SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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HILDENE CAPITAL MANAGEMENT, LLC, and HILDENE OPPORTUNITIES MASTER FUND, LTD., individually and derivatively,

Plaintiffs,

-against-

DECISION AND ORDER
Index No: 650980/2010
Motion Seq. Nos.: 006-007

THE BANK OF NEW YORK MELLON, as Indenture Trustee, BIMINI CAPITAL MANAGEMENT, INC., and HEXAGON SECURITIES LLC,

Defendants,

and THE BANK OF NEW YORK MELLON, as Indenture Trustee, and PREFERRED TERM SECURITIES XX, LTD.,

Nominal Defendants.

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O. PETER SHERWOOD, J.:

These are competing motions for summary judgment pursuant to CPLR 3212 by plaintiffs (along with plaintiff-intervenor) and the remaining defendant in this action, Bimini Capital Management (Bimini). The facts are taken from the Rule 19-A statements filed with each motion, and are undisputed except as noted.

I. BACKGROUND

Plaintiff Hildene Capital Management, LLC is a private limited liability company and is the manager of plaintiff Hildene Opportunities Master Fund (together, Hildene). Plaintiff-Intervenor Preferred Term Securities, XX, LTD (PreTSL XX [together with Hildene, the plaintiffs]) is a limited liability company incorporated under the laws of the Cayman Islands. PreTSL XX is a collateralized debt obligation (CDO). Notes in the CDO were sold to investors in PreTSL XX pursuant to an Offering Circular dated December 7, 2005. Hildene Opportunities Master Fund purchased $100,000 of the Class A-2 Senior Notes issued by PreTSL XX on the secondary market on or about April 27, 2009, and currently holds (according to face value) $5,616,500 of such Notes, as well as $17,000,000

of Class B Mezzanine Notes, and $500,000 of Class C Mezzanine Notes issued by PreTSL XX. An indenture agreement dated December 15, 2005 (the Indenture) governs the notes issued by PreTSL XX. Parties to the Indenture are PreTSL XX as issuer, Defendant Bank of New York Mellon (BNYM), as Indenture Trustee, and non-party Preferred Term Securities, Inc., as co-issuer.

PreTSL XX used the proceeds of the note offering to purchase a portfolio of investments, including trust preferred securities (TruPS), a type of debt security. Money earned by PreTSL XX's investments was to be used, first, to pay PreTSL XX's expenses, and the remainder, if any, was to be distributed to the PreTSL XX noteholders in a waterfall of payments, depending on the class of notes held. Pursuant to the Indenture, PreTSL XX's investments were generally to be held, rather than actively traded, as the investments could be sold only under certain specified circumstances.

Defendant Bimini is a publicly traded real estate investment trust (REIT). Bimini formed Bimini Capital Trust I (BCT I) in May 2005 to issue and sell TruPS, some of which were purchased by non-party Taberna Capital Management (Taberna). Bimini also formed Bimini Capital Trust II (BCT II) in October 2005 to issue and sell TruPS. BCT II issued $50 million in TruPS. PreTSL XX purchased $24 million of the BCT II offering as an investment to support the notes which it had already issued.

While the level of Bimini's financial stability in 2008 is disputed, it is undisputed that neither Bimini nor BTC I or BTC II filed for bankruptcy protection, and that Bimini never received a going concern qualification from its auditor. In July 2008, shortly after Robert Cauley (Cauley) became CEO of Bimini, Cauley raised the possibility of a tender offer for some of Bimini's trust preferred debt to Bimini's board of directors, and a tender offer was subsequently authorized. Bimini then made an offer to repurchase the TruPS held by PreTSL XX in September 2008 for 12.5% of par value, but the offer failed, as an insufficient percentage of the PreTSL XX noteholders voted for it. In April of 2009, Bimini performed a trust preferred debt exchange with Taberna (holder of TruPS sold by BCT I) (the Taberna Exchange) and extinguished $50 million of its TruPS debt in exchange for securities worth approximately $17.5 million.

