BDC Fin. L.L.C. v Barclays Bank PLC

2012 NY Slip Op 33758(U)

August 15, 2012

Sup Ct, New York County

Docket Number: 650375/2008

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN Justice PART 3

Index Number : 650375/2008
BDC FINANCE L.L.C.,
vs.
BARCLAYS BANK PLC,
SEQUENCE NUMBER : 009
SUMMARY JUDGEMENT

INDEX NO. 650375/2008
MOTION DATE 3/2/2012
MOTION SEQ. NO. 009
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8-15-12

EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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BDC FINANCE L.L.C.,

Plaintiff,

-against-

BARCLAYS BANK PLC,

Defendant.

----------X

Index No. 650375/2008
Motion Date: 3/2/2012
Motion Seq. Nos.: 008, 009

BARCLAYS BANK PLC,

Plaintiff,

-against-

BDC FINANCE L.L.C.,

Defendant.

----------X

BRANSTEN, J.

Motion sequence numbers 008 and 009 are consolidated for disposition. In motion sequence number 008, Plaintiff BDC Finance L.L.C. ("BDC") moves for summary judgment of its claims for breach of contract and for a declaratory judgment. Defendant Barclays Bank PLC ("Barclays") opposes.

In motion sequence number 009, Barclays moves for summary judgment of its claims for breach of contract and for a declaratory judgment. BDC opposes.

I. Background

BDC is a hedge fund that invests in various types of derivatives transactions. Affidavit of Stephen H. Deckoff ("Deckoff Aff."), ¶¶ 1-2. Barclays is a British bank that is a leader in the derivatives market. Affirmation of Matthew M. Riccardi ("Riccardi Affirm."), Ex. B, p. 45.

A. The Agreement

On May 5, 2005, Barclays and BDC entered into an agreement by which BDC would obtain the benefits of an investment portfolio of debt instruments known as the "Reference Assets" in exchange for financing payments to Barclays (the "Agreement"). Deckoff Aff., Exs. A-E. This type of transaction is a "total return swap." Barclays' Memorandum in Support of its Motion for Summary Judgment ("Barclays Memo"), p. 4.

The Agreement was memorialized in several standard forms issued by the International Swap and Derivatives Association ("ISDA"). These forms included a Master Agreement, a Schedule and a Credit Support Annex ("CSA"). Deckoff Aff., Exs. A-C. The Agreement also included a Master Confirmation which was negotiated and drafted by the parties. *Id.*, Ex. D.

Under the Agreement, each party had the right to demand collateral from the other party based on changes in the value of the underlying Reference Assets. Deckoff Aff., Ex. C. Such a demand of collateral is known as a "collateral call." The Agreement refers

to the party with the right to determine the value of the underlying Reference Assets and, thus, the amount of collateral calls, as the "Valuation Agent." *Id.* Both BDC and Barclays had the right to act as Valuation Agents under the Agreement. *Id.*

B. The Agreement's Dispute Resolution Mechanism

The CSA portion of the Agreement sets forth a two-tiered mechanism for resolving disputes between the parties on the calculation of collateral calls. The CSA provides that, in the event of a dispute, the parties are to first use an informal dispute resolution mechanism. The informal mechanism requires that "(1) [t]he Disputing Party will notify the other party [of the dispute] . . . (2) . . . Transfer the undisputed amount to the other party . . . [and] (3) the parties will consult with each other in an attempt to resolve the dispute." Deckoff Aff., Ex. C, p. 21. If the parties "fail to resolve the dispute," then the parties must utilize the CSA's formal dispute resolution mechanism. *Id.* The formal mechanism requires the party who made the collateral call to recalculate the call by "seeking four actual quotations [of the Reference Assets' value] at mid-market from Reference Market-makers" and utilizing the quotes' arithmetic average to determine the Reference Assets' value. *Id.*

C. The Disputed Collateral Calls

The value of the Reference Assets began to fall precipitously following the collapse of Lehman Brothers on September 15, 2008 and the subsequent widespread decline of the loan market. Barclay's Memo, p. 7. Around mid-September, Barclays changed its method

of valuing the Reference Assets and determining the amount of its collateral calls. Barclays Memo, p. 7, Memorandum of BDC Finance in Support of its Order to Show Cause for Summary Judgment ("BDC Memo"), p. 6. Barclays had previously used a commercial pricing service called LoanX. Following the collapse of Lehman Brothers, Barclays began valuing the Reference Assets below LoanX prices. Barclays Memo, p. 7.

Barclays asserts that it changed its valuation method because it believed that the value of the Reference Assets was falling faster than the LoanX prices reflected. *Id.* BDC claims that Barclays changed its valuation method for the purpose of inflating its collateral calls. BDC Memo, p. 6.

BDC claims that it opposed Barclays' post-September 15th collateral calls, but, believing it had no practical alternative under the circumstances, it paid the calls under protest. Deckoff Aff., ¶ 8. After paying Barclays' collateral calls for several weeks, BDC determined that Barclays was over-collateralized by approximately $40 million.

At 12:56 p.m. on October 6, 2008, BDC sent Barclays a collateral call for $40,140,405.78. Deckoff Aff., Ex. I. One minute later, Philip Nesbit ("Nesbit"), the head of Barclays' total return swap desk, sent BDC an e-mail stating, "We do not agree with this call. Please let us know if you want to invoke the dispute mechanism." Deckoff Aff., Ex. J.

At 2:56 p.m. that same day, an e-mail was sent from BDC treasurer Melinda Muller's ("Muller") e-mail address to Barclays. Affidavit of Jeffrey T. Scott ("Scott Aff."), Ex. 37.

Muller testified that she did not write the e-mail herself. The 2:56 e-mail stated that BDC was "not seeking to invoke the dispute mechanism. . . . The notice sent to you earlier today is a [collateral call] based on close of business value on 10/3 . . . . The notice is independent of any [collateral call] made by Barclays, which we will continue to address in accordance with the documents." Deckoff Aff., Ex. K.

Three minutes later, Nesbit responded to Muller, "We show that BDC owes Barclays, not the other way around." Deckoff Aff., Ex. L.

At 3:38 p.m. that same day, Yuka O'Conner ("O'Conner"), a Barclays employee of the total return swap desk, called Nicole Brock ("Brock"), a BDC assistant treasurer, to discuss the collateral call. O'Conner told Brock that she was "confused by [the] email that [she] got from Melinda [Muller]." Scott Aff., Ex. 59. Brock told O'Conner that she had not received Muller's 2:56 p.m. e-mail. Brock and O'Conner agreed over the course of the call that BDC owed Barclays $13.52 million. BDC sent Barclays a payment for $13.52 million later that day. Scott Aff., Ex. 60.

On October 7th, O'Conner called Brock at 10:30 a.m. to "make sure [they were] on the same page" regarding BCD's October 6th collateral call. Scott Aff., Ex. 61. O'Conner and Brock agreed that Barclays owed BCD $5,080,000. They did not discuss the $40,140,405.78 that BCD had called.

Despite this discussion, at 3:55 p.m., another e-mail that Muller claims not to have written was sent from her e-mail account to Nesbit and O'Conner, among others. The e-mail

informed Barclays that, "we have not received payment [on the collateral call], nor has Barclays exercised its dispute right. We remind you that pursuant to Paragraph 4(b) and Paragraph 5 of the [CSA], by 5:00 p.m. today Barclays must either pay the amount set out in the request or exercise its dispute rights." Deckoff Aff., Ex. M.

O'Conner responded to this e-mail at 4:05 p.m., stating that, "Barclays agrees to return 5,080,000. This is for margin call made on 10/6 (COB 10/3)." Deckoff Aff., Ex. N. Barclays paid BDC $5 million on October 8, rather than October 7, when the payment was due. Scott Aff., Ex. 63. Barclays claims that the late payment was due to a technical problem. Scott Aff., Ex. 64. Barclays further asserts that Muller verbally indicated to a Barclay's employee that the late payment would not be a problem. *Id.* Muller testified that she made no such assertion, and that she instead told the Barclay's employee that she "wasn't able to help him with the matter." Scott Aff., Ex. 37.

D. The Notice of Failure

On October 8, 2008, BDC sent Barclays a document entitled "Notice of Failure to Transfer Return Amount" (the "Notice of Failure"). Scott Aff., Ex. 65. The Notice of Failure stated that Barclay's had failed to "either (i) to pay the relevant Return Amount or (ii) notify BDC that Barclays disputes the calculation of the Return Amount and make a payment with respect to the undisputed amount." *Id.* The Notice of Failure further informed Barclays that "if this failure continues for two business days, an Event of Default will have occurred." *Id.*

E. Further Collateral Calls between the Parties

On October 8, O'Conner and Brock had another telephone conversation in which they discussed collateral calls from Barclays to BDC. Scott Aff., Ex. 66. There was no mention of a dispute between the parties or the Notice of Failure. *Id.*

BDC paid Barclays October 8th and 9th collateral calls. Scott Aff., Exs. 67-68. However, Muller sent emails to Barclays stating that the payments were made "under protest and without prejudice to any and all claims and rights of BDC Finance." *Id.*

F. The Termination Notices

Barclays sent BDC further collateral calls on October 10th and 14th, respectively. Scott Aff., Exs. 72-73. BDC refused to pay those collateral calls. BDC stated in response to Barclays' collateral calls that "an Event of Default had occurred . . . . Accordingly, all outstanding transactions have been terminated and no further margin calls are applicable." Scott Aff., Ex. 69.

On October 14, BDC e-mailed Barclays a document entitled "Notice of Designation of Early Termination Date" (the "Termination Notice"). *Id.* The Termination Notice stated that "a 'Credit Support Default' Event of Default has occurred under the Master Agreement by virtue of Barclays' failure to transfer the Return Amount reflected in the Return Demand on or prior to the second business day after the date of the Notice of Failure." *Id.*

That same day, Barclays responded to BDC's e-mail. Scott Aff., Ex. 70. Barclays wrote that, "[c]ontrary to the [Termination] Notice, no Event of Default has occurred under

the Master Agreement in relation to Barclays." *Id.* Barclays further asserted that it had complied with the dispute resolution procedure under the Agreement and had promptly disputed BDC's collateral call. *Id.*

On October 16, BDC replied to Barclays' letter. Scott Aff., Ex. 71. BDC reiterated that Barclays failed to pay or dispute BDC's collateral call, and stated that Barclays' letter was "the first and only time that Barclays has purported to invoke the Dispute Resolution process." *Id.*

Barclays then sent BDC a letter notifying BDC of a Potential Event of Default because BDC had not paid Barclays' October 10th and October 14th collateral calls. Scott Aff., Ex. 74.

On October 23, Barclays sent BDC a letter entitled "Designation of Early Termination Date" purportedly terminating the Agreement due to BDC's alleged default. Scott Aff., Ex. 75.

G. The Instant Action

On October 17, 2008, BDC filed the instant action. BDC asserted causes of action for breach of contract and for a declaratory judgment. Barclays subsequently brought counterclaims for breach of contract and a declaratory judgment. Each party claims the other breached the agreement by failing to pay and/or properly dispute the other party's collateral calls.

II. Standard of Law

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Upon making such a showing, the burden of proof shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim" or an acceptable reason for his failure to do so. *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980).

III. Analysis

A. BDC's Motion for Summary Judgment

BDC raises two principal arguments in support of its motion for summary judgment of its claims for breach of contract and for a declaratory judgment.

First, BDC asserts that Barclays defaulted on the Agreement because it failed to comply with the CSA's dispute resolution provision. BDC contends that Barclays did not provide BDC with sufficient notice to commence a formal dispute under the CSA concerning BDC's October 6th collateral call.

Alternatively, BDC argues that Barclays breached the Agreement even if it adequately complied with the notice requirement of the CSA's dispute resolution provision. BDC

asserts that the Agreement required Barclays to pay the full amount of any BDC collateral call prior to disputing under the CSA, which Barclays did not do.

The court will consider each argument in turn.

1. Notice of Dispute

BDC first claims that it is entitled to summary judgment of its breach of contract claim because Barclays did not provide adequate notice that it was disputing BDC's October 6th collateral call. BDC interprets the CSA as requiring detailed written notice specifically stating that Barclays wished to formally dispute BDC's call.

Barclays argues that the Agreement does not require formal notice. Barclays claims that the parties had established a longstanding practice of informally noticing disputes. Barclays further asserts that it complied with the notice provision of the CSA by repeatedly informing BDC that it disagreed with BDC's call.

i. Prior Course of Dealing Between the Parties

The CSA's dispute resolution provision states that, if either Barclays or BDC disputes a collateral call, "the Disputing Party will notify the other party." Deckoff Aff., Ex. C, p. 21. The Agreement does not enumerate any additional notice requirements, nor does it provide a standard of form.

Barclays claims that the parties understood the CSA to require only informal notice of disputes. In his first October 6th e-mail to BDC, Nesbit stated in response to BDC's

collateral call, "We do not agree with this call. Please let us know if you want to invoke the dispute mechanism." Deckoff Aff. Ex. J. Barclays asserts that Nesbit's e-mail was consistent with the methods the parties had used to notify each other of disputes prior to October 6th. For example, when Barclays sent BDC a collateral call on January 14, 2008, BDC responded, "We do not agree to your call for today." Scott Aff., Ex. 18. BDC used identical language to dispute Barclays' collateral call for January 15, 2008.[1] Scott Aff., Ex. 19. Barclays also points to testimony by Brock and BDC's expert stating that BDC and Barclays interchangeably used phrases such as "do not agree," "disagree" and "partial agree" to dispute one another's collateral calls. Scott Aff., Ex. 22, pp. 19-20, 35, 164; Scott Aff., Ex. 25, p. 154.

BDC claims that the e-mails Barclays references to show the prior course of dealing between the parties were not intended to invoke the CSA's dispute resolution provision because they did not involve the type of valuation discrepancy that could be remedied using the formal dispute resolution mechanism. Plaintiff BDC Finance L.L.C.'s Memorandum in Opposition to Barclays' Motion for Summary Judgment ("BDC Opp. Memo"), p. 23.

Furthermore, BDC argues that the CSA requires formal notification of disputes. According to BDC, neither the e-mails cited by Barclays as establishing prior course of

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[1] The parties resolved these disagreements prior to resorting to the CSA's formal dispute resolution mechanism.

dealing nor Nesbit's October 6th e-mail were specific enough to constitute an adequate notice of dispute under the CSA. In support of its argument, BDC points to Barclays' own interpretation of the CSA's notice provision. BDC claims that it informed Barclays by e-mail that it disagreed with Barclays' post-September 15th collateral calls using language similar to the above-referenced e-mails. BDC asserts that Barclays required BDC to send detailed notice in writing specifically enumerating the subject of the dispute in order to "officially dispute" Barclays' collateral calls. BDC's Opp. Memo, p. 24.

ii. Barclays' Knowledge of its Obligation to Dispute

BDC next claims that the portion of Nesbit's email asking if BDC "want[ed] to invoke the dispute mechanism," Deckoff Aff., Ex. J, shows that Barclays was not disputing BDC's October 6th call, but was instead inviting BDC to dispute Barclays' prior collateral calls.

Nesbit stated that, when he asked BDC if it wanted to invoke the dispute mechanism in his October 6th e-mail, "what [he] mean[t] is [he] wanted to know if BDC wanted to have bids put on the portfolio," as per the dispute resolution process set forth in the CSA. Affirmation of Negar Teeki ("Teeki Affirm"), Ex. P, p. 478.

BDC argues that, contrary to his testimony, Nesbit did not intend for his October 6th e-mail to initiate a formal dispute of BDC's call because Barclays was unaware that it had any obligation to dispute BDC's collateral calls. BDC asserts that the Agreement is atypical, in that it empowers both BDC and Barclays to act as Valuation Agents, whereas the vast

majority of Barclays' total return swap customers did not enjoy such a right. This means that both parties could determine the value of the Reference Assets and collateral calls. Both parties therefore had to follow the dispute resolution mechanism in the event of a disagreement. In Barclays' other total return swap contracts, only Barclays had the right to act as a Valuation Agent. Barclays would consequently never need to dispute its customer's collateral call amounts, as only Barclays determined the amounts. Only the customer would be obligated to dispute in the event that it disagreed with Barclays' calculations.

BDC also points to an October 15, 2008 internal telephone conversation between Nisbet and two other Barclays employees. In that conversation, Nesbit stated that the "one thing [Barclays] learned about [BDC] is they have the same confirm . . . if we say we owe them five and they say we owe them 16 . . . it's not up to them to dispute, it's up to us to dispute. It's like they're calling us." Affirmation of Negar Tekeei, Ex. W, p. 4.

Further confusing matters, Nesbit testified that BDC had disagreed with all of Barclays' collateral calls that were not calculated using LoanX prices, but had nevertheless paid those calls. Rather than dispute each of those calls in accordance with the CSA, BDC sent Barclays its October 6th collateral call for over $40 million. This would mean that BDC's October 6th call was not actually a collateral call, but a retroactive dispute of a series of Barclays' collateral calls. If this were the case, then it is unclear exactly who had an obligation to dispute and when that obligation arose. Nesbit's testimony lends credence to,

but does not confirm, BDC's theory that Nisbet's October 6th e-mail was not initiating a dispute, but was rather asking BDC if it wished to dispute Barclays' previous collateral calls using the CSA's formal dispute resolution mechanism.

BDC additionally claims that the fact that it sent Barclays multiple letters stating that Barclays had failed to exercise its dispute rights shows that BDC did not understand Barclays' communications to be a dispute under the CSA. BDC asserts that Barclays' failure to respond to those letters left BDC with no actual knowledge as to whether Barclays planned to exercise its dispute rights.

iii. Factual Issues Regarding Notice

Factual issues exist as to whether Barclays intended its communications with BDC following BDC's October 6th collateral call to be a notice of dispute under the CSA. Even if Barclays intended to notify BDC of a dispute via Nesbit's October 6th e-mails, issues of fact remain regarding whether those e-mails provided sufficient notice to impart actual knowledge of the dispute to BDC. Because of these material factual issues, BDC's motion for summary judgment is denied as to the issue of whether Barclays disputed BDC's October 6th collateral call. *Zuckerman,* 49 N.Y.2d at 562.

iv. Barclays' Alleged Breach of the CSA's Additional Informal Dispute Resolution Requirements

BDC contends that Barclays failed to comply with the CSA clauses requiring Barclays to timely transfer to BDC the undisputed amount of a disputed collateral call and to consult

with BDC to resolve any dispute between the parties. As the issue of whether Barclays triggered the CSA's dispute resolution provision is unresolved, the court need not reach the issue of BDC's fulfillment of the dispute resolution provision's additional requirements at this time.

2. Barclays' Motion for Summary Judgment of the Issue of Notice

Barclays' counterclaim for breach of contract is premised on the proposition that BDC defaulted on the Agreement by failing to pay Barclays' October 10th and 14th collateral calls. BDC informed Barclays that BDC would not pay those calls because Barclays was in default for failing to "either pay or dispute" BDC's October 6th call. Scott Aff., Ex. 65. Barclays claims that it was not in default because it properly disputed BDC's call, and thus, BDC had no right to refuse to pay Barclays' calls.

The court cannot grant summary judgment on Barclay's claim without first determining whether Barclays properly disputed BDC's October 6th call. As explained above, material issues of fact exist regarding whether Barclays provided BDC with sufficient notice of its purported dispute. Barclays' motion for summary judgment of its claim for breach of contract is consequently denied.

3. BDC's Pay First, Dispute Later Theory

BDC alternatively argues that it is entitled to summary judgment on its claims for breach of contract and for a declaratory judgment because Barclays defaulted on the

Agreement regardless of whether it provided BDC with adequate notice of its dispute. BDC interprets the Agreement as requiring Barclays to pay the full amount of BDC's collateral call prior to disputing, which Barclays admittedly failed to do.

Barclays argues that the Agreement only requires the payment of the "undisputed amount" of a disputed collateral call while the parties attempt to resolve their disagreement. Barclays further posits that BDC's interpretation of the Agreement would render several of its key provisions meaningless, and would lead to an uneven allocation of power between the parties.

The court's "role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract. If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further." *Evans v. Famous Music Corp., 1 N.Y.3d 452, 458* (2004). If the contract is ambiguous, the court "turn[s] to extrinsic evidence for guidance as to which interpretation should prevail." *Id.* at 459.

i. The Master Confirmation's Delivery of Collateral Clause

The court looks first to the language of the Agreement. In a section entitled "Delivery of Collateral," the Master Confirmation provides that, "[n]otwithstanding anything in the [CSA] to the contrary: . . . (b) the Total Return Payer shall Transfer any Return Amounts in respect of Transactions not later than the Business day following the Business Day on which the Counterparty requests the Transfer of such Return Amount." Deckoff Aff., Ex. D, p. 17.

The Agreement explains that the "Total Return Payer" is Barclays. The term "Counterparty" in this section of the Agreement mistakenly refers to Barclays. Both parties have acknowledged that the reference to Barclays is a drafting error and the "Counterparty" is, in fact, BDC. The "Return Amount" refers to the amount of BDC's collateral calls to Barclays. Thus, this section provides that Barclays must pay BDC's collateral calls by close of business the day after the call is made. The Master Confirmation does not contain analogous language pertaining to collateral calls from Barclays to BDC.

ii. BDC's Interpretation of the Delivery of Collateral Provision

BDC contends that the language of the Delivery of Collateral section of the Master Confirmation unambiguously establishes a pay first, dispute later scheme. Specifically, BDC claims that the phrase "notwithstanding anything in the [CSA]" means that the Master Confirmation overrides any and all conflicting provisions in the CSA. BDC further argues that the phrase "any Return Amount" means any Return Amount demanded by BDC, whether disputed or not.

BDC posits that the requirement to pay "any Return Amount" conflicts with the CSA's dispute resolution provision. That provision states that the parties need only pay the "undisputed amount" until the dispute is resolved. According to BDC, because the Master Confirmation and the CSA conflict, the Master Confirmation controls.

BDC's reading of the Master Confirmation therefore requires Barclays to pay any and all amounts called by BDC within one day of such call. The Master Confirmation would thereby negate the CSA provision stating that only the undisputed amount must be paid in the event of a dispute.

Additionally, under BDC's interpretation, the Master Confirmation would override the "Conditions Precedent" to payment contained in the CSA. The CSA provides that a condition precedent to both parties' obligation to pay collateral calls is that "(i) no Event of Default [or] Potential Event of Default . . . has occurred and is continuing with respect to the other party; and (ii) no Early Termination Date for which any unsatisfied payment obligations exist has occurred or been designated as the result of an Event of Default . . . with respect to the other party." Deckoff Aff., Ex. C, p. 20.

The Conditions Precedent provision conflicts with BDC's reading of the Master Confirmation as directing that, without exception, any and all Return Amounts demanded by BDC must be paid the day after they are called. BDC's construction of the Master Confirmation would render these provisions meaningless as to Barclays, and thereby require Barclays to pay all of BDC's collateral calls even if BDC were to default.[2]

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[2] BDC contends that any rights Barclays would lose under BDC's interpretation of the Master Confirmation are merely "boilerplate provisions in a form document" that the court need not take into consideration. Plaintiff BDC Finance L.L.C.'s Reply Memorandum of Law in Support of its Order to Show Cause for Summary Judgment ("BDC Reply Memo"), p. 5, n. 4.

iii. Barclays' Interpretation of the Delivery of Collateral Provision

Barclays argues that the Delivery of Collateral provision in the Master Confirmation should be read as modifying only the "Transfer Timing" provision of the CSA. The "Transfer Timing" provision states that collateral calls must be paid by close of business the day after the call is made unless the call is made after 1:00 p.m., in which case the parties have an extra day to pay the call. *Id.* Barclays' construction of the Master Confirmation reads the Delivery of Collateral provision as merely requiring that payments be made the day after a call is issued, even if the call is made after 1:00p.m. Under this interpretation, the Master Confirmation does not modify any portion of the CSA's dispute resolution or conditions precedent provisions, which remain in full force and effect.

Barclays asserts that BDC's interpretation of the Delivery of Collateral provision places undue force on the phrase "any Return Amount," and does not conform to the expectations of the parties. Barclays contends that its interpretation of the Master Confirmation expresses both the intent of the parties in negotiating the Agreement and the parties' understanding of the Agreement subsequent to its execution. Barclays claims that BDC's expert invented the "pay first, dispute later" theory long after BDC terminated the contract and brought the instant action.

However, it is a "well-settled rule of [contract] construction that no provision of a contract should be left without force and effect." *Gessin Elec. Contrs., Inc. v. 95 Wall Assoc.*, 74 A.D.3d 516, 519 (1st Dep't 2010).

In support of its contention, Barclays points to the fact that Muller's October 7th e-mail, the Notice of Failure, and the Termination Notice all stated that Barclays had to *either* pay BDC's October 6th collateral call *or* exercise its dispute rights. None of these communications expressed an understanding that the Agreement required Barclays to pay the full amount of the collateral call *before* disputing the call. Finally, Barclays calls attention to BDC's counsel's argument before this court on January 13, 2009. Scott Affirm., Ex. 1. BDC's counsel then explained to the court that "under the document that governs these transactions . . . Barclays had an option to either return the excess amount or to dispute it." *Id.* at 4:14-18.

BDC asserts that it has always understood the Agreement to contain a pay first, dispute later provision. The only evidence BDC provides in support of its contention is an excerpt of Nesbit's deposition testimony. BDC states that this testimony shows that "BDC raised the Delivery of Collateral clause on the first day of the first deposition in this case." BDC Reply Memo, pp. 4-5, n. 3. The testimony in question does not, however, reflect BDC's pay first, dispute later theory. It merely shows that BDC's counsel asked Nesbit to explain his understanding of the terms "total return receiver" and "total return payer."

iv. Applicable Law and the Court's Construction of the Master Confirmation

"An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation." *Ruttenberg v.*

Davidge Data Sys. Corp., 215 A.D.2d 191, 196 (1st Dep't 1995); *see also Gessin Elec. Contrs., Inc.*, 74 A.D.3d at 519 (holding that it is a "well-settled rule of [contract] construction that no provision of a contract should be left without force and effect.")

A written contract "will be read as a whole, and every part will be interpreted with reference to the whole." *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y. 2d 352, 358 (2003). Otherwise, "[t]he meaning of a writing may be distorted where undue force is given to single words or phrases." *Id.* "Words in a contract are to be construed to achieve the apparent purpose of the parties. Although [a literal reading of] the words might seem to admit of a larger sense, . . . they should be restrained to the particular occasion and to the particular object which the parties had in view." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989).

BDC's interpretation of the Agreement asks the court to read several important provisions out of the Agreement based on the Master Confirmation's use of the phrase "any Return Amount." Barclays' construction leaves all provisions of the Agreement intact. Barclays' construction also conforms to expectation of the parties, as evidenced by BDC's repeated assertions that the Agreement required Barclays to either pay or dispute, not pay then dispute.

Finally, the Master Confirmation does not contain parallel language regarding the timing of delivery for "any Delivery Amounts," which are collateral calls from Barclays to

BDC. BDC's reading of the Agreement only forces Barclays, not BDC, to pay first, then dispute. The "court will endeavor to give the contract [the] construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other." *Metro. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 438 (1994). This is because "[i]t is highly unlikely that two sophisticated business entities, each represented by counsel, would have agreed to such a harshly uneven allocation of economic power under the Agreement." *Id.* As both parties were allowed to act as Valuation Agents, it is illogical that the Agreement would require only one party to pay first and dispute later.

Reading the Agreement as a whole so as to achieve the purpose of the parties, and giving all of the Agreement's provisions full force and effect, the court rejects BDC's reading of the Agreement as requiring Barclays to have paid the full amount of BDC's October 6th collateral call prior to disputing. BDC's summary judgment motion is denied, and summary judgment is granted to Barclays solely on the issue of whether the Agreement establishes a pay first, dispute later mechanism. The court interprets the Agreement as providing that, in the event of a dispute, the parties need only pay the undisputed amount of a collateral call prior to the resolution of the dispute.

3. Barclays' Alleged Default Due to Improper Calculation of Collateral Calls

In its opposition to Barclays' motion for summary judgment, BDC raises a final argument in support of its own motion for summary judgment. BDC claims that Barclays' improperly calculated its post-September 15th collateral calls by undervaluing the Reference Assets. BDC Opp. Memo, p. 29. BDC asserts that BDC's allegedly improper calculations provided a basis for the termination of the contract independent of Barclays' failure to pay BDC's October 6th collateral call. BDC argues that it was not required to follow the CSA's dispute resolution mechanism because doing so would have been futile. BDC did not provide Barclays with any notice that it was terminating the contract on this basis.

The CSA clearly sets forth procedures for resolving collateral call disputes. Nothing in the Agreement permits a party to unilaterally terminate the contract without resorting to the dispute resolution mechanism, without providing the other party with a notice of default and without giving the other party an opportunity to cure.

VCG Special Opportunities Master Fund, Ltd. v. Citibank, N.A., 594 F.Supp. 2d 334 (S.D.N.Y. 2008) is directly on point. That case involved a derivatives transaction similar to the one at issue here. The parties therein entered into an agreement using the exact ISDA forms used by BDC and Barclays, including a CSA with an identical dispute resolution provision. Like BDC, VGC argued that it did not invoke the dispute resolution mechanism because "doing so would have been meaningless." *Id.* at 343. Applying New York law, the

court held that "[t]his position suggests that the Dispute Resolution process was optional instead of mandatory. New York public policy, however, favors alternative dispute resolution mechanisms that reflect the informed negotiation and endorsement of the parties." *Id.*

Like in *VCG*, nothing in the Agreement implies that the CSA's dispute resolution mechanism was optional. The CSA unequivocally states that, if either party disputes a collateral call, the "Disputing Party *will* notify the other party . . . *will* transfer the undisputed amount . . . [and] the parties *will* consult with each other in an attempt to resolve the dispute." Deckoff Aff., Ex. C, p. 21. If the parties fail to resolve the dispute under the informal dispute resolution mechanism, then the CSA mandates that the parties "will" utilize the CSA's formal dispute mechanism. *Id.*

Having failed to follow the CSA's dispute resolution clause, BDC cannot now seek to avoid the CSA's requirements and retroactively challenge Barclays' calculation of its post-September 15th collateral calls. BDC's motion for summary judgment as to its claim that Barclays' calculation of its collateral calls using "mid-values" provided an independent basis for BDC's termination of the contract is therefore denied.

III. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that the portion of plaintiff BDC Finance L.L.C.'s motion for summary judgment, Motion Sequence Number 008, seeking correction of a scrivener's error is granted.

The term "Counterparty" in Section VI(b) of the Master Confirmation is hereby replaced by the term "Total Return Receiver." BDC's motion for summary judgment is otherwise denied; and it is further

ORDERED that defendant Barclays Bank PLC's motion for summary judgment, Motion Sequence Number 009, is granted to the extent that the portion of BDC's cause of action for breach of contract claiming that Barclays was required to pay the full amount of BDC's collateral call of October 6, 2008 for $40,140,405.78 prior to disputing is dismissed. Barclays' motion for summary judgment is otherwise denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 442, 60 Centre Street, on September 11, 2012, at 10 a.m. to discuss the remaining issues in the case, which are (1) whether Barclays notified BDC of its dispute of BDC's collateral call; (2) if so, whether such notice was adequate; (3) whether Barclays timely paid the undisputed amount of the call and consulted with BDC to resolve the dispute; (4) whether BDC breached the Agreement by refusing to pay Barclays' October 10th and 14th collateral calls; and (5) the amount of damages, if any, incurred by each party.

Dated: New York, New York
August 15, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.