

**Financials Restructuring Partners III, LTD. v New S.  
Bancshares, Inc.**

2014 NY Slip Op 31190(U)

May 5, 2014

Supreme Court New York County

Docket Number: 650933/2013

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  
COUNTY OF NEW YORK

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FINANCIALS RESTRUCTURING PARTNERS III, LTD. and HOLDCO ADVISORS, L.P., as manager for  
Financials Restructuring Partners III, Ltd.,

**Justice O. Peter Sherwood**  
**Commercial Division**

**Index No. 650933/2013**

Plaintiffs,

**ORDER**

*-against-*

NEW SOUTH BANCSHARES,  
INCORPORATED,

Defendant.  
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THE HONORABLE O. PETER SHERWOOD:

Plaintiffs, Financials Restructuring Partners III, Ltd. (“FRP”) and HoldCo Advisors, L.P. (“HoldCo”), as manager and power of attorney for Financials Restructuring Partners III, Ltd. having moved for summary judgment in lieu of complaint pursuant to section 3213 of the New York Civil Practice Law and Rules (“CPLR”), against defendant, New South Bancshares Incorporated (“New South”) seeking entry of judgment against New South in the amount of \$6,500,000, plus accrued interest and costs as applicable, and the motion having come on to be heard on December 10, 2013. FRP’s motion is GRANTED for the reasons discussed below.

**I. Background**

**A. The Parties**

Plaintiff, HoldCo Advisors, L.P. is a Delaware limited partnership acting as manager of Financials Restructuring Partners, Ltd. Plaintiff FRP, in turn, is a limited liability company organized under the laws of the Cayman Islands. FRP holds approximately 39% of the \$16.5 million (\$6.5 million) notional of trust preferred securities (“Capital Securities”) issued by New South’s subsidiary trust, New South Capital Trust VII (the “Trust”) and for which New South

has guaranteed payment. Pursuant to a General Power of Attorney dated as of February 15, 2013, FRP has authorized HoldCo to perform any lawful action on FRP's behalf vis-à-vis New South, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant, First National Bank Holding Company is a Delaware corporation with the primary purpose of serving as a bank holding company for New South Federal Savings Bank, a regulated bank operating in Irondale, Alabama (the "Bank"). The Bank failed in December 2009 and were seized by the Office of Thrift Supervision on December 18, 2009. The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with Beal Bank, pursuant to which, Beal Bank acquired substantially all the assets and deposits of the Bank.

#### **A. The Capital Securities and the Debentures**

Plaintiffs commenced this action under CPLR 3213 based upon FRP's ownership of \$6.5 million in principal of Capital Securities issued by the Trust and guaranteed by New South.

To issue the Capital Securities, New South and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of June 1, 2006 between New South Bancshares, Incorporated, as issuer, and Wells Fargo Bank, National Association, as indenture trustee (the "Indenture"); (ii) that certain Amended and Restated Declaration of Trust dated as of June 1, 2006 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated June 1, 2006 (the "Guarantee"). On or about September 8, 2011, FRP acquired \$6.5 million of New South's Capital Securities.

Plaintiffs have submitted an affidavit sworn to by Steve Gomes, Vice President of U.S. Bank National Association ("USB") who states that USB is holding on behalf of FRP, Capital Securities sponsored by New South and issued by the Trust and attests to the signed letter from

USB confirming that FRP currently holds \$6.5 million of New South's Capital Securities, and identifying them by CUSIP number 64880VAA0.

**B. New South's Exercise of Its Right to Defer Interest Payments**

On March 30, 2009, New South sent a letter to the Trustee, exercising its right to defer interest payments on the Capital Securities. The maximum period for the deferral of interest is set by the Indenture at 20 consecutive quarters. The 20 consecutive quarterly deferral period expired on March 30, 2014. No payment has been made since the expiration of the deferral period.

**D. Event of Default**

In their motion, plaintiffs presented evidence of multiple "Events of Default" under the Indenture allowing for acceleration of the entire amount owed by New South to FRP:

*First*, New South has defaulted under Section 5.01(e) of the Indenture because the FDIC was appointed as receiver for New South's wholly-owned bank subsidiaries, the Bank;

*Second*, New South has defaulted under Section 5.01(f) of the Indenture because: (i) it has lost its primary assets, the Bank, and has failed to remit any payments on account of the Capital Securities since at least March 2009, meaning it is generally failing to pay its debts as they become due; and (ii) it has consented to the FDIC's receivership of the Bank;

*Third*, New South has defaulted under Section 5.01(a) of the Indenture by failing to (i) make payments on the Debentures or the Capital Securities since March 2009 and (ii) the maximum 20 consecutive month deferral period has expired.

*Fourth*, New South has defaulted under Section 5.01(d) by failing to comply with the covenant set forth in Section 3.07; specifically New South covenanted not to "sell, convey, transfer or otherwise dispose of all or substantially all of its property" absent specific

circumstances which have not been met, and the seizure and subsequent sale of the Bank constitute such prohibited disposal of New South's primary asset.

New South has thus defaulted under at least sections 5.01(a), 5.01(d), 5.01(e), and 5.01(f) of the Indenture. Each of these defaults constitutes an Event of Default that "is continuing" and "is attributable to the failure" of New South to make timely payments on the Capital Securities, and each result in the principal and interest on the Debentures being immediately due and payable. Such defaults directly affect Capital Securities holders' rights under the Trust Documents, and go to the core of New South's obligations and the Capital Securities holders' benefits under the Trust Documents. Accordingly, the Trust Declaration has granted the Capital Securities holders direct rights of action in the event of non-payment, and FRP, as the holder of 39% of New South's Capital Securities, has direct standing to bring this action. HoldCo, as FRP's manager and power of attorney, also has this right.

## **II. Damages**

The plaintiffs are entitled to recover the full \$6.5 million principal amount under the Capital Securities plus interest accruing at a 3-month LIBOR + 1.70%. *See* Indenture § 2.10; *see also* Trust Declaration, Annex 1, p. A-I-1 – A-I-2. The total accrued interest on the Debentures and Capital Securities to date is \$713,321.

## **III. Order**

Now upon reading and filing Plaintiffs' Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, Memorandum of Law in Support of Motion for Summary Judgment in Lieu of Complaint, dated March 18, 2013, together with the exhibits annexed thereto, Affidavit of Vik Ghei in Support of Motion for Summary Judgment in Lieu of Complaint sworn on March 15, 2013, together with the exhibits annexed thereto, Request for

Judicial Intervention and Request for Judicial Intervention Addendum (the "Motion Papers") and Plaintiffs having submitted proof of service upon New South Bancshares Incorporated, and Defendant having responded by filing its Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment in Lieu of Complaint and Affidavit of William T. Ratliff III in Opposition to Plaintiff's Motion for Summary Judgment in Lieu of Complaint and accompanying exhibits; and having reviewed all other responses and replies to Plaintiff's Motion Papers; and after oral argument on Plaintiff's Motion Papers; and the Court on January 2, 2014 having issued its Decision and Order, in relevant part, granting Plaintiff's Motion for Summary Judgment In Lieu of Complaint in the matter *Financials Restructuring Partners III, Ltd. and HoldCo Advisors, L.P., as manager for Financials Restructuring Partners III, Ltd. vs. Riverside Banking Company*, Index No.650934/2013 (the "Riverside Matter"), and the Court on March 19, 2014, having directed Plaintiffs to apply the Court's reasoning in the Riverside Matter to settle the order in this case;

**IT IS THEREFORE**

ORDERED that motion for summary judgment in lieu of complaint by Financials Restructuring Partners, Ltd. and HoldCo Advisors, L.P., as manager for Financials Restructuring Partners, Ltd. is GRANTED in full; and it is further

ORDERED that defendant shall pay to plaintiffs the full amount of \$6,500,000 in principal, plus accrued interest as calculated above, totaling \$713,321; and it is further

ORDERED that FNBG shall also pay to plaintiffs any post-judgment interest accruing at the statutory rate of 9% pursuant to CPLR § 5004, beginning from the date of entry of this order; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: 5.5.2014

ENTER:

A handwritten signature in black ink, appearing to read "O. Peter Sherwood". The signature is written in a cursive style with a large, looping initial "O".

J.S.C

**O. PETER SHERWOOD**