In June 2009, Bimini began work on a new tender offer for the TruPS held by PreTSL XX and communicated its plans to a representative of BNYM. BNYM told Bimini that there were problems with the proposed transaction, that while the "cash offer is presented as being in accordance with Section 5.16(a) of the Indenture," it was not allowed. BNYM explained that:

> "Section 15(b) of the Indenture . . . does permit the Requisite Noteholders to direct the Indenture Trustee to dispose of a Collateral Security if a breach of a representation or warranty in an Underlying Instrument for a Collateral Security occurs that materially adversely affects the Issuer as the holder of the Collateral Security and if the Rating Agency Condition is satisfied. [That section also] permits the Requisite Noteholders to direct the Indenture Trustee to dispose of a defaulted Collateral Security. . . . Our analysis reveals that the only permitted release of the Bimini TruPS in exchange for cash would be in the context of a breach of a representation or warranty in an Underlying Instrument for the Bimini Collateral Security or in the event the Bimini TruPS were a defaulted Collateral Security, all as provided in Section 5.16(b) of the Indenture. Otherwise, the Indenture Trustee is not permitted to release assets at the direction of the Requisite Noteholders at this time. . . . [T]he PreTSL deals were not drafted to easily facilitate changes in the collateral"

(E-mail from Stephen Ellison to Mark Wickersham dated June 17, 2009, Nagle aff, exhibit 31). Cauley responded that:

> "My company has had significant financial difficulties of the last two years as a result of the ongoing financial crisis. While we have managed to avoid bankruptcy so far, we now need to repurchase our [TruPS] if we are to survive. . . . I just learned today that your company may have reversed its position [that a tender offer would be permissible under the Indenture] and now contends that the indentures for the PreTSL deals do not permit cash repurchases to occur. THIS IS AN OUTRAGE"

(Letter from Robert Cauley to Chris Grose [PreTSL XX "relationship manager" at BNYM] dated June 19, 2009, Nagle aff, exhibit 28). Subsequently, BNYM told Bimini that BNYM would allow a repurchase transaction if Bimini provided an opinion of counsel that the transaction complied with the requirements of the Indenture (E-mail from Cauley to Michael Ludlow dated June 23, 2009, Nagle aff, exhibit 86). Bimini requested its law firm, Hunton & Williams [Hunton], to provide the opinion.

The Opinion Memo sent to the Hunton Opinion Committee stated that,

> "To date and to our knowledge, Bimini has neither defaulted on its payments on the TruPS nor breached any covenants under the TruPS documents. As we understand from our client, Bimini has value as a going concern, but its shareholders' equity is very close to zero due, in part, to its assets being marked at market value. Given the longer-term adverse effects of actually defaulting on its TruPS, Bimini prefers to find an alternative solution"

(Opinion Memo dated July 14, 2009, Nagle aff, exhibit 20, at 2). The Opinion Memo recognized Bimini's preference for proceeding with a tender offer that would be permissible under Section 5.16 of the Indenture, which specifies that

> "[i]f a breach of a representation or warranty in an Underlying Instrument for a Collateral Security . . . occurs and materially adversely affects the Issuer as the holder of such Collateral Security, then the Requisite Noteholders may direct the Indenture Trustee to exercise the Issuer's rights under those documents, which may include attempting to dispose of such Collateral Security. . . . In addition, the Indenture Trustee may dispose of a defaulted Collateral Security at the direction of the Requisite Noteholders"

(*id.* quoting the Indenture at §5.16). The Opinion Memo reasoned that since the Indenture referred to a "defaulted Collateral Security" here, and not a "Defaulted Security," a defined term in the Indenture,[1] it was possible for the Indenture Trustee to dispose of some collateral securities which were not Defaulted Securities (Opinion Memo at 4). Hunton speculated that "[m]ost likely, 'defaulted Collateral Securities'" are those in which the issuers of such securities are in a distressed situation such that the issuers either "(a) have defaulted on a security but the applicable grace period

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[1] A "Defaulted Security" is defined as:

