

**Financials Restructuring Partners Ltd. v Founders  
Group, Inc.**

2014 NY Slip Op 31208(U)

May 5, 2014

Sup Ct, NY County

Docket Number: 651273-2013

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, LTD. and HOLDCO ADVISORS, L.P., as manager  
for Financials Restructuring Partners, Ltd., **Index No. 651273-2013**  
**ORDER**

Plaintiffs,

*-against-*

FOUNDERS GROUP, INC.,

Defendant.

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THE HONORABLE O. PETER SHERWOOD:

Plaintiffs, Financials Restructuring Partners, Ltd. (“FRP”) and HoldCo Advisors, L.P. (“HoldCo”), as manager and power of attorney for Financials Restructuring Partners, 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, Founders Group, Inc. (“Founders”). FRP seeks entry of judgment against Founders in the amount of \$20 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, Ltd. Plaintiff FRP, in turn, is a limited liability company organized under the laws of the Cayman Islands. FRP holds 91% of the \$22 million notional of trust preferred securities (“Capital Securities”) issued by Founders’ subsidiary trust, Founders Capital Trust II (the “Trust”) and for which Founders 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 Founders, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant, Founders Group, Inc. is an Illinois corporation with the primary purpose of serving as a bank holding company for Founders Bank, a regulated bank operating in Worth, Illinois (collectively, the "Bank"). The Bank failed in July 2009 and was seized by the Illinois Department of Financial Regulation, Division of Banking on July 2, 3009. The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with The PrivateBank and Trust Company, pursuant to which, The PrivateBank and Trust Company acquired substantially all the assets and deposits of the Bank.

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

Plaintiffs commenced this action under CPLR 3213 based upon FRP's ownership of \$20 million in principal of Capital Securities issued by the Trust and guaranteed by Founders.

To issue the Capital Securities, Founders and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of December 21, 2004 between Founders Group, Inc., as issuer, and JPMorgan Chase Bank, as indenture trustee (the "Indenture"); (ii) that certain Amended and Restated Declaration of Trust dated as of December 21, 2004 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated December 21, 2004 (the "Guarantee"). On or about September 8, 2011, FRP acquired all \$20 million of Founders' Capital Securities.

Plaintiffs have submitted an affidavit sworn to by Jeffrey Katz, Vice President of Bank of New York Mellon ("BNY") who states that BNY is holding on behalf of FRP, Capital Securities sponsored by Founders and issued by the Trust and attests to the signed letter from BNY

confirming that FRP currently holds \$20 million of FNBH's Capital Securities, and identifying them by CUSIP number 3505319A9.

**C. 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 Founders to FRP:

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

*Second*, Founders 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 July 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*, Founders has defaulted under Section 5.01(a) of the Indenture by failing to (i) make payments on the Capital Securities since July 2009 and (ii) the maximum 20 consecutive month deferral period has expired.

*Fourth*, Founders has defaulted under Section 5.01(c) by failing to comply with the covenant set forth in Section 3.07; specifically Founders 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 Founders' primary asset.

Founders has thus defaulted under at least sections 5.01(a), 5.01(c), 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 Founders 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 Founders' 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 91% of Founders' 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 \$20 million principal amount under the Capital Securities plus interest accruing at a 3-month LIBOR + 1.85% 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 \$2,331,294.

## **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 April 17, 2013, together with the exhibits annexed thereto, Affidavit of Vik Ghei in Support of Motion for Summary Judgment in Lieu of Complaint sworn on April 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 Founders, and upon further consideration of the Affidavit of Jeffrey Katz 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 \$20,000,000 in principal, plus accrued interest as calculated above, totaling \$2,331,294; and it is further

ORDERED that Founders 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**