ICP Asset Mgt. LLC v Triaxx Prime CDO 2006-1 Ltd.
2016 NY Slip Op 31241(U)
June 23, 2016
Supreme Court, New York County
Docket Number: 653202/2014
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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ICP ASSET MANAGEMENT LLC, INSTITUTIONAL CREDIT PARTNERS, LLC, and THOMAS C. PRIORE,

Plaintiffs,

-against-

Index No. 653202/2014
Motion Seq. No. 004
Motion Date: 2/18/2016

TRIAXX PRIME CDO 2006-1 LTD., TRIAXX PRIME CDO 2006-02 LTD. AND TRIAXX PRIME CDO 2007-1 LTD.,

Defendants.

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BRANSTEN, J.:

Plaintiffs ICP Asset Management LLC ("ICP"), Institutional Credit Partners, LLC ("ICP HoldCo") and Thomas C. Priore bring this action to recover legal fees and costs incurred in defending the actions entitled *Securities and Exchange Commission v. ICP Asset Management, et al.*, No. 10-CV-4791 (S.D.N.Y.) ("the SEC Action") and *AIG Financial Products Corp. v. ICP Asset Management, et al.*, Index No. 651117/2011 (Sup. Ct. N.Y. Cnty.) ("the AIG Action"). Plaintiffs' claims are based upon indemnification provisions of three Collateral Management Agreements ("CMAs") between ICP and defendants Triaxx Prime CDO 2006-1 Ltd., Triaxx Prime CDO 2006-2 Ltd. and Triaxx Prime CDO 2007-1 Ltd. (collectively, "the Funds"), dated September 7, 2007, December 14, 2006 and March 29, 2008. Pursuant to the CMAs, ICP agreed to provide certain collateral management services to each of the Funds, and each of the Funds agreed to indemnify and hold plaintiffs harmless and to reimburse them for all their reasonable

legal fees and expenses incurred in any pending or threatened litigation arising out of any actions or omissions incurred in providing services under the CMAs.

In the motion currently before the Court, plaintiffs move to dismiss defendants' affirmative defenses and counterclaims. For the reasons set forth below, plaintiff's motion is granted, and the affirmative defenses and counterclaims are dismissed.

I. Background

Defendants interposed five counterclaims with their amended answer – counterclaims against ICP and Priore for breach of contract (first counterclaim), fraud (second counterclaim), and breach of fiduciary duty (fourth counterclaim); a counterclaim against ICP HoldCo for aiding and abetting fraud (third counterclaim); and, a counterclaim against ICP for indemnification (fifth counterclaim).

Defendants allege that plaintiffs engaged in a "continuous scheme to abuse, mismanage and defraud the Triaxx Funds in order to benefit themselves and their favored clients." (Counterclaims ¶ 13.) In support of this allegation, defendants cite to four specific transactions – (1) in June 2007, plaintiffs "rebooked" purchases of securities "earmarked for defendants" (*id.* ¶ 21); (2) in August 2007, plaintiffs caused defendants to enter into "unapproved" forward purchase agreements at "back-dated" prices (*id.* ¶ 24); (3) in June 2008, plaintiffs committed defendants to forward purchase certain bonds and then "replaced those positions with cheaper bonds bought from ICP's affiliated broker-

dealer" (*id.* ¶ 25); and, (4) on August 5, 2008, plaintiffs caused Triaxx 2 to purchase a bond issue at $75 per share from an ICP "favored client," after Triaxx 2's Trustee had rejected the same bond issue at a lower price because it "failed to meet the Fund's investment criteria, which prohibited purchases of bonds priced below $75. *Id.* ¶ 22. In addition, defendants allege that one transaction "occurred on October 28, 2008," *id.* ¶ 19, but provide no detail as to the nature of that transaction.

As a result of these transactions, defendants assert that the Triaxx Funds "incurred millions of dollars in damages and lost profits in an amount to be determined at trial," including fees or expenses incurred in connection with the AIG and SEC Actions, and "millions of dollars in damages due to [plaintiffs] causing the Triaxx Funds to purchase bonds at inflated, above-market prices." *Id.* ¶¶ 43, 51, 57.