> "any (a) Pledged Security in the Trust Estate with respect to which there has occurred and is continuing (x) any default or event of default under the related Underlying Instrument or any other obligation of the issuer of such Pledged Security ranking pari passu or senior to the Underlying Instrument which entitled the holders of such pledged Security, with the giving of notice or passage of time or bother, to accelerate the maturity of all or a portion of the principal amount of such Pledged Security or (y) any default in the payment of principal or interest when due (after giving effect to the cure period, if any) under the Underlying Instrument whether or not such default is an event of default in the Underlying Instrument (but any such security covered by this clause (a) shall be considered a "Defaulted Security" only until such time as the default or event of default has been cured or waived. . . , (c) Collateral Security with respect to which a DS Avoidance Event has occurred"

(Indenture, Section 1.1).

has not run or (b) are imminently about to default" (*id.*).[2] Hunton concluded that "[g]iven the financial position of Bimini and its ability to represent that the cash tender offer is needed to avoid a potential default on the TruPS, it is reasonable to consider that the TruPS come within the meaning of a 'defaulted Collateral Security'" (*id.*). Hunton agreed to provide an opinion that the proposed Bimini transaction was permissible under the Indenture.

Bimini then pursued the transaction. Bimini informed the noteholders it was seeking to repurchase the TruPS for $8.5 million in cash, approximately 35.4% of par value. The offer did not receive the required number of votes to proceed. Bimini raised its offering price to $10.8 million, approximately 45% of par value. This offer also failed. Bimini then added "consent payments," cash payments to be made to each senior note holder that consented to the offer. With this addition, the offer gained sufficient votes to proceed, over Hildene's objections.

It is undisputed that until consummation of the repurchase on October 21, 2009, the Bimini TruPS remained performing securities, and that Bimini had neither defaulted on any of its interest payments nor breached any covenant or other obligation (NYSCEF Doc. No. 330, Material Fact No. 176).[3] It is also undisputed that Bimini recognized a gain of $9.6 million after the repurchase, and paid dividends totaling over $3.3 million to its shareholders shortly thereafter. Had Bimini continued to make all payments on the TruPS, it would have, over time, paid $74,338,394. Plaintiffs calculate the present value of that amount (as of the closing of the repurchase), minus the amount paid in the repurchase, as $28,371,087. While Bimini does not dispute the calculation, it contends that there was no guarantee that all of the scheduled payments would have been made, making this number an inaccurate estimate of damages (*id.*, Material Fact No. 196).

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[2] Hunton also noted that the first provision of Section 5.16 would apply and allow the transaction if Bimini were to breach a minor covenant of the TruPS. Bimini did not wish to follow this path. Even breaching a minor covenant would have jeopardized Biminis' funding, and could have lost Bimini its REIT status, subjecting it to regulation under the Investment Company Act of 1940.

[3] From Bimini's Counterstatement and Objections to Plaintiffs' Rule 19-A Statement of Material Fact, NYSCEF Doc. No. 330, Material Fact No. 176). The parties likely meant that Bimini had not defaulted or breached under the PreTSL XX Indenture, which was between PreTSL XX and Bimini (*id.*, Material Fact No. 14, p 6), even though they use the term "Indenture" in the 19-A statement, which is a defined term referring to the document governing the PreTSL XX CDO, to which Bimini was not a signatory (*see id.*, Material Fact No. 7, p 4).

II. DISCUSSION

Plaintiffs assert claims against Bimini for Tortious Interference with a Contract, Aiding and Abetting Breach of Fiduciary Duty, and Unjust Enrichment. Bimini has counterclaimed against PreTSL XX for Contribution and Set Off.

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin,* 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Tortious Interference with a Contract

Plaintiffs claim Bimini tortiously interfered with the Indenture contract. To prove a claim for tortious interference with contract, the plaintiff must show: (1) the existence of a valid contract; (2) defendant's knowledge of the contract; (3) defendants' intentional procurement of the third-party's breach without justification; (4) actual breach of the contract; and (5) damages caused by breach of the contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]); *Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). There is no dispute as to the existence or validity of the Indenture, Bimini's knowledge of the Indenture, or that permitting the sale of the TruPS constituted a breach of the Indenture by BNYM. Bimini concedes these three elements for purposes of its motion for summary judgment [4] (*see* NYSCEF Doc. No. 286 at 12).

Plaintiffs argue that Bimini intentionally procured BNYM's breach when Bimini pursued the transaction, pressuring BNYM after its initial statement that the repurchase would breach the Indenture; misrepresented its finances to Hunton as being more dire than they were in order to obtain the opinion letter; and overstated the risks of default. Plaintiffs claim to be damaged because Bimini paid less to repurchase the TruPS than either the par value or the amount it would have paid if there had been no redemption and Bimini had made the required coupon payments.

As to the question of defendants' intentional and unjustified procurement of the third-party's breach, Plaintiffs claim that by use of the Hunton opinion letter, which was based on incorrect information, Bimini convinced BNYM to approve the repurchase, despite BNYM's original opinion that it would violate the Indenture. According to a Hunton memo to its opinion committee, it issued the opinion letter based on representations about Bimini's financial state made by Cauley in a letter to BNYM dated June 19, 2009 (Hildene Reply at 9; Opinion Memo dated July 14, 2009, Nagle aff, exhibit 20, at 4, n.5; Cauley letter to BNYM dated June 19, 2009, Nagle aff, exhibit 28). In that letter, Cauley claimed "we now need to repurchase our [TruPS] if we are to survive" (Cauley letter to BNYM dated June 19, 2009, Nagle aff, exhibit 28, at 1). Cauley had also "repeatedly . . .

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[4]Plaintiffs assert that Bimini is collaterally estopped from arguing that the Indenture was not breached, as that issue was litigated in a case in the Southern District of New York, brought by another noteholder, shortly after the repurchase closed (*see Howe v Bank of New York Mellon*, 783 F Supp 2d 466, 480 [SD NY 2011]). That court found BNYM's actions to be a breach of the Indenture. Given Bimini's concession, the court need not decide this issue.

represented to Hunton that "its shareholders' equity is, if not still negative, "very close to zero" (Opinion Memo dated July 14, 2009, Nagle aff, exhibit 20, at 2 n.4). Based on the above representations from Bimini and on reports of Bimini's "telephone conversations with many Holders," Hunton concluded that Bimini had the "ability to represent that the cash tender offer is needed to avoid a potential default on the TruPS," and that, therefore, the TruPS qualified as a "defaulted Collateral Security" (Opinion Memo dated July 14, 2009, Nagle aff, exhibit 20, at 4).

As support for their position that the risks Bimini represented to Hunton were overstated, Plaintiffs cite Bimini's Consolidated Balance Sheet as of June 30, 2009, which reflected shareholders' equity of $3,250,295, and the Bimini Consolidated Balance Sheet as of April 30, 2009, which reflected shareholders' equity of $3,567,892 (Nagle aff, exhibits 93 and 92, respectively). Plaintiffs also refer to statements made by Cauley in a letter to the Bimini board of directors in June 2009 (*see* Letter, Nagle aff, exhibit 68). Cauley wrote that "long term viability is still somewhat uncertain," and "[i]f we are unable to consummate the second trust preferred debt exchange we have limited options," but noted that Bimini did have positive net worth at that time, and would likely do better than break even for at least the next quarter, and possibly two (*id.*). The letter noted that if Bimini were to obtain additional equity, it would have "reasonable expectations of long term viability," and outlined the company's efforts toward that goal. Cauley also described a possible strategy of moving toward using "structured products" as their "predominant investment vehicle," which Cauley deemed "would be enough to operate the company indefinitely- although at a modest level. On the other hand," Cauley posited, "if we are able to consummate the second trust preferred debt exchange - even a partial exchange - we could jump start the process" (*id.*). At his deposition in this case, Cauley stood behind the letter as candid and truthful.

To support its position that Bimini was in dire financial straits in the summer of 2009, Bimini points to the expert report of Scott Friedland, which concluded that "(I) the estimated fair market share of Bimini's assets was less than its liabilities . . . ; (ii) Bimini was thinly capitalized, with Bimini's equity as a percent of assets of 3.9% . . . ; and (iii) that had Bimini lost its sole remaining repo lender, it would have insufficient assets to repay its obligations" (Bimini Opposition at 9). According to the Friedland report, Bimini's financial ratios put it in the category of "likely to fall into bankruptcy" (*id* at 9; Friedland Expert Report at 11-13). Bimini also presents an independent

analysis prepared in December 2008 by another entity, which put the likelihood of a Bimini default on the TruPS within the year at 45% (Bimini Opp. at 9; Red Pine Analysis, McCallen aff, exhibit 3). This evidence shows that there are disputed issues of material fact as to Bimini's financial state at the time of the Hunton Opinion Memo and the repurchase, and therefore as to whether Bimini intentionally procured BNYM's breach without justification.

Bimini argues that it was pursuing its economic self-interest in repurchasing the TruPS, and so it cannot be liable for tortious interference with a contract under New York law (Bimini Memo at 12, *citing White Plains Coat & Apron Co., Inc. v Cintas Corp.* 8 NY3d 422, 426 [2007] [economic interest defense applies where third party "act(s) to protect its own legal or financial interest in the breaching party's business"]; *Foster v Churchill*, 87 NY2d 744, 750 [1996]["Economic interest is a defense to an action for tortious interference with a contract unless there is a showing of malice or illegality"]). Plaintiffs point out that the economic self-interest defense applies only where the defendant is acting to protect its interest "in the breaching party's business" rather than its own business, and that Bimini had no qualifying legal or financial stake in BNYM's business (Plaintiffs' Opposition at 9, *citing White Plains Coat & Apron*, 8 NY3d at 426). In *White Plains Coat & Apron*, the Court of Appeals gave several examples of valid uses of the defense, including where "defendants were significant stockholders in the breaching party's business; where defendant and the breaching party had a parent-subsidiary relationship; where defendant was the breaching party's creditor; and where the defendant had a managerial contract with the breaching party at the time defendant induced the breach of contract with plaintiff" (8 NY3d at 426).

Bimini argues that an economic interest in its own business is sufficient to support the defense (Bimini Reply at 1, *citing Howe v Bank of N.Y. Mellon*, 783 F Supp 2d 466, 482 [SD NY 2011]). *Howe* relied on *Don King Productions, Inc. v Smith* (47 F App'x 12, 15-16 [2nd Cir 2002]), a case which not only pre-dates *White Plains Coat & Apron*, but is an unpublished decision which the Second Circuit specifically noted should not be cited as precedential authority (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 460 F3d 281, 288 n.1 [2nd Cir 2006]). *Howe* also cited *Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, in which the court determined the defendant's enforcement of a security agreement with the breaching party was neither malicious nor done with intent to harm plaintiff, and was insufficient to sustain the tortious interference claim through the

motion to dismiss (579 NYS2d 353, 354 [1st Dept 1992]). Here, as Bimini had no interest in the business of BNYM similar to the qualifying interests described in *Ultramar* (security interests in the breaching party's property), or *White Plains Coat & Apron*, it fails to satisfy the requirements to claim the economic interest defense.

The financial status of Bimini at the time of the opinion letter, and whether the repurchase was necessary to avoid default are disputed issues of fact. Contradictory representations by Cauley and the expert report and other documentary evidence on each side, demonstrates that there are disputed issues of material fact, suitable for trial. As to the issue of damages, plaintiffs have made a *prima facie* showing that they received less from the repurchase then they would have if Bimini had either repurchased at par value or paid on the TruPS over time as planned. While the parties agree that a trial is needed on the amount of damages, Bimini has not rebutted plaintiffs' *prima facie* proof of damages, thereby satisfying the final element of a tortious interference with a contract cause of action (*see* Plaintiffs' Reply at 10 n.9). Accordingly, summary judgment on this claim must be denied to both sides.

C. Aiding and Abetting Breach of Fiduciary Duty

To establish a claim for aiding and abetting a breach of fiduciary duty, plaintiff must demonstrate "a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom" (*Bullmore*, 45 AD3d at 464). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator" (*Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

Bimini argues that it should be awarded summary judgment on this claim because the undisputed facts show that BNYM did not breach a fiduciary duty. Bimini claims that New York law limits the duties owed by an indenture trustee to the duties specified in the indenture and an additional duty "to avoid conflicts of interest and discharge its obligations with absolute singleness of purpose" (Bimini Memorandum at 15, quoting *LNC Inv. Inc. v First Fidelity Bank, Nat Ass'n*, 935 F Supp 1333, 1347 [SD NY 1996] [also recognizing a duty to perform "basic non-discretionary ministerial tasks]). For example, the indenture trustee would have a conflict of interest if it was influenced to place its own financial interests ahead of those of the beneficiaries (*id.*, citing *Dabney v Chase National Bank of City of New York*, 196 F2d 668, 670 [2nd Cir 1952]["the duty of a trustee,

not to profit at the possible expense of his beneficiary, is the most fundamental of the duties which he accepts when he becomes a trustee"]). Bimini claims that, as BNYM had no financial interest in the repurchase transaction, it could not have had a conflict of interest, and so did not commit the prerequisite breach of fiduciary duty required by this claim against Bimini.

Hildene argues that BNYM had a broader fiduciary duty, to serve with "undivided loyalty, free of any conflict of interest," and must place the beneficiaries' interests above those of third parties (Hildene Opp. at 13, quoting *AMBAC Indem. Corp. v Bankers Trust Co.*, 151 Misc 2d 334, 337 [Sur Ct, NY County 1991] and Restatement [Third] of Trusts § 78 cmt. f.). Hildene claims that BNYM breached these fiduciary duties by allowing the repurchase, and that it placed the interests of Bimini over the interests of the beneficiaries. Plaintiffs do not provide any case law on the issue, but merely attempt to distinguish the cases cited by Bimini.

Bimini, in reply, points out that while some of the language in *AMBAC* was broad, that case involved a trustee which had a financial conflict of interest, and that later language in the opinion defined the scope of a trustee's fiduciary duties more narrowly, as "not to advance its own interests at the expense of the bondholders" (AMBAC, 151 Misc 2d at 208). Bimini also points out that the Restatement of Torts does not relate to "trusts as devices for conducting business and investment activities outside the express private and charitable trust context" (Restatement [Third] of Trusts §1 cmt. b).

Without legal basis to support plaintiffs' argument that BNYM had broader fiduciary duties, and as plaintiffs do not argue that BNYM had a financial interest in the repurchase, plaintiffs have failed to demonstrate that BNYM's actions breached a fiduciary duty to plaintiffs. Absent such an underlying breach of fiduciary duty, plaintiffs' claim against Bimini for aiding and abetting breach of fiduciary duty fails, and summary judgment shall be granted to Bimini.

D. Unjust Enrichment

In an action for unjust enrichment, plaintiff must show that the defendant was enriched, at plaintiff's expense, and equity and good conscience require the defendant to return the benefit (*see Clark v Daby*, 751 NYS2d 622, 623 [2002]; *Nakamura v Fujii*, 253 AD2d 387, 390 [1st Dept

1998][plaintiff must show it "conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor"]). While "privity is not required for an unjust enrichment claim, a claim will not be supported if the connection between the parties is too attenuated" (*Mandarin Trading Ltd.*, 16 NY3d 173, 182 [2011] [dismissing unjust enrichment claim for "lack of allegations that would indicate a relationship between the parties"]). In addition, "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]).

