All Children's Hosp., Inc. v Citigroup Global Mkts., Inc.
2016 NY Slip Op 31626(U)
August 24, 2016
Supreme Court, New York County
Docket Number: 162155/2014
Judge: Jeffrey K. Oing

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48
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ALL CHILDREN'S HOSPITAL, INC.,

Plaintiff,

-against-

CITIGROUP GLOBAL MARKETS, INC.,

Defendant.

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Index No.: 162155/2014

Mot. Seq. Nos. 001 & 002

DECISION AND ORDER

JEFFREY K. OING, J.:

Relief Sought

Mtn Seq. No. 001

Defendant, Citigroup Global Markets, Inc. ("Citigroup"), moves, pursuant to CPLR 3211(a)[5] and [7] and CPLR 3016(b), for an order dismissing the complaint on the ground that it is barred by the applicable statute of limitations, or that it fails to state a cause of action.

Mtn Seq. No. 002

Plaintiff, All Children's Hospital, Inc. ("ACH"), moves for an order striking certain exhibits submitted in support of Citigroup's motion to dismiss. In the alternative, ACH seeks to convert Citigroup's motion to one for summary judgment and to permit the parties to engage in discovery.

These two motions are consolidated for disposition. On October 9, 2015, this Court held oral argument on the instant motions (NYSCEF Doc. No. 72 ["Tr."]).

Factual and Procedural Background

ACH is a non-profit corporation that owns and operates the All Children's Hospital facility located in St. Petersberg, Florida. On September 18, 2007, ACH issued two series of bonds, totaling $92,200,000, as a means to provide additional funds to complete improvements for medical services. ACH contends that at Citigroup's recommendation the bonds it issued were in the form of auction-rate securities ("ARS").[1] ACH claims that Citigroup served as its advisor, underwriter, broker-dealer, and investment banker in connection with the September 2007 ARS bond issuance.

The crux of ACH's complaint is that Citigroup failed to disclose that it was artificially propping up the ARS market through its support bids and that its artificial support bids were necessary to create the needed correlation between the rate on ARS and the rate of a corresponding interest rate swap based on the London Interbank Offered Rate ("LIBOR"). In early 2008, Citigroup stopped artificially supporting the ARS market. As a result, the interest rates of ACH's ARS suffered and ACH ultimately refinanced the A-series ARS.

ACH commenced this action asserting four causes of action: breach of fiduciary duty, fraud, breach of contract and breach of

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[1] The mechanics of the ARS investment vehicle is set forth in the October 9, 2015 transcript (Tr. at pp. 3-9).

duty of good faith and fair dealing, and negligent and fraudulent misrepresentation.

Citigroup moves to dismiss the complaint arguing, inter alia, that ACH's claims are barred by the applicable statute of limitations. Citigroup contends that under CPLR 202, New York's borrowing statute, Florida's shorter limitations periods apply to ACH's claims (Tr. at pp. 10-11).

Discussion

Mtn Seq. No. 001

Under Florida law, claims for fraud and negligent misrepresentation are all governed by a limitations period of four years from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence (Fla. Stat. §§ 95.11(3)[j]; 95.031(2)[a]). The statute of limitations for breach of fiduciary duty is also fours years and commences to run when the injury is sustained (Fla. Stat. §§ 95.11(3)[p]; 95.031[1]). The statute of limitations for breach of contract and breach of the duty of good faith and fair dealing is five years and runs from the date of the alleged breach (Fla. Stat. § 95.11(2)[b]). Florida's statute of limitations periods, therefore, are shorter than the applicable New York limitations periods for ACH's claims (CPLR 213(2)[breach of contract -- six year limitations period];

213(8)[fraud -- six year limitations period]; IDT Corp. v Morgan Stanley Dean Witter & Co., 12 NY3d 132 [2009][breach of fiduciary duty -- three or six year limitations period]; 14 Bruckner LLC v 14 Bruckner Blvd. Realty Corp., 78 AD3d 431 [1st Dept 2010][negligent misrepresentation -- six year limitations period]).

CPLR 202 provides as follows:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Here, ACH is a Florida non-profit corporation located in Florida, and it sustained alleged economic damages in Florida. Therefore, its claims accrued in Florida, and CPLR 202 requires application of Florida's shorter limitations period to ACH's claims (Global Financial Corp. V Triarc Corporation, 93 NY2d 525 [1999] ["When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss"]).

ACH, however, raised for the first time the argument that under the circumstances of this case there is no need to apply CPLR 202 and Florida's shorter limitations period because the public policy for which New York's borrowing statute was created,

i.e., to prevent forum shopping, is not implicated. Given that ACH raised this argument for the first time at the oral argument, this Court directed counsel to submit supplemental briefs on the issue.

In its supplemental submission, ACH claims that because section 5.10(b) of the parties' broker-dealer agreement contains a choice of forum provision directing that all litigation must be brought in New York ACH had no choice but to commence this action in New York. As such, CPLR 202's public policy of preventing forum shopping is not an issue in this case.

Section 5.10(b) of the parties' broker-dealer agreement for choice of forum provides:

> The parties agree that all actions and proceedings arising out of this Broker-Dealer Agreement or any of the transactions contemplated hereby shall be brought in a New York State Court or United States District Court, in each case the County of New York and, in connection with any such action or proceeding, submit to the jurisdiction of, and venue in, such County.

(Ehrlich Affirm., 1/30/15, Ex. E).

ACH's argument that the borrowing statute should not apply here because ACH is clearly not forum shopping and thus New York's longer limitations period applies is unavailing. The issue has been decided (Insurance Company of North America v ABB Power Generation, Inc., 91 NY2d 180 [1997]). There, the Court of Appeals held:

> CPLR 202 requires that a court, when presented with a cause of action accruing outside New York, should apply the limitation period of the foreign jurisdiction if it bars the claim. Only where the cause of action accrues in favor of a New York resident is this rule rendered inapplicable. It matters not that jurisdiction is unobtainable over a defendant in the foreign jurisdiction or that the parties have contracted to be venued in this State.

(Id. at 187-188 [emphasis added]).

Accordingly, contrary to ACH's argument, regardless of the fact that New York is the contractually selected forum, under the factual circumstances herein CPLR 202 applies, and, therefore, Florida's shorter limitations period applies as well.

Further, ACH's argument that ABB Power is distinguishable because it involved "two conflicting provisions regarding two separate states' laws" (Supplemental Memorandum of Law, 11/20/15 [NYSCEF Doc. No. 66], at p. 10) is misplaced. As in this case, ABB Power resolved the issue of "whether New York's borrowing statute applies to a cause of action in which all of the operative facts occur outside New York State but, pursuant to agreement by the parties, must be [litigated] in New York" (Insurance Company of North America v ABB Power Generation, Inc., 91 NY2d at 183, supra).

ACH also argues in its supplemental submission that in addition to preventing forum shopping the purpose of New York's borrowing statute is to govern the conflicts of law rules for

statute of limitations purposes. In making this argument, ACH points to section 5.10(a), which provides:

> This Broker-Dealer Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to agreements made and to be performed in said State, without giving effect to principles of choice of law or conflicts of law thereof.

Specifically, because the parties agreed in section 5.10(a) to be governed by New York law "without giving effect to principles of choice of law or conflicts of law", ACH argues that this language demonstrates that the parties agreed to apply New York law only, including New York's procedural law governing statute of limitations. As such, ACH contends that the borrowing statute does not apply here. ACH's argument unpersuasive.

