SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

CREDIT AGRICOLE CORPORATE and INVESTMENT BANK NEW YORK BRANCH, f/k/a CALYON NEW YORK BRANCH, *et al.*,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

UBS AG, STAMFORD BRANCH AND UBS LOAN FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

AND RELATED COUNTERCLAIMS

Index No. 651989/10

Mot. seq. no. 022

DECISION AND ORDER

BARBARA JAFFE, JSC:

Based on defendants' conduct as bidders in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561 [1st Dept 2016]) and thereafter, plaintiffs assert contract and other claims against them.

Defendants BDC Finance, LLC. Black Diamond Capital Management, LLC, Black Diamond CLO 2006-1 (Cayman), Ltd., Black Diamond Commercial Finance, LLC and GSC Acquisition Holdings, LLC (together, defendants), move pursuant to CPLR 3025(b) for an order granting them leave to amend their answers to assert the defenses of champerty and lack of

capacity to sue.

I. BACKGROUND

This intercreditor dispute arises from a secured syndicated loan to a nonparty borrower that filed for bankruptcy. Plaintiffs held secured interests as creditors in the loan, although some defendants held most of the interests, also as secured creditors, and other defendants administered the loan or controlled the collateral which was sold during the bankruptcy proceeding. Plaintiffs seek damages for breach of contract and breach of the implied covenant of good faith and fair dealing.

II. APPLICABLE LAW

A. CPLR 3025

> Leave to amend a pleading shall be freely given absent prejudice or surprise resulting directly from the delay. The movant need not establish the merit of [its] proposed new allegations, but only that the proffered amendment is not palpably insufficient or clearly devoid of merit.

(CPLR 3025). The court is "not required to accept . . . allegations as true on a motion to amend." (*Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). Thus, to demonstrate that a proffered amendment is neither palpably insufficient nor devoid of merit, the movant must offer an affidavit of merits and evidentiary proof sufficient to support a motion for summary judgment. (*McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016]; *Bag Bag*, 129 AD3d at 649).

> Any alleged prejudice must arise from the newly pleaded fact or facts, and
>
> [t]here must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.

(*Jacobson v Croman,* 107 AD3d 644, 645 [1st Dept 2013] [internal quotation marks and citation

omitted]). That additional discovery or time to prepare a case is needed does not preclude the grant of leave (*id.*), nor does delay in moving (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]). Even "where the amendment is sought after a long delay, and a statement of readiness has been filed," the amendment may be granted, although the court must exercise discretion in doing so with circumspection, prudence, and caution. (*Cseh v New York City Tr. Auth.*, 240 AD2d 270, 272 [1st Dept 1997]).

B. Champerty

> [N]o corporation or association ... shall solicit, buy or take 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.

(Judiciary Law § 489). The statute derives from ancient law, the intent of which was "to prevent or curtail the commercialization of or trading in litigation." (*Justinian Cap. SPC v WestLB AG*, __ NE3d __, 2016 WL 6270071, 2016 NY Slip Op 07047, *quoting Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 729 [2000]). "[S]imply intending to bring a lawsuit on a purchased security is not champerty, but when the purchase of a security was 'made for the very purpose of bringing such suit' that is champerty because 'this implies an exclusion of any other purpose.'" (*Justinian Cap. SPC*, __ NE3d __, 2016 WL 6270071, 2016 NY Slip Op 07047, *quoting Moses v McDivitt*, 88 NY2d 62, 65 [1882]). Thus, the statute does not bar a transfer or assignment when its goal is the collection of a legitimate claim. (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1 v Love Funding Corp.*, 13 NY3d 190, 201 [2009]; *Red Tulip, LLC v Neiva*, 44 AD3d 204, 213 [1st Dept 2007]). Thus, where a claim "would not be prosecuted if not stirred up in an effort to secure costs," it is prohibited. (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc.*, 13 NY3d at 201).

III. CONTENTIONS

In seeking leave, defendants assert that, after the underlying loan was extinguished in the bankruptcy proceeding and while this case was pending, certain plaintiff-lenders transferred their claims and interests in the loan to third parties for insufficient consideration in violation of Judiciary Law § 489, and that but for these transfers, the claims would have been abandoned or sold to a defendant willing to pay a higher price. According to defendants, the proposed champerty defense will defeat a substantial portion of plaintiffs' claims and cause no prejudice or surprise, as the underlying circumstances came to their attention in 2015 through discovery about the transfers. They claim that they satisfy the requirements set forth in CPLR 3025 by alleging that the transfers were made with the intent and purpose of bringing an action in violation of Judiciary Law § 489. (NYSCEF 514 [unredacted version]).