Bimini argues that an unjust enrichment claim cannot survive when there is an express contract governing the underlying events (Bimini Memorandum at 16). Bimini asserts that the plaintiffs' claim against it derives from plaintiffs' allegation that BNYM breached the terms of the Indenture, and therefore a claim for unjust enrichment is precluded. Plaintiffs rely on *Howe*, in which Judge Harold Baer, Jr., held that since Bimini was not a party to the Indenture, Howe's unjust enrichment claim against Bimini could proceed (*see Howe*, 783 FSupp2d at 485-86 ["the Indenture does not set forth [plaintiff's] rights with respect to Bimini, a third party to the Indenture . . . . [T]o bar [plaintiff] from asserting a claim for unjust enrichment "would subvert the 'logic of [this] equitable doctrine ... which is designed to prevent unjust enrichment where the absence of an enforceable contract otherwise prevents recovery from [the culpable] parties"]; *see also Hughes v BCI International Holdings, Inc.*, 452 F Supp 2d 290 [SD NY 2006] [unjust enrichment claim not precluded by a contract that did not specify rights of plaintiff against defendants not parties to the contract]).

Bimini argues that the *Howe* decision was inconsistent with New York State precedent (*see Vitale v Steinberg*, 764 NYS2d 236, 239 [1st Dept 2003]["the existence of the . . . agreement, an express contract governing the subject matter of plaintiff's claims, also bars the unjust enrichment cause of action as against the individual defendants [officers and directors of the entity defendants], notwithstanding the fact that they were not signatories to that agreement"]; *Bellino Schwartz Padob Advertising, Inc. v. Solaris Marketing Group, Inc.*, 635 NYS2d 587, 588 [1st Dept 1995]["The existence of an express contract between Solaris and plaintiff governing the subject matter of the

plaintiff's claim also bars any quasi-contractual claims against defendant Titan, as a third party nonsignatory to the valid and enforceable contract between those parties"]; *see also Feigen v Advance Capital Management Corp.*, 541 NYS2d 797, 799 [1st Dept, 1989] ["a non-signatory to a contract cannot be held liable where there is an express contract covering the same subject matter"]; *citing Julien J. Studley, Inc. v New York News, Inc.*, 70 NY2d 628, 629 [1987]["A contract cannot be implied in fact where there is an express contract covering the subject matter involved"]).

In New York, when a contract covers a subject, a party to the contract may not bring claims on that subject in quasi-contract against a non-party. In a 2013 decision, a judge of the Southern District of New York agreed with this approach, declining to follow either *Hughes* or *Howe,* and determining that the agreement at issue in that case gave the plaintiff "a remedy at law through a breach of contract claim, which necessarily extinguishes recovery for the same underlying conduct through a quasi-contract claim" against a non-signatory to the contract (*Morgan Stanley & Co. Inc. v Peak Ridge Master SPC Ltd.*, 930 F Supp 2d 532, 546 -547 [SD NY 2013] *citing In re Chateaugay Corp.*, 10 F3d 944, 958 [2d Cir 1993] ["[T]he successful assertion of its [Appellant's] contractual right ... is fatal to any quasi contractual claim,"]).

Plaintiffs also argue that Bimini's conduct falls outside the scope of the Indenture, and so the Indenture does not "clearly cover" the dispute between the parties here, or "specifically address" the underlying issue. (*Union Bank, N.A. v CBS Corp.*, No. 08 Civ. 08362, 2009 WL 1675087, at *7 [SD NY, June 10, 2009], *citing Clark-Fitzpatrick*, 70 NY2d at 389). Plaintiffs also rely on *Howe* and *Hughes* and refer back to the argument discussed above that the defendant was not a signatory to the relevant agreement. Here, the subject of plaintiffs' suit is their interest in the TruPS and the propriety of the sale of the TruPS. The requirements for permitting a sale of the TruPS are governed by the Indenture. Therefore, as the subject of this claim is covered by the terms of a contract, plaintiffs may not make a claim against Bimini in quasi-contract, even though Bimini was not a signatory to the Indenture. Summary judgment will be granted to defendants on the unjust enrichment claim.

