

**White v Wells Fargo Advisors**

2014 NY Slip Op 31862(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 155206/13

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

-----X  
IRENE WHITE and DAISY WHITE STARK,

Index No. 155206/13

Plaintiffs,

-against-

WELLS FARGO ADVISORS and DEUTSCHE BANK,

Defendants.

-----X  
JOAN A. MADDEN, J.

Defendant Wells Fargo Advisors (“Wells Fargo”) moves to dismiss the complaint for failure to state a cause of action, on statute of limitations grounds and under the equitable doctrine of laches (motion seq. no. 001). Defendant Deutsche Bank separately moves to dismiss based on documentary evidence, the defense of payment, on statute of limitations grounds and for failure to state a cause of action (motion seq. 002)<sup>1</sup>. Plaintiffs oppose the motions and cross move for leave to serve a supplemental summons and amended complaint joining Prudential Equity Group, Inc. (“PEG”) as a defendant, and to add claims based on negligence and breach of contract.

Background

In this action, plaintiffs, who are mother and daughter, allege that they are entitled to interest from 1973 to 1997 on eight bearer bonds with a face amount of \$5,000 each (the “Bearer Bonds”). It is alleged that the Bearer Bonds were purchased through Bache & Co., Inc. (“Bache”), a New York investment firm. Plaintiffs’ late husband and father, Jerry White, opened

---

<sup>1</sup>Motion sequence numbers 001 and 002 are consolidated for disposition.

a joint account with plaintiffs at Bache in 1973. The complaint alleges that Bache “underwent several acquisitions, mergers and name changes, and is now operating as Wells Fargo” (Complaint, ¶6). The complaint further alleges that at the time the Bearer Bonds were purchased, the transfer/redemption agent was Morgan Guaranty Trust, which, “through mergers and acquisitions,” became Deutsche Bank.

The Bearer Bonds were allegedly due on November 1, 2013, paying interest at a rate of 6% for an alleged purchase price of \$40,146.67. It is alleged that the bonds were called early for redemption in 1997 and escheated to the State of New York in November 2000. The complaint also alleges, upon information and belief, that the original bond certificates with the coupons attached were never delivered to the plaintiffs, and that in August 2012, when they sought to redeem the Bearer Bonds, they learned for the first time that the Bearer Bonds were not originals but only photocopies. Plaintiffs also allege that they were not aware of anyone who had the original interest coupons attached to the bonds, nor who submitted them for payment. Plaintiffs recovered \$41,096.69 from the State of New York, representing the principal amount of the bonds. In this action, plaintiffs seek to recover \$2,400 in interest allegedly due annually on the Bearer Bonds from 1973 until they were redeemed in 1997, for a total of \$57,600.

Instead of answering the complaint, defendants now separately move to dismiss it. Wells Fargo argues that while Prudential (a Bache successor firm) and Wachovia (a predecessor of Wells Fargo) entered into a joint venture agreement, the agreement, by its terms, provided that no liabilities relating to actions taken prior to the closing date of the agreement (July 1, 2003) were to be transferred or assumed. In support of its position, Wells Fargo submits the affidavit of Michael Naccarato, legal counsel for Wells Fargo, and various documentary support including

relevant provisions of the joint venture agreement. Moreover, as the bonds escheated to the State in 2000, Wells Fargo argues that any liability thereunder predated the joint venture. Wells Fargo also argues that the claims in the complaint are time barred by the statute of limitations and the doctrine of laches, as it is only required by statute to maintain the relevant records for six years.

Deutsche Bank asserts that the documentary evidence demonstrates that plaintiffs are not entitled to the interest payments on the Bearer Bonds since, based on allegations in the complaint, plaintiffs are not in physical possession of the coupons, which, are required to be presented and surrendered in order for Deutsche to disburse the accrued interest by the terms of the bonds. Deutsche Bank also argues that, based on the affidavit of its representatives, the original coupons for seven of the eight bonds have been duly paid to the coupon holder who is not the plaintiffs. Their records do not reveal whether or not the interest was paid on the eighth Bearer Bond. Deutsche Bank also argues that the claims are time barred by the applicable statute of limitations and fail to state a cause of action.

Plaintiffs oppose the motions and seek to serve a supplemental summons and amended complaint naming PEG as a defendant based on statements in Mr. Naccarato's affidavit that Bache was acquired by Prudential Financial, Inc. ("Prudential Financial") and that Prudential Financial's wholly owned subsidiary, Prudential Securities, Inc. ("PSI") which subsequently changed its name to PEG, conducted, inter alia, PSI's retail security brokerage. The proposed amended complaint also alleges that the defendants were careless, negligent, and reckless in turning over the original bonds with coupons to the wrong party and in not ascertaining the proper owner of the coupons, which were submitted for payment. The amended complaint further alleges that defendants are liable for breach of contract in that Plaintiffs were third party

beneficiaries of the agreement made by the Defendants with the bond issuers.

Plaintiffs also oppose the motions to dismiss, arguing that plaintiffs were never provided with the original Bearer Bonds or the interest coupons, and did not know that they did not possess the originals, and that defendants should be equitably estopped from asserting the statute of limitations under these circumstances. In addition, plaintiffs argue that while Deutsche Bank is obviously aware of the party that collected their interest payments, the Bank has refused to provide plaintiffs with this information and thus the statute of limitations should be tolled based upon late discovery of fraud. Plaintiffs further maintain that the claims against Deutsche Bank are governed by the 20-year statute of limitations provided by CPLR 211(a), which applies to actions to recover the principal or interest on a bond. Moreover, plaintiffs argue that as the claims accrued when the bonds were called in 1997, their claims are timely under this provision.

In reply, Deutsche argues that the 20-year limitations period only applies to actions against issuers of bonds and that proceeds of these bonds (bonds of the Urban Development Corp.) are not money of the State; thus the statute does not apply. Moreover, Deutsche maintains that plaintiffs do not allege fraud in their complaint and thus should not be able to invoke the limitations period for late discovery on that basis. Deutsche further contends that no fiduciary relationship exists (or existed) between either plaintiffs and Deutsche or plaintiffs and Bache, their original broker, and therefore, the doctrine of equitable estoppel should not be invoked to evade the applicable statute of limitations.

In reply, Wells Fargo argues that plaintiffs provide no evidence sufficient to raise an issue of fact as to a connection between Wells Fargo and their alleged loss. Moreover, Wells Fargo contends that the 20-year statute of limitations set forth in CPLR 211(a) does not apply since this

is not an action against an issuer of the bonds.

### Discussion

On a motion pursuant to CPLR 3211 (a)(7) for failure to state a cause of action, the complaint must be interpreted in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1<sup>st</sup> Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1<sup>st</sup> Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. A dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1<sup>st</sup> Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

With respect to plaintiffs’ claims against Wells Fargo, plaintiffs allege that “in or about the summer of 1973, the late Jerry White, Plaintiff Irene White, and Plaintiff Daisy White Stark, through Bache & Co., Inc. purchased eight bearer bonds with a face amount of \$5,000 each, issued by N.Y.S. Urban Development Corp., . . .” and that upon said purchase “were never given the original certificates . . . and the photocopies now in their possession were the only papers

delivered to Plaintiffs upon their purchase of the Bearer Bonds” (Complaint, ¶12) and that “Bache & Co., Inc. underwent several acquisitions, mergers, and name changes, and it is now operating under Wells Fargo Advisors” (Complaint, ¶6).

The record first establishes that Prudential acquired Bache in 1981, which is substantiated by the history section of Prudential’s website. Naccarato Affidavit, ¶6. Next, the joint venture agreement between Wells Fargo and Prudential, by its terms, expressly provides that Prudential retained liabilities for claims “which arise[] from an action, omission to act, condition or event (or series of related actions, omissions, conditions or events) that first occurred prior to the Closing.” (Joint Venture Agreement, §1.1)

Here, the allegations in the complaint, whether sounding in negligence or for breach of contract, are aimed at Bache’s successor for Bache’s failure to provide the original certificates upon their purchase in 1973 and therefore “arises from an action . . . or event that first occurred prior to Closing,” which occurred on July 1, 2003. Indeed, no action giving rise to a claim could have occurred after November 9, 2000, as the bonds escheated to the State of New York on that date. Thus, the documents submitted by defendants, particularly the joint venture agreement, flatly contradict plaintiff’s factual allegation that Wells Fargo may be liable to plaintiffs as Bache’ successor. Moreover, plaintiffs’ do not dispute the legitimacy of defendant Wells Fargo’s assertion as to Bache’s chain of succession as they now seek leave to amend the complaint in order to name PEG as an additional defendant.

As against Deutsche Bank, plaintiffs allege that “[u]pon information and belief, the transfer/redemption agent for the aforesaid bonds at the time of their purchase in was Morgan Guaranty Trust Company of New York . . .,” which “underwent several acquisitions and mergers,

and it currently is Deutsche Bank. . .” (Complaint, ¶9, 10). The complaint again alleges that plaintiffs “were never given the original certificates . . . and the photocopies now in their possession were the only papers delivered to Plaintiffs upon their purchase of the Bearer Bonds” and that “[n]o interest was paid on the aforesaid bonds to any of the Plaintiffs, from 1973 to date.” (Complaint, ¶12, 19). Further, “[a]lthough Defendant Deutsche Bank has stated on several occasions that coupons were clipped and submitted for payment, they refuse to release their records or divulge information in their possession as to who clipped the coupons, when the coupons were presented for payment, and the total amount of interest paid in connection therewith.” (Complaint, ¶22).

With respect to defendant Deutsche Bank’s argument based on documentary evidence, the record establishes that defendant’s performance under the terms of the bonds at issue, namely the payment of interest, is conditioned on “presentation and surrender of the coupons.” Stucki Affidavit, ¶4. Moreover, the terms of the bond do not require the coupons to be presented by any particular individual. *Id.* (“The New York State Urban Development Corporation promises to *pay the bearer . . .*”) (emphasis added). This evidence firmly establishes that the bonds at issue, as well as their coupons, are in fact in “bearer form”, which is undisputed based on the allegations in the complaint.

