

**Credit Agricole Corp. & Inv. Bank N.Y. Branch v BDC
Fin., LLC**

2014 NY Slip Op 31898(U)

July 16, 2014

Sup Ct, New York County

Docket Number: 651989/2010

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CREDIT AGRICOLE CORPORATE AND INVESTMENT
BANK NEW YORK BRANCH, f/k/a CALYON
NEW YORK BRANCH, *et al.*,

Plaintiffs,

- against -

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X
BLACK DIAMOND CAPITAL MANAGEMENT, LLC,
et al.,

Counterclaim-Plaintiffs,

- against -

CREDIT AGRICOLE CORPORATE AND INVESTMENT
BANK NEW YORK BRANCH, f/k/a CALYON
NEW YORK BRANCH, *et al.*,

Counterclaim-Defendants.

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BARBARA JAFFE, J.:

For counterclaim-plaintiffs:

Craig A. Newman, Esq.
Richards Kibbe & Orbe LLP
One World Financial Center
New York, NY 10281
212-530-1800

David W.T. Daniels, Esq. (admitted *pro hac vice*)
Portrait Bldg.
701 8th Street, NW
Washington, DC 20001
202-261-2960

For counterclaim-defendants:

J. Christopher Shore, Esq.
Andrew W. Hammond, Esq.
White & Case LLP
1155 Avenue of the Americas
New York, NY 10036

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DECISION AND ORDER

By notice of motion, defendants move pursuant to CPLR 3211(a)(7) for an order
dismissing causes of action five and seven of plaintiffs' amended complaint and the complaint in

intervention, and the complaints as against defendant GSC Acquisition Partners, LLC. By notice of cross motion, plaintiffs oppose the motion and cross-move pursuant to CPLR 3214(b) for a determination that disclosure is not stayed pending the determination of defendants' motion to dismiss or, in the alternative, to lift the stay. They do not oppose the removal from the caption of GSC Acquisition Partners, LLC as there are no claims pending against it, but do so while reserving their right to file suit against it in the future. Defendants ask that the complaint against GSC Acquisition Partners, LLC be dismissed with prejudice.

I. BACKGROUND

Plaintiffs allege in their complaint that defendants BDC Finance, LLC, Black Diamond Commercial Finance, LLC, Black Diamond Capital Management, LLC, and Black Diamond CLO 2006-1 [Cayman] Ltd. (collectively, Black Diamond) is a hedge fund that, since July 2010, holds a majority of outstanding debt under a credit agreement, thereby acquiring the status of "required banks" under the agreement. Plaintiffs hold approximately 33 percent of the debt. Black Diamond appointed its affiliate Black Diamond Commercial Finance, LLC (Black Diamond agent) as the administrative agent under the agreement and collateral agent under a related security agreement. (NYSCEF 159).

GSC Group is a group of borrowers and guarantors under the credit agreement. They are debtors in a chapter 11 bankruptcy proceeding and seek to sell substantially all of their assets at a sale pursuant to 11 USC § 363. GSC Group's financial advisor values their assets at approximately \$238 million, and there is approximately \$257 million of indebtedness outstanding under the credit agreement secured by their assets. As an asset management company, GSC Group generates most of its income from management fees pursuant to the

management contracts that are GSC's most valuable assets. As such, those assets constitute the most valuable collateral securing the claims under the credit agreement and related security agreement. (*Id.*).

In July 2011, the loan was fully paid from the proceeds of an auction sale of the borrowers' collateral. Plaintiffs describe the process by which Black Diamond and Black Diamond Agent obtained their majority position as follows: Black Diamond Agent would "credit bid" approximately \$257 million and extinguish all of the debt outstanding under the credit agreement, while BDCM would contribute \$5 million in cash and \$6 million by note. In exchange, at the close of the transactions, approximately \$228 million in assets would transfer from GSC Group to a Black Diamond vehicle, GSC Acquisition Holdings, LLC, where it would be under the control of BDCM. A credit bid offsets against the purchase price of the auctioned property, claims secured by a lien against the property, and where the bid is made by a collateral agent holding a security interest for the benefit of many lenders, the cost of the credit bid is borne by all lenders, whose loans are then extinguished to the extent of their *pro rata* share of the credit bid.

Thus, plaintiffs maintain, "rather than receiving their ratable share of the approximately \$238 million of collateral securing the outstanding obligations, as is their right under the Credit Agreement, the Secured Creditors could wind up receiving nothing if the contemplated transactions close." (*Id.*). Defendants thereby misappropriated the collateral in breach of the credit agreement and security agreement, and in violation of the implied covenant of good faith and fair dealing. They characterize the process as "commercially unreasonable," and predict that such conduct will "adversely affect the rights of parties under innumerable extant credit

agreements . . . “ (*Id.*).

Plaintiffs advance, in pertinent part, the following causes of action in their amended complaint:

count IV: breach of contract by Black Diamond Agent in that it violated sections 12.5, 10.14, and 14.12 of the credit agreement, and sections 6.1 and 6.5 of the security agreement;

count V: breach of the implied covenant of good faith and fair dealing against Black Diamond Agent in that it violated sections 10.14 and 14.7 of the credit agreement and section 6.5 of the security agreement;

count VI: breach of contract against BDCM, BDC Finance and Black Diamond CLO in that they violated sections 14.7(b), 12.5, and 14.12 of the credit agreement and section 6.1 of the security agreement; and

count VII: breach of the implied covenant of good faith and fair dealing against BDCM, BDC Finance and Black Diamond CLO in that they violated sections 10.14 and 14.7 of the credit agreement and section 6.5 of the security agreement.

II. DISCUSSION

Pursuant to CPLR 3211(a)(7), a party may move for an order dismissing a cause of action against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept all of the alleged facts as true, and accord the non-movant every possible favorable inference, ascertaining only whether the allegations fall within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

A. Motion to dismiss counts five and seven

Defendants argue that as counts five and seven of the amended complaint are based on the same facts as those set forth in counts four and six alleging breach of contract, and seek recovery of the same damages, those counts must be dismissed.

Plaintiffs deny that the claims are duplicative and argue that they constitute alternative

pleadings.

Although counts five and seven appear on their face to be duplicative of counts four and six, in according non-movant plaintiffs every possible favorable inference, I decline to dismiss the allegedly duplicative counts at this juncture of the proceedings.

B. Motion to dismiss as against GSC Acquisition Partners, LLC

Motion granted. I decline to do so with prejudice.

C. Motion to lift discovery stay

Granted.

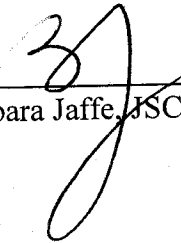
III. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to dismiss is granted solely to the extent of dismissing plaintiffs' and intervening plaintiffs' claims against defendant GSC Acquisition Partners, LLC, the complaint and complaint in intervention are severed and dismissed as against GSC Acquisition Partners, LLC, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that plaintiffs' cross motion to lift the discovery stay is granted.

ENTER:



Barbara Jaffe, JSC

DATED: July 16, 2014
New York, New York