

**Five Mile Capital SPE B LLC v RIH Casino Resorts,  
LLC**

2011 NY Slip Op 34000(U)

October 3, 2011

Sup Ct, New York County

Docket Number: 651579/10

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 39

Index Number : 651579/2010  
FIVE MILE CAPITAL SPE B LLC,  
vs.  
RIH CASINO RESORTS, LLC  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. 651579/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

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**

Dated: 10/3/11

  
\_\_\_\_\_  
**BARBARA R. KAPNICK** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 39**

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FIVE MILE CAPITAL SPE B LLC, individually  
and acting by and through BERKADIA  
COMMERCIAL MORTGAGE LLC, as Special  
Servicer for the Commercial Mortgage  
Pass-Through Certificates Series 2007-FL,  
pursuant to the authority granted under  
that certain Pooling and Servicing  
Agreement dated August 7, 2007, on behalf  
of the Participants in the Second Amended  
and Restated Participation Agreement  
by and among J.P. Morgan Chase Bank, N.A.,  
German American Capital Corporation,  
Goldman Sachs Mortgage Company, CBRE  
Realty Finance Holdings IV, LLC, Capital  
Trust, Inc., GSRE-DB II, Ltd., Five Mile  
Capital SPE B LLC, NIC DB LLC, 111  
Debt Acquisition LLC, Newcastle CDO  
1 X 1, Limited, Capital Trust, Inc.,  
GSRE-DB II, Ltd., Petra Fund Reit Corp.,  
Goldman Sachs Mortgage Company, WCP Real  
Estate Strategies Fund, L.P., WCP Real  
Estate Strategies Fund (Cayman), L.P.,  
Mortgage Stanley Senior Funding, Inc.,  
and Carlyle Strategic Partners, L.P.,

Plaintiffs,

-against-

RIH CASINO RESORTS, LLC, RESORTS  
INTERNATIONAL HOLDINGS, LLC, RIH  
ACQUISITIONS IN, LLC, RIH PROPCO IN,  
LLC, RIH ACQUISITIONS MS I, LLC, RIH  
PROPCO MS I LLC, RIH ACQUISITIONS NJ,  
LLC, RIH PROPCO NJ, LLC, RIH ACQUISITIONS  
MS II, LLC, RIH PROPCO MS II, LLC,

Defendants.

-----x  
**BARBARA R. KAPNICK, J:**

**Background**

On or about October 24, 2006, JPMorgan Chase Bank, N.A.  
("JPMorgan") loaned \$960 million to the six RIH Propco and

**DECISION/ORDER**  
Index No. 651579/10  
Motion Seq. No. 002

Acquisitions defendants named in the caption (the "Borrower Defendants") plus the non-parties RIH Acquisitions IN, LLC and RIH Propco IN, LLC (the "Indiana Entities"). The parties executed a lengthy Loan Agreement, attached as Exhibit 1 to the Amended Complaint. The loan was issued to fund operations at casinos that the borrowers owned in Atlantic City, New Jersey; Robinsville, Mississippi; and East Chicago, Indiana.

The loan from JPMorgan was evidenced by a note in the amount of \$960 million, with several lenders originally participating pursuant to a Participation Agreement. That Agreement was amended and restated on May 10, 2007, and participation interests in the loan were sold to a number of additional entities, including plaintiff Five Mile Capital SPE B LLC, who is a "Junior C4 Participant" in the loan. Pursuant to the Participation Agreement, certain participation interests in the loan were securitized and made assets of a trust that was created, pursuant to a Pooling and Servicing Agreement ("PSA"), dated August 1, 2007. Berkadia Commercial Mortgage LLC ("Berkadia") is the Special Servicer of the loan.<sup>1</sup> Wells Fargo Bank, N.A. is the trustee of the loan ("Trustee").

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<sup>1</sup>The original Special Servicer of the loan was Capmark Finance, Inc. ("Capmark"), however, the role of Special Servicer was transferred to Berkadia as a result of Capmark's bankruptcy filing on October 25, 2009.

Defendant RIH Casino Resorts, LLC ("RIH Casino") is a Delaware limited liability company, and is the parent of defendant Resorts International Holdings, LLC ("RIH Holdings"), also a Delaware limited liability company. RIH Holdings, in turn, is the parent of the Borrower Defendants and the Indiana Entities. In this action, plaintiff challenges the transfer of \$151 million from RIH Holdings to RIH Casino following the sale of some of the collateral for the loan.

The Amended Complaint alleges that on or about April 3, 2007, RIH Holdings sold its membership interest in the Indiana Entities to Ameristar East Chicago Holdings, LC ("Ameristar") for \$675 million, and that the proceeds of the sale were paid directly to RIH Holdings (Amended Complaint, ¶ 28). On or about September 18, 2007, the Trustee released the lien on the Indiana casino in exchange for a payment of a "Release Price" of approximately \$475 million to the trust fund created by the Second Amended and Restated Participation Agreement (Amended Complaint, ¶ 27). Although not acknowledged in the Amended Complaint, the Trustee also released RIH Holdings' pledge of its equity interest in the Indiana Entities, which interests were also part of the collateral that secured the loan. Without the release of both the lien on the Indiana casino and RIH Holdings' pledge of its equity interest in

the Indiana Entities, the sale to Ameristar could not have taken place.

Plaintiff alleges that RIH Holdings had no right to sell the Indiana Entities under the terms of the Loan Agreement, because it did not provide for the sale of the equity interests of any of the Borrower Defendants or the Indiana Entities held by RIH Holdings (Amended Complaint, ¶¶ 26, 29). Citing Section 2.5.1 of the Loan Agreement, plaintiff alleges that the borrowers were only entitled to obtain the release of an "Individual Property" from the plaintiff's lien (defined as one of the three casinos, its real and personal property) and the release of Borrower's obligations under the Loan Documents with respect to such Individual Property (*Id.*, ¶ 25). The proceeds of any sale beyond the amount required to obtain the Release Price from the Trustee "should have," according to plaintiff, remained the property of the Borrower that sold the Individual Property (*Id.*, ¶ 29). Thus, plaintiff complains that the manner in which RIH Holdings structured the sale of the Indiana Entities deprived the Borrower Defendants (and the Indiana Entities) of the excess proceeds of the sale and instead resulted in the proceeds being paid directly to RIH Holdings, in violation of the Loan Agreement (*Id.*, ¶ 30).

The Amended Complaint further alleges that, after the sale to Ameristar, the gaming industry was hit hard by the downturn in the global economy. No later than early 2008, gaming revenue was down and the Atlantic City Hilton casino, which had been planning a major expansion, announced that the project was being placed on hold (Amended Complaint, ¶¶ 32-38). Despite the worsening economic climate, in February 2008, RIH Holdings made a distribution from the proceeds of the sale of the Indiana Entities to its parent, RIH Casino, in the approximate amount of \$150,948,000 (*Id.*, ¶ 39). It is this transfer that plaintiff seeks to avoid in this action.

Plaintiff alleges that the February 2008 distribution: (i) was not made for fair consideration; (ii) was received by RIH Casino with fraudulent intent to avoid the obligations of the Borrower Defendants under the loan; (iii) left the Borrower Defendants without sufficient capital to fund operational shortfalls and make necessary improvements; and (iv) caused the Borrower Defendants to be rendered insolvent (Amended Complaint, ¶¶ 41-44). Plaintiff alleges that the Borrower Defendants failed to make the loan interest payment due on July 9, 2009 in the amount of \$2,544,870.09, and that by letter dated July 14, 2009, the Special Servicer provided notice of this default to the participants. (*Id.*, ¶ 45).

By letters dated November 6, November 24, and December 22, 2009, plaintiff requested that Capmark review the above allegations and take action to protect the interests of the loan participants. By letters dated November 10, and November 30, 2009, Capmark stated that it had engaged a consultant to analyze the Borrower Defendant's operations, management and financial statements, and that as part of that investigation, it would consider potential claims. Capmark allegedly never reported back the results of this investigation or took any action.

On July 12, 2010, a written demand was made on the Trustee to institute an action in its own name as Trustee under the PSA. In response, the Trustee advised that the role of the Special Servicer had been transferred from Capmark to Berkadia as a result of Capmark's filing for bankruptcy. On July 16, 2010, a letter was sent to Berkadia attaching the July 12th letter and informing Berkadia that plaintiff retained the right under Section 10.02 of the PSA to commence an action if the Trustee failed to do so within 60 days of the July 12th letter. Plaintiff states that the Trustee failed to take any action with respect to the February 2008 distribution to RIH Casino and did not respond to the July 12th letter (Id., ¶¶ 51-57).

**Discussion**

Plaintiff brings this action, suing both individually and on behalf of the other named loan participants by and through Berkadia, to set aside RIH Holdings' February 2008 distribution to its parent, RIH Casino. The Amended Complaint asserts the following five causes of action: (1) a constructive fraudulent transfer under Sections 273 and 274 of the New York Debtor and Creditor Law ("NYDCL") (first cause of action); (2) an actual fraudulent transfer under NYDCL 276 (second cause of action); (3) the recovery of attorneys' fees pursuant to NYDCL 276-a (third cause of action); (4) violation of Section 18.607 of the Delaware Limited Liability Company Act (fourth cause of action); and (5) piercing the corporate veil of RIH Holdings (fifth cause of action).

Defendants now move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1), (2), (3) and (7) based on documentary evidence, lack of standing, lack of subject matter jurisdiction, and failure to state a cause of action.

First, defendants argue that plaintiff lacks the capacity to sue either individually or derivatively by and through the Special Servicer on behalf of the other loan participants. Defendants are correct in that each of the asserted causes of action are

derivative in nature, not direct. It is clear that only the Trustee would have been harmed, since the Note is owed to the Trustee and is the property of the trust fund. It is equally clear that Section 10.02 of the PSA grants plaintiff, as a participant, the right to "institute any suit, action or proceeding . . . with respect to [the Pooling and Servicing Agreement] or any Mortgage Loan," after complying with certain prerequisites, including serving a written demand on the Trustee to take action.

However, plaintiff is purportedly suing by and through Berkadia, the Special Servicer, which has no legal entitlement to loan payments and suffers no injury in the event of a default. To the extent that a derivative action is maintained, any claim would have to be asserted on behalf of the Trustee, not the Special Servicer or the loan participants. While this pleading error could be corrected by further amendment of the Complaint, as demonstrated below, plaintiff has failed to state any valid cause of action.

Defendants also argue that the Court lacks subject matter jurisdiction, because one of the loan participants, Petra Fund Reit Corp. ("Petra"), was a debtor in Chapter 11 proceedings pending at the time the Amended Complaint was filed. However, as stated above, the claim belongs to the Trustee, not to any individual participant, and Petra does not have a direct right of action

against the defendants to recover damages or injunctive relief. 11 USC 541. The cases cited by defendants would only deprive this Court of subject matter jurisdiction if the Trustee were in bankruptcy. See *Mitchell Excavators, Inc. by Mitchell v Mitchell*, 734 F2d 129 (2d Cir 1984); *Bronx Chrysler Plymouth v Chrysler Corp.*, 212 F Supp 2d 233 (SD NY 2002).

Any cause of action against RIH Holdings or RIH Casino based on the February 2008 distribution is predicated on piercing the corporate veil of the Borrower Defendants and treating them as the alter ego of RIH Holdings. This is because the February 2008 distribution did not involve a conveyance by the Borrower Defendants of their own property. Rather, the February 2008 distribution consisted solely of a transfer of money from RIH Holdings to RIH Casino, money that was received by RIH Holdings directly from Ameristar as part of the sale of the Indiana casino. The Borrower Defendants did not make a "conveyance" within the meaning of NYDCL 270. To avoid the February 2008 distribution, therefore, plaintiff must allege specific facts demonstrating that the Court should pierce the corporate veil and treat RIH Holdings as the alter ego of the Borrower Defendants.

A plaintiff seeking to pierce a corporate veil bears "a heavy burden of showing that the corporation was dominated as to the

transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." *TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 (1998), citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-42 (1993). "Parent and subsidiary or affiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual obligations of the other absent a demonstration that there was an exercise of complete dominion and control (citation omitted), but '[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.'" *Sheridan Broadcasting Corp. v Small*, 19 AD3d 331, 332 (1st Dept 2005), quoting *TNS Holdings v MKI Sec. Corp.*, supra at 339.

The Amended Complaint fails to allege any facts that would warrant piercing the corporate veil of RIH Holdings. Plaintiff offers only conclusory allegations that RIH Holdings and RIH Casino "disregarded the corporate form of the Borrower Defendants," "operated [the companies] as a single entity," and that RIH Holdings and RIH Casino "exercised dominion" over the Borrower Defendants (Amended Complaint, ¶¶ 83-85), without any factual claims to back up these conclusions. There is a complete failure

to plead any specific instance in which corporate formality was disregarded.

The only specific factual allegation to support the claim that the corporations were operated as a single entity is that RIH Holdings and its subsidiaries issued consolidated financial statements for the year-end 2008 (Amended Complaint, ¶ 40). There is no claim that the borrowers failed to maintain their own financial statements or accounts, or did not have their own corporate officers or board of directors, nor does plaintiff allege any other facts to show that the defendants disregarded corporate form to perpetuate a fraud or injustice. See *East Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 (2d Dept 2009), *affd* 16 NY3d 775 (2011).<sup>2</sup>

The documentary evidence attached to the Amended Complaint and submitted by the defendants on this motion also belies plaintiff's claim that the sale of RIH Holdings' equity interest in the Indiana Entities was in violation of the Loan Agreement (See Amended Complaint, ¶ 30). Plaintiff fails to point to any section of the Loan Agreement or other loan documents that prohibited RIH Holdings

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<sup>2</sup> The Court notes that the corporate structure of the defendant corporations was disclosed to JPMorgan as part of the loan documentation. See Loan Agreement, Schedule IV.

from selling its equity interest in any of the borrowers, arguing only that it was not "contemplated" (*Id.*, ¶ 26).

However, the Trustee consented to the sale and agreed to release the lien on the casino and RIH Holdings' pledge of its interest in the Indiana Entities, in exchange for the payment of over \$450 million. Defendants contend, without opposition from the plaintiff, that this amount was in excess of the Release Price for the casino predetermined by the loan documents. (See May 4, 2011 Tr. at 26; Pls. Memo. in Opp. at 1; Defs. Reply Memo. at 9). While plaintiff, in hindsight, may wish that the Trustee had not consented to the sale, or that the proceeds were not paid directly to RIH Holdings, plaintiff fails to establish how this was wrongful or in violation of its rights under the loan documents. Notably, while plaintiff contends that the "manner" in which RIH Holdings structured the sale of the Indiana Entities was wrongful (Amended Complaint, ¶ 30), plaintiff nowhere contends that the Trustee breached its fiduciary duty in consenting to the sale.

Plaintiff cites *Chase Manhattan Bank (N.A.) v 264 Water St. Assoc.*, 174 AD2d 504 (1st Dept 1991), to support its alter ego theory. In that case, however, the Amended Complaint alleged that the principal of a corporate guarantor of a \$6 million dollar construction loan, shortly after the loan was declared in default,

schemed to defraud the lender of the benefit of the guarantee, by transferring all of the assets of the corporate guarantor to its parent corporation as a purported stock dividend leaving only \$1 million in shareholders' equity in the corporate guarantor.<sup>3</sup> The Appellate Division affirmed the denial of a motion to dismiss the complaint for failure to state a cause of action, finding that the Amended Complaint "specifically alleged that appellants masterminded a scheme to denude the subsidiary of its assets in order to render it unable to honor its obligations resulting in a loss to plaintiff." *supra* at 505. The pleading before this Court alleges no such type of fraudulent scheme after a loan default, only a sale of some loan collateral for valid consideration with the full consent of the lender's representative.

Finally, plaintiff does not properly assert a cause of action under Section 18-607 of the Delaware Limited Liability Company Act, which prohibits a limited liability company from making distributions to members at a time when the company's liabilities exceed the fair value of its assets. The Amended Complaint alleges that the February 2008 distribution to its sole member, RIH Casino, "caused the Borrower Defendants' liabilities to exceed the fair value of its assets. . . ." (Amended Complaint, ¶ 80). Since this

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<sup>3</sup>Referring to the allegations in paragraphs 44 through 48 of the Amended Complaint filed in *Chase Manhattan Bank v 264 Water Street Assoc., et al.*, Sup Ct, NY County, Index No. 27443/89.

cause of action is also based on the claim that RIH Casino, RIH Holdings and the Borrower Defendants were all operated as a single entity (*Id.*, ¶ 79), and plaintiff has failed to state a basis for piercing the corporate veils of these companies, this claim is also dismissed.

**Conclusion**

For the foregoing reasons, defendants' motion to dismiss is granted and the Amended Complaint is dismissed in its entirety with prejudice and without costs or disbursements.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

Dated: October 3, 2011



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**