

**U.S. Bank Natl. Assoc. v Vitro Automotriz, S.A. DE
C.V.**

2012 NY Slip Op 33357(U)

July 13, 2012

Supreme Court, New York County

Docket Number: 650506-2012

Judge: Bernard J. Fried

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED PART 60

HON. BERNARD J. FRIED Justice

FILE

US BANK NATIONAL ASSOCIATION., not in its individual capacity, but solely as Indenture Trustee, Plaintiff,

Index No. #650506/2012

MOTION DATE _____

-against-

MOTION SEQ. NO. #001

VITRO AUTOMOTRIZ, S.A. DE.C.V., et. al., Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

Dated: 7/13/2012

B. J. Fried
HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

-----X

U.S. BANK NATIONAL ASSOCIATION, not in
its individual capacity, but solely as
Indenture Trustee,

Plaintiff,
-against-

Index No. 650506-2012
Motion Seq. # 01 and 03

VITRO AUTOMOTRIZ, S.A. DE C.V., et al.,

Defendants.

-----X

ELLIOTT INTERNATIONAL, L.P., et al.,

Plaintiffs,
-against-

Index No. 650428-2012
Motion Seq. # 06 and 07

VITRO PACKAGING, LLC, et al.,

Defendants.

-----X

APPEARANCES:

For Plaintiffs Elliott and ACP

Friedman Kaplan Seiler & Adelman, LLP
Attorneys for Aurelius Opportunities Fund
Seven Time Square
New York, New York 10036
Edward A. Friedman, Esq.

Dechert, LLP
Attorneys for Elliott International and
Liverpool Ltd. Partnership
1095 Avenue of the Americas
New York, New York 10036-6797
Dennis H. Hranitzky, Esq.

For Vitro Defendants

Milbank Tweed Hadley & McCloy LLP
One Chase Manhattan Plaza
New York, New York 10005-1413
Alan J. Stone, Esq.
Patrick Marecki, Esq.

For Plaintiff U.S. Bank

Sullivan & Worcester LLP
Attorneys for U.S Bank National Assn.
Jeanne P. Darcey
1633 Broadway
New York, NY 10019-6708

FRIED, J.:

This decision addresses motion sequence numbers 01 and 03 in the action bearing index number 650506-2012 (the U.S. Bank Action) and motion sequence numbers 06 and 07 in the action bearing index number 650428-2012 (the Elliott-Aurelius Action). In the U.S. Bank Action and the Elliott-Aurelius Action (the Actions), U.S. Bank National Association (U.S. Bank, in its capacity as indenture trustee), Elliott International L.P., The Liverpool Limited Partnership and Aurelius Opportunities Fund IV, Ltd. (Elliott-Aurelius, together with U.S. Bank, collectively, Plaintiffs), seek to recover unpaid principal, accrued interest and other amounts due and owing on certain notes that were issued by Vitro S.A.B. de C.V. (Vidro) and guaranteed by the defendants in these Actions (Defendants). Plaintiffs' motions are brought on by orders to show cause as cross-motions for summary judgment, pursuant to my instructions given at the June 14, 2012 hearing on Defendants' motions to dismiss (which are treated as motions for summary judgment under CPLR 3211 (c)) the Plaintiffs' complaints, which assert causes of action for breach of contract and for declaratory judgment with respect to Defendants' obligations under the indentures, the notes and the guaranties. Because the motions are based on substantially similar facts and involved virtually identical legal issues, they are consolidated for disposition. Familiarity with the background facts leading to these motions is assumed and will not be repeated.

In opposition to Plaintiffs' cross-motions for summary judgment, Defendants argue that no court has ever ruled on the merit of their "limitation on amount of guarantee" defense, the determination of which, according to Defendants, involves highly complicated issues of

law and fact, and thus precludes the entry of summary judgment. This argument is without merit. Notably, in their appeal of my prior ruling that rejected such argument, Defendants made the same argument in their briefings filed with the Appellate Division, First Department. In affirming the ruling, the appellate court stated “Defendants waived the defense of limitation on liability, pursuant to the fraudulent conveyance savings clause provision in a series of indentures guaranteed by them ... In any event, the limitation provision at issue could be triggered only by an allegation of a fraudulent conveyance, and no such allegation was made here.” *Elliott Intl. L.P. v Vitro S.A.B. de C.V.*, 95 AD3d 565, 565 (1st Dept 2012). Undisputably, there has been no allegation of a fraudulent conveyance.

Alternatively, Defendants argue that in the event I grant summary judgment in favor of Plaintiffs, such judgment should be reduced by an amount necessary to prevent double recovery. This argument is inapplicable as to the U.S. Bank Action, because U.S. Bank, as indenture trustee for certain noteholders, had agreed not to seek recovery based on notes that were canceled prior to the entry of judgment; in any event, U.S. Bank indicated that no notes have been submitted to it for cancellation to date. The argument is also unpersuasive as to the Elliott-Aurelius Action, because Elliott-Aurelius indicated that they would be able to reach an agreement with Vitro and/or Defendants to avoid double recovery, just as the parties had recently done in connection with the special referee hearing and entry of judgment in the companion Wilmington Trust case, under Index No. 652303-2011.

Opposing the declaratory judgment sought by U.S. Bank as to Defendants’ obligations under the applicable indentures and guaranties, Defendants argue that any declaratory relief would constitute an impermissible advisory opinion on the impact of the hypothetical

enforcement of the Concurso Plan in the United States; however, they concede that if I should determine that declaratory relief is appropriate, it should be limited to the declaratory relief that was granted to Wilmington Trust in the companion case. Notably, on June 13, 2012, the Texas Bankruptcy Court issued a memorandum opinion that denied Vitro's motion seeking to enforce the Mexican Concurso Plan in the United States, finding that the Concurso Plan violates both United States statutes and public policy. In so doing, the Bankruptcy Court must have considered, and then determined, the issue or controversy as to the obligations of Defendants (who were non-debtor guarantors) under the indentures and guaranties that Vitro sought to discharge under the Concurso Plan. Thus, any argument that this issue or controversy is not ripe for determination has no merit. In any event, the declaratory relief that I grant in favor of U.S. Bank, as set forth below, is pursuant to the terms of the applicable indentures, which are governed by New York law. Moreover, in a decision dated March 12, 2012, the Bankruptcy Court stated that the parties are free to continue litigation against the non-debtor guarantors (Defendants) to reduce their claims to judgment. The declaratory relief granted is simply to reduce U.S. Bank's claims against Defendants to judgment.

Accordingly, for all of the foregoing reasons, it is hereby

ORDERED that, with respect to the action bearing index number 650428-2012 (the Elliott-Aurelius Action), defendants' motion for summary judgment dismissing the complaint (motion sequence number 06) is denied, and plaintiffs Elliott-Aurelius's cross-motion for summary judgment (motion sequence number 07) is granted, together with costs and disbursement to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that, with respect to the action bearing index number 650506-2012 (the U.S. Bank Action), defendants' motion for summary judgment dismissing the complaint (motion sequence number 01) is denied, and plaintiff U.S. Bank's cross-motion for summary judgment (motion sequence number 03) is granted, together with costs and disbursement to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ADJUDGED and DECLARED that, with respect to the U.S. Bank Action, pursuant to the relevant provisions of the applicable indentures, which are unambiguous and enforceable under New York law, any non-consensual release, discharge or modification of the obligations of the defendants is prohibited by the relevant terms of the indentures; and it is further

ORDERED that all issues arising in the U.S. Bank Action and the Elliott-Aurelius Action with respect money judgments against the defendants, including the computation of unpaid principal, accrued interest and other amounts, are hereby referred to, pursuant to CPLR 4317 (b), a Special Referee or another person designated by the parties to serve as referee, to hear and determine all such issues; and it is further

ORDERED that within five (5) business days from the date of this decision and order, a copy of this decision and order with notice of entry, together with a completed Information Sheet, shall be served by plaintiffs' counsel upon the Special Referee Clerk in the Motion

Support Office in Room 119 M at 60 Centre Street, who is directed to place this matter on the calendar on the Special Referee's Part for the earliest possible date.

Dated: 7/13/2012

ENTER:



J.S.C.

HON. BERNARD J. FRIED