RAIT Preferred Funding II, Ltd. v CWCapital Asset Mgt., LLC
2018 NY Slip Op 30158(U)
January 29, 2018
Supreme Court, New York County
Docket Number: 651729/2016
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 61

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RAIT PREFERRED FUNDING II, LTD.,

Plaintiff,

- v -

CWCAPITAL ASSET MANAGEMENT, LLC, U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK NATIONAL ASSOCIATION

Defendant.

INDEX NO. 651729/2016

MOTION DATE _____

MOTION SEQ. NO. 006 & 007

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 110, 111

were read on this application to/for Dismiss

HON. BARRY R. OSTRAGER:

Factual Background

This case involves a dispute between mortgage lenders as to repayment under a Co-Lender Agreement. The loan is divided into two parts. The Note A Mortgage Loan was in the principal amount of $190,000,000 and is now held by the Note A Lender, defendant U.S. Bank National Association ("U.S. Bank"). The Note B Mortgage Loan was in the principal amount of $18,500,000 and is now held by plaintiff RAIT Preferred Funding II, Ltd. ("RAIT"). A Servicing Agreement was executed contemporaneously with the Co-Lender Agreement, and the two agreements reference and incorporate each other. The Servicing Agreement governs the servicing rights and obligations under the loans and establishes defendant Wells Fargo Bank National Association ("Wells Fargo") as the Master Servicer and defendant CWCapital Asset

Management LLC ("CWC") as the Special Servicer for the loan. The Co-Lender Agreement is specific to the mortgage loan and governs the rights between the Note A Lender and the Note B Lender, including the distribution priority of mortgage loan proceeds between the lenders, which is the subject of the present dispute.

The Co-Lender and Servicing Agreements (collectively, the "Operative Agreements") were executed in March 2008. The Borrower defaulted in January 2012 after failing to make its monthly interest payment as required under Note A and Note B. CWC negotiated a loan modification with the Borrower that was ultimately executed in March 2013 (the "2013 Modification"). The 2013 Modification, *inter alia*, extended the mortgage loan's maturity date from March 11, 2014 to February 11, 2016. In 2015, the Borrower requested another extension of the maturity date to August 11, 2017 (the "2016 Modification") which was accepted over the objection of RAIT.[1]

On May 19, 2017, CWC allegedly informed RAIT that the Borrower had finished paying off the mortgage loan principal. CWC never paid RAIT its $18,500,000 Note B principal and communications between the parties ceased for several weeks. In August 2017, CWC and U.S. Bank communicated to RAIT that RAIT was not entitled to recover any amount on its Note B principal, and that RAIT had been "out of the money" on the loan for several years. CWC now contends that the Note A Lender is owed, and is entitled to collect, millions of dollars in accrued and unpaid interest, as well as unreimbursed costs and expenses, in addition to monies already received. Defendants thus assert that these amounts must be taken off the top of Section 4.01 of the Co-Lender Agreement's distribution waterfall because payment of RAIT's Note B principal

[1] After CWC allegedly ignored RAIT's objection to the 2016 Modification, RAIT filed this action on March 31, 2017. The parties agreed to conditionally settle and stay the lawsuit under a September 30, 2017 Settlement Agreement. It is undisputed that the stay is no longer in effect.

is subordinated to the Note A Lender's recovery of these amounts. Essentially, the senior lender asserts that it has not recovered the full sums due on Note A as the result of the loan modifications, and as such, RAIT is not entitled to recover on Note B as the junior lender.

The Operative Agreements

Under the Co-Lender Agreement, "the Note B Lender hereby subordinates its rights to receive payments on or with respect to the Note B Mortgage Loan to the Note A Lender's rights to receive payments on or with respect to the Note A Mortgage." (Co-Lender Agreement, Section 2.01(b) [NYSCEF Doc. 71]). But, Section 3.01(c) of the Co-Lender Agreement states:

> *Notwithstanding* anything to the contrary contained herein, *in the event that*, consistent with the foregoing, *there is a modification, extension*, waiver or amendment of the payment terms of any Mortgage Loan (in accordance with the Applicable Servicing Agreement and this Agreement and in connection with a Workout Action) such that … (iv) *any other adjustment is made* to any of the payment terms of either Mortgage Loan, *then all payments to the Lenders pursuant to Section 4.01 shall be made as though such Workout Action did not occur*, with the payment terms of Note A and Note B remaining the same as they are on the date hereof… (emphasis added).

