

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

SAMUEL HILDENBRAND, et al.,

**Plaintiff(s)**

**v.**

W HOLDING COMPANY, et al.,

**Defendant(s)**

CIVIL NO. 07-1886 (JAG)

**MEMORANDUM AND ORDER**

GARCIA-GREGORY, D.J.

Before the Court is Defendant's Motion to Dismiss for lack of jurisdiction. (Docket No. 194). For the reasons stated below, the motion is denied.

This case has been the object of motion practice for four years now. The legal claims and factual issues are widely known. Based on this knowledge, the Court writes for the parties and recounts what is necessary to the marginal question now before us.

**DISCUSSION**

This case was filed in September of 2007 on behalf of purchasers of the publicly traded securities of W Holding Co. (Hereinafter "W") against the company and its executives for several violations to securities laws and regulations. W is the

bank holding company of the now defunct Westernbank, which has been under FDIC receivership since April 30, 2010. It was Westernbank's projected failure which prompted this action.

Defendant FDIC argues that this case should be dismissed because several Plaintiffs have failed to exhaust the administrative claims process outlined in 12 U.S.C. § 1821(d). Plaintiffs oppose Defendant's motion and argue that they were under no obligation to proceed administratively, given that Defendant FDIC did not timely move for a stay. They aver that in actions where the complaint is filed before receivership, 12 U.S.C. § 1821(d)(12) gives the FDIC two options at the point in which it becomes receiver. It may opt for continuing judicially by resting, or it may require any claimants to proceed administratively. To opt for the latter, the FDIC must move for a stay within 90 days of its appointment as receiver. 12 U.S.C. § 1821(d)(12). In this case, Defendant FDIC moved for a stay on August 27, 2010; 129 days after it was appointed receiver of Westernbank. Plaintiffs argue that Defendant FDIC chose to proceed judicially when it failed to move the Court for a stay within the 90 days.

Plaintiffs rest their argument on Damiano v. FDIC, 104 F.3d 328 (11<sup>th</sup> Cir. 1997) and Whatley v. RTC, 32 F.3d 905 (5<sup>th</sup> Cir. 1994). Though not factually identical to the case at bar, both are similar enough. More importantly, both cases squarely

address the issue now before us and hold that in cases where Plaintiffs file suit before the FDIC is appointed receiver, the FDIC may compel claimants to exhaust administrative remedies, but only if it moves the court for a stay within 90 days of its appointment as receiver. Damiano, 104 F.3d at 335; Whatley, 32 F.3d at 910.

Plaintiffs' argument is well made, and the case law behind it is sound. The operative language in 12 U.S.C. § 1821(d)(12), as analyzed in Damiano, empowers the FDIC to compel administrative exhaustion in pre-receivership cases. To do so, it must (1) require the parties to proceed administratively by staying the case, and (2) it must do so in a timely fashion, that is, it must move the court for a stay within the 90 day period of § 1821(d)(12). Damiano, 104 F.3d at 335. In the case before us, Defendant FDIC failed to move this Court for a stay within 90 days. Its motion to dismiss must be denied.

In its reply, Defendant FDIC argues that the Court's reasoning should not be led by Damiano, and that we should instead follow Marquis v. FDIC, 965 F.2d 1148 (1<sup>st</sup> Cir. 1992). The court in Marquis held that the Financial Institutions Reform, Recovery and Enforcement Act does not command courts to automatically dismiss all complaints filed against a failed bank prior to receivership by the FDIC. Id. Marquis, decided prior to Damiano, also stands for the unremarkable proposition that

whenever the FDIC is receiver for a failed bank, claimants who fail to initiate administrative claims within the filing period forfeit their right to later proceed judicially against the FDIC. Marquis, 965 F.2d at 1152.

Our decision today is not to the contrary; neither is Damiano. Indeed claimants are generally required to file administrative claims against the FDIC if they later wish to have their day in court. Id. However, they need not do so if the FDIC has not asserted its right to proceed administratively in a timely fashion. To hold the contrary would allow the FDIC to sit idle for an indefinite period of time, only to move the court for a stay and compel administrative procedures at its whim at a point when other parties, and the court, have perhaps invested considerable time and energy in a judicial proceeding. This is an untenable proposition.

#### CONCLUSION

For the reasons stated above, the Court hereby **DENIES** Defendant's Motion to Dismiss.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10<sup>th</sup> day of June, 2011.

S/Jay A. Garcia-Gregory  
JAY A. GARCIA-GREGORY  
United States District Judge