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SUPERIOR COURT
WASHINGTON COUNTY

STATE OF VERMONT
WASHINGTON COUNTY

LIFE INSURANCE COMPANY OF THE SOUTHWEST, Plaintiff

v.

CITIGROUP GLOBAL MARKETS, INC., Defendant

Washington Superior Court
Docket No. 511-9-04 Wncv

DECISION ON THE MERITS

Life Insurance Company of the Southwest ("LSW") brings suit against Citigroup Global Markets, Inc, corporate successor to Salomon Smith Barney, Inc., to recover a payment of bond collateral allegedly due and payable since September, 1998.[1] Plaintiff is represented by Attorney Robert Burke, Assistant General Counsel to National Life Insurance Company, Montpelier, Plaintiff LSW's corporate parent. Defendant is represented by Attorney Michael Burak, of Burak Anderson & Melloni, Burlington.

By motion, the parties jointly requested to be excused from mediation and an evidentiary trial, and to submit the case on stipulated facts and written briefs. The court granted the motion, and the parties filed a Stipulation and Submission of Facts on February 5, 2007. The parties have subsequently filed several memorandum of law. Both parties have also filed affidavits, attempting to present additional facts. The court considers such attempts akin to an attempt to introduce additional facts through affidavit after the evidence has been closed in a final evidentiary hearing, and declines to consider those facts. Similarly, the alternative request for an evidentiary is hearing is denied as untimely. The parties are held to their stipulation, approved by the court at their request, to submit the case on stipulated facts only.

On May 17, 1996, the parties entered into a Master Securities Loan Agreement, which anticipated oral transactions for the lending and borrowing of certain securities and the transfer of collateral related thereto. On May 18, 1998, Plaintiff LSW lent to Defendant a bond issued by the government of the Phillippines ("the Bond"). The Bond had a face amount of $1,500,000 and a maturity date of April 15, 2008. Upon delivery, Defendant collateralized the market value of the bond by making a cash payment of $1,485,000 to Chase Manhattan Bank, LSW's agent.

[1] As the parties did in their stipulation, the court will use "Defendant" to refer to both Salomon and Citigroup.

The Bond's market value fluctuated, and as it did, the parties maintained collateral equivalent to the market value by transferring money at points of change in the market value, known as "marks to market" or "marks." On those occasions when Defendant owed cash collateral to Plaintiff LSW at a given mark because of appreciation in the market value of the bond, Defendant would pay into Chase Manhattan, as it had when it first borrowed the Bond. On December 29, 1998, the Bond loan terminated.

Plaintiff LSW asserts that as of September 31, 1998, it had $75,000 less in its Chase Manhattan account than it should have. Plaintiff traces the shortfall back to a $75,000 increase in Bond value, which occurred from September 10 to September 18, 1998, and for which Plaintiff denies receiving payment. Defendant rejected, or "DKed," a September 10, 1998 mark from 81% to 82%, because Defendant contested the claimed 1% appreciation upon which the mark was taken. Defendant therefore did not supply $15,000 collateral commensurate with the 81% to 82% mark. On September 17, 1998, however, the Bond was marked from 81% to 86%, which mark would have subsumed the 1% mark of September 10, 1998, and which would have called for a transfer of $75,000.

A record from the Depository Trust Company shows a payment by Defendant to Chase Manhattan, dated September 17, 1998, in the amount of $75,000. Plaintiff contends that the record produced, though it shows a payment to Chase Manhattan, "is not limited to transactions involving LSW." See Stipulation ¶ 7(b)-(d). Plaintiff argues that this does not prove payment as the payment or part thereof could have been directed to some other party holding an account at Chase Manhattan, or the payment or part thereof could have been DKed.

Early in 1999, LSW began discussing with Defendant the missing $75,000. Although the disputed $75,000 allegedly began as missing collateral, its practical effect, by Plaintiff's allegation, was to cause LSW to overpay Citigroup when the bond loan terminated on or around December 29, 1998. Plaintiff claims an attorney for LSW sent a formal demand letter to Defendant on March 28, 2000. Defendant neither confirms nor denies that the letter was sent.

Analysis

The Master Securities Loan Agreement contains a choice of law provision, at § 20, which dictates that New York law governs disputes on the Agreement. No arguments have been raised concerning the applicable law. In an action for breach of contract, as in civil actions generally, it is the plaintiff's burden to support the claim of breach with evidence, which must constitute a preponderance of the evidence in order for the claim to be proved. The parties' obligations are established by the contract and not contested. The amount in question is not disputed; it is $75,000. The question is solely whether Plaintiff has proved that Defendant failed to make a required payment on a bond mark on September 17, 1998.

LSW's "proof" that the money was not paid is its assertion that it had $75,000 less in its Chase Manhattan account that it believed it should have. Defendant relies on

the record from the Depository Trust Company showing a transfer to Chase Manhattan on that date, in that amount. See Stipulation Exhibit #1, page 1 of 4, line 1. Although Plaintiff LSW seems to contend that the Depository Trust Company record is not limited to transactions involving LSW, the record suggests otherwise with respect to the individual transaction lines. Specifically, clearly visible on the same transaction line showing a $75,000 transfer on September 17, 1998 is an "old price" of 81.00 and a "new price" of 86.00. It is undisputed that the bond was marked from 81% to 86% on September 17, 1998.

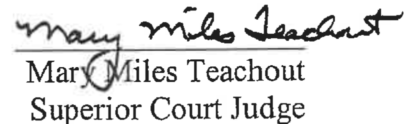
The issue is whether the stipulated facts show that it is more likely than not that Defendant failed to pay the $75,000 due under the Master Securities Loan Agreement. Plaintiff suggests that Defendant may have misdirected the recorded payment, because a code within the transaction entry begins with the letter S, whereas a similar code–on a transaction later "DKed," or rescinded–for which LSW did receive credit, begins with the letter T. Plaintiff asks the court to infer that Defendant should have directed payment to an account with a code that starts with T, and because it did not, Defendant failed to make the payment. Defendant counters that the various series of characters are tracking numbers and not a code specific to Plaintiff's account. There is no evidentiary basis for the court to make any finding at all about what either the "S" or "T" codes mean.

The Depository Trust Company record showing a payment of $75,000 on September 17 serves to make the fact of payment to LSW's agent more probable than not. Plaintiff should have been aware of its claim in late 1999, and was unquestionably aware by the time of the letter to Defendant in March of 2000. It had time to examine documentation, which is now apparently no longer available due to the passage of time and corporate reorganization. Even if Plaintiff is sure it is missing $75,000, there are two possible explanations: either Defendant failed to pay it, or Chase Manhattan failed to properly credit it. Both are possible, but the Depository Trust Company record makes nonpayment by Defendant the less likely of the two. Plaintiff's evidence is insufficient to establish nonpayment on the part of Defendant to Plaintiff's agent, Chase Manhattan.[2]

Plaintiff's evidence is simply insufficient to meet its burden of proof that it is more likely than not that Defendant failed to pay Plaintiff or its agent.

For the foregoing reasons, judgment is entered this day for Defendant.

Dated at Montpelier, Vermont this 5th day of July, 2007.



Mary Miles Teachout
Superior Court Judge

[2] The applicable statutes of limitation for recovery from the intermediary, Chase Manhattan, who could possibly have misdirected the funds, has run. See N.Y. C.P.L.R. 213(6) (six-year limitations period).