Securitized Asset Funding 2011-2, Ltd. v Canadian Imperial Bank of Commerce
2018 NY Slip Op 30582(U)
April 3, 2018
Supreme Court, New York County
Docket Number: 653911/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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SECURITIZED ASSET FUNDING 2011-2, LTD.,

Plaintiff,

- v -

CANADIAN IMPERIAL BANK OF COMMERCE, CANADIAN IMPERIAL BANK OF COMMERCE, SECURITIZED ASSET FUNDING 2011-2, LTD., SECURITIZED ASSET FUNDING 2009-1, LTD., PROMONTORIA EUROPE INVESTMENTS XXIII LDC, CSMC 2012-8R, LTD.

Defendant.

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INDEX NO. 653911/2015

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 53, 54, 56, 75, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396

were read on this application to/for PARTIAL SUMMARY JUDGMENT

HON. SALIANN SCARPULLA:

This action arises out of a payment dispute between parties to a complex note transaction. Plaintiff and counterclaim-defendants move, pursuant to CPLR § 3212 (a),

for partial summary judgment on plaintiff's causes of action for breach of contract and for dismissal of defendant/counterclaim plaintiff's counterclaims.

Background

Plaintiff/counterclaim-defendant Securitized Asset Funding 2011-2, Ltd. is a special purpose investment vehicle, and together with counterclaim-defendants Securitized Asset Funding 2009-1, Ltd., Promontoria Europe Investments XXIII LDC, and CSMC 2012-8R, Ltd., is affiliated with Cerberus Capital Management, L.P. (collectively, "Cerberus"). Defendant and counterclaim-plaintiff Canadian Imperial Bank of Commerce ("CIBC") is a bank organized under the laws of Canada.

In October 2008 CIBC issued a note to Cerberus in exchange for $571 million, which was eventually reissued on October 16, 2014 as the Fourth Amended and Restated Class A1 Note ("A Note"). The A Note is an outgrowth of two prior transactions involving U.S. housing related securities.

Initially, non-party Altius IV Funding, Ltd. issued three tranches of collateralized debt obligations to non-party Goldman Sachs International ("GS") for $860 million ("Altius 4 Notes").[1] Then, in 2007, GS purchased credit protection on the Altius 4 Notes from CIBC via credit default swaps, in the event the assets underlying the Altius 4 Notes

[1] A collateralized debt obligation ("CDO") is a security backed by mortgages and other assets.

stop performing ("Altius 4 Swaps").[2] Ultimately, to reduce its exposure to the U.S. housing crisis in 2008, CIBC issued the A Note to Cerberus.

Pursuant to the A Note, CIBC would pay Cerberus from two groups of securities, defined as either "Cash Assets" or "Synthetic Assets" (collectively, "Proceeds").[3] The Proceeds would generate four payment streams that, *inter alia*, paid 20% accrued interest and then repaid the principal balance on the A Note. Specifically, the Cash Assets generate one payment stream, which is not at issue in this action, while the Synthetic Assets generate the following three payment streams: (1) Synthetic Asset Interest Proceeds Amount ("Synthetic Interest"); (2) Synthetic Asset Principal Proceeds Amount ("Synthetic Principal"); and (3) Synthetic Asset Libor Amount ("Synthetic Libor") (collectively, "Synthetic Proceeds").

This action concerns a dispute over the payments due on one set of Synthetic Assets identified as (1) Altius 4 A1F, (2) Altius 4 A1B, and (3) Altius 4 A1V in the A Note's "Synthetic Portfolio" (collectively, "Altius 4"). Altius 4 is subsequently listed in the "Synthetic Asset Payment Schedule," which provides the basis for calculating each stream of Synthetic Proceeds for Altius 4.

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[2] A credit default swap ("CDS") replicates a reference obligation such as a CDO, in that the owner of the security purchases protection against a default, and the protection seller receives a payment without initially investing funds.

[3] The Cash Assets are directly owned residential mortgage-backed securities and CDOs. The Synthetic Assets are mostly derivative obligations.

Pursuant to the A Note, Synthetic Libor is calculated "in accordance with the column entitled 'Individual RONA' in the Synthetic Asset Payment Schedule."[4] For Altius 4, "Individual RONA" is defined as the "Relevant Notional Amount reduced in accordance with the terms of the [Reference Document] which includes any Scheduled Payments[.]" The Reference Document for Altius 4 is the "Swap . . . dated as of June 5, 2007, between Canadian Imperial Bank of Commerce and Goldman Sachs International (or if any swap goes away then deemed to be outstanding)[.]" ("Altius 4 Swap Documents").

Pursuant to the A Note, Synthetic Interest is calculated "in accordance with the column entitled 'Interest Proceeds' in the Synthetic Asset Payment Schedule."[5] For Altius 4, the "Interest Proceeds" is defined as "Fixed Payments due and payable plus any Collections." As is relevant here, "[c]apitalized terms used but not defined in [the Altius

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[4] Pursuant to the A Note, Synthetic Libor is defined for purposes of this motion as the "Average Reference Portfolio Notional Amount." The Average Reference Portfolio Notional Amount is based on, *inter alia*, the "Reference Portfolio Notional Amount," which the A Note defines as "the sum of the Synthetic Asset Notional Amounts for all Synthetic Assets." The Synthetic Asset Notional Amount is defined "in respect [to] each [identified] Synthetic Asset" in the A Note, which "will be calculated in accordance with the column entitled 'Individual RONA' in the Synthetic Asset Payment Schedule."

[5] Pursuant to the A Note, Synthetic Interest is defined "in respect [to] each Synthetic Asset [as] the amount that was paid or payable, as calculated in accordance with the column entitled 'Interest Proceeds' in the Synthetic Asset Payment Schedule. For the avoidance of doubt, such amount will be calculated . . . without reference to actual receipts by CIBC under the applicable Synthetic Assets and, in relation to Synthetic Assets that are swaps, without regard to whether or not CIBC's Synthetic Asset counterparty is performing under such Synthetic Asset or whether or not such Synthetic Asset to which CIBC is a party has been terminated."

4] row have the meanings given to them in the [Altius 4 Swap Documents]." The Altius 4 Swap Documents calculate "Fixed Payments" by applying a formula that takes "the average of the Relevant Notional Amount for each day during the related [period]."

Generally, a notional amount in a CDS reflects the principal amount on the reference obligation so that payments due under the CDS reflect the balance that is being protected against default on the reference obligation. The Altius 4 Swap Documents define "Relevant Notional Amount" as

> The Notional Amount as decreased on or after the Effective Date in accordance with "Principal Payments" below.
>
> On or after the Delivery Date,[6] if any, the Relevant Notional Amount hereunder shall not be further reduced pursuant to "Principal Payments", but shall be reduced by each Scheduled Payment with respect to principal paid by or on behalf of the Seller.

The Altius 4 Swap Documents define "Scheduled Payment" as follows, "As of any Scheduled Payment Date,[7] the aggregate of (a) the related Distribution Amount and (b) any Avoided Payment."[8] The Reference Document defines "Distribution Amount" as

> (a) With respect to any Scheduled Payment Date, the total amount of Interest payable on such Scheduled Payment Date due in respect of an

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[6] Pursuant to the Altius 4 Swap Documents, the "Delivery Date" is the date on which the reference obligations, *i.e.*, the Altius 4 Notes, are delivered to CIBC as the seller of credit protection.

[7] Pursuant to the Altius 4 Swap Documents, "Scheduled Payment Date" is "[e]ach date on which a payment under the Reference Obligation [*i.e.*, the Altius 4 Notes] is scheduled to be due and payable under the terms of the Indenture as in effect on the Effective Date (without regard to any acceleration of the maturity or early redemption or prepayment of the Reference Obligation)."

[8] Avoided Payment occurs in the context of bankruptcy, which the parties do not dispute is not the case here.

> outstanding principal amount of the Reference Obligation equal to the Relevant Notional Amount and payable on such Scheduled Payment Date, and (b) with respect to the Scheduled Payment Date in November 2042, the total amount of principal due on an outstanding principal amount of the Reference Obligation equal to the Relevant Notional Amount and payable on such Scheduled Payment Date....

In 2010 a default occurred on two tranches of the Altius 4 Notes, which triggered an applicable "Credit Event" under the terms of the Altius 4 Swap Documents. In June 2010, because of the "Credit Event," GS delivered two tranches of the Altius 4 Notes to CIBC as part of a "Physical Settlement" under the terms of the Altius 4 Swap Documents. Then, in September 2010, GS delivered the remaining tranche of the Altius 4 Notes to CIBC as part of a "tear-up" of the Altius 4 Swap Documents in exchange for a lump payment. Consequently, GS and CIBC no longer had any obligations to one another as parties to the Altius 4 Swaps, and CIBC would directly receive any future interest and principal as the holder of the Altius 4 Notes.

After this transaction, CIBC continued paying Synthetic Proceeds on the A Note's Altius 4. As it did prior to June 2010, CIBC continued paying Synthetic Libor and Synthetic Interest based on a gradually decreasing Relevant Notional Amount that corresponds to the principal payments CIBC received as the holder of the Altius 4 Notes. Although Cerberus now asserts that CIBC wrongfully reduced the Relevant Notional Amount after June 2010, resulting in a failure to pay the full amount of Synthetic Libor and Synthetic Interest in breach of the A Note, Cerberus accepted CIBC's payments without objection for a period of more than sixty months.

During this same period, Cerberus and CIBC entered into a second transaction in June 2011 ("B Certificate"). Pursuant to the B Certificate, CIBC sold any potential residual Proceeds from the A Note's Cash and Synthetic Assets to Cerberus for $80 million. The B Certificate was structured as a limited recourse obligation, *i.e.*, if the Proceeds from the Cash and Synthetic Assets paid off the A Note, then Cerberus would be entitled to any residual Proceeds. If not, then Cerberus would not receive payment under the B Certificate. Altius 4 is also identified as part of the Synthetic Assets in the B Certificate, and the B Certificate has the same terms as the A Note to the extent discussed herein.

The assets underlying the Altius 4 Notes were eventually liquidated in July 2015, with proceeds totaling $191 million. CIBC received those proceeds as the holder of the notes. CIBC then paid the liquidation proceeds to Cerberus in July 2015 as Synthetic Principal for Altius 4 and thereafter ceased paying Synthetic Libor and Synthetic Interest for Altius 4.

Cerberus argues that CIBC breached the A Note and the B Certificate by failing to pay Synthetic Libor and Synthetic Interest after the Altius 4 Notes were extinguished in July 2015. In opposition, CIBC argues that without underlying assets, the Altius 4 Notes no longer exist, and the A Note and B Certificate do not require any further payments to Cerberus for Altius 4. Cerberus disputes CIBC's interpretation, asserting that CIBC is obligated to pay Synthetic Libor and Synthetic Interest at a fixed amount until November 2042 irrespective of the extinguishment of the Altius 4 Notes, pursuant to the unambiguous terms of the A Note and B Certificate.

Cerberus filed this complaint against CIBC for breach of the A Note and B Certificate in November 2015. CIBC subsequently answered and asserted various affirmative defenses, including estoppel, and asserted counterclaims against Cerberus for: (1) mutual mistake; (2) unilateral mistake; (3) unjust enrichment; and (4) a declaratory judgment. Although the parties have not engaged in any meaningful discovery, and no note of issue has been filed, Cerberus moves for partial summary judgment on its causes of action, and for dismissal of CIBC's counterclaims.

Discussion

A. Cerberus's Causes of Action for Breach of Contract

"The elements of [breach of contract] include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" *Harris v Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Damages are not at issue in this motion, because the parties are only addressing the issue of liability, *i.e.*, whether CIBC breached the A Note and B Certificate. Specifically, the parties dispute whether CIBC breached the A Note and B Certificate by reducing the payment amount of Synthetic Libor and Synthetic Interest after delivery of the Altius 4 Notes to CIBC in June 2010, and then altogether ceasing payment after the extinguishment of the Altius 4 Notes in July 2015.

Altius 4 Synthetic Assets

As an initial matter, the parties dispute whether the Altius 4 Notes are Synthetic Assets under the terms of the A Note and B Certificate. The A Note and B Certificate

define Synthetic Assets as the "assets listed in the table titled 'Synthetic Portfolio.'" The Synthetic Portfolio uses various identifiers such as "Asset," "CUSIP/ISN," "Counterparty," and "CIBC Internal Trade ID" to identify Synthetic Assets. CIBC argues that "Asset" and "CUSIP/ISN" are characteristics of notes and that therefore, the Synthetic Portfolio includes both the Altius 4 Swaps and the Altius 4 Notes or, at the very least, is ambiguous.

The A Note and B Certificate do not identify the underlying notes, *i.e.*, the Altius 4 Notes, as Synthetic Assets. The express language of the A Note and B Certificate, define "the underlying obligation that is identified in the column entitled 'Asset'" as "Synthetic Asset Underlying Obligation." CIBC places unwarranted emphasis on the column "Asset" and "CUSIP/ISN" as signifying the inclusion of the Altius 4 Notes, when reference to the underlying notes does not create an ambiguity in the clear language of the A Note and B Certificate. *See S. Rd. Assoc., LLC v Intern. Bus. Machines Corp.*, 4 N.Y.3d 272, 277 (2005) (stating that "[i]t is important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases").

Moreover, interpreting the Altius 4 Notes as Synthetic Assets is entirely inconsistent with the "Synthetic Asset Payment Schedule" for Altius 4, which identifies the Altius 4 Swap Documents, *i.e.*, the agreements governing the Altius 4 Swaps, as the "Reference Document." In calculating the payments at dispute, nowhere does the "Synthetic Asset Payment Schedule" reference the Altius 4 Notes or the indentures governing those Notes. *See Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 N.Y.3d 398, 404 (2009) ("The entire contract must be reviewed and '[p]articular words

should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.'"). At bottom, the Altius 4 Notes are not Synthetic Assets under the unambiguous terms of the A Note and B Certificate.

Termination of Altius 4 Swaps

The parties also dispute what impact, if any, the "tear up" of the Altius 4 Swaps (between non-party GS and CIBC) had on CIBC's obligation to pay Synthetic Interest and Synthetic Libor under the terms of the A Note. CIBC argues that the A Note does not clearly state how to calculate payments for Synthetic Interest and Synthetic Libor after the "tear up" occurred in September 2010.

Contrary to CIBC's argument, the A Note expressly provides that "[f]or the avoidance of doubt," the amount due for Altius 4 Synthetic Interest is "without regard to whether or not such Synthetic Asset to which CIBC is party has been terminated." The parties' mutual intent to proceed with payment of Synthetic Interest even in the event that the Altius 4 Swaps terminated was clearly expressed with the words "[f]or the avoidance of doubt[.]" To the extent CIBC argues that such an interpretation would contradict the A Note's limited recourse provision, precedence is given to a specific contractual clause over an arguably conflicting general one. *See Isaacs v Westchester Wood Works, Inc.*, 278 A.D.2d 184, 185 (1st Dep't 2000).

CIBC notes that unlike Synthetic Interest, the A Note defines Synthetic Libor without including similar "[f]or the avoidance of doubt" language regarding post-termination payments. CIBC argues that the implication drawn from the omission is that

the parties did not intend CIBC to continue paying Synthetic Libor after the Altius 4 Swaps were terminated. However, the Synthetic Asset Payment Schedule for Altius 4 makes clear that "if any swap goes away then deemed to be outstanding." This language plainly demonstrates that the parties intended payment for Altius 4 to exist even after the Altius 4 Swaps terminated, and I will not "imply a term which the parties themselves failed to include[.]" *RMP Capital Corp. v Victory Jet, LLC*, 139 A.D.3d 836 (2d Dep't 2016).

In accordance with the unambiguous terms of the A Note, the "tear up" of the Altius 4 Swaps does not impact CIBC's obligation to pay Synthetic Interest and Synthetic Libor, including how payments are calculated, under the A Note.

Calculating Payments

Pursuant to the A Note and B Certificate, payment of Synthetic Libor is calculated by the "Relevant Notional Amount reduced in accordance with the terms of the Altius [4] Swap Documents which includes any Scheduled Payments[.]" Further, "[c]apitalized terms used but not defined [for Altius 4] have the meaning given to them in the Altius [4] Swap Documents[.]"

By reference to the Altius 4 Swap Documents, Cerberus interprets "Relevant Notional Amount" and "Scheduled Payments" to mean that after delivery of the Altius 4 Notes to CIBC in June 2010 (pursuant to a "Physical Settlement" under the terms of the Altius 4 Swap Documents), only a single "Scheduled Payment" in November 2042 would reduce the "Relevant Notional Amount." Therefore, according to Cerberus, by failing to freeze the Relevant Notional Amount following the delivery in June 2010 until

November 2042, Cerberus breached the A Note by paying reduced amounts of Synthetic Libor thereafter and then altogether ceasing payment in July 2015.

CIBC argues that "Relevant Notional Amount" and "Scheduled Payments" as used in the A Note and B Certificate are broader than the terms in the Altius 4 Swap Documents, and that any principal payment, regardless of timing, in addition to "other reductions" such as "Scheduled Payments" reduce the "Relevant Notional Amount." Therefore, according to CIBC, it did not breach the A Note by making reduced payments of Synthetic Libor based on a gradually decreasing "Relevant Notional Amount" after delivery in June 2010.

Upon review, I find the terms "Relevant Notional Amount" and "Scheduled Payments" ambiguous and subject to the competing interpretations the parties have submitted in their motion papers. *See Goldman Sachs Group, Inc. v Almah LLC*, 85 A.D.3d 424, 426–27 (1st Dep't 2011) ("[a] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings"). Contrary to Cerberus's interpretation, reference to the Altius 4 Swap Documents does not resolve the contractual dispute in its favor when the A Note and B Certificate permit reductions based on "any Scheduled Payments." The term "Scheduled Payment" as incorporated is susceptible to conflicting interpretations because reducing Relevant Notional Amount by a single "Scheduled Payment" in November 2042 contradicts reducing Relevant Notional Amount by multiple "Scheduled Payments" as used in the A Note and B Certificate.

Additionally, the Altius 4 Swap Documents are equally inconsistent, and the language of these complicated documents are not susceptible to only one meaning. On one hand, Relevant Notional Amount is "reduced by each Scheduled Payment with respect to principal paid," on the other hand, only a single Scheduled Payment in November 2042 reduces principal. This leads to reasonably different interpretations because "each Scheduled Payment" denotes one of multiple reductions while the Scheduled Payment in November 2042 constitutes a single reduction.

CIBC's interpretation also creates an inconsistency in the "Relevant Notional Amount." Although the A Note and B Certificate do not explicitly state whether to calculate principal payments regardless of timing, "Relevant Notional Amount" as incorporated provides that "after the Delivery Date . . . the Relevant Notional Amount shall not be further reduced pursuant to 'Principal Payments.'" Yet, CIBC does not suggest what "other reductions" impact Relevant Notional Amount after the Delivery Date if not principal payments and/or the sole Scheduled Payment in November 2042. For all these reasons, I cannot determine whether payments of Synthetic Interest were properly reduced as a matter of law, because that calculation depends on "Relevant Notional Amount."[9]

[9] Pursuant to the A Note and B Certificate, Synthetic Interest is calculated based on "Fixed Payments due and payable plus any Collections[.]" The Altius 4 Swap agreements calculate "Fixed Payments" by applying a formula that takes "the average of the Relevant Notional Amount for each day during the related" time period.

CIBC and Cerberus submit extensive extrinsic evidence in support and in opposition to the summary judgment motion, [10] but interpretation of the Relevant Notional Amount and Scheduled Payments are not clear from the documents submitted, thus the calculation of payments under the A Note and B Certificate may not be resolved as a matter of law on this motion for summary judgment. *See Spears v Spears Fence, Inc.*, 60 A.D.3d 752, 753 (2d Dep't 2009) ("when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact").

Accordingly, material issues of fact remain as to how the parties intended to calculate Synthetic Libor and Synthetic Interest, particularly after the Delivery Date, and I deny Cerberus's motion to the extent it seeks summary judgment on its breach of contract cause of action based on CIBC's gradually reduced payments of Synthetic Libor and Synthetic Interest after the delivery in June 2010.

Extinguishment of Altius 4 Notes

Cerberus also seeks partial summary judgment for breach of the A Note and B Certificate because of CIBC reducing the Relevant Notional Amount to $0 after the Altius 4 Notes were extinguished in July 2015. CIBC opposes, arguing that the A Note and B Certificate are unclear about the obligation to pay Synthetic Interest and Synthetic

[10] For example, CIBC submits more than one hundred exhibits of payments Cerberus accepted after the Delivery Date, which represents only a fraction of the evidence submitted.

Libor after the Altius 4 Notes were extinguished. Therefore, according to CIBC, reasonable inferences must be drawn against Cerberus, and it cannot prevail on summary judgment.

That the A Note and B Certificate are silent regarding payment of Synthetic Interest and Synthetic Libor in the event the Altius 4 Notes are extinguished does not make either agreement ambiguous. *See also Greenfield v Philles Records, Inc.*, 98 N.Y.2d 562, 573 (2002) (stating that "silence does not equate to contractual ambiguity"). Neither is the omission material when, as discussed *infra*, the Altius 4 Notes are not Synthetic Assets. *See County of Jefferson v Onondaga Dev., LLC*, 151 A.D.3d 1793, 1798 (4th Dep't 2017) ("This is not a case in which 'an omission as to a material issue ... create[s] an ambiguity and allow[s] the use of extrinsic evidence [since] the context within the document's four corners [does not] suggest[ ] that the parties intended a result not expressly stated'") (citation omitted) (changes in original). Considering the entire transaction, I find that extinguishment of Altius 4 Notes does not impact whether CIBC is obligated to pay Synthetic Interest or Synthetic Libor under the terms of the A Note and B Certificate.

CIBC argues that such an interpretation would conflict with the A Note and B Certificate as limited recourse obligations. However, as Cerberus demonstrated during oral argument, the interest on the balance of the A Note far exceeds any Proceeds Altius 4 generates from Synthetic Libor and Synthetic Interest. Considering the A Note's negative amortization provision (whereby the principal balance on the A Note would increase by any payment shortfall on the A Note's interest), the A Note could remain

outstanding even after payment of Synthetic Interest and Synthetic Libor ceased. Therefore, payment of Synthetic Interest and Synthetic Libor after the Altius 4 Notes were extinguished does not eliminate Cerberus's risk and make the A Note and B Certificate inconsistent as limited recourse obligations.

Although extinguishment of Altius 4 Notes in July 2015 does not impact whether CIBC is obligated to pay Synthetic Interest or Synthetic Libor, I cannot determine, as a matter of law, whether CIBC breached the A Note and B Certificate by failing to pay Cerberus in July 2015 for Altius 4. Factual questions regarding payment calculations discussed *infra* as well as factual questions raised in relation to CIBC's counterclaim for mutual and unilateral mistake discussed *supra* preclude summary judgment.

B. CIBC's Counterclaims

Cerberus also moves for dismissal of CIBC's four counterclaims: (1) mutual mistake; (2) unilateral mistake; (3) unjust enrichment; (4) and declaratory judgment.

Mutual Mistake

Cerberus argues that CIBC's counterclaim for mutual mistake must be dismissed because it fails to allege with particularity, pursuant to CPLR 3016(b), exactly what was agreed upon between the parties that was not reflected in the A Note and B Certificate. Cerberus also argues that mutual mistake is not supported by the facts when the counterclaim depends on a mistake unknown to either party, and the agreements at issue were negotiated by sophisticated parties represented by counsel.

