

Bank of Am., N.A. v Prima Capital Advisors LLC

2010 NY Slip Op 34061(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 600740/10

Judge: Melvin L. Schweitzer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45

Bank of America

INDEX NO. 600740/10

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

Prima Capital Advisors

MOTION CAL. NO. _____

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 *by plaintiff to dismiss*

defendant Prima Capital's second affirmative defense and counterclaims is GRANTED;

cross-motion by defendant Prima Capital to dismiss Interpleader and summary judgment is DENIED;

Motion by ~~the~~ defendant Oz Master Fund, Oz Global and Goldman Sachs Profit Sharing for summary judgment is DENIED

all per the attached decision and order.

Dated: October 8, 2010

Melvin L. Schweitzer
J.S.C.

MELVIN L. SCHWEITZER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

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

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

PRESENT: MELVIN L. SCHWEITZER
J.S.C. Justice

PART 45

Bank of America

INDEX NO. 600740/10

MOTION DATE _____

- v -
Prima Capital Advisors

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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 by plaintiff to dismiss defendant Prima Capital's second affirmative defense and counterclaims is GRANTED;

cross motion by defendant Prima Capital to dismiss counterpleader and for summary judgment is DENIED;

Motion by defendants Oz Master Fund, Oz Global and Goldman Sachs Profit Sharing for summary judgment is DENIED.

All per the attached Decision and Order.

Dated: October 8, 2010

Melvin L. Schweitzer
J.S.C.

MELVIN L. SCHWEITZER J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 45

-----X
BANK OF AMERICA, N.A., as successor by merger to :
LaSalle Bank N.A., in its capacity as Trustee under that :
certain Indenture, dated as of November 6, 2006, :
among Prima Capital CRE Securitization 2006-1 Ltd., :
Prima Capital CRE Securitization 2006-1 Corp., and :
Bank of America, N.A., :

Interpleader Plaintiff, :

-against- :

PRIMA CAPITAL ADVISORS LLC, OZ MASTER :
FUND, LTD., OZ GLOBAL SPECIAL :
INVESTMENTS MASTER FUND, L.P., GOLDMAN :
SACHS & CO. PROFIT SHARING MASTER :
TRUST, CEDE & CO., as Holder of certain Notes and :
nominee name of the Depository Trust Company, :
EUROCLEAR SA/NV, CLEARSTREAM :
INTERNATIONAL S.A., DOES 1 THROUGH 100, :
owners of beneficial interests in the Notes, :

Interpleader Defendants, :

and :

PRIMA CAPITAL ADVISORS LLC, :

Interpleader Defendant and :
Interpleader Counterclaim :
Plaintiff, :

- against - :

BANK OF AMERICA, N.A., as successor by merger to :
LaSalle Bank N.A., in its capacity as Trustee under that :
certain Indenture, dated as of May 24, 2005, among :
Prima Capital CDO 2005-1 Ltd., Prima Capital CDO :
2005-1 Corp., and Bank of America, N.A., and BANK :
OF AMERICA, N.A., as successor by merger to :

Index No. 600740/10

DECISION AND ORDER

Sequence Nos. 001, 002

LaSalle Bank N.A., in its capacity as Trustee under that :
certain Indenture, dated as of November 6, 2006, :
among Prima Capital CRE Securitization 2006-1 Ltd., :
Prima Capital CRE Securitization 2006-1 Corp., and :
Bank of America, N.A., :

Interpleader Counterclaim :
Defendants :

and :

OZ MASTER FUND, LTD., OZ GLOBAL :
SPECIAL INVESTMENTS MASTER :
FUND, L.P., and GOLDMAN SACHS & CO. :
PROFIT SHARING MASTER TRUST, :

Interpleader Counterclaim :
Plaintiff, :

-against- :

BANK OF AMERICA, N.A., as successor by :
merger to LaSalle Bank N.A., in its capacity as :
Trustee under that certain Indenture, dated as of :
November 6, 2006, among Prima Capital CRE :
Securitization 2006-1 Ltd., Prima Capital CRE :
Securitization 2006-1 Corp., and Bank of America, :
N.A., :

Interpleader Counterclaim :
Defendant. :

-----X

MELVIN L. SCHWEITZER, J.:

Introduction

This interpleader matter arises out of the interpretation of provisions of the transaction documents relating to the issuance of two series of notes. The interpleader plaintiff, Bank of America, N.A. (the Bank), is the trustee under two indentures relating to the issuance of the

notes. It takes the position that there is an ambiguity in the transaction documents relating to the disbursement by the Bank of certain monies generated by investment securities which were purchased with the proceeds from the sale of the notes. As the Bank concluded that it could not determine between competing claims to the monies and that it was subject to multiple liability with respect to its position, it filed an interpleader complaint in this court in March 2010. One group of interpleader defendants counterclaimed seeking declaratory relief with respect to the interpretation of the provisions of the transaction documents. Other interpleader defendants also sought declaratory relief based on a contrary interpretation, and also asserted numerous counterclaims against the Bank.

Background

Facts

Prima Capital Advisors LLC (Prima) is an investment advisory firm that provides pension fund management services to institutional pension funds. Prima also establishes and manages investment vehicles through which its clients and other investors may purchase various types of assets. Prima earns management fees from these activities. In May 2005, Prima created an investment vehicle that issued notes (the 2005 Notes) to various investors (the 2005 Noteholders), including Prima's clients. The investment vehicle is comprised of two separate companies: Prima Capital CDO 2005-1 Ltd. (Prima CDO Ltd.) and Prima Capital CDO 2005-1 Corp. (Prima CDO Corp., and, together with Prima CDO Ltd., the 2005 Issuer). The 2005 Issuer used funds paid by the 2005 Noteholders as the purchase price for the 2005 Notes to purchase commercial mortgage assets (the 2005 Assets) that earn income in the form of interest and

principal. Pursuant to a Collateral Management Agreement, dated May 24, 2005 (the 2005 CMA), Prima CDO Ltd. engaged Prima to serve as Collateral Manager for the 2005 Issuer.

In November 2006, Prima created a second investment vehicle that issued notes (the 2006 Notes and, together with the 2005 Notes, the Notes) to investors (the 2006 Noteholders and, together with the 2005 Noteholders, the Noteholders), including Prima's clients. Like the 2005 Issuer, the investment vehicle is comprised of two separate companies: Prima Capital CRE Securitization 2006-1 Ltd. (Prima CRE Ltd.) and Prima Capital CRE Securitization 2006-1 Corp. (Prima CRE Corp.) (collectively, the 2006 Issuer and, together with the 2005 Issuer, the Issuers). Also, like the 2005 Issuer, the 2006 Issuer used funds paid by the 2006 Noteholders as the purchase price for the 2006 notes to purchase commercial mortgage assets (the 2006 Assets and, together with the 2005 Assets, the Collateral Interests). Pursuant to a Collateral Management Agreement, dated November 6, 2006 (the 2006 CMA and, together with the 2005 CMA, the CMAs), Prima CRE Ltd. engaged Prima to serve as Collateral Manager for the 2006 Issuer.

Pursuant to an indenture executed in 2005 (the 2005 Indenture), the 2005 Issuer engaged LaSalle Bank N.A. (LaSalle) to serve as Trustee with respect to the 2005 Notes. Pursuant to an indenture executed in 2006 (the 2006 Indenture and, together with the 2005 Indenture, the Indentures), the 2006 Issuer engaged LaSalle to serve as Trustee with respect to the 2006 Notes. In or about October 2007, the Bank purchased LaSalle and assumed all of the aforementioned agreements entered into by LaSalle with respect to the Notes, including the Indentures.

The 2005 Issuer issued nine classes of Notes under the 2005 Indenture, which classes are identified in order of seniority (highest to lowest) as classes A-1 through H. The 2005 Indenture designates classes A-1 through F as Senior Notes, and classes G and H as Junior Notes.

Similarly, the 2006 Issuer issued eleven classes of Notes under the 2006 Indenture, which classes are identified in order of seniority as classes A-1 through K. The 2006 Indenture designates classes A through G as Senior Notes, and classes H, I, J and K as Junior Notes. Because each class of Notes is subordinated to the class(es) above it, payment of income from the Collateral Interests (Income) is made to holders of the A Notes first, then the B Notes, and so on. This sequential payment process is referred to as a “Waterfall,” because the income flows down sequentially to each class of Notes.

As Collateral Manager to the Issuers, Prima is expressly tasked, *inter alia*, with “determining whether Collateral Interests have become Impaired Interests or Credit Risk Interests.” CMAs § 2(b). The Indentures define an Impaired Interest as follows:

“A Collateral Interest with respect to which foreclosure or default (whether or not declared) with respect to the underlying Commercial Mortgage Loan has occurred or, with respect to any Collateral Interest that is a CMBS, CRE CDO Security or a REIT Bond (i) the rating of such Collateral Interest has been reduced by at least three rating subcategories or withdrawn by any Rating Agency from the ratings that were in place as of the Closing Date (or, in the case of Substitute Collateral Interest, the date of substitution) or has been put on “credit watch” or similar status for possible downgrading, qualification or withdrawal or (ii) since the date such Collateral Interest is delivered to the Trustee, the principal amount thereof has been reduced without receipt of a corresponding principal distribution as a result of allocation to such Collateral Interest of a “realized loss,” “collateral support deficit,” “additional trust fund expense” or similar item.”

Indentures § 1.1.

The determination of a Collateral Interest as an Impaired Interest affects how payments on that Collateral Interest are allocated among classes of Noteholders. With a normal (unimpaired) Collateral Interest, interest collections are treated as interest proceeds and principal collections are treated as principal proceeds, and both are disbursed by the Bank pursuant to the

priority of payments, depending on such characterization. With an Impaired Interest, however, all payments received are treated as principal proceeds until such payments equal the greater of the original purchase price or par value of the Collateral Interest, and then any excess is treated as interest proceeds. As a result, with an Impaired Interest, only the holders of the senior-most class of Notes will receive income generated by that asset, until such payments equal the purchase price or par value of the asset.

The dispute at the center of the Interpleader here (the Interpleader) concerns two sets of Collateral Interests. The first is a commercial mortgage obligation among the 2006 Assets that is identified as the St. Louis Galleria B-1 Note (the St. Louis Note). The St. Louis Note is an obligation issued by the St. Louis Galleria LLC (the St. Louis Galleria) and supported by commercial real estate loans made to the St. Louis Galleria. In April 2009, the owner of the St. Louis Galleria filed for bankruptcy protection, which constituted a default with respect to the St. Louis Note.

The Bank informed Prima of the default on July 28, 2009. The Bank, following the terms of the 2006 Indenture, treated the St. Louis Note according to the terms set forth in the 2006 Indenture for Impaired Interests. Prima did not object to this treatment.

The second group of Collateral Interests at issue are six classes of collateralized mortgage-backed securities (CMBS) among the 2005 Assets that are identified as CAM 2002-CAM2 classes H through N (the CAM2 CMBS). In or about April 2009, as part of a broad review of CMBS ratings, Standard & Poor's (S&P) placed the CAM2 CMBS on CreditWatch negative. Accordingly, the Bank treated the CAM2 CMBS according to the terms set forth in the 2005 Indenture for Impaired Interests. Prima did not object to this treatment.

In December 2009, the owner of the St. Louis Galleria emerged from bankruptcy and the St. Louis Note was no longer in default. At that time, Prima deemed it necessary and desirable that the St. Louis Note no longer be treated as impaired and, accordingly, that Income from the St. Louis Note be paid to all of the 2006 Noteholders, rather than be restricted to those investors holding the senior-most 2006 Notes. On January 29, 2010, Prima instructed the Bank that it should no longer consider the St. Louis Note to be an Impaired Interest and should disburse Income from the St. Louis Note accordingly (the 2006 Issuer Order). The Bank informed Prima of its concern that following Prima's 2006 Issuer Order could expose the Bank to liability. Upon not getting a satisfactory response from Prima, the Bank decided to solicit the views of the Noteholders, as described below, to determine whether any had objections to Prima's effort to recharacterize the Impaired Interest.

Accordingly, on February 4, 2010, the Bank issued a notice to the 2006 Noteholders regarding Prima's proposed recharacterization of the St. Louis Note (the 2006 Trustee Notice). After describing Prima's position, the Bank stated that it could not determine with certainty whether the Collateral Manager had the power to recharacterize an Impaired Interest as an unimpaired Collateral Interest, since the transaction documents appear to be silent on this point. In addition, the Bank informed the recipients of the notice that, since the resolution of this issue would affect the allocation of payments, the Bank would retain in escrow all interest payments on the St. Louis Note pending resolution of the issue. Lastly, the Bank invited any Noteholder to provide it with input or analysis regarding the interpretation of the provisions of the Indenture relevant to Prima's proposed recharacterization within 45 days of the date of the 2006 Trustee Notice. As indicated in the 2006 Trustee Notice, the Bank has retained in escrow \$2,779,285.08

of interest payments related to the St. Louis Note (plus additional accrued interest) (the 2006 Disputed Funds).

On February 25, 2010, Prima notified the Bank that it is the position of Prima and various Noteholders that (a) the direction to the Trustee set forth in the 2006 Issuer Order falls within the CMA's grant of discretion to the Collateral Manager; (b) the 2006 Issuer Order is valid and contractually binding upon the Trustee; and (c) the Trustee's failure to honor the 2006 Issuer Order is a breach of the Indenture. Accordingly, Prima requested that the Bank honor the 2006 Issuer Order without delay.

On March 5, 2010, another group of Noteholders – namely, OZ Master Fund, Ltd., OZ Global Special Investments Master Fund, L.P., and Goldman Sachs & Co. Profit Sharing Master Trust (the OZ Noteholders) – notified the Bank that it is their position that once a Collateral Interest has become an Impaired Interest under the terms of the Indenture, it is permanently an Impaired Interest and cannot be recharacterized. The OZ Noteholders asserted that neither the definition of an Impaired Interest under the Indenture nor the provisions of the Indenture, the CMA, or the related Offering Memorandum contemplate or otherwise provide for the recharacterization of an Impaired Interest. The OZ Noteholders also claim that market practice generally supports the notion that once a Collateral Interest has become an Impaired Interest, it remains an Impaired Interest.

On February 23, 2010, S&P removed the CAM2 CMBS from CreditWatch negative. At that time, as with the St. Louis Note, Prima deemed it necessary and desirable that the CAM2 CMBS no longer be treated as impaired and, accordingly, that income from the CAM2 CMBS be disbursed to all of the 2005 Noteholders rather than be restricted to investors holding the

senior-most 2005 Notes. Prima instructed the Bank on March 26, 2010 that it should no longer consider the CAM2 CMBS to be Impaired Interests and should disburse Income from the CAM2 CMBS accordingly (the 2005 Issuer Order and together with the 2006 Issuer Order, the Issuer Orders).

On March 24, 2010, the Bank issued a notice to the 2005 Noteholders regarding Prima's proposed recharacterization of the CAM2 CMBS (the 2005 Trustee Notice and, together with the 2006 Trustee Notice, the Trustee Notices). As with the 2006 Trustee Notice, the Bank described Prima's position and stated that the Trustee could not determine with certainty whether the Collateral Manager had the power to recharacterize an Impaired Interest as an unimpaired Collateral Interest. In addition, the Bank informed the recipients that it would escrow all interest payments on the CAM2 CMBS and invited any Noteholder to provide it with input or analysis regarding the proposed recharacterization within 45 days of the date of the 2005 Trustee Notice. As indicated in the 2005 Trustee Notice, the Bank has retained in escrow \$156,783.66 of interest payments related to the CAM2 CMBS (plus additional accrued interest) (the 2005 Disputed Funds and together with the 2006 Disputed Funds, the Disputed Funds).

On March 26, 2010, Prima notified the Bank that it is the position of Prima and various Noteholders that (a) the direction to the Trustee set forth in the 2005 Issuer Order falls within the CMA's grant of discretion to the Collateral Manager; (b) the 2005 Issuer Order is valid and contractually binding upon the Trustee; and (c) the Trustee's failure to honor the 2005 Issuer Order is a breach of the Indenture. Accordingly, Prima requested that the Bank honor the 2005 Issuer Order without delay.

On April 30, 2010, NIBC Credit Management Inc. (NIBC), a Senior 2005 Noteholder notified the Bank that the interest proceeds collected from the CAM2 CMBS should be treated as Principal Proceeds and disbursed according to the principal Waterfall. In other words, NIBC objected to Prima's attempt to recharacterize the CAM2 CMBS as unimpaired. Thereafter, in May 2010, Prima instructed the Bank to invest the Disputed Funds in interest-bearing instruments.

The Bank followed those instructions promptly.

Procedural History

The Bank initiated the Interpleader pursuant to CPLR 1006 on March 23, 2010. On April 19, 2010, Prima answered the Interpleader and asserted counterclaims against the Bank. On May 10, 2010, the OZ Noteholders filed an answer and counterclaim to the Interpleader. On June 2, 2010, the Bank moved to dismiss Prima's second affirmative defense and counterclaims. On July 7, 2010, Prima opposed the Bank's motion to dismiss and cross moved for dismissal of the Interpleader and for summary judgment. On July 27, 2010, the OZ Noteholders moved for summary judgment.

This opinion resolves the issues of (i) the Bank's motion to dismiss Prima's counterclaims; (ii) Prima's cross-motion for dismissal of the Interpleader and for summary judgment; and (iii) the OZ Noteholder's motion for summary judgment.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction.” *Leon v Martinez*, 84 NY2d 83, 87 (1994) (denying motion to dismiss). The court will “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory[.]” *Id.* at 87-88. “In assessing a motion under 3211 (a)(7) . . . , the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one[.]” *Id.* at 88 (internal citations omitted). “[W]hether [the] plaintiff can ultimately establish its allegations is not part of the calculus[.]” *Golden Gate Rehab. & Health Care Ctr., LLC v Giordano*, 22 Misc 3d 136 (A), 2009 WL 444583, at *1 (2d Dept 2009) (internal citations omitted).

Summary judgment is proper where there are no “facts sufficient to require a trial of any issue of fact” and the court can direct judgment in favor of any party “as a matter of law.” CPLR 3212 (b). “The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court.” *See Estate of Hatch v NYCO Minerals, Inc.*, 245 AD2d 796, 747 (3d Dept 1997) (citing *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990)); *RAD Ventures Corp. v Artukmac*, 31 AD3d 412, 412 (2d Dept 2006). As such, where the interpretation of contractual obligations “is determinable by written agreements, the question is one of law, appropriately decided . . . on a motion for summary judgment.” *Marinas of the Future, Inc. v City of N.Y.*, 87 AD2d 270, 277 (1st Dept 1982) (citations omitted). Where “evidence of the terms of a contract and of one party’s breach is clear, summary judgment is

appropriate.” *See CMI II, LLC v Newman & Newman, P.C.*, 17 Misc 3d 1107 (A), 2007 WL 2874961, at *6 (Sup Ct NY Co Oct. 1, 2007) (Fried, J.).

The question at the core of the Interpleader is whether or not Prima has the authority under the relevant transaction documents to recharacterize an investment asset which is an Impaired Interest as an unimpaired Interest. The court also must decide whether the Trustee, in taking its course of action, including filing this action, acted in good faith and reasonably and prudently believed that it was authorized or acting within its rights and powers under the Indentures. For the reasons set forth below, the court holds there is a material question of fact as to whether Prima had authority under the relevant transaction documents to recharacterize an Impaired Interest as an unimpaired Interest. The court also holds that the Trustee acted in good faith, and reasonably and prudently believed that it was authorized or acting within its rights and powers under the Indenture when it followed the course of conduct, including the initiation of this Interpleader, detailed herein.

Section 2(b) of the CMAs states that Prima will provide the Issuer with the service of determining whether Collateral Interests have become Impaired Interests. There is no question that Prima has done so (or concurred with the Bank’s acting as if it had) with respect to the St. Louis Note and the CAM2 CMBS. Tellingly, however, the CMAs do not state that, when the facts dictate such action, Prima will provide the Issuer with the service of determining whether Collateral Interests which it previously determined to be Impaired Interests have become, once again, unimpaired Interests. It is silent on this point.

Section 1(b) of the CMAs provides Prima with full power and authority “to do any and all things in connection with its servicing and management duties which it may deem necessary or

desirable and are permitted or not expressly prohibited by this Agreement or the Indenture.”

Prima believes with a high degree of certitude, which resulted in it accusing the Bank of bad faith, that Section 1(b) does permit it to perform the service of determining that an Impaired Interest must, once again, be treated as an unimpaired Interest.

Prima argues, in the first instance, that a stakeholder seeking to commence an interpleader must establish that it is subject to multiple liability as required by CPLR 1006(a), not merely that it is unable to determine to whom monies should be disbursed. *See* CMI II, 17 Misc 3d 1107 (A) 2007 WL 287461 at *9; *Royal Bank of Comm v Weiss*, 172 AD2d 167, 169 (1st Dept 1991). It posits that no Noteholder has notified the Bank of an intent to assert a claim or, even if it had, the Noteholder would be prohibited from asserting a claim without first satisfying certain conditions precedent in Section 5.8 (the no action clauses) of the Indentures. Prima says this set of circumstances establishes an absence of multiple liability. Furthermore, Prima contends that even were the conditions precedent satisfied, the Bank would be expressly relieved from liability for following Issuer Orders and that the Issuers have indemnified the Bank for any such liability.

The Bank counters that Prima is asserting that an interpleader action can only be filed if the stakeholder is facing multiple, objectively meritorious claims that have been, or imminently will be, filed. The Bank cites CPLR 1006 (a) to the effect that a party may commence an interpleader when it is, or may be, exposed to multiple liability; that a claimant is a person who has made, or may be expected to make a claim; and that a stakeholder may commence an action of interpleader against two or more claimants.

The Bank cites authority to the effect that New York courts have sanctioned the use of interpleader as an anticipatory action (*see Fischbein, Badillo, Wagner v Tora Realty Co.*, 193

AD2d 442 (1st Dept 1993) and that a stakeholder is not required to objectively assess the validity of claims against it. *See Bank of New York v First Millennium, Inc.*, 607 F3d 905, 922 (2d Cir 2010); *United States Trust v Alpert*, 10 F Supp 2d 290, 301 (SDNY 1998) and *Viewhaven, Inc. v Danan*, 1986 WL 6779 at *2 (SDNY 1986). *See Viewhaven* at *2 for the view that the test for the validity of an interpleader is whether “the party requesting it has real and reasonable fear of double liability and vexatious, conflicting claims.”

As noted above, the Bank has been notified by Noteholders holding opposing opinions with respect to whether Prima can recharacterize an Impaired Interest as an unimpaired Interest. This was to be expected, as the determination of this issue will result in an allocation of economic benefits which favors only one group of competing Noteholders. Thus, the question before the court is whether the Bank, given the respective positions of opposing groups of Noteholders, was justified in initiating this Interpleader. Both Prima and OZ contend that the Bank was not.

The court agrees with the Bank’s position that there were competing claims that could expose the Bank to multiple liability. The positions of Prima and OZ in this litigation establish this to the court’s satisfaction. Prima’s contention that it is not a stakeholder, as it has no claim to the impounded income, does not end this discussion. As pointed out by the Bank, Prima’s actions have a direct, potentially positive, impact on Noteholders which are its clients.

Prima next argues with respect to multiple liability that no Noteholder can initiate any proceeding with respect to the Indentures, including any remedy thereunder, without complying with the no action clause in Section 5.8 of the Indentures. This clause requires a Noteholder to notify the Bank of an event of default under the Indenture, aggregate a percentage of the

Noteholders to request initiation of a proceeding, offer the Bank indemnity and allow the Bank time to institute proceedings. Prima asserts New York courts uniformly uphold such clauses citing *McMahan & Co. v Warehouse Entm't*, 859 F Supp 743, 747, 749 (SDNY 1994) and that since the treatment of Impaired assets will affect all Noteholders, all Noteholders seeking to institute a proceeding must comply with Section 5.8 of the Indentures.

The Bank counters that the no action provisions do not apply to proceedings against the Bank. See *Cruden v Bank of N.Y.*, 957 F2d 961, 968 (2d Cir 1992); *Metro. W. Asset Mgmt. LLC v Magnus Funding, Ltd.*, 2004 WL 1444868 *5 (SDNY 2004). The court agrees with the reasoning of *Cruden* which found that it would be absurd to require securityholders to ask a trustee to sue itself. Prima's efforts to distinguish *Cruden* are not persuasive.¹

As to the question whether or not the Bank acted reasonably and in good faith in accordance with Section 6.3 (n) of the Indentures in filing this Interpleader, the answer is illuminated by an analysis of the contractual interpretation issue relevant to this matter. In short, do the CMAs unambiguously permit the recharacterization of an Impaired Interest. The Bank is of the view that they do not. It points out that the specific section (Section 2 (b)) of the CMAs dealing with the notion of Impaired gives Prima the authority to determine when an asset is Impaired but not its resurrection to unimpaired status. This lack of balance, it believes, answers the core question in the negative. The Bank dismisses Prima's reliance on the catch-all empowerment provisions of the CMAs Section 1 (b) as misplaced. Specifically, the Bank

¹ In its amended memorandum of law, Prima also asserts, without supporting argument, that the Bank is not subject to liability because it is expressly relieved from liability for following Issuer Orders (Indentures § 6.2 (c)(iii), 6.3 (a)) and, in any case, is Indemnified by the issuers for such liability. (Indentures § 6.7 (a)(iii)) These conclusory assertions are not persuasive, as each of the provisions of the Indentures provides exceptions for bad faith or negligence. Since the Trustee has been accused of such behavior here, the court is not convinced that these provisions stand in the way of demonstrating multiple liability.

contends that Section 1 (b), which grants Prima the authority “to do any and all things in connection with its servicing and management duties which it may deem necessary or desirable and are permitted or not specifically prohibited by this Agreement or the Indenture,” relates only to Prima’s “servicing and management duties,” which does not encompass recharacterization of Impaired Interests.

The Bank, *citing Kass v Kass*, 91 NY2d 554, 566 (1998) for the proposition that one should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed, points out that if Section 1 (b) did empower Prima to recharacterize assets, it would eradicate the need for Section 2 (b), which would be rendered surplusage. If so interpreted, argues the Bank, it would give Prima vast authority to issue any order on any subject. Next, the Bank engages in a linguistic analysis of the term “have become,” the past participle form of “become,” in connection with the § 2 (b) definition of Impaired Interests. The court does not give this particular parsing of the verbiage much weight in reaching its conclusion with respect to this issue.

Finally, the Bank engages in an examination of a hypothetical situation with respect to recharacterization. The Bank asserts the view that a recharacterization would have potential inequitable effects on the Waterfall mechanic, resulting in certain instances of an overpayment of principal payments to Senior Noteholders. The Bank states that if the drafters of the Indentures had intended to allow recharacterization, they “likely” would have included a provision concerning the payments from recharacterized Collateral Interests in order to protect Junior Noteholders from being penalized in the cited circumstances. The insertion of the word “likely” in the Bank’s argument undermines its case. It underscores the notion of ambiguity pregnant in

the example asserted by the Bank. It is difficult to divine what the drafter of the Indentures would have provided had he even thought of the hypothetical. Furthermore, there are indeed other hypotheticals which could be presented with respect to the mechanics of the Waterfall. It is not fruitful for the court to engage in a comparative analysis of hypotheticals. Rather, it is necessary for the court to have a firm platform of facts to support the intent of the drafter. At this point, this is absent.

Prima relies on the legal proposition that in sophisticated transaction documentation, any restriction on commercial freedom of a business entity to conduct business as it sees fit must be expressly set out. *See Loral Space & Commins Inc. Consol. Litig.*, 2008 Del. Ch. Lexis 136 at *133 (Del Ch 2008); *Bank of N.Y. Mellon v Realty Corp.*, 979 A2d 1113, 1121 (Del Ch 2008). It cites *Allied Capital Corp. v GC-Sun Holdings, L.P.*, 910 A2d 1020, 1033 (Del Ch 2006) for the proposition that “the highly-negotiated provisions of notes and debentures that restrict commercial freedom that issuers otherwise enjoy under default law are traditionally interpreted strictly, precisely because they involve specifically extracted limitations on ordinary economic liberties.” It points out that no provision of the CMAs prohibits recharacterization and that Prima has decided it is necessary and desirable to recharacterize the assets at issue here.

Prima further argues that the Bank is simply wrong when it states Section 1 (b) does not apply to management services, and that the Bank’s “past participle” point would nullify express rights granted to investors with respect to cure rights granted to holders of preferred shares. Prima’s arguments on these points are plausible but not determinative.

At the end of the day neither party has convinced the court that its position is compelling. There are open questions regarding the interpretation of the cited provisions of the CMAs which,

leads to the conclusion that the Bank was in the same position as the court is now with respect to this issue – justifiably undecided. The court believes it is appropriate in these circumstances to hear evidence from the Issuers, the Collateral Manager and representatives of the classes of Noteholders as to what was intended with regard to impairment; also, expert testimony concerning market practice with regard to impaired Interests, and the meaning of “servicing and management duties” *viz*: a collateral manager may shed light on the proper treatment of the collateral in this instance. In sum, the court finds the CMAs ambiguous on the point of whether Prima can recharacterize an Impaired Asset as unimpaired.² This conclusion compels the court to opine that the Bank’s course of action in this matter, including filing of the Interpleader, was taken in good faith and that it reasonably and prudently believed it was authorized or within its rights and powers under the Indenture in so doing.

Accordingly, it is

ORDERED that the motion of Bank of America, N.A. to dismiss Prima Capital Advisors, LLC’s second affirmative defense and counterclaims is granted; and it is further

ORDERED that Prima Capital Advisors, LLC’s cross-motion for dismissal of the Interpleader and for summary judgment is denied; and it is further

ORDERED that OZ Master Fund, Ltd., OZ Global Special Investments Master Fund, L.P., and Goldman Sachs & Co. Profit Sharing Master Trust’s motion for summary judgment is denied; and it is further

² The court sees no need to address the Bank’s assertion that Prima has a conflict of interest.

ORDERED that the parties are to appear for a Preliminary Conference on November 23, 2010 at 11 a.m. at 26 Broadway, 10th Floor.

Dated: *October 8, 2010*

ENTER


J.S.C.