

Aozora Bank, Ltd. v J.P. Morgan Secs. LLC
2017 NY Slip Op 31487(U)
June 29, 2017
Supreme Court, New York County
Docket Number: 652159/13
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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AOZORA BANK, LTD.,

Plaintiff,

Index No. 652159/13

- against -

J.P. MORGAN SECURITIES LLC, and JP
MORGAN CHASE & CO.,

Defendants.
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Hon. C. E. Ramos, J.S.C.:

Defendants J.P. Morgan Securities LLC and JPMorgan Chase & Co. (together, defendants) move for an order (1) scheduling a hearing at which the parties' Japanese law experts can testify in order to permit the Court to resolve the issue of the scope and application of the Japanese statute of limitations; or (2) dismissing the complaint as untimely under Japanese law for the reasons set forth in defendants' initial motion to dismiss pursuant to CPLR 3211 (a) (3); or (3) bifurcating discovery to allow the prompt disclosure of evidence relevant to whether Aozora's claims are time-barred.

Background

The facts set forth herein are taken from the complaint.

Aozora, a Japanese bank, alleges that it was defrauded by Bear Stearns & Co. (BS&Co.).¹ In June 2007, Aozora invested approximately \$20 million in a collateralized debt obligation

¹ J.P. Morgan Securities LLC and JPMorgan Chase & Co. is sued herein solely in its capacity as successor to BS&Co.

(CDO) captioned HG-Coll 2007-1 (the HGC CDO). BS&Co. allegedly misrepresented that the HGC CDO was "High Grade" when, in reality, it was full of toxic assets that failed to meet the applicable underwriting standards.

Previously, defendants moved to dismiss Aozora's complaint on the grounds that the claims were time-barred and failed to state a claim. This Court granted the motion to dismiss for failure to state a claim, and did not reach the statute of limitations issue (*Aozora Bank, Ltd. v J.P. Morgan Securities LLC*, 2015 WL 1815683 [Sup Ct, NY County 2015]). In November 2016, the First Department reversed, finding that the complaint adequately stated a claim for fraud and breach of the duty of good faith and fair dealing (144 AD3d 440 [1st Dept 2016]). The First Department also did not reach defendants' statute of limitations arguments.

Both parties agree that, under New York's borrowing statute, Aozora's tort claims accrued in Japan and are subject to Japan's three-year statute of limitations (SOL), which is set forth in Article 724 of the Civil Code of Japan. Under the Japanese SOL, a plaintiff must file a claim within three years of acquiring actual knowledge of its damages and the identity of the perpetrator (Namba Aff., ¶¶ 10-11; Minami Aff., ¶ 4). The parties' Japanese law experts disagree over what constitutes actual knowledge, and whether a claimant's characteristics and

sophistication are relevant to the actual knowledge inquiry required by the statute.

Defendants argue that the SOL began once Aozora had the "practical ability" to bring its claim, and does not require direct evidence. Rather, defendants' expert asserts that Japanese courts will consider whether and when a plaintiff acquired knowledge based on the circumstances, including publicly available information, the existence of a reasonable opportunity for the plaintiff to access such information, documents in the plaintiff's possession, and the level of sophistication of the plaintiff (Namba Aff., ¶¶ 10, 17, 19).

In June 2007, Aozora made its investment with the purchase of \$20 million par of HGC's CDOs, and learned around the time of purchase that BS&Co had structured and was the "arranger" and "initial purchaser of HGC (Complaint, ¶ 27). Aozora alleges that by March 2008, its investment had imploded and was downgraded to junk status. By April 2008, Aozora reported that its losses stemming from the fallout from the US sub-prime mortgage crisis topped JPY 50 billion, which it repeated publicly throughout 2008. BS&Co allegedly seized and controlled a material portion of HGC's collateral portfolio selection, which it used to offload certain of BS&Co's most toxic assets (Complaint, ¶¶ 4, 9-10). The HGC CDO purportedly contained an inordinately high concentration of residential mortgage backed securities (RMBS)

that were underwritten by BS&Co. In October 2008, Aozora reported the creation of a task force to "analyze the causes of the CDO investment losses" (Exhibit A, annexed to the Nagy Aff.).

Defendants also allege that Bear Stearns' collapse and alleged CDO fraud were widely reported in Japan, prior to June 2010. BS&Co was a named defendant in numerous lawsuits that investors commenced in 2008, 2009, and early 2010, including a June 2008 lawsuit brought by Sumitomo Mitsui Banking Corporation (SMBC), a Japanese bank. In these lawsuits, plaintiffs alleged that BS&Co's securitization was a house of cards, not supported by real value, that BS&Co disregarded underwriting standards, and had issued materially false and misleading statements regarding its subprime-backed assets. Defendants point out that as early as July 2005, a representative office of Aozora was established in New York to "enhance [Aozora's] information gathering function within the United States" (Exhibit O, annexed to the Nagy Aff.).

Defendants assert that under the standard articulated by its Japanese law expert, Aozora's fraud claim is untimely because it is evident that Aozora became aware of its damages and that the perpetrator was BS&Co., at least by 2008 (through widely reported public information concerning BS&Co.'s misconduct in underwriting RMBS transactions which were filled with low-grade collateral); that HGC CDO was downgraded to junk status in 2008, and that Aozora had created a task force in 2008 to investigate the source

of its losses in CDOs, including the HGC CDO.

Aozora rejects any consideration of its sophistication or characteristics as irrelevant to the determination of the SOL under Japanese law. Aozora maintains that the information upon which its claims are premised did not emerge until late 2012, including the 2012 findings of state and government regulatory agencies which revealed (allegedly for the first time) Bear Stearns' systematic pattern of misconduct affecting RMBS creation and sale between 2005 and 2007.

Pursuant to CPLR 4511 (b), this Court concludes that the expert affidavits and translations of the relevant Japanese statute and caselaw provide sufficient evidence to determine the applicable statute of limitations standard. Based on these submissions, it is evident that Japanese law requires evidence of actual knowledge by a plaintiff to trigger the statute of limitations for claims sounding in tort (*accord Aozora Bank, Ltd. v UBS*, 2015 NY Misc LEXIS 3745 [Sup Ct, NY County 2013, Scarpulla, J.]).

Confronted with the limited record, the Court determines that the facts submitted by defendants are insufficient to conclusively determine that Aozora had actual knowledge of its claims by June 18, 2010. Although defendants highlight circumstantial evidence such as media reports and at least one other lawsuit by a Japanese bank against BS&Co and others

alleging fraudulent practices relating to RMBS transactions, such evidence does not demonstrate whether Aozora was actually aware of these sources. With respect to the issue of whether Aozora gained actual knowledge of the tortious conduct of the defendants in the course of its task force investigation in 2008, discovery targeted to the findings of this task force is crucial to the dispositive issue of the SOL.

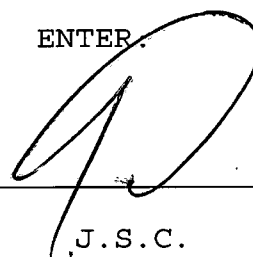
Thus, the parties are directed to conduct expedited discovery limited solely to the dispositive issue of the timeliness of Aozora's claims under Japanese law, which will undoubtedly conserve resources.

Accordingly, it is

ORDERED that Defendants J.P. Morgan Securities LLC and JPMorgan Chase & Co.'s motion is granted to the limited extent of bifurcating expedited discovery limited solely to the issue of the timeliness of the plaintiff's claims under Japanese law, and is otherwise denied.

Dated: 6/24/17

ENTER



J.S.C.