

CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC

2026 NY Slip Op 30159(U)

January 14, 2026

Supreme Court, New York County

Docket Number: Index No. 653277/2018

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CWCAPITAL COBALT VR LTD.,

Plaintiff,

- v -

CWCAPITAL INVESTMENTS LLC, and CWCAPITAL
ASSET MANAGEMENT LLC,

Defendants.

INDEX NO. 653277/2018

MOTION DATE --

MOTION SEQ. NO. 030

**DECISION + ORDER ON
MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 030) 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1230, 1523, 1544

were read on this motion to/for PRECLUDE.

In motion sequence number 030, defendants CWCapital Investments LLC (CWCI) and CWCapital Asset Management LLC (CWCA, and collectively CW or defendants) move to preclude testimony from the affirmations of Matthew Tuten (NYSCEF 942, Tuten aff) and Blair Wallace (NYSCEF 941, Wallace aff), submitted by plaintiff CWCapital Cobalt Vr Ltd. (Cobalt) in support of its motion for summary judgment. (See NYSCEF Doc. No. [NYSCEF] 1221, Order to Show Cause [OSC].)

Background

The court’s prior decisions in this action provide a detailed background of the dispute. As such, additional background information will be provided only where necessary.

In support of its motion for partial summary judgment, motion sequence 031, Cobalt submitted the affirmations of Tuten and Wallace. Although the court did not rely

on these affidavits for its summary judgment decision, it resolves the motion in anticipation of trial. (See NYSCEF 1615, Decision mot. seq. 31 at 48, n 12.)

Wallace is the “President and Chief Executive Officer of Obra Capital . . . an institutional asset manager.” (NYSCEF 941, Wallace aff ¶ 2.) Prior to joining Obra Capital, Wallace “was employed for ten years at Sculptor Capital Management (formerly Och-Ziff Capital Management), from July 2010 to March 2020 (“Sculptor”)” where he was responsible for “due diligence and management of structured assets including investments in collateralized debt obligation (“CDO”) notes, commercial mortgage-backed security (“CMBS”) certificates and other types of structured products and investments.” (*Id.* ¶ 3.) During Wallace’s employment at Sculptor, Sculptor owned Class A-1 CDO notes and Class A-2 notes issued by Cobalt. (*Id.* ¶¶ 4-5.) After Sculptor’s purchase of the Class A-2 notes, Wallace “oversaw a detailed review of the investment,” which included “an assessment of whether there were any ways that the CMBS certificates in Cobalt’s portfolio could be managed in a manner to improve the ultimate recoveries.” (*Id.* ¶¶ 6-7.)

Like Wallace, Tuten has “been employed by several institutional managers of CMBS investments.” (NYSCEF 942, Tuten aff ¶¶ 2-6.) Between May 2015 and April 2019, Tuten “managed the CMBS and CRE CDO portfolio at [Sculptor].” (*Id.* ¶ 5.) Part of Tuten’s responsibility at Sculptor included “evaluat[ing] whether the CMBS certificates owned by Cobalt were being managed in a manner that maximized their value to Cobalt.” (*Id.* ¶ 9.) After leaving Sculptor, Tuten has “been employed as a CMBS portfolio manager at Pacific Investment Management Company LLC (“PIMCO”), one of the largest managers of bond positions in the world.” (*Id.* ¶ 6.) At PIMPCO, Tuten’s

responsibility has also included “helping to manage investments in CDO notes issued by Cobalt.” (*Id.* ¶ 7.)

Discussion

CW argues that the testimony of Tuten and Wallace are inadmissible because (i) Cobalt never disclosed Tuten and Wallace as experts as required by Commercial Division Rule 13; (ii) as non-expert fact witnesses Tuten and Wallace are not permitted to offer opinion testimony nor “opine on the ultimate issue in the case, i.e., whether CWCI complied with its duties and obligations as collateral manager for the CDO” (NYSCEF 1117, CW’s MOL at 2-3); (iii) Tuten and Wallace’s opinion testimony are, regardless, irrelevant because neither Tuten nor Wallace are qualified to testify as to how the CDO should have been managed by a collateral manager; and (iv) similarly, Tuten and Wallace’s factual testimony is irrelevant because neither of them have any personal knowledge regarding the structuring of the CDO.

Cobalt counters that “neither Tuten nor Wallace offer expert opinions,” instead, they “testify about what they did and observed, personally.” (NYSCEF 1222, Cobalt’s MOL in Opp at 2.) Moreover, even if the court were to find that Tuten and Wallace’s testimony may be characterized as opinions, New York law does not “impose an absolute bar on fact witnesses offering opinions.” (*Id.*) Cobalt further argues that CW was well-aware of and had every opportunity to depose Tuten and Wallace as evidenced by the fact that CW (i) met with Wallace prior to this action ever being filed, (ii) included allegations about Tuten and Wallace in their amended complaint, and (iii) disclosed Tuten and Wallace as persons with relevant knowledge of the parties’ claims. Finally, Cobalt contends that Tuten and Wallace’s testimony is relevant because “CW

put it at issue by accusing them of investing in Cobalt's notes solely to fabricate legal claims against CW." (*Id.* at 3.)

Expert Witnesses

CW argues that the testimony of Tuten and Wallace must be precluded because Cobalt never disclosed Tuten and Wallace as experts as required by Commercial Division Rule 13(c). Cobalt counters that Tuten and Wallace are not experts and, therefore, no disclosure was necessary.

CPLR 3101(d)(1)(i) states that

"each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." (CPLR 3101 [d] [1] [i].)

Commercial Division Rule 13(c) adds to this requirement that

"[i]f any party intends to introduce expert testimony at trial, no later than thirty days prior to the completion of fact discovery, the parties shall confer on a schedule for expert disclosure -- including the identification of experts, exchange of reports, and depositions of testifying experts -- all of which shall be completed no later than four months after the completion of fact discovery." (22 NYCRR § 202.70.)

Here, it is undisputed that Cobalt never designated Tuten and Wallace as expert witnesses. (See NYSCEF 1117, CW's MOL at 2 ["Tuten and Wallace were never disclosed as experts and never produced expert reports"]; NYSCEF 1222, Cobalt's MOL in Opp at 10 ["Tuten and Wallace . . . are not experts and are not offering expert opinions."].) While a failure to designate an expert under Commercial Division Rule 13(c) may be grounds for precluding expert testimony (*see Pope Invs. II LLC v Belmont Partners, LLC*, 214 AD3d 484, 485-86 [1st Dept 2023]), that is not the case here.

CPLR 3212(b) provides that

“[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit.” (CPLR 3212 [b].)¹

Accordingly, even if the court were to determine that Tuten and Wallace’s affidavits amount to expert testimony, the court will not preclude the affidavits on Cobalt’s motion for summary judgment or trial on this basis. (See *Washington v Trustee of The M.E. Church of Livingston Manor*, 162 AD3d 1368, 1369 [3d Dept 2018] [held that pursuant to CPLR 3212(b) the “Supreme Court did not abuse its discretion in relying on plaintiff’s expert affidavit]; *Moreland v Huck*, 156 AD3d 1396, 1396 [4th Dept 2017] [“[e]ven assuming, arguendo, that each of the witnesses provided expert testimony in his affidavit, we note [] CPLR 3212 (b)”]; *Trotman v Boston Pops., Inc.*, 59 Misc 3d 1230[A], 2018 NY Slip Op 50803[U], *3 [Sup Ct, Bronx County 2018] [held that pursuant to CPLR 3212(b) the “affidavit is admissible even though Plaintiff’s expert was not previously disclosed”].) Accordingly, the court reject’s CW’s argument that Tuten and Wallace’s affirmations must be precluded because Cobalt failed to disclose Tuten and Wallace as experts.

Opinion Testimony

CW further moves to preclude Tuten and Wallace’s testimony on the basis that their affirmations contain opinion testimony, which Tuten and Wallace are not permitted to give because Cobalt has not designated them as expert witnesses. Cobalt counters

¹ This language was added to CPLR 3212 in 2015. Accordingly, CW’s citations to case law prior to 2015 rejecting affidavits by fact witnesses on a summary judgment motion are not considered. (See NYSCEF 1117, CW’s MOL at 19-20.)

that Tuten and Wallace do not offer expert opinions, and even if the court finds that they do offer opinion testimony, New York law does not “impose an absolute bar on fact witnesses offering opinions.” (NYSCEF 1222, Cobalt’s MOL in Opp at 2.)

“Generally, ordinary witnesses, as opposed to expert witnesses, may only testify as to facts and not opinion.” (*Giraldez v City of New York*, 214 AD2d 461, 462 [1st Dept 1995]; see also *People v Russel*, 165 AD2d 327, 332 [2d Dept 1991], *affd* 79 NY2d 1024 [1992].) “The recognized exception to the general rule is that a lay person may give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression.” (*People v Hackett*, 228 AD2d 377, 378 [1st Dept 1996], *lv denied* 88 NY2d 986 [1996].) Moreover, the Guide to New York Evidence provides that

“(1) The testimony of a witness not testifying as an expert may be given in the form of an opinion or inference when that testimony:

(a) is rationally based on the witness’s personal perception;

(b) is within the ambit of common experience or that of a particular witness; and

(c) would be helpful to the finder of fact in understanding the witness’s testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference.

(2) Testimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact.” (Guide to NY Evid., Opinion of Lay Witness § 7.03.)

Here, CW argues that “Cobalt relies on [Tuten and Wallace’s] affirmations in an effort to supplement (or replace) the opinions of its disclosed experts.” (NYSCEF 1117, CW’s MOL at 10.) Specifically, CW provides that Cobalt quotes Tuten and Wallace’s

testimony regarding their understanding of the standard of care for hedge fund managers and relies on their affirmations “to opine on CMBS industry fee sharing custom and practices.” (*Id.* at 11-12.) How Cobalt construes and relies on Tuten and Wallace’s testimony is separate from the question of whether Tuten and Wallace’s affirmations amount to expert opinions.

Standard of Care

CW argues that Tuten and Wallace impermissibly offer opinion testimony regarding the standard of care that applies to CWCI. Specifically, CW points to Wallace’s testimony where he offers that

“[a]fter the purchase of the Class A-2 Notes, I oversaw a detailed review of the investment to see how we could best manage it for the benefit of the funds that owned the Notes. This was consistent with what I understood to be Sculptor’s obligations as an institutional asset manager to manage investments on behalf of our funds in the manner that would maximize the recoveries on those investments.” (NYSCEF 941, Wallace aff ¶ 6.)

Similarly, CW points to Tuten’s testimony in which he provides that

“[a]cross my experience at these investment managers, I have understood my responsibilities in managing CMBS and CMBS-related investments to be guided by an obligation to seek to maximize the recoveries on those investments for the benefit of the funds that owned those investments as well as the investors in those funds.” (NYSCEF 942, Tuten aff ¶ 8.)

It is generally true that only an expert can establish the applicable standard of care. (*See Merlin Biomed Asset Mgt., LLC v Wolf Block Schoor & Solis-Cohen LLP*, 5 Misc 3d 1011[A], 2004 NY Slip Op 51331[U], *8 [Sup Ct, NY County 2004] “[i]n order to make out a prima face case that [defendant’s] conduct has breached duty of care, a plaintiff must generally present expert testimony establishing the applicable standard of care from which the defendant allegedly deviated.” (citations omitted)].) However, here, Tuten and Wallace are offering their understanding of an institutional asset managers’

obligations based on their personal perceptions and experiences working with and for institutional investment managers. Wallace and Tuten both offer such opinions in order to explain their responsibility at Sculptor with respect to Cobalt's CMBS certificates. (See NYSCEF 941, Wallace aff ¶ 7 ["[o]ur review included an assessment of whether there were any ways that the CMBS certifies in Cobalt's portfolio could be managed in a manner to improve the ultimate recoveries to Cobalt"]; NYSCEF 942, Tuten aff ¶ 9 ["part of my responsibilities included helping to evaluate whether the CMBS certifies owned by Cobalt were being managed in a manner that maximized their value to Cobalt"].) Because understanding Tuten and Wallace's work for Sculptor is informed by an understanding of an institutional asset managers' obligations generally, Tuten and Wallace's testimonies are helpful and do not amount to impermissible expert opinions. (See Guide to NY Evid., Opinion of Lay Witness § 7.03 [1].)

Industry Custom and Practice

CW further argues that Tuten and Wallace impermissibly offer opinion testimony regarding the CMBS industry's custom and practices regarding fee sharing. Specifically, CW points to Wallace's testimony where he offers that

"[f]rom my experience helping to manage CMBS investments at Sculptor, I had become well aware of a CMBS industry practice whereby special servicers would agree to share fees with the holders of the controlling classes of certificates that either appointed them or agreed to let them remain in the special servicing role." (NYSCEF 941, Wallace aff ¶ 9.)

Similarly, CW points to Tuten's testimony in which he provides that

"continuing through all of my roles at Prosirris, Sculptor, and PIMCO managing investments in CMBS certificates with control rights, I have been aware of the practice of special servicers entering into fee share arrangements with CCRs pursuant to which the special servicers have agreed to share portions of the fees to which they are otherwise entitled under the relevant PSA with controlling class

certificateholders in order to retain servicing assignments.” (NYSCEF 942, Tuten aff ¶ 13.)

“Based on my discussions with multiple special servicers, I believe that their willingness to enter into relatively after-the-fact fee sharing agreements . . . stems from the fact that fee-sharing is so market standard it would be unusual, and relationship-damaging, for a special servicer to refuse this type of request.” (*Id.* ¶ 21.)

Again the court declines to find Tuten and Wallace’s testimonies to be expert opinions. Both Tuten and Wallace testify as to their personal observations and experiences as to the use of fee sharing agreements in the CMBS industry. Moreover, because Tuten and Wallace’s responsibilities while working for Sculptor involved CMBS certificates and specifically assessing whether CMBS certificates owned by Cobalt were managed in a value-maximizing manner, the use of fee-sharing agreements by CMBS special servicers in the industry are helpful to understanding Tuten and Wallace’s work and do not amount to impermissible expert opinions. (See Guide to NY Evid., Opinion of Lay Witness § 7.03 [1].)

Opinion on the Ultimate Issue

Further, CW argues that the testimony of Tuten and Wallace must be precluded because Tuten and Wallace opines “whether CWCI fulfilled its duties and obligations to the CDO” and these “are impermissible opinions regarding the ultimate issue in the case.” (NYSCEF 1117, CW’s MOL at 15.) Specifically, CW points to Wallace’s affirmation that

“[i]n addition to not entering into fee sharing agreements, our review identified several other ways in which CWCI had not been using Cobalt’s control rights to maximize recoveries on Cobalt’s investments. These included CWCI having failed to utilize fair value purchase option rights, having allowed fees to be diverted to one of its other affiliates CWFS-REDS, LLC, and having allowed CWCA to use CMBS trust funds to settle a litigation related to the servicing of a loan on the Peter Cooper Village and Stuyvesant Town housing development

even though the settlement largely benefited CWCA personally in protecting its special servicing fees. In each case, this conduct shared a similarity with CWCI's failure to enter into fee sharing agreements in that CWCI was benefiting its affiliates at the expense of Cobalt." (NYSCEF 941, Wallace aff ¶ 11.)

Similarly, CW references Tuten's testimony that states

"we concluded that Cobalt's CMBS investments were not being managed by [CWCI] in a manner that maximized the recoveries for Cobalt on those investments. In particular, it was apparent to me that the control rights that Cobalt possessed as a result of its owning the controlling classes of dozens of CMBS trusts (including some of the largest in CMBS history) were not being used for the benefit of Cobalt and its investors in the same ways that I regularly utilize such control rights to benefit the funds and their investors that hold similar CMBS controlling class positions I am responsible for managing. In particular, Cobalt's control rights had not been used by CWCI to negotiate the type of fee-sharing agreements that I have regularly negotiated, as I discuss below, or to exercise other control rights that could have benefited Cobalt such as monetizing fair value purchase options, or directing servicing activities that impacted Cobalt's recoveries." (NYSCEF 942, Tuten aff ¶ 10.)

Cobalt counters that Tuten and Wallace are not opining as to the ultimate issue in the case because contrary to CW's contention, the ultimate issue in this case is not whether CWCI fulfilled its duties and obligations to the CDO but rather, "whether CWCI breached the CMA." (NYSCEF 1222, Cobalt's MOL in Opp at 14.) The court finds this distinction to be without a difference because a failure by CWCI to satisfy its obligations to the CDO could amount to a breach of the CMA.

Nevertheless, the court finds that despite Tuten and Wallace's testimony going toward the ultimate issue in the case, their testimonies are admissible. Section 7.03(2) of the Guide to New York Evidence provides that "[t]estimony in the form of an opinion or inference that meets the foregoing criteria for admissibility is admissible even if it embraces an ultimate issue to be decided by the trier of fact." (Guide to NY Evid., Opinion of Lay Witness § 7.03.) Both Wallace's and Tuten's testimony satisfies the criteria set forth in § 7.03(1)(a)-(c). First, their testimony is based on their personal

experiences and roles at Sculptor tasked with assessing whether Cobalt's CMBS certificates were managed in a value-maximizing manner. Second, because evaluating the management of Cobalt's CMBS certificates was a critical part of Tuten and Wallace's jobs at Sculptor, their testimony is helpful to understand how they performed such assessment.

Relevance

Finally, CW argues that Tuten and Wallace's affirmations must be precluded because their testimonies are irrelevant. CW contends that Tuten and Wallace's testimony is irrelevant because Tuten and Wallace have no experience or knowledge about the role of CDO collateral managers generally and moreover, neither Tuten nor Wallace began working for Sculptor until years after the CDO at issue here was formed. Cobalt counters that CW's contentions "misconstrues the standard applicable to its management of Cobalt's investments" because CWCI "agreed to manage Cobalt's assets in a manner consistent with the practices and procedures then in effect followed by reasonable and prudent investment managers." (NYSCEF 1222, Cobalt's MOL in Opp at 14 [internal quotation marks omitted].) Therefore, CWCI was not limited to the conduct of only CDO collateral managers.

CW's argument fails for two reasons. First, CW cannot concurrently represent to the court that Tuten and Wallace's testimony must be precluded because they are (i) irrelevant and (ii) opine on the ultimate issue in this case. By asking the court to preclude Tuten and Wallace's testimony on the grounds that they opine on the ultimate issue, CW concedes that Tuten and Wallace's testimony is relevant. Second, as Cobalt correctly points out, CWCI was obligated to undertake duties on Cobalt's behalf "in a

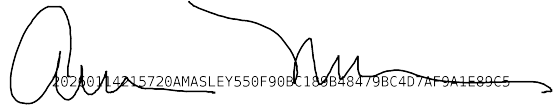
manner consistent with the practices and procedures then in effect followed by reasonable and prudent **intuitional managers** of national standing.” (NYSCEF 946, CMA § 1 [emphasis added].) Therefore, Tuten and Wallace’s experience with Sculptor, an institutional manager of CMBS investments, is relevant to the question of whether CWCI performed its duties under the CMA. Though CW accurately notes that neither Tuten nor Wallace worked for Sculptor at the time the CDO at issue here was formed, this is not alone sufficient to deem their testimony irrelevant.

“It is well settled that whether evidence should be excluded . . . rests within the sound discretion of the trial court.” (*Shafran v St. Vincent’s Hosp. & Med. Ctr.*, 264 AD2d 553, 556 [1st Dept 1990] [internal quotation marks and citations omitted].) Moreover, it is statutorily required that “[a] motion for summary judgment shall be supported by affidavit[s]” from “person[s] having knowledge of the facts.” (CPLR 3212 [a].) Reviewing Tuten and Wallace’s affirmations confirm that the statements therein are limited to their personal knowledge from having assessed and evaluated the management of Cobalt’s CMBS certificates during their employment with Sculptor, as well as their review and management of CMBS trusts for institutional investment managers more generally. Neither Tuten nor Wallace are offering expert testimony, nor will it be considered as such by this court. The court will, therefore, permit the consideration of Tuten and Wallace’s affirmations and allow them to offer fact testimony concerning their understandings based on their personal knowledge and management of Cobalt’s CMBS certificates.

Accordingly, it is

ORDERED that motion 030 to preclude testimony of Matthew Tuten and Blair

Wallace is denied.



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1/14/2026

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE