

Condor Capital Corp. v CALS Invs., LLC
2018 NY Slip Op 31166(U)
June 7, 2018
Supreme Court, New York County
Docket Number: 652700/2017
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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CONDOR CAPITAL CORP.,

INDEX NO. 652700/2017

Plaintiff,

MOTION SEQ. NO. 001

- v -

DECISION AND ORDER

CALS INVESTORS, LLC, XYZ CORP., 1-10

Defendant.

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The following e-filed documents, listed by NYSCEF document number 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this application to/for Dismiss

HON. SALIANN SCARPULLA:

Defendant CALS Investors, LLC (“CALS”) moves, pursuant to CPLR 3211 (a)(1) and (a)(7), to partially dismiss plaintiff Condor Capital Corp.’s (“Condor”) first cause of action that alleges CALS breached the Portfolio Purchase Agreement (“PPA”).

Background

On November 23, 2015, CALS and Condor (including Condor’s court-appointed receiver, nonparty Denis O’Connor) entered the PPA, in which Condor sold a portfolio of auto loans to CALS in exchange for a purchase price comprising of (1) payment at closing (“Closing Payment”) and (2) additional payment if the underlying loans sufficiently performed (“Earnout Payments”).

Pursuant to section 3.01 (b) of the PPA, the Closing Payment required CALS to “remit to [Condor] an amount equal to the Closing Cash Purchase Price minus the Aggregate Holdback Amount.”¹ The transaction closed on February 26, 2016, and the Closing Cash Purchase Price was \$64,464,497.00. However, the Closing Payment also required Condor to “remit to [CALS] an amount equal to the Pre-Closing Proceeds minus the Pre-Closing Payments” for operating the portfolio during the period before closing. The parties do not dispute that payment amounted to \$44,075,342.73. Consequently, the total conveyed to Condor for the Closing Payment was \$20,389,153.90 (less the holdback amount), reflecting the difference between the Closing Cash Purchase Price CALS owed Condor and the payment Condor owed CALS.²

In addition to the Closing Payment, CALS was also obligated to pay Condor quarterly Earnout Payments if the portfolio of purchased auto loans sufficiently performed. Pursuant to section 3.01 (c), Condor “shall pay [CALS] an amount . . . equal to Thirty Percent (30%) of the excess of (i) the Net Cash Collected from and after the Closing Date through the last day of the First Earnout Quarter, over (ii) the amount of Net Cash Collected from and after the Closing Date that was necessary in order for [CALS] to achieve the IRR Target and MOIC Target through the last day of the First

¹ The PPA defines “Closing Cash Purchase Price” as “[a]n amount equal to (a) Forty-Seven Percent (47%) of the Unpaid Principal Balance minus (b) Two Million Five Hundred Thousand Dollars (\$2,500,000) for the Charged-Off Contracts.” The Aggregate Holdback Amount is defined as the sum of certain amounts held back in case of certain circumstances occurring after the sale, such as litigation involving the underlying loans.

² \$20,389,153.90 reflects \$5,800,000 in holdbacks and an increase of \$641,610.28 from a post-closing adjustment.

Earnout Quarter.” Such payment was due “[o]n the first Information Delivery Date³ after the sixth (6th) month after the Earnout Target Date.” PPA defines the “Earnout Target Date” as “the first day following the first calendar quarter . . . in which [CAL S] achieved the IRR Target and the MOIC Target for the period beginning on the Closing Date and ending on the last day of such quarter.” The IRR Target “[f]or any period [is] an [internal rate of return] of Fifteen Percent (15%) on the Target” while the MOIC Target “[f]or any period [is] a [multiple of invested capital] of One Hundred and Fifteen Percent (115%) of the Target[.]” Under the PPA, Target is defined as “an amount equal to the Closing Cash Purchase Price.”

In sum, once CAL S achieved the IRR Target and MOIC Target, it would start paying Condor (six months after it met both Targets) 30% of any net proceeds above the amount necessary to meet the IRR and MOIC Targets on a quarterly basis. According to CAL S’ statements, CAL S met the IRR Target in September 2016, and the MOIC Target in October 2016, and exceeded those Targets by steadily increasing amounts the following months. Based on those statements and dates, the first quarter in which CAL S met both Targets was the fourth quarter of 2016, making the first of the Earnout Payments due on July 31, 2017.

Condor alleges, however, that CAL S incorrectly calculated its MOIC Target. Specifically, Condor claims that, while the Closing Cash Purchase Price totaled

³ PPA defines “Information Delivery Date” as the monthly statements CAL S would send Condor with the amount collected each month, the net cash collected, the calculation of the IRR and MOIC Targets, and the balance of each particular holdback.

\$64,464,497.00, CALS' actual investment was only \$20,389,153.90. According to Condor, had CALS calculated the MOIC Target using the net amount paid rather than the aggregate Closing Cash Purchase Price, CALS would have met the MOIC Target in August 2016, receiving the first of the Earnout Payments as early as April 28, 2017. Although Condor alleges that this dispute does not affect the calculation of the IRR Target, Condor does allege that the overall amount of Earnout Payments would be affected.

Condor's complaint alleges two causes of action: (1) breach of contract premised on CALS allegedly improper calculation of the MOIC Target and for inflated servicing fees, and (2) breach of the implied covenant of good faith and fair dealing based on the inflated servicing fees. CALS now moves to dismiss that branch of the first cause of action based solely on the calculation of the MOIC Target.

Discussion

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" *Greenfield v Philles Records*, 98 N.Y.2d 562, 569 (2002).

Here, the PPA defines the "MOIC Target" as "One Hundred and Fifteen Percent (115%) of the Target," and further defines "Target" as "[a]n amount equal to the Closing Cash Purchase Price." Condor concedes that "[a]t the time of the closing, the Closing Cash Purchase Price was calculated as \$64,464,497.00". However, Condor argues that CALS improperly calculated MOIC Target because the PPA defines MOIC as a

“Multiple of invested capital[,]” and the Closing Cash Purchase Price as defined is not the “invested capital” CALS paid. I disagree.

The straightforward language of the PPA provides that the MOIC Target is based on “[a]n amount equal to the Closing Cash Purchase Price[,]” a separately defined term. As a sophisticated contracting party, Condor could have, but did not, bargain for calculating the MOIC Target based on the Closing Payments, instead of the Closing Cash Purchase Price. Condor’s interpretation of the PPA conflates Closing Cash Purchase Price with the Closing Payments due pursuant to section 3.01 (b), and I will not “interpret an agreement as impliedly stating something which the parties have neglected to specifically include[.]” *See Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004).

Moreover, contrary to Condor’s interpretation, applying the unambiguous terms does not make the PPA commercially unreasonable. Simply because Condor now believes it made a bad deal does not entitle it to rewrite the PPA. *See Cambridge Petroleum Holdings, Inc. v Lukoil Americas Corp.*, 129 A.D.3d 501, 502 (1st Dep’t 2015) (“[A] party may not rewrite the terms of an agreement because, in hindsight, it dislikes its terms”).

In accordance with the plain language of the PPA, which calculates the MOIC Target based on the Closing Cash Purchase Price as a defined term, Condor has failed to plead a breach of contract cause of action based upon CALS alleged incorrect calculation of the MOIC Target.

CALS also moves for its attorneys' fees and costs pursuant to 22 NYCRR 130-1.1 (c), for bringing a frivolous cause of action based on the MOIC Target. I deny Condor's request for sanctions. While I find that Condor's interpretation of the MOIC Target is incorrect, its argument was not unreasonable.

In accordance with the foregoing, it is hereby

ORDERED that defendant CALS Investors, LLC's motion to partially dismiss the first cause of action for breach of the PPA is granted, and that branch of the first cause of action related to the calculation of the MOIC Target is dismissed; and it is further

ORDERED that defendant CALS Investors, LLC's motion for sanctions is denied; and it is further

ORDERED that the remainder of this action is severed and shall continue.

This constitutes the decision and order of the Court.

6/7/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	DO NOT POST		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE