SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

CORTLANDT STREET RECOVERY CORP. and WILMINGTON TRUST COMPANY, as Trustee,

Plaintiffs,

– against –

DAVID BONDERMAN, et al.,

Defendant.

Index No.: 653357/11

CORTLANDT II

DECISION/ORDER

Plaintiffs Cortlandt Street Recovery Corp. (Cortlandt) and Wilmington Trust Company (WTC) move for leave to reargue and renew their prior motion to dismiss, which was decided by this court's decision and order dated September 16, 2014 (2014 NY Slip Op 24268, 2014 WL 4650231). Plaintiffs seek relief only with respect to the holding that WTC, the trustee under a PIK Note Indenture (Indenture), is not authorized to maintain the causes of action pleaded in the complaint in this action (Cortlandt II).

Leave to reargue is denied.

Leave to renew is granted and, upon renewal, the court adheres to its prior decision. WTC argues that in the prior decision, the court on its own motion raised "the validity of the Direction received by the Trustee" to maintain this action, including the fraudulent conveyance causes of action; that defendants never challenged the validity of the Direction; and that the court "misapprehended the process for issuing a direction to authorize the Trustee." (Ps.' Memo. Of Law In Supp. of Motion For Reargument and Renewal at 15-16, 11 [Ps.' Renewal Memo.].)

As noted in the prior decision, section 6.05 of the Indenture provides in pertinent part: "Holders of a majority in aggregate principal amount of the then outstanding Notes may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee or exercising any trust or power conferred on it." As defined in the Indenture, "'Holder' means, with respect to any Note, the Person in whose name such Note is registered in the register maintained by the registrar pursuant to the provisions of this Indenture." On the motion to dismiss, defendants argued that WTC was not authorized under section 6.03 of the Indenture to assert fraud claims against third-parties. (Apax/TPG Memo. Of Law In Supp. of Motion to Dismiss at 35-37 [NYSCEF Doc. 55].) In opposition, WTC cited section 6.05, and expressly argued that "the Trustee received such a direction from Cortlandt, exercising the rights of the majority of noteholders pursuant to §§ 6.05 and 6.06 of the PIK Indenture to bring this action in New York." (Ps.' Memo. of Law In Opp. to Motion to Dismiss at 38 [NYSCEF Doc. No. 116].)

In the prior decision, this court reasoned that section 6.03 did not authorize the trustee to maintain the fraudulent conveyance or other pleaded claims. (2014 WL 4650231, * 15.) The court further held that the trustee was not authorized under section 6.05 to maintain the claims because, according to WTC, the trustee received the direction from Cortlandt and, as acknowledged by Cortlandt, Cortlandt was authorized to act by SPQR, which was a beneficial holder, "not a 'Holder' within the meaning of the indenture." (Id., * 17.) In view of the latter holding, the court expressly held that it need not reach the issue of whether section 6.06, the no-action clause of the Indenture, would authorize maintenance of these claims if the trustee were properly authorized by the Holders. (Id.,* 16-17).[1]

[1] WTC mischaracterizes the decision, claiming that it in fact determined that that the trustee could maintain the claim if authorized by the requisite percentage of holders. (Ps.' Renewal Memo. at 11.)

WTC now seeks to adduce evidence in support of an argument that WTC was authorized to maintain this action by the beneficial holders of the notes. More particularly, WTC argues that Euroclear and Clearstream, the holders of the Global Note, had Operating Procedures under which they solicited a directive from "Indirect Participants" – i.e., investors who own a beneficial interest in the Global Note – to approve various actions, including a directive to the trustee "to join the suit commenced by Cortlandt pursuant to section 6.05 of the Indenture." WTC further claims that "the Indirect Participants holding the majority of beneficial interests in the PIK Notes . . . voted in favor of the requested actions." (Ps.' Renewal Memo. at 5-7.)

WTC did not make this argument on the motion to dismiss.[2] Moreover, WTC does not claim that any provision of the Indenture incorporates the Global Note Holder's Operating Procedures. Nor does it cite any authority in support of its highly questionable claim on this motion for renewal that such Operating Procedures supersede the unambiguous requirement of section 6.05 of the Indenture that registered holders of the Note, as opposed to beneficial holders, authorize the trustee with respect to the exercise of remedies or of powers conferred upon it.[3] WTC's argument reduces to a policy argument that the court should ignore the negotiated terms of the contract in order to facilitate the "modern book entry system of ownership." (See Ps.' Renewal Memo. at 13.)

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[2] The Cortlandt II Complaint pleaded: "Cortlandt is authorized by the vote of the majority of the Noteholders to exercise the rights of the majority under § 6.05 of [the PIK Notes] indenture . . . and to direct the Trustee to join on behalf of the Noteholders the suit commenced by Cortlandt." (Compl., ¶ 10.) The Complaint also made a more specific allegation which referred to Cortlandt's authorization by Participants: "Cortlandt is authorized by assignments of owners of Book Entry Interests and by vote of a majority of the Nonparticipants and Participants in accordance with the terms of the PIK Indenture to collect payment of the PIK Notes." (Id., ¶ 156.) On the motion to dismiss, however, plaintiffs did not raise, let alone develop, the argument made here, that pursuant to the Operating Procedures, WTC was authorized to maintain the claims in this action by the Indirect Participants – i.e., the beneficial as opposed to registered "Holders."

[3] As discussed in the prior decision, Cortlandt's assignor, SPQR (while represented by the same counsel as Cortlandt) arguably itself recognized the need to obtain status as a registered "Holder" in order to authorize Cortlandt to sue. In a UK insolvency proceeding, SPQR thus sought – albeit, without success – to acquire Definitive Notes that would confer such status upon it. (2014 WL 4650231, *8-9.)

This motion is yet another attempt at a new theory of liability by plaintiffs that have brought serial, piecemeal, and duplicative pleadings arising out of the same transaction.

It is accordingly hereby ORDERED that the branch of plaintiffs' motion for leave to reargue is denied; and it is further

ORDERED that the branch of plaintiffs' motion for leave to renew is granted and, upon renewal, the motion is denied with prejudice.

This constitutes the decision and order of the court.

Dated: New York, New York
February 5, 2015

MARCY FRIEDMAN, J.S.C.