Financials Restructuring Partners III v Crescent Banking Co.
2015 NY Slip Op 30500(U)
April 2, 2015
Sup Ct, New York County
Docket Number: 650925/2013
Judge: O. Peter Sherwood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

----------X

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

Plaintiffs,

-against-

CRESCENT BANKING COMPANY,

Defendant.

----------X

DECISION AND ORDER

Index No.: 650925/2013
Mot. Seq. Nos.: 001

O. PETER SHERWOOD, J.:

In motion sequence number 001, plaintiffs Financials Restructuring Partners III, Ltd. ("FRP") and HoldCo Advisors L.P., ("Holdco") as manager for FRP move, pursuant to CPLR 3213 for summary judgment in lieu of complaint. Crescent Banking Company ("Crescent") opposes the motion and cross-moves to dismiss. Because this case is identical in all key respects to *Financials Restructuring Partners III, Ltd., et al, v. Riverside Banking Company*, Index No. 650934/2013 (hereinafter, "*Riverside*") in which this Court granted summary judgment in lieu of complaint by Decision and Order dated January 2, 2014 (*see Financials Restructuring Partners III, LT v Riverside Banking Co.*, 2014 N.Y.Slip Op. 30013[U][Sup Ct, NY County Jan 2, 2014]), the motion in this case must be granted and the cross-motion denied.

BACKGROUND

FRP owns all of the trust preferred securities (the "Capital Securities") issued by a Crescent subsidiary trust, in the amount of $10 million. Crescent serves as a bank holding company. Crescent's principal asset was the Crescent Bank and Trust Company (the "Bank"), a regulated bank operating in Jasper, Georgia. After the Bank failed in July 2010, regulators seized it and sold substantially all of its assets.

Prior to the seizure, Crescent entered into a series of transactions resulting in the issuance of the Capital Securities. As is typical in such transactions, Crescent as sponsor first established Crescent Capital Trust IV (the "Trust") as its wholly owned subsidiary. Crescent then issued $10 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 $10 million (the "Securityholders")[2], and lent Crescent the $10 million in proceeds. Crescent guaranteed payment of the Capital Securities. FRP claims to have acquired 100% of the Capital Securities on May 26, 2011, and continues to own them (*see* Ghei aff., NYSCEF Doc. No. 5, ¶ 10).

Three documents (all dated August 27, 2007) govern this series of transactions: (1) an amended and restated declaration of trust (the "Trust Declaration"); (2) an indenture governing the Debentures, between Crescent as issuer of the debentures and LaSalle Bank, N.A. as indenture trustee (the "Indenture"); and (3) a guarantee of payment pursuant to which Crescent guaranteed payment on the Capital Securities (the "Guarantee"). These documents created a two-tier payment structure: when Crescent pays the Trust on account of the Debentures, the Trust uses the proceeds to pay the Capital Securities holders. Pursuant to the Guarantee, Crescent guarantees payment to the Capital Securities holders if the Trust fails to do so.

A. The Indenture

The Indenture provided for quarterly interest payments on the Debentures. However, under the Indenture Crescent was entitled to initiate an extension period, deferring interest payments, provided no Event of Default had occurred (Indenture § 2.11, NYSCEF Doc. No. 6). Crescent was required to give notice to the Trustee, who in turn was required to give notice to the Securityholders. Crescent was also entitled to extend this extension period for up to twenty consecutive quarters, by providing notice to the Trustee (*see* Indenture § 2.11, Ghei Aff. Ex. D, NYSCEF Doc. No. 6). At the conclusion of the extension period, Crescent was obligated to pay all deferred interest.

Events of Default are defined in Section 5.01 of the Indenture as follows:

> (a) [Crescent] defaults in the payment of any interest upon any Debt Security when it becomes due and payable (unless [Crescent] has elected and may defer interest payments pursuant to Section 2.11), and continuances of such default for a period of 30 days . . . ; or
>
> (b) [Crescent] defaults in the payment of all or any part of the principal of . . . any Debt Securities as and when the same shall become due and payable . . . by

---

[2] "Securityholder" or "holder of Debt Securities" is defined in the Indenture as "any person in whose name at the time a particular Debt Security is registered on Debt Security Register" (Indenture § 1.01).

> declaration of acceleration pursuant to Section 5.01 of this Indenture or otherwise; or
>
> (c) [Crescent] defaults in the payment of any interest upon any Debt Security when it becomes due and payable following the nonpayment of any such interest for 20 or more consecutive quarterly periods; or
>
> (d) [Crescent] defaults in the performance of, or breaches, any of its covenants . . . and continuance of such default or breach for a period of 30 days after there has been given, by registered or certified mail, to [Crescent] by the Trustee or to the Company and the Trustee by holders of not less than 25% in aggregate principal amount of the outstanding Debt Securities, a written notice specifying such default or breach and requiring it to be remedied and stating that such notice is a "Notice of Default" hereunder; or
>
> (e) a court having jurisdiction in the premises shall enter a decree or order for relief in respect of [Crescent] in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or appoints a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of [Crescent] or of any substantial part of its property . . . ; or
>
> (f) [Crescent] shall commence a voluntary case under any applicable bankruptcy, insolvency, or other similar law now or hereafter in effect, shall consent to the entry of an order for relief in an involuntary case under such law, or *shall consent to the appointment or taking possession by a receiver*, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of [Crescent] or of any substantial part of its property . . . or shall fail generally to pay its debts as they become due.

(*Id* § 5.01 [emphasis added]). If an Event of Default under subsection (c) occurs, the Trustee or the holders of 25% of the outstanding Debt Securities by notice to the Company (and the Trustee) may declare the entire principal of the Debt Securities and unpaid interest due and payable, with immediate effect. Events of Default under subsections (e), (f), and (g) automatically trigger this acceleration.

Section 5.02 of the Indenture, discusses suits for Events of Default under Section 5.01. It authorizes suits by the Trustee and provides a mechanism for such lawsuits to take place. Section 5.04 of the Indenture is a "no-action" clause, which prohibits Securityholders from bringing suit:

> unless such Securityholder previously shall have given to the Trustee written notice of an Event of Default with respect to the Debt Securities and unless holders of not less than 25% in aggregate principal amount of the Debt Securities then outstanding shall have given the Trustee a written request to institute such action, suit or proceeding and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred thereby, and the

> Trustee for 60 days after its receipt of such notice, request and offer of indemnity shall have failed to institute any such action, suit or proceeding . . . .

(*Id* § 5.04).

B. The Trust Declaration

The Declaration of Trust contemplates direct actions by Securityholders against Crescent, "if an Event of Default has occurred and is continuing and such event is attributable to the failure of the Debenture Issuer to pay interest or premium, if any, on or principal of the Debentures on the date such interest, premium, if any, or principal is otherwise payable" (Trust Declaration § 2.8[e], NYSCEF Doc. No. 5, p. 118).[3] The Declaration of Trust further provides that "[t]he Trust shall dissolve on the first to occur of . . . a Bankruptcy Event with respect to the Sponsor the Trust, or the Debenture Issuer" (*id.* § 7.1 [a][ii], NYSCEF Doc. No. 5, p. 137). FRP contends that such a "Bankruptcy Event" occurred when Crescent's principal asset, the Bank, was seized by the Georgia Department of Banking & Finance on July 23, 2010, and the FDIC was appointed as receiver (*see id.*, § 1.1 [providing that a "Bankruptcy Event" occurs when a court appoints (or Crescent consents to the appointment of) a receiver for Crescent or any substantial part of its property]). Upon dissolution of the Trust, the Trust Declaration provided for the pro rata distribution of the Debentures to the holders of the Capital Securities (*see id.* at § 3).

Section 6.1 of the Declaration of Trust requires the Trust Administrators to issue Capital Securities, and sets forth provisions regarding those securities. In particular, it provides that the Securityholders "shall be entitled to the benefits provided in [the Declaration of Trust]" (*id.* § 6.1 [e]).

C. FRP Acquires the Capital Securities and Institutes this Action

On or about May 26, 2011, FRP acquired $10 million of the Capital Securities, CUSIP number 225662AA3. The interest in the securities is held at Wells Fargo Bank, N.A. ("Wells Fargo") as custodian, as evidenced by a letter sent by Wells Fargo on March 14, 2013 (*see* Ghei aff Ex. G, NYSCEF Doc. No. 5, p. 216). FRP has not received any interest or principal payments on the Capital Securities since acquiring them. On February 15, 2013, FRP retained HoldCo to act for it in this case

---

[3] Events of Default under the Trust Declaration are defined as Events of Default under the Indenture (*see* Trust Declaration §1.1[f]).

pursuant to a General Power of Attorney (*see* Ghei Aff Ex. A). On March 12, 2013, HoldCo sent a Default Notice via Certified Mail to Crescent, copy to the Trustee, declaring that Riverside had defaulted under Indenture Section 5.01(a), (d), (e), and (f) and that all principal and interest was accelerated and immediately due and payable (*see* Ghei Aff Ex. J, NYSCEF Doc. No. 5, p. 225). HoldCo received neither a response to the Default Notice nor payment. This litigation ensued.

On October 23, 2014, after opposition to FRP's motion for summary judgment in lieu of complaint were served in the Riverside Action, Cede & Co. as nominee of the Depository Trust Corporation ("DTC"), holder of record of the Capital Securities and nominal party for the true party in interest, authorized FRP, as beneficial owner of the Capital Securities to bring or prosecute a lawsuit against Crescent thereby specifically authorizing the instant action (*see* Ghei Suppl. Aff, Ex A, NYSCEF Doc. No. 62, p. 3).

DISCUSSION

In an attempt to distinguish this case from Riverside, Crescent makes two arguments. First, unlike in *Riverside*, there has been no Event of Default under the Indenture or Trust Declaration, or at minimum there are questions of fact on the issue. Second, FRP lacks standing as a Securityholder because evidence of the litigation authorization purportedly provided by Cede & Co. (the "Litigation Authorization") is hearsay. However, as is discussed below, the Court need not reach the questions of whether the Trust necessarily dissolved on the occurrence of an Event of Default and whether FRP can sue on the Debentures because FRP has been authorized to sue as beneficial holders of the Capital Securities. The Capital Securities provide a sufficient basis to recover directly against Crescent.

A. Legal Standard for Motion for Summary Judgment in Lieu of Complaint

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, as in *Riverside*, the underlying Capital Securities plainly qualify as "instrument[s] for the payment of money only." Accordingly, a suit under CPLR § 3213 is proper.

B. Event of Default

FRP contends that Events of Default occurred under sections 5.01(a), (b), (d), (e) and (f) of the Indenture. The record in this case reveals that Crescent defaulted under §§ 5.01(e) and (f) of the Indenture by virtue of the seizure of the Bank[4]. Section 5.01(e) provides that an Event of Default occurs when "a court having jurisdiction in the premises . . . appoints a receiver of [Crescent] or for any substantial part of its property . . . ." This occurred here when the Bank, Crescent's only substantial asset, was seized by regulators and the FDIC was appointed as receiver. In addition, § 5.01(f) provides that an Event of Default occurs when "[Crescent] . . . shall consent to the appointment or taking possession by a receiver . . . of [Crescent] or of any substantial part of its property." This occurred here when Crescent failed to seek judicial review of the receivership of the Bank. These defaults resulted in automatic acceleration (*see* Indenture § 5.01["If an Event of Default under clause (e) (f) or (g) of this Section 5.01 occurs, then, in each and every such case, the entire

---

[4] This finding is consistent with the Court's opinion in *Riverside*. In that case the Court found that there was an event of default under the terms of an identical provision of the indenture presented in that case. The holding in *Riverside* is persuasive authority for the holding in this case because the factual circumstances and applicable law are identical. To the extent Crescent argues that the Court incorrectly decided the issue in *Riverside*, the claim must be addressed to the Appellate Division.

amount of the Debt Securities and any premium and interest accrued, but unpaid, thereon, shall ipso facto become immediately due and payable without further action"]).

Crescent argues that these events do not constitute Events of Default (or at least that triable issues of material fact exist) for several reasons. First, the appointment of a receiver for the Bank does not constitute appointment of a receiver for Crescent's property – Crescent's property is its equity interest in the Bank, not the bank itself (*see* Def. Reply Br., NYSCEF Doc. No. 61, pp. 8-9). Second, the "Comptroller of the Currency" does not qualify as "a court having jurisdiction in the premises" for purposes of § 5.01(e) of the Indenture. Finally, Crescent did not "consent" to appointment of a receiver and the taking of a substantial part of its property within the meaning of § 5.01(f) of the Indenture – it continues to own its shares in the Bank, and its failure to seek judicial review of the appointment of the receiver for the Bank cannot legally be considered consent (*see* Def. Reply Br., NYSCEF Doc. No. 61, pp. 9-10).

In *Riverside*, the Court addressed and rejected these arguments. There the Court found that seizure of the Bank by the Office of the Comptroller of the Currency and appointment of the FDIC as receiver constituted Events of Default under §§ 5.01(e) and (f) of the Indenture presented there. In so holding, this Court noted that:

> [a]ny other ruling would write §5.01(e) out of the Indenture. Courts do not have power to place banks into bankruptcy. Federal regulators have "the exclusive power to appoint a conservator or receiver for a Federal savings association" (12 USC § 1464(d)(2)(B)). After such appointment, the association may seek judicial review. . . . Having failed to seek judicial review, Riverside's claim that it did not "consent" to appointment of a receiver within the meaning of Indenture §5.01(f) must be rejected.

(*Riverside*, 2014 N.Y.Slip Op. 30013[U] [January 2, 2015]). The facts and applicable law in this case are indistinguishable from those in *Riverside*. Accordingly, the Court concludes that Events of Default occurred under §§ 5.01(e) and (f) of the Indenture.[5]

C. Notice to the Trustee

---

[5] Because Events of Default under the Declaration of Trust are defined in the same manner as in the Indenture, an Event of Default occurred under the Declaration of Trust as well (*see* Trust Declaration §1.1[f]).

Crescent argues that even if FRP holds the Capital Securities, it still lacks standing to sue under the Indenture because it failed to satisfy certain notice requirements thereunder. Under section 5.02 of the Indenture, a Securityholder may bring suit only after (1) notifying the Trustee in writing of an Event of Default, (2) requesting in writing that the Trustee institute action, (3) offering to indemnify the Trustee for the costs, expenses and liabilities of such action; and (4) waiting a period of 60 days after the Trustee receives the notice, request and offer of indemnity for the Trustee to institute action (*see* Indenture § 5.02).

In *Riverside* which involved documents identical to those at issue here, the Court found that, notwithstanding any notice requirements in the Indenture, Securityholders had a direct right of action under the Declaration of Trust. The Declaration of Trust contemplates direct action by Securityholders against Crescent "if an Event of Default has occurred and is continuing and such event is attributable to the failure of the Debenture Issuer to pay interest or premium, if any, on or principal of the Debentures on the date such interest, premium, if any, or principal is otherwise payable" (Declaration of Trust § 2.8). Unlike the Indenture, the Declaration of Trust contains no pre-action notice requirements. Thus, even absent compliance with the notice requirements in the Indenture, in the event of an ongoing default (as exists here), Securityholders have a direct right of action against Crescent under the Declaration of Trust. Because FRP has established the existence of at least one Event of Default, the only remaining issue to be resolved concerns its standing as a Securityholder.

In any event, FRP substantially satisfied the notice requirements of the Indenture (*see* Ghei aff, Ex. J). The letter dated March 12, 2013 satisfies each of the notice requirements except for the 60 days waiting period. That waiting period has now passed. Thus, to dismiss on this ground would result in merely restarting the litigation process.

D. FRP's Standing to Sue Crescent

FRB has established its standing to sue as beneficial owner of the Securities. It cannot be disputed that FRP is the beneficial owner of the Capital Securities. Moreover, the registered holder of the Capital Securities, the DTC's nominee Cede & Co. expressly authorized this suit (*see* Ghei suppl aff, Ex. A, NYSCEF Doc. No. 62).

Nevertheless, Crescent attacks the litigation authorization as hearsay, asserting that the document is not admissible in evidence under the business records exception to the hearsay rule (*see* Def. Sur-reply Br., NYSCEF Doc. No. 66, pp. 1-3). Crescent contends that the affidavit of Robert Hensey does not provide a sufficient foundation to qualify the litigation authorization for admission in evidence under the business records hearsay exception. The Court addressed this issue in *Riverside*. The Court there held that identical documents introduced by an identical affidavit qualified under the business records exception. The Court ruled that:

> The copy of the consent submitted bears the signature of Cede & Co. by "Robert Hensey, partner". Thereafter counsel for FRP submitted an affidavit signed by Robert Hensey, who attests that he is a vice president of DTC, that he has personal knowledge of the facts and that Cede & Co is DTC's partnership nominee. He attaches a copy of the above referenced consent, states that it is a true and accurate copy of a letter from Cede as the nominal holder of certain Riverside Statutory Trust II issued by Riverside, CUSIP 76881AAA9 and adds that it is a business record of DTC and that it is the business of DTC to maintain such records. . . . The challenged documents are admissible under the business records exception to the hearsay rule.

((*Riverside*, 2014 N.Y.Slip Op. 30013[U] [January 2, 2015], NYSCEF Doc. No. 53, p. 9 fn. 1).

Crescent's argument that it is unclear whether Mr. Hensey is a partner of Cede & Co. or rather a vice president of DTC is unpersuasive. There is nothing inconsistent with Mr. Hensey submitting the affidavit in his capacity as vice president of the DTC, and signing the litigation authorization in his capacity as a partner of Cede & Co. Moreover, Crescent's argument that questions of fact exist with regard to the relationship between DTC and Cede & Co. such that an officer of DTC lacks the necessary status to make statements regarding Cede & Co.'s business operations and practices is also baseless. Mr. Hensey's affidavit explains that Cede & Co. is DTC's partnership nominee.[6] In his capacity as vice president of the DTC, Mr. Hensey asserts that it is the regular course of business for DTC to maintain such records as the Litigation Authorization. He testifies that the Litigation Authorization is true and accurate and that it was prepared in the regular

---

[6] Although no evidence is submitted as to the relationship, it is well known in the industry (and the Court may take judicial notice) that Cede & Co. is a wholly owned subsidiary of the DTC, whose employees are also employees of the DTC. Indeed, the names Cede & Co. and DTC are often used synonymously (*see, e. g., Sino Clean Energy Inc. v Little*, 35 Misc3d 1226 [A] [Sup Ct, NY County May 21, 2012] [describing the relationship of DTC and Cede & Co under section 17A of the Securities Exchange Act of 1934]).

course of business by *"persons acting under [the DTC's] direction and control"* (*see* Ghei suppl aff, Ex. A, NYSCEF Doc. No. 62, ¶ 5 [emphasis added]). There is nothing inconsistent with employees of Cede & Co. acting under the DTC's direction and control as its nominee in preparing the litigation authorization. The litigation authorization qualifies for admission into evidence.

Accordingly, the motion for summary judgment in lieu of complaint is granted, and the cross-motion to dismiss is denied. Because FRP has been authorized to sue as beneficial holders of the Capital Securities, the Court need not decide whether the Trust necessarily dissolved on the occurrence of an Event of Default and whether FRP can sue on the Debentures. The Capital Securities provide a sufficient basis to recover directly against Crescent. It is hereby

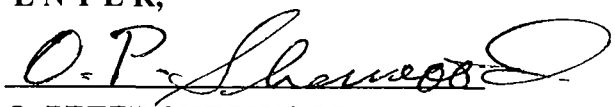
ORDERED that the motion of plaintiffs for summary judgment in lieu of complaint is GRANTED and the cross-motion of defendants is DENIED; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs and against defendant in the sum of $10 million, plus interest accruing at 3-month LIBOR + 1.73% in the total amount of $1,538,263 (*see* Indenture §2.10; Trust Declaration, Annex 1, pp. A-I-1 to A-I-2), plus post-judgment interest accruing in the statutory rate of 9% pursuant to CPLR 5004 accruing from date of entry of this order for a total amount to be calculated by the Clerk.

This constitutes the decision and order of the court.

DATED: April 2, 2015

E N T E R,



O. PETER SHERWOOD
J.S.C.