

Taib Bank, B.S.C. (c) v West End Equity I, LTD

2016 NY Slip Op 30261(U)

February 16, 2016

Supreme Court, New York County

Docket Number: 652669/2011

Judge: Jeffrey K. Oing

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

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TAIB BANK, B.S.C.(c),

Plaintiff,

-against-

WEST END EQUITY I, LTD., WEST END
EQUITY II, LTD., WEST END EQUITY III,
LTD., WEST END EQUITY IV, LTD.,
WEST END EQUITY V, LTD., and
DCD AMERICA, INC.,

Defendants.

WEST END EQUITY I, LTD., WEST END
EQUITY II, LTD., WEST END EQUITY III,
LTD., WEST END EQUITY IV, LTD.,
WEST END EQUITY V, LTD., and
DCD AMERICA, INC.,

Defendants-Counterclaim
Plaintiffs,

and DCD INVESTMENTS LTD.,

Additional Counterclaim
Plaintiff,

-against-

TAIB BANK, B.S.C.(c),

Plaintiff-Counterclaim
Defendant,

and IQBAL MAMDANI

Additional Counterclaim
Defendant.

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Index No.: 652669/2011

Mtn Seq. No. 003

DECISION AND ORDER

JEFFREY K. OING, J.:

Plaintiff TAIB Bank, B.S.C.(c), ("TAIB"), a private bank organized under the laws of the Kingdom of Bahrain, brings this action against defendants, West End Equity I, Ltd., West End Equity II, Ltd., West End Equity III, Ltd., West End Equity IV, Ltd., West End Equity V. Ltd. (collectively, the "West End Defendants"), and DCD America, Inc. ("DCD" and the West End Defendants collectively referred as "defendants") seeking: (i) a judgment against the West End Defendants, jointly and severally, for all costs and expenses of enforcement of its rights with respect to the obligations under the Note; and (ii) a judgment against DCD in the amount of \$10 million plus interest and costs.

Factual Background

Beginning in or around 2002, DCD and TAIB jointly entered into four separate real estate transactions in England and the United States (Dadabhoj EBT at pp. 47-49, Stricker Aff., Ex. D; Dadabhoj Aff., ¶ 8, Stricker Aff. Ex. G). In or around April 2007, DCD, through its affiliate, West End Investments LLC, a Delaware limited liability company, sought to acquire property located at 1200 New Hampshire Avenue and 2300 M Street in Washington, D.C. (the "DC Purchase") (Answer, ¶ 26). In connection with this effort, DCD formed the West End Defendants as a vehicle for investors to participate in the indirect

ownership of the properties acquired in the DC Purchase (Private Placement Memorandum, O'Donnell Reply Aff., Ex. A).

On June 29, 2007, TAIB, West End Partners, Inc., DCD, and Acacia Real Estate Limited ("Acacia") entered into an Underwriting Agreement (the "Underwriting Agreement") in which TAIB agreed to contribute \$20 million, less an upfront underwriting fee of four percent (the "Underwritten Amount") to underwrite the DC Purchase (Underwriting Agreement at § 1, 3, Stricker Aff. In Opp., Ex. H). TAIB agreed that in the year following the execution of the Underwriting Agreement it would use all commercially reasonable efforts to solicit investment offers from qualified investors in order to sell down the Underwritten Amount (Underwriting Agreement, ¶ 7, Stricker Aff. In Opp., Ex. H). If TAIB failed to sell down the entirety of the Underwritten Amount, however, TAIB could require West End Partners, Inc., DCD and/or Acacia to repurchase any shares that TAIB had not sold, plus interest (Underwriting Agreement, ¶ 8, Stricker Aff. In Opp., Ex. H).

In or around August 2007, TAIB requested that the Underwriting Agreement be recast as a loan guaranteed by DCD (Counterclaims, ¶ 34). Defendants claim that TAIB's CEO, Iqbal Mamdani ("Mamdani") assured the President of DCD, Siraj Dadabhoy ("Dadabhoy"), that this change would be "purely cosmetic" and

that TAIB would not seek to enforce the recast agreement (Counterclaims, ¶¶ 34-36; Dadabhoj Aff., ¶ 22, O'Donnell Aff., Ex. X). Defendants concede that they executed a Bridge Equity Finance Agreement (the "Bridge Agreement") and promissory note (the "Note") with TAIB on October 19, 2007, but claim that they did so only in reliance on Mamdani's representations.

The Bridge Agreement superseded and terminated the Underwriting Agreement (Bridge Agreement at § 2.3, O'Donnell Aff., Ex. B). In the Bridge Agreement, TAIB agreed to extend \$17 million to the West End Defendants, \$15 million of which had already been advanced pursuant to the Underwriting Agreement (Id. at § 2.1, O'Donnell Aff., Ex. B).

In the Note, the West End Defendants agreed to repay TAIB the \$17 million, with a principal payment of \$2.25 million on December 31, 2007 and the remainder on October 15, 2008 (Note at p. 1, O'Donnell Aff., Ex. C). These payments were to be made "without setoff, counterclaim or other defense" (Note at p. 2, O'Donnell Aff., Ex. C). Furthermore, the West End Defendants waived: (i) "the right to interpose any set-off or counterclaim of any nature or description in any litigation" between TAIB and the West End Defendants or DCD; (ii) the right to rely on or enforce "any oral statements made prior to, contemporaneously with or subsequent to the signing of [the] promissory note;" and

(iii) any right to a trial by jury with respect to any litigation arising out of, under, or in connection with the Note (Note at pp. 4-6). Finally, the Note provided that the West End Defendants would be liable for "any and all court costs and all reasonable attorneys' fees incurred by [TAIB] in enforcement of its rights" pursuant to the Note and Bridge Agreement (Note at p. 5, O'Donnell Aff., Ex. C).

The Bridge Agreement contemplated that the West End Defendants would raise the money to repay the Note by selling shares of stock in the West End Defendants to third party investors (Id. at § 4.1). If the West End Defendants failed to do so, DCD was obligated to sell these shares and use the funds from such sales to repay TAIB (Id. at § 10.1[a]). TAIB, in turn, agreed to "fully cooperate and assist" the Defendants in the placement of these shares by: (i) "facilitating introductions to potential investors;" and (ii) "meeting with [DCD] upon [DCD]'s reasonable request to discuss placement strategy" (Id. at §§ 4.1, 10.1[a]).

In the event DCD or the West End Defendants did not sell sufficient shares to repay the Note, DCD agreed to pay all or any portion of the amounts due under the Note, up to \$10 million (the "Guaranty") (Id. at § 10.1[b]). DCD's obligations under the Guaranty were "irrevocable, absolute, independent and

unconditional and [would] not be affected by any circumstance which constitutes a legal or equitable discharge of a guarantor" (Bridge Agreement at § 10.3, O'Donnell Aff., Ex. B). The Bridge Agreement also provided that neither it "nor any other Loan Document [could] be changed, waived, discharged or terminated unless such change, waiver, discharge or termination is in writing signed by TAIB" (Id. at § 11.15).

In a letter agreement, dated October 19, 2007, between TAIB, DCD, and West End Sponsor, LLC (the "Letter Agreement"), the parties agreed that in the event that an amount greater than \$10 million was unpaid upon the maturity of the Note, DCD would pay TAIB a percentage of the excess over \$10 million out of any money DCD received from West End Sponsor, LLC, pursuant to a separate agreement between those entities, which was not included in the record here (Letter Agreement, O'Donnell Aff., Ex. D).

On December 31, 2007, the West End Defendants made the \$2.25 million payment, but made no subsequent payments (Compl. at ¶ 22; Sultan Aff., ¶ 12, O'Donnell Aff., Ex. E).

Procedural History

On September 29, 2011, TAIB filed a motion, pursuant to CPLR 3213, for summary judgment in lieu of complaint seeking enforcement of the Note and Guaranty against defendants. On May 14, 2012, this Court entered judgment in favor of TAIB with

respect to the Note, but stayed enforcement of this judgment pending Defendants' response to TAIB's complaint.

On June 8, 2012, TAIB filed a complaint, seeking: (i) a judgment against the West End Defendants, jointly and severally, for all costs and expenses of enforcement of its rights with respect to the obligations under the Note; and (ii) a judgment against DCD under the Guaranty in the amount of \$10 million plus interest and costs (Compl. at pp. 7-8).

Defendants interposed an Answer asserting counterclaims for: (1) fraudulent inducement against TAIB and Mamdani; (2) negligent misrepresentation against TAIB and Mamdani; (3) breach of fiduciary duty against TAIB; (4) promissory estoppel against TAIB; (5) equitable estoppel against TAIB; (6) unjust enrichment against TAIB; (7) breach of the Underwriting Agreement against TAIB; (8) breach of the Underwriting Agreement's duty of good faith and fair dealing against TAIB; (9) breach of the Bridge Agreement against TAIB; (10) breach of the Bridge Agreement's duty of good faith and fair dealing against TAIB (Answer at pp. 28-41, O'Donnell Aff., Ex. H). While the Answer originally contained a number of other counterclaims, they were withdrawn prior to this motion.

Relief Sought

TAIB moves, pursuant to CPLR 3212, for summary judgment on its first and second causes of action, and for summary judgment dismissing defendants' counter-claims.

Discussion

I. Enforcement of Guaranty

"On a motion for summary judgment to enforce an unconditional guaranty, the creditor must prove the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty" (Davimos v Halle, 35 AD3d 270, 272 [1st Dept 2006]). Defendants do not dispute that they executed the Bridge Agreement and Note, or that they failed to fulfill their respective obligations under these contracts. Defendants argue that summary judgment is nevertheless inappropriate because: (i) the parties had a prior oral agreement that TAIB would not enforce the Bridge Agreement and Note; and (ii) TAIB breached the Bridge Agreement by failing to "market the investment," in the DC Purchase.

Even assuming that there was such a prior oral agreement, it may not invalidate or otherwise alter the terms of the Bridge Agreement and Note. A party that "for the accommodation of a bank, executes an instrument which, in its form, is a binding obligation, is estopped from enforcing an alleged oral agreement

not to enforce the instrument according to its terms" (Franklin Nat. Bank v. Skeist 49 AD2d 215, 219-20 [1st Dept 1975]); First Nat. City Bank v. Cooper 50 AD2d 518, 518-19 [1st Dept 1975] [alleged oral agreement that bank personnel would not enforce notes did not bar summary judgment]). Defendants' contention that this rule is limited to domestic banks is incorrect (see e.g., Caisse Nationale De Credit Agricole-CNCA, New York Branch v Valcorp, Inc., 92 CIV. 1689 (KTD), 1992 WL 245500, at *7 [SDNY Sept. 17, 1992]; Hong Kong Deposit and Guar. Co. Ltd. v Hibdon, 611 F Supp 224, 229 [SDNY 1985]).

Even if this rule were inapplicable, however, consideration of the alleged oral agreement is barred by the parol evidence rule and the statute of frauds. The parol evidence rule bars consideration of communications that contradict a subsequent or contemporaneous clear and unambiguous written agreement (First Intern. Bank of Israel, Ltd. v L. Blankstein & Son, Inc., 88 AD2d 501, 501-02 [1st Dept 1982] aff'd, 59 NY2d 436 [1983]).

Defendants argue, however, that parol evidence is admissible here to prove the contracts were induced by fraud, citing Millerton Agway Cooperative, Inc. v. Briarcliff Farms, Inc., 17 NY2d 57, 59 (1966). There, the defendants claimed that they agreed to increase their guaranty to plaintiff from \$400,000 to \$1,000,000 in reliance on plaintiff's oral representations that plaintiff

would supply defendants with additional goods on credit up to \$1,000,000 and only then enforce payment of the Guaranty (Id. at 59)). The Court of Appeals held that the plaintiff's motion for summary judgment should not have been granted, explaining that while

[i]t might be considered implausible that defendants would sign unconditional million-dollar guarantees containing no mention of plaintiff's promise ... it is not impossible. On the other side ... it might be thought unlikely that appellants would increase their guarantees from \$400,000 to a million dollars without some assurance that [they] would be allowed to stay in business ... However appropriate the summary judgment method may be for disposing without trial cases where there is no issue at all, this is not that kind of case. The truth as to these matters must be arrived at ... by a trial where the witnesses can be examined and cross-examined and their demeanor and their versions put under the scrutiny of the triers of the facts

(Id. at 63-64). Millerton is readily distinguishable, however.

In that case, the plaintiff allegedly agreed to forebear from enforcing the guaranty until a certain condition occurred. Here, defendants claim that TAIB agreed not to enforce the Note and Bridge Agreement under any circumstances, essentially negating these contracts. In this situation, the parol evidence rule applies (Korea Exch. Bank v A.A. Trading Co., 8 AD3d 344, 345 [2d Dept 2004] [guarantor's claim that he was told by plaintiff's representative that the execution of the guaranty was a mere formality and he would not be responsible for the

underlying debt was not a sufficient defense, and violated the parol evidence rule]; Citibank, N.A. v Fleet Leasing Corp., 185 AD2d 838, 838-39 [2d Dept 1992]).

In addition, the statute of frauds presents a separate and independent bar to consideration of the alleged oral agreement. A "written agreement ... which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent" (Gen. Oblig. Law § 15-301). Here, the Bridge Agreement contains such a prohibition, stating that it may not be "changed, waived, discharged or terminated unless such change, waiver, discharge or termination is in writing signed by TAIB" (Bridge Agreement at § 11.15, , O'Donnell Aff., Ex. B). Therefore, the alleged prior oral agreement is barred by the statute of frauds (Manufacturers Hanover Trust Co. v Trans Nat. Communications, Inc., 36 AD2d 709, 710 [1st Dept 1971]; North Bright Capital, LLC v. 705 Flatbush Realty, LLC, 66 AD3d 977 [2d Dept 2009]).

Nonetheless, defendants maintain that the statute of frauds and parol evidence rule do not bar consideration of the alleged oral agreement because "an oral agreement to modify a written contract will be effective if there has been partial performance

thereof that is 'unequivocally referable' to the modification" (Citibank, N.A. v Silverman, 85 AD3d 463, 465 [1st Dept 2011]). They argue that such partial performance has occurred here.

For a party's actions to be "unequivocally referable" to an alleged oral agreement, the mere fact "that the oral agreement gives significance to plaintiff's actions" is not sufficient (I.S. Design, Inc. v Gasho of Japan, Intl., Ltd., 269 AD2d 150, 151-52 [1st Dept 2000]). Rather, the conduct in question must be "explainable only with reference to the oral agreement" and cannot be reasonably explained any other way (Nassau Beekman, LLC v Ann/Nassau Realty, LLC, 105 AD3d 33, 39 [1st Dept 2013] [emphasis added]).

Defendants have failed to point to any evidence of TAIB's clear departure from the terms of the Bridge Agreement sufficient to support the existence of a prior oral modification of that agreement. Defendants allege that following the execution of the Bridge Agreement TAIB: (i) continued to account for the money paid to the West End Defendants as an investment held for resale in its internal records; (ii) failed to issue monthly statements to the West End Defendants or DCD as to the principal and interest due under the Bridge Agreement and Note, as was its general practice with loans; and (iii) failed to include a "top-off" provision in the Bridge Agreement whereby the borrower would

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be required to provide additional security in the event that the value of the collateral securing the loan declined, as was TAIB's standard practice with its other loans.

Notwithstanding their claims to the contrary, these actions are not "unequivocally referable" to the alleged oral agreement not to enforce the Bridge Agreement. Any failure by TAIB to follow standard procedure regarding the funds dispersed under the Bridge Agreement can be attributed to clerical error just as readily as an intent to treat it as an equity investment. As such, these claimed actions are insufficient to demonstrate partial performance on the part of TAIB (Compare Carlin v Jemal, 68 AD3d 655, 656 [1st Dept 2009] [neither defendants' failure to pay on due date nor plaintiff's failure to demand immediate payment constituted partial performance unequivocally referable to alleged oral modifications] with Greenberg v Frey, 190 AD2d 546, 547 [1st Dept 1993] [plaintiff's concession that he did not demand annual interest payments provided for in agreement during the first six years in which the agreement was in effect presented issue of fact as to whether monies owed under contract had been forgiven in oral modification]).

Defendants are relentless in their opposition. In that regard, they also point to an October 31, 2007 email from Sanjay Lal, the director of real estate for TAIB, to Banco Efisa --

which purchased a portion of TAIB's interest in the Bridge Agreement in January 2007 (Participation Agreement, O'Donnell Aff., Ex. Q) -- informing Banco Efisa that there was no possibility for investors to see annual returns before the end of the five year "hold period" (Stricker Aff., Ex. P). Defendants interpret this statement to mean that Banco Efisa could not expect a return on its investment in the Bridge Agreement before five years, and argue that this exchange demonstrates TAIB's understanding that the money owed under the Bridge Agreement and Note would be paid at the end of five years, contrary to the plain terms of those contracts.

In reply, TAIB has submitted an affidavit from Sanjay Lal, in which he explains that he was informing Banco Efisa that investors in the West End Defendants would not see an annual return before five years, and was not referring to the repayment of the Bridge Agreement and Note (Lal Aff. at ¶¶ 5-7, O'Donnell Aff. In Reply, Ex. B). Defendants have failed to offer any evidence contradicting this explanation.

Alternatively, defendants argue that an issue of fact exists as to whether TAIB fulfilled its obligation under section 10 of the Bridge Agreement to cooperate fully and assist defendants in the placement of the shares in the West End Defendants because TAIB: (i) did not adequately prepare before introducing DCD to

potential investors in the West End Defendants or follow-up with potential investors after these introductions; and (ii) only introduced DCD to investors capable of investing a maximum of \$100,000 each. This argument is unavailing.

TAIB's obligations under the Bridge Agreement were limited to "facilitating introductions to potential investors, and meeting with [DCD] upon [DCD]'s reasonable request to discuss placement strategy," (Bridge Agreement at § 4.1, Stricker Aff., Ex. L). The record demonstrates, and defendants acknowledge, that TAIB facilitated introductions to potential investors (Opp. Br. at p. 12; Dadabhoy EBT at pp. 168-170, Stricker Aff., Ex. D).

Defendants also claim that TAIB failed to provide weekly or monthly updates and reports of its efforts. TAIB was not obliged to do so, however, but was instead required to meet with DCD upon its reasonable request to discuss placement strategy. Defendants do not allege that TAIB failed to satisfy this obligation.

Accordingly, TAIB's motion for summary judgment as to its second cause of action to enforce the Guaranty against DCD is granted.

II. Costs and Expenses of Enforcement of Note And Guaranty

TAIB seeks in its first cause of action an award of its costs and expenses in obtaining the judgment against the West End Defendants, including attorneys' fees. In general, legal fees

are only recoverable if provided for by a contractual provision or statutory liability (Coopers & Lybrand v. Levitt, 52 AD2d 493, 496 [1st Dept, 1976]).

Here, the Note provides that the West End Defendants "shall be liable for any and all court costs and all reasonable attorneys' fees incurred by [TAIB] in enforcement of its rights [under the] Loan Documents" (Note at p. 5, O'Donnell Aff., Ex. C). As the Note and Bridge Agreement are included within the definition of the "Loan Documents" (id. at p. 2), and there is no dispute that this action was brought by TAIB to enforce its rights under the Bridge Agreement and Note, TAIB is entitled to reasonable attorneys' fees. Accordingly, that branch of plaintiff's motion for summary judgment as to this cause of action is granted.

III. Defendants' Counterclaims

1. Fraudulent Inducement

Defendants allege that: (i) TAIB and Mamdani represented that they would not seek to enforce the Bridge Agreement or Note and that TAIB would fulfill its obligations under the Bridge Agreement; (ii) defendants reasonably relied on these misrepresentations by entering into the Bridge Agreement and Note; and (iii) defendants have been damaged as a result.

Defendants' claim for fraudulent inducement of the Note fails. While a fraudulent inducement claim may be based upon a party's misrepresentation that payment on a note would not be demanded, such a claim may not proceed if the provisions in the Note bar reliance on such a representation (McCabe v Green, 39 Misc 3d 270, 277 [Sup Ct 2013]). Here, the Note clearly and unambiguously provided that TAIB was to be repaid by October 15, 2008, and the West End Defendants waived "all rights to rely on or enforce any oral statements made prior to, contemporaneously with or subsequent to the signing of" the Note (Note at pp. 5-6).

Defendants' claim for fraudulent inducement of the Guaranty also fails. Such a claim may not stand when the guaranty at issue recites that it is absolute and unconditional regardless of any lack of validity or enforceability of the guaranty or any other circumstance which might otherwise constitute a defense available to a guarantor because these recitals are inconsistent with a guarantor's claim of reliance upon a prior oral representation (Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, 25 NY3d 485, 494 [2015]). The Bridge Agreement contains such a provision:

[the Bridge Agreement] shall be valid and enforceable and shall not be subject to any reduction, limitation, impairment, discharge or termination for any reason ... including the occurrence of any of the following, whether or not the Guarantor shall have had notice or

knowledge of any of them: ... (vii) any defenses, setoffs or counterclaims which any Borrower may allege or assert against any Beneficiary in respect of the Obligations, including failure of consideration, breach of warranty, payment, statute of frauds, accord and satisfaction and usury

(Bridge Agreement 10.3[f]).

Accordingly, that branch of TAIB's motion to dismiss defendants' fraudulent inducement counterclaim is granted (Hotel 71 Mezz Lender LLC v Mitchell, 63 AD3d 447, 448 [1st Dept 2009]; Sterling Nat. Bank v Biaggi, 47 AD3d 436 [1st Dept 2008]), and it is dismissed.

2. Negligent Misrepresentation

To state a claim for negligent misrepresentation, defendants must allege: (i) a special or privity-like relationship between the parties imposing a duty on TAIB to impart accurate information to defendants; (ii) TAIB provided inaccurate information; and (iii) defendants reasonably relied on the information to its detriment (MatlinPatterson ATA Holdings LLC v Fed. Express Corp., 87 AD3d 836, 840 [1st Dept 2011]).

Defendants claim that TAIB had a duty to convey accurately all material information concerning TAIB's intentions as to the Bridge Agreement and Note, but failed to do so. This claim fails for two reasons. First, no special "privity-like" relationship existed here. Such a special relationship may be established by

"persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 180 [2011]). No such relationship existed here -- the Underwriting Agreement establishes that the parties' relationship prior to the execution of the Note and Bridge Agreement was that of an underwriter and issuer, an arm's-length business relationship (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 20-22 [2005]; HF Mgt. Services LLC v Pistone, 34 AD3d 82, 84 [1st Dept 2006]). While there is an exception to this rule if an advisory relationship exists between the underwriter and issuer independent of the underwriting agreement (EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 20-22 [2005]), defendants do not claim that such a relationship existed here.

In addition, TAIB and Mamdani's alleged promise not to enforce the Bridge Agreement and Note is contradicted by the express terms of those agreements, which set forth a date at which payment will become due, require that any modification be in writing (Bridge Agreement at § 11.15, O'Donnell Aff., Ex. B), and disclaim reliance on prior oral representations (Note at pp. 5-6, O'Donnell Aff., Ex. C). As such, defendants' reliance on TAIB and Mamdani's purported promise was unreasonable (Sheth v

New York Life Ins. Co., 273 AD2d 72, 74 [1st Dept 2000]

[purported misrepresentations relied on by plaintiffs may not form basis of claim for negligent misrepresentation where they are contradicted by written agreement between the parties]).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

3. Breach of Fiduciary Duty

To establish a claim for breach of fiduciary duty, defendants must allege: (i) the existence of a fiduciary relationship between the parties; (ii) misconduct by one party; (iii) damage to the other party that directly results from this misconduct (Rut v Young Adult Inst., Inc., 74 AD3d 776, 777 [2d Dept 2010]).

Defendants argue that a fiduciary relationship existed between them and TAIB as a result of "their long-standing relationship and their joint venture partnership in the DC Purchase" (Counterclaims, ¶ 78), and that TAIB therefore had a fiduciary duty to provide defendants with accurate, truthful, timely and complete information concerning its intention to enforce the Note and Bridge Agreement. In that regard, defendants point to their six year relationship with TAIB, in which they worked together on at least four real estate acquisitions. Defendants' contention is unavailing.

Four separate transactions over six years is insufficient to create a fiduciary duty, however (Compare Apple Records, Inc. v Capitol Records, Inc., 137 AD2d 50, 57 [1st Dept 1988] [continuous business relationship of 25 years sufficient time to create fiduciary relationship outside of contract] with Sony Music Entertainment Inc. v Robison, 01 CIV. 6415 (LMM), 2002 WL 272406, at *3 [SDNY Feb. 26, 2002] [six year relationship insufficient to create fiduciary relationship]).

In addition, defendants conclusory claim that they entered into a joint venture with TAIB with respect to the DC Purchase is contradicted by the documentary evidence. The Underwriting Agreement demonstrates that TAIB was simply an underwriter of the DC Purchase, rather than a partner or joint venturer. This underwriter-issuer relationship does not create fiduciary obligations between the parties (HF Mgt. Services LLC v Pistone, 34 AD3d 82, 86 [1st Dept 2006]; Blue Grass Partners v Bruns, Nordeman, Rea & Co., 75 AD2d 791, 791-92 [1st Dept 1980]). Furthermore, while defendants claim that TAIB directly invested in the DC Purchase, in fact this investment was made by Acacia, an independent "spin-off" of TAIB (Dadabhoy EBT at p. 26, Stricker Aff., Ex. D).

Finally, no fiduciary relationship existed under the Bridge Agreement and Note (See Bank Leumi Trust Co. of New York v Block

3102 Corp., 180 AD2d 588, 589 [1st Dept 1992] [relationship between borrower and a bank does not create fiduciary duties between bank and borrower or guarantors].

Accordingly, that branch of TAIB's motion to dismiss this counterclaim is granted, and it is dismissed.

4. Promissory Estoppel

The elements of a claim for promissory estoppel are: (i) a clear and unambiguous promise; (ii) reasonable reliance on the promise by a party; and (iii) injury to that party resulting from this reliance (MatlinPatterson ATA Holdings LLC v Fed. Express Corp., 87 AD3d 836, 841-42 [1st Dept 2011]).

Here, defendants claim they relied on TAIB's promises that TAIB would: (i) not enforce the Bridge Agreement or Note; and (ii) make good faith efforts to place shares in the West End Defendants with new investors, in accordance with Section 4.1 of the Bridge Agreement.

As the alleged promise not to enforce the Bridge Agreement and Note is explicitly contradicted by those agreements -- DCD expressly waived all defenses, setoffs or counterclaims to the Guaranty in the Bridge Agreement, while the West End Defendants waived any reliance on prior oral agreements in the Note -- defendants' reliance on this alleged promise was unreasonable, and their promissory estoppel claim fails (Capricorn Inv'rs III,

L.P. v Coolbrands Intern., Inc., 66 AD3d 409, 410 [1st Dept 2009]). In addition, TAIB's alleged promise to make good faith efforts to place shares in the West End Defendants with investors stems from TAIB's obligations under the Bridge Agreement, and is duplicative of defendants' breach of contract claim (Hoeffner v Orrick, Herrington & Sutcliffe LLP, 61 AD3d 614, 615 [1st Dept 2009]).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

5. Equitable Estoppel

To state a claim for equitable estoppel, defendants must establish that TAIB: (i) made a false representation or concealment of material facts; (ii) with the intention or expectation that the other party will act upon such conduct, and (iii) had actual or constructive knowledge of the true facts (Forman v Guardian Life Ins. Co. of Am., 25 Misc 3d 1224(A) [Sup Ct 2009] aff'd sub nom. Forman v Guardian Life Ins. Co. of Am., 76 AD3d 886 [1st Dept 2010]).

Defendants allege that TAIB promised not to enforce the Bridge Agreement and Note, and to make good faith efforts to place shares in the West End Defendants with new investors even though it knew at the time these promises were made that it intended to enforce defendants' payment obligations under these

agreements and to not make good faith efforts to place shares in the West End Defendants.

To the extent that this claim is flatly contradicted by the Bridge Agreement and Note, it must be dismissed (Hollinger Digital, Inc. v Looksmart, Ltd., 267 AD2d 77, 77 [1st Dept 1999]). In addition, insofar as this claim is based on plaintiff's alleged failure to place shares in the West End Defendants with new investors, the claim for equitable estoppel must be dismissed because it is duplicative of defendants' breach of contract counterclaim (Guerrero v W. 23rd St. Realty, LLC, 45 AD3d 403, 404 [1st Dept 2007]).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

6. Unjust Enrichment

To state a claim for unjust enrichment, defendants must allege that TAIB was enriched at defendants' expense and that it is against equity and good conscience to permit TAIB to retain what it seeks to recover (GFRE, Inc. v U.S. Bank, N.A., 130 AD3d 569, 570 [2d Dept 2015]). Defendants allege that TAIB induced them to recast the Underwriting Agreement as a loan guaranteed by DCD, and then caused a default under the Bridge Agreement and Note by failing to place shares in the West End Defendants with new investors.

A claim for unjust enrichment does not lie, however, where it duplicates or replaces a conventional contract claim (Scarola Ellis LLP v Padeh, 116 AD3d 609, 611 [1st Dept 2014]). Here, defendants' claim duplicates its claim for breach of the Bridge Agreement and Note, discussed infra.

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted (AO Asset Mgt., LLC v Levine, 119 AD3d 457, 460-61 [1st Dept 2014]; Schultz v Gershman, 68 AD3d 426, 427 [1st Dept 2009]), and it is dismissed.

7. Breach of Contract -- Underwriting Agreement

Defendants allege that TAIB breached the Underwriting Agreement by "failing to use all commercially reasonable efforts to solicit investment offers from qualified investors, and failing to use its best efforts to sell down its equity investment in the [DC Purchase] within a year of the date of the agreement" (Counterclaim, ¶ 104). Because these alleged breaches occurred after the Underwriting Agreement was terminated, all claims against TAIB were released (Bridge Agreement at § 2.3, O'Donnell Aff., Ex. B).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted (Penfield v Murray Hill Holding Corp., 281 AD 675, 675 [1st Dept 1952] aff'd sub nom. Penfield v Murray Hill Holding Corp., 306 NY 602 [1953] [plenary suit for

enforcement of alleged contractual rights cannot be maintained in the absence of contract]), and it is dismissed.

8. Breach of Duty of Good Faith and Fair Dealing -- Underwriting Agreement

This claim duplicates defendants' claim for breach of the Underwriting Agreement, and, as such is dismissed (Smile Train, Inc. v Ferris Consulting Corn., 117 AD3d 629, 630 [1st Dept 2014] [claim for breach of implied covenant of good faith and fair dealing may not be used as a substitute for nonviable claim of breach of contract]; StarVest Partners 101 AD3d 610, 613 [1st Dept 2012]; Sheth v New York Life Ins. Co. 273 AD2d 72, 73 [1st Dept 2000]).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

9. Breach of Contract -- Bridge Agreement

Defendants claim that TAIB breached its obligations under sections 4.1 and 10.1 of the Bridge Agreement which obligated TAIB to assist defendants in placing shares in the West End Defendants by: (a) failing to prepare a Private Placement Memorandum, (b) failing to educate its customer representatives regarding the details of the investment in the West End Defendants and (c) failing to introduce the investment to qualified investors.

As discussed supra, however, TAIB's obligations under the Bridge Agreement were limited to facilitating introductions to potential investors and meeting with DCD upon DCD's request to discuss placement strategy. There is no dispute that TAIB introduced defendants to investors, and defendants do not allege that TAIB did not meet with DCD upon DCD's request. As such, this counterclaim must be dismissed.

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

10. Breach of Duty of Good Faith and Fair Dealing -- Bridge Agreement

Defendants allege that TAIB breached its duty of good faith and fair dealing by causing them to default under the Bridge Agreement. Given that the breach alleged in this cause of action duplicates defendants' claim for breach of the Bridge Agreement, this claim must be dismissed (Smile Train, Inc. v Ferris Consulting Corn., 117 AD3d 629, 630 [1st Dept 2014]; see also StarVest Partners 101 AD3d 610, 613 [1st Dept 2012]; Sheth v New York Life Ins. Co. 273 AD2d 72, 73 [1st Dept 2000]).

Accordingly, that branch of plaintiff's motion to dismiss this counterclaim is granted, and it is dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on its first cause of action for an award of attorneys' fees as against

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the West End Defendants is granted, and is respectfully referred to a Special Referee or Judicial Hearing Officer to hear and report -- or, if the parties so-agree, to hear and determine -- the amount of reasonable attorneys' fees due and owing to plaintiff; and it is further

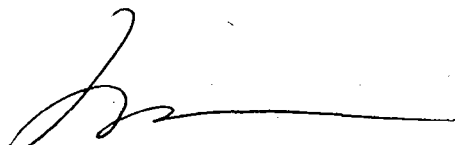
ORDERED that plaintiff's motion for summary judgment on its second cause of action seeking enforcement of the Guaranty is granted, and is respectfully referred to a Special Referee or Judicial Hearing Officer to hear and report -- or, if the parties so-agree, to hear and determine -- the amount due and owing to plaintiff under the Guaranty; and it is further

ORDERED that plaintiff is directed, within fourteen days from the date hereof, to serve a copy of this order with notice of entry, together with a completed Information Sheet upon the Special Referee Clerk in the General Clerk's Office, who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that plaintiff's motion to dismiss defendants' counterclaims is granted, and they are dismissed.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/16/16


HON. JEFFREY K. OING, J.S.C.