II. **Discussion**

A. *Defendants' Counterclaims*

1. Breach of Contract (First Counterclaim)

Plaintiffs first contend that defendants' breach of contract counterclaim is time-barred. The Court agrees.

Pursuant to CPLR § 213(2), defendants' claim for breach of contract is subject to a six-year statute of limitations, which begins to run when a cause of action accrues. *Hahn Auto. Warehouse, Inc. v. Am. Zurich Ins. Co.*, 18 N.Y.3d 765, 770 (2012). In contract

actions, "a claim generally accrues at the time of the breach," and claims are deemed interposed when served. *Id.*; CPLR § 203(d) ("A defense or counterclaim is interposed when a pleading containing it is served.").

The original counterclaims were served on July 16, 2015, and the amended counterclaims were served on August 25, 2015. Defendants allege breaches that occurred more than six years earlier, in June 2007, August 2007, June 2008, and in or about August 5, 2008 – more than six years before the counterclaims were interposed. Morever, even by the time the original complaint was filed on October 22, 2014, the statute of limitations had already run on the counterclaims. Although defendants also claim that a "transaction" occurred on October 28, 2008, within six years of the commencement of the action, the counterclaims do not give any clue as to the facts of that transaction, how it arose, or why it is actionable.

a. **Continuous Violation Doctrine**

Defendants concede that the breach of contract counterclaim is subject to a six-year statute of limitations and do not dispute that the breaches that they allege occurred more than six years before they interposed their counterclaims. Nevertheless, defendants try to save their breach of contract counterclaim by claiming that the transactions constitute a "continuous course of breaching conduct," such that a single transaction,

allegedly occurring within the six-year period on October 28, 2008, tolls the statute of limitations on the earlier claims.

However, the counterclaims here do not allege a continuing breach, but rather are a series of discrete breaches. *See Meruk v. City of New York*, 223 N.Y. 271, 276 (1918) (stating that a continuous breach is "where a defendant unlawfully produces some condition which is not necessarily of a permanent character and which results in intermittent and recurring injuries to another"); *see also Jensen v. Gen. Elec. Co.*, 82 N.Y.2d 77, 85 (1993) (detailing the origins and application of the continuing wrong doctrine); *1050 Tenants Corp. v. Lapidus*, 289 A.D.2d 145, 147 (1st Dep't 2001).

The "continuing violation doctrine" does not apply where, as here, "plaintiffs suffered discrete, actionable harms each time they paid too much or received too little on a . . . transaction." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 WL 6243526, at *136 (S.D.N.Y. 2015). Like defendants here, the plaintiffs in the *LIBOR* litigation alleged a series of discrete breaches, each of which was separately actionable. Here, defendants claim that there was a "year long" series of "Funding CDO" trades that began in February 2008 and ended on October 28, 2008. (Counterclaims ¶¶ 17-18.) However, each of these trades, other than the single trade which closed on October 28, 2008, are time-barred precisely because, according to defendants, "each time they paid too much or received too little on a . . . transaction." *LIBOR*, 2015 WL 6243526 at *136.

Defendants also separately allege four transactions concerning "rebooked" purchases, "unapproved forward purchase agreements," and other trades which allegedly occurred in June 2007, August 2007, June 2008, and on August 5, 2008. (Counterclaims ¶¶ 21, 22, 24, 25.) These four transactions clearly fall outside the limitations period, and are barred, as are each of the "Funding CDO" claims, other than the single trade which was closed on the October 28, 2008 transaction.

Further, even if the transactions constituted a "continuous" breach of contract, defendants could not claim contract damages except for those wrongful transactions occurring within the six-year limitation period. Under the "theory of continuous accrual," "a plaintiff may recover for a harm committed within the limitations period, even though the plaintiff cannot recover for similar harms committed outside the limitations period." *LIBOR*, 2015 WL 6243526 at *135. "A defendant that manipulated LIBOR in 2008 is not immune simply because it also manipulated LIBOR in 2007 or 2006." *Id.* at *137. At the same time, however, "the fact that a plaintiff suffered injury within the limitations period does not salvage a claim that a defendant committed a misrepresentation or omission . . . before the limitations period" *Id.* Thus, even under the "theory of continuous accrual," defendants are barred from recovering for any harms alleged to have occurred prior to the six-year limitations period. *Parlato v. Equitable Life Assur. Soc'y of U.S.*, 299 A.D.2d 108, 114 (1st Dep't 2002) (holding recovery on fraud limited to transaction's six-year limitations period); *see also General Precision v. Ametek, Inc.*, 20

N.Y.2d 898, 899 (1967) (deeming alleged damages for "continued breach" barred "for the period prior to six years before the commencement of the action").

Again, the only transaction to have occurred within six years of the commencement of this action supposedly occurred on October 28, 2008. Nevertheless defendants do not allege a single fact about that transaction showing that it is actionable, or why it should relate back to the filing of the original complaint. More specifically, defendants fail to identify in their counterclaims any information concerning the October 2008 transaction, including the asset which was the subject of the transaction, the price at which such asset was purchased, the price at which it was sold, which of the defendants, if any, engaged in the transaction, or the identity of the alleged counterparty. Defendants make only conclusory assertions that the "October 28, 2008 transaction" was one of "dozens" of trades at "prices higher than selling out in the market." (Defs.' Br. at 10.)

Nonetheless, defendants assert that additional detail is "present in the materials filed by the SEC in their lawsuit for securities fraud against plaintiffs," *id.* at 11, and in the unsworn Rule 56.1 Statement submitted by the SEC in its unsuccessful motion for summary judgment. However, this reference to additional detail outside the record does not salvage defendants' claim. Under New York law, counsel's unsupported statement about SEC materials and the Rule 56.1 statement are both insufficient to cure defendants' pleading deficiencies. *See Mamdouh v. Leger*, 34 Misc. 3d 1212[A] at *3 (Sup. Ct. Kings Cnty. 2011) ("unsworn [letter has] no probative value and will not be considered to

remedy an[y] deficiencies in the complaint"); *see also Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d 61, 68 (1st Dep't 2008), *aff'd* 13 N.Y.3d 398 (2009) ("unsupported statements by counsel are not entitled to any weight whatsoever on a CPLR 3211 motion"). Accordingly, any claim upon which the October 2008 transaction is supposedly based must be dismissed, as well.

b. Equitable Estoppel

Defendants also seek to avoid the statute of limitations by making the conclusory assertion that "concealment prevents the Triaxx Funds from discovery that ICP and Priore have breached the CMAs." (Counterclaims ¶ 42.) However, a claim of equitable estoppel based on "concealment" requires particularized allegations of misrepresentation for the specific purpose of inducing defendants not to litigate and reliance by the defendants in failing to prosecute. *Rains v. Metro. Transp. Auth.*, 120 A.D.2d 509, 509 (2d Dep't 1986). Moreover, equitable estoppel is only "triggered by some conduct on the part of the defendant after the initial wrongdoing," and "the later fraudulent misrepresentation must be for the purpose of concealing the former" conduct. *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 491 (2007). The "same wrongful act" cannot be "the basis of both the estoppel argument and the underlying claims." *Kaufman v. Cohen*, 307 A.D.2d 113, 122 (1st Dep't 2003).

Defendants allege no particularized allegations of misrepresentation for the purpose of inducing defendants not to litigate, much less any culpable conduct subsequent to any alleged "initial wrongdoing." Defendants also do not allege facts stating that plaintiffs' purported misrepresentations caused defendants "to refrain from filing suit" before the limitations period expired. *Ross*, 8 N.Y.3d at 492; *see also Green v. Albert*, 199 A.D.2d 465, 467 (2d Dep't 1993) ("plaintiff admittedly realized that he would have to litigate the matter . . . approximately five or six months prior to the expiration of the Statute of Limitations," such that the defendant's "conduct cannot be relied upon to establish estoppel").

Indeed, defendants were on notice to proceed with their claims from both the SEC Action, which was filed in 2010, and the AIG Action, which was filed in 2011. *See* Counterclaims ¶¶ 29, 31; *see also Nichols v. Curtis*, 104 A.D.3d 526, 528 (1st Dep't 2013) (rejecting estoppel argument where "the complaint admits that plaintiff realized by November 2003 that defendants' representation of her had fallen below the skill and knowledge commonly required of members of the legal profession"). Thus, defendants had more than sufficient notice to proceed if they so desired. Consequently, they may not argue that they were misled into not bringing suit in a timely fashion.

Accordingly, the first counterclaim for breach of contract must be dismissed.

2. Fraud (Second Counterclaim)

Like their first counterclaim for breach of contract, defendants' second counterclaim for fraud also must be dismissed on statute of limitations grounds. "A cause of action sounding in fraud must be commenced within 6 years from the date of the fraudulent act or 2 years from the date the party discovered the fraud or could, with due diligence, have discovered it." *Ghandour v. Shearson Lehman Bros.*, 213 A.D.2d 304, 305 (1st Dep't 1995); CPLR § 213(8).

Each of the allegedly fraudulent transactions – which are identical to the transactions that form the basis for the breach of contract claim – occurred more than six years before the counterclaims were interposed, or the action commenced. Accordingly, defendants' counterclaim for fraud must be dismissed as time-barred.

Defendants' fraud counterclaim must also be dismissed because it duplicates defendants' contract claim. *See Caniglia v. Chicago Tribune-N.Y. News Syndicate, Inc.*, 204 A.D.2d 233, 234 (1st Dep't 1994) ("[I]t is well settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation"); *Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993) (dismissing fraud claims where the "damage is recoverable under the other causes of action alleged"). "To plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must allege a breach of

duty which is collateral or extraneous to the contract between the parties." *Krantz v. Chateau Stores of Canada Ltd.*, 256 A.D.2d 186, 187 (1st Dep't 1998).

Since the fraud counterclaim is based entirely on the alleged breach of contract and defendants fail to allege a legal duty collateral to their duty to perform under the contract, the fraud claim separately merits dismissal for failure to state a claim.

3. Aiding and Abetting Fraud (Third Counterclaim)

In the third counterclaim, defendants assert that ICP HoldCo aided and abetted the fraud committed against the Funds. Defendants' aiding and abetting claim also must be dismissed as time-barred.

The statute of limitations for a claim of aiding and abetting fraud is six years. *Solow v. Tanger*, 258 A.D.2d 323, 323 (1st Dep't 1999); CPLR § 213(8). The alleged misrepresentations supporting the underlying fraud claim all occurred more than six years prior to the interposition of the counterclaims on July 16, 2015, or the amended counterclaims on August 25, 2015. To the extent that defendants claim that the counterclaims should relate back to the date of the filing of the complaint, defendants have failed to allege any specific misrepresentation that occurred within six years of the commencement of the action on October 22, 2014. Accordingly, for the same reasons

defendants' underlying fraud claim must be dismissed as time-barred, the claim for aiding and abetting fraud must be dismissed as time-barred as well.

4. Breach of Fiduciary Duty (Fourth Counterclaim)

Defendants counterclaim for breach of fiduciary duty also merits dismissal on statute of limitations grounds. The applicable limitations period here is three years because the breach of fiduciary duty claim is purely monetary in nature. *See* Counterclaims ¶ 61 ("As a result of [the allege breach of fiduciary duty], the Triaxx Funds have incurred millions of dollars in damages and lost profits"). Where, as here, "[t]he remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR § 214(4), which has a three-year limitations period." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009).

This claim accrued on August 5, 2008 – the last date on which any of the specific transactions referred to in the amended counterclaims occurred. Accordingly, the claim was timely no later than August 5, 2011, long before this action commenced, and long before the claim was interposed on July 16, 2015.

Although defendants argue in opposition that the six-year statute of limitations applies here because the breach of fiduciary duty is premised on fraud, that argument fails, as the six-year statute of limitations also has expired.

Finally, Defendants' counterclaim for breach of fiduciary duty must also be dismissed because it is "duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages." *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600, 600 (1st Dep't 2014). Defendants concede that the CMAs control the parties' relationship and assert that the CMAs are the basis for the parties' fiduciary relationship. *See* Defs.' Br. at 21-22.

5. Indemnification (Fifth Counterclaim)

Defendants' fifth counterclaim for indemnification is asserted only as against ICP. However, this claim must be dismissed because the contract language does not support the indemnification claim. Indemnification provisions in contracts are to be "strictly construed to avoid reading into [them] a duty which the parties did not intend to be assumed." *Hooper Assoc., Ltd. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989).

Pursuant to section 10(c) of the CMAs, to allege indemnification, defendants must allege that their costs were "incurred in investigating, preparing, pursuing or defending" claims or actions or investigations arising from the Collateral Manager's misconduct, and that they gave "written notice" of their claims. Defendants conclusorily claim that their damages are "attorneys' fees arising from the SEC and AIG actions," Counterclaims ¶ 64, but utterly fail to allege any facts showing that the damages were "incurred in investigating, preparing, pursuing or defending" the AIG or SEC Actions. Defendants

also do not allege that they provided written notice of their claims. Indeed, none of the defendants alleges that they were even parties to the SEC Action, and only defendant TRIAXX CDO 2007-1 could assert that it was a party to the AIG action. Accordingly, defendants do not state a claim for indemnification under section 10 (c) of the CMAs.

B. *Affirmative Defenses*

Defendants' first affirmative defense – that the complaint fails to state a claim – was decided in favor of plaintiffs in this Court's June 22, 2015 Order. This Order, which was not appealed, denied defendants' motion to dismiss the complaint and held that plaintiffs stated a cause of action. Where, as here, a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation of that issue. *See Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dep't 2005). Accordingly, the first affirmative defense is barred.

Defendants' second through fifth affirmative defenses must also be dismissed because they are entirely conclusory. Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Defenses that plead conclusions of law without supporting facts are insufficient. *See, e.g., Robbins v. Growney*, 229 A.D.2d 356, 358 (1st Dep't 1996) (holding that trial court should have dismissed conclusory affirmative defense since "bare legal conclusions are insufficient").

Defendants' affirmative defenses consist of nothing more than the name of the affirmative defenses – "failure to state a claim," "public policy against reimbursement for disgorgement," "doctrine of unclean hands," "material breaches," and "set off." Defendants allege no facts demonstrating the applicability of such defenses.

Although defendants argue that they have provided "sufficient notice," it is well settled that affirmative defenses that are "the mere titles of such defenses [are] not sufficiently particular to give the court and parties notice of the grounds for the defenses as required by CPLR 3013." *Bel Paese Sale Co. v. Macri*, 99 A.D.2d 740, 741 (1st Dep't 1984); *see also 170 W. Vill. Assoc. v. G & E Realty, Inc.*, 56 A.D.3d 372, 372-73 (1st Dep't 2008).

Accordingly, these boilerplate and conclusory affirmative defenses must be stricken. *See Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 35 A.D.3d 317, 319 (1st Dep't 2006) ("Defendant's affirmative defenses of waiver, laches, unclean hands, unconscionability and negligence per se were all properly dismissed as, *inter alia*, conclusory"); *Herbert Paul, P.C. v. Coleman*, 236 A.D.2d 268, 269 (1st Dep't 1997) ("Defendant's affirmative defenses . . . were properly dismissed as insufficiently pleaded and factually unsupported").

The Court has considered the remaining arguments and deems them to be without merit.

III. **Conclusion**

Accordingly, it is

ORDERED that plaintiffs' motion to dismiss defendants' counterclaims and affirmative defenses is granted, and the counterclaims and affirmative defenses and counterclaims are hereby dismissed; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 442, 60 Centre Street, on August 23, 2016.

Dated: New York, New York
June 23, 2016

Hon. Eileen Bransten, J.S.C.