Hildene Capital Mgt, LLC v Bank of N.Y. Mellon
2012 NY Slip Op 33790(U)
August 23, 2012
Supreme Court, New York County
Docket Number: 650980/2010
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

HILDENE CAPITAL MANAGEMENT, LLC, *et al.*,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON, *et al.*,

Defendants.

INDEX NO. 650980/2010

MOTION DATE Dec. 14, 2011

MOTION SEQ. NO. 004

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion for leave to intervene.

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that the motion for leave to intervene is decided in accordance with accompanying decision and order.

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

Dated: August 23, 2012

O. PETER SHERWOOD, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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HILDENE CAPITAL MANAGEMENT, LLC, and HILDENE OPPORTUNITIES MASTER FUND, LTD., Individually and derivatively,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON, as Indenture Trustee, BIMINI CAPITAL MANAGEMENT, INC. and HEXAGON SECURITIES LLC,

Defendants

and THE BANK OF NEW YORK MELLON, as Indenture Trustee, and PREFERRED TERM SECURITIES XX LTD.,

Nominal Defendants.[1]

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DECISION AND ORDER

Index No. 650980/2010

O. PETER SHERWOOD, J.:

Before the Court is a motion by Preferred Term Securities XX, Ltd. ("PreTSL XX"), a limited liability company incorporated under the laws of the Cayman Islands (Proposed Complaint in Intervention ("PCII") ¶ 5) and a static Collateralized Debt Obligation ("CDO") which was formed under and is governed by an Indenture, dated December 15, 2005 (the "Indenture), for an order, pursuant to CPLR §§ 1012 and 1013, *inter alia,* granting PreTSL XX leave to intervene in the instant action brought by plaintiffs Hildene Capital Management, LLC and Hildene Opportunities Master Fund, Ltd. ("Hildene" or "plaintiffs"), individually and derivatively on behalf of investors in a special purpose investment vehicle, against defendant and nominal defendant Bank of New York Mellon ("BNYM" or "Indenture Trustee"), as Indenture Trustee, and Bimini Capital Management, Inc. ("Bimini") (collectively "defendants"). This action alleges that the defendants caused the loss

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[1]On May 2, 2011, after Justice Harold Baer of United States District Court of the Southern District of New York in a related federal court action titled *Howe v Bank of New York Mellon* (783 F. Supp. 2d 466) dismissed the derivative claims asserted on behalf of BNYM and PreTSL XX for lack of standing under Cayman Islands law, plaintiffs filed a Notice of Voluntary Discontinuance Without Prejudice, pursuant to CPLR § 3217 (a), dismissing any and all claims asserted against Hexagon Securities LLC and Preferred Term Securities XX, Ltd.

of some $13.2 million in principal of trust preferred securities ("TruPS") paid by Bimini for the repurchase of TruPS issued by Bimini and the resulting diminished cash flow that would have inured to the benefit of PreTSL XX from the $24 million of TruPS issued by Bimini and purchased by PreTSL XX.

The motion is opposed jointly by BNYM and Bimini on the ground that PreTSL XX, which they describe as a "mere shell company with no purpose other than to purchase Collateral Securities and issue the notes" (Ds' Memo of Law in Opposition, p. 10), lacks standing to intervene as it allegedly retained no legal interest in the corpus of the Trust which is the subject of this action. Defendants claim that PreTSL XX created a Trust through the Indenture for the benefit of Noteholders and that under the plain terms of the Indenture PreTSL retained no interest in the Trust *res*.

For the reasons that follow, PreTSL XX's motion for leave to intervene is granted, PreTSL shall be added as a party plaintiff, and the Proposed Complaint in Intervention, attached as Exhibit "A" to the Affirmation of PreTSL XX's counsel in Support of the Motion, is deemed served as of the date of this Decision and Order.

Factual Background

PreTSL XX was formed to issue and sell various tiers of notes to investors and to use the proceeds from those notes to purchase various assets known as "Collateral Securities" pursuant to an Offering Circular of December 16, 2005 (Affirmation of Douglas W. Miskin in Opposition to Motion, Exhibit "B"). The securities PreTSL purchased were placed in trust pursuant to the Indenture with BNYM as Indenture Trustee. PreTSL XX is structured as a static CDO which does not allow for any trading of the Collateral Securities in the investment portfolio and through which a Collateral Security can only be sold or otherwise removed from the PreTSL XX Trust Estate under limited and narrowly prescribed circumstances pursuant to the express terms of the Indenture (*id.* Exhibit "A", ¶ 3.8; Verified Complaint ¶ 17). The cash flow from the CDO collateral was to be used to make interest and principal payments to investors who bought PreTSL XX securities. Such securities were issued by PreTSL XX to investors in different tranches, or classes, representing different levels of risk, including the most senior notes, the mezzanine notes and the investor notes.

In 2005, defendant Bimini, a publicly traded real estate investment trust ("REIT"), issued TruPS with a face value of $50 million through Bimini Capital Trust II (*id.* Exhibit "C"). PreTSL XX purchased $24 million of TruPS issued by Bimini Capital Trust II.

Plaintiff Hildene is a senior note holder governed by the terms of the Indenture.

In September 2008, Bimini made a tender offer to repurchase the TruPS from PreTSL XX allegedly in an effort to restructure its debt and remain solvent, but the offer apparently failed to receive the consent of the Requisite Noteholders (as defined by the Indenture [Mishkin Affirm. Exhibit "A", Indenture, p. 24]). Under section 5.1 of the Indenture, setting forth the remedies available to the Indenture Trustee upon the occurrence of an "Event of Default", the Trustee may, subject to obtaining the consent of Requisite Noteholders, sell or otherwise liquidate the Trust Estate or any portion thereof (Verified Complaint ¶ 18).

On or about June 19, 2009, Robert Cauley, Chairman and CEO of Bimini, sent a letter to BNYM, addressed to Chris Grose, the relationship manager at BNYM[2], expressing outrage that the Indenture Trustee had reversed its position to the effect that the Indenture allowed cash repurchases and might not be willing to move forward with the transaction permitting Bimini to repurchase the TruPS held by PreTSL XX. Bimini's special counsel issued an opinion letter to BNYM stating that the Indenture Trustee was authorized to act at the direction of the Requisite Noteholders in taking action necessary to effectuate Bimini's offer (Verified Complaint ¶ 37).

In September 2009, Bimini submitted a revised tender offer to repurchase the TruPS and provided for payments to each holder of Senior Notes who consented to the Tender Offer. BNYM, purportedly on the strength of the Opinion Letter issued by Bimini's special counsel, forwarded the tender offer to the Senior Noteholders for approval. On or about October 21, 2009, BNYM received approval of over 90% of the Senior Noteholders consenting to Bimini repurchasing its TruPS. The transaction closed on October 21, 2009, with the transfer of the TruPS to Bimini in exchange for $10.8 million in cash and separate consideration of approximately $3.3 million in consent payments directly to the consenting Senior Noteholders (Verified Complaint ¶ 39). Following the transaction,

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[2]Chris Grose is apparently no longer employed by BNYM and is currently an employee of Hexagon Securities LLC, Bimini's financial advisor on the tender offer transaction (Verified Complaint ¶ 31).

Bimini posted a gain of approximately $9.6 million on the early extinguishment of this debt (*id.* ¶ 42).

Hildene commenced the instant action on July 16, 2010, alleging the following thirteen causes of action: breach of contract against BNYM (count 1, individually and count 2, derivatively on the right of BNYM and on behalf of PreTSL XX); breach of good faith and fair dealing against BNYM (count 3, individually, and count 4, derivatively); tortious interference with contract against Bimini and Hexagon (count 5, individually, and count 6, derivatively); breach of fiduciary duty against BNYM (count 7, individually, and count 8, derivatively); aiding and abetting breach of fiduciary duty against Bimini and Hexagon (count 9, individually, and count 10, derivatively); unjust enrichment against Bimini and Hexagon (count 11, individually, and count 12, derivatively); and rescission/illegality against Bimini (derivatively only).

Bimini and BNYM filed separate motions to dismiss which were fully briefed and submitted to the court. On October 20, 2011, the date scheduled for oral argument on the respective motions to dismiss, Hildene's attorney, who also represents PreTSL XX, advised the court that a day earlier he had filed the instant motion on behalf of PreTSL XX for leave to intervene. The court adjourned oral argument on the motions to dismiss so that said motions could be heard together with the instant motion for leave to intervene.[3] Oral argument on PreTSL XX's motion for leave to intervene was held on December 20, 2011, at which counsel for, respectively, proposed plaintiff intervenor, Hildene, BNYM and Bimini appeared. Following oral argument, the court reserved decision on the motion.

Discussion

CPLR §§ 1012 and 1013 govern circumstances in which non-parties may intervene in an existing action and be made parties thereto. CPLR § 1012, pertaining to applications to intervene as of right, provides, in relevant part, that:

> Upon timely motion, any person shall be permitted to intervene in any action . . . [w]hen the representation of the person's

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[3]The transcript of the October 20, 2011 appearance indicates that plaintiffs' counsel advised the court that if PreTSL XX is found to have standing and the motion for leave to intervene is granted, plaintiffs will voluntarily discontinue their derivative claims as duplicative (October 20, 2011 Transcript, pp. 13-14).

> interest by the parties is or may be inadequate and the person is or may be bound by the judgment.

CPLR § 1013, governing intervention by permission, provides, in pertinent part, that:

> Upon timely motion, any person may be permitted to intervene in any action . . . when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

Here, no party to this action has argued that the instant motion, brought fifteen months after commencement of the action, is untimely. In any event, there has been no showing of prejudice to a substantial right stemming from any delay in seeking intervention (*see generally, Yuppie Puppy Pet Products v Street Smart Realty, LLC,* 77 AD3d 197 [1st Dept 2010]). It is also worth noting that "[w]hether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted 'where the intervenor has a real and substantial interest in the outcome of the proceedings'" (*Global Team Vernon, LLC v Vernon Realty Holding, LLC,* 93 AD3d 819, 820 [2d Dept 2012]).

In support of its motion, PreTSL XX claims that the Granting Clause of the Indenture, while giving to BNYM, as Indenture Trustee, a security interest in PreTSL XX's causes of action and, thereby, giving BNYM a limited right to bring proceedings in furtherance of BNYM's obligations under the Indenture, did not divest PreTSL XX of the authority to bring claims itself, particularly where BNYM has failed to do so. In reliance upon section 3.22 (c) of the Indenture, PreTSL XX contends that it is the only owner of all the assets held as collateral, which ownership is not altered by the fact that it granted a security interest in such collateral in favor of BNYM. Such section 3.22 states that PreTSL XX "owns and has good and marketable title to the Collateral free and clear of any lien claim or encumbrance of any person."

PreTSL XX also directs the Court's attention to other provisions of the Indenture that it claims support its position that BNYM's right to bring proceedings was not exclusive. Specifically, section 3.5 of the Covenants section of the Indenture titled "Protection of Trust Estate" provides that PreTSL XX, as Issuer, "shall . . . take such other action necessary or advisable to: . . . (iv) preserve

and defend title to the Collateral and the rights of the Indenture Trustee, the Noteholders, and the Swap Counterparties in such Collateral against the claims of all other Persons." PreTSL contends that this provision supports a finding that the parties to the Indenture envisioned PreTSL XX taking action to enforce the Noteholders' rights in improperly sold Collateral.

Similarly, section 6.16 of the Indenture Trustee section of the Indenture titled "Assignment of Rights, Not Assumption of Duties" provides that PreTSL XX "shall remain liable under this Indenture and each of the related agreements to which it is a party . . . to perform all of its duties and obligations thereunder to the same extent as if this Indenture had not been executed, (b) the exercise by the Indenture Trustee of its rights, remedies or powers hereunder shall not release [PreTSL XX] from any of its duties or obligations under this Indenture and each of the related agreements to which it is a party."

In opposition, BNYM and Bimini jointly argue that under the Indenture PreTSL was divested of all legal interest in the corpus of the trust and does not have any "real and substantial interest" in the trust *res,* namely the Collateral Securities and any expected future income or principal payments from such securities. On that basis, BNYM and Bimini argue that PreTSL XX has no standing to bring suit as it has retained no right to receive an ongoing benefit from any income and principal payments from the Collateral Securities. By extension of reasoning, PreTSL cannot be harmed by any alleged damage to property in which it no longer has an interest.

BNYM and Bimini's arguments cannot be reconciled with the language of the Indenture, particularly sections 3.5 and 6.16. To have standing, a party must establish an "'injury in fact–an actual stake in the matter being adjudicated" (*Security Pacific Nat. Bank v Evans,* 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007], quoting *Society of the Plastics Indus., Inc. v County of Suffolk,* 77 NY2d 761, 772 [1991]).

Contrary to the position espoused by NYBM and Bimini, the court concludes that PreTSL XX may be said to have a bona fide interest in any determination with respect to the competing claims. Given the language of the Indenture whereby PreTSL XX is the owner of all the assets held as collateral and, as Issuer, has a continuing obligation under the Indenture to both the Indenture Trustee and the Noteholders with respect to the trust *res*, defendants' argument that PreTSL lacks standing is unpersuasive. Rather, it appears that PreTSL has "an actual stake in the matter being

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adjudicated" (*Security Pacific Nat. Bank,* 31 AD3d at 279). This conclusion is particularly warranted in light of the position taken by the Indenture Trustee, which is adverse to the position taken by the plaintiff Senior Noteholders. As noted, PreTSL has a continuing obligation under the terms of the Indenture to protect and defend title to the Collateral Securities and the rights of the Noteholders in respect of such Collateral. Given the position taken by the Indenture Trustee, it may not be said that PreTSL's interest in this proceeding is or can be adequately represented by either BNYM or Hildene. Further, PreTSL's claims have issues of law and fact in common with the issues raised in this proceeding. Accordingly, the criteria for intervention have been met.

Conclusion

Based upon the foregoing discussion, it is

ORDERED that the motion of Preferred Term Securities XX Ltd. for leave to intervene in this proceeding as a party plaintiff is GRANTED and the proposed complaint in intervention, annexed as Exhibit "A" to plaintiff's motion papers, is deemed served as of the date of filing of this Decision and Order with Notice of Entry; and it is further

ORDERED that the caption of the action shall be amended and read as follows:

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HILDENE CAPITAL MANAGEMENT, LLC, and HILDENE OPPORTUNITIES MASTER FUND, LTD., individually and derivatively,

Index No. 650980/2010

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON as Indenture Trustee, and BIMINI CAPITAL MANAGEMENT, INC.,

Defendants,

and THE BANK OF NEW YORK MELLON, as Indenture Trustee,

Nominal Defendant.

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PREFERRED TERM SECURITIES XX, LTD.,

Plaintiff-Intervenor,

-against-

THE BANK OF NEW YORK MELLON, as Indenture Trustee, and BIMINI CAPITAL MANAGEMENT, INC.,

Defendants.

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and it is further

ORDERED that defendants' counsel shall advise the court within fifteen (15) days of the date of this Decision and Order stating their position with respect to their motions to dismiss the complaint (Motion Seq. Nos. 002 and 003); and it is further

ORDERED that the attorneys for the parties shall appear for a preliminary conference in Part 49, Room 252, at 60 Centre Street, on September 12, 2012, at 9:30 a.m.

This constitutes the decision and order of the court.

DATED: 8/23/12

ENTER,

O. PETER SHERWOOD
J.S.C.