

**Stonehill Capital Mgt., LLC v Bank of the West**

2014 NY Slip Op 30751(U)

March 24, 2014

Supreme Court, New York County

Docket Number: 652287/2012

Judge: O. Peter Sherwood

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

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**STONEHILL CAPITAL MANAGEMENT LLC,  
 STONEHILL INSTITUTIONAL PARTNERS, L.P. and  
 STONEHILL MASTER FUND,**

**Plaintiffs,**

**DECISION AND ORDER**

**-against-**

**Index No.: 652287/2012  
 Mot. Seq. No. 003**

**BANK OF THE WEST and MISSION CAPITAL  
 ADVISORS, LLC,**

**Defendants.**

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

Plaintiffs, Stonehill Capital Management, LLC, Stonehill Institutional Partners, L.P. and Stonehill Master Fund, Ltd. (collectively, “Stonehill”), move pursuant to CPLR 3212 for summary judgment against defendant Bank of the West (“BOTW”). BOTW cross-moves for summary judgment dismissing the Amended Complaint in its entirety. For the reasons outlined below, the motion must be GRANTED and the cross-motion DENIED.

***BACKGROUND***

In February 2012, BOTW, the lender of certain non-performing loans, including a loan in the principal amount of \$8,787,141 (the “Loan”) to borrowers, Gary Goett and others, determined to sell the loans. Pursuant to a written engagement agreement dated March 6, 2012, BOTW retained defendant Mission Capital Advisors, LLC (“Mission”) to market a collection of loans and to conduct an auction sale of the BOTW assets, including the Loan (Stern aff Ex. A). The sale process was a structured timeline sealed-bid auction designed to result in the submission of non-contingent final bids along with pre-negotiated purchase and sale agreements (Stern aff Ex. C).

On March 8, 2012, Mission distributed an Offering Memorandum which included the Loan in a Single Asset Pool. The Offering Memorandum set a timeline for Indicative Bids (March 28, 2012), Final Bids (April 18, 2012), Winning Bidder Selection (April 19, 2012), Deposit (April 20, 2012) and Closing (April 27, 2012). On the Final Bid Date, prospective buyers were to submit “non-contingent offers (the acceptance of which by Seller will require immediate execution of pre-

negotiated Asset Sale Agreement(s) by Prospective Bidder accompanied by a 10% non-refundable wire funds deposit)” (Stern aff Ex. S). The Offering Memorandum also stated that “the Seller is selling its Assets subject only to those representations and warranties explicitly stated in the Asset Sale Agreement.” The Offering Memorandum included a disclaimer that “the seller reserves the right, at their sole and absolute discretion, to withdraw any or all of the assets from the loan sale, at any time” (*id.*).

Although the parties dispute who initiated the call, on April 16, 2012 Steven Emery of Mission spoke with Michael Stern of Stonehill regarding the auction. Stern expressed an interest in participating in the auction. Mission forwarded a copy of the proposed loan sale agreement (“LSA”) that BOTW intended to utilize in connection with the winning bid (Stern aff Ex. D). The LSA was the “pre-negotiated Asset Sale Agreement” referenced in the Offering Memorandum. On April 18, 2012 Stonehill advised mission that the proposed LSA did not contain the technical provisions necessary to effectuate sale and assignment of a loan under a syndicated credit facility, and offered to modify the proposed LSA or use the Loan Syndications and Trading Association syndicated loan documents, (“LSTA Documentation”) (Stern aff Ex. E). A LSTA Documentation is a form purchase and sale agreement incorporating standardized terms and conditions for trading distressed syndicated loans. (Stonehill Rule 19-a Statement ¶ 11; BOTW Rule 19-a Response ¶ 11).

On April 20, 2012, Emery called Stern to inform him that Stonehill’s bid price (30% of the loan amount) was accepted as the winning bid at the auction. On April 23, 2012, Stonehill sent Mission a modified version of the LSA to address the requirements for a syndicated credit facility (Stern aff Ex. F). On April 24, 2012, Jason Kuwayama, counsel for BOTW, sent Emery an email stating that if the Loan was a syndicated credit “then the LSTA form agreement is actually pretty good” (Stern aff Ex. G). Emery replied that he was “99.9% certain that [Stonehill is] right about this being a syndicated credit” (*id.*).

On April 27, 2012, Mission sent an email to Stonehill stating: Subject to the mutual execution of an acceptable Loan Sale Agreement, Bank of the West (“Seller”) has agreed to the Stonehill Capital Management, LLC (“Buyer”) bid of:

Mixed Portfolio - \$ 8,787,141 UPB

Purchase Price - \$2,363,142

As discussed, counsel representing Bank of the West will be Jason Kuwayama . . . Jason will be sending you an executable Loan Sale Agreement (in clean and redline form) by Tuesday, May 1st. An executed signature page and 10% non-refundable deposit is expected no later than 2:00 pm EDT on Wednesday May 2nd . . .

(Stern aff Ex. H).

Later that day, Kuwayama emailed Stonehill stating that he was previously unaware that the Loan was syndicated and that he “preferred[ed] to use the LSTA documentation for syndicated credits” (Stern aff Ex. I). Kuwayama further stated that because most trade agents would not approve trades at the end of the month, the parties should aim for an early May closing date (*id.*).

On May 4, 2012, Kuwayama again emailed Stonehill, stating that he was “working on getting you the documents by Monday.” He also requested a copy of previous documents regarding the Loan (Stern aff Ex. J). On May 6, 2012, Stonehill responded with draft documents, and expressed a desire to move forward with execution so that Stonehill could pay the required deposit (Stern aff Ex. K).

On May 7, 2012, BOTW learned that Stonehill had provided financing to Goett. In an internal memorandum dated May 10, 2012 (Stern aff Ex O), BOTW employee Mark McCue summarized the auction by stating that:

On or shortly after April 20, 2012, BO[T]W determined that it would be in its best interest to place the Goett Note with Mission to be sold. Mission capital negotiated the sale of the Goett Note to Stonehill Capital at the sales price of \$2,600,000.

The memorandum states further that “no formal written commitments are executued between BO[T]W/Mission Capital and Stonehill that would obligate BO[T]W to sale (sic) the Goett Note. Fact remains that BO[T]W acted in good faith and has verbally committed to the Goett Note sale to Stonehill.” The memorandum makes no mention of the April 27, 2012 email from Mission to Stonehill which states that “Bank of the West . . . has agreed to the Stonehill . . . bid . . .” (Stern aff Ex. H).

On May 14, 2012, Stonehill emailed Kuwayama following up on the status of the transaction. Kuwayama forwarded the email to Mission stating “Huh? Did you talk to them?” (Stern aff Ex. P). On May 16, 2012, Stonehill emailed Mission, following up as well (Stern aff Ex. Q). On May 18, 2012, Kuwayama advised mission that BOTW “will not proceed with [the sale] because it has no obligation to do so. There are no agreements . . . between [BOTW} and Stonehill Capital. The

Offering Memorandum . . . permits the [BOTW] to withdraw any loan from the auction at any time.” Mission forwarded the email containing the attorney’s advice to Stonehill on May 25, 2012 (Stern aff Ex. R).

On June 21, 2012, as a result of the financing Goett received, BOTW received \$4,197,441.01 on the Loan, which exceeded Stonehill’s bid by \$1,834,402. (see Stonehill Rule 19-a Statement ¶ 36; BOTW Rule 19-a Response ¶ 36).

Seven days later Stonehill commenced this action. The Complaint alleged three causes of action, (1) Breach of Contract, (2) Breach of Implied Covenant of Good Faith and Fair Dealing, and (3) Indemnification. Plaintiff sought “damages in a sum exceeding \$1,000,000” plus the costs, disbursements and attorneys’ fees.

Following dismissal of the second cause of action with leave to replead in the alternative (motion sequence no. 001), Stonehill filed an Amended Complaint, repleading Breach of Implied Covenant of Good Faith and Fair Dealing (Second Cause of Action) in the alternative, adding an Unjust Enrichment cause of action in the alternative (Third Cause of Action) and renumbering the Indemnification cause of action as the Fourth Cause of Action. In the Amended Complaint Plaintiff seeks damages “in the sum of at least \$1.5 million”. On June 27, 2013, the Court denied BOTW’s motion to dismiss the Second and Third Causes of Action. On August 20, 2013, Stonehill moved for summary judgement against BOTW as to the First Cause of Action, or alternatively on the Second and Third Causes of Action.

### ***DISCUSSION***

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see*, CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney’s affirmation (*see*, *Alvarez, supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and “a shadowy semblance of an issue” are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

#### **A. Whether A Contract Was Formed**

To sustain a breach of contract action, plaintiffs must demonstrate (i) an agreement; (ii) plaintiff’s performance; (iii) defendant’s breach of the agreement; and (iv) damages as a result of the breach (*see Krauss v Visa International Service Assoc.*, 304 AD2d 408 [1st Dept 2003]).

The Loan was put up for auction by BOTW and were offered for sale “subject only to those representations and warranties explicitly stated in the Asset Sale Agreement” (Stern aff Ex. S). Stonehill submitted the highest bid at the auction which bid was accepted by Mission on behalf of BOTW subject to execution by the parties of an acceptable Loan Sale Agreement (Stern aff. Ex. H). BOTW argues that because the acceptance, was made expressly “subject to mutual execution of an acceptable Loan Sale Agreement,” and there is no dispute that the LSA (or LSTA) was never executed, there was no binding agreement.

In *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce* (70 AD3d 423, 426 [1st Dept 2010]) the court stated that “in determining whether a contract exists, the inquiry centers upon the parties’ intent to be bound, i.e., whether there was a ‘meeting of the minds’ regarding the material terms of the transaction.” A loan “subject to a mutually acceptable” agreement does not necessarily condition assent on the execution of a definitive agreement as long as “[t]he agreement [is] reasonably certain as to material terms” *Emigrant Bank v UBS Real Estate Securities, Inc.*, 49 AD3d 382, 383-384 [1st Dept 2008]; *see also Bed Bath & Beyond, Inc. v Ibex Construction, LLC*, 52 AD3d

413 [1st Dept 2008]. However, “if an agreement is not reasonably certain in its material terms, there can be no enforceable contract” *Cobble Hill Nursing Home Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989].

Here, the auction was structured such that the material terms were pre-negotiated. Because it misapprehended the nature of the Loan, BOTW erroneously included a LSA that was inappropriate for a syndicated credit facility. When Stonehill pointed out that an LSTA Documentation should be used instead, BOTW’s counsel agreed immediately. But for BOTW’s misunderstanding of the nature of the Loan, the material terms of the sale were established at the time of Mission’s acceptance of Stonehill’s bid. The parties’ post-acceptance discussions regarding the agreement were focused on correcting the error by substitution of another well understood standard form of agreement. Stonehill never expressed any intention to modify the material terms of the agreement. On the contrary, the undisputed evidence shows that Stonehill was ready willing and able to sign a compliant form and that delays in concluding the transaction were initiated by BOTW.

BOTW’s recent assertion that the LSTA Documentation “contains myriad provisions to which BOTW would not agree, failed to contain various provisions upon which BOTW would insist (Kuwayama aff ¶ 9) is not supported by any contemporaneous communication evidencing any of either the “myriad provisions” it found to be objectionable or the “various provisions upon which [it] would insist.” These protestations advanced in litigation are also inconsistent with the sale terms BOTW set as “subject only to those representation and warranties explicitly stated in the Asset Sale Agreement”. Regarding the “myriad” and “various” provisions which BOTW states have not been met, BOTW argues that it was under no obligation to disclose to Stonehill the changes it purportedly wanted to make to the LSTA Documentation. It adds that until those secret changes were made, it was under no binding obligation to proceed with the sale. These arguments are utterly meritless. The material terms on which to Loan sold at auction are readily ascertainable by reference the Offering Memorandum, the original LSA, Stonehill’s bid, and Mission’s email accepting the bid.

BOTW requested the LSTA Documentation from Stonehill and stated that it would send a form to Stonehill to execute. Stonehill sent a proposed version of the LSTA Documentation to BOTW, at BOTW’s request. BOTW neither objected to any of the terms in the LSTA

Documentation nor provided any counter-proposal. There is no evidence of that BOTW manifested an intent not to be bound by the results of the auction until after it learned that Stonehill had provided refinancing to Goett, thereby increasing the value of the Loan by \$1.8 million. The “subject to” language in Mission’s email accepting Stonehill’s bid did not render it an unenforceable agreement to agree. (*see Bed, Bath and Beyond, Inc., supra* [“use of the language ‘subject to’ in the [letter of Intent] and references to the execution of a Construction Agreement as a ‘qualification’ do not amount to an express reservation of the right not to be bound”]).

