Fortelus Funds Invs. Trust v Hellas Telecom. (Luxembourg) II SCA

2023 NY Slip Op 32978(U)

August 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653824/2022

Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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INDEX NO. 653824/2022

MOTION DATE 05/22/2023

MOTION SEQ. NO. 001

FORTELUS FUNDS INVESTMENTS TRUST, BASIL VASILIOU, WHITE MULTI-STRATEGY PARTNERS, LP, WHITEBOX CREDIT PARTNERS, LP, WHITEBOX GT FUND, LP, PANDORA SELECT PARTNERS, LP, ZOHAR BEN-DOV, KEMPEN UMBRELLA FUND II SUBFUND PHOENIX FUND,

Plaintiff,

- v -

HELLAS TELECOMMUNICATIONS (LUXEMBOURG) II SCA, KEVIN HELLARD, MIKE SAVILLE,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 77, 78, 79, 80, 81, 82, 88, 93, 94

were read on this motion to/for JUDGMENT - SUMMARY IN LIEU OF COMPLAINT.

On its face, this is an unopposed CPLR 3213 motion. Plaintiffs Fortelus Funds Investments Trust; Basil Vasiliou; Whitebox Multi-Strategy Partners, LP; Whitebox Credit Partners, LP; Whitebox GT Fund, LP; Pandora Select Partners, LP; Zohar Ben-Dov, in his capacity as trustee of The Geili Revocable Trust; and Kempen Umbrella Fund II Subfund Phoenix Fund (collectively, "Plaintiffs" or "Fortelus") move for Summary Judgment in Lieu of Complaint against Defendant Hellas Telecommunications (Luxembourg) II SCA ("Hellas II"), and nominal Defendants Kevin Hellard and Mike Saville (together with Hellas II, "Defendants"), in their capacities as the Joint Liquidators of Hellas II. Plaintiffs are each beneficial holders of specific Floating Rate Subordinated Notes due 2015 that were issued by Defendant Hellas II pursuant to an indenture dated December 21, 2006 and a confidential offering memorandum dated December 18, 2006.

It is undisputed that Hellas II, which liquidated in proceedings in England, has not paid under certain Floating Rate Subordinated Notes due 2015 (the "Sub Notes"). Plaintiffs purchased the Sub Notes at a discount in the secondary market after Hellas II's financial distress

became known. Plaintiffs seek to enforce rights under the Sub Notes pursuant to the terms of the Sub Notes and the Indenture. Because of the liquidation proceedings in England, in 2014, the United States Bankruptcy Court for the Southern District of New York issued an order staying all litigation against Hellas II, including Plaintiffs' ability to obtain a judgment on the Sub Notes. The stay was lifted on September 27, 2022 and plaintiffs then commenced this CPLR 3213 action.

Plaintiffs hold approximately €505 million in face value of the Euro-denominated Sub Notes, and $65 million in face value of the U.S. dollar-denominated Sub Notes. The majority of Plaintiffs' claims in this action—€505,467,000 in principal face value—derives from Plaintiffs' right to recover their interests in the Sub Note bearing ISIN code ending in 556, registered to Euroclear. In addition, Fortelus seeks recovery in connection with its beneficial ownership of $33,800,000 in principal face value of the Sub Note bearing ISIN code ending in A22 and $25,500,000 in principal face value of the Sub Note bearing ISIN code ending in A87.

On January 6, 2023, following extensive correspondence, Plaintiffs and the Joint Liquidators whom the court in England appointed, jointly filed the Stipulation and Proposed Judgment Order. Rather than simply settle, Plaintiffs and the Joint Liquidators agreed to a proposed judgment, that they want the court to sign, presumably for Plaintiffs to then be able to go after non-parties elsewhere, such as under an alter ego theory in front of Justice Reed in *Cortlandt Street Recovery Corp., v TPG Capital Mgmt, L.P. et al*, Index No., 651176/2017 (*Cortlandt II*). The Joint Liquidators required confirmation that Plaintiffs currently hold the Sub Notes and as well as information concerning how Plaintiffs calculated interest under the indenture.

The Sub Notes and Indenture expressly provide for Hellas II's absolute, unconditional obligation to pay the principal and interest due, specify the amount of principal and the basis for calculation of interest, and define the Events of Default. Under section 6.01(a)(1) of the Indenture and section 13(1) of each Sub Note, a "default in the payment of interest" that continues for 30 days is an "Event of Default." Hellas II failed to make the interest payments due on each Sub Note on October 15, 2009, and has made no principal or interest payments on any Sub Note since that date. The Sub Notes remain in default, and all relevant deadlines to cure any default have passed.

Plaintiffs demonstrate their personal knowledge of the relevant facts. The first paragraph of each affidavit states expressly that the affiant is "personally familiar with the facts," Further, each affidavit describes the position each affiant holds at each Plaintiff be it trustee, fund manager, or Senior Legal Analyst [see EDOCS 14, 40, 46, 29, ¶ 1]. Mr. Vasiliou describes his own beneficial holding. (EDOC 23 ¶ 3). Each affiant also described how amounts due were calculated. Accordingly, plaintiffs have shown, *prima facie*, entitlement to judgment against defendants Hellas II Sub Notes and indenture.

Nonparties

While the Joint Liquidators have not opposed this motion, there has been vigorous objection from nonparties. Nonparty Apax Partners US, LLC is an investment advisory firm organized under the laws of Delaware, with its office in New York City. Nonparty TPG Capital-New York, Inc. is a corporation organized under the laws of Delaware with an office in New York City. Apax and TPG and their affiliates have been involved in the Hellas II transactions.

The Nonparties' have filed a Demand To "Be Heard," but have not moved to intervene in this action. The Nonparties have been similarly involved in *Cortlandt Street Recovery Corp. v. Hellas Telecommunications II, S.C.A. et al.* ("Cortlandt I"), Index No. 653181/2011 (N.Y. Sup. Ct.). There, Apax and TPG were originally named as defendants to the suit, but Cortlandt's claims against them were dismissed. Years later, after Cortlandt and the only remaining defendant, Hellas II, had agreed to a form of judgment and filed a proposed order directing entry of judgment, the Nonparties filed a letter asking the Court to delay resolution of the case to provide for Apax and TPG to apprise the court of any objections they may have. Although it is debatable whether this court needs to entertain arguments from nonparties who have not even tried to intervene, in an abundance of caution, the court will address their arguments.

Nonparties' "Collusion" Assertion

The Nonparties do not dispute that Hellas II defaulted on the Sub Notes in or around November 2009, and the notes remain in default. However, the Nonparties argue that there are glaring deficiencies that should prevent this motion from being granted. In particular, they allude to collusion between plaintiffs and the Joint Liquidators. However, they point to no real evidence of collusion. Rather, the stipulated judgment followed extensive correspondence. The Joint Liquidators required confirmation that Plaintiffs currently hold the Sub Notes and information concerning how Plaintiffs calculated interest under the indenture, including the model used to calculate pre-judgment interest before agreeing to move forward. There is nothing

to suggest that the stipulated judgment was anything more than a decision by the Joint Liquidators that, rather wasting resources staving off the inevitable, they could agree to a judgment now and save costs as Plaintiffs have agreed to waive them.

The concern that two nominally adverse parties would conspire to produce a judgment to use against third parties is simply not present here. This is a real debt. It would be owed one way or the other. The Joint Liquidators in England are akin to a bankruptcy trustee in this country. As such, they must act on behalf of all the creditors. Counsel for the Joint Liquidators was wise not to throw money away on lawyers when the outcome was apparent.

Calculations

One of the Nonparties' main contentions is that plaintiffs have not produced the model behind the interest calculation that is the basis for the $900 million in prejudgment interest plaintiffs seek. They argue this is a critical evidentiary issue that should preclude summary judgment. Nonparties are incorrect. First, the nonparties offer no calculations of their own to contradict plaintiffs' calculations. Here, we have an extra layer of reliability because the Joint Liquidators received the interest model and approved the final calculations. If the Nonparties really wanted to challenge these calculations, they should have intervened and asked for discovery.

Moreover, the Nonparties fail to explain why those who attested to the facts here, a corporate representative from each plaintiff claiming personal knowledge, would not know about their own companies' investments and what is owed under those investments. Each individual attested to using the Whitebox model themselves or directing the use of the Whitebox model to calculate amounts due (see, e.g., Affidavit of Basil Vassiliou, sworn to October 11, 2022; EDOC 23 ¶ 10 ["To ensure a uniform interest calculation methodology across the Plaintiffs, I reviewed the interest calculation model prepared by Whitebox Advisors LLC and utilized this model to calculate the interest due and owing to me as of the date of this filing"]; [see also Affidavit of Andrew Thau, sworn to October 14, 2022, EDOC 29 ¶ 13]). If the Nonparties were interested in what the Whitebox mathematical model entailed, they could have intervened and asked for it.

Champerty

Plaintiffs bought their Sub Notes in the secondary market after Hellas II defaulted and was known to be unable to pay Sub Note holders. Nonparties claim this suggests the primary

purpose of purchase and assignment was bringing suit and therefore there is a champerty defense. Nonparties believe champerty-related discovery is warranted.

The champerty doctrine is codified in Judiciary Law § 489(1), that states in relevant part:

> No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon*... (emphasis added)

Thus, champerty is a limited doctrine. It "does not apply when the purpose of an assignment is the collection of a legitimate claim" (*Certificate Holders of Merril Lynch Mortgage Investors inc. v Love Funding Corp*., 13 N.Y.2d 190, 201 [2009]). It merely prohibits the purchase of securities or claims with the primary purpose of bringing a lawsuit (*Bluebird Partners v First Fid. Bank*, 94 NY2d 726, 735-736 [2000]). Nothing the Nonparties have claimed points to anything more than the common situation in which an entity that purchased distressed debt is now seeking payment on that debt. It is not champertous to purchase distressed debt as an investment (*see Espadarte Partners, LLC v Riverside Gulf Banking Banking Co*., 2020 WL 1955672 at *7 [Sup. Ct. New York Cty April 23, 2020]).

MLRN LLC v. U.S. Bank Nat'l Ass'n, 217 AD3d 576, 579 (1st Dep't 2023) does not compel a different result. In that case, MLRN had purchased some of these Certificates after the Court of Appeals held that the Trustee could not recover in putback litigation and purchased others after the filing of the lawsuit. Thus, given the timing, there was significant evidence that MLRN purchased primarily to sue. Here, we simply have investors attempting to recover notes purchased after a default, with an apparent plan to seek that recovery from other possibly responsible parties later (see *BF Holdings I, Inc. v. S. Oak Holding, Inc.*, 251 A.D.2d 1 [1st Dep't 1998][champerty not applicable where the mortgage loan had already fallen into default and been accelerated before its assignment to plaintiff]).

Further, evidence in the record indicates that at least plaintff Geilli Recovable Trust purchased its interest for a price of $848,000.00. This falls into the safe harbor provision of Judiciary law § 489(2). Any suggestion that Geilli did not actually pay this amount is pure speculation.

Inconsistency with *Cortlandt II*

Next, the Nonparties argue that plaintiffs lack standing under Justice Reed's December 23, 2022 decision in *Cortlandt II*. Justice Reed held in *Cortlandt II* that Cortlandt has standing to sue on Sub Notes registered to Euroclear, but not on those registered to Clearstream. (*Cortlandt II*, Index No 651176/2017 EDOC 292 at 20). The nonparties speculate that "at least one plaintiff's Sub Notes (and likely those of other plaintiffs) recently were moved from Clearstream to Euroclear such that, under *Cortlandt II*, they are ineligible for suit" (EDOC 79 at 11).

This argument is irrelevant. Here, plaintiffs have express authorization from Euroclear and DTC, the record holders of the Sub Notes (see, e.g. EDOC 20, authorization letter from Euroclear to JP Morgan Chase, dated June 30, 2022; EDOC 21 authorization letter from Cede & Co., as the nominee of DTC, and as holder of record of the Subject Notes, dated August 23, 2022). This type of authorization is permitted under sections 2.01 (c) and 2.04 (b) of the Indenture (see EDOC 8). In *Cortlandt II*, express authorization was lacking.[1]

Improper Proposed Judgment

Nonparties claim that the Proposed Judgment is facially improper where it favors plaintiffs jointly instead of severally. Nonparties are correct. The amounts on the Sub Notes are owed severally. Therefore, the court orders plaintiffs to file a new proposed judgment with the correct amounts for each plaintiff's Sub Notes restricted to the amount that matches the amounts in the record before the court currently. In other words, because plaintiffs decided to proceed via CPLR 3213, they cannot supplement the record to obtain additional amounts at this juncture.

Res Judicata

Nonparties also claim that the part of the order carving out future fraud claims is contrary to New York's res judicata doctrine, under which a judgment in this case would bar all future claims concerning the Sub Notes. However, the *res judicata* effect of the proposed judgment is not before the court at this time.

Accordingly, it is

[1] In *Cortlandt I*, which has been pending since 2011, Justice Marcy Freedman ruled that plaintiffs in that case lacked standing, but that this lack was curable (47 Misc 3d 544, 558) ("Cortlandt's lack of standing to maintain this action under an assignment that gives it only a right to collection. . .is subject to cure") *aff'd*, *Cortlandt St. Recovery Corp. v. Hellas Telecommunications, S.D.r.l.*, 142 A.D.3d 833, 835 [1st Dep't 2016]).

ORDERED that the court grants plaintiffs' motion for summary judgment in lieu of complaint subject to a new stipulated judgment providing for amounts owed per plaintiff, rather than jointly, within 20 days of the efiled date of this decision and order; and it is further

ORDERED that the new proposed judgment is confined to the current record only. No new information or calculations will be permitted.

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8/28/2023
DATE

MELISSA A. CRANE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE