SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

CREDIT SUISSE LOAN FUNDING LLC and CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH Plaintiffs, -against- HIGHLAND CRUSADER OFFSHORE PARTNERS, L.P., HIGHLAND CDO OPPORTUNITY MASTER FUND, L.P., HIGHLAND CREDIT STRATEGIES MASTER FUND, L.P., and HIGHLAND CREDIT OPPORTUNITIES CDO, L.P., Defendants.	:	Index No. 652492/2013 DECISION AND ORDER Motion Sequence No. 002

MELVIN L. SCHWEITZER, J.:

Plaintiffs allege breach of contract against defendants for failure to settle certain Trades obligating them to purchase over $50 million of syndicated loans. Plaintiffs have moved for summary judgment. Defendants oppose plaintiffs' motion on the grounds that further discovery is necessary pursuant to CPLR 3212 (f) and that relevant issues of fact exist.

Background

Between May and July 2008, plaintiffs entered into a series of Trades with defendants pursuant to which plaintiffs agreed to sell, and defendants agreed to purchase, certain portions of commercial loans that were funded to Goldfield Preserve Development LLC (Goldfield) and Westgate Investments, LLC (Westgate). The Trades were documented in five separate, duly executed, Confirmations and were subject to industry standard Terms and Conditions published by the Loan Syndications and Trading Association (LSTA). The LSTA is a not-for-profit trade association established by the corporate loan industry to publish industry-standard forms to facilitate the trading of par/near par loans. The LSTA has published over fifty standard forms,

including the industry-standard forms that govern the Trades at issue in this action. These same forms have been used in connection with hundreds of billions of dollars in trades. New York Law governs the Confirmations.

Three of the five Confirmations were entered into on July 1, 2008, each bearing a Trade date of June 25, 2008. Those three Trades concerned a syndicated loan arranged by plaintiffs and made to Westgate under a Third Lien Credit Agreement, dated July 1, 2008 (the Westgate Third Lien Credit Agreement). In those trades:

- Highland Crusader Offshore Partners, L.P. agreed to purchase $36,500,000 of that loan (the July 1 Highland Crusader Confirmation);
- Highland Credit Strategies Master Fund, L.P. agreed to purchase $30,000,000 of that loan (the July 1 Highland Credit Strategies Confirmation); and
- Highland Credit Opportunities CDO, L.P. agreed to purchase $10,000,000 of that loan (the July 1 Highland Credit Opportunities Confirmation).

The loan to Westgate was ultimately funded in an amount less than the face amount of the Westgate Third Lien Credit Agreement, and Highland Crusader's, Highland Credit Strategies', and Highland Credit Opportunities' purchase obligations under their respective Trades were reduced to $23,248,913.04, $19,108,695.65, and $6,369,565.22, respectively.

The remaining two Confirmations were entered into on July 10, 2008, with each bearing a Trade date of May 29, 2008. These two Trades concerned a syndicated loan arranged by plaintiffs and made to Goldfield under a separate Credit Agreement, dated June 28, 2006 (the Goldfield Credit Agreement). In those trades:

- Highland Crusader agreed to purchase $689,655.35 of that loan (the July 10 Highland Crusader Confirmation); and
- Highland CDO Opportunity agreed to purchase $862,069.05 of that loan (the July 10 Highland CDO Opportunity Confirmation).

None of the Confirmations specified a closing date yet the Terms and Conditions required the parties to settle "as soon as practicable" after the Trade date. The Terms and Conditions further stipulated that even if the "Buyer and Seller were unable to effect settlement of the Transaction as specified in the Confirmation, a valid and binding obligation to settle the trade nevertheless continues to exist between Buyer and Seller." Despite defendants' admitted contractual obligation to do so, they concede they have never settled the Trades.

