Credit Agricole Corp. v BDC Finance, LLC
2017 NY Slip Op 30347(U)
February 23, 2017
Supreme Court, New York County
Docket Number: 651989/10
Judge: Barbara Jaffe
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
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.

Index no. 651989/10

Mot. seq. no. 027

DECISION and ORDER

UBS AG, STAMFORD BRANCH AND UBS LOAN FINANCE LLC,

Plaintiffs,

-against-

BDC FINANCE, LLC, *et al.*,

Defendants.

AND RELATED COUNTERCLAIMS

BARBARA JAFFE, JSC:

Based on defendants' conduct in a bankruptcy proceeding auction (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]), and thereafter, plaintiffs assert contract and other claims against them. Defendant Black Diamond Commercial Finance LLC (agent) moves, pursuant to CPLR 3212, for an order granting it a summary dismissal of counts I, II, III, IV, V, and IX of the amended complaint (NYSCEF 83) and counts I, II, III and IV of the complaint in intervention (NYSCEF 153) (together, the complaint).

I. BACKGROUND

The facts of this case have been discussed in prior decisions, including for motion sequence numbers 24 and 26, familiarity with which is presumed. Black Diamond Capital Management, LLC (BDCM), BDC Finance, LLC and Black Diamond CLO 2006-1 (Cayman), Ltd. (together with BDCM, BDC Lenders), and some plaintiffs held interests in a syndicated loan and were parties to the related loan agreement (credit agreement). The loan was made to a nonparty borrower, GSCP (NJ), LP (together with certain of its affiliates, GSC).

Through a security agreement (with the credit agreement, the credit documents), GSC pledged almost all of its assets as security for the repayment of the loan. The security agreement is referenced in the related credit agreement (*see eg* credit agreement §§ 10.13, 10.14, 11 [definitions]). BDC Lenders became the holder of approximately 51 percent of the loan interests, assuming the role of required banks under the credit documents. Plaintiffs claim, collectively, about 30 percent of the loan interests.

BDC Lenders appointed the agent, its affiliate, as the administrative agent under the credit agreement and the collateral agent under the security agreement, to which the agent is a party, on behalf of the secured creditors, which includes BDC Lenders and plaintiffs or their assignees. Under the security agreement, the agent could exercise remedies in order to obtain the collateral in the event of certain types of borrower defaults, such as occurred. GSC received bankruptcy court authorization to sell the loan collateral in an auction (*see* 11 USC § 363). BDC Lenders and the agent won the auction, with a joint bid in which the agent bid the debt owed by GSC.

Thereafter, plaintiffs proposed an alternate reorganization plan. In December 2010, GSC terminated the sale, and the bankruptcy court then appointed a trustee for the GSC estate. In May 2011, the trustee agreed to enter into a sales transaction with BDC Lenders and sought approval of the sale of the substantial majority of GSC's assets, which the bankruptcy court granted. Two asset purchase agreements executed for the sale reflect a credit bid of the entirety of GSC's debt obligations. With the July 26, 2011 closing, the agent delivered a payoff letter deeming GSC's loan obligations paid and satisfied. GSC's assets were transferred to defendant GSC Acquisition Holdings, LLC (GSCAH). The parties rely on the credit documents; there is no separate intercreditor agreement.

A. The agent's affidavit

In an affidavit, Hugo H. Gravenhorst, the agent's managing director, states that the agent: (1) submitted a credit bid to acquire some, or all, lots of assets offered at the bankruptcy auction and declined to join its credit bid, other than with BDC Lenders, at the required banks' instruction; (2) received a direction letter from the required banks instructing the agent to credit bid on October 31, 2010 and May 23, 2011; and (3) signed the payoff letter with the July 26, 2011 closing. Gravenhorst also states that the agent was represented by separate counsel at the auction, and recalls that GSC's financial advisor announced that the bidding procedures had been modified to allow joint bidding, but learned after the auction that the minority lenders' consent to a joint bid included a reservation of rights to claims against the agent and BDC Lenders. Having failed to set forth a basis for stating that the reservation of rights was not disclosed to BDC Lenders, that statement is inadmissible.

According to Gravenhorst, he received, as proceeds from the GSC sale, $5 million from

GSC in partial payment of GSC's loan obligations at the July 2011 closing, which he deposited into the agent's bank account, applying approximately $3.72 million of the amount to reimburse sales expenses in accordance with the credit agreement, and holding the balance as a reserve against future expenses. At an unspecified time, he maintains, the agent was assigned a $6.7 million promissory note from GSC, in partial payment of the loan obligations, through an assignment/assumption agreement, dated as of the closing, and continues to hold the $6.7 million note, which has not matured, on behalf of the former lenders. Gravenhorst states that in connection with the July 2010 closing, the agent received 100 percent of the class A membership interests in GSCAH, pursuant to an instruction letter from the required banks directing the agent to accept these interests as consideration for the credit bid in the asset purchase agreements, to be held by the agent in its capacity as collateral agent and treated in accordance with the credit document terms. He also alleges that, on April 28, 2012, nine months after the closing, the agent distributed these interests to each of the former lenders, based on their pro rata interest in the loan, and that the agent's compensation for its role was pursuant to a fee agreement entered into with GSC prior to the bankruptcy filing.

B. The agent's contentions concerning the credit bid, sale to GSCAH and distribution

In a memorandum of law, the agent contends that it offset the balance of the GSC loan against the amount it credit bid, pursuant to 11 USC § 363(m), as a result of which the loan was repaid in full, and GSC's obligations were deemed satisfied. Thus, it executed the payoff letter. It also contends that the GSCAH LLC agreement was amended to reflect the sales transaction, allotting the class A membership interests to the class A members, which included only assets that GSCAH acquired pursuant to the agent's credit bid.

The agent states that credit agreement § 10.14 contains the principal methods for distributing proceeds it received from the sale, as security agreement § 6.5 concerns only moneys the agent received or collected. It maintains that, under either credit agreement § 10.14 (a), or security agreement § 6.5(a)(I), it was first to receive its reasonable costs and expenses, and indemnification, after which, under credit agreement § 10.14(b), certain expenses of others are to be paid. The agent then asserts that credit agreement § 10.14©, (d), and security agreement § 6.5(a)(ii) require the payment, in cash, pro rata, of interest, principal and other miscellaneous sums for amounts constituting obligations under the contracts, and in a footnote, that these provisions were inoperative after the GSC sale closed, because no obligations remained due as of then, due to the exchange of the payoff letter deeming them satisfied upon the credit bid. The agent notes that plaintiffs admit in the complaint that the loan was extinguished .

The agent contends that it received the GSCAH LLC class A membership interests due to the exercise of the credit bid, on behalf of all lenders, making the former lenders "lawfully entitled" to these interests (credit agreement § 10.14 [e]; security agreement § 6.5 [a] [iii]), and distributed the interests based on the lenders' pro rata interest in the loan. The agent explains that it holds the balance of the $5 million cash in reserve for future expenses or indemnification, but otherwise on behalf of the secured creditors under security agreement § 6.1(d), which permits it to hold proceeds pending application under security agreement § 6.5. Until the note matures, it maintains, there is no way to distribute it under the credit documents.

II. DISCUSSION

The proponent of a summary judgment motion must demonstrate, *prima facie*, entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*). When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A. Contract interpretation

"When the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document . . ." (*ABS Partnership v AirTran Airways*, 1 AD3d 24, 29 [1st Dept 2003]), and the court should enforce the writing according to its terms (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 474 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). The court should strive to give a fair and reasonable meaning to the language, in light of the purpose and intent of the agreement as a whole (*Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 9-10 [1997]), and "every part [of the contract] will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324-325 [2007] [internal quotation marks and citation omitted]), "in the context of the parties' relationship and circumstances" (*Matter of Riconda*, 90 NY2d 733, 738 [1997]). "[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations." (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977] [internal quotation marks and citation omitted]). It is well settled "that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties" (*Cole v Macklowe*, 99 AD3d 595, 596 [1st Dept 2012]), or in a manner that renders portions of it meaningless.

B. Limitations on liability/exculpatory provisions

Sophisticated contracting parties may limit liability in agreements. Such limitations should be enforced as "represent[ing] the parties' Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor." (*Metropolitan Life Ins. Co. v Noble Lowndes Intl*, 84 NY2d 430, 435, 436 [1994] [enforcing damages limitations for lost profits, loss of business, or other financial loss resulting from breach/non-performance and determining that willful acts, an exception to the limitation, did not include intentional breach, in the economic interest of the party that decided not to perform, as opposed to other types of breaches]). However, "[l]imitations on a party's liability . . . to be enforceable must be clearly, explicitly and unambiguously expressed in a contract [and] are . . . strictly construed against the party seeking to avoid liability." (*Terminal Cent. v Modell & Co.*, 212 AD2d 213, 218-219 [1st Dept 1995]; *compare Madison Hudson Assoc. LLC v Neumann*, 44 AD3d 473, 481 [1st Dept 2007] [enforcing explicit and unambiguously expressed limitation on damages to return of capital contribution]). Bad faith, wrongful conduct or gross negligence may bar enforcement of exculpatory agreements. (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 385 [1983]).

C. Breach of contract (count IV)

1. Contentions

In count IV of the complaint, plaintiffs claim that the agent breached credit agreement § 12.5 and security agreement § 6.1 by following the instructions of the required banks to submit an inflated credit bid that was neither reasonable nor for the benefit of the secured creditors, and that the agent should have joined with other bidders to avoid harm to the secured creditors. They allege that the agent agreed to submit credit bids in connection with the asset purchase agreements that extinguished the lenders' $257 million claim against GSC, but took no steps to ensure that plaintiffs would receive their ratable share of the collateral, which was part of a strategy to siphon collateral to the agent's affiliates and avoid the credit agreements' pro rata sharing provisions. Plaintiffs maintain that by releasing the liens on the collateral in the security agreement in this manner, the agent purported to effectuate a waiver under credit agreement § 14.12, to which plaintiffs did not consent, thereby breaching that provision.

The agent argues that it complied with its contractual duties to follow instructions it received from the required banks, to credit bid in support of the GSC sale, and it thus applied the proceeds it received from the sale pursuant to the contractual requirements. In response to plaintiffs' allegations that it refused to join bids with other bidders and follow the required banks' instruction to credit bid, releasing the liens and security interests the agent held on those collateral assets, the agent contends that it is contractually required to follow instructions of the required banks with respect to the realization of the collateral upon a default and that it is insulated from liability for conduct in accordance with such instructions.

The agent relies on credit agreement § 10.13 and security agreement § 6.1, which provide that "the Secured Creditors agree that [the security agreement] may be enforced only by the action of the Collateral Agent, in each case acting upon the instructions of the Required Banks." It maintains that section 6.1 reflects that, in exercising the powers it holds, it follow the instructions of the required banks, and that, in the event of a default, its powers and rights are those of a secured lender, including to sell collateral "for cash, on credit or for other property," to bid for and purchase collateral, on behalf of the secured creditors, at any sale and to set off any or all of the collateral against the loan, or to exercise any other right, power or remedy available "by law" (security agreement § 6.1[k], [l]). The agent contends that credit agreement § 12.4, which provides that it be "fully protected," underscores its limited, ministerial role, and means that it is fully protected if it receives and acts pursuant to an instruction from the required banks, that it would be fully justified in declining to act if it received no instruction or, under that circumstance, may choose to act of its own accord, demanding indemnity before doing so.

The agent claims that credit agreement § 12.3 is exculpatory, and that it acted lawfully by following the required banks' instruction to credit bid, as the contract requires that it follow such instructions and authorizes its powers. The agent otherwise states that plaintiffs' accusation of gross negligence/willful misconduct lacks evidentiary support and ignores case law providing that a damages limitation provision is not circumvented even where a party intentionally declines to perform its contractual obligations for financial self-interest. It also relies on the exculpatory provision of security agreement § 6.1(k) and on credit agreement §§ 12.1, 12.3 relieving it of any fiduciary duties. The agent asserts that the provision in credit agreement § 12.5 requiring that it "take such action with respect to such Default or Event of Default as shall be reasonably directed by the Required Banks," and the indemnification provisions demonstrate that it is accorded maximum protection when fulfilling this responsibility in order to facilitate the unitary enforcement structure set forth in security agreement § 6.1. Citing credit agreement §§ 12.4 and 12.7, the agent maintains that it could rely on statements or documents believed by it to have been made by a proper person, and decline to take any action absent an instruction from the required banks, or that it believed that it lacked adequate indemnity.

The agent challenges what it characterizes as plaintiffs' claim that it should have followed plaintiffs' preferred restructuring outcome, as contrary to the intended unitary enforcement structure, in which the required banks have the right to control the agent and the realization of collateral. Had it failed to follow the required banks' instructions, it maintains, it would have violated its obligation to do so, and that an interpretation of the agreements as requiring the agent to either violate this obligation, or some obligation to the minority lenders, would lead to absurd results. The agent argues that it shared proceeds it received, properly applying them in accordance with the contract documents.

In opposition, plaintiffs argue that the agent is not entitled to summary judgment because it has not addressed its contractual obligations under the credit documents, which it breached in participating in the GSC sale to GSCAH. Plaintiffs state that the agent's argument that it had no actionable duties is contrary to credit agreement § 10.13(iii) which requires that it enforce the security documents as a collateral agent thereunder, and incorporates the provision set forth in security agreement § 6.1 requiring that it follow the required banks' instruction to enforce that agreement "for the benefit of the Secured Creditors." They argue that, without this promise, a creditor would not be secured, and would not forego its rights to enforce security interests, and that the agent should not have taken predatory directions that harmed the secured creditors. Plaintiffs interpret credit agreement § 12.5 as a limitation on the agent's blind reliance on the required banks' instructions where unreasonable, predatory to secured creditors' recoveries, and not in their best interests, and argue that the agent's interpretation of credit agreement §§ 10.13 and 12.5 renders security agreement § 6.1 meaningless.

Plaintiffs argue that the evidence establishes that the agent accepted unreasonable instructions concerning the sale to GSCAH which are contrary to the secured creditors' interests, the scope of the credit documents, and contractual agency requirements. In support, they rely on Gravenhorst's testimony, which they say demonstrates that he (1) had no general knowledge as to which assets were purchased with the credit bid, or their value in relation to the bid amount, or knowledge as to what recoveries the secured creditors would receive; (2) delivered the payoff letter to GSC releasing liens on substantially all of the collateral, extinguishing the GSC loan, for no known recoveries to the secured creditors, without consulting counsel, and considering only the directions of Stephen Deckoff, who controls BDC Lenders, even though defendants' expert submitted an opinion that just a portion of the collateral was worth $157 million; and (3) did not see the GSCAH LLC agreement terms concerning the interests in the collateral that the secured creditors would receive for the credit bid until after the sale's closing.

Plaintiffs contend that the unreasonableness of the instructions is underscored by the express pro rata sharing design of the agreements, reflected in credit agreement §§ 10.14, 14.7, and security agreement § 6.5 (a) (ii), which demonstrate a collective design in which lenders "share the risks of potentially unequal treatment." (*Beal Sav. Bank v Sommer*, 8 NY3d at 329; *Credit Francais Intl. v Sociedad Fin. de Comercio*, 128 Misc 2d 564, 578 [Sup Ct, NY County 1985] [sharing provisions designed "to prevent any participating bank from obtaining an undue preference over another"]; *see also Prudential Ins. Co. of Am. v WestLB AG*, Index No. 650371/2009 [Sup Ct, NY County Oct. 12, 2012] [assets acquired with credit bid were to be distributed pro rata]). Plaintiffs argue that entry into the asset purchase agreements was contrary to their interests and nullified the pro rata distribution arrangement, transferring all collateral to

GSCAH, owned and controlled by Deckoff, with GSCAH ownership interests distributed according to his discretion. The predictable result, plaintiffs contend, is that they have received nothing. As the agent answered, in an interrogatory that, in its view, the secured creditors were "oversecured" (West affirmation, ¶ 64 [citing exhibit X]), plaintiffs assert that, had the agent acted for the secured creditors' benefit, it would not have agreed to deliver the payoff letter and release the liens for less than a 100 percent recovery for them, citing in support, *In re Pine Lake Vill. Apt. Co.*, 19 BR 819, 825 (Bankr SD NY 1982).

Plaintiffs challenge the agent's reliance on the bankruptcy court's opinion, note that the agent's argument about credit agreement § 12.4 was rejected by the First Department, and deny that credit agreement § 12.3 exculpates the agent, as it engaged in willful misconduct and acted in bad faith to assist its affiliates in enriching themselves at the expense of other secured creditors. They assert that these circumstances do not present a simple disagreement with the agent's judgment calls made in good faith reliance on Deckoff's instructions, as the agent admitted having knowingly taken actions detrimental to the lenders based solely on them, which is either not exculpated, as a matter of law, or presents a triable issue as to whether it constitutes bad faith or willful misconduct.

In reply, the agent argues that it complied with its duties to follow instructions of the required banks and to distribute proceeds, that it had the right to credit bid at the direction of the required banks, that the provision in security agreement § 12.4 is a standard for agents, with protections also reflected in security agreement § 6.1(k), credit agreement § 12.3, and other provisions. The agent denies that credit agreement § 12.5 imposes on it an affirmative duty to the plaintiffs, but is intended to give it grounds on which to decline to follow the required banks' instructions, where unlawful or contrary to the contract, and it interprets security agreement § 6.1 as providing that the agent may not act for its own account in realizing upon collateral, not that the agent must act for the benefit of the secured creditors. The agent contends that it acted for the secured creditors' account by supporting a sale under which they are to receive $49 million in value, that the GSCAH assets have substantial value, and that plaintiffs will be receiving a distribution from GSCAH, as the agent is in the process of distributing cash and some assets, totaling $32 million to former lenders, with $17 million remaining, which is not, as plaintiffs argue, nothing. The agent deems plaintiffs' lack of response concerning the distribution as mandating dismissal of any claim relating thereto, and asserts that the structuring of the sale to GSCAH is standard in a loan restructuring of this type, giving plaintiffs beneficial ownership of assets acquired on their behalf with the credit bid.

2. Analysis

The bankruptcy court, in approving the sale, addressing good faith under the bankruptcy law, and discussing the agent's conduct, expressly stated that plaintiffs did not consent to the sale to GSCAH. (*In re GSC, Inc.*, 453 BR 132, 170, 172-73 [Bankr SD NY 2011]).

It may not be inferred from the requirement set forth in credit agreement § 10.13, that the agent enforce the security interests in the security documents, an obligation to enforce the security agreement in any particular manner. Rather, pursuant to credit agreement § 10.14, the agent must apply proceeds it received from any sale or collection or other realization upon the collateral, made through the agent's exercise of its remedies, in the manner described therein. As a credit bid is a remedy afforded the agent, by law, under the bankruptcy law, a credit bit is permitted under the security agreement. Although it is not clear on this record how, upon the credit bid of GSC's debt obligations, the agent could have refused to release the security interests in the collateral, there remains a triable issue, precluding summary judgment. To the extent that the collateral was neither sold nor liquidated, it was not realized by the agent, because in the transaction that the agent characterizes as the loan restructuring, it did not obtain the collateral. GSC, the seller in the transaction, did not sell GSCAH membership interests; the collateral went to GSCAH, which was not under the agent's control. The agent's hands may have been tied as to certain actions under the two agreements (*see Matter of Drexel Burnham Lambert Group Inc.*, 113 BR 830, 835 [Bankr SD NY 1990] [stating that certain pro rata sharing provisions were inviolate, that agent required to follow instructions concerning method and timing of liquidation, but not for, *inter alia*, distribution and application of proceeds from any realization on collateral]). Credit agreement § 10.14, which the agent represents it followed, uses the word "indefeasible," or "not capable of being annulled or voided or undone" (https://www.merriam-webster.com/dictionary/indefeasible) in addressing proceeds received by the collateral agent from a sale or collection or realization on the collateral.

Although it attempts to fit into section 10.14 the receipt of GSCAH equity interests, the agent does not sufficiently demonstrate that it received what was pledged as collateral, or that it was required to, or permitted to, acquiesce to the transfer of the assets outside of its control under the credit documents. GSCAH's LLC agreement and the April 2012 distribution letter, signed by BDC Lenders as member of GSCAH, indicate that BDC Lenders and their principals control the collateral to this day and GSCAH only announced a distribution when the parties made summary judgment motions. Plaintiffs complain about the structuring, and the agent does not sufficiently demonstrated that what occurred was in compliance with the credit documents, for even that subset of assets that the agent argues was purchased with the credit bid, where plaintiffs received restricted minority LLC interests. Pursuant to security agreement § 6.1, no secured creditor has a right, individually, to realize upon the security interests, and the agent is charged with doing so for the benefit of the secured creditors, a defined group, and upon the terms of the agreement. GSCAH's structure appears to have enabled some secured creditors, BDC Lenders, to receive collateral in a more advantageous manner than others.

It may be that the GSCAH transaction reflects a common method of restructuring a loan. The testimony offered by the agent in support of this premise reflects, however, only that it is one of several methods of restructuring, and appears to address the situation in which an agent places collateral into an entity it controls, not one controlled by a subset of secured creditors. That the secured creditors have a right to receive the $49 million dollars of value, about which GSCAH recently announced a partial distribution, and to future distributions, does not demonstrate that the agent had the power to effect it, nor does it explain why the announcement comes five years after the closing, while credit agreement § 10.14 requires that it be promptly effected.

Neither party adequately demonstrates the meaning of the provision in credit agreement § 12.4, that the agent be "fully protected," or that the term applies to the structuring of the collateral sale. The protections are necessarily applicable only to those matters as to which the credit documents grant the required banks authority to direct the agent, and in accordance with the terms of the agreements, which are also insufficiently addressed.

The agent's assertion that there is no evidence of bad faith to support an exception to the exculpatory provision of credit agreement § 12.3 reflects its reliance on alleged gaps in plaintiffs' case instead of disposing of material factual issues, does not entitle it to summary judgment.

(*Bryan v 250 Church Assoc., LLC*, 60 AD3d 578 [1st Dept 2009]). Moreover, a party's good or bad faith generally presents a factual issue (*Norden Rest. Corp. v Sons of Revolution in State of NY*, 73 AD2d 213 [1st Dept 1980], *revd on other grounds* 51 NY2d 518 [1980]). Viewing the evidence in the light most favorable to plaintiffs, and granting them the benefit of all reasonable favorable inferences that may be drawn therefrom (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]), Gravenhorst's testimony reflects that he may not have reviewed the GSCAH LLC agreement prior to the closing, thereby raising a factual issue as to good faith, gross negligence or willful misconduct. Gravenhorst also testified that, in some instances, the agent might have to consider the reasonableness of instructions, and the agent does not demonstrate that reasonableness is not a consideration in credit agreement § 12.5, or that its motive was not to enrich its affiliates. While the agent states that section 12.5 is intended for its benefit, it does not address that section 12.1 states that all of section 12 of the credit agreement is for the benefit of the agent and the banks.

For the reasons set forth in my prior decision on motion sequence numbers 24 and 26, no determination is made here that security agreement § 6.1(k) is exculpatory, where GSC, not the agent, sold the collateral. While credit agreement § 12.3 addresses collectability and enforcement of documents, upon which the agent relies, this case is not about whether a document was unenforceable, an agreement sufficient, or the collectability of collateral. Valuable collateral was collected. In light of these unresolved factual issues as to whether the agent breached the agreements, or is immune from liability, the motion is denied.

D. Implied covenant of good faith and fair dealing (count V)

The implied covenant of good faith and fair dealing "embrac[ing] a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract," is imputed by law into contracts, and includes "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] [internal quotation marks and citations omitted]). A party claiming rights under the covenant "must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole." (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]). Where a contract contemplates the exercise of discretion, the implied covenant requires that the discretion be exercised in a rational, nonarbitrary manner, not in bad faith to deprive other parties of the contract's benefits. (*Dalton*, 87 NY2d at 389). It may not be used in a manner inconsistent with or to nullify the terms of a contract, or to add terms to an agreement. (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006]; *Behren v Warren Gorham & Lamont, Inc.*, 24 AD3d 132, 132-33 [1st Dept 2005] [implied covenant claim dismissed as inconsistent with exclusive contract right to manage sold assets and for lack of evidence of arbitrary or irrational conduct where plaintiff testified that alleged mismanagement not intentional, but due to incompetence]). Implied covenant claims based on the same facts or alleged injury as an express contract claim, generally are dismissed as duplicative. (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

1. The complaint

In count V, plaintiffs allege that the agent breached the implied covenant by repeatedly taking actions which it knew or should have known would cause injury to lenders in order to benefit its affiliates, BDC Lenders, in using their majority position to obtain all of the collateral securing GSC's obligations. Plaintiffs allege that the agent credit bid approximately $257 million, extinguishing GSC's debt, while BDCM contributed the $5 million and a $6.7 million note, transferring the sold assets to GSCAH, 100 percent controlled by BDCM, at the close of which, only interests in GSCAH were distributed, so that, other than BDCM, the other secured creditors would receive only an interest in GSCAH, instead of a ratable share of the $238 million of collateral that secured the GSC obligations, winding up with nothing.

According to plaintiffs, their reasonable expectations, and the fruits of the credit documents, include the right of each secured creditor to receive its pro rata share of the proceeds from a disposition of the collateral, as expressed through sharing provisions in credit agreement §§ 10.14 and 14.7 and security agreement § 6.5, but that the agent manifested an intent to deprive plaintiffs of this share, by submitting inflated credit bids, not tied to the value of the assets, knowing that this would injure some of the secured creditors, while disproportionately benefitting BDCM, as bids were structured to ensure that BDCM would win the auction for certain valuable collateral assets. Plaintiffs allege that the agent refused to partner with a bidder other than BDCM, and that defendants changed the original structure of the sale, transferring the assets purchased with the bids to two separate entities, because the bankruptcy court would not approve the disproportionate asset allocation, resulting in the GSCAH structure.

2. Contentions

The agent argues that the implied covenant claim against it should be dismissed because: (1) the parties disclaimed it against the agent; (2) the claim is contrary to the terms of the contracts; (3) the claim is duplicative; and (4) there is no triable issue of fact of arbitrary or irrational conduct. The agent first argues that credit agreement § 12.1 and security agreement § 9.3, which provide that the administrative agent has only the express duties in the agreements, are enforceable and waive the implied covenant, that it did not violate an implied covenant in performing its express contractual duties in following the required banks' directions, and that implying a good faith covenant to hold the agent liable for doing so, or for allegedly failing to provide plaintiffs their "rightful share of the collateral" would rewrite the express terms of the contracts; nullify the protections set forth in credit agreement §§ 12.3, 12.4 and security agreement §§ 6.1(k) and 6.1 (l) (agent may "set-off any . . . Collateral against any and all Obligations"); and create an absurd situation whereby the agent would have to breach its express obligations to the required banks in order to comply with some implied obligation to the "minority lenders."

The agent also argues that the implied covenant claim, by which plaintiffs allege that the agent, through its actions, deprived them of their purportedly rightful share of collateral (complaint, ¶ 130), restates the contract claim that the agent breached by following the instructions of the required banks and by failing to share proceeds. The agent maintains that there is no evidence that it exercised its powers arbitrarily or irrationally, but followed the required banks' instructions pursuant to the contract provision mandating that it do so, and did so without personally profiting from that decision. The agent posits that plaintiffs did not attempt to dissuade it from joining bids with BDC Lenders, or object to joint bidding at the auction, but sat passively as GSC announced that, with plaintiffs' consent, the bidding procedures were to be modified to permit this conduct. It is neither irrational nor arbitrary, the agent asserts, for it to do what plaintiffs permitted, and that it also acted with a rational basis in connection with the final sale, following the instructions of the required banks to credit bid the full amount of outstanding loan obligations in exchange for GSCAH equity, and had the contractual right to do so and to issue the payoff letter at closing for GSC's obligations, with approval of the bankruptcy court and the trustee.

According to the agent, plaintiffs admit that it is not uncommon for an agent to receive equity in a restructuring vehicle on behalf of lenders in exchange for a credit bid, and the bankruptcy court stated that the agent had no discretion to refuse to follow the required banks' instructions. In light of the bankruptcy court's opinion concerning the likelihood of confirmation of plaintiffs' propose plan, the agent ridicules the proposition that the implied covenant requires it to support plaintiffs' reorganization plan (*In re GSC*, 453 BR at 165).

In opposition, plaintiffs argue that the evidence supports a finding of arbitrary/irrational conduct as the agent released all of the collateral in its trust, extinguishing its principal's claims for no known recovery and that the agent does not address their allegation that its actions manifest an intent to deprive them of the fruits of the agreements and their reasonable expectations thereunder (complaint, ¶ 130). They urge that arbitrary or irrational conduct is not required (*Dalton*, 87 NY2d at 389), as the implied covenant embraces a pledge that neither party do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of a contract, and that an implied promise not to act arbitrarily or irrationally in exercising discretion is only a subset of the implied covenant claim.

Plaintiffs contend that the agent's argument that it is insulated from liability because it did what the contract required by following the required banks' instructions, was rejected by the

First Department, and that the implied covenant claim must be permitted because the agent claims to have had no express duties under the credit documents concerning the collateral, other than to follow the required banks' instructions, and that it was free to take unreasonable instructions that harmed the secured creditors. Under this theory, plaintiffs argue, nothing in the terms of the credit documents prevented the agent from giving away the collateral to Deckoff. Plaintiffs contend that, if the contract did not prohibit the agent from knowingly taking actions that would harm the secured creditors, the implied covenant fills the gap, prohibiting the agent from destroying the lenders' expectation of their pro rata share of all recoveries in light of the numerous pro rata sharing provisions in the credit agreement, or their expectation that the agent would act for their benefit, not contrary thereto. The agent took actions that it knew would prevent them from receiving these expected fruits, and absent a determination concerning the meaning of the pertinent provisions, plaintiffs must be permitted to proceed with their claim.

In reply, the agent states that the implied covenant claim is based on allegations that the agent failed to share proceeds ratably, and improperly exercised its credit bid rights, with the former duplicative and the latter inconsistent with the agreement and without factual foundation. That the agent did not share proceeds ratably, it contends, duplicates the unmeritorious, abandoned claim that the agent breached credit agreement § 10.14 and security agreement § 6.5 by failing to share sale proceeds ratably, and plaintiffs replace their defective sharing claim with an implied covenant. The agent points to my earlier decision, in the motion to dismiss, declining to dismiss what appeared might be duplicative claims, and argue that, on appeal, where plaintiffs argued that the implied covenant claim did not duplicate the claim for breach of the contract's sharing provisions, the First Department sustained the sufficiency of the pleading because plaintiffs also alleged distinct misconduct for bid manipulation and depression during the auction. That determination, the agent argues, is consistent with the determination that an implied covenant claim concerning a failure to share sale proceeds is duplicative, and that, as I no longer need to give plaintiffs the benefit of the doubt about the pleading, that portion of the claim should be dismissed.

The agent reiterates its argument that the implied claim is inconsistent with the contract's express terms, that it cannot have violated an implied covenant by performing its authorized duties, and that plaintiffs improperly try to read into the contract an implied obligation requiring that the agent reject the required banks' instructions to credit bid. It argues that credit agreement § 12.4 fully protects it for following even unreasonable instructions, and that security agreement § 6.1 means that the agent may not act for its own account, and imports no fiduciary duty, which was disclaimed.

The agent contends that plaintiffs are required to produce evidence of bad faith, and that they incorrectly argue that the evidence that they have been deprived of the contract's fruits is sufficient, confusing the legal definition of the implied covenant with the elements necessary to prove the claim. It states that plaintiffs offer no evidence that its decision to comply with the allegedly unreasonable instructions of the required banks was in bad faith, or arbitrary or irrational, as the agent credit bid pursuant to a bankruptcy court authorized procedure, joined its bid to BDC Lenders' bid only after it was advised, in the presence of plaintiffs, that it was free to do so, and the bankruptcy court states that the agent had no obligation under the bankruptcy law to bid with another bidder. (*In re GSC*, 453 BR at 181-82.) The agent was contractually entitled to rely on oral statements made at the auction, and plaintiffs did not disclose to the agent the purported reservation of rights in the agreement plaintiffs executed with GSC during the auction (Gravenhorst aff, ¶¶ 6-7), and the credit documents do not require the agent to exercise due diligence concerning the value of assets, a duty plaintiffs attempt to write into the contract.

The agent challenges plaintiffs' argument that the agent engaged in conduct that resulted in no known recovery, or amounted to giving away the collateral to Deckoff, as ignoring that plaintiffs will receive their pro rata share once the pending distribution is completed, with an additional distribution coming in a future year. It argues that the implied covenant does not undermine a party's right to act in its own interest, even if benefits due the other contracting party may be decreased.

3. Analysis

While the agent cites authority that it contends demonstrates that the secured creditors waived the implied covenant of good faith and fair dealing, in those decisions, the courts do not expressly find that the implied covenant was waived (*see eg SNS Bank v Citibank,* 7 AD3d 352, 354 [1st Dept 2004] [merger clause bars additional contractual provision]; *Greater NY Sav. Bank v 2120 Realty*, 202 AD2d 248, 248 [1st Dept 1994] [concerning waivers of claims by guarantors in unconditional guarantees, and whether they prevented claims absent fraud]; *Goldfeld v Mattoon Communications Corp*., 99 AD2d 711, 712 [1st Dept 1984] [merger clause in limited partnership agreement precluded determination that agreement intended to govern internal affairs of limited partner's general partner, a corporation]; *Matter of Enron Corp*., 292 BR 752, 783 [Bankr SD NY 2003] [where contract has clearly defined rights and duties, and expressly excludes other obligations, implied covenant cannot be used to create additional or inconsistent terms]). Assuming, without deciding, that parties may waive the implied covenant where a contractual agent acts on behalf of a collective group, including by immunizing the agent for any bad faith conduct, presumably these sophisticated parties would have done so in a less opaque manner.

One of plaintiffs' claims is that the agent wrongfully permitted, or acquiesced to, a sale of the collateral to GSCAH for no known recovery. (Complaint ¶¶ 89-90, 129-130, plaintiffs' opposition at 11). In other words, that the sale was structured so that the collateral would not be under the agent's control for distribution, but relinquished to the control of only subset of the secured creditors. While plaintiffs do not challenge the agent's argument that it met the pro rata distribution requirements, they do not thereby abandon their claim that the agent permitted the structuring of the sale to GSCAH in bad faith. There thus exists a factual issue as to whether the agent intended to evade credit document requirements or acted in bad faith.

In addition, based on plaintiffs' allegation that bids were intended to ensure that BDCM would disproportionately benefit, they raise an issue of good faith. Assuming, without deciding, that the contract does not contain an enforceable provision that the agent bid for the benefit of the secured creditors, but only requires that it refrain from exercising remedies for its own account, that does not mean that in bidding, under what the agent describes as a unitary enforcement scheme for a collective group, the agent actually acted in good faith when it followed the required banks' directions to bid in a manner that so greatly benefitted a subset of that collective group at the expense of the rest of the group. While it may be that the agent acted in good faith, that determination is for the fact finder. The agent also does not adequately demonstrate that it had no choice other than to follow what may have been unreasonable directions concerning several aspects of the transactions that took place, and the agent testified that it may have had some discretion. The excerpts cited by the agent from two publications, primarily about an administrative agent's ministerial role, do not address the circumstances here, and the First Department's decision in this case, that the implied covenant claim against the agent is not barred by, or inconsistent with, the express terms of the agreements, while not *res judicata*, addresses the contract provisions.

Given the existence of an overlap of facts, with separate claims concerning different aspects of the transactions, and the agent's conduct relating to these transactions, and what may be some ambiguous provisions under the agreements, precludes the agent's argument from being dispositive.

E. Counts I, II, III and IX of the amended complaint and I and II of the complaint-in-intervention

Plaintiffs do not oppose dismissal of counts I, II and IX of the complaint and counts I and II of the complaint-in-intervention.

In count III of the complaint, plaintiffs seek a declaration that the agent is not entitled to indemnification under security agreement § 14.1(b), concerning the borrower, GSC, a nonparty. In the amended complaint, they seek instead to assert a claim for the same relief, under security agreement § 14.1(c). The agent opposes the allowance of what it deems an amendment on the merits, arguing that the original claim should be dismissed as abandoned, and that it is too late to amend. As to the merits, the agent contends that there is no evidence of bad faith, gross negligence or intentional misconduct, and that mere breach is not enough.

The substance of plaintiffs' declaration, that the agent is not entitled to indemnification under the credit agreement, has not, in essence, changed. Thus, no new theory is offered and no indication of prejudice is demonstrated. As there remain unresolved issues concerning the agent's conduct, dismissal is not warranted as this juncture.

III. CONCLUSION

In light of the foregoing it is,

ORDERED that the motion for summary judgment is granted to the extent that counts I, II and IX of the amended complaint and counts I and II of the complaint-in-intervention are dismissed and is otherwise denied.

ENTER:

BARBARA JAFFE, JSC

Dated: February 23, 2017
New York, New York