Espadarte Partners, LLC v Riverside Gulf Coast Banking Co.
2020 NY Slip Op 31436(U)
April 23, 2020
Supreme Court, New York County
Docket Number: 654289/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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ESPADARTE PARTNERS, LLC

Plaintiff,

- v -

RIVERSIDE GULF COAST BANKING COMPANY (F/K/A RIVERSIDE GULF COAST STATUTORY TRUST 1 AND RIVERSIDE GULF COAST CAPITAL TRUST III),

Defendant.

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INDEX NO. 654289/2018

MOTION DATE 01/02/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 54

were read on this motion to/for SUMMARY JUDGMENT(BEFORE JOIND).

Upon the foregoing documents, it is

Plaintiff, Espadarte Partners LLC ("Espadarte") moves for summary judgment in lieu of complaint pursuant to CPLR 3213 for payment of money on a written instrument. Defendant Riverside Gulf Coast Banking Company (f/k/a Riverside Gulf Coast Statutory Trust I and Riverside Gulf Coast Capital Trust III) ("Riverside") cross-moves for leave to file supplemental papers regarding its opposition to the summary judgment motion.

Background[1]

Riverside was a bank holding company incorporated in Florida, whose main asset was Riverside Bank of the Gulf Coast (the "Bank"). The Bank failed in 2009 and was

[1] Unless otherwise stated, all factual allegations are based upon Espadarte's motion for summary judgment in lieu of complaint (NYSCEF Doc. No. 1).

taken over by the Federal Deposit Insurance Corporation. Before the Bank went into receivership, Riverside established two trusts: Riverside Gulf Coast Statutory Trust I ("Trust I") and Riverside Gulf Coast Statutory Trust III ("Trust III") (collectively, the "Trusts") as wholly owned subsidiary trusts.

The Trusts

On or about September 17, 2003, Riverside established Statutory Trust I, which issued $3 million in principal of capital securities and lent Riverside the proceeds in exchange for subordinated debentures. Riverside created three sets of documents for this transaction: (1) the September 17, 2003 Statutory Trust I Indenture between Riverside as issuer and U.S. Bank National Association as indenture trustee ("Trust I Indenture") (NYSCEF Doc. No. 6); (2) the September 17, 2003 Amended and Restated Declaration of Trust ("Trust I Declaration") (NYSCEF Doc. No.7); and (3) the September 17, 2003 Guarantee Agreement ("Trust I Guarantee").

On or about July 15, 2005, Riverside established Trust III, which issued $5 million in principal of capital securities and lent Riverside the proceeds in exchange for subordinated debentures. Once again, Riverside created three sets of documents: (1) the July 15, 2005 Capital Trust I Indenture between Riverside as issuer, and Wells Fargo Bank, as trustee ("Trust III Indenture") (NYSCEF Doc. No. 8); (2) the July 15, 2005 Amended and Restated Declaration of Trust ("Trust III Declaration") (NYSCEF Doc. No. 9); and (3) the July 15, 2005 Guarantee Agreement ("Trust III Guarantee").[2]

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[2] Espadarte did not submit The Trust I Guarantee Agreement and The Trust III Guarantee Agreement with its motion papers.

Collectively, the Trust I and III Indenture and Declaration are referred to as the "Trust Documents."

Espadarte's Purchase of the Capital Securities

Espadarte is a limited liability company organized under the laws of Florida and is the beneficial holder of the $8 million in principal of the capital securities issued by the Trusts. According to Espadarte, it purchased the securities on two separate occasions. Espadarte's custodian is JPMorgan Chase Bank ("JPMorgan"). Espadarte submitted a letter from JPMorgan stating that as of August 24, 2018, JPMorgan holds the securities on behalf of Espadarte (NYSCEF Doc. No. 10).

The Bank's Failure and Riverside's Alleged Default

The Bank was closed in 2009 by the Florida Office of Financial Regulation and Espadarte maintains that the Federal Deposit Insurance Corporation (the "FDIC") was appointed as receiver. Espadarte states that the FDIC then executed a purchase and assumption agreement with TIB Bank, and TIB bank acquired all the assets and deposits of the Bank.

