Federated Project & Trade Fin. Core Fund v Amerra Agri Fund, LP
2014 NY Slip Op 30890(U)
April 4, 2014
Sup Ct, New York County
Docket Number: 651986/12
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FEDERATED PROJECT AND TRADE FINANCE CORE FUND and GML AGRICULTURAL COMMODITY TRADE FINANCE FUND LLC,

Plaintiffs,

Index No. 651986/12

- against -

DECISION/ORDER

AMERRA AGRI FUND, LP,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Cross Motion and Affidavits Annexed.....	2
Replying Affidavits.....	3,4
Exhibits.....	5

Plaintiffs Federated Project and Trade Finance Core Fund ("Federated") and GML Agricultural Commodity Trade Finance Fund LLC ("GML") commenced the instant action against defendants Amerra Agri Fund, LP ("Amerra") and Amerra Capital Management, LLC ("Amerra Capital") alleging causes of action for breach of contract, wilful misconduct and gross negligence. This court has already dismissed Amerra Capital from the action along with plaintiffs' causes of action for gross negligence and wilful misconduct. Amerra now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. Plaintiffs cross-move for an Order pursuant to CPLR § 3212 for summary judgment on their cause of

action for breach of contract. For the reasons set forth below, Amerra's motion is granted in part and denied in part and plaintiffs' cross-motion is denied.

The relevant facts are as follows. On or about October 30, 2009, Amerra, as Buyer, entered into a Master Repurchase Agreement (the "Repo Agreement") with Cia. Arrocera Covodonga S.A. de C.V. ("Covadonga"), a Mexican grain company, as Seller, relating to the sale and repurchase of Warehouse Receipts, or certificates of deposits ("CDs"), covering specific quantities of rice and beans, for a 45-day period. The Covadonga inventory of rice and beans stored in warehouses in Mexico would serve as collateral for the Repo financing (the "Repo Collateral"). The Repo Agreement provided for a "Maximum Purchase Amount" of $7.5 million. On or about December 1, 2009, Amerra increased the Maximum Purchase Amount to $12.5 million and on or about December 17, 2009, it further increased the Maximum Purchase Amount to $14.5 million.

Subsequent to entering into the Repo Agreement, Amerra invited plaintiffs to participate with it in financing Covadonga. In or around December 2009, Amerra entered into a Participation Agreement with each plaintiff and with Rochdale GML Trade Finance Income Fund Limited ("Rochdale"). Pursuant to such Participation Agreements, plaintiffs were not investors in Amerra's fund but rather they participated on the "same level" as Amerra in transactions under the Repo Agreement. Amerra maintained a minimum commitment of its own funds toward the Repo Agreement.

Pursuant to the Repo Agreement, Amerra received CDs issued by professional "Almacenadoras," or "warehousemen," licensed under the Mexican General Law Governing Auxiliary Credit Organizations and Activities. Each month between November 2009 and

September 2010, Amerra received and allegedly relied upon confirmations by these warehousemen that sufficient Repo Collateral existed to cover the CDs issued to Amerra. Amerra also allegedly relied on the warehousemen to confirm the commodity and quantity held by its warehouses under CDs issued in favor of Covadonga and then endorsed to Amerra. On or about June 25, 2010, Amerra engaged Maloney Commodity Services, Inc. ("Maloney") to do a physical inspection of Covadonga's rice and bean inventory. Specifically, Amerra hired Maloney to verify sufficient inventory to cover all issued and outstanding CDs and instructed Maloney to find out whether the warehousemen had issued any duplicate CDs. Between June 29, 2010 and July 2, 2010, Maloney inspected the inventory covered by Amerra's CDs in warehouses located in Ecatepec, Ruiz and Ah Kim Pech and confirmed surpluses in each location.

Throughout the first half of 2010, Amerra requested and received from Covadonga various financial statements from 2009 and 2010, pursuant to the Repo Agreement. By mid-August 2010, Covadonga provided interim financials through the second quarter of 2010 and audited financials from prior years. Between June 2010 and October 2010, Amerra advised plaintiffs that Covadonga had liquidity problems, sought various forms of financing directly or through other related companies owned by the controlling family shareholders of Covadonga for millions of dollars, existing lending was exposed to a margin call and that such events triggered Amerra to request a series of Repo Collateral inspections to be performed by Maloney. Amerra alleges that it regularly sent plaintiffs reports on extensions of the Repo Agreement along with their share of premium payments made by Covadonga.

Between December 2009 and May 2010, Covadonga's repurchase obligations under the Repo Agreement were extended from time to time by Amerra. Specifically, on May 27, 2010,

Amerra extended Covadonga's repurchase obligations under the Repo Agreement until July 9, 2010. As of May 27, 2010, Amerra had provided Covadonga with $14.5 million in financing, the Maximum Purchase Amount allowed under the terms of the Repo Agreement. Amerra had contributed $5 million of that amount, with plaintiffs and Rochdale contributing the remaining $9.5 million.

Subsequently, Amerra was advised that Covadonga and its affiliates were in need of additional financing in order to continue operating their business. In response, on June 1, 2010, Amerra loaned an affiliate of Covadonga an additional $8 million (the "Rural Loan"). The Rural Loan was collateralized by individuals and entities affiliated with Covadonga by the execution of personal guarantees, share pledges, trademark pledges and a commitment to convert collateral to secure mortgages on land and property (the "Rural Loan Collateral"). In June 2010, in addition to lending Covadonga's affiliate an additional $8 million secured by the Rural Loan Collateral, Amerra purchased a series of insured short-term Covadonga promissory notes at a discount, with a face value of $10,488,161.36, from a supplier to Covadonga. In July 2010, Amerra purchased an additional $2,543,580.00 of insured short-term Covadonga promissory notes, and sold a participation to GML (the "promissory notes").

On July 9, 2010 Amerra extended Covadonga's repurchase obligations under the Repo Agreement to July 20, 2010. On July 20, 2010, Amerra again extended Covadonga's repurchase obligations under the Repo Agreement to August 24, 2010. As Covadonga expressed a need for more financing, on August 24, 2010, Amerra amended the Repo Agreement, increasing the Maximum Purchase Amount to $16.3 million, with a corresponding increase in collateral, and extending Covadonga's repurchase obligations to October 8, 2010. Also on August 24, 2010,

Amerra sent plaintiffs notice that it intended to increase the Maximum Purchase Amount under the Repo Agreement by $1.8 million. Amerra alleges that plaintiffs did not object to this modification of the Repo Agreement.

On September 3, 2010, Covadonga defaulted on the payment of the first of the promissory notes. Covadonga explained to Amerra that it defaulted because it was experiencing "some temporary liquidity issues" due to a bank unexpectedly curtailing its credit lines. On September 20, 2010, Covadonga paid Amerra on the first of the promissory notes. On September 21, 2010, Covadonga defaulted on the payment of the second of the promissory notes and was unable to cure that default. Covadonga also defaulted on the remaining promissory notes.

On September 28, 2010, Amerra sent a letter to Covadonga's principals stating that in light of Covadonga's "current default status," Amerra would be "seeking additional information about the current status of Covadonga's liquidity, debt profile and general ability to meet its future obligations to Amerra." In that letter, Amerra also demanded that Covadonga immediately increase the valuations of the Repo Collateral and arrange for physical inspections of the warehouses where the Repo Collateral was being stored to "a minimum of twice per week," and thereafter provide Amerra with confirmation that "there is an adequate volume of commodity to cover the [Warehouse Receipts]." Additionally, Amerra demanded that by October 1, 2010, Covadonga submit "weekly cash flow report[s] each Friday reflecting the upcoming week's project cash flows."

On October 6, 2010, Amerra sent Covadonga a letter warning it that its repurchase obligations under the Repo Agreement would become payable in full on October 8, 2010 and

threatened to sell the Repo Collateral. Specifically, Amerra's letter stated, *inter alia*,

> [I]t is our expectation that we will promptly receive on such date the repurchase price of US $ 16,300,000.00 and premium of US $ 193,562.50 (total amount due US $ 16,493,562.50) applicable thereto[.] [O]therwise, as provided by applicable law, we will assume that [Covadonga] has forfeited its right to retrieve the relevant CDs and that [Amerra] will proceed to sell the same in the market.

On October 8, 2010, Covadonga defaulted on its repurchase obligations under the Repo Agreement, which gave Amerra the right to exercise all rights and remedies available to it under the Repo Agreement, including the right to sell the Repo Collateral immediately. However, Amerra granted Covadonga a twenty-eight day grace period to cure its default in order to investigate further. Thereafter, Amerra sent e-mail correspondence to the warehousemen and received confirmation that Amerra's CDs were in full order. On or about October 17, 2010, General, one of the warehousemen, sent further reassurances to Amerra that all the grain was present and accounted for. On or about October 21, 2010, Amerra sought assurance from Gomez, another of the warehousemen, that it was in control of enough inventory to honor Amerra's CDs and the next day, October 22, 2010, Gomez confirmed that it would inspect the facility. Additionally, Amerra commissioned a second round of inspections by Maloney.

On or about October 28, 2010, Amerra effected payments to plaintiffs for their premium rights under the Repo Agreement for the period of September 20, 2010 to October 13, 2010. Plaintiffs allegedly accepted these and subsequent payments from Amerra without objection. Concerned that the Repo Collateral might not be sufficient to cover the $16.3 million Covadonga owed to Amerra and plaintiffs under the Repo Agreement, in or around October 2010, Amerra and Covadonga's affiliate entered into an amendment to the Rural Loan providing that certain

Rural Loan Collateral, both new and existing, would cover Covadonga's obligations under the Repo Agreement in exchange for Amerra increasing the Rural Loan to approximately $8.1 million and pushed back the payment dates. Under Section VII of the amendment, the Guarantors, which were entities that had owners in common with Covadonga, agreed, *inter alia*, that once the Rural Loan was fully repaid, including all interest, fees and collection costs, any collateral in excess of that amount could be used as cross-collateral for any remaining payment deficiencies under the Repo Agreement (the "Cross-Collateral Guarantee"). In early November 2010, Covadonga's affiliate defaulted on the Rural Loan.

On or about November 5, 2010, Maloney sent several written inspection reports to Amerra memorializing the results of the second round of inspections, which were satisfactory. On that same date, representing the end of the grace period, Covadonga failed to cure its default and Amerra declared Covadonga to be in default under the Repo Agreement. On or about November 7, 2010, Amerra informed GML via e-mail of the status of Maloney's inventory inspections and Amerra's research regarding the potential liquidation of the collateral pursuant to the Repo Agreement. On or about November 18, 2010, Amerra notified Maloney of rumors regarding the possibility of foreign matter being used to inflate the appearance of collateral in certain warehouses and requested that Maloney conduct a third round of thorough inspections. On November 19, 2010, Maloney responded that Amerra's concerns were overstated, explaining that rice inventory is always moving for production, that barriers are used for rice but not counted in Maloney's audits and that these factors may have attributed to the rumors. On November 23, 2010, at Amerra's insistence, Maloney again inspected inventory covered by Amerra's CDs and reported an actual material shortage after discovering the use of sand and grass to appear as rice

in certain silos. Thus, based on the shortages reported by Maloney and the reports of Covadonga's apparent fraud, in early December 2010, Amerra decided to exercise its rights under the Repo Agreement to sell the Repo Collateral.

However, by late November 2010, other creditors of Covadonga had also learned of Covadonga's apparent fraud and had begun to take similar actions to sell as much of their grain collateral as possible. Amerra was able to sell a small amount of its Repo Collateral in December 2010, February 2011 and March 2011. However, Commercializadora de Granos Patron SA de CV ("Patron"), another creditor of Covadonga, took action to collect on its unsecured claims by taking over Covadonga's factory and grounds in Ecatepec, which included the grain inventory covered by some of the CDs held by Amerra. Thus, it was not until June 1, 2011 that Amerra was able to sell the entirety of the Repo Collateral to Patron for a fraction of the $16.3 million of financing provided to Covadonga, thereby causing plaintiffs and Amerra to suffer significant financial losses.

On November 23, 2010, Amerra sent plaintiffs a memorandum entitled "Covadonga Legal Strategy - AMERRA'S legal strategy to obtain full recovery of exposures" (the "Memo"). The Memo referred to the Cross-Collateral Guarantee between the Rural Loan Collateral and the Repo Agreement. In or around December 2010, Craig Tashjian, the Managing Director of Amerra Capital, sent an e-mail to GML stating that "AMERRA holds a[n] $8.1 million land loan....Once fully repaid, *excess* collateral would support the Repo and P/Ns." In that e-mail, Mr. Tashjian also proposed that GML initially pay 25% of the legal costs for recoveries under the Cross-Collateral Guarantee, even though GML's total exposure level across both Covadonga deals would be closer to 45.2%. Additionally, on December 24, 2010, Mr. Tashjian explained to

GML that Amerra's lending of $8.1 million had a first position on the proceeds from various collateral, that is, the various personal guarantees, share pledges, trademark pledges and mortgages on land and property pledges under the Rural Loan and that once values collected extinguished the obligations under the Rural Loan, the excess value would flow to the cross-collateralized Repo lenders' exposure. Further, Mr. Tashjian explained to GML that "[t]he [Repo Agreement] would gain access to all cash flow rights after the full repayment of principal, interest, legal and recovery costs of the Land Loan."

Between March and April 2011, plaintiffs requested written confirmation of their rights under the Cross-Collateral Guarantee. On or about April 14, 2011, Amerra's counsel sent plaintiffs a letter stating that Amerra's Rural Loan was a first priority lien over the existing guarantees. Oscar Estrella, a Mexican lawyer for Amerra, wrote that "AMERRA (and the same Credit Agreement, known as the land loan) continues to be a first creditor with a first priority lien under the Credit Agreement and its existing guaranties." During subsequent negotiations, GML asked for concessions and a final intercreditor agreement that would provide returns for plaintiffs before the satisfaction of interest obligations under the Rural Loan. However, Amerra was not amenable to such requests. The parties continued to negotiate an intercreditor agreement through February 2012. On or about January 20, 2012, Stefan Pinter of GML sent an e-mail to Amerra in which he expressed a desire to reach a final intercreditor agreement among plaintiffs and Amerra. However, the parties could not agree to the terms of any intercreditor agreement. The issue of the value and viability of the rights under the Cross-Collateral Guarantee remains an open issue in pending litigation in Mexico.

In the summer of 2012, Amerra commenced an action against Maloney (the "Maloney

Action") alleging, *inter alia*, breach of contract, breach of fiduciary duty and negligent misrepresentation. Shortly thereafter, plaintiffs commenced the instant action against Amerra and Amerra Capital alleging causes of action for breach of contract, gross negligence and wilful misconduct and demanding damages in the amount of $7,369,920.60. Specifically, plaintiffs in the instant action allege that Amerra breached Sections 7(d) and (e) of the Participation Agreements by (a) breaking the Repo Agreement by increasing the Maximum Purchase Amount to $16.3 million on August 24, 2010; (b) failing to sell the Repo Collateral promptly after Covadonga's default on October 8, 2010; (c) failing to sell the Repo Collateral promptly after Covadonga's default on November 5, 2010; (d) failing to require Covadonga to provide Amerra with interim consolidated and consolidating financial statements at the end of each month and a detailed schedule of all inventory owned by Covadonga, prior to breaking the Repo Agreement; (e) failing to require Covadonga to provide Amerra with interim consolidated and consolidating financial statements at the end of each month and a detailed schedule of all inventory owned by Covadonga prior to giving Covadonga a 28-day grace period to cure its default under the Repo Agreement; and (f) granting Covadonga a 28-day grace period to cure its default under the Repo Agreement after Covadonga had already defaulted on September 21, 2010 on all but one of the short-term promissory notes purchased by Amerra. Defendants answered and interposed a counterclaim for breach of contract. In June 2012, defendants moved to dismiss the action. In a decision and order dated September 11, 2012, this court dismissed plaintiffs' causes of action for gross negligence and wilful misconduct and the case was dismissed as against Amerra Capital only. In or around October 2012, plaintiffs amended their complaint to add two causes of action for (1) a declaratory judgment establishing their rights to participate *pro-rata* with Amerra in any

recoveries that Amerra has obtained, or may obtain in the future, through enforcement proceedings in Mexico or elsewhere in connection with the Rural Loan and Rural Loan Collateral; and (2) a declaratory judgment establishing their rights to participate *pro-rata*, based upon their Participation Percentages, with Amerra in any recoveries that Amerra has obtained from a judgment in or settlement of the Maloney Action. The Maloney Action is still currently pending.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

As an initial matter, Amerra has established its right to summary judgment dismissing plaintiffs' cause of action for breach of contract on the ground that it did not breach the Participation Agreements as a matter of law. Pursuant to Sections 7(d) and (e) of the Participation Agreements,

> (d) The Participant agrees that the Seller may, in its sole discretion, without prior notice to the Participant, agree to the modification, amendment or waiver of any of the terms of any of the Repurchase Documents; provided, the Seller shall not, without the consent of the Participant, agree to a reduction of any payment of the Repurchase Price relating to any Transaction (other than in connection with any early payment of the Repurchase Price) or such other action which

> would have a material adverse effect on the interest of the Seller (as the Repo Provider), or the Participant of the Participation, under the Repurchase Documents.
>
> (e) In making and handling the Participation, the Seller shall exercise the same care as it normally exercises with respect to Transactions in which no participations are sold, but the Seller shall have no further responsibility to the Participant except as expressly provided herein and except for its own gross negligence or wilful misconduct which results in actual loss to the Participant, and, except to such extent, the Seller shall have no responsibility to the Participant for the failure by the Seller to make any Transaction or other extension of credit to the Credit Party or the failure by the Seller (as Repo Provider) to comply with any of the Seller's other obligations (as Repo Provider) to the Credit Party under the Repurchase Agreement or otherwise. In administering the Participation, the Seller may consult with legal counsel (including counsel for the Credit Party), independent accountants and other experts selected by it and shall not be liable for any action taken or omitted to be taken by it in good faith in reliance on the advice of any such Person.

Thus, as the Participation Agreements make clear, Amerra will only be liable to plaintiffs if its conduct amounted to gross negligence or wilful misconduct. Initially, it is well-settled that a court may find a lack of gross negligence as a matter of law on a summary judgment motion. *See Fireman's Fund Ins. Co. v. ADT Sec. Sys., Inc.*, 847 F.Supp. 291, 298-99 (E.D.N.Y. 1994)(granting summary judgment on the ground that a failure to notify a customer of "gut feeling" about security risk and about the number of flagged alarms was not a grossly negligent response and fell within contractual limitation of liability.) "'[G]ross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, U.S.A. v. Jewelers Protection Servs.*, 81 N.Y.2d 821, 823-24 (1993). If the conduct complained of is merely "suggestive of negligence," it will be insufficient to evince the necessary recklessness.

Id. at 824. It is clear that "a mistake or series of mistakes alone, without a showing of recklessness, is insufficient for a finding of gross negligence." *Travelers Indem. Co. of Connecticut v. Losco Group, Inc.*, 204 F.Supp.2d 639, 644-45 (S.D.N.Y. 2002). Additionally, wilful misconduct has been defined as "a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct." *Grey v. American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955).

Here, Amerra has established its entitlement to summary judgment dismissing plaintiffs' cause of action for breach of contract as its conduct did not amount to gross negligence or wilful misconduct as a matter of law. As an initial matter, Amerra's conduct in increasing the Maximum Purchase Amount under the Repo Agreement to $16.3 million did not amount to gross negligence or wilful misconduct. Pursuant to Section 7(d) of the Participation Agreements, "[Amerra] may, in its sole discretion, without prior notice to [plaintiffs], agree to the modification, amendment or waiver of any terms of the Repurchase Documents" provided that it does not agree to a reduction of payment or other action that would create a materially adverse effect. Amerra's increase of the Maximum Purchase Price under the Repo Agreement involved solely increasing exposure for Amerra, not for the plaintiffs, and did not adversely change the obligation owed to plaintiffs, their rate of return or their security. In exchange for the increase of the Maximum Purchase Amount, Amerra received additional Repo Collateral, which made available more grain, which was a benefit to plaintiffs and may not be considered an adverse effect.

