

Barclays Bank Mexico S.A. v Homex

2013 NY Slip Op 32467(U)

October 8, 2013

Supreme Court, New York County

Docket Number: 651681/2013

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

BARCLAYS BANK MEXICO S.A., et al.

Plaintiffs,

-against-

DESARROLLADORA HOMEX, S.A.B. De C.V.,

Defendant.

INDEX NO. 651681/2013

MOTION DATE August 9, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

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 to dismiss action is decided in accordance with the accompanying decision and order.

Dated: October 8, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

10/9/13
RS

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49**

-----X
**BARCLAYS BANK MÉXICO S.A., INSTITUCIÓN DE BANCA
MÚLTIPLE, GRUPO FINANCIERO BARCLAYS MÉXICO**

Plaintiff,

**DECISION AND
ORDER**

-against-

Index No. 651681/2013

DESARROLLADORA HOMEX, S.A.B. De C.V.,

Defendant.

-----X
O. PETER SHERWOOD, J.:

On this motion to dismiss pursuant to CPLR 3211(a)(8), defendant Desarrolladora Homex, S.A.B de C.V. (“Homex”) moves to dismiss for lack of personal jurisdiction. For the following reasons, the motion is denied. .

I. BACKGROUND

Plaintiff Barclays Bank México S.A., Institución de Banca Múltiple, Grupo Financiero Barclays México (“BBMex”) is a Mexican financial institution. Homex is a publically traded home construction company based in Mexico. On February 15, 2012, BBMex and Homex entered into the standard agreement that governs derivatives transactions: the 1992 ISDA Master Agreement (the “Master Agreement”), which pursuant to usual custom and practice, includes and incorporates a Schedule (the “Schedule”).

Pursuant to Section 1(c) of the Master Agreement, the Master Agreement, the Schedule, and all subsequent Confirmations form a single agreement (the “Agreement”) that governs all relevant transactions between the parties. The Master Agreement provides that “[i]n the event any inconsistency between the provisions of Schedule and the other provisions of [the] Master

Agreement, the Schedule will prevail” (Master Agreement §1 [b]). It further provides that “[i]n the event of any inconsistency between the provisions of any Confirmations and [the] Master Agreement (including the Schedule), such Confirmation will prevail *for the purpose of the relevant transaction*” (*id.* [emphasis added]).

The Master Agreement specifies the following with regard to governing law:

(a) Governing Law. The Agreement will be governed by and construed in accordance with the law specified in the Schedule

(b) Jurisdiction. With respect to any suit, action or proceedings relating to this Agreement (“Proceedings”), each party irrevocably:

(i) submits to the jurisdiction of the English courts if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York . . . if this agreement is expressed to be governed by the laws of the State of New York; and

(ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court . . . [and] waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

(*id.* § 13).

The Schedule, also dated February 15, 2012, provides that New York law governs the parties’ agreement (Schedule Part 4 [h]). Attached as an appendix to the Schedule is a Legal Opinion by Javier Romero Castañeda, Homex’s General Counsel. In the opinion, Castañeda confirms that Homex’s submission to the jurisdiction of the courts of New York “in the Agreement is a valid submission . . .” (Simões aff Ex. G at 15).

BBMex and Homex engaged in several derivative transactions under the Master Agreement between February 15, 2012 and October 2012. The Confirmations to two of those transactions, dated March 23, 2012 and September 14, 2012 list the Governing Law as “English” (Katz aff, Ex. D, F). Other Confirmations are silent as to Governing Law (*see, e.g., id.* Ex. C [Feb. 16, 2012], Ex. E [July

18, 2012]).

In April 2013, BBMex demanded that Homex make two transfers of collateral, as required under the terms of the Master Agreement. According to BBMeex, Homex has refused to make the transfers, resulting in the instant litigation.

II. DISCUSSION

CPLR 3211 [a] [8] provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant.” When presented with a motion under CPLR 3211 [a] [8], “the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue” (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]).

The arguments raised by the parties are identical to those presented before Justice Kornreich in another action between BBMex and a different defendant (*see Barclays Bank Mexico v Urbi Desarrollos Urbanos*, 40 Misc 3d 1212[A], 2013 NY Slip Op 51159[U] [Sup Ct NY County 2013]; *see also Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 104 [1st Dept 2012] [finding the Schedule’s selection of New York law conclusive]). Although the transaction dates differ, all the underlying agreements are identical in all material respects. The Court is persuaded by Justice Kornreich’s analysis in that case. At the time the Master Agreement and Schedule were negotiated in February 2012, the parties made a clear choice of law: New York. The complaint does not allege that the two Confirmations specifying English law were breached. In fact, the complaint does not mention any specific transaction or its associated Confirmation. The plain language of the Master Agreement provides that the terms of the Confirmation will prevail only “for the purpose of the relevant transaction.”

The two Confirmations do not amend the parties' choice of New York law applicable to the Master Agreement, as expressed in the Schedule and as understood by Homex's General Counsel at the time of the agreement.

Based upon the foregoing, it is

ORDERED that defendant's motion to dismiss is DENIED; and it is further

ORDERED that the parties are to appear in Part 49, Supreme Court, New York County, 60 Centre Street, Room 252, New York, NY, for a status conference on November 6, 2013 at 2:30 in the afternoon.

This constitutes the decision and order of the Court.

DATED: October 8, 2013

ENTER,



O. PETER SHERWOOD
J.S.C.