Espadarte alleges that Riverside has failed to pay any principal or interest payments "on account of the Debentures or Capital Securities since the last of its interest deferment periods (as provided for by Sections 2.11 of the Indentures) expired on or about February 13, 2014, approximately five (5) years after the Receivership Date" (NYSCEF Doc. No. 1, p.7). According to Espadarte the receivership date was February

13, 2009, but Espadarte alleges that "Sections 2.11 of the Indentures allowed Riverside to defer payments for up to twenty (20) consecutive quarterly periods, or five (5) years. Therefore, Riverside was not obligated to make payments until after February 13, 2014, five years from [sic] Receivership Date." *Id.*

The principal on the debentures was not due until 2033 for Trust I and 2035 for Trust III. On July 23, 2018, Espadarte sent a notice of default/acceleration to Riverside, informing Riverside that Espadarte owns 100% of the principal of the capital securities and that Espadarte has chosen to accelerate the debt (NYSCEF Doc. No. 11).

Motion for Summary Judgment in Lieu of Complaint

Espadarte now moves pursuant to CPLR 3213 for summary judgment in lieu of complaint. Espadarte argues that the debentures and capital securities are instruments for the payment of money only and Riverside has defaulted on its obligation to pay principal or interest since the last of its interest deferment periods allegedly expired on February 13, 2014. In opposition, Riverside puts forth a laundry list of defenses, and argues that summary judgment must be denied because triable issues of fact exist with respect to these defenses. As discussed more fully below, some of Riverside's defenses may be disposed of now, but at least one defense requires a fuller development of the record for determination.

Discussion

"To establish prima facie entitlement to summary judgment in lieu of complaint, a plaintiff must show the existence of a promissory note executed by the defendant

containing an unequivocal and unconditional obligation to repay and the failure of the defendant to pay in accordance with the note's terms. Once the plaintiff submits evidence establishing these elements, the burden shifts to the defendant to submit evidence establishing the existence of a triable issue with respect to a bona fide defense." *Zyskind v. FaceCake Mktg. Techs., Inc.,* 101 A.D.3d 550, 551 (1st Dep't 2012) (internal citations omitted). "[A] document comes within CPLR 3213 if a prima facie case would be made out by the instrument and a failure to make the payments called for by its terms. The instrument does not qualify if outside proof is needed, other than simple proof of nonpayment or a similar de minimis deviation from the face of the document." *Weissman v Sinorm Deli*, 88 N.Y.2d 437, 444 (1996) (internal quotation marks and citations omitted).

Because Riverside does not dispute that the Trust Documents constitute an instrument for the payment of money, the only arguments before me are those regarding Riverside's defenses, and whether any of the defenses create a sufficient issue of fact.

Riverside's Defenses

"A defendant can defeat a CPLR 3213 motion by offering evidentiary proof sufficient to raise a triable issue of fact." *Banco Popular N. Am. v. Victory Taxi Mgmt., Inc.,* 1 N.Y.3d 381, 383 (2004). Riverside puts forth six defenses in support of its argument that summary judgment should be denied. Riverside also cross-moves for leave to submit supplemental papers to support an additional seventh defense. The defenses are discussed below.

1. Champerty Defense

Riverside argues that Espadarte's purchase of Riverside's capital securities are potentially champertous and therefore, discovery is required. Riverside alleges that Espadarte's motion papers "provide no details concerning, *inter alia*: (1) the amount Espadarte allegedly paid for such Capital Securities; (2) Espadarte's intent and purpose in purchasing the Capital Securities; and (3) whether there is any agreement between Espadarte and anyone else concerning the 'ownership' of Riverside's Capital Securities." (NYSCEF Doc. No. 24, p.4). Because these details were not provided, Riverside alleges that discovery is needed to determine whether Espadarte's ownership of the securities is legitimate or pretextual and champertous.

In reply, Espadarte argues that champerty is a limited doctrine that is inapplicable here. Espadarte emphasizes that this is a cause of action for payment of money on a written instrument supported by documents and that, other than demanding discovery on this issue, Riverside submits no evidence showing that a champerty defense is viable.

The champerty doctrine is codified in Judiciary Law § 489(1), which states in relevant part:

> No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon*… (emphasis added)

The purpose of champerty is "to prevent or curtail the commercialization of or trading in litigation." *Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. v. Love Funding Corp.*, 13 N.Y.3d 190, 198 (2009) (internal quotation marks and citation omitted). In New York, the doctrine is "limited in scope and largely directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs, which, at the time, included attorneys' fees." *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 94 N.Y.2d 726, 734 (2000). In fact, "while [the New York Court of Appeals] has been willing to find that an action is *not* champertous as a matter of law... it has been hesitant to find that an action *is champertous as a matter of law*." *Id*. at 734-735 (emphasis in original) (internal citations omitted). Finally, establishing champerty requires "that the acquisition be made with the intent and for *the* purpose (as contrasted to *a* purpose) of bringing an action or proceeding." *Id*. at 736.

