

Craft EM CLO 2006-1 Ltd. v Deutsche Bank AG
2018 NY Slip Op 32682(U)
October 15, 2018
Supreme Court, New York County
Docket Number: 656152/16
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X
CRAFT EM CLO 2006-1, LTD.

Plaintiff,

-against-

Index No.
656152/16

DEUTSCHE BANK AG,

Defendant.

-----X
Hon. C. E. Ramos, J.S.C.:

In motion sequence 001, the defendant Deutsche Bank AG ("Deutsche Bank") moves pursuant to CPLR 3211 (a) (1), (3), (5), and (7), to dismiss the plaintiff Craft EM CLO 2006-1 Ltd.'s ("Craft") complaint (the "Complaint").

Factual Background¹

For a full recitation of the facts, please see this Court's prior decision, dated August 14, 2017 (the "Decision") (*Craft EM CLO 2006-1, Ltd. v Deutsche Bank AG*, 56 Misc 3d 1216(A), [Sup Ct, NY County 2017, Ramos, J.]).

In the Decision, this Court found that "Craft's claims that Deutsche Bank failed to apply updated Moody's mapping tables and to meet specified criteria in the Reference Obligation are time-barred under the applicable statute of limitations..." because

¹ Defined terms contained herein have the identical definition as contained in the Decision, unless otherwise defined herein.

HSBC had no viable claims to assign as of the date of execution of the 2016 Assignment Agreements and on this basis, the Court dismissed that portion of Craft's claims and directed limited discovery pertaining to the issuance date of the alleged improper Accountant Certifications following a credit event.

Discussion

With respect to the timeliness of Craft's claims alleging improper Accountant Certifications following a credit event, Deutsche Bank has established that eleven of the Accountant Certifications (including Egana and Peace Mark, as addressed in the 2017 Decision) were issued more than six years prior to the initiation of this action, November 23, 2016. Consequently, Craft's claims relating to those eleven Accountant Certifications are time-barred as well (Tambe Supp. Aff., Ex. A, #1-11; Exs. B-L) because a claim for breach of contract "accrues at the time of breach" (*Chelsea Piers L.P. v Hudson River Park Tr.*, 106 AD3d 410, 412 [2013]).

Otherwise, this Court concludes that Craft lacks standing to pursue its claims because the 2016 Assignment Agreements are void pursuant to the anti-assignment provision in the Swap Agreements.

Section 5(1) of the Schedule to the ISDA Master Agreement clearly provides that:

[Deutsche Bank] hereby acknowledges that [Craft] has granted a first priority security interest in its rights under this Agreement, has directed that payments owed to it be made to the Trustee

pursuant to this Agreement and the Issue Swap Confirmation hereunder and has assigned this Agreement to the Trustee pursuant to the Indenture, and consents thereto, and [Deutsche Bank] hereby consents to further transfer of such rights pursuant to the Indenture. [Craft] shall not pledge, encumber or assign any interest (whether outright or by way of security) in this Agreement without the prior written consent of [Deutsche Bank], and any attempted assignment in violation of this provision shall be null and void.'

(Tambe Aff., Exs. 8, 9, § 5 [1]).

Craft contends that the assignments are nonetheless valid because anti-assignment clauses do not apply to the assignment of claims after loss has occurred. Craft also argues that the anti-assignment provision is merely a personal covenant that does not render the assignments themselves invalid.

This Court disagrees. The plain language of the anti-assignment provision in the Schedule to ISDA Master Agreements expressly states that "any attempted assignment in violation of this provision shall be null and void" (*id.*). Pursuant to the ISDA Master Agreement, "any inconsistency between the provisions of the Schedule and the other provisions of this Master Agreement" shall be resolved in favor of the Schedule (*id.*). In addition, the cases cited by Craft in support of its contentions are not applicable here, either because they arise in the context of insurance policies or involve anti-assignment provisions that do not contain express language indicating that the assignment would be void.

Beginning in January 2007, HSBC held the right to bring any and all breach of contract claims arising under the Swap Agreements, including those purportedly asserted here.

Craft argues that Deutsche Bank consented to HSBC's assignments, however, the plain language of the Schedules to ISDA Master Agreements demonstrate that Deutsche Bank provided only limited written consent "to any further transfer of such rights pursuant to the Indenture..." (*id.*). Absent from the Indentures is any provision that would permit the type of assignments contemplated by the 2016 Assignment Agreements and Craft otherwise fails to establish that Deutsche Bank consented to the assignments.

As a result, the assignments are not transfers "pursuant to the Indenture," and are thus transfers without consent that are void pursuant to the Schedule to the ISDA Master Agreement (*id.*). "Where the agreement in question contains express language that any assignment would be void, language to the effect that an assignee would acquire no rights as the result of an assignment, or indicates that the nonassigning party has no obligation to recognize the assignee, the subsequent assignment is void" (*Marion Blumenthal Tr. ex rel. Blumenthal v Arbor Commercial Mortg. LLC*, 40 Misc 3d 1215(A), *aff'd* 133 AD3d 419 [1st Dept 2015]).

Consequently, because the 2016 Assignment Agreements are

invalid, the Craft's claims must be dismissed for lack of standing (*Natl. Fin. Co. v Uh*, 279 AD2d 374, 375 [1st Dept 2001])).

Accordingly, it is

ORDERED that defendant Deutsche Bank AG's motion to dismiss the complaint is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: October 15, 2018

ENTER:

J. S. C.