Defendants allege that some of the transferor-plaintiffs are investment entities based in the Cayman Islands, that they are intentionally self-limited in duration, and that, in the ordinary course of business, they wound down their operations and sold their assets, some through side loan participation agreements whereby all causes of action were assigned along with a promise to share in the economies of the loan going forward, with the transferor remaining as lender of record. As the loan was extinguished in July 2011, however, all that remained to be conveyed was the assignment of the claims. (*Id.*).

In opposition, plaintiffs assert that champerty cannot be established, as a matter of law, as defendants do not demonstrate that any transactions "stirred up" a litigation that would not otherwise have been brought, intending to harass defendants or generate costs. They argue that in seeking leave, defendants delayed over four years after becoming aware of the transfers, and

that the delay is prejudicial because defendants have, in bad faith, effectively put off resolving the action, and that allowing the amendment will require additional discovery on this issue, further delaying resolution. (NYSCEF 537 [unredacted version]).

In reply, defendants newly argue that the champertous nature of the transfers is reflected in the interplay of the loan participation agreements and the "lock up provision" in plaintiffs' fee agreement/retainer (retainer) with their counsel. (NYCEF 573 at 3-7). They maintain that the lock-up provision penalizes any plaintiff seeking to abandon or withdraw its claims by charging it with its share of accrued hourly counsel fees in addition to the contingency fee, while permitting, without penalty, the sale of its claims to another plaintiff or a party approved of by a majority of plaintiffs. They contend that the lock-up provision encourages plaintiffs to remain in the case, thereby leading to legal fees which would not exist if the claim had been withdrawn or discontinued, and that a scale of potential claims is required under the retainer agreement before the litigation would be worth counsel's while. They also maintain that having sufficiently shown that the transfers were intended to assert claims that would not otherwise continue to be prosecuted, solely to secure costs and profit from the litigation, the transfers made pursuant to the lock-up provision were made with the intent and for the purpose of bringing an action thereon. They deny that there is any relevance to whether some of the transferees were already parties to the litigation at the time of the transfers, and contend that a grant of leave to conduct discovery on the issue of champerty over plaintiffs' objection constitutes the law of the case, thereby requiring that they be granted leave to amend.

Defendants submit an email in which employees of a plaintiff expresses concern over whether an assignment is champertous, and assert that the claim that certain plaintiffs lack

capacity arose within weeks before the note of issue was filed, and not long after plaintiffs' most recent production of documents relating to champerty. (NYSCEF 573 [unredacted version]).

In a permitted sur-reply, plaintiffs contend that defendants impermissibly raise a new argument based on the retainer fee arrangement and that the argument is frivolous and unsupported. (NYSCEF 1070).

III. ANALYSIS

As this motion was made some three weeks after the note of issue was filed, and the related discovery was exchanged as late as August 2015, the delay is minimal. Having been filed post-note, however, the motion must be supported by nonconclusory allegations and the court's examination of the merit of the amendment is required. (*Bag Bag*, 129 AD3d at 649; *see e.g. See Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]). Absent any authority cited for the proposition that leave to conduct discovery on an issue subsequently bars the opposing party from advancing the same arguments made in opposition to a motion to amend, I decline to so hold.

A. Transfers in issue

1. Green Lane to Security

One of the challenged transfers was made by Green Lane CLO Ltd. to Security Benefit Insurance Company (Security). As Security is not and has never been a party in this action, the transfer is not champertous as a matter of law.

2. UBS to Echo

In October 2013, UBS AG, Stamford Branch, and UBS Loan Finance LLC (together, UBS), a lender on the loan, filed a complaint and moved to intervene in this case. (NYSCEF

143). In November 2013 it transferred its claim against defendants to Echo Investments II, Ltd. (Echo). Therefore, given UBS's preexisting interest in the loan (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1*, 13 NY3d at 201), and the fact that it sold its interest and did not buy an interest, it did not "solicit, buy or take an assignment of ... a bond, promissory note . . . or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action . . . thereon," in violation of Judiciary Law § 489.

B. Landmark to Stone Lion

The remaining allegedly champertous transfers are those made by former plaintiffs Endurance CLO I Ltd. (Endurance), Landmark III CDO, Ltd., and Landmark IV CDO, Ltd. (Landmark) to plaintiffs Stone Lion Portfolio, LP and Permal Stone Lion Fund. Ltd. (collectively, Stone Lion plaintiffs), after the loan was extinguished. The Stone Lion purchasers were party plaintiffs in this action when the complaint was filed in May 2011 (NYCEF 39, 83), well before the transfers. At the time, Endurance and Landmark were plaintiffs in this action, and all plaintiffs sought injunctive relief and compensation under the agreements governing the loan and collateral securing the debt.

The transfers were thus made by existing plaintiffs purchasing the claims of other existing and similarly situated plaintiffs in a litigation concerning the same loan and loan documents, and was being prosecuted by the same counsel. As the transferees were already plaintiffs litigating claims for different fractional interests of the same loan, they did not purchase additional claims in order to commence vexatious litigation or profit from litigating them (*see SB Schwartz & Co., Inc. v Levine*, 82 AD3d 742 [2d Dept 2011] [transaction not champertous if purpose of

transaction is to enforce legitimate claim]; *Rozen v Russ & Russ, P.C.*, 76 AD3d 965 [2d Dept 2010] [defendant acquired rights in order to enforce them, not to profit from litigating them]; *Promenade v Schindler Elev. Corp.*, 39 AD3d 221 [1st Dept 2007], *lv dismissed* 9 NY3d 839 [plaintiff did not accept assignment for sole purpose of bringing claim as investment or to harass or injure]), but instead continued the litigation of alleged wrongs (*see Wetmore v Hegeman*, 88 NY 69 [1882] [claim was purchased after lawsuit had commenced and was pending and prosecuted by same attorneys]; *Madison 96th Assocs., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409 [1st Dept 2014] [assignment not champertous as action commenced before assignment and purpose of assignment was to enforce legitimate claim]; *71 Clinton St. Apts. LLC v 71 Clinton Inc.*, 114 AD3d 583, 584 [1st Dept 2014] [no champerty claim in mortgage foreclosure action where plaintiff acquired loan for purpose of obtaining judgment of foreclosure on default mortgage "in a proceeding that was already under way"]; *Al Sari v Alishaev Bros., Inc.*, 121 AD3d 506 [1st Dept 2014] [assignment from non-party to defendant not champertous as plaintiff already suing defendant and defendant had counterclaim against plaintiff]; *Fahrenholz v Sec. Mut. Ins. Co.*, 13 AD3d 1085 [4th Dept 2004] [as loans were made after action commenced and pending, they were not made with intent and purpose of bringing action]; *Bellarno Intern. Ltd. v Irving Trust Co.*, 165 AD2d 809 [1st Dept 1990] [plaintiff was not stranger to underlying transaction and action had commenced and was pending]; *Coopers and Lybrand v Levitt*, 52 AD2d 493 [1st Dept 1976] [litigation underway at time of assignment]; *Sygma Photo News, Inc. v Globe Intern., Inc.*, 616 F Supp 1153 [SD NY 1985] [assignment occurred after plaintiff had already filed lawsuit and obtained preliminary relief]; *cf. Richbell Info. Svces., Inc. v Jupiter Partners*, 280 AD2d 208 [1st Dept 2001] [trial court rejected argument that assignment not

champertous as made after litigation commenced, observing that upon assignment assignee filed amended complaint three times as long as original one and asserted 21 new causes of action; however, motion to dismiss action based on champerty defense denied as factual issues remained as to purpose of assignment]; *Ehrlich v Rebco Ins. Exchange, Ltd.*, 225 AD2d 75 [1st Dept 1996], *lv dismissed* 89 NY2d 1029 [1997] [assignment was champertous as, even though action pending, assignment made to allow assertion of new claims in action in form of counterclaims]).

Defendants have thus failed to show that Stone Lion plaintiffs purchased the claims "with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs." (*Trust for Certificate Holders of Merrill Lynch Mtge. Invs., Inc. Mtge. Pass-Through Certificates, Series 1999-C1*, 13 NY3d at 201 [citation and internal quotation marks omitted]).

In stark contrast is *Justinian Cap. SPC v WestLB AG*, __ NE3d __, 2016 WL 6270071, 2016 NY Slip Op 07047 [2016]). There, the plaintiff, a Cayman Islands shell company with little or no assets, acquired notes by assignment from a nonparty, and within days, commenced an action against the defendants for fraud relating to the steep decline in value of the notes following the nonparty's purchase of the notes from the defendants. The purpose of the assignment of the notes to the plaintiff was for the nonparty to avoid certain governmental repercussions in bringing its own action against the defendants. The nonparty thus agreed to assign the notes to the plaintiff in exchange for $1 million, with the plaintiff prosecuting the action against the defendants and retaining 20 percent of any proceeds from the action. Additionally, the assignment was not contingent on the plaintiff's payment of the $1 million.

Rather, the failure of the plaintiff to pay was to result in interest accruing on the $1 million, and a reduction to 15 percent of the plaintiff's share of the proceeds. The plaintiff never paid the nonparty, and the nonparty did not demand payment.

The Court found that there was no evidence that the assignment was for any purpose other than the commencement of the lawsuit, and that the "very essence" of the assignment was to sue on the notes, characterizing the parties' agreement as a "sham transaction between the owner of a claim which did not want to bring it (the nonparty) and [plaintiff] . . ." (*Id.*). These facts are manifestly distinct from those alleged with respect to the Stone Lion transfers. Moreover, in *Justinian*, neither the purchaser nor the seller were parties to any litigation involving the notes before agreeing to their assignment, and the litigation was commenced after the sale. (*Id.*).

