Aozora Bank, Ltd. v Credit Agricole Corporate & Inv. Bank
2015 NY Slip Op 31426(U)
July 27, 2015
Supreme Court, New York County
Docket Number: 652160/2013
Judge: Eileen Bransten
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 3

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AOZORA BANK, LTD.,

Plaintiff,

- against -

Index No.: 652160/2013
Mot. Seq. No.: 001
Motion Date: 9/26/2014

CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, and CREDIT AGRICOLE SECURITIES (USA) INC.,

Defendants.

---X

BRANSTEN, J.:

In this action, plaintiff Aozora Bank, Ltd. ("Aozora") asserts claims for common-law fraud, aiding and abetting fraud, negligent misrepresentation, breach of the implied covenant of good faith and fair dealing, tortious interference and unjust enrichment against defendants Credit Agricole Corporate and Investment Bank and Credit Agricole Securities (USA) Inc. (collectively "CA-CIB"). CA-CIB now seeks dismissal of the complaint, pursuant to CPLR 3211(a)(1), (a)(3), (a)(5), and (a)(7). In support of their motion, defendants contend that Aozora's tort claims are time-barred by the Japanese statute of limitations and that the complaint fails to assert any cause of action. For the following reasons, defendants' motion is granted in part and denied in part.

I. BACKGROUND

This action concerns plaintiff's approximately $34,000,000 investment in the Millstone IV collateralized debt obligation ("CDO"). The Millstone IV CDO was comprised primarily of asset-backed securities.

In its June 18, 2013 complaint, plaintiff alleges that it was fraudulently induced into making its June 25, 2007 purchase of the notes by defendants' false statements (including marketing Millstone IV as a "Super High Grade" CDO) and by omissions and active concealment of material information. Plaintiff also alleges that the Millstone IV was designed to fail and served as a dumping ground for unwanted assets owned by defendants.

II. DISCUSSION

Defendants seek to dismiss plaintiff's torts claims in their entirety on statute of limitations grounds. Defendants also contend that the complaint fails to state a claim. These arguments will be addressed below.

As a preliminary matter, the Court cannot subscribe to defendants' contention that the holding in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), precludes plaintiff from pursuing state fraud claims. The issue in *Morrison* was "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges." *Id.* at 250-51. There are no such claims in this action.

Indeed, there is case law holding that *Morrison* in inapplicable to New York State fraud claims. *See Ge Dandong v. Pinnacle Performance Ltd.*, 966 F.Supp.2d 374, 387 (S.D.N.Y. 2013) ("nothing in Morrison—which held, as a matter of statutory construction, that Section 10(b) of the Securities Exchange Act of 1934 does not extend to extraterritorial conduct, supports Morgan Stanley's argument that 'New York state law [cannot] ... regulat[e] entirely foreign securities transactions like the Pinnacle Notes.' Indeed, courts have been careful to limit Morrison' s application to the narrow issue before the Court.") Defendants cite no authority holding that *Morrison* bars a common law fraud claim involving an investment sold overseas.

Accordingly, the Court denies the motion to dismiss on this ground.

A. *Statute of Limitations*

"When a nonresident sues on a cause of action accruing outside New York, CPLR 202 [New York's Borrowing Statute] requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Global Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). As explained by the Court of Appeals, "[t]his prevents nonresidents from shopping in New York for a favorable Statute of Limitations." *Id.* "On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Benn v. Benn*, 82 A.D.3d 548, 548 (1st Dep't 2011).

The parties agree that because plaintiff resides in Japan, and the cause of action accrued in Japan, the Japanese three-year statute of limitations for tort claims applies. *See Global Fin.Corp.* 93 N.Y.2d at 529 ("When an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss.") However, the parties disagree on when the Japanese statute of limitations was triggered.

The parties have submitted expert affidavits, accompanied by Japanese case and statutory law, providing the Court with a sufficient basis for interpreting Japanese law. Defendants' expert is Taku Ito, a Japanese attorney who practices in Tokyo. Plaintiff has submitted the affidavit of Koichi Yoshioka, also a Japanese attorney who practices in Tokyo.

The statute of limitations for tort claims in Japan is three years, as defined in Article 724 of the Civil Code of Japan: "The right to claim compensation for the damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator; the same rule shall apply when twenty years have elapsed from the time of the tortious act." (Affidavit of Taku Ito Ex. A.)

Under Japanese law, "the starting point of reckoning the statute of limitations for the right to claim damages in tort, the time at which the victim gained knowledge of the damage should be interpreted to mean not merely gaining knowledge of the fact that

damage has occurred due to an injurious act, but also gaining knowledge of the fact that the injurious act constitutes a tortious act . . ." (Affidavit of Koichi Yoshioka Ex. C) (Supreme Court First Petty Bench, Decision of November 30, 1967). "For the purposes of determining the awareness of the tortiousness of the act, it is sufficient that the victim recognizes the basic facts which enable an ordinary person to judge that there would be a fair possibility of the establishment of a tort." (Ito Reply Aff. Ex. A) (Sapporo District Court July 25, 1979 Decision, 1974 (Wa) No.1371).

Defendants' expert testifies that the "ordinary person" described by the Japanese courts "is thought to be an ordinary person with characteristics appropriate for the respective plaintiff's characteristics." (Ito Reply Aff. ¶14.) Ito submits a treatise excerpt in support of this contention but concedes that there is no Japanese case law to support this theory. Using this standard, Ito argues that an ordinary person may have been put on notice that a tort was committed as early as November 30, 2007, when defendants delivered a notice of default to plaintiff.

Ito also argues that there was a large quantity of circumstantial evidence that would put an ordinary person in plaintiff's position on notice that a tort was committed. This evidence includes the "Loreley case,"[1] which was commenced in the Commercial Division on June 18, 2010. The "Loreley case" involved notes to Millstone IV and had nearly identical allegations to the instant action. Ito also cites other generic media

[1] *Loreley Financing (Jersey) No. 31, Ltd. v. Credit Agricole Co. & Inv.. Bank*, Index No. 650673/2010 (Sup. Ct. N.Y. Cnty.) (Schweitzer, J.).

coverage of failing CDOs in early 2008, a Pulitzer Prize winning article in 2010, and a book authored in 2010. Ito also states that because plaintiff had an office in New York, experience in the American structured finance market, and was majority-owned by Cerebus (an American investment firm), plaintiff would have been aware that Millstone IV defaulted due to fraud.

Plaintiff's expert avers that the Japanese statute of limitations is triggered when the plaintiff obtains actual knowledge of the basic facts of a tortious act, in contrast to the "could have" or "should have" known inquiry notice standard advanced by defendants. In support of this argument, plaintiff's expert submits a Japanese Supreme Court decision, dated April 22, 2011. *See* Yoshioka Aff. Ex. E. In that case, the defendants successfully raised a statute of limitations defense, based on the fact that plaintiff had actual knowledge that regulators had shut a company it had invested in. The plaintiff was aware that the defendant company had regulatory action taken against it due to being insolvent and engaging in improper accounting practices. The court held that plaintiff's actual knowledge of the regulator's ruling, coupled with the actual knowledge that many of its co-investors commenced legal proceedings against the defendant put the plaintiff on notice that torts had been committed. Like defendants' expert, plaintiff's expert states he is not aware of any Japanese case law holding that circumstantial evidence is sufficient to put a plaintiff on notice that a tort has been committed.

The Court concludes that defendants have not made a prima facie showing that the Japanese statute of limitations for fraud has run. Defendants have put forth no Japanese

case law in support of the contention that circumstantial evidence can put a plaintiff on notice that a tort has been committed. Additionally, the plain language of Article 724 of the Japanese Civil Code contains reference to use an inquiry notice standard.

Defendants' motion to dismiss on the statute of limitations grounds is therefore denied. *See also Aozora Bank, Ltd. v. Morgan Stanley & Co. Inc.*, 2014 WL 3899215, at *4 (Sup. Ct. N.Y. Cnty. Aug. 5, 2014) ("The court holds that Japanese law requires evidence of actual knowledge to trigger the statute of limitations. ... A record must be fully developed to determine whether Aozora possessed actual knowledge of its claims in June 2010.").

B. *Sufficiency of the Claims*

Defendants next contend that plaintiff's complaint must be dismissed for failure to state a claim. On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W.*

232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

1. The Fraud Claims

"To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 135 (1st Dep't 2014). If any of the elements are not adequately stated, the fraud claims must be dismissed.

i. **Particularity**

Defendants contend that plaintiff's allegations fail to plead the fraud allegations with the particularity required by CPLR 3016(b) and make only generalized and unattributed allegations "upon information and belief."

"Although under section 3016(b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud. Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 (2008). "The language of CPLR 3016(b) merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice." *Houbigant, Inc. v. Deloitte & Touche LLP*, 303 A.D.2d 92, 97 (1st Dep't 2003).

Defendants argue that plaintiff's allegations concerning the Magnetar-sponsored Constellation CDOs[2] are unrelated to the Millstone IV CDO, and the allegations concerning defendants' selection of collateral are too vague to sustain a cause of action for fraud.

Plaintiff's complaint clearly provides notice to defendants that it is alleged that they "misrepresented and/or made misleading statements concerning: (a) the entity that selected Millstone IV's collateral portfolio; (b) the methods and motives used for Millstone IV portfolio selection; and (c) Millstone IV's purported status as a 'Super High Grade' CDO." (Compl. ¶ 109.) The complaint also clearly informs defendants that, due to their knowledge of the nature and risks of the Constellation deals, they allegedly knew that inclusion of Constellation collateral for Millstone IV did not align with the representation that Millstone IV was "Super High Grade;" "[c]ontemporary internal emails demonstrate Calyon's [defendants'] awareness that the Constellation CDOs had been built-to-fail, which is relevant here because tranches of nearly $100 million issued by the Constellation CDOs were included in Millstone IV's portfolio." (Compl. ¶ 10.) The fact that the specific Constellation CDOs used as collateral in Millstone IV were not arranged by defendants is not conclusive proof that defendants did not know that other Constellation CDOs were designed to fail as well.

[2] Aozora alleges that Credit Agricole's wholly owned subsidiary, Caylon CIB, arranged the built-to-fail Constellation CDOs on behalf of Magnetar, and had actual knowledge that the securities were built to fail. (Compl. ¶¶ 35- 56.)

The claims that defendants secretly selected toxic collateral, rather than the designated collateral manager, CTA, are also sufficiently particular. In *Loreley Fin. (Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 117 A.D.3d 463 (1st Dep't 2014), very similar allegations were held to be particular enough to sustain a fraud claim. "These factual allegations provide sufficient details to inform the Merrill defendants and 250 Capital of the alleged fraudulent conduct, namely that the CDO was secretly designed by an undisclosed hedge fund, Magnetar, which was secretly placing massive short bets against the very same deals it was sponsoring." *Id.* at 467.

Accordingly, the Court denies defendants' motion to dismiss on the grounds of insufficient particularity.

ii. Loss Causation

Next, defendants contend that plaintiff fails to plead that defendants' alleged fraud was the cause of their losses. Instead, defendants attribute plaintiff's losses to the financial crisis. This argument was specifically and explicitly rejected in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287 (1st Dep't 2011). "It cannot be said, on this pre-answer motion to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis[;] it is the job of the factfinder to determine which losses were proximately caused by misrepresentations and which were due to extrinsic forces." *Id.* at 296 (internal citation and punctuation omitted). This argument fails here as well.

Defendants also argue that the documentary evidence flatly contradicts the allegations that the Constellation CDOs were the first to default and caused plaintiff's losses. Defendants do not argue that the Constellation CDOs did not default, merely that they did not default first. In support of this contention, defendants submit November 2007 Millstone IV Trustee Report, which purports to show four non-Constellation CDOs which defaulted prior to the Constellation CDOs. *See* Affirmation of Lea Haber Kuck Ex. G. Defendants argue that because the four CDOs that defaulted first were not alleged to be risky and designed to fail, plaintiff has not alleged loss causation. However, defendants do not argue that the default of the Constellations CDOs did not damage plaintiff, nor have defendants made a showing that plaintiff could not have been damaged by the CDOs that defaulted first, which were allegedly toxic assets secretly placed as collateral into Millstone IV by defendants. Accordingly, defendants' arguments fail to provide a basis for dismissal of the fraud claim.

iii. **Reasonable Reliance**

Defendants next contend that plaintiff has not pleaded justifiable reliance because there were multiple disclosures and disclaimers within the offering documents. This argument is without merit.

"The question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss." *ACA Fin. Guar. Corp. v. Goldman, Sachs & Co.*, 25 N.Y.3d 1043, 1045 (2015). "The law is abundantly clear in

this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge." *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 137 (1st Dep't 2014).

Defendants' disclaimers in this case were not sufficiently specific to invalidate a claim of reliance. The disclaimers included statements that only the offering documents were to be relied on and that it was Aozora's responsibility as a sophisticated investor to analyze the risks for itself. Such disclaimers do not address the particular fraud alleged here, especially the allegations that defendants knowingly and secretly selected securities which were intended to fail. *See* Compl. ¶¶ 96-100; *see, e.g., Basis Yield*, 115 A.D.3d at 138 ("These disclaimers and disclosures, in our view, fall well short of tracking the particular misrepresentations and omissions alleged by plaintiff.").

Additionally, the First Department held that disclaimers, such as the ones at issue in this case, are not specific enough to disclaim reliance on misrepresentations that an independent collateral manager would select assets. "Under the circumstances, it cannot be said that the disclaimers and disclosures in the offering circulars preclude a claim of fraud on the ground of a prior misrepresentation as to the specific matter, namely that the CDO's collateral had been carefully selected by an independent collateral manager, in the interests of the success of the deal and for the benefit of Auriga's long investors. Whether

it was reasonable for plaintiff to rely on the representation in the offering circular that 250 Capital would select Auriga's collateral is a factual matter that cannot be determined on a CPLR 3211 motion to dismiss." *Loreley Fin. (Jersey) No. 28 Ltd.*, 117 A.D. 3d at 467-468 (internal citations omitted).

Accordingly, defendants' attacks on plaintiff's justifiable reliance pleading fail, and defendants' motion to dismiss on these grounds is denied.

iv. **Misrepresentation**

Defendants argue that the "Super High Grade" description of Millstone IV CDO is not an actionable misrepresentation. They state that the collateral selected was in line with the requirements of the offering circular and that because Aozora examined the collateral prior to purchase, it was in a position to evaluate the risks for itself. This contention likewise fails.

Plaintiff's primary allegation with regard to being misled by the "Super High Grade CDO" label is that defendants secretly selected collateral they knew would fail, not that the collateral did not meet stated qualitative characteristics. Likewise, the fact that plaintiff conducted due diligence on the collateral does not invalidate this allegation; reasonable pre-purchase investigation would not have exposed defendants' alleged concealed motivation to unload toxic assets into Millstone IV.

2. The Aiding and Abetting Fraud Claim

Defendants contend that plaintiff's cause of action for aiding and abetting fraud must be dismissed because plaintiffs have not alleged the elements of fraud. The Court disagrees.

"To state a claim for aiding and abetting fraud, a plaintiff must plead '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud.'" *Stichting Pensioenfonds ABP v. Credit Suisse Grp. AG*, 38 Misc.3d 1214(A), at *3 (Sup. Ct. N.Y. Cnty. 2012) (quoting *Stanfield Offshore Leveraged Assets, Ltd. v. Metro. Life Ins. Co.*, 64 A.D.3d 472, 476 (1st Dep't 2009)). "A complaint may be sustained even where the case for corporate defendants' knowledge and participation in the alleged fraud is a purely circumstantial one drawn from the inferences arising from their positions and responsibilities at the defendant companies." *HSH Nordbank AG v. Barclays Bank PLC*, 42 Misc.3d 1231(A) at *24 (Sup. Ct. N.Y. Cnty. 2014); *see also Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 493 (2008). Accepting the allegations of the complaint as true and giving plaintiffs the benefit of all favorable inferences, the Court concludes that plaintiff's complaint pleads a cause of action for aiding and abetting fraud.

3. The Negligent Misrepresentation Claim

Defendants next seek dismissal of the negligent misrepresentation claims on the ground that no special relationship existed between plaintiff and defendants when the notes to Millstone IV were purchased. The Court agrees.

"A claim for negligent misrepresentation requires a showing of a special relationship of trust or confidence between the parties which creates a duty for one party to impart correct information to another. . . . Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties." *MBIA Ins. Corp.*, 87 A.D.3d at 296 (internal citation omitted). Plaintiff's complaint alleges that because defendants had superior knowledge of the facts regarding the Millstone IV and its collateral, and knew that plaintiffs would rely on their misrepresentations, a "special relationship" between the parties arose. However, allegations of "superior knowledge of the particulars of its own business practices is insufficient to sustain the cause of action [for negligent misrepresentation]." *Id.* at 297. "Plaintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties." *Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447 (1st Dep't 2010).

Despite plaintiff's conclusory allegations of the existence of a special relationship, no such relationship existed between the parties. Instead, plaintiff's allegations set forth

an arm's-length relationship between the parties. Accordingly, the claims for negligent misrepresentation fail as a matter of law.

4. The Unjust Enrichment Claim

"The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement." *Goldman v Metro. Life Ins. Co.*, 5 N.Y.3d 561, 572 (2005). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 N.Y.2d 382, 388 (1987).

Plaintiff's purchase of Millstone IV notes was governed by a multitude of lengthy written contracts, and thus, the claim for unjust enrichment must be dismissed.

5. The Breach of the Implied Covenant of Good Faith and Fair Dealing Claim

"Implicit in all contracts is a covenant of good faith and fair dealing *in the course of contract performance*." *Dalton v Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (emphasis added). Plaintiff has alleged that defendants breached the implied covenant of good faith and fair dealing by actively soliciting Plaintiff's purchases of Millstone IV, recommending Millstone IV to Plaintiff, and by completing issuance of the notes by loading Millstone IV with toxic assets. (Compl. ¶¶ 126,127.) These allegations must be dismissed from the complaint; they are allegations of fraud in the inducement and

concern only pre-contractual acts. These are not breaches of good faith in the course of performance.

The following allegations survive dismissal: "Calyon breached its good faith and fair dealing obligations by allowing built-to-fail Constellation CDO collateral, which Calyon knew to have been built-to-fail, to be included in the Millstone IV portfolio, even though Calyon as Millstone IV's warehouse provider possessed the power to reject inclusion of risky assets in Millstone IV's warehouse." (Compl. ¶ 126.) These allegations concern defendants' usurpation of the role of collateral manager and failure to reject toxic assets it selected during the course of performance.

Accordingly, motion to dismiss the cause of action for breach of the implied covenant of good faith and fair dealing is granted in part, and denied in part.

6. <u>The Tortious Interference with Contract Claim</u>

Defendants assert that plaintiff's claim for tortious interference fails because it is untimely under Japanese and New York law, and that Aozora lacks standing to assert a claim for tortious interference. Defendants do not otherwise address the merits of the tortious interference claims.

i. **Statute of Limitations**

With regard to the Japanese statute of limitations, defendants refer the Court to the argument concerning the three-year Japanese statute of limitations for claims sounding in

tort. The Court has denied this portion of the motion, *supra.* As discussed above, these claims must be timely under the law of New York as well. The parties agree that the statute of limitations for tortious interference is three years in New York. The parties also agree that the statute of limitations is triggered when damages are sustained.

Defendants argue the claim is untimely because plaintiff was damaged on November 30, 2007, when it was served with a notice of default. Plaintiff argues that it was damaged in August 2010, when it was notified that Millstone IV had been liquidated, and that it would not receive any proceeds from the liquidation. The Court deems plaintiff's argument persuasive. Plaintiff has alleged that it was damaged by losing 100% of its principal; the damages were realized when Millstone IV was liquidated, and Aozora did not recoup any of its principal.

ii. **Standing**

Next, defendants argue that the tortious interference claim fails because Aozora does not have standing to assert such a claim. Defendants premise this argument on the grounds that plaintiff was not a party, nor a third-party beneficiary to the collateral management agreement ("CMA"). "A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." *State of Cal. Pub. Emp.' Ret. Sys. v.*

Shearman & Sterling, 95 N.Y.2d 427, 434-35 (2000) (internal quotation marks and citations omitted).

The parties do not dispute that the CMA was valid. Under the terms of the CMA, the collateral manager was tasked with the duty of engaging in market transactions to ensure an income stream to investors. At the pleadings stage, this evinces a sufficient intent to benefit noteholders, and that the benefit incurred (payments) was not merely incidental.

"[T]he best evidence of whether contracting parties intended their contract to benefit third parties remains the language of the contract itself. Where a provision exists in an agreement expressly negating an intent to permit enforcement by third parties, as exists in the agreement at bar, that provision is decisive." *Nepco Forged Prods. v. Consolidated Edison Co. of N.Y.*, 99 A.D.2d 508, 508 (1984) (internal quotation marks and citations omitted). Here, the CMA contains no such clause; to the contrary, Section 12(a) actually confers the right of noteholders to sue the collateral manager if it engages in "acts constituting bad faith, gross negligence or willful misconduct in the performance of the duties and obligations of the Collateral Manager." *See* Kuck Affirm. Ex. F at 11. This language indicates that the CMA was intended to benefit noteholders, and that noteholders had an interest in the contract to the extent that they would have the recourse of enforcing their rights if the benefit was not realized.

Accordingly, the Court declines to dismiss the cause of action for tortious interference.

III. CONCLUSION

Accordingly, it is,

ORDERED that defendants' motion to dismiss the third cause of action for breach of the implied covenant of good faith and fair dealing is granted in part and denied in part as indicated in this decision; and it is further

ORDERED that defendants' motion to dismiss the fifth and sixth causes of action for negligent misrepresentation and unjust enrichment is granted in full and these claims are dismissed; and it is further

ORDERED that defendants' motion to dismiss the complaint is otherwise denied; and it is further

ORDERED that defendants shall serve an Answer to the Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on September 22, 2015 at 10:00 am.

Dated: New York, New York
July 27 2015

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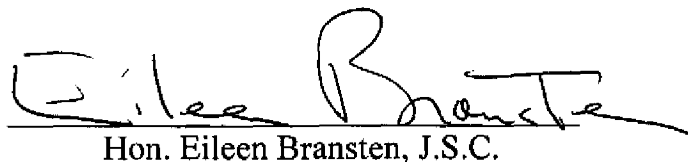

Hon. Eileen Bransten, J.S.C.