A security in “bearer form” is “payable to the bearer” and as such, does not “specif[y] a person entitled to the security.” NY UCC §8-102 (a). A “[b]earer” is defined as “the person in possession of an instrument, document of title, or certificated security payable to bearer of indorsed in blank.” NY UCC §1-201(5). Furthermore, they are not registered like most other securities, and it has been noted that by commentators that the ease with which title may be

passed is the bearer bond's most desirable feature as it renders these securities particularly marketable.<sup>2</sup> Since Deutsche Bank did not breach any agreement with the issuer of the bonds by paying the interest to the unidentified coupon holder(s), it cannot be said that as alleged in the proposed amended complaint that Deutsche Bank is liable to plaintiffs on a theory that plaintiffs are a third-party beneficiary of such agreement.

Therefore, the only inquiry that remains is whether plaintiffs have a viable cause of action against Deutsche Bank based on allegations that it negligently paid interest to an unknown party upon presentation of the coupons to seven of the eight bonds, which depends, in the first instance on whether Deutsche was under a duty to ascertain the registered owners of the coupons when they were presented for redemption.

In assessing the existence of a duty under these circumstances, it is first relevant to note that there is no fiduciary relationship between plaintiffs and Deutsche Bank. Based on the allegations in the complaint, Deutsche Bank's predecessor, Morgan Guaranty Trust Company of New York, was merely an agent for the issuer and as such does not appear to have had any direct correspondence with plaintiffs or Jerry White, who appear to have dealt exclusively with Bache. A "[f]iduciary relationship does not exist between parties engaged in an arms-length business transaction." (Dembeck v. 220 Cent. Park South, LLC., 33 A.D.3d 491 (1<sup>st</sup> Dep't 2006))

---

<sup>2</sup> Guy Bernfeld, *Bearer Bonds: From Popular to Prohibited*, INVESTOPEDIA (January 21, 2012), <http://www.investopedia.com/articles/bonds/08/bearer-bond.asp> ("Bearer bonds are bonds that are owned by whoever is holding them, rather than having registered owners like most other securities. . . . Bearer bonds are also called coupon bonds because the physical bond certificates have coupons attached to them that can be redeemed at an authorized agent bank for biannual interest payments, an activity that is commonly called 'clipping coupons.' . . . Because there is no registered owner's name printed on the face of a bearer bond, interest and principal will be paid without question to anyone tendering a bond certificate.").

Furthermore, in the context of securities transactions, such a relationship hinges on the giving of “investment advice.” Ascot Fund Ltd. v UBS PaineWebber, Inc., 28 A.D.3d 313, 314 (1<sup>st</sup> Dep’t 2006). Thus, Deutsche Bank did not owe plaintiffs any higher standard of care than that demanded of a reasonable and prudent person under the circumstances.

Furthermore, as the bonds at issue were in bearer form, it cannot be said that Deutsche Bank breached any duty by paying interest to the party or parties holding the interest coupons. As plaintiffs have not established the prima facie merit of their proposed claims for breach of contract and negligence, their cross motion to amend the complaint to include these claims must be denied. See generally, Sharon Ava & Co. v. Olympic Tower Associates, 259 A.D.2d 315 (1<sup>st</sup> Dept 1999). Moreover, based on the foregoing, the complaint must be dismissed as against Deutsche Bank,<sup>3</sup> and the court need not reach the statute of limitations issue.<sup>4</sup>

However, as the record contains evidence indicating that PEG is successor of Bache, the bank that sold the bearer bonds at issue, plaintiffs’ cross motion is granted to the extent that they are permitted to serve a supplemental summons and amended complaint on PEG.

In view of the above, it is

ORDERED that defendant Wells Fargo’s motion to dismiss the complaint is granted; and

---

<sup>3</sup>Even though the complaint has been dismissed as against Deutsche Bank, plaintiffs may nonetheless seek non-party discovery from Deutsche Bank, including records pertaining to the unknown presenter(s) of the interest coupons.

<sup>4</sup> Contrary to defendants’ argument, it would appear that twenty-year limitations period provided by CPLR 211(a) is applicable to this action which seeks “to recover . . . interest upon a written instrument evidencing an indebtedness on the state of New York or any person, association or public or private corporation..secured only by the full faith and credit of the issuer...” See generally, Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, Tex., 87 N.Y.2d 36, 43 (1995).

it is further

ORDERED that defendant Deutsche Bank's motion to dismiss the complaint is granted;

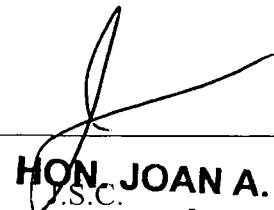
and it is further

ORDERED that plaintiffs' cross motion to amend is granted to the extent of permitting them file and serve a supplemental summons and amended complaint on PEG consistent with this decision and order; and it is further

ORDERED that the supplemental summons and amended complaint as against PEG shall be served and filed within 20 days of the date of e-filing of this decision and order.

DATED: July 11, 2014

---

  
**HON. JOAN A. MADDEN**  
J.S.C.  
**J.S.C.**