Financials Restructuring Partners III, Ltd. v WSB Fin. Group, Inc.
2015 NY Slip Op 30337(U)
March 12, 2015
Supreme Court, New York County
Docket Number: 650528/2013
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : COMMERCIAL DIVISION PART 49

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

Plaintiffs,

-against-

WSB FINANCIAL GROUP, INC.,

Defendant.

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DECISION AND ORDER

Index No.: 650528/2013
Mot. Seq. Nos.: 001

O. PETER SHERWOOD, J.:

This is a motion for summary judgment in lieu of complaint (mot. seq. 001) by plaintiff HoldCo Advisors, L.P. ("HoldCo") against defendant WSB Financial Group, Inc. ("WSB").

I. Background

Plaintiff HoldCo serves as the acting manager of Financials Restructuring Partners III, Ltd ("FRP"), and pursues this action on behalf of FRP pursuant to a general power of attorney dated February 15, 2013. FRP in turn owns all of the trust preferred securities (the "Capital Securities") issued by WSB's subsidiary trust in the amount of $8 million. WSB serves as a bank holding company. WSB's principal asset was the Westsound Bank (the "Bank"), a regulated bank operating in Bremerton, Washington. After the Bank failed in May 2009, regulators seized it and sold all of its assets.

Before the Bank was seized, WSB entered into a series of transactions aimed at issuing the Capital Securities. As is typical in such transactions, WSB as sponsor first established WSB Financial Group Trust I (the "Trust") as its wholly owned subsidiary. WSB then issued $8 million in junior, subordinated, unsecured debentures to the Trust (the "Debentures"). The Trust in turn issued the Capital Securities to market investors in the amount of $8 million, and lent WSB the $8 million in proceeds. WSB guaranteed payment of the Capital Securities. FRP acquired 100% of the Capital Securities on March 11, 2011, and continues to own them (Ghei aff. Ex. F, NYSCEF Doc. No. 6).

Three documents (all dated July 27, 2005) govern this series of transactions: (1) an amended and restated declaration of trust (the "Trust Declaration"); (2) an indenture governing the Debentures, between WSB as issuer of the debentures and JPMorgan Chase Bank, N.A. as indenture trustee (the "Indenture"); and (3) a guarantee of payment pursuant to which WSB guaranteed payment on the Capital Securities (the "Guarantee"). These documents create a two-tiered payment structure: when WSB pays the Trust on account of the Debentures, the Trust uses the proceeds to pay the Capital Securities holders. Pursuant to the Guarantee, WSB guarantees payment to the Capital Securities holders if the Trust fails to do so.

The Trust Declaration provides for the Trust's dissolution "upon a Bankruptcy Event with respect to the sponsor, the Trust or the Indenture Issuer" (Ghei aff, Ex. D, NYSCEF Doc. No. 6 - Trust Declaration, § 7.1[a][ii]). Such a "Bankruptcy Event" occurred when the Washington Department of Financial Institutions seized WSB's principal asset, the Bank, on May 8, 2009 and appointed a receiver (the FDIC) (*id.*, § 1.1 [providing that a "Bankruptcy Event" occurs when a court appoints (or WSB consents to the appointment of) a receiver for WSB or any substantial part of its property]). Accordingly, the Trust dissolved on that date. Upon dissolution of the Trust, the Trust Declaration provided for the pro rata distribution of the Debentures to the holders of the Capital Securities (*id.*, § 3). FRP, as holder of all of the Capital Securities, accordingly became holder of 100% of the Debentures.

The Indenture provided for quarterly interest payments on the Debentures. However, the Indenture entitled WSB to defer interest payments for up to five years, provided no event of default had occurred. In order to do so, WSB was required to provide notice to the Debenture holders (in this case, FRP) of such deferrals for each quarter in which it chose to defer interest (Ghei aff, Ex. C, NYSCEF Doc. No. 6, Indenture § 2.11). Even if the Trust had not been dissolved, WSB would have had to provide notice to the indenture trustee, who in turn would have had to notify the Capital Securities holders (including FRP). It is undisputed that WSB did not notify FRP of its intent to defer interest payments (*see* Ghei aff ¶ 12). Regardless, the last possible deferral period under the Indenture expired on August 7, 2014. At the conclusion of the extension period, WSB was obligated to pay all deferred interest.

The evidence presented by plaintiff establishes that the defendant defaulted under four separate subsections of the Debenture. First, WSB defaulted under § 5.01(e) of the Indenture when the FDIC was appointed as receiver for WSB's wholly-owned bank subsidiary, the Bank. Second, WSB defaulted under § 5.01(f) of the Indenture because: (i) it lost its primary asset, the Bank, and failed to remit any payments on account of the Capital Securities since May 2009,; and (ii) it consented to the FDIC's receivership of the Bank. Third, WSB defaulted under § 5.01(a) of the Indenture by failing to make payments on the Capital Securities since May 2009. Finally, WSB defaulted under § 5.01(d) by failing to comply with its covenant not to "sell, convey, transfer or otherwise dispose of all or substantially all of its property" (Ghei aff, Ex. C, NYSCEF Doc. No. 6, Indenture § 3.07). The seizure and sale of the Bank constitutes such prohibited disposal of WSB's primary asset. These events of default triggered acceleration of the entire principal of the Debt Securities and unpaid interest due and payable, with immediate effect.

II. Discussion

WSB does not contest that the plaintiff has made out a prima facie case entitling it to summary judgment. Rather, WSB raises challenges to this Court's jurisdiction, and to HoldCo's capacity to maintain this suit. In this respect, the arguments WSB advances are similar to those made in related cases, and passed upon by the Court in those actions. As in those cases and for the following reasons, these challenges fail. Accordingly, the Court grants summary judgment in favor of the plaintiff.

A. Summary Judgment In Lieu of Complaint

The plaintiff has demonstrated entitlement to summary judgment. CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence "other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.*, 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power*, 37 NY2d 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.*, 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis v Lanteri*, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213

motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a prima facie case for summary judgment (*Weissman,* 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.,* 274 AD2d 327 [1st Dept 2000]).

A debtor's right to extend the date of payment for specified periods of time does not preclude an action based on CPLR § 3213 (*Stevens v Phlo Corp.*, 288 AD2d 56 [1st Dept 2001]). "Such provision does not require additional performance by plaintiff as a condition precedent to payment, or otherwise make defendant's promise to pay something other than unconditional" (*id.*). Reference to an indenture to determine acceleration of balance in cases of default similarly do not bar such actions (*Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, 291 AD2d 342, 342 [1st Dept 2002]).

Here, the underlying Capital Securities and the Debentures plainly qualify as "instrument[s] for the payment of money only." Accordingly, a suit under CPLR § 3213 is proper. Moreover, as noted above, there is no dispute that WSB defaulted under §§ 5.01(a), (d), (e) and (f). Plaintiff has established by admissible evidence that WSB failed to make any payment on the Capital Securities since May 8, 2009. Even if WSB had properly chosen to defer interest (and there is no evidence that it provided proper notice to do so), the Indenture provides an outside limit of five years for such deferral. That period expired on August 7, 2014. WSB does not dispute that it has not made a payment after that date. Moreover, the events of default described above triggered acceleration of the entire principal of the Capital Securities and unpaid interest due and payable.

B. Personal Jurisdiction over WSB

Rather than challenge the plaintiff's prima facie case, WSB maintains that the Court lacks personal jurisdiction over WSB. CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011] [*citing Peterson v*

Spartan Industries, Inc., 33 NY2d 463, 467 [1974]]).

WSB argues that because it is organized under the laws of the State of Washington and conducts no business in New York, it is not subject to personal jurisdiction in New York. The plaintiff bases its claim of personal jurisdiction over WSB on the forum selection clause in the Trust Declaration (Ghei aff, Ex. D, NYSCEF Doc. No. 6 -Trust Declaration, § 13.3). By executing the Trust Declaration, WSB consented to personal jurisdiction in New York for transactions that are contemplated therein. The issuance and payment of the Capital Securities as well as the direct lawsuit by holders of those securities to enforce payment are plainly contemplated by the Trust Declaration.

WSB attempts to avoid the consequences of the forum selection clause by arguing that the dissolution of the Trust absolves it of its obligations under the Trust Declaration. This argument is unpersuasive for a number of reasons. First, dissolution of a trust is not tantamount to recision of the declaration of trust establishing the trust (*see, e.g, NML Capital v Republic of Argentina*, 17 NY3d 250, 263 [2011]). Second, in line with this general proposition, the Trust Declaration makes clear that its terms persist following the Trust's dissolution. Pursuant to the terms of the Trust Declaration, dissolution is simply one step in a process toward termination of the Trust, a process that has not yet been completed. Section 7.1(b) of the Trust Declaration specifically provides that creditors of the Trust must be paid prior to termination of the Trust. Because FRP has not been paid, the Trust has not terminated, and the terms of the Trust Declaration remain binding on WSB. Accordingly, WSB's arguments regarding personal jurisdiction is rejected.

C. HoldCo's Capacity to Maintain this Suit

In addition to challenging the Court's jurisdiction, WSB challenges the capacity of HoldCo to maintain this suit. WSB argues that FRP is a foreign limited parternship doing business in New York without authority, and therefore is prohibited by statute from maintaining this action.[1] WSB also argues that HoldCo's power of attorney is defective. Neither claim is tenable.

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[1] WSB cites to Business Corporation Law § 1312. However, because both FRP is a limited liability company, the appropriate statute is Limited Liability Company Law § 808.

1. FRP's Alleged Unauthorized Business in New York

Limited Liability Company Law § 808(a) provides that: "A foreign limited liability company doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such limited liability company shall have received a certificate of authority in this state." It is undisputed that FRP has not been authorized to do business in New York. Plaintiff contends that FRP nonetheless is doing business in this state, and therefore should be barred from maintaining this action. Similarly, because HoldCo's authority derives from FRP by virtue of the power of attorney, it too cannot maintain this action.

WSB's contention that FRP is "doing business" in New York is unsupported by any evidence of FRP conducting systematic and regular activity in this state (*see CadleRock Joint Venture, L.P. v Klar*, 278 AD2d 39, 39 [1st Dept 2000]). FRP is a Caymans Island limited partnership, with no employees and no office in New York. It neither conducts nor solicits any business in New York (*see* Zaitzeff Affidavit, NYSCEF Doc. No. 27, ¶ 6). WSB contends that FRP's relationship with HoldCo, which is its agent for the purposes of managing securities and maintaining this lawsuit, evidences that FRP is "doing business" in New York. However, WSB fails to identify any regular and systematic course of activity that HoldCo conducts on behalf of FRP in New York. WSB simply notes that HoldCo is acting as FRP's representative pursuant to a power of attorney in several lawsuits before this Court. Such incidental contacts, even if attributable to FRP, do not rise to a level of systematic activity sufficient to establish that FRP is doing business in New York. Accordingly, the Court rejects this argument.

2. HoldCo's Power of Attorney

Lastly, WSB argues that the power of attorney HoldCo holds is defective, thereby precluding this action. The power of attorney grants HoldCo authority "to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents . . . in connection with any pending, outstanding, or potential claim, action, suit, arbitration, or proceeding in connection with [FRP's] interest in debt securities . . . issued by . . . WSB" (Ghei aff, Ex. A, NYSCEF Doc. No. 6). While it is true that a power of attorney must be strictly construed (*see Matter of McArthur*, 173

AD517, 519 [3d Dept 1916]), it must not "be so strictly construed as to destroy its purpose" (*id.* at 520). The power of attorney unambiguously authorizes HoldCo to prosecute this action.

IT IS THEREFORE

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

ORDERED that defendant WSB Financial Group, Inc, shall pay to plaintiffs the full amount of $8,000,000 in principal, plus accrued interest accruing at a 3-month LIBOR + 1.73% rate, totaling $1,230,611.00; and it is further

ORDERED that WSB Financial Group, Inc., shall pay to plaintiffs 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: March 12, 2015

E N T E R,

O. PETER SHERWOOD

J.S.C.