Additionally, Amerra's failure to sell the Repo Collateral promptly after Covadonga's initial default of the Repo Agreement on October 8, 2010, and then again on November 5, 2010, and Amerra's conduct in granting Covadonga a twenty-eight day grace period to cure such default did not amount to gross negligence or wilful misconduct. Amerra has affirmed that upon Covadonga's initial default of the Repo Agreement, it provided Covadonga with a twenty-eight day grace period in order to investigate the quantity of the Repo Collateral at the warehouses in Mexico and to give Covadonga a chance to cure its default. Amerra did so in reliance on repeated confirmations and detailed reports from General and Gomez, Mexican-government regulated and licensed warehousemen, who were hired to store and monitor the grains. From November 2009 through October 2010, Gomez and General confirmed existence of all grains represented on Amerra's CDs. Additionally, Amerra relied on reports from Maloney, its expert inspector, independent from the warehousemen, confirming that the grain Repo Collateral in the warehouses conformed to the CD values assigned by Covadonga and routinely confirmed by the warehousemen. It was not until mid-November 2010 that Maloney reported to Amerra any concrete issues with the quantity of Repo Collateral stored at the warehouses. Pursuant to Section 7(e) of the Participation Agreements, "[Amerra] may consult with...experts selected by it and shall not be liable for any action taken or omitted to be taken by it in good faith in reliance on the advice of any such Person." Moreover, Amerra was not obligated under the Participation Agreements to promptly sell the Repo Collateral in October 2010 or November 2010. Pursuant to Section 7(c) of the Participation Agreements, "[Amerra] may, in its sole discretion, exercise or refrain from exercising any right, or take or refrain from taking any action, which [Amerra] may be entitled to take or assert under any of the Repurchase Documents...." Therefore, although

Amerra was entitled to sell the Repo Collateral promptly upon Covadonga's initial default pursuant to the Repo Agreement, Amerra was not obligated to do so and may not be held liable pursuant to the Participation Agreements for its failure to do so in accordance with plaintiffs' desired timeline.

Finally, Amerra's conduct in allegedly failing to require Covadonga to provide it with interim consolidated and consolidating financial statements at the end of each month and a detailed schedule of all inventory owned by Covadonga prior to granting Covadonga the twenty-eight day grace period and prior to increasing the Maximum Purchase Amount under the Repo Agreement to $16.3 million did not constitute gross negligence or wilful misconduct. Amerra has affirmed that it did require Covadonga to provide it with certain financial statements and a schedule of inventory. Specifically, in the first half of 2010, Amerra requested and received from Covadonga financial statements from 2009 and 2010. Additionally, in mid-August 2010, prior to Amerra's increase of the Maximum Purchase Amount, Covadonga provided Amerra with interim financial statements through the second quarter of 2010. During this time, Amerra informed plaintiffs of Covadonga's liquidity problems. However, the financials received by Amerra did not indicate the fraud that was being perpetrated by Covadonga.

Plaintiffs' assertion that defendant's conduct amounted to gross negligence and wilful misconduct as a matter of law, as evidenced by the fact that Amerra did not detect the extent of Covadonga's fraud in time to prevent significant losses, is without merit. As an initial matter, although Amerra acknowledged that its "due diligence failed," such failure is not indicative of gross negligence as exercise of due diligence will not always guarantee a lack of wrongdoing or harm caused by others. Additionally, plaintiffs' assertion that Amerra's reliance on the

inspection reports from Maloney constituted gross negligence because Maloney may not be considered an "expert" commodities inspector that gave "advice" within the meaning of Paragraph 7(e) of the Participation Agreements is unavailing. Maloney clearly markets itself as a company that is an "expert" in the field of commodities inspection and Suresh Advani, a principal of plaintiff GML, testified that plaintiffs routinely rely on "experts" like Maloney for commodities inspections. However, even if Maloney is not an "expert" pursuant to the Participation Agreements, which it is, Amerra did not merely rely on Maloney's reports but relied on confirmations from the warehouseman and its own meetings with its counsel in Mexico. At worst, and as Amerra admits, what occurred here was "an imperfect exercise of business judgment in waiting a few weeks while an obligor sought to solve liquidity issues that turned out accompanied by a third-party fraud."

Additionally, Amerra's motion for summary judgment dismissing plaintiffs' second cause of action seeking a declaratory judgment establishing their rights to participate *pro rata* with Amerra in any recoveries that Amerra has obtained, or may obtain in the future, through enforcement proceedings in Mexico or elsewhere in connection with the Rural Loan and Rural Loan Collateral is granted. As an initial matter, to the extent plaintiffs' second cause of action seeks a declaration that they are entitled to a *pro rata* share of all Rural Loan Collateral recoveries *prior* to the satisfaction of the Rural Loan, such cause of action must be dismissed. Plaintiffs have provided no legal basis for their request to receive a *pro rata* share of any Rural Loan Collateral recoveries *prior* to the satisfaction of the principal obligations, interest and collection costs of the Rural Loan. However, to the extent plaintiffs' second cause of action seeks a declaration that they are entitled to a *pro rata* share of any recoveries Amerra may obtain

in connection with the Rural Loan *after* the principal, interest and collection costs of the Rural Loan have been satisfied, such cause of action must be dismissed without prejudice on the ground that it is premature. "A justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff." *Ashley Builders Corp. v. Town of Brookhaven*, 39 A.D.3d 442 (2d Dept 2007). "The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination." *Id.* In the instant action, it is undisputed that Amerra has yet to satisfy the Rural Loan and there is a real possibility that Amerra may never satisfy the Rural Loan. If Amerra does obtain recoveries over and above the satisfaction of the Rural Loan, then at that time, plaintiffs may seek a declaration of their rights with regard to such recoveries.

Amerra's motion for summary judgment dismissing plaintiffs' third cause of action seeking a declaratory judgment establishing their rights to participate *pro rata* with Amerra, based upon their Participation Percentages, in any recoveries that Amerra has obtained from a judgment in or settlement of the Maloney Action is resolved as follows. Plaintiffs are only entitled to participate *pro rata* with Amerra in any recoveries that Amerra obtains from a judgment in or settlement of the Maloney Action if they comply with Section 8(a) of the Participation Agreements regarding cost sharing. Pursuant to Section 8(a) of the Participation Agreements,

> The Participant shall reimburse the Seller, ratably to the extent of the Participant's Percentage, for any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, and disbursements, including legal fees, which may be incurred or made by the Seller in connection with any action which may be taken by the Seller to collect the principal of or interest on the Transactions in which the Participant is participating or for the preservation or

> enforcement of any rights conferred by any of the Repurchase Documents for which the Seller is not reimbursed at any time by or on behalf of the Credit Party.

Plaintiffs assert that they ceased compliance with Section 8(a) of the Participation Agreements based upon Amerra's alleged breach of Section 7(e) of the Participation Agreements. However, this court has determined that Amerra did not breach Section 7(e) of the Participation Agreements as its conduct did not amount to gross negligence or wilful misconduct as a matter of law. Therefore, if plaintiffs agree to comply with Section 8(a) of the Participation Agreements by contributing ratably to Amerra's legal fees in the Maloney Action, they are entitled to participate *pro rata* with Amerra, based upon their Participation Percentages, in any recoveries that Amerra obtains from a judgment in or settlement of the Maloney Action. However, nothing with respect to this decision prevents Amerra from arguing that plaintiffs' delay in complying with Section 8(a) of the Participation Agreements constitutes a waiver of plaintiffs' right to seek recoveries obtained by Amerra in the Maloney Action.

Finally, plaintiffs' cross-motion for an Order pursuant to CPLR § 3212 granting them summary judgment on their first cause of action for breach of contract is denied as this court has already granted defendant's motion for summary judgment dismissing plaintiffs' breach of contract cause of action.

Accordingly, that portion of Amerra's motion which seeks an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' first cause of action for breach of contract is granted; that portion of Amerra's motion which seeks an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs' second cause of action for a declaratory judgment is granted; and that portion of Amerra's motion for an Order pursuant to CPLR § 3212 for summary

judgment dismissing plaintiffs' third cause of action for a declaratory judgment is denied on the condition that plaintiffs comply with Section 8(a) of the Participation Agreements. Plaintiffs' cross-motion for an Order pursuant to CPLR § 3212 for summary judgment on its first cause of action for breach of contract is denied. Thus, plaintiffs' first cause of action is hereby dismissed and plaintiffs' second cause of action is dismissed without prejudice. The Clerk is hereby directed to enter judgment accordingly. This constitutes the decision and order of the court.

Dated: 4/4/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.