Financials Restructuring Partners III, Ltd. v Riverside Banking Co.
2014 NY Slip Op 30013(U)
January 2, 2014
Supreme Court, New York County
Docket Number: 650934/2013
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

FINANCIALS RESTRUCTURING PARTNERS, III, LTD., *et al.*,

Plaintiffs,

-against-

RIVERSIDE BANKING COMPANY,

Defendant.

INDEX NO. 650934/2013

MOTION DATE Dec. 10, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for summary judgment in lieu of complaint.

	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 this motion for summary judgment in lieu of complaint is decided in accordance with the accompanying decision and order.

Dated: January 2, 2014

O. PETER SHERWOOD, *J.S.C.*

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

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: COMMERCIAL DIVISION PART 49

----------X

FINANCIALS RESTRUCTURING PARTNERS III, LTD. and HOLDCO ADVISORS, L.P., as manager for Financials Restructuring Partners III, Ltd.,

Plaintiffs,

-against-

RIVERSIDE BANKING COMPANY,

Defendant.

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DECISION AND ORDER

Index No.: 650934/2013
Mot. Seq. Nos. 001 -and- 002

O. PETER SHERWOOD, J.:

In motion sequence number 001, plaintiffs Financials Restructuring Partners III, Ltd. and HoldCo Advisors L.P., as manager for Financials Restructuring Partners III, Ltd. (together "FRP") move, pursuant to CPLR 3213 for summary judgment in lieu of complaint. In motion sequence number 002, defendant Riverside Banking Co. ("Riverside") moves, pursuant to CPLR 3211 (a)(8) to dismiss the complaint for lack of personal jurisdiction. For the reasons discussed below, the motion for summary judgment in lieu of complaint is GRANTED and motion to dismiss is DENIED.

BACKGROUND

Riverside was a bank holding company whose principal assets were three regulated financial institutions operating throughout Florida: AmericanFirst Bank ("AmericanFirst"), Federal First Bank of North Florida ("Federal First"), and Riverside National Bank of Florida ("Riverside Bank"). The banks failed in April 2010 and were seized by regulators, who sold substantially all the banks' assets. It is undisputed that Riverside did not conduct business in New York.

Prior to seizure of the banks, Riverside established Riverside Statutory Trust II (the "Trust") as a wholly owned subsidiary trust. Riverside, through an indenture dated May 19, 2006 (the "Indenture") issued to the Trust $20 million of debt securities. The Trust in turn issued $20 million of trust preferred securities to investors. Riverside guaranteed payment of the securities. FRP claims to own 50% of these securities, making it a beneficial holder. FRP has not been paid interest in accordance with the Indenture. FRP now sues Riverside.

A. The Indenture

Riverside as Issuer and Wells Fargo Bank, NA as Trustee, executed the Indenture on May 19, 2006, issuing approximately $20 million in Debentures. The Trustee was then to issue the same amount in Junior Subordinated Debt Securities (the "Capital Securities"), with a redemption date of July 7, 2036 to Securityholders (Ghei aff Ex. C). "Securityholder" or "holder of Debt Securities" is defined in the Indenture as "any person in whose name at the time a particular Debt Security is registered on Debt Security Register" (Indenture § 1.01). The Indenture required the transfer of all Capital Securities to be recorded in the Debt Security Register and be made in accordance with a restricted securities legend (Indenture § 2.05).

The Indenture provided for quarterly interest payments but Riverside was entitled to initiate an extension period, deferring interest payments, provided no Event of Default had occurred (Indenture § 2.11). In order to do so, Riverside was required to give notice to the Trustee, who in turn was required to give notice to the Securityholders. Riverside was also entitled to extend this extension period for up to twenty (20) consecutive quarters, by providing notice to the Trustee. At the conclusion of the extension period, Riverside was obligated to pay all deferred interest. The last of the extensions expired in October of 2013.

