

Credit Agricole Corp. v BDC Fin., L.L.C.

2016 NY Slip Op 31337(U)

July 15, 2016

Supreme Court, New York County

Docket Number: 651989/10

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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CREDIT AGRICOLE CORPORATE and
INVESTMENT BANK NEW YORK BANK,
f/k/a CALYON NEW YORK BRANCH, *et al.*,

Plaintiffs,

-against-

Index No. 651989/10

Mot. seq. no. 21

DECISION AND ORDER

BDC FINANCE, L.L.C., *et al.*,

Defendants.

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UBS AG, STAMFORD BRANCH AND UBS LOAN
FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

-----X

AND RELATED COUNTERCLAIMS

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BARBARA JAFFE, JSC:

Based on defendants' conduct as bidders in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]), plaintiffs assert contract and other claims against defendants.

Defendants move for an order vacating the note of issue (NOI) filed by plaintiffs on October 28, 2015, on the grounds that discovery is not complete and that the NOI and certificate

of readiness for trial are not accurate. Defendants also move for an order enforcing a provision in an compliance conference order dated August 12, 2015, and compelling and setting a schedule for the disclosure of (1) documents, (2) interrogatory responses, and (3) expert information (CPLR 3101[d]). The parties have resolved an issue defendants raised concerning depositions.

In the August 12, 2015 order, plaintiffs were directed to file their NOI on October 28, 2015. No follow-up discovery conference was ordered, and the parties were directed to discuss outstanding disclosure disputes and move for relief if needed. Plaintiffs were also ordered to “finalize dismissal of certain settled plaintiffs.” (NYCEF 463). Defendants argue that plaintiffs filed the NOI even though discovery that they had previously demanded, and that had been ordered exchanged, remains outstanding and notwithstanding plaintiffs’ failure to comply with the August 12, 2015 directive that they finalize the dismissal of settled plaintiffs.

Discovery has gone on for years in this case, the NOI deadline has been extended many times, and plaintiffs filed the NOI on the court-ordered deadline. Defendants did not move to compel the disclosure that they seek here prior to that deadline. While some previously ordered discovery may remain outstanding, the parties have filed summary judgment motions, which stays disclosure. Without answers to their interrogatories, defendants claim that they are unaware of the precise nature of plaintiffs’ theory of liability or alleged basis for damages. However, as they have filed a motion for summary judgment, this issue is apparently waived.

Given plaintiffs’ assertion that they have not yet hired an expert, there is no need to vacate the NOI. (*Kimberlee M. v Jaffe*, 139 AD3d 508 [1st Dept 2016] [CPLR 3101(d) “does not require a party to retain an expert at any particular time” (citation omitted)]; *see* CPLR 3212[b] [amended in 2015 to add that a court “shall not decline to consider” a CPLR 3101[d] expert

affidavit submitted in support of or opposition to a summary judgment motion “because an expert exchange pursuant to (CPLR 3101[d]) was not furnished prior to the submission of the affidavit”). Moreover, defendants’ request of the imposition of a deadline of 60 days for the expert exchange is improperly raised for the first time in reply (*see Matter of Erdey v City of New York*, 129 AD3d 546 [1st Dept 2015]), and neither party indicates that a court order or stipulation exists concerning expert disclosure. Additionally, pursuant to Rule 11 of the Justices of the New York County Supreme Court, Civil Branch (http://www.nycourts.gov/courts/ljd/suptctmanh/Uniform_Rules.pdf), expert information must be exchanged no later than 30 days prior to the date set by the court for trial, unless the parties agree to increase the time.

Here, defendants fail to advance a sufficient reason for vacating the NOI for the disclosure that they assert remains, which in any event, consists of a small number of responses to interrogatories and some documents. Should the pending summary judgment motions not dispose of the action, and should the case remain on the trial calendar, defendants are not precluded from renewing this motion, to the extent that they seek an order compelling the limited remaining disclosure. (CPLR 3101[h] [parties required to supplement discovery responses as information is received]).

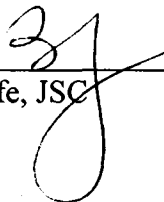
Based on the August 12, 2015 compliance conference order, defendants argue that the NOI should be vacated because plaintiffs have failed to clarify which plaintiffs have settled their cases, which never joined the action, and which have transferred their claims to other plaintiffs. According to plaintiffs, those entities that have agreed to have their claims voluntarily dismissed have provided defendants with executed stipulations to that effect. Thus, in effect, they deny that defendants need such clarification.

Given the mandatory nature of the August 12 order, plaintiffs must comply.

Accordingly, it is hereby

ORDERED, that defendants' motion to vacate the note of issue and to compel disclosure and set a disclosure schedule and to compel compliance with the portion of the August 12, 2015 court order addressing the finalizing of dismissal of entities that are no longer plaintiffs and to order plaintiffs to amend the caption is granted to the extent that plaintiffs are directed to finalize the dismissal of entities that are no longer plaintiffs in this action, in compliance with the directive in the August 12, 2015 order of this court within 20 days of the date of this order and is otherwise denied.

ENTER:



Barbara Jaffe, JSC

Dated: July 15, 2016
New York, New York