Defendants' allegations that the former plaintiffs may have abandoned their claims or sold them back to Black Diamond is irrelevant, and while the lock-up provision may result in increased counsel fees and discourage a plaintiff from abandoning its claims or selling potential recovery interests back to Black Diamond, nothing in Judiciary Law § 489 prohibits such a provision. Defendants do not otherwise dispute plaintiffs' contention that the retainer is a standard contingency agreement.

Defendants thus fail to establish that the proposed champerty defense is not palpably insufficient or clearly devoid of merit. (*See Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015] [citations and quotation marks omitted] [denying amendment to add corporation through corporate veil piercing]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] [amendments granted if proposed amendment not "palpably insufficient or

clearly devoid of merit").

B. Lack of capacity defense against Endurance

1. Contentions

Defendants assert that Endurance, a Cayman Islands entity which allegedly effected a champertous transfer to Stone Lion, then dissolved, and thus has no capacity to sue and was thereafter unable to maintain a claim with any possibility that it would revert to it. (NYSCEF 514 [unredacted version]). Plaintiffs argue that New York law permits a dissolved corporation to maintain an action. (NYSCEF 537 [unredacted version]).

Defendants, for the first time in reply, and plaintiffs, in a permitted surreply, rely on Cayman Islands law to dispute Endurance's capacity to bring suit after dissolution. Defendants also allege that they became aware of the facts underlying the lack of capacity defense weeks before the note of issue was filed, and not long after plaintiffs' most recent production of documents relating to champerty, and that there is no surprise to plaintiffs that a member of their group no longer exists. (NYSCEF 573 [unredacted version]; NYSCEF 1070). Plaintiffs also observe that the case law submitted by defendants does not address whether a Cayman Islands entity's claims in a pending lawsuit are extinguished upon the entity's dissolution. (NYSCEF 1070).

2. Analysis

"Capacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review." (*Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs.*, 5 NY3d 36, 41 [2005]). Moreover, CPLR 3016(e) provides that "[w]here a cause of action or defense is based upon the law of a foreign country or its political subdivision, the

substance of the foreign law relied upon shall be stated," and pursuant to CPLR 4511(b), the court may take judicial notice of foreign law if the party seeking it requests such notice, furnishes the court with sufficient data to enable it to take judicial notice, and notifies adverse parties that notice is being sought.

Here, defendants fail to mention Cayman Islands law in their moving papers or provide an affidavit of merit, and I decline to review the submissions concerning Cayman Islands law where no expert counsel affidavit or other evidence is provided. (*See Sea Trade Maritime Corp. v Coutsodontis*, 111 AD3d 483 [1st Dept 2013] [among evidence court may consider in determining whether to take judicial notice of foreign law are copies of statutes or expert affidavits interpreting relevant law when accompanied by documentary evidence]; *Ponnambalam v Sivaprakasapillai*, 35 AD3d 571 [2d Dept 2006] [court did not err in failing to apply Sri Lankan law as plaintiff did not plead substance of foreign law to be applied as required by CPLR 3016(e), and failed to provide court with sufficient information to enable it to take judicial notice of law at issue pursuant to CPLR 4511(b)]; *see also JPMorgan Chase bank, NA v Motorola, Inc.*, 47 AD3d 292 [1st Dept 2007] [as no expert opinion on Indian law offered, court declined to interpret Indian legal materials absent such guidance]; *MediaXposure Ltd. [Cayman] v Omnireliant Holdings, Inc.*, 29 Misc 3d 1215[A], 2010 NY Slip Op 51835[U] *10 [Sup Ct, NY County 2010] [citing cases]). Defendants therefore fail to demonstrate that their lack of capacity defense is not palpably insufficient or clearly devoid of merit.

III. CONCLUSION

In light of this result, I need not address plaintiffs' assertion of prejudice, nor arguments defendants raise for the first time in their reply papers that certain other plaintiffs are not the real

parties in interest and therefore lack standing to sue are not considered. (*See Weksler v Weksler*, 140 AD3d 491 [1st Dept 2016] [argument improperly made for first time in reply]).

Accordingly, it is

ORDERED, that the motion of defendants BDC Finance, LLC. Black Diamond Capital Management, LLC, Black Diamond CLO 2006-1 (Cayman), Ltd., Black Diamond Commercial Finance, LLC and GSC Acquisition Holdings, LLC for leave to amend their answers is denied.

ENTER:

Barbara Jaffe, JSC

DATED: November 30, 2016
New York, New York

BARBARA JAFFE
J.S.C.