The principle is well established that choice of law provisions concern substantive law, while issues concerning statutes of limitations are procedural (Portfolio Recovery Associates, LLC v King, 14 NY3d 410 [2010]; see also Global Financial Corp. v Triarc Corporation, 93 NY2d 525 [1999] ["[T]here is a significant difference between a choice-of-law question, which is a matter of common law, and [a] Statute of Limitations issue, which is governed by particular terms of the CPLR"]). As such, ACH's argument that the parties choice of law provision contained in the broker-dealer agreement applies to issues involving the appropriate statutes of limitations is

unavailing. Section 5.10(a)'s choice of law provision concerns New York substantive law, and does not specifically provide for the application of New York procedural law governing statute of limitations. The question that remains is whether ACH's claims are timely after applying New York's borrowing statute.

Here, ACH filed a statement of claim with the Financial Industry Regulatory Authority ("FINRA") against Citigroup on September 30, 2013. Citigroup, however, obtained an order from the federal court in the Southern District of New York enjoining ACH's FINRA proceeding. Florida has a statutory provision tolling the limitations period until any issue regarding the arbitrability of a dispute has been resolved (Fla. Stat. § 95.051[g]). Thus, the operative filing date for statute of limitations analysis is September 30, 2013, the date ACH filed the statement of claim with FINRA, which Citigroup conceded at oral argument (Tr. at p. 10). Simply stated, the issue is whether ACH's claims asserted herein are timely as of September 30, 2013.

Similar to New York's statute of limitations, Florida's relevant statute is not triggered until ACH reasonably discovered its injury. ACH argues that under Florida law claims for fraud, fraudulent misrepresentation, and negligent misrepresentation do not accrue until "the facts giving rise to the cause of action

were discovered or should have been discovered with the exercise of due diligence" (Fla. Stat. § 95.031(2)[a]).

ACH argues that its claims did not accrue until it discovered that Citigroup's representations regarding the correlation between ARS rates and LIBOR were false and manufactured by Citigroup's own rate rigging. In that regard, ACH's Chief Financial Officer, Nancy Templin, provides:

> ACH did not have actual knowledge that [Citigroup's] support bidding practices artificially impacted and overstated the correlation coefficient between the variable leg of the swap and the auction rate securities rates until October 2012 after reviewing several hundred thousand auction results and Citi's specific auctions.

(Templin Aff. 2/27/15, ¶ 4).

To begin, Citigroup maintains that the latest ACH's claims accrued is February 12, 2008 when Citigroup stopped placing support bids. ACH's accrual argument fails to include its breach of fiduciary duty or breach of contract claims. As such, given that the record indicates that the accrual date of those two claims is February 12, 2008, and September 30, 2013 is the measuring date, applying the applicable Florida limitations period, those two claims were not timely interposed and are time barred.

As for ACH's fraud-based causes of action, Citigroup argues that ACH's claim to have only discovered any alleged fraud in

October 2012 is implausible. Citigroup explains that on February 11, 2008, as the financial crisis deepened, many ARS broker-dealers, including Citigroup, stopped placing support bids in certain ARS auctions. As a result, auctions throughout the ARS market failed. In the wake of this mass withdrawal of support bidding by the broker-dealers, numerous ARS investors and issuers, similar to ACH, filed actions in early 2008 against the broker-dealers, including Citigroup, alleging similar claims to those asserted by ACH in this action. Citigroup refers to these actions filed approximately from March 2008 through May 2008 in federal courts throughout the country (Def's Moving Mem. of Law, p. 10, fn 7). Citigroup also points out that several states, including New York, announced investigations into broker-dealer bidding practices, as did the United States Securities and Exchange Commission ("SEC"). (Ehrlich Affirm., 1/30/15, Exs. Q and R). In August 2008, Citigroup entered into a settlement with the SEC pursuant to which it agreed to repurchase approximately $7.5 billion of ARS and to pay certain civil fines. Citigroup points out that the SEC issued a press release announcing the settlement, which was also reported in the media (see Ehrlich Affirm., 1/30/15, Exs. S, T, U, V, W).

Given the breadth of the alarming information concerning the ARS market in the public domain, beginning in February 2008 when

Citigroup ceased making its artificial bids in the ARS auctions, and the government led investigations, ACH fails to demonstrate that through the exercise of reasonable diligence it would not have discovered the basis for its claims prior to October 2012 (see CIFG Assurance North America, Inc. v Credit Suisse Securities (USA) LLC, 128 AD3d 607 [1st Dept 2015]). Even giving ACH the benefit of the date when the SEC announced its settlement with Citigroup in August 2008, ACH's claims are still untimely under Florida's four year statute of limitations when measured against September 30, 2013.

Nonetheless, ACH argues that because of Citigroup's own failures to disclose material information and material misrepresentations to ACH Citigroup is equitably estopped from asserting any statutes of limitation as a defense. This argument is unavailing. Under Florida law, in order for the doctrine of equitable estoppel to bar the assertion of a statute of limitations defense, the plaintiff "must have known about the existence of the cause of action before the limitations period expired and must have been induced to forebear from filing suit" (Ryan v Gonzalez, 921 So.2d 572 [2005]). Here, ACH does not claim that it was aware that it had a cause of action before the limitations period expired. In fact, ACH cannot even make this claim given its position that it did not know that the ARS market

was in a downward spiral. Nor can it make the claim that it was induced by Citigroup in any way to forebear from commencing an action.

Lastly, ACH asserts that its claims are not time-barred because the applicable limitations periods were subject to the tolling doctrine found in American Pipe & Construction Co. v Utah, 414 US 538 [1974]. Under the American Pipe doctrine, the statute of limitations is tolled for putative class members during the pendency of a class action suit. ACH asserts that it was a putative class member of Mayor and City Council of Baltimore, Maryland v Citigroup, Inc., 2010 U.S. Dist. LEXIS 13193 [SDNY 2010]).

In Mayor and City Council of Baltimore v Citigroup, the issuers of ARS filed a class action complaint against various ARS broker-dealers alleging that defendants acted collectively to withdraw support for the ARS market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Citigroup was a defendant in that class action. The Mayor and City Council of Baltimore case was dismissed on January 26, 2010, prior to ruling on class certification and the plaintiffs appealed. The Second Circuit denied the appeal on March 5, 2013 (Mayor and City Council of Baltimore, Maryland v Citigroup, Inc., 709 F3d 129 [2d Cir. March 5, 2013]). ACH claims, under American Pipe doctrine, ACH's

claims against Citigroup were tolled from September 4, 2008 to March 26, 2013 when the Second Circuit denied the appeal.

Contrary to ACH's argument, the statute of limitations applicable to ACH's causes of action are not entitled to tolling under the American Pipe doctrine. The claim asserted in Mayor and City Council of Baltimore, Maryland v Citigroup, Inc. et al. was an antitrust claim under Section 1 of the Sherman Act (15 U.S.C. § 1) (2010 U.S. Dist. LEXIS 13193). The Florida courts apply American Pipe to require "that the claims in the later action be the same as those alleged in the earlier action" (Hromyak v Tyco Int'l Ltd., 942 So.2d 1022 [Fla. Dist. Ct. App. 2006]). As such, the claim asserted in the federal district court class action is clearly not the same as the claims being asserted here, namely, for fraud and breach of contract.

Based on the foregoing, ACH's claims are barred by the applicable Florida statute of limitations.

Mtn Seq. No. 002

ACH argues that certain Citigroup exhibits should be stricken because such exhibits are inappropriate for this Court to take judicial notice of on a pre-answer motion to dismiss. The motion to strike is denied.

This Court referred to the dates certain lawsuits were commenced and news articles became available in the public domain

to determine whether ACH was on inquiry notice for statute of limitations purposes only (see e.g. CIFG Assurance North America, Inc. v Credit Suisse Securities (USA) LLC, 128 AD3d 607, supra). Such evidence was not relied upon to challenge the complaint's factual allegations as ACH contends.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted and the complaint is hereby dismissed on the ground that the claims are time-barred; and it is further

ORDERED that plaintiff's motion to strike is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/24/16

HON. JEFFREY K. OING, J.S.C.