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

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

ROYAL PARK INVESTMENTS, SA/NV, INDEX NO. 652808/2011

Plaintiff,

-against- MOTION DATE _____

CIFG ASSURANCE NORTH AMERICA, INC. and CIFG GUARANTY LTD., MOTION SEQ. NO. 002

Defendants.

The following papers, numbered 1 to _____ were read on this motion to dismiss and cross-motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	No (s). _____
Answering Affidavits — Exhibits _____	No (s). _____
Replying Affidavits _____	No (s). _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendants' motion to dismiss and plaintiff's motion for summary judgment are decided in accordance with the accompanying decision/order dated December 16, 2013.

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

Dated: December 16, 2013

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----------X

ROYAL PARK INVESTMENTS, SA/NV,

Plaintiff,

-against-

CIFG ASSURANCE NORTH AMERICA, INC. and CIFG GUARANTY LTD.,

Defendants.

----------X

DECISION/ORDER

Index No. 652808/2011
Motion Seq. No. 002

FRIEDMAN, MARCY S., J.:

In this action, plaintiff Royal Park Investments, SA/NV (RPI), a noteholder under an indenture, alleges that defendant CIFG Assurance North America, Inc. (CIFG),[1] the insurer of the notes, has retained payments due to RPI. CIFG moves to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7) and 3211 (c). RPI cross-moves for summary judgment and costs.[2]

BACKGROUND

The material facts, as alleged in the complaint, are largely undisputed. By indenture dated January 7, 2003 (Indenture), Duke Funding IV, Ltd. and Duke Funding IV, Inc. (collectively the Duke Issuers) issued $190 million in collateralized 20-year notes (Class A-1 Notes or Notes). (Complaint, ¶¶ 2, 18.) The Duke Issuers used the proceeds from the sale of the Notes to purchase assets in the form of income producing securities (the Duke Assets). (Id., ¶

[1] According to CIFG, the complaint against defendant CIFG Guaranty Ltd. should be dismissed because that entity was merged into CIFG, is no longer in existence, and has no obligations to plaintiff under the identified agreements. Plaintiff objects to such dismissal on the ground that it has received no proof to support CIFG's representation, and it seeks to reserve all rights against CIFG Guaranty, Ltd.

[2] By letter dated March 1, 2013, RPI withdrew its request for costs pursuant to 22 NYCRR Part 130.

19.) The Duke Assets were then deposited into a trust (the Duke Trust) and pledged as collateral for the Class A-1 Notes. (Id.) The trustee of the Duke Trust (Duke Trustee) was directed to make quarterly payments, including payments of principal and interest to the Class A-1 Noteholders, in accordance with section 11.1 (a) of the Indenture, the "Priority of Payments" or Waterfall section. (Id., ¶ 19.)

In connection with the Class A-1 Notes, the Duke Trustee obtained a financial guaranty insurance policy from CIFG (the Duke Policy), for the benefit of the Class A-1 Noteholders. (Complaint, ¶ 20.) Pursuant to the Duke Policy and the Indenture, if the Duke Assets failed to generate enough principal and interest to make the full quarterly payment to the Class A-1 Noteholders, CIFG was obligated to make a payment to the Duke Trustee to cover the shortfall. (Id.; Duke Policy Endorsement No. 1 at 4-5 [Aff. of Sami Rashid [D's counsel] [Rashid Aff.], Ex. A; Indenture, § 17.3 [a].) This payment was defined in the Indenture as the "Class A-1 Scheduled Payment Shortfall Amount" (Claim Payment).[3] (Id., § 17.3 [a].) Once the Claim Payment was received by the Duke Trustee, the Trustee was required to transfer the Claim Payment to the Class A-1 Noteholders in proportion to their holdings. (Id., § 17.3 [a] 2; see Complaint, ¶ 20.)

The Indenture also provided for CIFG to receive reimbursement for its Claim Payments. Pursuant to sections 11.1 (a) (i) (E) and (a) (ii) (A), CIFG was entitled to receive payment of "Class A-1 Note Credit Enhancement Reimbursement Obligations" before any noteholders,

---

[3]Although the term Claim Payment is not a defined term in the Indenture, it is used by the parties to refer the defined term "Class A-1 Scheduled Payment Shortfall Amount," and will be used in this opinion.

including Class A-1 Noteholders, were paid out interest or principal.[4] The Indenture defined "Class A-1 Note Credit Enhancement Reimbursement Obligations" as: "with respect to any Quarterly Distribution Date, the sum of (x) all Insured Payments [Claim Payments] paid by the Class A-1 Note Credit Enhancer [CIFG] on or prior to the Quarterly Distribution Date, but for which [CIFG] has not been reimbursed prior to such Quarterly Distribution Date. . . ." (Id., § 1, Definitions, "Class A-1 Note Credit Enhancement Reimbursement Obligations.")

