

**Financials Restructuring Partners III v Florida
Community Banks, Inc.**

2014 NY Slip Op 31737(U)

June 30, 2014

Sup Ct, New York County

Docket Number: 651272/2013

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 III, LTD, and HOLDCO ADVISORS, L.P., as manager for
Financials Restructuring Partners III, Ltd., **Index No. 651272/2013**
ORDER

Plaintiffs,

-against-

FLORIDA COMMUNITY BANKS, INC.,

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, Florida Community Banks, Inc. (“FCB”). FRP seeks entry of judgment against FCB in the amount of \$5 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 25% of the \$20 million of trust preferred securities (“Capital Securities”) issued by FCB’s subsidiary trust, FCBI Capital Trust II (the “Trust”) and for which FCB 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 FCB, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant, FCB is a Florida corporation with the primary purpose of serving as a bank holding company for (1) Florida Community Bank (the "Bank"). The Bank failed in January 2010 and was seized by the Florida Office of Financial Regulation on January 29, 2010. The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with Premier American Bank, National Association, pursuant to which Premier American Bank 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 \$5 million in principal of Capital Securities issued by the Trust and guaranteed by FCB.

To issue the Capital Securities, FCB and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of May 12, 2006, between Florida Community Bank, 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 May 12, 2006 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated May 12, 2006 (the "Guarantee"). On or about March 11, 2011, FRP acquired \$5 million of FCB's Capital Securities.

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

confirming that FRP currently holds \$5 million of FCB's Capital Securities, and identifying them by CUSIP number 30247EAA7.

C. FCB's Exercise of Its Right to Defer Interest Payments

On December 19, 2008, FCB 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 thus expired December 15, 2013, and FCB has failed to pay any principal or interest on account of the Capital Securities since the December 15, 2014 interest deferral expiration date.

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 FCB to FRP:

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

Second, FCB 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 August 2011, 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, FCB has defaulted under Section 5.01(a) of the Indenture by failing to make payments on the Capital Securities since August 2011.

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

FCB 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 FCB 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 FCB'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 25% of FCB'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 \$5 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 \$629,456.

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 FCB, 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 \$5,000,000 in principal, plus accrued interest as calculated above, totaling \$629,456; and it is further

ORDERED that FCB 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: June 30, 2014

ENTER:


J.S.C
O. PETER SHERWOOD