

Phoenix Light SF Ltd. v Merrill Lynch & Co., Inc.
2014 NY Slip Op 33269(U)
December 15, 2014
Supreme Court, New York County
Docket Number: 653235/2013
Judge: Charles E. Ramos
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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
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PHOENIX LIGHT SF LIMITED, SILVER ELMS
CDO PLC, SILVER ELMS CDO II LIMITED and
KLEROS PREFERRED FUNDING V PLC,

Plaintiffs,

-against-

Motion Sequence No. 001
Index No. 653235/2013

MERRILL LYNCH & CO., INC., MERRILL
LYNCH, PIERCE, FENNER & SMITH
INCORPORATED, MERRILL LYNCH
MORTGAGE LENDING, INC., FIRST FRANKLIN
FINANCIAL CORPORATION and MERRILL
LYNCH MORTGAGE INVESTORS, INC.,

Corrected Opinion

Defendants.

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Hon. Charles E. Ramos, J.S.C.:

In motion Seq. No. 001 the defendants move to dismiss the plaintiffs' amended complaint. At the onset of this litigation, these plaintiffs initially filed a complaint that combined claims against numerous banks involved in dozens of unrelated RMBS transactions. This Court dismissed that complaint for the failure to set forth specific allegations as to each defendant as to any of the particular transactions. This Court granted leave to these plaintiffs to re-plead separate claims against each bank in order to permit a rational analysis of the claims and defenses.

The present amended complaint (229 pages containing 580 numbered paragraphs) gives a somewhat clearer picture of the transactions. A summary of the transactions at issue is contained in the amended complaint at paragraphs 1-3.

This action does not address the plaintiffs' potential

contract or securities laws claims. The amended complaint pleads causes of action based in fraud. Because fraud must be pled with particularity, CPLR 3016(b), these plaintiffs must set forth in reasonable detail, the actionable misstatements or omissions their claim is based on. Such allegations are fundamental to an action for fraud.

When pressed to explain why the amended complaint described alleged misrepresentations that were set forth in documents that post date the purchase (and therefore cannot constitute the basis of a fraud claim), counsel for the plaintiffs admitted that his clients had no details and that his clients do not possess the actual offering documents relied upon in pursuing the RMBS transaction (transcript 8/14/2014, pp 48:12-50:19). Counsel stated that he intends to uncover the details of the fraud in discovery (Id. at 50:23-51:8). In a footnote to paragraph 1 of the amended complaint, plaintiffs clearly admit that "some" of the purchase decisions were made prior to the release of the final prospectus supplements. This is critical because the amended complaint sets forth allegations based on representations contained in the final prospectus, which, as aforesaid, post dated the transactions at issue.

Plaintiffs seek to avoid the consequences of their lack of precision by alleging that "On information and belief...all such purchases were made in direct reliance upon draft prospectuses supplement...that...were identical in all material respects to the final prospectus supplements..." (Amended Complaint, footnote

to ¶ 2). Such a statement renders compliance with CPLR 3016(b) a practical impossibility. These plaintiffs have admitted that they are unable to plead the particulars of the alleged fraud because they do not know what actually occurred. The failure to allege what, if anything, constituted misrepresentations, requires a dismissal. The purchasers to whom the representation were made, the plaintiffs' assignors, must provide these plaintiffs, the defendants and this Court with the facts. As drafted, this amended complaint is mere speculation.

There are 32 certificates at issue in this case. The plaintiffs avoid alleging any specific allegations of the supposed misrepresentations regarding any of certificates because they admit they do not possess any direct knowledge and no one with knowledge has supplied them with any particulars. It should be noted that the absence of detail is not a consequence of this information being solely within the control of the defendants.

An additional point needs to be raised. Some of the plaintiffs are original purchasers and, in theory, should be able to plead without difficulty. However, the complaint is so vague that this Court is unable to distinguish mere speculation from allegations based upon knowledge.

In addition, the claims as pled rely on reports and publications that have no connection to the actions of these defendants or to the loans underlying the specific certificates at issue here. Plaintiffs' complaint relies mostly on generalized due diligence and originator reports that are not tied to any

specific securitization, industry publications that do not even reference these defendants, and allegations regarding analyses offered by different investors in different securitizations.

This lack of specificity is particularly significant in light of the fact that the offering documents disclosed that the loan originators would follow their guidelines only "generally", that "exceptions to the underwriting standards" may be made, and that a "substantial portion" of the loans may have been subject to such exceptions. A pleading that satisfies the requirements of CPLR 3016(b) requires more than mere boilerplate allegations. The allegations set forth in this complaint were seemingly gleaned from media reports. Specific facts must be set forth that connect these generalized allegations of underwriting guideline abandonment by the loan originators to the actual mortgage loans at issue in the case. This is especially so where, as here, the offering documents state that the originators would make exceptions to their underwriting standards.

In light of the foregoing, the amended complaint is dismissed with leave to replead, but this Court admonishes counsel for the plaintiffs not to submit a further amended complaint until they are capable of satisfying the pleading requirements for fraud pursuant to CPLR 3016(b). The defendants and this Court are entitled to specific allegations, not the generalized and irrelevant matter set forth in the prior pleadings.

This shall constitute the decision and order of this Court.

Dated: December 15, 2014



J.S.C.

CHARLES E. RAMOS