

**Financials Restructuring Partners III v Peotone
Bancorp., Inc.**

2015 NY Slip Op 30133(U)

January 22, 2015

Supreme Court, New York County

Docket Number: 651282/2013

Judge: O. Peter Sherwood

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

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FINANCIALS RESTRUCTURING PARTNERS III,
LTD., And HOLDCO ADVISORS, L.P. as manager for
Financials Restructuring Partners III, Ltd.,

Justice O. Peter Sherwood
Commercial Division

Index No. 651282/2013

Plaintiffs,

ORDER

-against-

PEOTONE BANCORP, INC.,

Defendant.
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THE HONORABLE O. PETER SHERWOOD:

Plaintiffs, Financials Restructuring Partners III, Ltd. (“FRP”) and HoldCo Advisors, L.P. (“HoldCo,” and collectively “Plaintiffs”), as manager and power of attorney for Financials Restructuring Partners III, Ltd. having moved for summary judgment in lieu of complaint pursuant to section 3213 of the New York Civil Practice Law and Rules (“CPLR”), against Defendant Peotone Bancorp, Inc. (“Peotone”), seeking entry of judgment against Peotone in the amount of \$10,000,000.00, plus accrued interest and costs as applicable, and the motion having come on to be heard on December 10, 2013.

FRP’s motion is GRANTED for the reasons discussed below.

I. Background

A. The Parties

Plaintiff, HoldCo Advisors, L.P. is a Delaware limited partnership acting as manager of Financials Restructuring Partners III, Ltd. Plaintiff FRP, in turn, is a limited liability company organized under the laws of the Cayman Islands. FRP holds 100% of the \$10 million notional of trust preferred securities (“Capital Securities”) issued by Peotone’s subsidiary trust, Peotone Capital Trust I (the “Trust”) and for which Peotone has guaranteed payment. Pursuant to a

General Power of Attorney dated as of February 5, 2013, FRP has authorized HoldCo to perform any lawful action on FRP's behalf vis-à-vis Peotone, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant, Peotone Bancorp, Inc., is an Illinois corporation with the primary purpose of serving as a bank holding company for the Peotone Bank and Trust Company, a regulated bank operating in Peotone, Illinois (the "Bank"). The Bank failed in April 2010 and was seized by the Illinois Department of Banking and Finance on April 30, 2010. The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with First Midwest Bank, pursuant to which, First Midwest Bank acquired substantially all the assets and deposits of the Bank.

B. The Capital Securities and the Debentures

Plaintiffs commenced this action under CPLR 3213 based upon FRP's ownership of \$10 million in principal of Capital Securities issued by the Trust and guaranteed by Peotone.

To issue the Capital Securities, Peotone and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of March 25, 2004, between Peotone Bancorp, Inc., as issuer, and J.P. Morgan Chase Bank, as indenture trustee (the "Indenture"); (ii) that certain Amended and Restated Declaration of Trust dated as of March 25, 2004 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated March 25, 2004 (the "Guarantee"). On or about September 8, 2011, FRP acquired all \$10 million of Peotone's Capital Securities.

Plaintiffs have submitted an affidavit sworn to by Jeffrey Katz, Vice President and Client Services Manager of Bank of New York Mellon (BNY) who states that BNY is holding on behalf of FRP, Capital Securities sponsored by Peotone and issued by the Trust and attests to the

signed letter from BNY confirming that FRP currently holds \$10 million of Peotone's Capital Securities, and identifying them by CUSIP number 7132509A8.

C. Event of Default

In their motion, plaintiffs presented evidence of multiple "Events of Default" under the Indenture allowing for acceleration of the entire amount owed by Peotone to FRP:

First, Peotone has defaulted under Section 5.01(c) of the Indenture because the FDIC was appointed as receiver for Peotone's wholly-owned bank subsidiary, the Bank;

Second, Peotone has defaulted under Section 5.01(f) of the Indenture because: (i) it has lost its primary asset, the Bank, and has failed to remit any payments on account of the Capital Securities since at least September 2011, meaning it is generally failing to pay its debts as they become due; and (ii) it has consented to the FDIC's receivership of the Bank;

Third, Peotone has defaulted under Section 5.01(a) of the Indenture by failing to make payments on the Capital Securities since at least September 2011.

Fourth, Peotone has defaulted under Section 5.01(d) by failing to comply with the covenant set forth in Section 3.07; specifically Peotone covenanted not to "sell, convey, transfer or otherwise dispose of all or substantially all of its property" absent specific circumstances which have not been met, and the seizure and subsequent sale of the Bank constitute such prohibited disposal of Peotone's primary asset.

Peotone has thus defaulted under at least sections 5.01(a), 5.01(d), 5.01(e), and 5.01(f) of the Indenture. Each of these defaults constitutes an Event of Default that "is continuing" and "is attributable to the failure" of Peotone to make timely payments on the Capital Securities, and each result in the principal and interest on the Debentures being immediately due and payable. Such defaults directly affect Capital Securities holders' rights under the Trust Documents, and go

to the core of Peotone's obligations and the Capital Securities holders' benefits under the Trust Documents. Accordingly, the Trust Declaration has granted the Capital Securities holders direct rights of action in the event of non-payment, and FRP, as the sole holder of 100% of Peotone's Capital Securities, has direct standing to bring this action. HoldCo, as FRP's manager and power of attorney, also has this right.

II. Damages

The plaintiffs are entitled to recover the full \$10 million principal amount under the Capital Securities plus interest accruing at a 3-month LIBOR + 2.70%. *See* Indenture § 2.10; *see also* Trust Declaration, Annex 1, p. A-I-1 – A-I-2. The total accrued interest on the Debentures and Capital Securities to date is \$1,988,890.00.

III. Order

Now upon reading and filing Plaintiffs' Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, Memorandum of Law in Support of Motion for Summary Judgment in Lieu of Complaint, dated April 17, 2013, together with the exhibits annexed thereto, Affidavit of Vik Ghei in Support of Motion for Summary Judgment in Lieu of Complaint sworn on April 15, 2013, together with the exhibits annexed thereto, Request for Judicial Intervention and Request for Judicial Intervention Addendum (the "Motion Papers") and Plaintiffs having submitted proof of service upon Peotone, and upon further consideration of the Affidavit of Jeffrey Katz authenticating and confirming FRP's beneficial ownership of the Capital Securities, and Defendant having failed to answer or otherwise appear in this case; and the Court on January 2, 2014 having issued its Decision and Order, in relevant part, granting Plaintiff's Motion for Summary Judgment In Lieu of Complaint in the matter *Financials Restructuring Partners III, Ltd. and HoldCo Advisors, L.P., as manager for Financials Restructuring Partners III, Ltd. vs.*

Riverside Banking Company, Index No.650934/2013 (the "Riverside Matter"), and the Court on March 19, 2014, having directed Plaintiffs to apply the Court's reasoning in the Riverside Matter to settle the order in this case;

IT IS THEREFORE

ORDERED that motion for summary judgment in lieu of complaint by Financials Restructuring Partners, Ltd. and HoldCo Advisors, L.P., as manager for Financials Restructuring Partners, Ltd. is GRANTED in full; and it is further

ORDERED that defendant shall pay to plaintiffs the full amount of \$10,000,000 in principal, plus accrued interest as calculated above, totaling \$1,988,890.00; and it is further

ORDERED that Peotone shall also pay to plaintiffs any post-judgment interest accruing at the statutory rate of 9% pursuant to CPLR § 5004, beginning from the date of entry of this order; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated:

1/22/15

ENTER:


J.S.C