Discussion

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant has made such a showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.*

The elements of breach of contract under New York law are "(1) the existence of a contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages." *Goldman Sachs Lending Partners, LLC v High River Ltd. P'ship*, 943 NYS2d 791, at *5 (Sup Ct NY Cnty 2011). "Contract interpretation is a question of law" and "[s]ummary judgment . . . should be granted where, as here, the terms of the contract are clear and unambiguous." *Id.*; *see also W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990) ("[W]hen parties set down their agreement in a clear, complete document, their writing should[,] as a rule[,] be enforced according to its terms.").

Liability

Plaintiffs argue that Highland breached the Confirmations as a matter of law. First, they assert each of the five Confirmations constitutes a valid, binding, and enforceable agreement between plaintiffs and defendants. Second, that plaintiffs performed all of their obligations under the terms of each Confirmation and were, at all relevant times, prepared to settle the Trades with defendants. Lastly, that defendants have failed to settle the Trades, causing plaintiffs to be damaged in an amount equal to the unpaid purchase amounts, totaling $48,727,173.91 for the Westgate trades and $1,551,724.40 for the Goldfield trades.

Defendants contend that further discovery is necessary to determine whether Credit Suisse committed a prior material breach under the credit agreements. They allege that Credit Suisse manipulated the value of the underlying assets and then traded them to defendants. Specifically, defendants assert that Credit Suisse enlisted appraisal firms to provide inflated collateral values for the Westgate and Goldfield loans so that Credit Suisse, as loan arranger and bookrunner, could generate millions in fees. They allege that Credit Suisse AG, Cayman Islands Branch (CS-CIB), as administrative agent, was contractually obligated to provide appraisals to the lenders that CS-CIB had approved as to "form and substance" and in its "reasonable judgment," and that CS-CIB failed in this obligation to review, approve, and deliver independent appraisals to the lenders.

The defendants' argument that they do not have to settle the Trades because CS-CIB breached certain obligations it supposedly owed as collateral or administrative agent under the credit agreements is without merit. Defendants are not entitled to discovery relating to the underlying loans or appraisals because the credit agreements are not the relevant contracts to the Trades, which are the subject of this suit. The only contracts that are relevant here are the

Confirmations, under which the defendants agreed to settle the Trades at issue. Although the Confirmations reference the credit agreements in order to identify the credit that is being traded, the Confirmations do not, as defendants claim, incorporate the terms of the credit agreements. Nothing in the Confirmations or Terms and Conditions states that the defendants' obligation to settle the Trades is in any way contingent on plaintiffs' performance under the credit agreements.

Even if the credit agreements were the relevant contracts to the Trades, which they are not, Credit Suisse would not have owed legal duties to the defendants to review and approve the appraisals. Although defendants argue that section 3.1 of the credit agreements required that CS-CIB receive and review information submitted by the borrower under section 5.3 "in form and substance reasonably satisfactory to the Administrative Agent," sections 3.1 and 5.3 imposed obligations on the borrowers, not CS-CIB. Specifically, section 3.1 stated the conditions the borrower had to satisfy for the loan to be funded on the Effective Date, and section 5.3 required the borrower to provide financial information, including appraisals, to CS-CIB as the administrative agent. Even if section 5.3 had imposed obligations on CS-CIB, these obligations would have been owed to the lenders, and defendants never settled their Trades and became lenders. The July 17, 2008 Assignment and Assumption agreements (A&As) that defendants cite as evidence of their rights under the Westgate Credit Agreement were executed by other Highland funds not at issue in this suit. Because the defendants were not parties to the underlying credit agreements, and these agreements are not the contracts at issue in this action, summary judgment is granted with respect to liability.

Damages

Plaintiffs assert that the court should grant prejudgment interest at the rate of 9% per annum as specified in CPLR § 5001. They argue that the court should use October 16, 2008 as the relevant date to calculate prejudgment interest because, after months of trying to settle, plaintiffs formally notified Highland Crusader on this date that they considered it in breach.