The Indenture also contained a subrogation provision which provided:

> "(a) Upon the payment by the Class A-1 Note Credit Enhancer [CIFG] to the Trustee of any amounts theretofore drawn by the Trustee under the Class A-1 Note Credit Enhancement [Claim Payment], [CIFG] shall be fully subrogated to the rights of each Holder of Class A-1 Notes to receive payments of amounts due in respect thereof from the Issuer in accordance with the Priority of Payments to the extent of any payments by [CIFG pursuant to the CIFG Policy]. The Trustee shall give effect to any such subrogation by distributing to [CIFG], as subrogee of the Holders of the Class A-1 Notes, reimbursement for any payments by [CIFG] under the Class A-1 Note Credit Enhancement [i.e., Claim Payments] in accordance with the Priority of Payments."

(Id., § 17.5 [a].)

In May 2009, RPI purchased $25 million of Class A-1 Notes. (Complaint, ¶ 18.) As of June 2009, CIFG had not been called upon to make any Claim Payments. (Id., ¶ 23.) However, to reduce its risk of losses in connection with future Claim Payments, it sought to terminate its obligations under the Duke Policy with respect to some of the Class A-1 Noteholders. (Id.) To that end, CIFG proposed that RPI and CIFG enter into an agreement to treat the Duke Policy as terminated as to RPI's Class A-1 Notes. (Id.)

---

[4]Thus, under the Priority of Payments provision, CIFG was entitled to receive reimbursement of any Claim Payment (§ 11.1 [a] [i] [E]) before a Class A-1 Noteholder was entitled to a distribution of interest (§ 11.1 [a] [i] [F]) or a distribution of principal (§ 11.1 [a] [ii] [A] [providing for distribution of principal in the same order as distribution of interest].)

RPI and CIFG (as well as CIFG Guaranty Ltd.) entered into a "Settlement Agreement," dated July 1, 2009, the stated purpose of which was to "effect a commutation" of the Duke Policy. (Settlement Agreement, Recitals, Third Whereas Clause.) Under this Agreement, CIFG paid RPI $1,059,826 (the "Cash Consideration") "[i]n full and final settlement of all claims the Insured [RPI] may now or hereafter have against [CIFG] or [CIF Guaranty Ltd.] in respect of the [Duke Policy] relating to the Outstanding Principal Balance of the [Duke Notes]." (Settlement Agreement, § 2.)

It is undisputed that because the Duke Policy had been issued to the Duke Trustee, neither CIFG nor RPI had the power to terminate the Policy. (Complaint, ¶¶ 24-25.) The Policy thus remained in effect after the parties' entry into the Settlement Agreement. However, while CIFG remained obligated under the Policy to make Claim Payments as to all Class A-1 Notes, the Settlement Agreement obligated RPI to return any future Claim Payments transferred to RPI by the Duke Trustee on account of RPI's Class A-1 Notes. (Id., ¶¶ 25-26.) The Settlement Agreement thus provided that the $1,059,826 Cash Consideration to RPI "will be reduced by the amount of actual claim payments made by [CIFG] after the Effective Date [of the Settlement Agreement] pursuant to the [Duke Policy] relating to the Outstanding Principal Balance of the [Duke Notes]." (Settlement Agreement, § 2.) The Settlement Agreement also contained an acknowledgment by RPI that the actual Claim Payments by CIFG might be greater than the Cash Consideration and, if so, RPI would be required to be reimburse them. (Id.)[5]

---

[5]Section 2 of the Settlement Agreement thus provided: "[RPI] hereby agrees to reimburse [CIFG] for any such amounts within ten (10) Business Days of receipt of notice from [CIFG] of any such payment, as evidenced by documentation received from the [Duke Trustee]. . . . For the avoidance of doubt, [RPI] acknowledges that reimbursement by it of all claim payments that may be made by [CIFG] with respect to the Outstanding Principal Balance may be greater than the amount of the [Cash

In August 2009, the Duke Trustee declared an event of default with respect to the Class A-1 Notes. (See Complaint, ¶ 27; Indenture, §§ 5.1 [a], [b].) However, CIFG did not elect at that time to direct the Duke Trustee to accelerate the Notes or liquidate the Duke Assets. (Id.)

In December 2009, in order to simplify reimbursements by RPI to CIFG of any Claim Payments made subsequent to the Effective Date of the Settlement Agreement, CIFG and RPI set up a trust (Rubble Trust). (Complaint, ¶¶ 28-31.) On August 20, 2010, CIFG and RPI executed the Rubble II Master Trust Series Supplement No. DFIV-5 (Rubble Supplement), which designated RPI's Class A-1 Notes and "all amounts payable pursuant to the terms of such assets" as property of the Rubble Trust. (Rubble Supp., §2 [a].) Pursuant to the Rubble Supplement, CIFG agreed to provide a quarterly payment notice to the Rubble Trustee, detailing the interest, principal, and claim payment amounts to be distributed to CIFG and RPI for that quarter. (See id., § 1, Definitions, "Bond Insurer Payment Notice".) The Rubble Trustee was required to apply any amounts in the payment notice that were received by the Rubble Trust in the order provided for in section 6, the "Payments and Distributions" provision of the Rubble Supplement. This section provided for the Rubble Trustee first to pay its own fees and expenses; then to pay CIFG any amounts up to the "Bond Insurer Payment" (id., § 6 [i]), which was defined as "any payments or portions of payments on the Bonds attributable to insurance payments" made by CIFG (id., § 1, Definitions, "Bond Insurer Payment"); and then to pay to RPI "any remaining amounts up to the interest received on the Bonds, as set forth in the Bond Payment Report," and

---

Consideration] paid by [CIFG] on the Effective Date and [RPI]'s obligation to make such payments shall continue if it ceases to be the beneficial owner of the [Class A-1 Notes]."

"any remaining amounts up to the principal received on the Bonds, as set forth in the Bond Payment Report." (Id., § 6 [a] [ii] and [iii].) The Bond Payment Report was defined as "the report prepared for each Bond Payment Date" by the Duke Trustee. (Id., § 1, Definitions, "Bond Payment Report.") Any remaining funds in the Rubble Trust, after the above payments, were required to be paid out to CIFG. (Id., § 6 [a] [iv].)

In March 2011, CIFG directed the Duke Trustee to accelerate payment of all principal and interest due on the Class A-1 Notes and to liquidate the Duke Assets. (Complaint, ¶ 34.) Thereafter, the Duke Trustee informed CIFG that, as a result of the acceleration, the amount due the Class A-1 Noteholders would be $91,790,772.65, and there would be a shortfall of $89,341,108.88. (Id., ¶ 35.) The Duke Trustee requested for the first time that CIFG make a Claim Payment in the $89 million amount. (Id.)

In April 2011, after receipt of the $89 million Claim Payment from CIFG and prior to the liquidation of the Duke Assets, the Duke Trustee distributed the full Claim Payment to the Class A-1 Noteholders, along with the nearly $2.5 million of otherwise available funds. (Id., ¶ 36.) The complaint acknowledges that "[t]hese combined payments represented full satisfaction of the principal amounts and accrued interest of $91,790,772.65 due to the Duke Noteholders." (Id.) The Duke Trustee's April 2011 distribution to RPI for its proportionate share of the amounts due on its Class A-1 notes included $25,670.75 of interest, $296,653.29 of principal, and $11,755,409.04 for RPI's share of the $89 million Claim Payment. (Id., ¶ 37.) As required by the Rubble Supplement, the sums paid by the Duke Trustee with respect to RPI's Class A-1 Notes were deposited into the Rubble Trust. Thereafter, in accordance with the Rubble Supplement, the Rubble Trustee paid the principal and interest (approximately $322,000) to RPI

and distributed the Claim Payment amount ($11,755,409.04) to CIFG. (Id.)

In June 2011, the Duke Trustee sold the Duke Assets, and generated $58,025,415.97 in sale proceeds. (Id.) The Duke Trustee then transferred all of the sale proceeds to CIFG "as reimbursement" for its $89 million Claim Payment. According to RPI, $5,323,823.94 of the sale proceeds were interest and principal "in respect of RPI's Duke Notes." (Id., ¶¶ 39-40.)[6]

It is undisputed that, upon receipt of the funds from the Duke Trustee, CIFG did not pay the $5.3 million into the Rubble Trust and did not submit a payment notice to the Rubble Trustee. Rather, CIFG kept the payment. RPI commenced this action, claiming that CIFG's retention of the $5.3 million constitutes a breach of the parties' Settlement Agreement and of the Rubble Supplement.

The parties' sharply dispute whether the $5.3 million that CIFG retained is principal and interest that RPI is entitled to have distributed to it under the Rubble Supplement, or whether it is reimbursement on account of the $89 million Claim Payment made by CIFG that CIFG is entitled to retain.

DISCUSSION

It is well settled that on a motion to dismiss addressed to the face of the pleading, "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See also 511 W. 232nd Owners Corp. v Jennifer

---

[6]In the papers on these motions, RPI does not explain how it calculated the $5.3 million amount for its alleged share of the sale proceeds.

Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88; see also Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

On a motion for summary judgment, the movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman, 49 NY2d at 562.)

It is further settled that the determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v 600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990].) Moreover, the court should determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].) "[M]atters extrinsic to the

agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument." (Id. at 572-573 [internal citation and quotation marks omitted].) Put another way, "extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." (W.W.W. Assocs, 77 NY2d at 163 [internal citation and quotation marks omitted].) In determining whether a contract is ambiguous the "initial question * * * is whether the agreement on its face is reasonably susceptible of more than one interpretation." (Chimart Assocs., 66 NY2d at 573; Nausch v Aon Corp., 283 AD2d 353 [1st Dept 2001].)[7]

Here, RPI and CIFG agree that the terms of the Indenture, Settlement Agreement, and Rubble Supplement are unambiguous, but offer significantly differing readings of these contracts. As discussed more fully below, the contracts are not reasonably susceptible of RPI's interpretation. Thus, whether the motion is treated as one to dismiss based on documentary evidence or one for summary judgment, the result is the same, as the court holds, based on the undisputed facts and the unambiguous terms of the parties' contracts, that CIFG is entitled to retain the $5.3 million payment distributed to it by the Duke Trustee after the liquidation of the Duke Assets.

Settlement Agreement

RPI argues that by keeping both the $5.3 million that the Duke Trustee distributed to CIFG after the liquidation of the Duke Assets and the $11.7 million for RPI's proportionate share

[7]The parties' agree that New York law governs the Indenture and Settlement Agreement, and that Delaware law governs the Rubble Supplement. CIFG contends, and RPI does not dispute, that the standards for interpretation of a contract are the same under both states' law. (D.'s Memo. In Support at 8.)

of CIFG's $89 million Claim payment, CIFG breached the Settlement Agreement because the Agreement entitled CIFG only to "the amount of actual payments made by CIFG" after the Effective Date of the Settlement Agreement in respect of RPI's Duke Notes. (P.'s Reply Memo. at 6.) This argument is based on a misreading of section 2 of the Settlement Agreement. As discussed above, it provided for a one time payment in satisfaction of any future obligation CIFG might have under the Duke Policy to make Claim Payments to RPI as a Class A-1 Noteholder. As CIFG correctly argues, the Settlement Agreement did not modify or amend either party's rights under the Indenture in any respect. Nor did it contain any provision that imposed any obligation on CIFG with respect to payments received by CIFG from the Duke Trustee pursuant to the terms of the Indenture. (D.'s Memo. In Support at 10.) More specifically, the Settlement Agreement did not include any provision that addressed the disposition of payments to CIFG by the Duke Trustee upon liquidation of the assets of the trust. Section 2 thus did not limit CIFG's right to reimbursement of Claim Payments from the Duke Trustee, which continued to be governed by section 11.1 (a) (i) of the Indenture. Section 2 merely provided, given that the Indenture and Duke Policy remained in effect and that the Trustee would therefore be required to pay over to RPI its share of Claim Payments that CIFG made after the date of the Settlement Agreement, that RPI must reimburse CIFG for any such claim payments, even if they proved to be greater than the $1 million commutation payment. (Settlement Agreeement, § 2, quoted supra at 4.)

Indeed, nothing in the Settlement Agreement indicates that the parties contemplated the possibility that the Duke Trustee would pay liquidation proceeds to CIFG as reimbursement for its Claim Payment. Rather, by its express terms, the Settlement Agreement was made for the

limited purpose of "effect[ing] a commutation" of the Duke Policy. (Settlement Agreement, Recitals, Third Whereas Clause.) (See Ronnen v Ajax Elec. Motor Corp., 88 NY2d 582, 588 [1996] [considering recital purpose clause of agreement in determining that contract was not ambiguous].) Once CIFG made the payment of approximately $1 million that effected the commutation, it satisfied all of its obligations under the Settlement Agreement.

The court accordingly holds as a matter of law that RPI fails to state a cause of action for breach of the Settlement Agreement.

Rubble Supplement

In claiming a breach of the Rubble Supplement, RPI cites section 2 (a), which provided that the property of the Rubble Trust included RPI's Class A-1 Notes and "all amounts payable pursuant to the terms of such assets." RPI then characterizes the $5.3 million distribution from the Trustee to CIFG as the "RPI Residual," and claims that it was principal and interest which should have been transferred by CIFG to the Rubble Trust and paid in accordance with the section 6 Waterfall – first to CIFG, but only up to its Claim Payment, and then to RPI for interest and principal, as set forth in the Bond Payment Report. (P.'s Memo. In Opp. at 2; Rubble Supplement, § 6 [a] [i]-[iii], quoted supra at 5-6.)

As a threshold matter, it is noted that the term "RPI Residual" does not appear in the Settlement Agreement, Rubble Supplement, or Indenture.[8] Moreover, it is undisputed that the $5.3 million distribution was made by the Duke Trustee to CIFG as a reimbursement on account

[8]RPI claims that CIFG itself introduced the term "residual" in an e-mail that used the term to refer to interest and principal payments that would be made to RPI under the Rubble Supplement. (P.'s Memo. In Opp. at 2, n 3.) However, this e-mail was dated July 2010, prior to the execution of the Rubble Supplement and nearly one year prior to CIFG's first Claim Payment.

of the $89 million Claim Payment. This distribution was evidenced by the Trustee's "Note Valuation Report Related to the June 30, 2011 Payment," which set forth the amounts "the Trustee will withdraw from the Payment Account and pay . . . in accordance with the priorities established in, Section 11.1 (a)" of the Indenture. (Note Valuation Report at 1[1st paragraph] [Aff. of Danny Frans [RPI's CEO], Ex. 6].) This Report showed that there was no distribution for Class A-1 interest or principal. (Id. at 1, 3 [leaving the spaces for these items blank].) In contrast, the Report recorded the amount of $58 million for the 11.1 (a) (i) (E) payment to CIFG for its Class A-1 Note Credit Enhancement Reimbursement Obligations – i.e., Claim Payments. (Id. at 3.)[9]

RPI does not argue that the Duke Trustee acted improperly in reimbursing the $58 million to CIFG pursuant to the Indenture for its Claim Payment. Rather, in support of its claim that its $5.3 million share of the payment must be transferred by CIFG to the Rubble Trust, RPI argues that the payment was principal and interest that was paid to CIFG as RPI's subrogee. This argument is unsupported by the clear terms of the Indenture.

Section 17.5 (a) of the Indenture, the subrogation provision, provided that upon the making of a Claim Payment, CIFG was subrogated to the rights of the Noteholder "to the extent of any payments" by CIFG. The provision also expressly stated that the "Trustee shall give effect to any such subrogation by distributing to [CIFG], as subrogee of the Holders of the Class A-1 Notes, reimbursement for any payments by [CIFG] in accordance with the Priority of Payments,"

---

[9]In comparison, the Note Valuation Report for the April 5, 2011 Payment, which included the $89 million Claim Payment, showed distributions to the Class A-1 Noteholders for interest in the amount of approximately $195,000 and principal in the amount of approximately $1.8 million. (Frans Aff., Ex. 3.)

pursuant to section 11.1 of the Indenture. (See § 17.5 [a], quoted in full, supra at 3.)

That is precisely what the Duke Trustee did here in paying the $58 million to CIFG "as reimbursement" for its prior Claim Payment of $89 million. RPI asserts that "the Duke Trustee distributed the Liquidation Proceeds – including the RPI Residual – to CIFG as subrogee of the Duke Noteholders' rights to receive those payments of principal and interest in respect of the Duke Notes." (P.'s Memo. In Opp. at 8.) Even assuming arguendo that RPI is correct that the liquidation proceeds were in fact principal and interest, RPI's argument ignores that the subrogation provision did not direct the Trustee to distribute principal and interest to CIFG for the benefit of the Class A-1 Noteholders. Rather, it directed the Trustee to distribute "reimbursement" to CIFG for any Claim Payments it had made.[10]

Significantly also, in claiming that CIFG was required to transfer the reimbursement into the Rubble Trust so that distributions of principal and interest could be made to it, RPI ignores that the principal and interest due for the Class A-1 Notes was accelerated when the $89 million Claim Payment was made in April 2011; that the Note Valuation Report for the April 2011 distribution reflected the distribution of such interest and principal to the Class A-1 Noteholders, including RPI; and that the Note Valuation Report for the June 2011 distribution showed that no

---

[10]RPI seeks to bolster its argument by claiming that section 4.1 of the Indenture "provides that the Duke Notes will remain Outstanding until distributions to CIFG are 'sufficient to pay the principal of and interest on such Notes[.]'" [brackets and emphasis in original]. This summary of section 4.1 is inaccurate. "Outstanding" is a defined term in the Indenture and its use in section 4.1 must be read in conjunction with its definition, which stated in pertinent part:

> "to the extent that any Class A-1 Notes have been paid with proceeds of the Class A-1 Note Credit Enhancement [i.e., by a Claim Payment], such Class A-1 Notes shall continue to remain Outstanding for purposes of this Indenture until the Class A-1 Note Credit Enhancer [CIFG] has been paid as subrogee hereunder, and the Class A-1 Note Credit Enhancer shall be deemed the Holder thereof, to the extent of any payments thereon made by the Class A-1 Note Credit Enhancer."

Section 4.1 is thus a provision for the benefit of CIFG, not RPI.

interest and principal was available to be distributed to the Class A-1 Noteholders. RPI also simply ignores that the Rubble Supplement called for distributions of interest and principal to RPI only "as set forth in the Bond Payment Report." (Rubble Supplement, § 6 [a] [ii], [iii], quoted supra at 5-6.) At the oral argument of the motions, the parties acknowledged that the Bond Payment Report is the Note Valuation Report. (Tr. at 14-15, 33-34.) By the express terms of the Rubble Supplement, then, there was no distribution due to RPI.

Although RPI argues at length on these motions that the Trustee's distribution was a distribution of principal and interest to which it was entitled, RPI's complaint acknowledges that the essence of its claim is that it reimbursed CIFG $11.7 million for its proportionate share of the Claim Payment at the time the Claim Payment was made, and that CIFG's retention of RPI's $5.3 million proportionate share of the $58 million reimbursement distribution is a duplicative reimbursement of its Claim Payment on account of RPI's notes, resulting in a windfall to CIFG. (Complaint, ¶ 43: "By seizing the RPI Residual as a duplicative reimbursement, CIFG has now obtained total reimbursement of $17,079,232.98 for its Claim Payment of $11,755,409.04. CIFG's improper conduct and its resulting $5,323,823.94 windfall breach the parties' Settlement Agreement and Rubble Documents"].) As held above, however, in the Settlement Agreement and Rubble Supplement that RPI entered into with CIFG, RPI did not provide for the eventuality that if CIFG made a Claim Payment, the Trustee might be required, under the Priority of Payments or Waterfall provision of the Indenture, to distribute all proceeds from the sale of the Duke Assets to CIFG as reimbursement. Under settled law, this court cannot re-write the parties' contract to achieve what the court might consider a more equitable result. (Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 2 AD3d 266, 267 [1st Dept 2003], lv denied 2

NY3d 702 [2004] ["[E]quitable considerations will not allow an extension of [contract language] beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against." [quotation marks and internal citation omitted].)

It is accordingly hereby ORDERED that motion of defendant CIFG Assurance North America Inc. to dismiss the complaint is granted to the extent of dismissing the complaint in its entirety with prejudice; and the Clerk shall enter judgment accordingly and it is further

ORDERED that the cross-motion of plaintiff Royal Park Investments, SA/NVfor summary judgment is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
December 16, 2013

MARCY S. FRIEDMAN, J.S.C.