Events of Default are defined in Section 5.01 of the Indenture. An Event of Default occurs when:

> (a) [Riverside] defaults in the payment of any interest upon any Debt Security when it becomes due and payable (unless [Riverside] has elected and may defer interest payments pursuant to Section 2.11), and continuances of such default for a period of 30 days; or
>
> (b) [Riverside] defaults in the payment of all or any part of the principal of . . . any Debt Securities as and when the same shall become due and payable . . . by declaration of acceleration pursuant to Section 5.01 of this Indenture or otherwise; or
>
> (c) [Riverside] defaults in the payment of any interest upon any Debt Security when it becomes due and payable following the nonpayment of any such interest for 20 or more consecutive quarterly periods; or
>
> (d) [Riverside] defaults in the performance of, or breaches, any of its covenants . . . and continuance of such default or breach for a period of 30 days after there has been given, by registered or certified mail, to [Riverside] by the Trustee or to the Company and the Trustee by holders of not less than 25% in aggregate principal amount of the outstanding Debt

> Securities, a written notice specifying such default or breach and requiring it to be remedied and stating that such notice is a "Notice of Default" hereunder; or
>
> (e) a court having jurisdiction in the premises shall enter a decree or order for relief in respect of [Riverside] in an involuntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect, or appoints a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) of [Riverside] or of any substantial part of its property . . . ; or
>
> (f) [Riverside] shall commence a voluntary case under any applicable bankruptcy, insolvency, or other similar law now or hereafter in effect, shall consent to the entry of an order for relief in an involuntary case under such law, or *shall consent to the appointment or taking possession by a receiver*, liquidator, assignee, trustee, custodian, sequestrator (or other similar official of [Riverside or of any substantial part of its property . . . or shall fail generally to pay its debts as they become due.
>
> (g) the Trust shall have voluntarily or involuntarily liquidated, dissolved, wound-up its business or otherwise terminated its existence except in connection with (1) the distribution of the Debt Securities to holders of the Trust Securities in liquidation of their interests in the Trust, (2) the redemtion of all of the outstanding Trust Securities or (3) certain mergers, consolidations or amalgamations, each as permitted by the Declaration.

(Indenture § 5.01 [emphasis added]).

If an Event of Default under subsection (c) occurs, the Trustee or the holders of 25% of the outstanding Debt Securities, by notice to the Company (and the Trustee), may declare the entire principal of the Debt Securities and unpaid interest due and payable, with immediate effect. Events of Default under subsections (e), (f), and (g) automatically trigger this acceleration.

Section 5.02 of the Indenture, discusses suits for Events of Default under Section 5.01 (c), (e), (f), and (g). Specifically, it authorizes suits by the Trustee and provides a mechanism for such lawsuits to take place. Section 5.02 of the Indenture is a "no-action" clause, which prohibits Securityholders from bringing suit:

> unless such holder previously shall have given to the Trustee written notice of an Event of Default with respect to the Debt Securities and unless holders of not less than 25% in aggregate principal amount of the Debt Securities then outstanding shall have given the Trustee a written request to institute such action, suit or proceeding and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred thereby, and the Trustee for 60 days after its receipt of such notice,

> request and offer of indemnity shall have failed to institute any such action, suit or proceeding . . . .

(Indenture § 5.02).

B. The Declaration of Trust and the Guarantee

Contemporaneously with the Indenture, Riverside and Wells Fargo executed an Amended and Restated Declaration of Trust (the "Declaration of Trust"). The Declaration of Trust defines "Holder" as "a Person in whose name a Certificate representing a Security is registered on the register maintained by or on behalf of the Registrar, such Person being a beneficial owner within the meaning of the Statutory Trust Act" (Declaration of Trust § 1.1). An Event of Default is defined as an Indenture Event of Default (*id.*). In language tracking Indenture Section 5.01(f), a "Bankruptcy Event" occurs when any person "consents to the appointment of or taking possession by a receiver . . ." (*id.*).

The Declaration of Trust contemplates direct actions by Holders, "if an Event of Default has occurred and is continuing and such event is attributable to the failure of the Debenture Issuer to pay interest or premium, if any, on or principal of the Debentures on the date such interest, premium, if any, or principal is otherwise payable" (Declaration of Trust § 2.8).

The Declaration of Trust also provides a non-exclusive forum selection clause, wherein the parties "agree[] that any suit action or proceeding arising out of or based upon [the Declaration of Trust] *or the transactions contemplated hereby*, may be instituted in any of the state or federal courts of the State of New York located in the Borough of Manhattan, City and State of New York . . . (Declaration of Trust § 13.3 (a) [emphasis added]). The Declaration of Trust provides that "[t]he Trust shall dissolve on the first to occur of . . . a Bankruptcy Event with respect to the Sponsor the Trust, or the Debenture Issuer" (Declaration of Trust § 7.1 (a)(ii)).

Riverside and the Trustee executed a Guarantee "for the benefit of the Holders." The Guarantee defines "Beneficiaries" as "any Person to whom the Issuer [i.e. Riverside Statutory Trust II] is or hereafter becomes indebted or liable" (Guarantee § 1.1). Riverside as Guarantor agreed to "to pay in full to the Holders the Guarantee Payments [i.e. unpaid Distributions]" (Guarantee § 4.1). The Guarantee provides that "[a]ny Holder of Capital Securities may institute a legal proceeding directly against the Guarantor to enforce the Guarantee Trustee's rights under this Guarantee without

first instituting a legal proceeding against the Issuer, the Guarantee Trustee or any other Person before so proceeding directly against the Guarantor" (Guarantee § 4.4).

C. The Capital Securities

Section 6.1 of the Declaration of Trust required the Trust Administrators to issue Capital Securities, and sets forth provisions regarding those securities. In particular, Holders of the securities "shall be entitled to the benefits provided in [the Declaration of Trust]" (Declaration of Trust § 6.1 (e)). The Capital Securities incorporate "the rights, limitations of rights, obligations, duties, and immunities" of the Indenture. The Trust issued a Certificate Evidencing Capital Securities, which certified that Cede & Co. ("Cede") as nominee of the Depository Trust Corporation ("DTC") is the registered owner of the Capital Securities.

D. Riverside's Exercise of Its Right to Defer Interest Payments

On September 18, 2008, Riverside sent a letter to the Trustee, exercising its right to defer interest payments on the Capital Securities (Brown aff Ex B) In the letter, Riverside affirmed its obligation not to issue dividends and confirmed that no Event of Default existed under Section 5.01 (c), (e), (f), or (g) of the Indenture. Riverside sent additional quarterly notices on December 29, 2008, March 12, 2009, June 12, 2009, September 8, 2009, December 10, 2009, and March 22, 2010. These additional notices all state that the extension period was to continue indefinitely. The maximum period of the extension period is set by the Indenture at 20 consecutive quarters. It is undisputed that Riverside could not extend the period beyond the October 2013 payment date and that no payment has been made as of that date.

E. The Consent Order and the Seizure of the Banks

On November 10, 2009, Riverside Bank's Directors, controlled by Riverside, entered into a Consent Order with the Office of the Comptroller of the Currency ("OCC") of the United States Department of the Treasury (Ghei supp aff Ex. B). The bank acknowledged that the Consent Order was "an order issued with the consent of the depository institution" (*id.*). The Consent Order provided for the OCC's supervision of the bank.

Despite the OCC's supervision, Riverside Bank ultimately failed. On April 16, 2010, the OCC closed the bank and appointed the Federal Deposit Insurance Corporation ("FDIC") as a receiver (Ghei supp aff Ex. C). On the same day, the FDIC was named receiver of both of

Riverside's other failed banks: AmericanFirst was closed by the Florida Office of Financial Regulation and Federal First was closed by the Office of Thrift Supervision (*see,* FDIC: Failed Bank List, http://www.fdic.gov/bank/individual/failed/banklist.html).

F. FRP Acquisition of the Securities and Demand for Payment

On or about March 11, 2011, FRP acquired a beneficial interest in $10 million of the Capital Securities, CUSIP 76881AAA9. The interest in the securities is held at US Bank as custodian, as evidenced by a letter sent by US Bank on March 5, 2013. (Ghei aff Ex. F). FRP has not received any interest or principal payments on the Capital Securities since acquiring them. On February 15, 2013, FRP retained HoldCo to act for it in this case pursuant to a General Power of Attorney and provided HoldCo with access to the books and records of FRP. (Ghei aff Ex. A; Ghei supp aff ¶ 5). On March 12, 2013, HoldCo send a Default Notice via Certified Mail to Riverside, copy to the Trustee, declaring that Riverside had defaulted under Indenture, Section 5.01(a), (d), (e), and (f) and that all principal and interest was accelerated and immediately due and payable (Ghei aff Ex. I). HoldCo did not receive a response or payment to the Default Notice. This litigation ensued.

After Riverside served its papers in opposition to FRP's motion for summary judgment in lieu of complaint, FRP provided a letter dated July 2, 2013 from Robert Hensey, partner of Cede (Ghei supp aff Ex. A). Cede is the nominee of the DTC, who is the holder of record of the Capital Securities. Cede, as nominal party for the true party in interest, authorized FRP, as beneficial owner of the Capital Securities to bring or prosecute a lawsuit against Riverside, specifically authorizing the instant action.

DISCUSSION

A. Summary Judgment in Lieu of Complaint

CPLR § 3213 provides for accelerated judgment where the instrument sued upon is for the payment of money only and where the right to payment can be ascertained from the face of the document without regard to extrinsic evidence, "other than simple proof of nonpayment or a similar de minimis deviation from the face of the document" (*Weissman v Sinorm Deli, Inc.,* 88 NY2d 437, 444 [1996]; *Interman Indus. Products Ltd. v R.S.M. Electron Power,* 37 NY2d 151, 155 [1975]). An action on a promissory note is an action for payment of money only (*see Seaman-Andwall Corp. v Wright Mach. Corp.,* 31 AD2d 136, 137 [1st Dept 1968], *affd* 29 NY2d 617 [1971]; *see also Davis*

v Lanteri, 307 AD2d 947 [2d Dept 2003]). The usual standards for summary judgment apply to CPLR § 3213 motions. The instrument and evidence of failure to make payments in accordance with its terms constitute a prima facie case for summary judgment (*Weissman,* 88 NY2d at 444; *Matas v Alpargatas S.A.I.C.,* 274 AD2d 327 [1st Dept 2000]).

A debtor's right to extend the date of payment for specified periods of time does not preclude an action based on CPLR § 3213 (*Stevens v Phlo Corp.*, 288 AD2d 56 [1st Dept 2001]). "Such provision does not require additional performance by plaintiff as a condition precedent to payment, or otherwise make defendant's promise to pay something other than unconditional" (*id.*). Reference to an indenture to determine acceleration of balance in cases of default similarly do not bar such actions (*Boland v Indah Kiat Finance (IV) Mauritius Ltd.*, 291 AD2d 342, 342 [1st Dept 2002]).

Here, the underlying Capital Securities plainly qualify as "instrument[s] for the payment of money only." Accordingly, a suit under CPLR § 3213 is proper.

B. Personal Jurisdiction - CPLR 3211 (a)(8)

CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]).

The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011] [*citing Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]]).

Riverside argues that because it conducts no business in New York, it is not subject to personal jurisdiction. FRP bases its claim of personal jurisdiction on the forum selection clause in the Declaration of Trust. Riverside argues in response that FRP's claims arise out of the Indenture or the Guarantee, neither of which incorporates by reference the Declaration of Trust. However, the underlying Capital Securities (of which FRP is a beneficial owner) incorporates the Declaration of Trust. As Securityholder under the Declaration of Trust, FRP "shall be entitled to the benefits

provided in [the Declaration of Trust]." (Declaration of Trust, §6.1[e]). As such, Riverside's contention that the forum selection clause is inapplicable must be rejected.

By executing the Declaration of Trust, Riverside consented to personal jurisdiction in New York for transactions that are contemplated therein. The issuance and payment of the Capital Securities as well as the direct lawsuit by Holders of those Securities to enforce payment are plainly contemplated by the Declaration of Trust. The motion of Riverside to dismiss the complaint for lack of personal jurisdiction is denied.

C. Event of Default

FRP asserts that Riverside is in Default on several alternate grounds, including seizure and receivership of the bank (Indenture §§5.01[e] and [f]), failure to pay debts (Indenture §5.01[a]) and failure to pay interest following nonpayment for twenty (20) or more consecutive quarters (Indenture §5.01[c]). As noted above, Riverside exercised its right to defer payment of interest and was able to avoid an Event of Default on grounds of nonpayment of interest for five (5) years. That right expired in October 2013. Accordingly, there is an Event of Default under §5.01(c) of the Indenture.

Regarding the assertion that seizure of the bank constitutes an Event of Default under Indenture §§5.01(e) and (f), Riverside seeks refuge in the fact that the bank was seized by regulators and neither was subject to a court ordered decree of involuntary bankruptcy (in which event Indenture §§5.01[e] applies) nor consented to voluntary bankruptcy (as to which Indenture §§5.01[f] applies). This defense must be rejected. Riverside entered into a Consent Order which provided for the Office of the Comptroller of the Currency to assume supervision of the bank. Acting pursuant to its supervisory powers, the OCC seized the bank and appointed the FDIC as receiver. On these undisputed facts, Riverside cannot avoid the consequences of an Event of Default under Indenture §§5.01(e) and (f). Any other ruling would write §5.01(e) out of the Indenture. Courts do not have power to place banks into bankruptcy. Federal regulators have "the exclusive power to appoint a conservator or receiver for a Federal savings association" (12 USC § 1464(d)(2)(B)). After such appointment, the association may seek judicial review. No such review was sought in this case. All three banks were eventually acquired by TD Bank. Having failed to seek judicial review, Riverside's claim that it did not "consent" to appointment of a receiver within the meaning of Indenture §5.01(f) must be rejected.

D. FRP Standing as Beneficial Holders of the Capital Securities to Sue Riverside

Riverside argues that FRP is not the registered Holder of the Capital Securities and cannot sue. Riverside points to the requirements for the transfer of the Securities and asserts that FRP did not comply with these requirements when it acquired its interest. This assertion ignores the fact that FRP is a beneficial holder of the securities. The registered Holder is the Depository Trust Corporation. There is no allegation that this has changed at any time. Therefore there was no obligation to comply with the requirements set forth in the Indenture.

Citing *Springwell Navigation Corp. v Sanluis Corporacion, S.A.* (46 AD3d 377 [1st Dept 2007]), Riverside argues that a beneficial holder cannot sue on the underlying Note when the Indenture reserves the right to the registered holder. This distinction is irrelevant because Cede, as nominee of the registered Holder, authorized FRP to continue this action and consented to be named as a nominal party.[1] The Declaration of Trust explicitly contemplates direct actions by Securityholders where, as here, an Event of Default has occurred (*see* Indenture §5.02).

Because FRP has been authorized to sue as beneficial holders of the Capital Securities, the Court need not reach the questions of whether the Trust necessarily dissolved on the occurrence of an Event of Default and whether FRP can sue on the Debentures. The Capital Securities provide a sufficient basis to recover directly against Riverside.

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[1]At oral argument counsel for Riverside argued that FRP had failed to offer evidence of beneficial ownership of the securities and of the consent of Cede to continue the suit because the documentary proof presented was hearsay. The copy of the consent submitted bears the signature of Cede & Co. by "Robert Hensey, partner". Thereafter counsel for FRP submitted an affidavit signed by Robert Hensey, who attests that he is a vice president of DTC, that he has personal knowledge of the facts and that Cede & Co is DTC's partnership nominee. He attaches a copy of the above referenced consent, states that it is a true and accurate copy of a letter from Cede as the nominal holder of certain Riverside Statutory Trust II issued by Riverside, CUSIP 76881AAA9 and adds that it is a business record of DTC and that it is the business of DTC to maintain such records. FRP also submitted an affidavit signed by Steven J. Gomes, vice president of U.S. Bank who states that U.S. Bank is holding on behalf of FRP, Capital Securities sponsored by Riverside and issued by Riverside Statutory Trust II, CUSIP No. 76881AAA9 and attests to the authenticity of a letter dated March 5, 2013 from U.S. Bank (a copy of which is attached to the affidavit as Exhibit A) confirming the same. Riverside's counsel responded by letter opposing the submissions. The challenged documents are admissible under the business records exception to the hearsay rule and will be considered.

Riverside also argues that the evidence submitted by FRP, the Affidavit of Vikaran Ghei, the founding partner of HoldCo, is insufficient to support summary judgment. According to Riverside, because the Power of Attorney was executed on February 15, 2013, two years after FRP's acquisition of the Capital Securities, he could not have personal knowledge of the purchase or ownership of those securities. However, Mr. Ghei was given access to all the books and records of FRP (Ghei supp aff ¶ 5). With such access, Mr. Ghei was in a position to ascertain FRP's ownership of the Capital Securities and whether or not any payments have been received. In any event, the non-payment is undisputed and the supplemental letter obtained from Cede further evidences FRP's beneficial ownership of the securities (Ghei supp aff Ex. A).

The cases cited by Riverside are not to the contrary. In *JMD Holding Corp. v Congress Financial Corp.* (4 NY3d 373 [2005]), the challenged affidavit was not based on personal knowledge because the plaintiff's president "relied entirely on the memorandum of law prepared by [his] attorney" (*id.* at 384-385). In this case, Mr. Ghei derived his knowledge from FRP's books and records. In *Simplex Grinnell, LP v Ruby Weston Manor* (59 AD3d 610 [2d Dept 2009]) the court rejected plaintiff's *attorney's* affidavit, because he "provided no basis to establish that he was familiar with the plaintiff's business practices or that he had personal knowledge of the transactions or events at issue" (*id.* at 611).

In *35 Estates v Central Park Garden* (35 AD2d 915 [1st Dept 1970]), a tort suit, the issue was whether affidavits stating a conclusion as to causation could be the basis of summary judgment. The First Department held those affidavits insufficient only because the "plaintiff alone has knowledge of the 'before-and-after' factors peculiar to th[at] case" (*id.*). The holding is not applicable in this case, where the affiant is merely asserting ownership, supported by business documents from financial institutions.

Riverside argues persuasively that the letter from US Bank is insufficient to support FRP's ownership interest (*see IRB-Brasil Resseguerros S.A. v Eldorado Trading Corp., Ltd* (2008 WL 8655385 [Sup Ct NY County Sept. 26, 2008]). That deficiency, however, was cured by the letter from Cede, the Holder of record, confirming FRP's beneficial ownership of the Capital Securities.

E. The Power of Attorney

Riverside argues that HoldCo's Power of Attorney is defective, precluding this action. The Power of Attorney grants HoldCo the authority "to sign, execute, certify, swear to, acknowledge, deliver, file, receive and record any and all documents . . . in connection with any pending, outstanding, or potential claim, action, suit, arbitration, or proceeding in connection with [FRP's] interest in debt securities . . . issued by . . . Riverside" (Ghei aff Ex A). While it is true that a Power of Attorney must be strictly construed (*see Matter of McArthur*, 173 AD517, 519 [3d Dept 1916]), it must not "be so strictly construed as to destroy its purpose" (*id.* at 520). The Power of Attorney unambiguously authorizes HoldCo to prosecute this action. The argument must be rejected.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment in lieu of complaint is GRANTED and the motion of defendants to dismiss the complaint is DENIED.

Settle order on five (5) days notice.

This constitutes the decision and order of the court.

DATED: January 2, 2014

ENTER,

O. PETER SHERWOOD
J.S.C.