Allenby, LLC v Credit Suisse
2014 NY Slip Op 31810(U)
July 9, 2014
Supreme Court, New York County
Docket Number: 652491/2013
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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ALLENBY, LLC and HAYGOOD, LLC,

Plaintiffs,

- against -

Index No. 652491/2013

CREDIT SUISSE, AG, CAYMAN ISLANDS BRANCH, CREDIT SUISSE SECURITIES (USA) LLC, and CREDIT SUISSE LOAN FUNDING LLC,

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

In motion sequence 001, the defendants Credit Suisse, AG, Cayman Islands Branch, Credit Suisse Securities (USA) LLC, and Credit Suisse Loan Funding LLC (collectively, Credit Suisse) move pursuant to CPLR 3211(a)(1) and (7) to dismiss the second through sixth causes of action in the plaintiffs Allenby, LLC (Allenby) and Haygood, LLC's (Haygood) complaint.

Background

As alleged in the complaint, this action arises out of a series of loan transactions (the Dividend Recapitalization Loans) that were syndicated and marketed to investors by Credit Suisse that were allegedly based on fraudulent appraisals.

Allenby and Haygood (the Lenders) are the assignees of certain managed investment funds that participated as lenders in the Dividend Recapitalization Loans marketed by Credit Suisse. In the instant action, the Lenders are seeking the recovery of its investment in five of the Dividend Recapitalization Loans:

Yellowstone Mountain Club, Turtle Bay Resort, Ginn Clubs & Resorts, Park Highlands, and Rhodes Homes (collectively, the Subject Loans).

The Dividend Recapitalization Loans allowed real estate developers to take out large, non-recourse loans based on the purported value of their entire development projects and immediately distribute a substantial portion of the loan proceeds as dividends to themselves. The Subject Loans were investments in hotel resorts.

Credit Suisse, an international investment bank, allegedly served as the administrative agent, syndication agent, collateral agent, fronting bank, paying agent, sole arranger, and sole bookkeeper on each transaction, and received millions of dollars in fees per transaction. The fees typically equated to 2 to 3% of the total amount of each Dividend Recapitalization Loan. The total amount of each of the Subject Loans ranges from $360 to $675 million. Thus, the greater the Dividend Recapitalization Loan, the greater Credit Suisse's fees would be in that transaction.

Credit Suisse was contractually obligated to review and approve the form and substance of the appraisals in its reasonable judgment as a condition precedent to the closing of the Dividend Recapitalization Loans.

Essentially, the Lenders allege that in an effort to

increase its fees, Credit Suisse perpetuated a scheme whereby it circumvented the regulations of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), pushed for greater loan amounts, employed valuation methodologies that did not comply with Uniform Standards of Profession Appraisal Practice (USPAP), overstating the value through improper comparables, projecting unrealistic growth, applying artificially low discount rates, arbitrarily shortening the absorption period, and manipulating and pressuring the appraisers to provide false and misleading appraisals, that were ultimately approved by Credit Suisse in violation of its contractual obligations to the Lenders.

Thereafter, the Lenders, in reliance of Credit Suisse's approvals and the false appraisals invested hundreds of millions of dollars in developments that were later revealed to be under-collateralized. As a result, four of the five Subject Loans defaulted and those hotel resorts ultimately filed for bankruptcy.

Discussion

Credit Suisse moves to dismiss the second through sixth causes of action in the complaint.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "We accept the facts as alleged in the

complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*).

The Lenders' second cause of action alleges that Credit Suisse breached the implied covenant of good faith and fair dealing by failing to perform their obligations pursuant to the terms of the contract. This cause of action must be dismissed because it is clearly duplicative of the Lenders' first cause of action for breach of contract since both causes of action arise from the same facts, seek identical damages (*Amcan Holdings, Inc. v Can. Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010]), and are based on the same contractual provisions (*Forman v Guardian Life Ins. Co. of Am.*, 76 AD3d 886, 888 [1st Dept 2010]).

On March 3, 2014, this Court dismissed the third cause of action for fraudulent omission. During oral argument, the Court dismissed without prejudice the third cause of action for fraud by omission because the allegations lacked the requisite specificity required by CPLR 3016(b) (tr at 26:19-27:14).

Consequently, the fourth cause of action for aiding and abetting fraud and the fifth cause of action for conspiracy to commit fraud must be dismissed without prejudice as well because the Lenders cannot allege an underlying fraud necessary to support these causes of action (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]).

The sixth cause of action for unjust enrichment alleges that Credit Suisse was unjustly enriched by the fees it received in connection with the Subject Loans.

Pleading a cause of action for unjust enrichment requires allegations that: (1) Credit Suisse were enriched, (2) at the expense of the Lenders, and (3) that it is against equity and good conscience to permit Credit Suisse to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]).

The fees were ultimately paid to Credit Suisse using proceeds from the Subject Loans. However, the Lenders concede that the fees were paid by the developers pursuant to engagement letters with Credit Suisse that the Lenders were not a party to (Pl. Opp., p. 24). Furthermore, the developers are not parties to this action.

As a result, dismissal of the Lenders sixth cause of action is warranted because the Lenders cannot allege that Credit Suisse was enriched at their expense, which is a critical element of pleading a cause of action for unjust enrichment.

Accordingly, it is

ORDERED that Credit Suisse' motion to dismiss the second through sixth causes of action is granted in part, to the extent of dismissing the second and sixth causes of action with prejudice and dismissing the third through fifth causes of action

without prejudice, and it is further

ORDERED that the parties shall contact the Clerk of Part 53 to schedule a status conference to be held on or before July 31, 2014.

Dated: July 9, 2014

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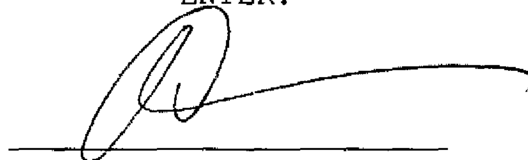

J.S.C.

HON. CHARLES E. RAMOS