Defendants contend that summary judgment is inappropriate for determining damages because an issue of material fact exists as to the date of breach. They argue that evidence shows breach may not have occurred by October 16, 2008, as plaintiffs claim. They emphasize that trades often settle more than 90 days after the trade date, that the ClearPar trade timeline reflected the extension of the settlement date for several years, and that plaintiffs reissued confirmations and A&As after October 16, 2008. They further highlight that plaintiffs sent an Unsettled Trade Notice for the Goldfield Trades but neglected to do so for the Westgate Trades.

Defendants' have failed to show that a material issue of fact exists with regard to the date of breach. The standard Terms and Conditions obligated the defendants to settle the Trades "as soon as practicable." The term, "as soon as practicable," when used in a contract, "is practically synonymous with speedily." *Wallbridge v Brooklyn Trust Co.*, 143 AD 502, 508 (2d Dept 1911); *Goldman Sachs Lending Partners, LLC v High River Ltd. P'ship*, 34 Misc 3d 1209 (A) (Sup Ct NY Cty 2011). Defendants have not provided any evidence showing that it was not practicable for them to settle the trades by October 16, 2008. First, Mr. Chism's affidavit, in which he claimed he is unaware of an industry practice of settling trades within 90 business days, is irrelevant to whether the defendants should have settled the specific Trades at issue in this case by October 16, 2008. Defendants' second point, that the ClearPar log notes reflected that the closing date would be postponed several times between 2008 and 2012, is similarly

irrelevant to defendants' obligation to settle the Trades by October 16, 2008. The ClearPar timeline, run by an independent third-party organization, ClearPar LLC, was an electronic platform the parties used to post documents and settle trades. As plaintiffs explain, it would automatically adjust the closing dates after defendants failed to settle. ClearPar's adjustment of the closing date did not indicate that defendants were not in breach of their obligations. Defendants' third point, that plaintiffs reissued confirmations and A&As after October 16, 2008, also fails to raise an issue of fact. Defendants are relying on irrelevant trades that are not at issue here, as well as reallocations of trades that occurred at defendants' request after they failed to settle the Trades. The reissued Confirmations and assignments maintained the original Trade dates and amounts, and simply show that plaintiffs were trying to settle the Trades, which defendants had failed to settle for years.

Lastly, Highland's assertion that they could not have been in breach as of October 16, 2008, since they never received an Unsettled Trade Notice for Westgate, is unpersuasive. Credit Suisse does not send these notices in connection with unsettled loan trades; Highland only received a notice for Goldfield because the Goldfield loan trade was converted to equity in Goldfield Ranch in October 2010. Because the Westgate loan was extinguished, no notices would have been sent to Highland regarding the Westgate loan. Even if Highland reasonably expected to receive a notice of any unsettled trades for Westgate, they still should have been aware that they were considered in breach as of October 16, 2008 because of plaintiffs' email bearing that date.

Defendants also argue that summary judgment should be denied regarding mitigation of damages because defendants must have an opportunity to conduct discovery concerning the disposition of the collateral underlying the loans. They emphasize that plaintiffs have retracted

their previous statement in which they claimed to have converted their debt position in Westgate to new assets, and that this reversal of position raises an issue of fact. Additionally, defendants claim that discovery is necessary as to the calculation of interest because, if breach occurred, plaintiffs would be entitled to the Average LIBOR Rate, which Credit Suisse has allegedly manipulated.

Defendants' contention that summary judgment should be denied regarding damages is unpersuasive. Defendants bear the burden of showing that plaintiffs "failed to make diligent efforts to mitigate its damages, and to the extent to which such efforts would have diminished those damages." *Eskenazi v Mackoul*, 72 AD3d 1012, 1014 (2d Dept 2010). The assertion that summary judgment is premature under CPLR 3212 (f) must be based on more than the mere hope that helpful discovery might exist. *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 530 (1st Dept 2014). Defendants' must provide an evidentiary basis showing that facts essential to opposing the motion may exist, are exclusively in plaintiffs' control, and cannot be stated at this time. *Williams v Spencer-Hall*, 113 AD3d 759, 760 (2d Dept 2014).

