

China Dev. Indus. Bank v Stanley
2012 NY Slip Op 33960(U)
February 24, 2012
Supreme Court, New York County
Docket Number: 650957/2010
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWARTZ, J.C.
JusticePART 45China Development Ind. BankINDEX NO. 650957/10

MOTION DATE _____

- v -
Morgan Stanley & Co. Incorporated,
et al.MOTION SEQ. NO. 009

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
unseal certain documents
is granted to the extent
set forth in the attached
Decision and Order.Dated: February 27, 2012Michael R. Adams
J.S.C.Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITIONCheck 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 : PART 45

-----X
CHINA DEVELOPMENT INDUSTRIAL BANK,

Plaintiff,

-against-

MORGAN STANLEY & CO. INCORPORATED,
(n/k/a MORGAN STANLEY & CO. LLC),
MORGAN STANLEY & CO. INTERNATIONAL PLC
(f/k/a MORGAN STANLEY & CO. INTERNATIONAL
LIMITED), TCW ASSET MANAGEMENT COMPANY,
JEFFREY GUNDLACH, LOUIS LUCIDO and
DOES 1-50,

Defendants.
-----X

Index No. 650957/2010

DECISION AND ORDER

Sequence Nos. 007, 008, 009

MELVIN L. SCHWEITZER, J.:

Plaintiff China Development Industrial Bank (CDIB) moves pursuant to CPLR 3124 to compel production of documents requested from defendants Morgan Stanley & Co. LLC and Morgan Stanley & Co. International plc (collectively, Morgan Stanley). Since August 31, 2010, when CDIB served its document demand, the parties have had numerous meet and confers and conferences before this court without fully resolving their dispute. They have requested that the court rule on the unresolved issues. Accordingly, the court now addresses motion sequence number 007. The court rules as follows:

Terms of General Application

The number of search terms shall be 25 and shall be provided by CDIB.

The custodians (Custodians) shall be those persons previously agreed upon as Custodians by CDIB and Morgan Stanley and Stephen D'Antonio, Anthony Tufariello, Steven Shapiro, Frank Telesca and Howard Hubler.

Documents are to be produced exclusively from files of the Custodians (except for documents responsive to No. 11) by using the 25 search terms.

Documents are to be produced for the period January 1, 2006 through April 31, 2007.

Defined terms are as defined in the plaintiff's Request for Production of Documents.

Document Production

Using the above terms, Morgan Stanley is directed to produce the following documents:

All documents regarding any payments, compensation, fees, profits, or income Morgan Stanley received in connection with the Stack CDO, excluding those related to trades of the Stack CDO Collateral Assets.

All documents related to the selection, purchase and value of the Stack CDO Collateral Assets.

All documents Morgan Stanley provided, delivered to or received from TCW, the Rating Agencies or any other person concerning the Stack CDO.

All documents concerning the Stack CDO (not including any of its Collateral Assets).

All documents relating to the models (including, but not limited to, software, databases and spreadsheets or other analytical software), data, inputs and assumptions Morgan Stanley used with respect to the Stack CDO, including, but not limited to, default probability, loss given default, recovery rates, correlation inputs and all pricing or other materials reflecting any analyses of the Collateral Assets, the Notes and/or the Supersenior Swap.

All transaction present value or “TPV” tickets, and all other documents concerning the valuation, mark-to-market and any other pricing information regarding the Supersenior Swap.

All documents concerning one investigation, inquiry, request for information or prosecution designated by plaintiff by any government agency, regulatory body or law enforcement agency, including, but not limited to, the Securities and Exchange Commission (SEC), the United States Department of Justice, any United States Attorney’s Office, the Internal Revenue Service, the Federal Bureau of Investigation, and any Attorney General’s office, concerning Morgan Stanley’s participation in the Stack CDO. This request includes, without limitation, documents produced to any government agency, regulatory body or law enforcement agency and transcripts of any testimony to the SEC.

All documents containing communications between three previously designated Morgan Stanley employees and the rating agencies during the period previously agreed upon by CDIB and Morgan Stanley.

The court now addresses motion sequence 008, in which Morgan Stanley moves pursuant to CPLR 3124 to compel production of documents requested from plaintiff CDIB. Since April 8, 2011, when Morgan Stanley served its document demand, the parties have had numerous meet and confers and conferences before this court without fully resolving their dispute. They have requested that the court rule on the unresolved issues, which the court now does herein. The parties dispute whether, or to what extent, CDIB has produced responsive documents. Morgan Stanley seeks to compel CDIB to produce the following:

1. documents sufficient to identify the CDIB personnel involved in making the CDIB Swap investment and other U.S. mortgage-related investments;

2. CDIB's investment policies, procedures and guidelines covering investments in U.S. mortgage-related securities like the CDIB Swap, and documents sufficient to identify CDIB's investments in such securities;
3. documents and communications concerning the CDIB Swap itself, including CDIB's execution of the May 2009 amendment;
4. documents concerning CDIB's familiarity and communications with the credit rating agencies, their models and their processes for rating U.S. mortgage-related securities like the CDIB Swap; and
5. documents concerning other investments CDIB made in U.S. mortgage-related securities like the CDIB Swap, including, among other things, documents reflecting due diligence, analyses, and financial performance.

There is no valid dispute that the documents sought by Morgan Stanley are material and necessary in the defense of this action (CPLR 3101). The court finds no merit in CDIB's claim that since Morgan Stanley allegedly has not complied with its own discovery obligation, CDIB should be excused from complying with Morgan Stanley's demands. In addition, the court refuses to try to determine to what extent, if any, CDIB has complied with Morgan Stanley's demands as CDIB invites the court to do.

In motion sequence 009, CDIB seeks to make public certain email correspondence which defendant Morgan Stanley wants sealed in accordance with a confidentiality order in this case. By agreement between the parties the court is requested to rule with respect to seven exhibits and the court will continue to deem the documents as confidential and not available to the public until its ruling is effective with respect to the documents. The documents, attached to the Affirmation of Jason C. Davis, dated November 14, 201, are identified as follows:

- Exh. 3: Email from Graham Jones of Morgan Stanley to Belinda Ghetty of S&P, et al., dated March 14, 2006.

- Exh. 5: Email from Brian Neer of Morgan Stanley to Elwyn Wong of S&P, dated May 20, 2006.
- Exh. 7: Email from Elwyn Wong of S&P to Brian Neer of Morgan Stanley, dated June 24, 2006.
- Exh. 11: Email from Elwyn Wong of S&P to Shawn Stoval of Constantine Cannon, dated July 20, 2006.
- Exh. 12: Email from Todd Jaeger of S&P to Graham Jones of Morgan Stanley, dated July 26, 2006.
- Exh. 15: Email from Belinda Ghetty of S&P to Shawn Stoval of Constantine Cannon, dated August 16, 2006.

There is a broad constitutional presumption that the public as well as the press are entitled to access to court proceedings, and denying such access must be narrowly tailored to serve compelling objectives. *Danco Labs, Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 (1st Dept 2000); *see also Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191 (1st Dept 2010). Thus, with this in mind, the court is obligated to weigh the claimed basis for confidentiality against the public interest in accordance with 22 NYCRR § 216.1 (Section 216.1), which provides:

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.

(b) For the purposes of this rule, “court records” shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a).

The First Department has recently provided the following guidelines for interpreting

Section 216.1 as follows:

Although the term “good cause” is not defined, “a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action.” “A finding of ‘good cause’ presupposes that public access to the documents at issue will likely result in harm to a compelling interest of the movant.” “Confidentiality is clearly the exception, not the rule,” and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.”

See Mosallem v Bergenson, 76 AD3d 345, 349 (1st Dept 2010) (citations omitted).

Applying these principles, the court concludes that on balance there is not good cause to seal exhibits 3, 5, 7, 11, 12, 15 and 19.

Accordingly, it is

ORDERED that pursuant to CPLR 2221 (a) the court vacates its Decision and Order dated February 2, 2012 on Sequence Nos. 8 and 9; and it is further

ORDERED that CDIB’s motion to compel is granted, and Morgan Stanley shall produce a copy of all responsive documents in accordance with the above not already produced within thirty days of the entry of this Decision and Order, and to the extent Morgan Stanley asserts that it has already produced responsive documents, it shall identify them by bates number; and it is further

ORDERED that Morgan Stanley’s motion to compel is granted, and CDIB shall produce a copy of all responsive documents in accordance with the above not already produced within thirty days of the entry of this decision and order, and to the extent CDIB asserts that it has already produced responsive documents it shall identify them by bates number; and it is further

ORDERED that within thirty days of the entry of this decision and order CDIB
may treat the documents identified as exhibits 3, 5, 7, 11, 12, 15 and 19 as not sealed
from the public.

Dated: February 24, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER
J.S.C.