E. Bimini Counterclaims Against PreTSL XX

Plaintiffs also move for summary judgment on Bimini's counterclaims against PreTSL XX. The counterclaims are based on PreTSL XX's obligations under Section 3.5 of the Indenture to take action to "preserve and defend title to the Collateral and the rights of the Indenture Trustee, the Noteholders, and the Swap Counterparties in such Collateral against the claims of all other Persons" (Indenture, Nagle aff, exhibit 1, at 3.5(iv); Bimini Answer and Counterclaims, p.13-14).

1. Contribution

Plaintiffs argue that Bimini's counterclaim for contribution pursuant to CPLR Section 1401 fails, as a matter of law. CPLR Section 1401 states that:

> "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought."

Accordingly, contribution is a claim sounding in tort, allowing one tortfeasor to collect from a co-tortfeaser (*see AG Capital Funding Partners, L.P. v State Street Bank & Trust Co.*, 5 NY3d 582, 594 [2005]). While Bimini refers to PreTSL XX as a torfeasor, it does not specify any tort PreTSL XX is alleged to have committed. Based on the allegations made, it appears that PreTSL XX is alleged to have breached a contract by failing to protect the collateral pursuant to Section 3.5(iv) of the Indenture. The New York Court of Appeals has held that "purely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (*Board of Education v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Nor does Bimini cite any support for allowing contribution from a non-tortfeasor, based on the non-tortfeasor's breach of a contract. Accordingly, summary judgment on the counterclaim for contribution must be granted to plaintiff PreTSL XX.

2. Set Off

Set off allows mutual debts to be cancelled against each other (*see* Black's Law Dictionary [9th ed. 2009], setoff). Here, Bimini does not allege that PreTSL XX owes it any money. An argument for set off would arise only if Bimini succeeded in its counterclaim for contribution.

However, as discussed above, that counterclaim is not viable. There being nothing to set off, summary judgment shall be granted to plaintiff PreTSL XX.

III. CONCLUSION

Summary judgment on the claim for tortious interference with a contract must be denied as to both sides because there are disputed issues of material fact, including issues of credibility, concerning the truth of Bimini's representations to BNYM and Hunton about its financial situation, and whether it intentionally procured BNYM's breach of the Indenture without justification. Summary judgment will be granted to defendant Bimini (1) dismissing the claim of aiding and abetting a breach of fiduciary duty, as there was no underlying breach of fiduciary duty by BNYM, and (2) dismissing the claim for unjust enrichment because the subject of plaintiffs' claim is covered by a contract (the Indenture), thereby precluding a claim on the same subject in quasi-contract. Summary judgment shall be granted to PreTSL XX on Bimini's counterclaim for contribution, as PreTSL XX is not alleged to have committed a tort, thereby making a counterclaim for contribution inapplicable. Further, without the claim for contribution, Bimini has not alleged any debt owed to it against which there could be a setoff and therefore the second counterclaim for setoff is dismissed.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of Hildene Capital Management against Bimini Capital Management (motion sequence number 006) is DENIED; and it is further

ORDERED that the motion for summary judgment of Bimini Capital Management against Hildene Capital Management (motion sequence number 007) is GRANTED as to the Ninth Claim (Aiding and Abetting a Breach of Fiduciary Duty) and Eleventh Claim (Unjust Enrichment) and is DENIED as to the Fifth Claim (Tortious Interference with a Contract); and it is further

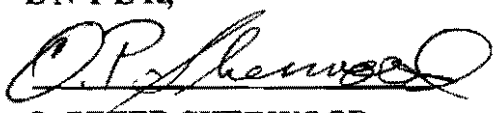
ORDERED that the motion for summary judgment of PreTSL XX to dismiss the counterclaims of Bimini Capital Management (motion sequence number 006) is GRANTED; and it is further

ORDERED that counsel shall appear at a status conference on the sole remaining issue, Tortious Interference with a Contract, at Part 49, Room 252, 60 Centre Street on March 3, 2015 at 9:30 am.

This constitutes the decision and order of the court.

DATED: January 5, 2015

E N T E R,



O. PETER SHERWOOD
J.S.C.