

IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.

2008 NY Slip Op 32644(U)

September 26, 2008

Supreme Court, New York County

Docket Number: 604013/06

Judge: Herman Cahn

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

PRESENT: Herman Cahn
Justice

PART 49M

IRB-BRASIL RESSEGUROS S.A.,

INDEX NO. 604013/06

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

^{-v-}
Eldorado Trading Corp. Oration LTD., Eldorado S.A. (formerly Eldorado S.A. Comercio, Indústria E Importação) and Verpar S.A. (formerly Verpar Comercio E PARTICIPAÇÕES S.A.)

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

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

FILED

OCT 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/26/08

Herman Cahn
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: IAS PART 49

-----X
IRB-BRASIL RESSEGUROS S.A.,

Plaintiff,

-against-

Index No. 604013/06

ELDORADO TRADING CORPORATION LTD.,
ELDORADO S.A. (formerly ELDORADO S.A.
COMERCIO, INDUSTRIA E IMPORTACAO), and
VERPAR S.A. (formerly VERPAR COMERCIO E
PARTICIPACOES S.A.),

Defendants.

-----X
CAHN, J.:

FILED
OCT 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff IRB-Brasil Resseguros S.A. (IRB) brings this action to recover amounts allegedly due it as the owner of a Permanent Global Note issued by defendant Eldorado Trading Corporation Ltd. (Eldorado), and guaranteed by defendants Eldorado S.A. and Verpar S.A. (the Guarantors).

IRB now moves for summary judgment on its two causes of action for breach of contract, CPLR 3212.

BACKGROUND

The following facts are not in dispute.

In November of 1996, Eldorado commenced a US \$50,000,000 Guaranteed Euro Medium-Term Note Program (Note Program), under which it agreed to issue medium-term notes to investors. The Note Program was governed by a Fiscal Agency Agreement (Fiscal Agreement) that was executed by Eldorado, the Guarantors, and Chase Manhattan Bank (Chase), as Fiscal Agent, on November 8, 1996, (Acquarone Aff., Exh. A). Under the terms of the Fiscal Agreement, any notes issued under the Note Program would be “unconditionally and irrevocably

guaranteed by the Guarantors” (id., § 2). A Guarantee to that effect was executed by Eldorado S.A. and Verpar S.A. that same day (id., Exh. B). Eldorado and the Guarantors also executed a Dealer Agreement with non-parties Paxton Securities Ltd. (Paxton) and Boavista Banking Ltd. (Boavista), pursuant to which Paxton and Boavista agreed to purchase and/or place any notes that were issued under the Note Program (Verissimo Aff., Exh. C).

Pursuant to the terms of the Fiscal Agreement, the notes were to be issued, in bearer form, as Temporary Global Notes, and later exchanged for Permanent Global Notes (Acquarone Aff., Exh. A, § 5). The Fiscal Agreement provided that, three days prior to the sale and placement of any note(s), Eldorado would cause a Pricing Supplement to be prepared, setting forth, inter alia, the note’s issue and maturity date, aggregate principal amount, issue price, and rate of interest (id., § 4). Eldorado also was required to instruct the Fiscal Agent to complete, authenticate, and deliver the relevant note(s) for deposit, on behalf of the subscribers, in a common depository with Euroclear or Cedel Bank (id.).

On November 22, 1996, Eldorado executed a Permanent Global Note, bearing ISIN number XS007159498-9, in the principal face amount of \$15,000,000 (the Global Note) (Caruso Aff., Exh. B). The Global Note was duly authenticated by Chase and deposited in a common account at Euroclear. Although the aggregate principal amount of the Note was \$15,000,000.00, the Pricing Supplement, executed by Eldorado, stated that the issue price was to be 79.019669% of the face value, i.e. \$11,852,950.35 (Caruso Aff., Exh. F). The Pricing Supplement further provided that the Global Note would have a maturity date of November 22, 2001, and that periodic interest would be paid by Eldorado at a fixed rate of 11% per annum on the 22nd of each May and November (id.).

IRB alleges that the Global Note was acquired by Lehman Brothers and Smith Barney on its behalf in November 1996. It is currently held by BB Securities Limited (BB Securities), on IRB's behalf, in a safe custody account at Euroclear. IRB alleges that, although Eldorado made five timely payments of interest on the Global Note between May 22, 1997 and May 24, 1999, and two late payments of interest due on November 22, 1999 and May 22, 2000, Eldorado has made no further interest payments on the Global Note. Eldorado has also failed to pay the principal due upon the maturity date of November 22, 2001.

On June 5, 2001, IRB sent a letter to each of the Guarantors, giving notice of Eldorado's default with respect to the missed payments of interest, and demanding payment (Acquarone Aff., Exh Q; Kuck Aff., Exh. F). On May 9, 2002, IRB sent a second notice of default to Eldorado and the Guarantors, declaring all principal and interest on the Global Note immediately due and payable (Kuck Aff., Exh. F).

In its response dated July 12, 2002, Eldorado stated that it had yet to receive proof that IRB is, or continues to be, the holder of the Global Note (id., Exh. G). Eldorado also indicated that it had never received the full \$15,000,000 that it had expected to receive upon issuance of the Global Note, and that it would like an opportunity to discuss this issue, among others, once IRB had produced evidence of its status as holder (id.).

On November 20, 2006, IRB commenced the instant action, asserting causes of action against Eldorado and the Guarantors for breach of contract. IRB now moves for summary judgment.

DISCUSSION

A motion for summary judgment will be granted only where the movant has made a

prima facie showing of entitlement to judgment as a matter of law by the “tender of evidentiary proof in admissible form” (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), sufficient to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once a movant has made such a showing, the party opposing the motion has the burden of producing evidentiary facts sufficient to raise triable issues of fact (Zuckerman, 49 NY2d at 562). Because issue finding rather than issue determination is key, summary judgment will not be granted where there is a factual issue (Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]).

Here, it is not disputed that Eldorado issued the Global Note under the Note Program; that the Guarantors guaranteed its payment pursuant to the Fiscal Agreement; and that Eldorado stopped paying interest on the Global Note after making five timely and two late payments. However, the parties do dispute whether IRB has proved its ownership of, or its entitlement to sue directly on, the Global Note.

IRB contends that summary judgment is warranted, as the evidence establishes that it is the owner/holder of the Global Note. In support of this contention, it submits an affidavit from Sergio Caruso, its Chief Financial Officer, who states that IRB’s records reflect that it acquired the Global Note from Eldorado in November 1996, and that it remains the holder of the Global Note.

The Global Note is currently held by BB Securities, on IRB’s behalf, in a safe custody account at Euroclear. In further support, IRB submits copies of the confirmations and account statements from Lehman Brothers and Smith Barney, to establish that IRB purchased \$15,000,000 worth of Eldorado’s Euro Medium-Term Notes (Caruso Aff., Exh. A; Acquarone

Aff., Exhs. C-F). IRB also submits copies of two notarized letters from Euroclear to BB Securities, certifying that \$15,000,000 of Eldorado Notes, bearing ISIN XS0071594989, are held in BB Securities Clearance Account # 97497 at Euroclear (see Caruso Exh. D; Acquarone Aff., Exhs. I and K); and copies of two letters from BB Securities to IRB, stating that these bonds, held in its safe custody account, were beneficially owned by, or held on behalf of, IRB (see Acquarone Aff., Exh. H and J). Additionally, IRB has produced copies of various account statements from BB Securities, to confirm that the interest paid by Eldorado on the Global Notes was credited by BB Securities to IRB (Acquarone Aff., Exhs. L-P).

IRB contends that under the Terms and Conditions of the Notes (Terms and Conditions), which are incorporated by reference into, and govern, the Global Note, the failure to pay any interest due, or any amount of principal in respect of the Notes, constitutes an Event of Default (id., Exh. Condition 11). While the Terms and Conditions provide that, if an Event of Default occurs and continues, “Definitive [bearer] Notes will be issued in exchange for beneficial interests in Permanent Global Notes” (id., Condition 3.1), IRB notes that Eldorado apparently has refused to do so upon its default.

IRB notes, however, that the Terms and Conditions also provide that,

[u]pon the occurrence of an Event of Default (as defined in Condition 11) while Notes are represented by a Permanent Global Note, each person that is shown by the records of Euroclear or Cedel Bank as being entitled to a particular number of Notes represented by a Permanent Global Note shall be entitled to file any claim, take any action or institute any proceeding to enforce, directly against the Issuer, the obligations of the Issuer hereunder to pay any amount due in respect of such Notes; *provided, however*, that the bearer of any such Permanent Global Note shall not have filed a claim, taken any action or instituted proceedings to enforce the same in respect of such Notes.

(id., Condition 2.3). The Terms and Condition further provide that

[f]or purposes of the foregoing sentence, the securities account records of Euroclear and Cedel Bank shall, in the absence of manifest error, be conclusive evidence of the identity of such persons and of the principal amount of Notes represented by any such Permanent Global Note

(id.)

In addition, IRB notes that the Global Note also provides that,

[n]otwithstanding any provision to the contrary contained in this Permanent Global Note, the Issuer irrevocably agrees, for the benefit of [the] Holder and its successors or assigns, that upon the occurrence and continuance of an Event of Default as described in Condition 11, such Holder or its successor or assigns may, without the consent and to the exclusion of the bearer hereof, file any claim, take any action or institute any proceeding to enforce, directly against the Issuer, the obligation of the Issuer hereunder to pay any amount due in respect of each Note represented by this Permanent Global Note which is credited to such person's securities account with Euroclear or Cedel Bank without the production of this Permanent Global Note, *provided* that the bearer hereof shall not theretofore have filed a claim, taken action or instituted proceedings to enforce the same in respect of such Note

(id., Exh. B). The Global Note further provides that

[f]or purposes of this Permanent Global Note, the securities account records of Euroclear or Cedel Bank shall, in the absence of manifest error, be conclusive evidence of the identity of the Holders of Notes and of the principal amount of Notes ... represented by this Permanent Global Note credited to the securities accounts of such Holders

(id.).

IRB contends that, as the only note at issue is the Global Note, and as the Global Note is held at Euroclear by BB Securities, on its behalf, it is entitled to bring this action as the beneficial holder/owner of the Global Note.

Defendants argue that the motion should be denied, as IRB has failed to produce the original note. Defendants argue that IRB's attempt to establish ownership of the Global Note through the various letters and communications from third-party financial institutions is unavailing, as these documents constitute inadmissible hearsay, and cannot be used for such purpose on a summary judgment motion. In any event, defendants contend that plaintiff's argument, that it is the owner/holder of the Global Notes, is undercut by the two letters from Euroclear to BB Securities, which establish that BB Securities, and not IRB, is reflected in the records of Euroclear, as the holder of the Global Note.

Defendants argue that summary judgment also must be denied because a triable issue of fact exists whether defendants were fraudulently induced to enter into the Global Note, and thus whether the Global Note is void. Specifically, they contend that in November 1996, Paxton and Boavista had agreed that Paxton would purchase a \$15,000,000 Note pursuant to the Note Program, and provide Eldorado with a full \$15,000,000 in funding. Defendants contend that, despite such representation, Eldorado received only \$11,800,000 in loan proceeds upon the issuance of the Global Note. They contend that Eldorado did not discover Paxton's alleged misrepresentation until 1998, and that only after Paxton refused to adjust the interest payments on the Global Note to reflect the actual principal amount of the loan, did Eldorado stop making payments.

Because the Court finds that plaintiff has failed to produce evidence sufficient to establish its actual status with respect to, and thus its right to sue upon, the Global Note, plaintiff's motion for summary judgment is denied.

First, the Court notes that IRB has not submitted proof in admissible form sufficient to

establish that it is the beneficial owner of the Global Note. Notably, plaintiff has proffered no affidavit from BB Securities, the holder of record on the Euroclear account, to establish IRB's status with respect to the Global Note. Although IRB argues that the two letters from BB Securities were received and maintained by IRB in the normal course of its business, and thus are admissible as evidence, such fact does not establish the truth of the matters asserted within the letters themselves. Additionally, the Court notes that the averment, that these documents were received and maintained in IRB's files in the regular course of business, was made solely through the affidavit of Acquarone, the General Counsel of IRB,¹ and not by an individual responsible for maintaining the company's records.

In any event, even if the Court were to find that IRB had presented sufficient proof, in admissible form, to establish that it is the beneficial owner of the Global Note, plaintiff's motion for summary judgment must still be denied, as IRB has not established that a beneficial owner has the right to sue on the Global Note. As indicated above, the Terms and Conditions provide that, in the event of default, Eldorado was to issue "Definitive Notes" in exchange for beneficial interests in the Global Notes. Here, it is undisputed that no such definitive bearer notes have been issued. While the Global Note, and the Terms and Conditions, provide that the Holder, "or its successors or assigns," may take action or institute a proceeding against the Issuer without

¹ According to his affidavit, Acquarone's

primary responsibilities are to advise IRB's Board of Directors and officers on legal matters and legal strategy issues, to represent the Company and its affiliates in litigation and to manage the legal department

(see Acquarone Aff., ¶ 1).

producing the Global Note, IRB has presented no admissible evidence to establish that it is such a holder, or a successor or assign of such a holder. Rather, the records of Euroclear, which, in the absence of manifest error, are considered conclusive evidence of the identity of such holder, indicate that a party other than IRB, i.e., BB Securities, currently maintains that status.

Nevertheless, plaintiff notes that, in Springwell Navigation Corp. v Sanluis Corp., S.A. (14 Misc3d 1206 (A), 2006 NY Slip Op 52425 [U] [Sup Ct, NY County 2006]), the court granted summary judgment to a beneficial owner of a note that also was held in a third-party custodial account, upon the tender of sufficient proof of beneficial ownership. It is noted, however, that the Appellate Division, First Department has since reversed that judgment, holding that the court “erred in finding that plaintiff had a right to sue on the Note itself, inasmuch as plaintiff was not the holder of a negotiable instrument” (Springwell Navigation Corp. v Sanluis Corporacion, S.A., 46 AD3d 377 [1st Dept 2007]). IRB has identified no other authority establishing that, as beneficial owner, it would be entitled to bring this action under those provisions of the Terms and Conditions or Global Note that grant such right to a holder, or its assignee.

As plaintiff’s motion for summary judgment is denied for the reasons stated above, the Court need not reach the merits of defendants’ contention that the Note is void, as procured by fraud.²


² In any event, the Court notes that, to the extent that defendants base this defense on the alleged representation by Paxton and/or Boavista, that “Paxton would purchase a U.S. \$15 million Note pursuant to the Note Program and, in turn, provide Eldorado U.S. \$15,000,000 in funding” (Verissimo Aff., ¶ 13), defendants have failed to allege facts to show that such claimed misrepresentation would be a defense to IRB’s claim under the Global Note, much less to the Guarantee. Additionally, it appears that defendants would be hard pressed to establish justifiable reliance on such representation, as the Pricing Supplement that Eldorado admittedly executed on

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment is denied.

Dated: September 26, 2008

ENTER:



A handwritten signature in cursive script, appearing to read "J.S.C.", is written over a horizontal line.

J.S.C.

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OCT 01 2008
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NEW YORK

November 19, 1996, after the alleged representation at issue, expressly states that the issue price of the Global Note was to be 79.01969% of its face value, i.e., \$11,852,950.35 (see Caruso Aff., Exh. F).