The cases cited by BOTW are not to the contrary. *Clifford R. Gray, Inc. v LeChase Construction Services, LLC* (31 AD3d 938 [3d Dept 2006]) involved the promised award of a subcontract, without material terms such as the precise nature of the work, the price, and manner of payment. The subject of the sale, price, and manner of payment in this case are definite. Although the time of closing was delayed from the initial terms, this was required because of BOTW’s failure to produce a suitable agreement for execution and the preference of BOTW’s counsel for a closing after month-end. Stonehill states that it was prepared to wire a deposit and close in accordance with BOTW’s proposed timeframe, an assertion that is not disputed. *IDT Corp v Tyco Group, S.A.R.L.* (13 NY3d 209 [2009]), involved a enforceable settlement agreement that required negotiation of later agreements before a party was obligated to perform. The parties negotiated in good faith, as the agreement required, but failed to reach an agreement. Here BOTW failed to negotiate in good faith. Despite acknowledging its commitment to Stonehill, it reneged on the sale without providing a single proposed change to the LSA/LSTA. *Amcan (supra)* involved an agreement with a “Conditions Precedent” subheading. The agreement was subject to completion of definitive loan documentation which contained the agreed upon terms and conditions and “such other terms and conditions as [defendant] may reasonably require.” Unlike *Amcan*, the agreement here did not contemplate additional terms and conditions. In this case all the terms and conditions were “pre-negotiated” and the technical execution of an acceptable form containing those pre-negotiated terms was all that was required. *Schneider v Jarmain* (85 AD3d 511 [1st Dept 2011], *affg* 2010 NY Slip Op 30801[U]), involved a letter of intent lacking material terms that “ma[de] clear that there was no agreement between the parties.”

### **B. Mission as BOTW's Agent**

BOTW also argues that Mission did not have authority to enter into a binding contract on its behalf. An agent has actual authority if the principal has granted the agent the power to enter contracts on the principal's behalf (*see Ford v Unity Hospital*, 32 NY2d 464, 469-470 [1973]).

Mission was hired by BOTW to conclude the auction and Mission did so. There is no evidence that Mission had less than full authority to conduct an auction that would be binding on the winning bidder and BOTW. If Mission lacked such authority, neither BOTW nor Mission disclosed that fact to potential bidders. In fact, BOTW relied on Mission to communicate both its acceptance of the bid and its decision not to "proceed" with the trade (Stern aff, Ex. H and R). Moreover, at oral argument on motion sequence number 002 held on June 27, 2013, counsel for BOTW readily conceded that Mission was hired by BOTW to conduct the auction and to declare the winning bid with the understanding that the sale was subject to completion of the LSA. The argument advanced by BOTW's lawyer (after BOTW learn there was more money to be made by not selling the loan to Stonehill) that Mission was not its agent for the purpose of sale (Stern aff Ex. R) is belied by documentary evidence demonstrating that Mission had actual authority. The Engagement Letter (Stern aff Ex. A) states that "Mission shall . . . conduct a final sealed bid round". The Offering Memorandum (Stern aff Ex. S) describes the process wherein bidders would "submit non-contingent final bids." Even if Mission did not have actual authority, there is no evidence that either BOTW or Mission took any steps that would alert a reasonable bidder that BOTW's auctioneer lacked authority.

### **C. Whether Stonehill Was Ready Willing and Able to Conclude the Sale**

Stonehill asserts, without contradiction, that it was ready to execute the LSTA Documentation and to wire a deposit as soon as BOTW forwarded it for execution. The 10% deposit was linked to execution of the agreement. Mission's emailed acceptance of the bid stated that Kuwayama would send an executable agreement by May 1, 2012, and that Stonehill was to execute it the next day and wire the 10% deposit. Kuwayama failed to send the draft agreement thereby precluding Stonehill from performing its obligations. On May 4, 2012, Kuwayama requested a version of the LSTA Documentation for use in the sale and indicated that he would send the documents by May 7, 2012. He failed to do so. Consequently, Stonehill's obligation to execute an agreement and wire the deposit was never triggered.

**CONCLUSION**

Stonehill has shown that it was the highest bidder at auction, that it was ready, willing and able to perform its obligations, that BOTW has failed to rebut Stonehill's prima facie case with evidence in admissible form that raises a genuine material issue of fact. The motion will be granted.

Accordingly, it is hereby

**ORDERED** that Stonehill's motion for summary judgment as to the first Cause of Action is GRANTED and BOTW's cross-motion for summary judgement dismissing the complaint is DENIED; and it is further

**ORDERED** that the judgement shall be entered in favor of Stonehill and against BOTW.

Settle judgement on ten (10) days notice.

This constitutes the decision and order of the court.

**DATED: March 24, 2014**

**ENTER,**



**O. PETER SHERWOOD**

**J.S.C.**