Defendants have failed to provide evidence showing that additional discovery is necessary regarding mitigation. Defendants offer no evidence, and fail to even argue, that there was an available market in which Credit Suisse could have sold the debt and thereby mitigated its damages. Information regarding whether there was an available market for this debt, or what the debt could have sold for in that market, would not be solely within the plaintiffs' possession, and is therefore not subject to CPLR 3212 (f). Although defendants emphasize that plaintiffs previously claimed to have converted the Westgate debt into new assets, plaintiffs' reversal of position does not by itself raise an issue of fact. As plaintiffs explained in their reply brief, they simply made a mistake and confused the Westgate first lien loan, which was converted to equity

in a new limited liability company, with the Westgate third lien loan, the loan at issue in this case, which was completely extinguished.

Defendants' argument that discovery is necessary as to calculation of interest is baseless. Defendants' cite *NML Capital v Republic of Argentina* as evidence that, when the parties' contract governs the calculation of interest, the contract rate, not the 9% statutory rate, governs prejudgment interest. 17 NY3d 250, 258 (2011). Here, however, neither the Confirmations nor the Terms and Conditions provide a pre-judgment rate of interest for a complete failure to settle. While section six of the Terms and Conditions requires a LIBOR calculation of interest in situations where settlement is delayed, this case does not present a mere delay, but instead, a total failure to settle. In cases in which a court finds the buyer in breach for failure to settle at all, the court has awarded pre-judgment interest at the CPLR's 9% rate. *Goldman Sachs*, 34 Misc 3d 1209 (A). Because plaintiffs have not asked for pre-judgment interest based on a LIBOR calculation, and there is no provision in the relevant contracts addressing the rate to be applied in the event of a failure to settle, the court denies defendants' argument for discovery into plaintiff's alleged manipulation of LIBOR and grants pre-judgment interest at the 9% statutory rate.

Waiver/Estoppel

Defendants assert that factual issues preclude summary judgment on their affirmative defense of waiver/estoppel. They allege that after other, unrelated dividend recapitalization loans they agreed to purchase from Credit Suisse began falling into default and/or bankruptcy in the summer of 2008, Timothy O'Hara, a senior Credit Suisse executive and investment banker, assured James Dondero, the Co-Founder and President of Highland Capital Management, L.P., that plaintiffs would "make things right." Mr. Dondero claims that, based on this alleged

conversation, he came to understand that Highland would not have to settle the Trades at issue in this case.

Although it is disputed whether this conversation ever took place, the court at the summary judgment stage accepts as true that Mr. O'Hara made this assurance to Mr. Dondero. Nevertheless, no jury could conclude that Mr. O'Hara's general assurance that he would "make things right" constitutes a waiver. Waiver is not lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection. *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 106 (2006). Mr. O'Hara's assurance, on the other hand, was general and vague, and could not reasonably be understood to mean that plaintiffs would not be enforcing their rights under the Trades.

Viewed in the light most favorable to defendants, as is appropriate in the context of plaintiffs' motion for summary judgment, no jury could find that plaintiffs should be estopped from enforcing the Confirmations. Estoppel requires proof that enforcement "would work fraud or injustice upon the person against whom enforcement is sought" who justifiably relied "upon the opposing party's words or conduct" and was "misled into acting upon the belief that such enforcement would not be sought." *Fundamental Portfolio Advisors, Inc.*, 7 NY3d at 106. Nothing in Mr. Dondero's affidavit demonstrates any words or conduct on which he could have reasonably relied, and which could have misled him into believing that plaintiffs would not seek to enforce the Trades. Therefore, plaintiffs' motion for summary judgment is granted with respect to defendants' affirmative defense of waiver/estoppel.

Accordingly, it is

ORDERED that summary judgment for plaintiffs is granted and that plaintiffs shall be awarded $50,278,898.31 plus 9% interest per annum from October 16, 2008.

Dated: July 30, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER