

Lapis Advisers, LP v NR Pa. Assoc., LLC

2023 NY Slip Op 33752(U)

October 23, 2023

Supreme Court, New York County

Docket Number: Index No. 655051/2021

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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LAPIS ADVISERS, LP,	INDEX NO.	<u>655051/2021</u>
Plaintiff,		08/04/2023,
- v -	MOTION DATE	<u>08/22/2023,</u>
		<u>09/06/2023</u>
NR PENNSYLVANIA ASSOCIATES, LLC, NR FLORIDA ASSOCIATES, LLC	MOTION SEQ. NO.	<u>003 004 005</u>
Defendant.	DECISION + ORDER ON MOTION	

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 102, 103, 104, 105, 106, 113, 115

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 107, 108, 109, 114

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 123

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

Upon the foregoing documents, the defendants’ motion (Mtn. Seq. No. 003) for leave to file a Proposed Verified Answer and Counterclaims (the **PAC**; NYSCEF Doc. No. 105) is denied because it is hopelessly late as note of issue was filed November 29, 2022 (without adequate explanation as to the reasons for such delay) and it is predicated on facts known to the defendant for years which predate this lawsuit entirely and, more importantly, as pled it is palpably insufficient as a matter of law as against Lapis (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]). To wit, and as discussed below, no allegations exist that Lapis was aware of any mutual mistake prior to its acquisition of the loans from Santander Bank, N.A. (**Santander**).

Pursuant to CPLR 3205(b), leave to amend pleadings should be freely given unless there is prejudice or surprise resulting from the delay to the opposing party or if the proposed amendment is “palpably improper or insufficient as a matter of law” (*McGhee*, 96 AD3d at 450). Leave to amend will be denied where the movant was aware of the factual basis for the proposed amendment at the time of the original pleading and fails to establish a reasonable excuse for its delay in asserting its claims (*Lattanzio v Lattanzio*, 55 AD3d 431, 431 [1st Dept 2008]). Granting leave in such circumstances after discovery has closed would prejudice the non-moving party (*id.*, at 432).

In the PAC, the defendants seek to add breach of contract counterclaims against the plaintiff and non-party Santander. These counterclaims are predicated on facts that were known to the defendants before this lawsuit was brought and before the loan was assigned to Lapis in August, 2020— *i.e.*, that Santander declared the defendants in default of the Credit Agreement and effectively froze their line of credit in 2019 by seizing on a known mutual mistake in the documents (NYSCEF Doc. No. 105, ¶¶ 117-119). Despite this alleged default by Santander, the defendants never sued Santander. Nor do the defendants assert that they contemporaneously asserted that Santander was in default or that they informed Santander of the alleged “mutual mistake” in the documents prior to Lapis’ acquisition of the loans. In fact, the first mention of the alleged mistake in the documents in the record before the Court occurred by letter (the **July 2021 Letter**; NYSCEF Doc. No. 31) dated July 15, 2021, from Daniel Eisner to Kjerstin Hatch of Lapis. The July 2021 Letter does not however assert a default by Santander or Lapis and instead indicates that the basis for the events of default “were erroneously implemented and did not reflect the mutual intent of the parties.” In any event, this was over 11 months *after* Lapis

purchased the loans and took assignment of them (NYSCEF Doc. No. 6). The defendants did not assert these counterclaims until after the Note of Issue was filed (NYSCEF Doc. No. 94) and discovery was closed. They offer no reasonable excuse for their delay. Thus, leave to amend the answer is denied.

Reference is made to this Court's prior Decision and Order (the **Prior Decision**), dated July 13, 2023. In the Prior Decision based on certain representations of defendants' counsel, the Court noted that a claim may lie based against the original lender who is alleged to have capitalized on a mutual mistake (NYSCEF Doc. No. 98 at 2) or against Lapis based on what they knew and understood when they acquired the loans. However, review of the PAC makes clear that the proposed counterclaim levelled against Lapis fails as a matter of law.

A holder in due course "takes the instrument free from (1) all claims to it on part of any person" (NY UCC Law § 3-305). To be a holder in due course, a holder must take the instrument (i) for value, and (ii) in good faith (NY UCC Law § 3-302). The notes are commercial instruments and were properly endorsed to Lapis by Allonge (NYSCEF Doc. No. 7, 8) (*U.S. Bank Nat'l Ass'n v Moulton*, 179 AD3d 734, 736 [2nd Dept 2020]). There was no assumption of liabilities in the assignment of the debt to Lapis (NYSCEF Doc. No. 110 §§ 3.4, 5.2) and there are no allegations to suggest that they knew of the alleged mutual mistake in the documents such that they should not be considered a holder in due course. It is wholly irrelevant that the defendants were in default at the time of the acquisition of the notes. What matters is that there are no facts alleged that they knew of

the defense and counterclaim now asserted by the defendants prior to their acquisition of the loans. Thus, the claim fails as a matter of law and the motion must be denied.

To the extent that any claim may exist against Santander Bank, given the stage of this lawsuit, this must be brought separately as it would needlessly delay and prejudice the legitimate rights of Lapis in this lawsuit.

The plaintiff's motion to seal (Mtn. Seq. No. 004) NYSCEF Doc. No. 109 is granted because that documents contain sensitive proprietary information such that good cause exists for sealing which outweighs the public interest (the proposed redactions in NYSCEF Doc. No. 112 are appropriate) (*Danco Lab., Ltd. V Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000]; 22 NYCRR § 216.1[a]).

The plaintiff's motion to enforce (Mtn. Seq. No. 005) the So Ordered Stipulation dated November 16, 2021 (the **Stipulation**; NYSCEF Doc. No. 53) is granted. Pursuant to the Stipulation, the defendants, pending resolution of this matter, shall provide the plaintiffs with updated financial statements. Because this matter has not yet been resolved, the plaintiffs are entitled to updated financial statements.

It is hereby ORDERED that the defendants' motion for leave to file the PAC is denied; and it is further

ORDERED that the plaintiff's motion to enforce the Stipulation is granted; and it is further

ORDERED that the defendants shall provide to the plaintiffs updated financial statements in substantially the same form as the financial statements provided to the plaintiffs on September 17, 2021; and it is further

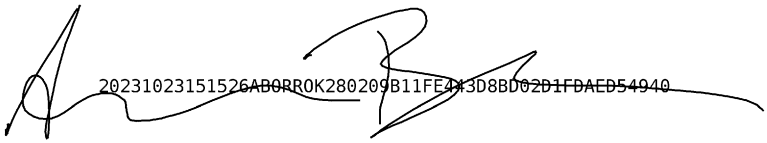
ORDERED that the Clerk of the Court is directed, upon service on him of a copy of this order with notice of entry, to seal NYSCEF Doc. No. 109 and to separate that documents and to keep it separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed document to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

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<p><u>10/23/2023</u> DATE</p> <p>CHECK ONE:</p> <p>APPLICATION:</p> <p>CHECK IF APPROPRIATE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED</p> <p><input type="checkbox"/> SETTLE ORDER</p> <p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p> <p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>
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ANDREW BORROK, J.S.C.