This action is a garden-variety action in which an entity that purchased distressed debt is now seeking to enforce payment on that debt. Champerty-related discovery is not triggered simply because a party raises the issue. Because champerty is a narrow doctrine and Riverside has failed to put forth sufficient factual allegations showing that Espadarte made its acquisition for the sole purpose of commencing a litigation, I dismiss this defense.

2. Insufficient Evidentiary Proof

Riverside maintains that the motion must be denied because Espadarte has failed to tender evidentiary proof in admissible form to support summary judgment.

Specifically, Riverside argues that the affidavit submitted by Espadarte's counsel, Kurt Lageschulte ("Lageschulte"), is insufficient evidence because the affidavit is not from a company officer of Espadarte. Riverside also argues that certain documents that Espadarte annexed to its motion papers constitute inadmissible hearsay. In reply, Espadarte maintains that Lageschulte's affidavit is valid because Lageschulte performed a review of Espadarte's books and records and therefore, has personal knowledge of the events relating to this action. Further, introduction of documents by a person who has personal knowledge of the records is appropriate.

Espadarte next states that the documents provided in support of its motion, such as a Custodian Letter from JPMorgan establishing Espadarte's ownership of the capital securities (NYSCEF Doc. No. 10) are not hearsay because they are business records.

"A business record will be admissible if that record 'was made in the regular course of any business and ... it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.'" *One Step Up, Ltd. v. Webster Bus. Credit Corp.,* 87 A.D.3d 1, 11 (1st Dept. 2011) (quoting CPLR 4518[a]). Although business records are often authenticated through an employee or custodian of the business, "it is also true that judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating." *Elkaim v. Elkaim*, 176 A.D.2d 116, 117 (1st Dept.1991) (internal citations and quotation marks omitted). For example, the Court in *Elkaim* held that bank records were admissible, noting:

> They [the bank records] appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they technically hearsay and that no witness was called to testify that they were made in the regular course of the banks' business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence

id.

Here, the documents offered are from Espadarte's custodian, JPMorgan, on its letterhead, and are signed by a corporate representative of JPMorgan. These documents are typical, admissible business records. However, to ensure that the record is complete, I direct Espadarte to submit an affidavit from JP Morgan attesting to the information in the letter. Upon such submission, I will dismiss this defense.

3. Standing

Riverside alleges that because Espadarte identified itself as the "beneficial holder" of the capital securities in its motion papers, it concedes that it not the "registered" holder of those securities and therefore, lacks standing to bring an action against Riverside. In support of its argument, Riverside points to several provisions in the Trust Documents which define the term "holder" and enumerate who can commence legal action. First, Riverside points to the Trust I Declaration, wherein a holder is defined as "a Person in whose name a Certificate representing a Security is registered, such Person being a beneficial owner within the meaning of the Statutory Trust Act." (NYSCEF Doc. No. 7, p.4). The Trust III Declaration similarly defines a holder as "a Person in whose name a Certificate representing a Security is registered on the register maintained by or on behalf

of the Registrar, such Person being a beneficial owner within the meaning of the Statutory Trust Act." (NYSCEF Doc. No. 9. p.5).

Riverside then points to a provision in the Trust Documents wherein the right to bring a "direct action" is described.[3] The Trust I Declaration states:

> [I]f an Event of Default has occurred and is continuing and such an event is attributable to the failure of the Debenture Issuer to pay interest or principal on the Debentures on the date such interest or principal is otherwise payable (or in the case of redemption, on the redemption date), then a Holder of the Capital Securities may directly institute a proceeding for enforcement of payment to such Holder of the principal of or interest on the Debentures having a principal amount equal to the aggregate liquidation amount of the Capital Securities of such Holder (a "Direct Action") on or after the respective due date specified in the Debentures."

NYSCEF Doc. No. 7, §2.8(d)

The Trust III Declaration contains nearly identical language.[4] Riverside claims that because the Trust Documents define a holder as someone in whose name a certificate representing a security is registered and because the Trust Documents "expressly limit" the right to bring an action to a holder of the capital securities, Espadarte does not have standing to bring suit (Riverside's Memo of Law in Opposition, NYSCEF Doc. No. 24, p.15).

To further support its argument, Riverside cites *Springwell Navigation Corp. v. Sanluis Corporación, S.A.*, where the Appellate Division found that the trial court properly concluded that because "[p]laintiff was the beneficial holder of a $1 million

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[3] Riverside notes that Espadarte relies on these provisions in its motion papers for summary judgment to establish its right to bring an action.

[4] *See* NYSCEF Doc. No. 9, §2.8 (e)

interest in an Unrestricted Global Note issued by defendant…plaintiff had no right to sue upon an indenture agreement for interest payments since that document specifically reserved that right to the registered holder of the Note." *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, 46 A.D.3d 377 (1st Dept. 2007).

In reply, Espadarte cites two New York Supreme Court cases in which a justice of this court held that a beneficial holder of securities has standing to bring a summary judgment motion for payment of the debt. First, in *Financials Restructuring Partners III, LT v Riverside Banking Co.* Justice O. Peter Sherwood considered an almost identical argument by defendant Riverside regarding standing.[5] In that action, defendant Riverside Banking Company argued that plaintiff Financials Restructuring Partners III ("FRP") lacked standing because it was not the registered holder of the capital securities. Justice Sherwood rejected this argument, reasoning that "[t]his assertion ignores the fact that FRP is a beneficial holder of the securities." *Financials Restructuring Partners III, LT v. Riverside Banking Co.*, No. 650934/2013, 2014 WL 36078 at 1 (N.Y. Sup. Ct. Jan. 02, 2014). He further noted, "Citing *Springwell Navigation Corp. v. Sanluis Corporacion, S.A.*, Riverside argues that a beneficial holder cannot sue on the underlying Note when the Indenture reserves the right to the registered holder. This distinction is irrelevant because Cede, as nominee of the registered Holder, authorized FRP to continue this action and consented to be named as a nominal party. The Declaration of Trust explicitly

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[5] The defendant in the case before Justice Sherwood was Riverside Banking Company.

contemplates direct actions by Securityholders where, as here, an Event of Default has occurred." *Id*. at p.8 (internal citations omitted).

Espadarte also cites *Financials Restructuring Partners III, Ltd. v Crescent Banking Co.*, another action decided by Justice Sherwood.[6] In that action, Justice Sherwood also held that plaintiff had standing to bring suit because it was a beneficial holder of the securities. The Court reasoned, "[i]t cannot be disputed that FRP is the beneficial owner of the Capital Securities. Moreover, the registered holder of the Capital Securities, the DTC's nominee Cede & Co. expressly authorized this suit." *Financials Restructuring Partners III*, 2015 WL 1504867, at 1 (N.Y. Sup. Ct. Apr. 02, 2015).

At oral argument on June 5, 2019, Espadarte supplemented the record by providing documents on the issue of standing. I accepted the documents, noting that Riverside had cross-moved to supplement the record.

Espadarte provided a letter dated June 4, 2019 from Cede & Co., the nominee of the Depository Trust Company, which states that Cede & Co is "the holder of record of the following Riverside Gulf Coast Capital Trust III issued by Riverside Gulf Coast Banking Company (the "Note"), as of July 15, 2005." The document states that JPMorgan is Cede & Co.'s Participant and the Note credited to it is beneficially owned by Espadarte. In the letter, Cede & Co. authorizes Espadarte to "commence and prosecute

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[6] Justice Sherwood notes that this action is "identical in all key aspects to *Financials Restructuring Partners III, Ltd, et al. v. Riverside Banking Company*, Index No. 650934/2013." 2015 WL 1504867, at 1 (N.Y. Sup. Ct. Apr. 02, 2015).

litigation, arbitration or other dispute resolution against Riverside Gulf Coast Banking Company under the documents relevant to the Note, which action(s) Cede & Co., as holder of the Note, is entitled to take" (Cede & Co Letter dated June 4, 2019, ¶ 3).

With respect to Trust I, counsel for Espadarte stated, "And with respect to Trust I, we do not have a letter from Cede & Co., and the reason we don't have a letter from them is because it's not held with the DTC as a book entry, but it is held in physical form with JP Morgan" (Transcript of Oral Argument, p.6, lines 7-11). For Trust I, counsel submitted the stock certificate which states that Riverside Gulf Coast Statutory Trust I is the owner of the capital securities of Trust I. It also submitted an email from a JPMorgan associate, which states "The $3mm is held as a physical stock certificate in our vault in the name of Espadarte Partners LLC. Attached is a copy. This shows that you are owners and can do whatever you want with it so we do not need the DTC letter for this one." (JPMorgan email from Melissa Sende, dated June 4, 2019).

Espadarte has standing to bring this suit with respect to Trust III for the same reasons to those given by Justice Sherwood in *Financials Restructuring Partners III, LT v. Riverside Banking Co.* and *Financials Restructuring Partners III, Ltd. v. Crescent Banking Co*. Like the plaintiffs in those cases, Espadarte provided the letter from Cede and Co. granting Espadarte authority to bring this lawsuit.

