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| Allenby, LLC v Credit Suisse, AG |
| 2015 NY Slip Op 50427(U) [47 Misc 3d 1203(A)] |
| Decided on March 3, 2015 |
| Supreme Court, New York County |
| Ramos, J. |
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| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on March 3, 2015

Supreme Court, New York County

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| <p>Allenby, LLC and HAYGOOD, LLC, Plaintiffs,</p> <p>against</p> <p>Credit Suisse, AG, CAYMAN ISLANDS BRANCH, CREDIT SUISSE SECURITIES (USA) LLC, and CREDIT SUISSE LOAN FUNDING LLC, Defendants.</p> |
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652491/2013

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Charles E. Ramos, J.

In motion sequence 002, the defendants Credit Suisse, AG, Cayman Islands Branch, Credit Suisse Securities (USA) LLC, and Credit Suisse Loan Funding LLC (collectively, Credit Suisse) move pursuant to CPLR 3212 for summary judgment on the plaintiffs Allenby, LLC and Haygood, LLC's (collectively the Lenders) first cause of action for breach of contract in the Amended Complaint (the Complaint).

The Lenders cross-move pursuant to CPLR 3024 to strike the second and third affirmative defenses in Credit Suisse's answer to the Complaint.

Background

This action arises out of a transaction whereby the Lenders, in reliance of Credit Suisse's approvals invested hundreds of millions of dollars in developments that were later revealed to be under-collateralized. The parties executed five separate, but similar credit agreements to memorialize the transactions (the Credit Agreements).

For a full recitation of the facts, please see this Court's decision, dated July 9, 2014 (NYSCEF No.57).

Briefly, the subject of the instant motion relates to two tolling agreements executed by the parties. On September 24, 2010, the parties entered into the first tolling agreement (the First Tolling Agreement). The First Tolling Agreement was due to expire on January 14, 2011. The parties subsequently amended the First Tolling Agreement four times, ultimately extending the expiration date to September 15, 2011. The parties agreed that the tolling period, 356 days, would not be included in calculations determining if the parties' causes of action were time barred.

The parties allowed the First Tolling Agreement to expire, and executed a new tolling agreement, also effective as of September 24, 2010 (the Second Tolling Agreement). The Second Tolling Agreement provided that it's termination would occur "thirty (30) calendar

days following the date that either [the Lenders] or [Credit Suisse] provides written notice to the other party that the [Second] Tolling Agreement is terminated" (Meade Aff., Ex. 10, ¶ 2).

On June 11, 2013, the Lenders provided written notice to Credit Suisse that the Second Tolling Agreement would terminate in thirty days.

Thereafter, on July 16, 2013, the Lenders filed its summons and compliant.

Discussion

The Lenders first cause of action for breach of contract alleges that pursuant to the terms of the Credit Agreements, Credit Suisse was obligated to use its reasonable discretion and judgment to approve the form and substance of Cushman & Wakefield's (C & W) initial appraisals and certain covenant compliance certificates (the Initial Appraisals), and C & W and CBRE's quarterly appraisal updates, for the Subject Loans (the Qualified Appraisal Updates). The Lenders allege that Credit Suisse breached sections 3.1 and 5.3 of the Credit Agreement by knowingly approving documents that contained misleading or fraudulent information, or that were grossly inflated.

Statute of Limitations

Credit Suisse argues that any alleged breaches that occurred [*2] prior to July 25, 2006 are time barred because the Second Tolling Agreement is unenforceable pursuant to General Obligations Law 17-103, which provides that:

A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise (General Obligations Law § 17-103).

Credit Suisse contends that the Second Tolling Agreement cannot be enforced "according to its terms" because it contemplates an indefinite extension of the statute of limitations.

The terms of the Second Tolling Agreement expressly provide that the termination date is "thirty (30) calendar days following the date that either Highland or CS provides written

notice to the other party that the [Second] Tolling Agreement is terminated..." (Meade Aff., Ex 10, ¶ 2).

The Second Tolling Agreement does in fact provide for an indefinite tolling of the statute of limitations for the Lender's first cause of action.

The Lender's argue that the Second Tolling Agreement can be enforced according to its terms because the Lenders terminated the Second Tolling Agreement on June 11, 2013, thus, fixing the termination of the Second Tolling Agreement as July 12, 2013.

However, such an interpretation would require this Court to reform the terms of the Second Tolling Agreement to state a definitive termination date of July 12, 2013. Doing so, would "ignore the legislative direction that a promise to extend the Statute of Limitations be enforced according to its terms' and either to speculate on the parties' intent as to the length of the extension they would have desired or to impose a blanket six-year extension irrespective of their intent" (*Bayridge Air Rights, Inc. v Blitman Const. Corp.*, 80 NY2d 777, 780 [1992])

"Given the intent behind General Obligations Law § 17-103 as well as the public policy concerns related to the Statute of Limitations and agreements to extend it, an agreement that cannot be enforced according to its terms' is ineffective to extend the limitations period" (*id.*)

Furthermore, this Court finds the Lenders fail to allege any inducement or misrepresentation by Credit Suisse that would warrant equitable estoppel (*Bielecki v Bielecki*, 106 AD3d 1454, 1455 *rearg denied* 107 AD3d 1647 [2013] *lv to appeal dismissed* 22 NY3d 909 [2013]). Moreover, the Lenders fail to provide any [*3]justifiable basis for construing the Second Tolling Agreement pursuant to Texas law. Lastly, this Court finds the contention that the Second Tolling Agreement was an amendment to a prior tolling agreement unpersuasive.

Consequently, any breaches that occurred prior to July 25, 2006, the six year and 356 day time period prior to July 16, 2013, the commencement date of this action, are time-barred and dismissed.

Summary Judgment

Credit Suisse further moves pursuant to CPLR 3212 for summary judgment against the Lender's first cause of action for breach of contract.

Credit Suisse argues that sections 3.1 and 5.3 of the Credit Agreements only impose obligations on the borrowers and do not otherwise require Credit Suisse to review and approve the submitted information.

The Lenders counter that Credit Suisse's obligation are contained within the contractual definitions of the documents that the borrowers are obligated to provide. Specifically, the borrower is required to provide an Initial Appraisal pursuant to section 3.1, and Qualified Appraisal Updates pursuant to section 5.3 to the administrative agent, Credit Suisse.

Initial Appraisal, as defined in the Credit Agreements, is encompassed by the defined term "Qualified Appraisals," which is defined as "the Initial Appraisal and any other real estate appraisal..., the form and substance of such appraisal to be reviewed and approved by the Administrative Agent in its reasonable judgment" (Credit Agreements § 1).

Qualified Appraisal Updates are defined as "a quarterly update of the Initial Appraisal or other Qualified Appraisal which uses the same methodology of the Initial Appraisal, the form and substance of such appraisal to be reviewed and approved by the Administrative Agent in its reasonable judgment" (Credit Agreements § 1).

Thus, the Credit Agreements establish that Credit Suisse owed the Lenders certain duties with respect to reviewing and approving certain transaction documents.

This Court finds a triable issue of fact as to Credit Suisse's obligations to review and approve certain transactional documents that warrants the denial of summary judgment (*Glick & Dolleck, Inc. v Tri©Pac Exp. Corp.*, 22 NY2d 439, 441 [1968][To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented]).

Cross-Motion

The Lenders cross-move to strike Credit Suisse's second affirmative defense for the statute of limitations and third [*4] affirmative defense for collateral estoppel. Based on the determinations herein, the Lenders' cross-motion is granted in part to the extent of dismissing the third affirmative defense of collateral estoppel, and otherwise denied.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment is granted in part, to the extent of dismissing the portions of the first cause of action for breach of contract that are time-barred, and it is further

ORDERED that the plaintiffs' cross-motion is granted in part, to the extent of dismissing the third affirmative defense for collateral estoppel, and it is further

ORDERED that the parties shall appear telephonically for a status conference on April 16, 2015 at 4:00 P.M.

Dated: March 3, 2015

ENTER:

J.S.C.

[Return to Decision List](#)