Elmrock Opportunity Master Fund I, L.P. v Citicorp N. Am., Inc.
2019 NY Slip Op 30128(U)
January 15, 2019
Supreme Court, New York County
Docket Number: 653300/2016
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 61EFM

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ELMROCK OPPORTUNITY MASTER FUND I, L.P.,

Plaintiff,

- v -

CITICORP NORTH AMERICA, INC., ESSL 2, INC., and CITIGROUP INC.

Defendants.

INDEX NO. 653300/2016

MOTION DATE 1/10/19

MOTION SEQ. NO. 006 & 007

DECISION AND ORDER

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HON. BARRY R. OSTRAGER:

Presently before the Court are Plaintiff's and Defendants' competing motions for summary judgment regarding the sole cause of action for breach of contract. For the reasons stated herein, Plaintiff's motion is denied in its entirety and Defendants' motion is granted in part.

Background

On Defendants' prior motion to dismiss, this Court rendered a written decision detailing the factual background of this case. (*See* Decision & Order [NYSCEF Doc. 65]). Briefly, Plaintiff Elmrock Opportunity Master Fund I, L.P. ("Elmrock") purchased three contingent interests in a nuclear power plant (the "Elmrock Options") from Defendants Citicorp North America, Inc., ESSL 2, Inc., and Citigroup Inc. (collectively, "Citi") predicated on the residual value of the nuclear power plant as determined at the end of an underlying sale-leaseback

transaction. The Elmrock Options were subordinated to the interests of non-party Fortress Investment Group, LLC ("Fortress"), another option holder. The Elmrock Options would be out of the money unless the plant's residual value exceeded $70,720,000, the amount which was payable to Fortress as the senior option holder.

Elmrock alleges, *inter alia*, that Citi breached the Elmrock Options by settling, rather than litigating, an adverse appraisal decision concerning the plant's fair market value at the end of the relevant lease term. Elmrock asserts that Citi was obligated to reject the settlement and, instead, attempt to collect additional proceeds through litigation to avoid an adverse effect on Elmrock's interest. Thus, Elmrock argues that a hypothetical litigation would have put the Elmrock Options in the money.

Additionally, Elmrock's Amended Complaint alleges that the Elmrock Options were always in the money because certain rent obligations, that had been scheduled for decades in the original sale-leaseback transaction, should have been included as part of the plant's residual value.

In December 2016, this Court granted dismissal of Elmrock's claims for fraud, breach of fiduciary duty, and punitive damages and denied dismissal of the breach of contract claim. In November 2017, the First Department affirmed this Court's decision in its entirety. *Elmrock Opportunity Master Fund I, L.P. v. Citicorp North America, Inc.*, 155 A.D.3d 411 (1st Dep't 2017). Plaintiff now moves for summary judgment on its claim for breach of contract and Defendants move for summary judgment dismissing the entire case.

Discussion

"To obtain summary judgment it is necessary that the movant establish [its] cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in [its] favor[.]" *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). Further, "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just." CPLR § 3212(e).

Elmrock argues that an additional $123 million that Entergy paid under the sale-leaseback transaction at the time of the appraisal should be included in valuing the plant at the end of the lease term. Citi argues, in opposition, that Entergy's $123 million payment constituted, to the penny, the four remaining scheduled Basic Rent payments due and owing by Entergy under the sale-leaseback transaction through July 2017.

Under the sale-leaseback transaction's Facility Leases, Entergy was obligated to make scheduled Basic Rent payments to an indenture trustee and Citi in precise amounts through the term of the Facility Lease, terminating in July 2017.

The Elmrock Options specifically exclude Basic Rent and payments to the indenture trustee as Option Property:

> "Option Property" shall mean any amounts received by, on behalf of or for the benefit of the Owner Trustee, the Trust, or ESSL 2 from any source whatsoever, in excess of amounts required to be paid to the Indenture Trustee or any "Holder" as defined in the Indenture pursuant to Section 1.01 of Article I of the Indenture; ***provided that Option Property shall not include (i) payments of Basic Rent received with respect to the period ending on or prior to July 1, 2017*** .... (Fishman Aff. Ex. 5 [NYSCEF Doc. 355]) (emphasis added).

At the time the appraisal determination was settled for $60 million, Entergy still owed four Basic Rent payments under the sale-leaseback transaction through the end of the Facility Lease.

Those payments were scheduled for January 2016, July 2016, January 2017, and July 2017, respectively, and totaled $123,271,899. In settling the appraisal dispute, Citi did not release Entergy from its existing Basic Rent obligations. (*See* Fishman Aff. Ex. 27 [NYSCEF Doc. 27]). In closing the Purchase Agreement, Entergy made three payments totaling $123,271,899.

Entergy's corporate representative with personal knowledge of the Purchase Agreement testified at his deposition that he understood the $123 million payment to be for outstanding Basic Rent under the Facility Leases. (*See* Fishman Aff. Ex. 25 [NYSCEF Doc. 375]). Citi's vice-president, who negotiated the Purchase Agreement, similarly testified at his deposition that Entergy's payments above $60 million were the precise payments of Basic Rent that Entergy owed as lessee under the sale-leaseback transaction. (*See* Fishman Aff. Ex. 40 [NYSCEF Doc. 390]). Elmrock's own principal testified at his deposition that the $123 million payment was "equal in timing and amount to the remaining lease payments." (Fishman Aff. Ex. 3 [NYSCEF Doc. 353]).

Elmrock argues that it is irrelevant that the amount Entergy paid was equal, to the penny, of the Basic Rent that would have been paid through July 2017. Instead, Elmrock asserts that the $123 million payment must be interpreted as consideration for the benefit of Citi under the Purchase Agreement, and not Basic Rent under the Facility Leases, because Citi no longer had any interest in the lease entitling it to receive Basic Rent. Thus, Elmrock argues that the payment was something other than Basic Rent because the Purchase Agreement terminated the lease and Entergy made part of the payment through a mortgage note.

Citi asserts that the circumstances by which Citi monetized the Basic Rent payment into a mortgage with a third party, Wells Fargo, does not alter the parties' rights and obligations.

The Court does not accept Elmrock's cramped interpretation of the $123 million payment made by Entergy. The Court will not "elevate form over substance", "obfuscate the nature of [] legal obligations" or "gloss over the essential character" of a transaction." *Chemical Bank v. Meltzer*, 93 N.Y.2d 296, 304 (1999). Ultimately, it is the "economic substance of a transaction" that determines the rights and obligations of the parties. *Sumitomo Mitsui Banking Corp. v. Credit Suisse*, 89 A.D.3d 561, 563-64 (1st Dep't 2011). For this reason, the Court holds that Entergy's $123 million payment was for Basic Rent.

This Court cannot, as a matter of law, dismiss Elmrock's breach of contract claim in its entirety because a triable issue of fact exists as to whether a hypothetical litigation would have put the Elmrock Options in the money.

Pursuant to Section 9(h) of the Elmrock Options:

> To the extent ESSL 2 or the Owner Trustee has any right to demand payment in connection with the Transaction Documents, including any early termination of the Transaction Documents, Seller shall not, and shall not cause or permit ESSL 2 or the Owner Trustee to, exercise or fail to exercise such rights without first consulting with Buyer, ***provided that in no event Seller shall, or cause or permit the Owner Trustee or ESSL 2 to, take any action or fail to take action which could reasonably be expected to have an adverse effect on the Option Property, Buyer's interest therein or the value thereof.*** (Fishman Aff. Ex. 5 [NYSCEF Doc. 355]) (emphasis added).

Elmrock must prove at trial that Citi's $60 million settlement of the appraisal dispute in which the appraiser valued Citi's interest at $26 million—as opposed to a lawsuit challenging the propriety of the appraisal—could reasonably be expected to have had an adverse effect on the Option Property. This raises issues of material fact that cannot be decided as a matter of law, thus precluding dismissal on summary judgment of Elmrock's breach of contract claim.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is denied in its entirety; it is further

ORDERED that Defendants' motion for summary judgment is granted in part; and it is further

ORDERED that the parties appear for a pre-trial conference in Room 232 on March 5, 2019 at 11 a.m.

1/15/2019
DATE

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE