

**Whitecap (US) Fund I, LP v Siemens First Capital
Commercial Fin., LLC**

2013 NY Slip Op 33245(U)

February 21, 2013

Sup Ct, NY County

Docket Number: 650888/2012

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: O. PETER SHERWOOD
Justice

PART 49

WHITECAP (US) FUND I, LP, et al.,

Plaintiffs,

-against-

SIEMENS FIRST CAPITAL COMMERCIAL FINANCE, LLC, et al.,

Defendants.

INDEX NO. 650888/2012

MOTION DATE Feb., 19, 2013

MOTION SEQ. NO. 002

MOTION CAL. NO.

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

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the motion to dismiss action is decided in accordance with the accompanying transcript, dated February 19, 2013 and decision and order.

Dated: February 21, 2013

O. Peter Sherwood signature and name 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.

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

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

-----X
**WHITECAP (US) FUND I, LP, WHITECAP (OFFSHORE)
FUND I, LTD., WHITECAP (OFFSHORE) FUND II, LTD.,
AND CORDELL FUNDING LLLP, individually and on
behalf of ALARM FUNDING LLC, CASTELROCK
SECURITY HOLDINGS, INC, and CASTLEROCK
SECURITY, INC.,**

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 650888/2012

**SIEMENS FIRST CAPITAL COMMERCIAL FINANCE
LLC, JAMES FLEET, PETER GIACALONE, and
DANIEL DOOLEY,**

Defendants,

AND

**ALARM FUNDING LLC, CASTLEROCK SECURITY
HOLDINGS, INC., and CASTLEROCK SECURITY, INC.,**

Nominal Defendants.

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

In motion sequence number 001, the court granted the motion of James Fleet, Peter Giacalone and Daniel Dooley (“Directors”) to dismiss the second cause of action on the ground, *inter alia*, that plaintiffs failed to aver either that they made a pre-suit demand upon the Directors to authorize a suit against Siemens First Capital (“Siemens”) on behalf of the Alarm Funding Companies (“Alarm Companies”) or that making such demand would have been futile.¹ The latter was not pleaded with “particularity which create a reasonable doubt that the directors’ action was entitled to the protections of the business judgment rule” *Aronson v Lewis*, 473 2d 805, 808 (Del 1984), overruled on the other grounds by *Brehm v Eisner*, 746 A2d 244, 254 (Del 2000). For the same reason, the

¹This Decision and Order supplements the decision rendered from the Bench on motion sequence number 002. In the event of an inconsistency, this Decision and Order shall take precedence.

first, third, fourth and fifth causes of action must be dismissed². The failure to demonstrate demand futility aside, the court notes that the challenged decision to wind down the Alarm Companies after failure to meet the March 1, 2011 deadline for launch of the IPO is consistent with the agreement of the parties to convert Castle Rock into a single purpose entity in order to facilitate a sale of its assets if plaintiffs failed to meet the deadline.

The sixth cause of action against Siemens for breach of the Pledge Agreement, must be dismissed because plaintiffs failed to deposit proceeds of an equity raise by March 1, 2011 and, alternatively, did not convert Castle Rock to a single purpose entity for liquidation as provided for in the parties' Credit Agreement (*see* Complaint ¶36; Sabados Aff., Ex 5 at §§ 5,9,10). The clause in the Third Amendment to the Credit Agreement which provides for deposit of the proceeds of the equity raise "simultaneously with the closing of the equity raise" cannot be read as a condition precedent to the March 1, 2011 deadline for depositing the proceeds of the IPO. The Credit Agreement provides that an Event of Default occurs if Castle Rock "shall fail to ... deposit the Restricted Proceeds ... by March 1, 2011". It also provides that "[i]n the event that the Equity Raise does not occur by March 1, 2011, [Castle Rock] shall immediately take all actions necessary" to become a single purpose entity in anticipation of liquidation.

Plaintiffs' claim that they were entitled to an extension of the March 1, 2011 deadline is unpersuasive. The alleged failure of Siemens to announce its intention to enforce the contractual deadline cannot operate as a waiver of that right especially given the no waiver provision of the Credit Agreement (*see Jeppaul Garage Corp. v Presbyterian Hosp. in N.Y.*, 61 NY2d 442, 446 [1984]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

The seventh cause of action for breach of the duty of good faith and fair dealing must be dismissed because it is duplicative of the breach of contract claim (*see Rather v CBS Corp.*, 68 AD3d 49, 59 [1st Dept 2009]). Moreover, this cause of action cannot be asserted to challenge a lenders exercise of its enforcement rights under the terms of a contract (*see Roswell Capital Ptnrs. LLC v Alternative Constr. Technologies*, 638 F Supp2d 360, 371 [SDNY 2009]).

²The court declined to direct that dismissal of the second cause of action was without prejudice and noted that CPLR 2221 is an adequate vehicle for a party seeking to revive a dismissed claim on the basis of newly discovered evidence.

Accordingly, it is

ORDERED that the motion of Directors to dismiss the second cause of action (motion sequence number 001) is GRANTED; and it is further

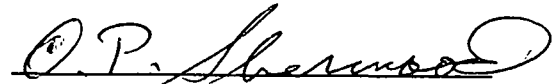
ORDERED that the motion of Siemens to dismiss the first, third, fourth, fifth, sixth and seventh causes of action (motion sequence number 002) is GRANTED; and it is further

ORDERED that the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: February 21, 2013

ENTER,

A handwritten signature in cursive script, appearing to read "O. P. Sherwood", written over a horizontal line.

O. PETER SHERWOOD

J.S.C.