Terrapin Indus., LLC v BRT Realty Trust
2011 NY Slip Op 30287(U)
February 8, 2011
Sup Ct, NY County
Docket Number: 111557/07
Judge: Paul Wooten
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SCANNED ON 2/8/2011
[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

TERRAPIN INDUSTRIES, LLC, COLIN RATH, Individually and on behalf of his minor child Breana Rath, GEORGE RATH, and BARBARA RATH

Plaintiffs,

- against -

BRT REALTY TRUST, TD WATERHOUSE INVESTOR SERVICES, INC. a/k/a TD AMERITRADE, INC., and MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendants.

INDEX NO. 111557/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

FILED
FEB 08 2011
NEW YORK
COUNTY CLERK'S OFFICE

The following papers were read on this motion by defendant TD Waterhouse Investor Services, Inc., for summary judgment, and cross-motion by plaintiffs to amend their complaint.

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits	1, 2, 3, 4, 5
Answering Affidavits — Exhibits (Memo), Notice of Cross-Motion & Affidavits	6, 7
Replying Affidavits (Reply Memo), Opposition and Reply to Cross-Motion	8, 9, 10

Cross-Motion: ■ Yes ☐ No

The motions at bar arise from a case in which the plaintiffs herein sought injunctive and declaratory relief to protect assets held by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc. ("TD") from collection by defendant BRT Realty Trust ("BRT"). TD seeks, by counterclaim and cross-claim, to recover costs and attorneys' fees pursuant to indemnification provisions, and now moves for summary judgment on the counterclaim and cross-claim. Plaintiffs also move, by cross-motion, to amend their complaint to allege related causes of action against TD. For the reasons stated below, summary judgment should be

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granted in TD's favor on both the counterclaim and cross-claim, and plaintiffs' cross-motion to amend their complaint should be denied.

In 2006, BRT loaned money to plaintiffs for renovation of an apartment building located at 121-123 West 15th Street, New York, New York. The loan was secured with a mortgage on the subject premises in the principal amount of $13,000,000.[1] As part of the loan agreement (hereinafter, the BRT Agreement"), plaintiffs pledged as collateral the value of $750,000 contained within TD brokerage accounts designated 886-804293 and 826-00071. To protect itself as a disinterested custodian of the subject accounts, TD required BRT and the Raths to execute a Collateral Loan Agreement, dated August 25, 2006 (hereinafter the "TD Agreement"), with TD. The issues presented herein rest entirely on this contract.

The TD Agreement recognizes the plaintiffs' $750,000 pledge to BRT as the "Collateral Equity Establishment Amount," (hereinafter the "Establishment Amount"), but that term is not defined beyond setting such amount, and in fact appears nowhere in the substantive text of the TD Agreement. Instead, the TD Agreement defines "Collateral" to essentially include all assets contained in the subject accounts.[2]

Plaintiffs' ability to withdraw or disburse assets from the subject accounts was limited by the TD Agreement, which provides that "[a]ny instruction to TD[] to withdraw or disburse cash or securities, or both, out of the Account, other than for the purpose of effecting the clearance or settlement of a trade in the Account, shall be made by a written instrument to such effect which shall be executed" in one of two methods. Clause (i) provides that such instrument may be

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[1]Plaintiffs also allegedly obtained two additional loans from BRT, each in the amount of $600,000, but those loans are not relevant for purposes herein.

[2]Specifically, Collateral was defined in the TD Agreement as "all of Pledger's right, title, and interest in the Account and all Pledger's security entitlements with respect thereto, as each term is defined in applicable state or federal regulations in effect as of the date hereof and as modified or amended from time to time hereafter together with all investments, funds, securities, instruments, and other property therein and all profits, interest, dividends, income, distributions, and cash and non-cash proceeds thereof" (TD Agreement at 1).

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executed by "an authorized officer of Lender [BRT] AND Pledger [plaintiffs]." Clause (ii) states that such an instrument may also be executed by:

> (ii) an authorized officer of Lender who shall certify in writing . . . that it is entitled to direct TD[] to cease complying with trading instructions originated by Pledger and/or to exercise its rights under the [BRT] Agreement (it being understood and agreed that TD[] shall have no duty or obligations whatsoever of any kind or character to determine the validity of Lender's certification or to take further instructions from Pledger) and that Lender has a right to all or part of the Collateral, specifying the amount so due Lender and the applicable security interest in such certification, and provided further that Lender hereby agrees to indemnify and hold harmless TD[], its affiliates, and respective directors, officers, employees, and agents from and against any and all claims, actions, liabilities, lawsuits, demands, or damages, including, without limitation, any and all court costs and reasonable attorneys' fees, that may result by reason of TD[] acting on such instructions

(TD Agreement at 2). The TD Agreement expressly provides that the Raths would similarly indemnify and hold harmless TD against any such costs, fees, liabilities, et cetera, arising out of, among other things, representations made by BRT to TD with respect to the subject accounts.

The TD Agreement further provides that "the Collateral may be sold or otherwise traded in the Account at the direction of Pledger [the Raths] . . . until such time as an authorized officer of Lender [BRT] delivers the notice described in clause (ii)," at which time TD "will cease complying with trading instructions concerning Collateral originated by Pledger" (TD Agreement at 1). The term of the TD Agreement is defined in a provision stating that, "This letter agreement shall remain in full force and effect until receipt by TD[] of written notification by Lender" (TD Agreement at 2). (TD Agreement at 1-3).

By letter dated August 3, 2007(hereinafter the "August 3 Letter"), BRT directed TD to cease complying with the Raths' trading instructions, pursuant to clause (ii) of the TD Agreement. The August 3 Letter stated that the principal amount due and owing on the subject loan was $13,000,000, and that "[t]he Lender has the right to sell all of the Collateral pursuant to the terms of the Pledge Agreement." For purposes herein, "Collateral" was also defined in

the August 3 Letter to include all assets contained within the subject accounts.[3] The August 3 Letter contained the required indemnification language as set forth in the previous paragraph hereinabove. (August 3 Letter at 1-3.)

BRT commenced an action to foreclose on the subject residential property by filing a summons and complaint on August 17, 2007. Plaintiffs then commenced the underlying action by filing a complaint, dated August 22, 2007, seeking a preliminary injunction and temporary restraining order enjoining, among other things, TD from transferring the assets then remaining in the subject TD brokerage accounts, as well as a declaratory judgment that plaintiffs are not in default of the Pledge Agreement and are entitled to the subject collateral. Regarding the TD accounts, plaintiffs alleged that TD had already released $750,000 from the subject accounts to BRT, and that BRT was demanding that TD transfer to BRT an additional $130,000 from the subject accounts.

On or about November 8, 2007, and pursuant to an order to show cause, this court resolved the first portion of the complaint by granting the request for a preliminary injunction "in its entirety" by so-ordered stipulation "enjoining all named defendants from transferring, liquidating, or assigning on anyone's request the subject matter of the order to show cause application . . . pending the resolution of the related foreclosure matter" (Order dtd November 8, 2007, Motion Seq 001, Annexed Stipulation at ¶3). That stipulation also expressly provided that the same was made "w/o prejudice to the claims of TD Ameritrade and its right to assert counterclaims and cross-claims for indemnification," and effectively dismissed defendant Massachusetts Mutual Life Insurance Company from the action (Order dtd November 8, 2007, *id*, Annexed Stipulation at ¶¶ 1, 4).

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[3]Specifically, the August 3 Letter defined Collateral as "All investments, funds, securities, instruments, and other property therein and profits, interests, dividends, income, distributions and cash and non-cash proceeds thereof held in the Account."

On or about April 11, 2008, the court granted BRT's summary judgment motion in the foreclosure action, concluding on the merits that plaintiffs herein had indeed defaulted on their mortgage obligations to BRT (Decision dtd April 11, 2008, Motion Seq 001, Index No 111308/2007). This decision rendered moot that latter portion of the underlying action, seeking a declaratory judgment that plaintiffs did not so default and was entitled to the subject collateral.

In or about February, 2009, BRT and the plaintiffs entered into a Settlement Agreement pursuant to which BRT and the plaintiffs resolved their respective claims in the underlying action and the related foreclosure action, as against each other. On October 1, 2009, the parties hereto entered a stipulation in the underlying action, terminating the preliminary injunction issued on November 8, 2007. That stipulation also provided that TD could serve counterclaims and cross-claims for indemnification.

On or about November 2, 2009, TD filed an answer in the herein action, asserting a counterclaim against plaintiffs George and Barbara Rath and a cross-claim against BRT, both seeking indemnification for its costs and attorneys' fees in this action, pursuant to the TD Agreement. On or about December 2, 2009, plaintiffs served a reply to the counterclaim, which asserted as a defense that TD is barred from asserting a claim for indemnification, as it breached the subject contract. Despite TD's counterclaims only being alleged against George and Barbara Rath, plaintiffs' reply to the counterclaim expressly states that the reply was made by all plaintiffs, including Colin Rath (Plaintiffs' Reply to TD's Counterclaim at 1). BRT apparently never filed any answer or reply to TD's cross-claim.

TD now moves: 1) for summary judgment in the underlying action; 2) to amend its counterclaim to include plaintiff Colin Rath,[4] who was allegedly protected by a since vacated bankruptcy stay at the time of the original counterclaim, and deem the counterclaim as

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[4]The amended counterclaim ostensibly seeks indemnification from all plaintiffs, but the text of the counterclaim makes clear that TD is only seeking indemnification from George, Barbara, and Colin Rath.

amended served *nunc pro tunc;* and 3) for summary judgment granting, on its counterclaim and cross-claim, a joint and several award of attorneys' fees, costs, and expenses incurred in the instant action.[5] Plaintiffs oppose the summary judgment motion as to the counterclaim, contending that TD was never permitted to freeze the subject accounts except to the extent of the Establishment Amount, that TD's refusal to "release its hold on the excess funds [was a] direct contradiction to the [TD Agreement]," and that there is therefore an issue of fact as to whether its hold on said excess funds was outside the scope of the provisions indemnifying TD under the TD Agreement (Plaintiffs' Affirmation In Support Of Cross-Motion And In Opposition To The Motion, ¶¶ 2, 14-15). Plaintiffs also contend that summary judgment is unavailable to TD because issue had not been joined on the amended counterclaim, and TD cannot simultaneously seek to amend the counterclaim and for summary judgment on that counterclaim as amended.

BRT opposes TD's motion as to the cross-claim, contending that plaintiffs agreed, in the TD Agreement, to indemnify TD, and because plaintiffs commenced the instant "frivolous" action, plaintiffs are obligated to TD for their defense costs (BRT's Affirmation in Opposition at 2, 9). BRT also submits a settlement agreement by and between the plaintiffs and BRT, covering both the foreclosure action and the action underlying the instant motions, in which plaintiffs agreed to release BRT from all actions relating to, among other things, the subject accounts. In reply, TD notes that plaintiffs' argument in the first instance was that there had been no default on the subject loan, that TD had no right to freeze or hold even the first $750,000 from the account, and therefore that the scope of indemnification is irrelevant. TD also notes that plaintiffs themselves caused the excess funds to be frozen by seeking the

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[5] TD also moves to strike plaintiffs' reply to TD's counterclaim, and for a joint and several award pursuant to 22 NYCRR 103-1.1. However, striking plaintiffs' reply is unnecessary, and the plaintiffs' claims are not sufficiently frivolous to warrant 103-1.1 sanctions, although plaintiffs toe the line with their argument that a matter of fact exists because of the existence of a matter of law. The Court does not believe that further discussion of these issues is warranted.

preliminary injunction and then signing on to the November 8, 2007 stipulation. TD replies to BRT's opposition by noting that BRT did not even address its own liability to indemnify TD.

Plaintiff is also now making a motion to amend its complaint to allege three causes of action against TD for freezing the excess funds. The first cause of action rests on the premise that the TD Agreement "required that upon the release of collateralized funds to BRT that the account be dissolved and all non-collateralized funds be released simultaneously to plaintiffs. TD's prompt release of said funds was critical to Plaintiffs as the stock market had begun to plummet" (Plaintiffs' Affirmation in Support of Cross-Motion at ¶5). Plaintiffs allege that TD impermissibly froze the account in excess of the $750,000 collateral Establishment Amount, and ignored plaintiffs' requests to release the subject accounts and to dissolve the same, resulting in a loss of value to those accounts. Plaintiffs' second cause of action alleges that TD breached the TD Agreement by denying plaintiffs the ability to move assets from the subject accounts. The third cause of action alleges that TD breached a fiduciary duty to plaintiffs by failing to carry out plaintiffs' requests to move assets in their TD accounts. Plaintiffs argue that there is no prejudice in granting their motion to amend, as the funds in excess of the Establishment Amount were the subject of the original complaint. Plaintiffs also argue that, if TD is permitted to amend their counterclaim, plaintiffs should be so permitted to amend the complaint as well. TD opposes the motion to amend, labeling same a "sham" for the reasons stated in the previous paragraph (TD's Affirmation In Opposition to Plaintiffs' Cross-Motion at 2).

Standards

Motion for Summary Judgment

"[P]ursuant to CPLR 3212(a), summary judgment is premature prior to joinder of issue" (*Miller v Schreyer*, 257 AD2d 358, 361 [1 Dept 1999], citing *City of Rochester v Chiarella*, 65

NY2d 92, 101 [1985]). "The proponent of a summary judgment motion [pursuant to CPLR 3212] must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Santiago v Filstein, 35 AD3d 184, 185-86 [1 Dept 2006]). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27 AD3d 228, 228 [1 Dept 2006]).

Motion to Amend Complaint

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept. 2003], citing *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given."]). The First Department has "consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . . " (*Ancrum*, 301 AD2d at 475). "Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept. 2005], citing *Ancrum*, 301 AD2d at 475, and *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [2001]). This essentially means that, upon a motion to amend or supplement a pleading, we must treat any opposition similarly to a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7).

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Discussion

TD's Motion to Amend Its Counterclaim

There is no opposition to TD's motion to amend, and leave to amend should be freely granted regardless. Furthermore, the amended counterclaim should be deemed served *nunc pro tunc*. The Court notes that TD's original counterclaim alleged that Colin Rath had filed for bankruptcy, which would preclude TD from alleging a counterclaim against him. According to TD's motion papers, plaintiffs' counsel advised TD that Colin Rath had filed for personal bankruptcy, but he never did so (TD's Statement of Undisputed Facts at ¶39)[6]. The claim for indemnification against George and Barbara Rath applies equally to Colin Rath, all three would have identical defenses, and they had retained the same attorney for the underlying action. Therefore, Colin Rath was on notice that TD would likely seek to amend its counterclaim when it discovered that it was not precluded from alleging a counterclaim against him. Under the circumstances, it would be unjust to deny TD's request to deem the amended counterclaim served upon Colin Rath at the time the original counterclaim was properly served upon his attorney (*see* CPLR 3025 ["Leave shall be freely granted upon such terms as may be just"]).

TD's Motion for Summary Judgment on Counterclaim

The issue of whether holding the excess funds was within the scope of the TD Agreement is a matter of unambiguous contract interpretation, and therefore a matter of law, and so plaintiffs' assertion that matters of material fact exist is specious (*see Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1 Dept 2008] ["Whether a contract is ambiguous presents a question of law for resolution by the court."], citing *Kass v*

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[6]Apparently, Terrapin Industries, LLC did file a Chapter 11 bankruptcy petition in an attempt to protect itself from the foreclosure sale pursuant to the related foreclosure action; when the foreclosure sale took place anyway, Colin Rath moved to dismiss the petition, which dismissal was granted. (TD's Statement of Undisputed Facts at ¶39.)

Kass, 91 NY2d 554, 566 [1998]). Summary judgment should be granted in TD's favor, as there are no issues of material fact requiring a trial.

By signing the TD Agreement, the plaintiffs entered a binding agreement promising to indemnify and hold harmless TD from any "claims, actions, [et cetera], arising out of or relating to: (ii) Representations or instructions made to TD[] whether by Pledger, Lender, or their respective agents with respect to the Account" (TD Agreement at 2). In the August 3 Letter, BRT made a representation and gave instructions with respect to the subject accounts. Specifically, BRT represented that it was entitled to the subject accounts in their entirety, and instructed TD to cease complying with plaintiffs' trading instructions and to transfer to BRT everything within the subject accounts. There is no question that all of plaintiffs' claims arose directly from these representations and instructions from BRT, and so TD has presented prima facie evidence of entitlement to summary judgment obligating plaintiffs George, Colin, and Barbara Rath to indemnify TD for all legal fees and other costs and expenses related to the underlying action.

Plaintiff argues that it is not obligated to indemnify TD because the indemnification was limited to TD's actions with respect to the Establishment Amount, and its actions with respect to funds in excess of such amount fell outside the scope of indemnification. This argument fails for two reasons. First, the plain language of the TD Agreement states that plaintiffs agreed to indemnify TD for any representations or instructions made by BRT to TD with respect to the "Account," meaning the subject accounts in their entirety. The indemnification provision is not limited to the "Collateral," let alone the Establishment Amount (*see Riverside*, 60 AD3d at 66 ["The fundamental rule of contract interpretation is that agreements are construed according to the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing."]). Because BRT gave representations and instructions as to the account in its entirety, plaintiffs must indemnify TD's actions with respect to the funds in excess

of the Establishment Amount.

Second, the TD Agreement was in no way limited by the Establishment Amount. As explained above, the term "Collateral," as used in the TD Agreement, includes all assets within the subject accounts, and is not limited to the Establishment Amount. Plaintiffs could have added text limiting the definition of "Collateral" and/or the TD Agreement's effect to a maximum of the Establishment Amount, and their failure to do so indicates that such a maximum was not part of the bargained-for exchange.[7] The Establishment Amount is merely mentioned for informational purposes, just before the street addresses of BRT and the plaintiffs, and does not modify the TD Agreement any more than do those addresses. This Court therefore cannot hold that the indemnification provision does not cover the funds in excess of the Establishment Amount (*see Riverside*, 60 AD3d at 66 ["A court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties."]).

Regarding plaintiffs' contention that issue has not yet been joined, TD's amended counterclaim is deemed served *nunc pro tunc*, as discussed hereinabove, and plaintiffs' reply expressly states that it is made by all plaintiffs, including Colin Rath. Plaintiffs cannot contend that Colin Rath has not had an opportunity to reply when he in fact did reply months earlier. Furthermore, allowing Colin Rath a chance to submit an additional reply would serve no purpose. Due to the identical nature of the indemnification claims against Colin Rath and George and Barbara Rath, it appears that any reply to the amended counterclaim would be identical to the reply to the original counterclaim, such that only its date would change. To the extent that Colin Rath could assert defenses that George and Barbara Rath could not, plaintiffs

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[7]To the contrary, the term "Establishment Amount" indicates the TD Agreement was constructed contemplating additional loans and/or modifications to the amount of collateral without requiring notice of such changes to TD, such that the Establishment Amount is intentionally divorced from the effective text of the document.

should have raised such defenses in opposition to the motion to amend the counterclaim.

TD's Motion for Summary Judgment on Cross-Claim

TD correctly notes that plaintiff's liability is irrelevant to and does not absolve BRT from its obligation to indemnify TD. By sending the August 3 Letter pursuant to clause (ii) of the TD Agreement, BRT made a promise, enforceable under the TD Agreement, to indemnify TD for any claims, actions, et cetera, arising from its instructions in the August 3 Letter. This enforceable promise was unaffected by the settlement agreement cited by BRT, to which agreement TD was not a party. As there is no question of fact that the plaintiffs' claims arose as a direct result of the instructions contained in the August 3 Letter, summary judgment is appropriate.

Plaintiffs' Motion to Amend

Plaintiffs' *quid pro quo* argument fails to address the relevant standard on a motion to amend, which is whether amendment will result in prejudice. No prejudice would result by amendment here, but plaintiffs' motion must still be denied because none of the proposed causes of action state a claim upon which relief can be granted. As already noted, plaintiffs are contractually precluded from bringing the causes of action alleged in the amended complaint, as they agreed to hold TD harmless from liability arising from representations or instructions from BRT.

Plaintiffs allege that, upon receiving notice pursuant to clause (ii), TD was required by the TD Agreement to liquidate and dissolve the account, disburse proceeds equal to the Establishment Amount to BRT, and release the remainder to the plaintiffs. The Court does not know plaintiffs' source for this proposition, but it is not in any way supported by the TD

Agreement. The allegation that TD failed upon due demand to dissolve the subject accounts, upon which plaintiffs premise their first proposed cause of action, is therefore nonsensical.

The proposed second cause of action fails because, while the TD Agreement is in effect, plaintiffs can never instruct TD to disburse assets outside the subject accounts without BRT's approval pursuant to clause (i).[8] Plaintiffs' second cause of action is therefore unintelligible, as it alleges that TD harmed plaintiffs by refusing to follow instructions that plaintiffs were contractually prohibited from making in the first instance.

The first and third proposed causes of action, by contrast, allege damages caused by TD ignoring instructions to effect trades within the account. Plaintiffs argue that the TD Agreement did not cover the funds in excess of the Establishment Amount, and TD therefore was obligated to continue effecting trades as to such excess funds. With respect to the effective scope of the indemnification provisions, this argument has already been considered, and rejected, hereinabove. Even if plaintiffs were not required to hold TD harmless, the TD Agreement prohibited TD from complying with any of plaintiffs' trading instructions, as to any of the funds in the subject account, that were received from the time that TD received notice pursuant to clause (ii) until termination of the TD Agreement. As TD received proper notice pursuant to clause (ii), TD could not comply with any trading instructions from plaintiffs, and cannot be held liable for any failure to do so.[9]

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[8]The parties' motion papers and the proposed amended complaint frequently employ an ambiguous metaphor, that TD "froze" the subject accounts. Such vague language does not distinguish between the disparate concepts of complying with instructions to effect trades *within the subject accounts* and complying with instructions to disburse assets *outside the subject accounts*. The TD Agreement provides that plaintiffs may trade assets freely within the subject accounts, unless and until TD receives notice from BRT pursuant to clause (ii). At that time, and until the TD Agreement is terminated, TD may no longer comply with plaintiffs' trading instructions.

[9]Any other conclusion would be impractical and contrary to public policy. Absent a much more detailed and complex collateral loan agreement, TD would be required, under plaintiffs' theories of contract interpretation to make various determinations that it cannot make. For example, if the TD Agreement only covers the Establishment Amount, then TD would be required to determine, without any input from BRT or the plaintiffs, which securities comprised the $750,000 Establishment Amount. Additional determinations would become necessary as such securities fluctuated in value. Such determinations would then open TD to liability, according to plaintiffs' reasoning, as such determinations are outside the scope of the relevant indemnification provisions. In addition to rendering the TD Agreement virtually useless and placing onerous duties upon TD, acceptance of plaintiffs' contract interpretation

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TD's Motion for Summary Judgment in the Underlying Action

To the extent that plaintiffs' original complaint alleged claims against TD for its actions pertaining to the funds in excess of the Establishment Amount, those claims have no merit, for the reasons stated hereinabove. Plaintiffs' other claims as against TD have been rendered moot. Further, plaintiffs' claims against defendant Massachusetts Mutual Life Insurance Company were dismissed pursuant to so-ordered stipulation dated November 8, 2007, and plaintiffs' claims as against BRT were resolved by the February, 2009 Settlement Agreement. Plaintiffs' complaint should therefore be dismissed in its entirety.

The Court has considered the parties' remaining claims and arguments and found them unavailing.

It is therefore,

ORDERED, that the portion of the motion by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc. seeking to amend its counterclaim and deem such counterclaim as amended served *nunc pro tunc*, is hereby granted; and it is further

ORDERED, that the portion of the motion by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc., seeking summary judgment on its cross-claim for indemnification against BRT Realty Trust is hereby granted; and it is further

ORDERED, that the motion by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc., seeking summary judgment on its counterclaim against the plaintiffs is hereby granted as to plaintiffs Colin Rath, George Rath, and Barbara Rath, and is denied and the counterclaim dismissed as to the remaining plaintiffs; and it is further,

ORDERED, that this matter is referred to a Special Referee to hear and determine the

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would be a chilling disincentive to financial institutions permitting assets under their control to be used as collateral.

amount of damages and monies due and owing to defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc. from each of the named defendants pursuant to the Decision and Order herein; and it is further

ORDERED that the defendant, TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc. shall serve a copy of this order with notice of entry upon the Special Referee Clerk of the Motion Support Office (Room 119M) to arrange a date for the reference to a special referee; and it is further,

ORDERED, that the portion of the motion by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc., seeking to strike the plaintiffs' reply to TD's counterclaims is hereby denied as moot; and it is further,

ORDERED, that the cross-motion by plaintiffs to amend their complaint is hereby denied; and it is further

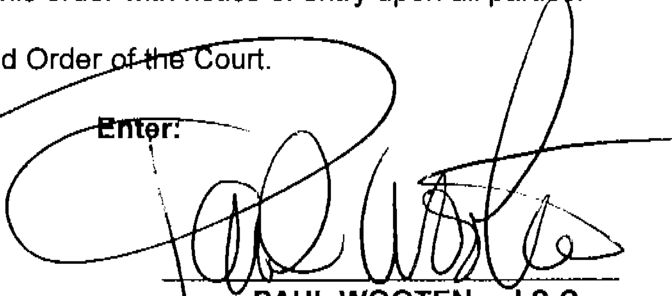
ORDERED, that plaintiffs' complaint is dismissed in its entirety; and it is further

ORDERED, that the motion by defendant TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc., for an award of sanctions pursuant to 22 NYCRR 130-1.1 is hereby denied; and it is further

ORDERED that the defendant, TD Waterhouse Investor Services, Inc. a/k/a TD Ameritrade, Inc., shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010 **Enter:**



PAUL WOOTEN J.S.C.

FILED

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NEW YORK
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