

Financials Restructuring Partners III, Ltd. v Peoples Holding Co.

2014 NY Slip Op 31205(U)

May 5, 2014

Supreme Court, NY County

Docket Number: 650529/2013

Judge: O. Peter Sherwood

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

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FINANCIALS RESTRUCTURING PARTNERS **Index No. 650529/2013**
III, Ltd. and HOLDCO ADVISORS, L.P. as
manager for Financials Restructuring Partners III, **ORDER**
Ltd.,

Plaintiffs,

-against-

PEOPLES HOLDING COMPANY,

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. have moved for summary judgment in lieu of complaint pursuant to section 3213 of the New York Civil Practice Law and Rules (“CPLR”), against defendant, Peoples Holding Company (“PHC”). FRP seeks entry of judgment against PHC in the amount of \$15 million in principal plus accrued interest and costs as applicable. 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 III, Ltd. Plaintiff FRP, in turn, is a limited liability company organized under the laws of the Cayman Islands. FRP holds 100% of the \$15 million notional of trust preferred securities (“Capital Securities”) issued by PHC’s subsidiary trust, Peoples Holding Capital Trust I (the “Trust”) and for which PHC 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 PHC, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant, Peoples Holding Company is a Georgia corporation with the primary purpose of serving as a bank holding company for (1) Bank of Ellijay, a regulated bank operating in Ellijay, Georgia, (2) First Commerce Community Bank, a regulated bank operating in Douglasville, Georgia, and (3) The Peoples Bank, a regulated bank operating in Winder, Georgia (collectively the "Banks"). The Banks failed in September 2010 and were seized by the Georgia Department of Banking and Finance on September 17, 2010. The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with Community & Southern Bank, pursuant to which, Community & Southern Bank acquired substantially all the assets and deposits of the Banks.

B. The Capital Securities and the Debentures

Plaintiffs commenced this action under CPLR 3213 based upon FRP's ownership of \$15 million in principal of Capital Securities issued by the Trust and guaranteed by PHC.

To issue the Capital Securities, PHC and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of May 30, 2007, between Peoples Holding Company, as issuer, and LaSalle Bank National Association, as indenture trustee (the "Indenture"); (ii) that certain Amended and Restated Declaration of Trust dated as of May 30, 2007 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated May 30, 2007 (the "Guarantee"). On or about March 11, 2011, FRP acquired all \$15 million of PHC's Capital Securities.

Plaintiffs have submitted an affidavit sworn to by Steve Gomes, Vice President of U.S. BanksNational Association (“USB”) who states that USB is holding on behalf of FRP, Capital Securities sponsored by PHC and issued by the Trust and attests to the signed letter from USB confirming that FRP currently holds \$15 million of PHC’s Capital Securities, and identifying them by CUSIP number 71114MAA3.

C. PHC’s Exercise of Its Right to Defer Interest Payments

On December 15, 2009, PHC 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 is set to expire on December 15, 2014. Further, PHC’s deferral notice is ineffective because, as discussed below, an Event of Default has occurred and is continuing under Indenture provisions 5.01(e) and (f). Indenture, § 2.11 (“*So long as no Event of Default pursuant to paragraphs (c), (e), (f) or (g) of Section 5.01 of the Indenture has occurred and is continuing*, the Company shall have the right” (emphasis added)).

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 PHC to FRP:

First, PHC has defaulted under Section 5.01(e) of the Indenture because the FDIC was appointed as receiver for PHC’s wholly-owned bank subsidiary, the Bank;

Second, PHC has defaulted under Section 5.01(f) of the Indenture because: (i) it has lost its primary asset, the Bank, and has failed to remit any payments on account of the Capital Securities since at least December 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, PHC has defaulted under Section 5.01(a) of the Indenture by failing to make payments on the Capital Securities since December 2009.

Fourth, PHC has defaulted under Section 5.01(d) by failing to comply with the covenant set forth in Section 3.07; specifically PHC 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 Banks constitute such prohibited disposal of PHC’s primary asset.

PHC 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 PHC 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 PHC’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 sole holder of 100% of PHC’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 \$15 million principal amount under the Capital Securities plus interest accruing at a 3-month LIBOR + 1.55% thereafter. *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 \$1,326,411.

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 15, 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 PHC, and upon further consideration of the Affidavit of Steven Gomes authenticating and confirming FRP's beneficial ownership of the Capital Securities, and Defendant having failed to answer or otherwise appear in this case; 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 \$15,000,000 in principal, plus accrued interest as calculated above, totaling \$1,326,411; and it is further

ORDERED that PHC 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:



J.S.C.

O. PETER SHERWOOD