The 2013 Modification and 2016 Modification, each extending the maturity date of the loans, appear to constitute an "adjustment" as contemplated by Section 3.01(c). Accordingly, Section 3.01(c) directs all payments to the Lenders under the waterfall provision of Section 4.01 to continue "as though such Workout Action did not occur."

Section 4.01(a) of the Co-Lender Agreement recites the general rule that "Note B and the rights of the Note B Lender to receive payments of interest, principal and other amounts with respect to Note B *shall at all times be junior, subject and subordinate* to Note A and the right of the Note A Lender to receive payments of interest …, principal and other amounts with respect to Note A." (emphasis added).

Section 4.01(a) of the Co-Lender Agreement then provides a payment waterfall with up to thirteen separate priority provisions, providing for payment "*first*, to the Note A Lender, up to the amount of any unreimbursed costs and expenses paid or advanced by the Note A Lender...." Section 4.01 of the Co-Lender Agreement further provides that the Note A Lender is next entitled to receive

> an amount equal to all accrued and unpaid interest (other than Default Interest) **(through the end of the then most recently ended Interest Period)** on the Note A Principal Balance at the related Applicable Interest Rate in effect as of the date hereof, net of the related applicable Master Servicing Fees, until all such interest is paid in full. (Co-Lender Agreement, Section 4.01(a)(ii)) (bold emphasis added).

The interpretation of the bolded clause is central to the parties' dispute. "Interest Period" is defined as the "applicable period for which the calculation of accrued and unpaid interest due on such Due Date is made in accordance with the Loan Documents." "Due Date" is defined as "the 11th day of each calendar month prior to the Maturity Date." (Co-Lender Agreement, Section 1.01).

RAIT argues that this phrase means that under the second payment priority (quoted above) the Note A Lender may only be paid interest accrued through the original maturity date of March 11, 2014, that date being "the end of the then most recently ended Interest Period." Defendants, in turn, argue that RAIT's interpretation would improperly limit the amount of interest the senior lender is entitled to receive based upon the extended maturity date. Defendants assert that nothing in Section 3.01 imposes a cap on the amount of interest the senior lender can collect or requires the Borrower's payments to be deemed retroactive to the original maturity date. Further, defendants seemingly contend that the extension of the Maturity Date necessarily extended the Due Date and the term of the Interest Period. RAIT, by contrast, appears to contend that because Section 3.01(c) requires payments to be made as though the maturity extensions

"did not occur," the terms "Maturity Date" and "Due Date" will always refer to the original maturity date, necessarily capping the senior lender's recovery of interest to that accrued by March 11, 2014, or, at a minimum, delaying the right of the Note A Lender to collect such interest until repayment of Note B.[2]

While RAIT's interpretation runs counter to the normal rule that grants priority to the senior lender, it cannot be said on a pre-answer motion to dismiss that RAIT's interpretation of Section 3.01 "is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties." *In re Lipper Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003). The pertinent provision within Section 3.01(c) is prefaced by the language: "[n]otwithstanding anything to the contrary contained herein...." Thus, notwithstanding the general rule granting priority to the Note A Lender and the waterfall provision in Section 4.01, Section 3.01(c) arguably contemplates that, in the event of a modification, payments under Section 4.01 "shall be made *as though such* [modification] *did not occur*, with the payment terms of Note A and Note *B remaining the same as they are on the date hereof...*" (emphasis added). The Court finds this provision of the Co-Lender Agreement ambiguous, at best, and subject to the competing interpretations the parties have submitted to the Court in their motion papers.

While it belies common sense for the senior lender to agree to multiple extensions of the maturity date if, as RAIT argues, the upshot would be to cut off interest payments to the senior lender after the original maturity date, the "court may not, in the guise of interpreting a contract, add or excise terms or distort the meaning of those used to make a new contract for the parties." *Riverside South Planning Corp. v. CPR/Extell Riverside, L.P.*, 60 A.D.3d 61, 66 (1st Dep't

[2] Plaintiff's Sur-Reply reiterates many of the same arguments made in the Opposition and during oral argument, despite the Court's direction that plaintiff use the opportunity to cite to case law for the proposition that a subordinated B Note holder is entitled to distributions under an intercreditor waterfall provision notwithstanding that the senior lender had not been fully repaid its principal and interest through the original repayment date.

2008). Additionally, the Court is "extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include." *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 (2004). RAIT's interpretation, though at odds with a typical intercreditor agreement of this sort, is not entirely unreasonable, and the Court is hesitant to ascribe an—admittedly common—contractual intent into the Co-Lender Agreement where an ambiguity exists. "[A] contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Goldman Sachs Group, Inc. v. Almah LLC*, 85 A.D.3d 424, 426 (1st Dep't 2011) (internal quotations omitted). This appears to be the case here.

Therefore, while the general purpose of the Co-Lender Agreement is to subordinate the payment rights of the Note B Lender to those of the Note A Lender, [*see* Section 2.01(b) ("...the Note B Lender hereby subordinates its rights to receive payments ... to the Note A Lender's rights to receive payments..."); Section 4.01(a) ("...the rights of the Note B Lender to receive payments ... shall at all times be junior, subject and subordinate to Note A and the right of the Note A Lender to receive payments...")], the language of Section 3.01(c) is sufficient as to warrant discovery of extrinsic evidence of the parties' contractual intent.

Claimed Fees and Expenses

Whatever the rights of the senior lender under the Co-Lender Agreement, dismissal of this action would nevertheless be premature. "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Id.* at 88. The

documentary evidence submitted must "utterly refute[] plaintiff's factual allegations." *McCully v. Jersey Partners, Inc.*, 60 A.D.3d 562, 562 (1st Dep't 2009).

Here, plaintiff's Amended Complaint presents issues of contract interpretation as well as factual issues. Specifically, the allocation of millions of dollars in ambiguously defined fees and charges that defendants claim force RAIT "out of the money" that cannot be determined without discovery. The spreadsheets prepared by defendant Wells Fargo claiming to show that the loan proceeds went to the Note A Lender to cover various fees, costs, and expenses cannot be relied upon as the sole grounds for dismissal of the Amended Complaint. As discussed during oral argument on this motion, the Wells Fargo spreadsheets show millions of dollars in "fees, advances and expenses" including outstanding principal and interest advances and unpaid "servicing" and "trustee" fees. (Distribution Date Statement, p. 47 [NYSCEF Doc. 107]). The senior lender has thus claimed a shortfall of over $4 million while also claiming many multiples more in unsubstantiated "fees, advances, and expenses" without clearly itemizing those fees. While a more complete itemization may not be required under the Operative Agreements, RAIT's allegations in the Amended Complaint warrant the type of clarity necessary to fairly adjudicate the claims herein. The true nature and scope of the fees and expenses at issue would have a demonstrable impact on whether RAIT is entitled to payment as the Note B Lender. RAIT has raised issues in the Amended Complaint sufficient to allow discovery on these fees to determine whether RAIT was indeed "out of the money" on the loan. And, it will be necessary for the Court to consider extrinsic evidence to determine the correct interplay between Sections 3.01 and 4.01.

Further, email correspondence described in RAIT's Amended Complaint tends to show a belief by defendants that RAIT was entitled to payment when the Borrower repaid the loan in

May 2017. (Amended Complaint, ¶¶110-117 [NYSCEF Doc. 70]). While it may be true that these statements were made prior to the completion of necessary calculations regarding distributions of payments, the communications, at a minimum, suggest that RAIT's entitlement to payment may not be as clear-cut as defendants suggest in their moving papers.

Conclusion

As the Court stated during oral argument on this motion, the motion to dismiss is granted as to plaintiff's claims for unjust enrichment, conversion, money had and received, and declaratory judgment. "[A] party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter." *Cox v. NAP Constr. Co., Inc.*, 10 N.Y.3d 592, 607 (2008). Further, "[a] claim for money had and received lies only in the absence of an agreement." *Galopy Corp. Intl., N.V. v. Deutsche Bank, A.G.*, 150 A.D.3d 416, 417 (1st Dep't 2017). As such, the claims for unjust enrichment and money had and received are subsumed by valid agreements and are dismissed. The conversion claim, similarly, is premised on the same underlying allegations as the breach of contract claims and must thus be dismissed as duplicative. *See Sebastian Holdings, Inc. v. Deutsche Bank, A.G.*, 108 A.D.3d 433, 433 (1st Dep't 2013) (dismissing conversion claim as duplicative of contract claim). Finally, "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1st Dep't 1988). Such is the case here.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is denied as to Counts I, II, and III for breach of contract, and granted as to Counts IV, V, VI, and VII for unjust enrichment, conversion, money had and received, and declaratory judgment, respectively; and it is further

ORDERED that defendants are to file an Answer to the Amended Complaint within twenty days of this decision and order; and it is further

ORDERED that the parties are to appear for a preliminary conference on February 13, 2018 at 9:30 a.m.

1/29/2018
DATE

BARRY R. OSTRAGER, J.S.C.
BARRY R. OSTRAGER
JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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