Upon review, I find that CIBC sufficiently alleges that the terms of the A Note should have specifically reflected that payments for Synthetic Libor and Synthetic

Interest would be reduced by various means, including principal payments. The ambiguity and issues of fact discussed *infra* relates to CIBC's alleged mistake. I sustain CIBC's counterclaim for mutual mistake because the parties' meeting of the minds is not clear. *See Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 (1st Dep't 2007) ("In the case of mutual mistake, it must be alleged that "the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement"). Moreover, CIBC's course of performance also raises an issue of fact regarding how the parties intended to calculate payments, which may show an intent contrary to Cerberus's litigation position now.[11]

Unilateral Mistake

"[I]n the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement[.]" *Greater New York Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 A.D.3d 441, 443 9 (1st Dep't 2007)

Here, CIBC alleges that the Cash and Synthetic Assets in the A Note were identical to the those in the B Certificate, and that CIBC represented that the B Certificate would have the same provisions regarding payment calculations as the A Note. CIBC further alleges that if Cerberus's contractual interpretation is correct, *i.e.*, that the basis for calculating payments of Synthetic Libor and Synthetic Interest froze in June 2010,

[11] While factual questions exist precluding summary dismissal of this counterclaim, resolution of the ambiguity against CIBC may make its counterclaim for reformation untenable.

then it misrepresented the substance of how the B Certificate would operate as a limited recourse note, and wrongfully induced CIBC to rely on Cerberus's course of performance.

Cerberus argues that as a sophisticated party represented by counsel, CIBC is unable to establish justifiable reliance when it had the access to same information and terms of the B Certificate. However, Cerberus's contentions are premature when resolution of how to calculate payments cannot be resolved as a matter of law. Evidence of the parties' intentions is necessary to resolve that issue, and summary judgment dismissal should not be granted if there is any doubt as to the existence of factual issues. *See Gateway Dev. and Mfg., Inc. v Commercial Carriers, Inc.*, 296 A.D.2d 821, 825 (4th Dep't 2002).

Moreover, Cerberus submits a May 11, 2011 letter, in which Cerberus states that "[t]he [B Certificate] will have the same terms and provisions as the [A Note] . . . relating to the identical assets underlying the [A Note.]" At the time Cerberus made this representation, it had already accepted nearly a year of reduced payments for Altius 4 without asserting that payment amounts froze in June 2010. Even assuming CIBC was not justified in relying on the ambiguous agreement, I find that Cerberus's representations, coupled with its course of performance, raise an issue of fact as to fraud vis-à-vis unilateral mistake. *See Resort Sports Network Inc. v PH Ventures III, LLC*, 67 A.D.3d 132, 136 (1st Dep't 2009) ("A unilateral mistake may give rise to reformation where the other party takes advantage of an error only it has noticed under circumstances constituting fraud").

Accordingly, I also deny Cerberus's motion for summary judgment dismissing CIBC's counterclaim for unilateral mistake.

Unjust Enrichment

CIBC alleges that if Cerberus's contractual interpretation is correct, then Cerberus will be unjustly enriched by the overpayment of Synthetic Principal, which in equity and good conscience Cerberus should disgorge. In support, CIBC references the A Note and Altius 4 Swap Documents, arguing that the agreements only provide for payment of Synthetic Principal prior to the Delivery Date.

"A party may not recover in ... unjust enrichment where the parties have entered into a contract that governs the subject matter[.]" *Pappas v Tzolis*, 20 N.Y.3d 228, 234 (2012). Because the A Note and Altius 4 Swap Documents govern the payment of Synthetic Principal, the unjust enrichment claim fails as a matter of law and I dismiss this counterclaim.

Declaratory Judgment

Cerberus argues that CIBC's counterclaim for declaratory judgment must be dismissed as a mirror image of Cerberus's contract claim. Although CIBC's obligation to pay Synthetic Interest and Synthetic Libor, as discussed *infra*, exists irrespective the Altius 4 Notes, I will not dismiss CIBC's counterclaim for declaratory judgment, in light of various factual questions that preclude summary judgment on Cerberus's causes of action for breach of the A Note and B Certificate.

In accordance with the foregoing, it is

ORDERED that the motion by plaintiff for partial summary judgment finding that defendant breached the A Note and B Certificate and dismissing defendant's first, second, third, and fourth counterclaims is granted only to the extent that the fourth counterclaim for unjust enrichment is dismissed and the motion is otherwise denied; and it is further

ORDERED that the parties appear for a preliminary conference on May 9, 2018 at 2:15 p.m..

This constitutes the decision and order of the Court.

4/3/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE