that, in recognition of the rulings about the validity of the assignment, Montagu and Guyerzeller entered into a “Restoration Agreement,” dated October 23, 2007, to restore the

parties' positions as they were prior to the 2003 assignment.

Even when considering Chrysler's newly-obtained documentary evidence, Chrysler fails to adequately explain the disposition of the obligation associated with the note and mortgage, and the basis for deeming the loan "discharged." The court cannot ascertain conclusively that the banks' internal notations establish that Montagu irrevocably assigned any rights that it had vis-a-vis the note and mortgage upon which it seeks to foreclose, or whether the payment constituted a satisfaction of the debt. That the August 18, 2003 internal Montagu memorandum recited the Mora loan as "Repaid" is not necessarily inconsistent with the assertion that the reference is to payment for the assignment, and not a discharge of the outstanding obligation. Thus, the evidence does not "utterly refute" the factual allegations and, therefore, it does not conclusively establish a defense as matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382 [1st Dept 2008]; *Barghout v Dweck*, 244 AD2d 190 [1st Dept 1997]).

Moreover, even if the documentary evidence, alone, were sufficient, to establish a prima facie entitlement to the relief sought, Montagu has submitted controverting evidence (*see e.g.*, Clarke Aff., Exh. 17 [Deed of Assignment, dated August 12, 2003]; Clarke Aff., Exh. 43 [e-mail correspondence as to the intended assignment]).

Furthermore, the assertion that Montagu will not produce documents relating to the Restoration Agreement until after the disposition of this motion is inconsequential. Although Chrysler seeks those documents to support its assertion that the Restoration Agreement is a sham, the evaluation of extrinsic evidence (i.e., documents relating to the Restoration Agreement) would be more appropriate on a motion for summary judgment. Chrysler's

argument – that Montagu asserts that the basis for maintaining this action is the Restoration Agreement – is unpersuasive because, as discussed above, the basis is the prior dispositions rendered by this court as well as by the Appellate Division.

Accordingly, it is

ORDERED that the motion is denied; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 20 days after service of a copy of this order with notice of entry.

Dated: May 29, 2008

ENTER:



J.S.C.

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