

**Financials Restructuring Partners III, Ltd. v
Columbian Fin. Corp.**

2015 NY Slip Op 32268(U)

November 23, 2015

Supreme Court, New York County

Docket Number: 652187/2014

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

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. 652187/2014

Plaintiffs,

ORDER

-against-

COLUMBIAN FINANCIAL CORPORATION,

Defendant.

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 Columbian Financial Corporation, ("CFC") are seeking entry of judgment against CFC in the amount of \$15,000,000.00, plus accrued interest and costs as applicable, and the motion having come on to be heard on September 3, 2014.

Plaintiffs' 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 60% of the \$25 million notional of trust preferred securities ("Capital Securities") issued by CFC's subsidiary trust, Columbian Financial Capital Trust II (the "Trust") and for which CFC has guaranteed payment. Pursuant to

a General Power of Attorney dated as of February 15, 2013, FRP has authorized HoldCo to perform any lawful action on FRP's behalf vis-à-vis CFC, including bringing this lawsuit. HoldCo thus acts on behalf of FRP in this matter.

Defendant CFC is a Kansas corporation with the primary purpose of serving as a bank holding company for Columbian Bank & Trust Company (the "Bank"), a regulated bank located in Topeka, Kansas. The Bank failed in August 2008 and was seized by the Kansas Bank Commissioner (the "KBC"). The Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. The FDIC then executed a purchase and assumption agreement with Citizens Bank and Trust ("Citizens") pursuant to which Citizens 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 \$15 million in principal of Capital Securities issued by the Trust and guaranteed by CFC.

To issue the Capital Securities, CFC and the Trust executed the documents (collectively, the "Trust Documents"): (i) that certain Indenture dated as of October 13, 2006, between CFC, as issuer, and Wells Fargo Bank, National Association, as indenture trustee (the "Indenture"); (ii) that certain Amended and Restated Declaration of Trust dated as of October 13, 2006 (the "Trust Declaration"); and (iii) that certain Guarantee Agreement dated October 13, 2006 (the "Guarantee"). On or about May 24, 2011, FRP acquired \$15 million of CFC's Capital Securities.

D. 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 CFC to FRP:

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

Second, CFC 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 August 2008, 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, CFC has defaulted under Section 5.01(a) of the Indenture by failing to make payments on the Capital Securities since August 2008.

Fourth, CFC has defaulted under Section 5.01(d) by failing to comply with the covenant set forth in Section 3.07; specifically CFC 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 constitutes such prohibited disposal of CFC's primary asset.

Fifth, CFC has defaulted under Section 5.01(b) by failing to pay any part of the principal after FRP had issued a notice of acceleration on May 2, 2014.

CFC has thus defaulted under at least sections 5.01(a), 5.01 (b), 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 CFC 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 CFC'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 holder of

60% of CFC'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 \$15 million principal amount under the Capital Securities plus interest accruing at a rate of 3-month LIBOR + 1.95%. *See* Indenture § 2.10; *see also* Trust Declaration, Annex 1, p. A-I-1 – A-I-2.

III. Order

Now upon reading and filing Plaintiffs' Summons, dated July 16, 2014, Notice of Motion for Summary Judgment in Lieu of Complaint, dated July 17, 2014, Memorandum of Law in Support of Motion for Summary Judgment in Lieu of Complaint, dated July 14, 2014, together with the exhibits annexed thereto, Affidavit of Vik Ghei in Support of Motion for Summary Judgment in Lieu of Complaint sworn on July 17, 2014, 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 CFC, and the Court on January 2, 2014 having issued its Decision and Order, in relevant part, granting Plaintiffs' 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, having directed Plaintiffs to apply the Court's reasoning in the Riverside Matter to settle the order in this and related cases;

IT IS THEREFORE

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

ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs in the amount of \$15,000,000 in principal, plus interest accruing at a rate of 3-month LIBOR + 1.95% from October 13, 2006 until the date of this Order, as calculated by the Clerk, and thereafter on the total sum at the statutory rate from the date of this Order until the date of entry of judgment, as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk.

Dated:

11/23/15

ENTER:

J.S.C. **O. PETER SHERWOOD**