With respect to Trust I, the email submitted at oral argument is not in evidentiary form sufficient to be considered on a motion for summary judgment in lieu of complaint. I direct Espadarte to supplement the record with an affidavit from JPMorgan attesting

that it is the holder of the Trust I debentures (in addition to the information set forth above). Upon such supplementation, this defense will be dismissed.[7]

4. Power of Attorney

Riverside's next defense is that the Power of Attorney ("POA") submitted by Lageschulte, pursuant to which this action was commenced, does not grant him the authority to bring this action on Espadarte's behalf. Riverside alleges that although the POA authorizes Lageschulte to conduct business for Espadarte, it does not explicitly state that Lageschulte can commence legal action on Espadarte's behalf. In reply, Espadarte argues that the POA grants Lageschulte the right to commence an action under the "plain terms" of the POA.

The POA identifies Neil Subin as a "Principal" of Espadarte and Lageschulte as an "Agent" and states:

> I hereby give to my agent full power in my name and on my behalf:
>
> to transact any and every kind of business relating to Espadarte Partners, LLC's acquisition, ownership, participation, maintenance and disposition of securities issued by (a) Riverside Gulf Coast Statutory Trust I under its Amended and Restated Declaration of Trust, dated September 17, 2003 and (b) Riverside Gulf Coast Capital Trust III under its Amended Restated Declaration of Trust, dated as of July 15, 2005 (the "Riverside Matters"); and to make, sign, and execute any contracts, checks, and other writings with respect to the Riverside Matters.
>
> to make, sign, and execute any contracts, checks, and other writing with respect to the Riverside Matters.

NYSCEF Doc. No. 12.

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[7] I also direct counsel for Espadarte to upload the documents submitted during oral argument onto NYSCEF so that they are part of the record.

Riverside states that Florida law governs the POA. Espadarte does not dispute this in reply. Under Florida law, "[g]enerally, the rule is that a power of attorney must be strictly construed and the instrument will be held to grant only those powers which are specified." *Dingle v. Prikhdina*, 59 So. 3d 326, 328 (Fla. Dist. Ct. App. 2011). Powers of attorney "will be held to grant only those powers that are specified and will be closely examined in order to ascertain the intent of the principal." *Kotsch v. Kotsch*, 608 So. 2d 879, 880 (Fla. Dist. Ct. App. 1992). Here, the POA does not explicitly grant Lageschulte power to commence an action and ascertaining the intent of the principal may unnecessarily prolong this action. Rather than deny Espadarte's motion on this ground, I direct Espadarte to supplement the record with an appropriate POA, specifically granting it the power to prosecute this action.

5. Subordination

Riverside next alleges that the motion for summary judgment should be denied because Espadarte's capital securities are subject to certain subordination provisions in the Indentures and the debt at issue is subordinate to other debt. First, while that argument may be made by the senior creditor, Riverside has no standing to make it. In any event, as of March 28, 2019, Espadarte now owns both the senior and junior debt (NYSCEF Doc. No. 46, ¶ 6). This defense is now moot.

6. Guarantees

Riverside argues that the motion should be denied because Espadarte failed to submit the two Guarantees that comprise part of the Trust Documents. In reply, Espadarte

states that it is not relying solely on the Guarantees to hold Riverside liable. I agree. Espadarte has submitted the Trust Indentures and Amended Declarations which establish the obligations between Riverside and Espadarte, as holder of Riverside's capital securities. The guarantees are unnecessary to adjudicate the motion, and this defense is dismissed.

The Cross-Motion

Several months after Espadarte filed its motion, Riverside cross-moved to supplement the record with further information concerning a defense of statute of limitations. In the cross-motion Riverside alleges that, upon a recent review of its books and records, it has determined that Espadarte miscalculated the date when the statute of limitations began to run. Riverside seeks to supplement the record with an affidavit from Randy E. Graber, Riverside's former Chief Financial Officer and Executive Vice President and an affidavit from its counsel, Mitchell J. Geller. Espadarte opposes the cross-motion and argues, that, in any event, the statute of limitations has not run on its debt.

Pursuant to CPLR 2214(c), "[o]nly papers served in accordance with the provisions of this rule shall be read in support of, or in opposition to, the motion, unless the court for good cause shall otherwise direct." "While unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for good cause. *U.S. Bank Tr., N.A. v. Rudick*, 156 A.D.3d 841, 842 (2d Dept. 2017) (internal quotation marks omitted).

I find that good cause exists here to grant Riverside's cross-motion because the statute of limitations argument is directly relevant to Espadarte's motion for summary judgment in lieu of complaint and could be dispositive. Also, Espadarte had a chance to respond to the cross-motion by submitting opposition papers, which it did. I also note that at oral argument on the motion, I accepted additional papers submitted by Espadarte as part of the record, thus fairness dictates that opportunity for Riverside. Therefore, I grant the cross-motion and will consider the arguments on Riverside's defense of statute of limitations.

Statute of Limitations

1. Contractual Statute of Limitations

Riverside argues that Espadarte incorrectly measured the statute of limitations as running from February 13, 2014. Espadarte's calculation of the statute of limitations is based on its allegation that Riverside elected to defer interest payments for five years (or twenty consecutive quarterly periods) starting from June 17, 2009 for Trust I and July 7, 2009 for Trust III.

In its cross-motion, Riverside argues that the statute of limitations began to run in 2009 when Riverside's last deferral interest payment period expired. Riverside submits the affidavit of Randy Graber, former Chief Financial Officer and Executive Vice President of Riverside (NYSCEF Doc. No. 37). Graber alleges that a review of Riverside's documents "show that Riverside's deferrals of the interest payment periods under Trust I and Trust III, respectively, pertained only to discrete quarterly interest payment periods and expired on June 17, 2009 and July 7, 2009." (NYSCEF Doc. No.

37, p.2). Graber states that he was personally involved in the preparation and signing of the deferral letters, and never sent a letter deferring the interest payment for twenty consecutive quarterly periods (or five years). He claims that although the right to defer for twenty consecutive periods existed, Riverside never exercised the right. He alleges that each of the deferral letters (NYSCEF Doc. Nos. 38 and 39) deferred interest within a *specific* quarterly interest payment period, and not for a deferral of interest for twenty consecutive interest periods *total*.

Riverside argues that, because the last deferral interest payment period for Trust I expired on June 17, 2009 and July 7, 2009 for Trust III, an *ipso facto* "Event of Default" occurred thirty days later for each trust. Because of this *ipso facto* acceleration event, the statute of limitations must be measured starting from July 17, 2009 for Trust I and August 6, 2009 for Trust III (thirty days from the last deferral of the interest payment period). Riverside argues that the action is thus time-barred, because the statute of limitations for a cause of action based on contract is six years.

Riverside also points out that in Espadarte's own motion papers, it indicates that Riverside's debt was automatically accelerated when it failed to pay interest in 2009 and did not cure within 30 days, thereby triggering the statute of limitations in 2009.[8]

In opposition, Espadarte argues that, under the Trust Documents, Riverside's default in interest did not constitute an automatic acceleration of the entire debt. As the

[8] In opposition to the cross-motion, Espadarte concedes that it did in fact say there was an *ipso facto* acceleration that would have been triggered in 2009 but maintains that it was mistaken in making this assertion in its original motion papers.

original owner of the debentures did not declare an event of default and accelerate the debt in 2009, the statute of limitations did not begin to run at that time.

The principal on the debentures was not due until 2033 for Trust I and 2035 for Trust III. And generally, a default on a single installment payment does not trigger the running of the statute of limitations on the entire debt. *See Phoenix Acquisition Corp. v. Campcore, Inc.,* 81 N.Y.2d 138 (1993). Rather, "separate causes of action accrued as installments of the loan indebtedness became due and payable." *Id.* at 141. Installment payments that have accrued more than six years prior to commencement of the action are time-barred. *See Cadlerock, L.L.C.,* 72 A.D.3d 454 (1st Dept. 2010).

Thus, the statute of limitations for repayment of the debentures would not begin to run upon the default in an interest payment unless there was an automatic acceleration provision which caused immediate acceleration of the entire amount due upon such default.

The Trust Documents plainly state that failure to make interest payments when due constitutes a default. Trust I Indenture, and Trust III Indenture both state that an Event of Default occurs if:

> The Company defaults in the payment of any interest upon any Debenture when it becomes due and payable, and fails to cure such default for a period of 30 days, provided however, that a valid extension of an interest payment period by the Company in accordance with the terms of this Indenture shall not constitute a default in the payment of interest for this purpose.

Trust Indenture I, §5.1, Trust Indenture III, §5.1, NYSCEF Doc. Nos. 6 and 8.

There is no dispute here that Riverside failed to pay interest when due. However, the Trust Documents say nothing about an *ipso facto* acceleration with respect to failure to pay interest. Instead, Trust I Indenture states:

> If an Event of Default occurs and is continuing with respect to the Debentures, then, and in each and every such case, unless the principal of the Debentures shall have already become due and payable, either the Trustee or the holders of not less than 25% in aggregate principal amount of the Debentures then outstanding hereunder, by notice in writing to the Company (and to the Trustee if given by Securityholders), ***may*** declare the entire principal due and payable immediately, and upon any such declaration the same shall become immediately due and payable. (emphasis added).

Trust I Indenture, §5.1(g), NYSCEF Doc. No.6, p. 22 (emphasis added). [9]

Pursuant to §5.1, the Trustee and/or the holder of at least 25% of the debentures *may* declare the entire principal due, thus acceleration of the debt based simply upon failure to pay interest is *not* automatic. Rather, some affirmative action must be taken, either by the Trustee or the holders of not less than 25% in aggregate principal amount of the Debentures then outstanding to accelerate the entire amount due.[10]

Under the Trust Documents and New York case law, each failed payment is an event of default, but these defaulting events do not automatically trigger the running of the statute of limitations. The statute of limitations begins to run when some affirmative

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[9] Trust III Indenture contains almost identical language.

[10] *See, e.g., Wells Fargo Bank, N.A. v Burke,* 94 A.D.3d 980, 982–83 (2d Dept. 2012 ("here the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder's election to take advantage of the accelerating provision, and until such action has been taken the provision has no operation.").

action is taken to accelerate the debt. Here, Espadarte did not accelerate repayment of the entire debt until 2018, thus the defense of statute of limitations based upon the Trust is dismissed.

2. Appointment of a Receiver

Riverside further argues in its cross-motion that another acceleration event occurred in 2009 which made all of the debt immediately payable, *i.e.,* the appointment of FDIC as receiver of the Bank. Section 5.1(e) of the Trust I Indenture and 5.01(e) of the Trust III indenture state that the appointment of a court-ordered receiver constitutes a defaulting event. Section 5.01 of the Trust III Indenture also states:

> If an Event of Default specified under clause (e) or (f) of this Section 5.01 occurs, then, in each and every case, the entire principal amount of the Debt Securities and any premium and interest accrued, but unpaid, thereon shall *ipso facto* become immediately due and payable without further action. Each of section 5.01(c), (e) and (f) shall be deemed to be an "Acceleration Event."

NYSCEF Doc. No. 8, p.28.

Riverside argues that the appointment of the FDIC as receiver in 2009 triggered the *ipso facto* acceleration clause of § 5.01 and made the entirety of the debt immediately due, and therefore, the statute of limitations began to run in 2009. In opposition, Espadarte recognizes that the appointment of a receiver constitutes a defaulting event under the Trust Indentures but maintains that such an event does not trigger *automatic* acceleration under prevailing case law because *ipso facto* acceleration clauses are inherently void and unenforceable as contrary to public policy.

In support of its argument that *ipso facto* acceleration clauses are contrary to public policy, Espadarte relies primarily on *The Bank of New York v. Federal Deposit Insurance Company*, 453 F. Supp. 2d 82, 96 (D.D.C. 2006), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007). In *Bank of New York,* the Court held that, under FIRREA (the Financial Institution Reform Recovery and Enforcement Act of 1989) the FDIC, as receiver of a failed institution, had the authority not to honor an *ipso facto* acceleration clause in loan documents, noting that Congress granted the FDIC broad authority to enforce contracts that "would otherwise terminate by their terms upon the appointment of a receiver." *Id*. at 96 (internal quotation marks and citations omitted).

Following that lawsuit, Bank of New York ("BNY") asserted an interpleader action in New York state court. In response, the FDIC initiated another action in The D.C. District Court (*F.D.I.C. v. Bank of New York*, 479 F. Supp. 2d 1, 15 (D.D.C.), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007)) seeking, among other things, an injunction protecting the FDIC's right to disregard the *ipso facto* clause. BNY's position was that even if the clause was unenforceable against the FDIC, it was still enforceable against the trust at issue because "[t]he Master Indenture, Indenture Supplements, and Notes created contractual obligations between the Trust and Noteholder with which the FDIC could not interfere." *Id.* at 15. The Court disagreed, holding, "[b]ecause this Court decided in *NextBank I* [the initial action, i.e., *The Bank of New York v. Federal Deposit Insurance Company*, 453 F. Supp. 2d 82, 96 (D.D.C. 2006)] that the Master Indenture's ipso facto clause was void, and therefore unenforceable by *any* party, and that the FDIC is excused from making accelerated payments to the Trust, there can be no basis for arguing that the

Trust should make accelerated payments to the Noteholders." *F.D.I.C. v. Bank of New York*, 479 F. Supp. 2d 1, 18 [D.D.C.] (emphasis added).

At oral argument in this action, Riverside claimed that the above cases are not relevant because this action was not brought by the FDIC (Transcript of Oral Argument, p.19, lines 1-2). At least one court has examined the issue, upholding an arbitration award which allowed a third-party (to whom the FDIC had assigned its rights) the "statutorily granted" right under the FIRREA to ignore an *ipso facto* clause. The United States District Court for the Central District of California, in *Golden State Bank v. First-Citizens Bank & Tr. Co.*, 2012 WL 12985121, at *4 (C.D. Cal. Apr. 30, 2012) reasoned:

> The arbitrators found, after considering the parties' supplemental briefing on this precise issue, that the FDIC, by *ignoring* the IFC [ipso facto clause] and transferring all of TVB's [Temecula Valley Bank] assets to FCB [defendant First-Citizens Bank], the FDIC implicitly exercised *its* rights under FIRREA in voiding the IFC, and thus it is unenforceable as against FCB. In the arbitrators' words, FCB's FIRREA-based affirmative defense is availing because:
>
> [FIRREA] allows the FDIC to ignore ipso facto clauses when assigning a contract of a failed bank to a third party transferee, who is then allowed to assume it notwithstanding the ipso facto insolvency clause in the contract and any objection of a non-consenting counterparty. (emphasis in original)

Id.

Because the statute of limitations based upon acceleration clauses was raised for the first time in a cross-motion to supplement the record, the parties have not sufficiently addressed the issue of whether a private assignee of the FDIC, as opposed to the FDIC itself, exercising its authority under FIRREA, may choose not to honor an *ipso facto* acceleration clause triggered by a bank's receivership. Further, neither party has

submitted any information to show whether the FDIC itself chose not to honor the acceleration clause during the period when it was Receiver for the Bank. For this reason, and because supplemental information is required, I deny the motion for summary judgment in lieu of complaint at this time. I note, however, that the defenses raised by Riverside in opposition to the motion and dismissed herein should not be relitigated in this action.

In accordance with the foregoing, it is hereby

ORDERED that the cross-motion for leave to file supplemental papers is granted; and it is further

ORDERED that the motion for summary judgment in lieu of complaint is denied; and it is further

ORDERED that Espadarte's motion for summary judgment in lieu of complaint is deemed the complaint, and Riverside's opposition, other than the defenses dismissed herein, is deemed the answer; and it is further

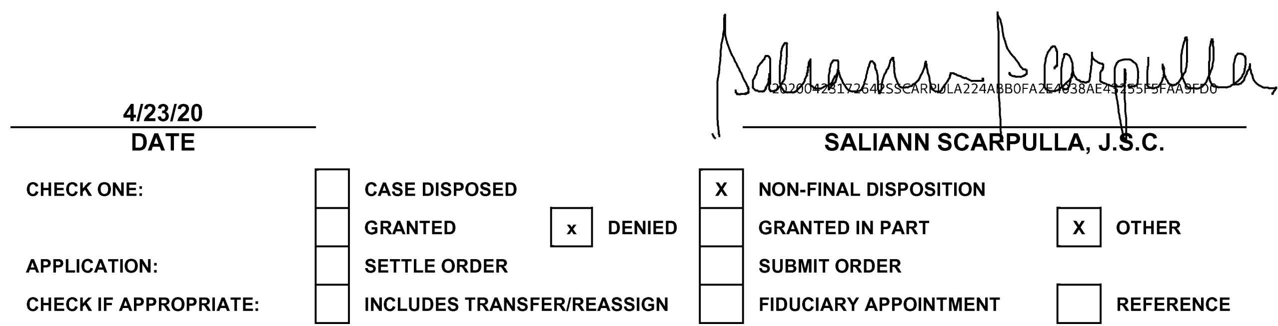
ORDERED that counsel for Espadarte shall, within sixty (60) days from the date of this Order submit the supplemental documents set forth above and file the documents submitted at oral argument, and, if Espadarte fails to do so, Riverside may maintain the defenses to which the supplemental documents apply; and it is further

ORDERED that Riverside may only continue to assert the defense which has not been dismissed herein, *i.e.* the statute of limitations defense based upon the alleged ipso facto acceleration of the entire debt upon the Bank's receivership, or the defenses that

may be maintained as a result of Espadarte's failure to supplement the record; and it is further

ORDERED that the parties are directed to appear for a conference on July 8, 2020, or such other adjourned date as may be necessary.

This constitutes the decision and order of the Court.



4/23/20
DATE

SALIANN SCARPULLA, J.S.C.

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