

**LibertyView Credit Opportunities Fund v Banc of
Am. Credit Prods., Inc.**

2016 NY Slip Op 32507(U)

December 20, 2016

Supreme Court, New York County

Docket Number: 652984/16

Judge: Barry Ostrager

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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 : IAS PART 61

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LIBERYVIEW CREDIT OPPORTUNITIES FUND,
 L.P., LIBERTYVIEW CREDIT SELECT FUND,
 L.P., LIBERTYVIEW FUNDS, L.P., LIBERTYVIEW
 GLOBAL RISK ARBITRAGE FUND, L.P. and
 LIBERTYVIEW SPECIAL OPPORTUNITIES FUND,
 L.P.,

INDEX NO. 652984/16

DECISION & ORDER

Plaintiffs-Counterclaim Defendants,

MOTION SEQ. NO. 002

-against-

BANC OF AMERICA CREDIT PRODUCTS, INC.,

Defendant-Counterclaim Plaintiffs.

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OSTRAGER, J:

The competing claim and counterclaims in this dispute between the seller of Lehman bankruptcy claims and the purchaser of those claims turns on whether LibertyView Credit Opportunities Fund, L.P. (“LibertyView”) withheld from Bank of America Credit Products, Inc. (“BACP”) material information about the allegedly impaired value of the Lehman bankruptcy claims that LibertyView sold to BACP (the “LV Claims” or “Claims”), while expressly representing to BACP that LibertyView knew of no such information. While LibertyView denies that it had any information that the Claims were impaired, for purposes of these dispositive motions, the Court must accept as true BACP’s allegation that LibertyView knew that it was selling BACP claims that were worth at least \$100 million pounds less than BACP paid for them.

The rights and obligations of these extremely sophisticated parties, each of which has extensive experience dealing with Lehman bankruptcy claims, is detailed in a heavily negotiated

seventeen page “Lehman Claims Assignment Agreement” dated August 17, 2013 which, in turn, references and incorporates scores of pages of exhibits. It is undisputed that both parties had extensive knowledge about and were exceedingly sophisticated about the value of the LV Claims. LibertyView seeks summary judgment on its claim for a declaratory judgment declaring that it has no liability to BACP and for dismissal of BACP’s counterclaims for breach of warranty, fraud in the inducement, and fraudulent concealment. BACP opposes.

The parties do not dispute the factual background of the events preceding the purchase by BACP of the LV Claims. Briefly, the LV claims were unsecured claims against the Estate of Lehman Brothers International (Europe) (“LBIE”). The LV Claims were allowed and admitted against the Lehman Estate in the principal amount of approximately 377 million pounds. As of August 2013, LibertyView had received approximately 258 million pounds in principal on the LV claims, leaving a principal balance of approximately 119 pounds.

Pursuant to an Assignment Agreement dated August 17, 2013, BACP purchased the LV claims for in excess of 260 million pounds. It is undisputed that BACP paid a multiple of the unpaid 119 million pounds because BACP had an expectation that it would ultimately receive, pursuant to the Assignment, the 119 pounds and, in addition, significantly more than 140 million pounds in statutory interest of at least 8 percent per annum on the entire original principal amount of the LV Claims running from the date LBIE entered administration on September 15, 2008. In other words, BACP was making what it believed would be a relatively short term investment of 260 million pounds to realize a profit of \$10-15 million pounds, which would represent a meaningful, but unspectacular, return on investment.

As previously indicated, the parties entered into a heavily negotiated Assignment Agreement. Nothing in the Assignment Agreement either warranted that LibertyView knew or

did not know what statutory interest would be paid on the LV claims. For this reason, and based also on the “no warranty” clause quoted below, LibertyView’s motion for judgment dismissing both BACP’s breach of warranty and fraudulent inducement claims is granted. However, a different result is warranted with respect to BACP’s fraudulent concealment claim. Accepting, as the Court must on a pre-answer motion to dismiss, that LibertyView knew that the Administrator was not going to award statutory interest from September 15, 2008 but only planned to pay statutory interest from March 2013, the fraudulent concealment counterclaim cannot be dismissed and LibertyView is not entitled to a judgment declaring that LibertyView has no obligation to BACP.

LibertyView relies on a disclaimer of warranty in the Assignment that provided in relevant part:

Buyer [BACP] acknowledges and agrees that: other than as expressly set forth in this Agreement Seller [LibertyView] makes no representation or warranty and assumes no responsibility with respect to the Transferred Rights or the financial condition, creditworthiness, properties, affairs, status or nature of the Administration, Insolvency Proceedings, LBIE or any affiliate thereof or . . . the amount, nature or value of any distributions payable with respect to the Transferred Rights.

LibertyView also relies on another provision of the Assignment pursuant to which BACP acknowledged and agreed that:

Seller [LibertyView] currently may have, and later may come into possession of, information relating to LBIE or its affiliates that is not known to [BACP] and that such information may be material to Buyer [BACP’s] decision to purchase the Transferred Rights from Seller [LibertyView], including, without limitation, information derived or arising from Seller [LibertyView’s] participation in discovery in the Administration, Insolvency Proceedings or any related proceedings or any litigation, hearing or communication relating to LBIE, its affiliates, plan of reorganization, scheme of arrangement or liquidation.”

But case law establishes that: “Where a party has no knowledge of a latent condition and no way of discovering the existence of that condition in the exercise of reasonable diligence then

... he may overcome a specific disclaimer clause and introduce parol evidence of fraudulent inducement.” *Rodas v. Manitaras*, 159 A.D. 2d 341-43 (1st Dep’t 1990). Here, LibertyView caused BACP to execute a confidentiality agreement that, for all intents and purposes, precluded BACP from communicating with the Administrator of the LBIE Estate. If, as is alleged, LibertyView had peculiar knowledge of the date from which statutory interest would run, excusing LibertyView’s non-disclosure of information that had a value in excess of 100 million pounds would be contrary to New York law providing that non-recourse disclaimers are ineffectual against willful misconduct or fraudulent concealment, particular where one party has peculiar knowledge of material information. See *Citibank v. Paplinger*, 66 N.Y. 2d 90, 94 (1985); *TIAA Global Investments, LLC v. One Astoria Square LLC*, 127 A.D. 3d 75, 87-88 (1st Dep’t 2015); *Kalisch-Jarcho, Inc. v. City of New York*, 58 N.Y. 2d 377, 384-85 (1983).

Accordingly, BACP is entitled to establish through discovery that bases exist for overcoming the disclaimers from LibertyView that BACP, as a sophisticated investor, freely and voluntarily accepted. But, at the pleading stage, BACP’s seemingly credible allegations defeat LibertyView’s motion to dismiss the fraudulent concealment counterclaim.

It is therefore ORDERED, that LibertyView’s motion for summary judgment on its declaratory judgment action is denied; and it is further

ORDERED that LibertyView’s motion to dismiss BACP’s first counterclaim for breach of warranty and second counterclaim for fraudulent inducement is granted and the Clerk is directed to sever and dismiss those claims with prejudice; and it is further

ORDERED that LibertyView’s motion to dismiss BACP’s third counterclaim for fraudulent concealment is denied; and it is further

ORDERED that LibertyView will answer BACP's third counterclaim by January 20, 2017 and a preliminary conference will be held on January 31, 2017 at 10:30 a.m. in Room 341.

Dated: December 20, 2016



J.S.C.

BARRY R. OSTRAGER