Banc of Am. Credit Prods., Inc. v Guidance Enhanced Green Terrain, LLC
2017 NY Slip Op 31910(U)
September 5, 2017
Supreme Court, New York County
Docket Number: 653011/2016
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

BANC OF AMERICA CREDIT PRODUCTS, INC.,

Plaintiff,

-against-

GUIDANCE ENHANCED GREEN TERRAIN, LLC,

Defendant.

DECISION AND ORDER
Index No.: 653011/2016

Motion Seq. No.: 001

O. PETER SHERWOOD, J.:

In motion sequence 001, defendant Guidance Enhanced Green Terrain, LLC ("Guidance") moves to dismiss the complaint of plaintiff Banc of America Credit Products, Inc. ("BACP"). For the reasons discussed below, the motion shall be granted only to the extent of dismissing plaintiff's claim for breach of the implied covenant of good faith and fair dealing. Because this case is closely related to *Guidance Enchanted Green Terrain, LLC v Bank of America Merrill Lynch, et al.*, Index No. 652009/2014 as to which an appeal is pending in the New York Court of Appeals, this case shall be consolidated with that action upon remand to this court.

I. ALLEGATIONS OF THE COMPLAINT

The following is taken principally from plaintiff's summary of the complaint, as stated in its memorandum in opposition at 3-8.

A. Underlying Agreement of the Dispute

When Lehman Brothers filed for bankruptcy in 2008, Guidance owned three interrelated claims against three separate Lehman debtors in the bankruptcy proceeding:

- A "Primary Claim" against Lehman Brothers Finance AG ("LBF"), a Lehman affiliate currently in liquidation in Switzerland, for 23,966,129.40 Swiss francs (the "Primary Claim Amount"). This claim was held pursuant to a swap agreement that terminated upon LBF's insolvency;
- A "Guarantee Claim" against LBF's parent, Lehman Brothers Holdings, Inc. ("LBHI"); and
- A "Security Claim" interest in a security agreement that purportedly secured LBF's obligations under the Primary Claim. The security agreement was provided by Lehman Brothers Special Financing, Inc. ("LBSF"), a subsidiary of LBHI and affiliate of LBF.

(*id.* ¶19; *see also id.* ¶¶ 28-30.)

In 2013, BACP and Guidance executed an Assignment of Claim Agreement ("Assignment Agreement"), pursuant to which Guidance agreed to convey to BACP the Primary Claim and the Guarantee Claim, including rights to all distributions on account of those two Claims (*id.* ¶ 22; *see also* affirmation of Sigurd A. Sorenson ["Sorenson aff"], exhibit B ["Assignment Agreement"], § 1 at 2-3). Guidance retained a limited interest in the Security Claim, pursuant to which it could share in distributions on account thereof (complaint ¶ 23). BACP agreed to pay Guidance $12,078,595.41, approximately $1.2 million of which was placed in escrow as a "Reserve" to be applied as a surety for any liabilities or obligations of Guidance to BACP (*id.* ¶22; *see also* Assignment Agreement § 2 at 3).

Due to the interrelated nature of the three Claims, the Parties negotiated a waterfall arrangement to divide any proceeds from the Security Claim ("Security Proceeds") to protect BACP against any resultant reduction of distributions to BACP on the Primary and Guarantee Claims (complaint ¶ 23; *see also* Assignment Agreement § 8 [b] at 9-10). In addition, the Parties negotiated an arrangement titled "Defense Authority" (complaint ¶ 24) pursuant to which Guidance preserved "the sole and exclusive right to handle all matters" with respect to the Security Claim for a prescribed period of time (complaint ¶ 24; *see also* Assignment Agreement § 10 [a] at 10-11). With respect to the Primary and Guarantee Claims, on the other hand, Guidance retained only the right for a period of time to defend the "valuation" of those Claims (complaint ¶ 24; *see also* Assignment Agreement § 10 [a] at 10-11).

To further protect BACP's rights and to ensure transparency in Guidance's exercise of its limited Defense Authority, Guidance agreed under multiple provisions of the Assignment Agreement to promptly provide BACP with all documents and notices affecting BACP's rights (complaint ¶ 26; Assignment Agreement § 1 [a]-[b] at 2 ["Seller . . . does hereby irrevocably sell, convey, transfer and assign unto Buyer . . . the Claim Documents . . . [and] all collateral, documents, agreements, notices, correspondence materials and other information with respect to the Derivative Contracts"], § 8 [d] at 10 ["In the event Seller receives any notices, correspondence or other documents in respect of the Assigned Rights, Seller shall promptly . . . deliver the same to Buyer"], § 14 at 12-13 [Seller . . . shall deliver to Buyer promptly after its request true and complete copies of, all Derivative Contracts and/or any other document, correspondence, records, information, tape recordings, electronic mail messages and the like it its possession that relate to, evidence, define or are in support of the Assigned Rights"]).

Guidance was prohibited from engaging in any conduct that would reduce, impair, or otherwise adversely affect BACP's Assigned Rights, and from taking any action with respect to the Primary Claim without BACP's prior written consent, except to take "reasonable steps" to maximize the Security Claim distributions (complaint ¶¶ 58-59; Assignment Agreement §§ 5 [h], [j] at 5). Guidance further agreed that it "shall not engage in any act . . . or omission that will cause a withholding or delay in distributions in respect of the Claims" (complaint ¶ 27; Assignment Agreement § 10 [c] at 11).

B. Guidance's Attempts to Settle the Security Claim

Following execution of the Assignment Agreement, Guidance sought BACP's consent on three separate proposed settlements of the Security Claim with LBSF, but was refused (complaint ¶¶ 33-44). Subsequently, Guidance filed suit against BACP for breach of the Assignment Agreement and for indemnification under section 12 (c) of the agreement. BACP filed a motion to dismiss all claims, which Justice Schweitzer granted in full by order dated February 22, 2015. (Sorenson aff, exhibit C.)

After the return date on the present motion, the First Department issued a split decision dated January 5, 2017, that reversed the February 22, 2015 order to the extent that it dismissed Guidance's cause of action for breach and repudiation of the contract (*see* NYSCEF Doc. No. 36 [January 25, 2017 Rule 18 letter]). The First Department subsequently granted BACP's motion for leave to appeal to the Court of Appeals (*see* NYSCEF Doc. Nos. 37-38 [March 3, 2017 Rule 18 letter]).

C. Guidance Settlement of the Security and Guarantee Claims

On January 8, 2016, BACP received a payment of $4.3 million from LBSF without advance notice (the "January 2016 Payment") (*id.* ¶ 49). Subsequently, Guidance advised BACP that it had settled the Security Claim and Guarantee Claim by agreement with LBSF dated as of December 30, 2015 (the "2015 Settlement") and asserted that the January 2016 Payment was made pursuant to the 2015 Settlement (*id.* ¶ 50). Guidance furnished BACP with a copy of its settlement agreement (the "Settlement Agreement") and demanded payment of $1,390,837 pursuant to the Security Claim waterfall (*id.* ¶51; *see also* Assignment Agreement § 8 [b] at 9-10). The 2015 Settlement was structured to ensure that no distributions would be paid on account of the Guarantee Claim that Guidance had sold to BACP and which distributions would be BACP's exclusive property (complaint ¶ 52; *see also* affirmation of Sharon L. Barbour ["Barbour aff"], exhibit 3

["Settlement Agreement"] § 1 at 3). The 2015 Settlement was the only documentation provided by Guidance to BACP (complaint ¶ 56). Concerned that the 2015 Settlement might have been a product of a collusive arrangement between Guidance and LBSF to circumvent its rights under the Assignment Agreement in violation of Section 5(h) of the Assignment Agreement (*id.* ¶¶ 57-59; *see* Assignment Agreement § 5 [h] ["Seller has not engaged (and shall not engage) in any act, conduct or omission, or had (and shall not have) any relationship with Debtor, Guarantor or any of their affiliates, that will reduce or impair or otherwise adversely affect the Assigned Rights"]), BACP requested that Guidance provide copies of "all communications between Guidance or its representatives, on the one hand, and LBSF, LBHI, their affiliates or their representatives, on the other, as well as all other documents concerning the Settlement Agreement (*id.* ¶ 60). Guidance refused (*id.* ¶ 61).

By letter dated February 3, 2016, Guidance demanded that BACP enter into an escrow agreement with Guidance and place the January 2016 Payment into an escrow account (*id.* ¶ 62). BACP offered to do so with a reservation of its right to challenge Guidance's entitlement to any portion of the January 2016 Payment (*id.* ¶ 63). Guidance refused, stating that in order to comply with Guidance's request "BACP must concede that the $4.3 million paid on the LBSF Claim are Security Proceeds," to which Guidance had a right to share (*id.* ¶ 64). BACP declined Guidance's demand (*id.* ¶ 65). Guidance has also demanded the release of a portion of the Reserve which was put in escrow at the time of BACP's purchase to cover, among other things, BACP's indemnity claims (*id.* ¶¶ 66-68). BACP refused the demand "in light of the pendency of Guidance's Appeal and the non-satisfaction of the release conditions, as well as the other disputes described [in the complaint]" (*id.* ¶ 69).

In this case, BACP asserts three causes of action. Count 1 alleges breach of "numerous provisions of the Assignment Agreement," including Sections 1, 5 (h), 5 (j), 5 (aa), 7 (a), 8 (d), 10, 12 (a) and 14 (*id.* ¶¶ 70-75). Count 2 asserts a claim for Contractual Indemnification arising out of Section 12 (a) and (b) of the Assignment Agreement (*id.* ¶¶ 76-79). Count 3 seeks a declaratory judgement that (i) BACP has no obligation to share the January 2016 Payment with Guidance until BACP has completed its due diligence into the 2015 Settlement and determines Guidance is so entitled (ii) BACP may place the January 2016 Payment into escrow without waiving its right to challenge Guidance's claimed entitlement; and (iii) BACP is not obligated to release the Reserve to Guidance unless and until resolution in Guidance's favor of Guidance's Appeal and the other

disputes described herein and satisfaction of all the conditions set forth in the Assignment Agreement (*id.* ¶¶ 80-84).

II. DISCUSSION

A. Breach of Contract Claim Arguments

1. Defendant's Memorandum in Support

Defendant presents three arguments for dismissal of the breach of contract claim. First, the complaint fails to allege how any of Guidance's alleged breaches of the Assignment Agreement caused plaintiff any harm (def's mem in support at 10-12). The complaint contains only boilerplate allegations of damage and BACP "concedes . . . that all its alleged damages spring from its indemnity claim" (*id.* at 11).

Second, the claim for breach of contract is barred because BACP materially breached the Assignment Agreement by refusing to make the waterfall payment required by Section 8 (b) and refusing to pay the Reserve as required by Section 2 (*id.* at 19-22). Defendant contends that both payments are presently due under the terms of the contract.[1] With respect to the waterfall payment under Section 8 (b), defendant asserts that one of BACP's attorneys, Darius Goldman, admitted in a letter that any "payment on account of the LBSF Claim . . . constitute[s] Security Proceeds for the purposes of paragraph 8 (b) of the Assignment Agreement" (*id.* at 20 n 14 quoting Sorenson aff exhibit H at 2 [letter from Goldman dated 1/25/14]). Having received $4.3 million of such Security Proceeds, defendant is entitled to its share under Section 8 (b) in the amount of 1.4 million. With respect to the Reserve payment, defendant contends that under Section 2, defendant is entitled to the Reserve the later of when "the first distributions on the Claims have been made" or when defendant has satisfied all its obligations under Section 10 (c). As to the latter, defendant contends the condition is met by "the LBSF Settlement . . . combined with [BACP's] admission that it has directly received all of the distributions from the LBSF Claim" (*id.* 21-22). Thus the defenses based on the assertion that BACP breached sections 8 (b) and (2) are based on the claim that BACP has admitted that it received Security Proceeds. As discussed below, BACP disputes this claim.

[1] Defendant also argues that, even if it breached the contract, plaintiff may not withhold either payments in light of Section 19 of the Agreement, which states that "[a]ny payment to be made by either Party shall be made without set-off, counterclaim or deduction of any kind" (def's mem in support at 20-12; Assignment Agreement at 13).

In the third argument, Guidance argues that the complaint fails to allege breach under any section of the Assignment Agreement listed under count one (def's mem in support at 12-19). With respect to Section 5 (j) (which prohibits Guidance from taking any action or inaction "with respect to" the Primary Claim without BACP's prior written consent), defendant maintains that the section prohibits only unconsented assignment of the Primary Claim and that, since the complaint concedes Guidance never took this action, this section has not been breached (*id.* at 13).

With respect to Guidance's disclosure requirements under Sections 1, 8 (d), and 14 (the "Disclosure Sections"), defendant contends that because these sections do not specifically require Guidance to disclose *confidential* communications (as opposed to communications generally), the court should not infer such a duty (*id.* at 13-17, citing *Rowe v Great Atl. & Pac. Tea Co., Inc.*, 46 NY2d 62, 72 [1978] [noting that "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). Defendant also argues that such a duty should not be inferred since it would constitute a waiver of Guidance's rights in its confidential information under Federal Rules of Evidence § 408 and CPLR 4546 (*id.* citing *e.g. Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] [noting that "waiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection"]). Defendant does not explain how evidentiary rules governing the admissibility of settlement communications excuses a contractual duty to disclose.

Defendant also argues that the communications plaintiff seeks are not covered by the Disclosure Sections, since these sections relate to defendant's Defense Authority under Section 10 (a), which states that "[n]otwithstanding anything herein to the contrary . . . [Guidance] shall have the sole and exclusive right to handle all matters relating to the Security Agreement." Defendant asserts that the "notwithstanding" provision constitutes a "trumping clause" which, under *Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.* (112 AD3d 78, 83 [1st Dept 2013]), takes priority over conflicting provisions. Defendant does not offer further explanation as to how any of these provisions conflict, or how communications relating to Guidance's right to "handle all matters relating to the Security Agreement" might not also be communications that are covered by the Disclosure Sections (i.e. communications that relate to the Assigned Rights).

Defendant also maintains that Section 1 specifically does not impose a duty to disclose the documents in question, since that section contains no provision requiring the parties to produce

documents created after execution of the Assignment Agreement. Likewise, defendant argues that Section 8 (d) imposes no such duty on the grounds that this section applies only to documents or correspondence Guidance "receives," and not back and forth settlement negotiations.

With respect to all remaining sections of the Assignment Agreement specifically enumerated under Count 1, defendant argues that the complaint "simply makes the conclusory allegation that these Sections were breached" and alleges no facts as to how Guidance breached them (def's mem in support at 12).

Finally, defendant argues that plaintiff's alternative claims of breach of the duty of good faith and fair dealing must be dismissed because they are duplicative of plaintiff's breach of contract claim and failure to allege damages or facts demonstrating breach (*id.* at 19).

2. Plaintiff's Memorandum in Opposition

With respect to defendant's first argument, plaintiff notes that its damages for breach of contract and for indemnification "are one and the same" (pl's mem in opposition at 13). Accordingly, plaintiff argues that the damages alleged, which defendant does not dispute as to the indemnification claim, are sufficient to sustain its cause of action for breach of contract.

With respect to defendant's second argument, plaintiff contends that it has sufficiently alleged multiple breaches of the Assignment Agreement and that defendant has failed to establish any breach by BACP of either Sections 2 or 8 so as to excuse plaintiff's performance as a matter of law at this pleading stage (*id.* at 12-23). As to the waterfall payment allegedly due under Section 8, plaintiff notes that the complaint alleges only that BACP received a $4.3 million payment from LBSF, not that the payment constituted Security Proceeds thereby triggering a duty to pay plaintiff $1.4 million under Section 8. Plaintiff further emphasizes that one of the reasons it initiated this suit was to compel Guidance to furnish relevant documentation so that BACP could determine whether the funds at issue properly constitute Security Proceeds. Plaintiff also argues that, even if the complaint had alleged that the payment constituted Security Proceeds, BACP's failure to turn that payment over would not constitute breach since BACP offered to deposit the funds into escrow in accordance with Assignment Agreement Section 9.

As to plaintiff's refusal to release the Reserve, plaintiff notes first that under Section 2 any "remaining Reserve" is not subject to release until after Guidance's "obligations and liabilities" to plaintiff has been "fully paid, performed and satisfied" (*id.* at 21). Plaintiff argues that because this action asserts claims against Guidance relating to its unfulfilled obligations, there is no

"remaining Reserve" to be paid until this action is resolved. Plaintiff also notes that Guidance is not entitled to Reserve payments under Section 2 until it has satisfied its obligations under Section 10 (c) to pay plaintiff in the event Guidance's exercise of its Defense Authority causes any delay or withholding in distributions to BACP. Here, defendant has not shown it is entitled to a Reserve payment since, for the purposes of this motion, defendant has failed to show by documentary evidence that it has met its obligation under 10 (c).

With respect to Section 5 (j) of the Assignment Agreement, plaintiff notes that the agreement broadly prohibits "any action or inaction . . . with respect to the LBF Claim" without BACP's prior written consent (pl's mem in opposition at 14-15). The defense that there is no cause of action for an unrealized intent to breach this provision (because BACP successfully thwarted the attempt) misreads Section 5 (j) and is contrary to a number of other provisions of the Assignment Agreement barring both "actions" broadly defined and failed attempts (*see e.g.* Assignment Agreement §§ 5 [h] and 5 [aa]). Plaintiff adds that to the extent defendant wants to argue that the parties intended a narrower construction of Section 5 (j) (specifically, the term "action"), it may not do so at this stage.

Regarding the Disclosure Sections, plaintiff first argues that defendant has failed to satisfy its burden under CPLR 3211 (a) (1) to demonstrate that these sections unambiguously do not require production of the documents in question (*id.* at 15-18). To the contrary, several provisions require Guidance to provide documents relevant to the Assigned Rights (*see e.g.* § 8 [d] ["In the event [Guidance] receives any notices, correspondence or other documents in respect to the Assigned Rights, [guidance] shall promptly . . . deliver same to ["BACP"]; and §§ 1 [a]-[b] and 14). As to defendant's arguments that the evidentiary rules governing the admissibility of settlement communications (CPLR 4547) shield such communications from disclosure, plaintiff asserts that such rules "have nothing to do with contractually-mandated disclosure" (*id.* at 17). Regarding the "trumping clause" of Section 10 plaintiff argues it "has nothing to do with Section 8 (d)" (*id.*). Plaintiff also notes "the utter absurdity of [defendant's] position that it need not even produce documents it 'receives' under Section 8 (d) because of the 'back and forth' nature of the communications" (*id.* at 18). Moreover, plaintiff notes that Section 14 specifically requires delivery of all documents "in [Guidance's] possession that relate to . . . the Assigned Rights."

Finally, plaintiff argues that it has sufficiently pleaded breach of the covenant of good faith and fair dealing as an alternative to its claim for breach of contract (*id.* at 18-19).

3. Defendant's Reply

Defendant's reply focuses on whether plaintiff materially breached the Assignment Agreement (def's mem in reply at 8-9). Defendant first argues that the $4.3 million plaintiff received could not have been anything but Security Proceeds, and asks the court "to take judicial notice of this fact because it is a matter of public record in the Lehman bankruptcy petition" (*id.* at 8). Additionally, defendant argues that BACP cannot avoid default by offering to put the waterfall payment in escrow since, under the terms of section 9, only Guidance has a right to demand an escrow agreement (*id.* at 9).[2]

B. Breach of Contract Claim Analysis

1. Governing Standards

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a

[2] The portion of section 9 which defendant cites reads: "At the request of Seller, each of Buyer and Seller shall enter into an escrow agreement (the 'Escrow Agreement') by and among Seller, Buyer and an escrow agent located in the United States (the 'Escrow Agent'), in form and substance reasonably acceptable to both parties hereto (acting in good faith). Upon entry into of an Escrow Agreement, the Security Proceeds shall be deposited in an [non]interest bearing segregated escrow account (the 'Escrow Account') maintained by the Escrow Agent and distributed to the parties hereto in accordance with Section 8(b) above."

defense as a matter of law" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

2. Whether Plaintiff Materially Breached

Section 2 in relevant part states that:

> "[t]he Reserve shall be applied as a surety for the now existing and hereafter arising obligations and liabilities of Seller to Buyer, which such obligations and liabilities shall continue and remain in full force and effect and be binding on Seller until fully paid, performed and satisfied."

Only after that point is Guidance entitled to "[a]ny remaining Reserve still in existence upon the later of (a) the date upon which the first distributions on the Claims have been made in the Proceedings or (b) satisfaction of all of Seller's obligations to Buyer pursuant to Section 10(c) (Distribution Delay)." The section provides for distribution to Guidance of any "remaining" Reserve. Guidance has no claim over such funds while Guidance's obligations to BACP "continue and remain in full force and effect." Accordingly, because this action asserts claims against Guidance relating to its allegedly unfulfilled obligations, there is no "remaining Reserve" at this time. Furthermore, as plaintiff also notes, Guidance is not entitled to a Reserve payment until after

it has satisfied all of its obligations under Section 10 (c), including the obligation to pay plaintiff in the event Guidance's exercise of its Defense Authority causes any delay or withholding in distributions to BACP. Guidance has not established that BACP has received "all of the distributions from the LBSF Claim," and the fact that the Settlement Agreement refers to the $4.3 million BACP received as an "Initial Settlement Amount" indicates that it is not so intended (*see* Settlement Agreement § 2 [a] at 3). Accordingly, defendant has failed to show by the standard CPLR 3211 (a) (1) requires that BACP breached this provision of the Assignment Agreement.

Section 8 (b) of the Assignment Agreement defines "Security Proceeds" as "any recoveries resulting from, or in connection with, the Security Agreement." Defendant has provided a copy of its demand on BACP to distribute waterfall proceeds from the $4.3 million Initial Settlement Amount received, along with a copy of the settlement agreement executed by Guidance and LBSF (Sorenson aff, exhibit G [NYSCEF Do. No. 16] ["Settlement Agreement"]). CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85). In this instance, the Settlement Agreement properly constitutes documentary evidence.

Section 2 (a) of the Settlement Agreement states that LBSF will pay "in connection with the LBSF Claim $4,300,000 . . . to the holder of record of the LBSF Claim in accordance with the settlement instructions on file with the Claim Administrator in connection with the LBSF" (Settlement Agreement at 3). Paragraph 49 of the complaint acknowledges that BACP received payment of $4.3 million from LBSF. Accordingly, as defined by the Assignment Agreement, and based on the documentary evidence, the $4.3 million constitutes a recovery "resulting from, or in connection with, the Security Agreement." Plaintiff's argument that it has not determined yet whether the $4.3 million *properly* constitutes Security proceeds misses the mark. Whether this

payment was proper or made in good faith is an entirely separate question from whether the payment constitutes "Security Proceeds" under the agreement.

Plaintiff contends it did not breach its obligations under Section 8 on the basis that it offered to deposit the funds into escrow in accordance with Section 9 of the agreement. Section 8 does not give BACP the option of depositing proceeds into escrow and Section 9 plainly grants only Guidance the right to demand that the parties enter into an escrow agreement. Accordingly, absent a request of Guidance to place the Security Proceeds in escrow, the failure of BACP to make distributions from the $4.3 million payment in accordance with Section 8 constitutes a breach of the Assignment Agreement.

The question of whether a breach is material presents a question of fact as to whether the breaches were "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" (*Smolev v Carole Hochman Design Group, Inc.*, 79 AD3d 540, 541 [1st Dept 2010]). Defendant has failed to show that such a breach meets the above definition of materiality. While, as a general matter, "failure to pay is a material breach of a contract" (*Taub v Marchesi di Barolo, S.p.A.*, 480 F App'x 643, 645 [2d Cir 2012]), a failure to pay does not automatically defeat the object of the parties in making the contract (*see Willoughby Rehabilitation v Webster*, 134 AD3d 811, 814 [2d Dept 2015] ["the buyers' failure to timely pay the $162,776.26 to the sellers was not a material breach, as it did not substantially defeat the purpose of the parties' agreements"]).

Here there is a credible argument to be made that the failure to pay Guidance its share of the settlement amount received is not material because it does not substantially defeat the purpose of the Assignment Agreement, which was designed to allocate and protect the interests of both claimants to funds owed by LBF and LBHI. The complaint in this case alleges that defendant negotiated a settlement in violation of multiple duties defendant owes to plaintiff, including an alleged duty to obtain plaintiff's consent to the very settlement defendant now seeks to enforce against plaintiff. The settlement gives rise to defendant's claim of breach of contract by plaintiff for failure to disburse to defendants its share of the settlement proceeds.

However, it is disputed how much of the amount paid in settlement constitutes Security Proceeds. In any event, pursuant to Guidance's demand that the January, 2016 payment be placed in escrow, BACP shall place the disputed funds in escrow pending resolution of this dispute, including share, if any, that must be paid to Guidance. Defendant has not established entitlement

to release of the Reserve as plaintiff has sufficiently alleged that there is no "remaining Reserve" at this point in the case. Accordingly, while defendant has met its burden in establishing that plaintiff breached Section 8 of the Assignment Agreement by failing to distribute the waterfall payment, it has not shown that the breach was material.

3. Whether Plaintiff States a Claim for Breach of Contract

i. *Disclosure Sections*

As noted previously, defendant's arguments regarding the disclosure sections suffer from a number of inadequacies. The assertion that the disclosure sections do not require disclosure of confidential communications because those communications are not explicitly enumerated, ignores the fact that the cited provisions encompass, without limitation, all documents that relate to the Assigned Rights (*see* Assignment Agreement §§ 1 ["Seller . . . does hereby irrevocably . . . transfer . . . unto Buyer . . . [b] all collateral, documents, agreements, notices, correspondence, materials and other information with respect to the Derivative Contracts"], 8 [d] ["In the event Seller receives any notices, correspondence or other documents in respect of the Assigned Rights, Seller shall promptly. . . deliver the same to Buyer."], 14 ["Seller . . . shall deliver to Buyer promptly after its request . . . any other documents, correspondence, records, information, tape recordings, electronic mail messages and the like in its possession that relate to, evidence, define or are in support of the Assigned Rights"]). Similarly, defendant fails to explain in any plausible manner how the rules of evidence inform its disclosure obligations under the Assignment Agreement, or how its disclosure obligations conflict with its Defense Authority, such that a "trumping clause" would apply. Thus, regardless of whether this court finds that defendant's interpretation of Sections 1 and 8 (d) is the only plausible interpretation, as required on a motion to dismiss, defendant would still be in violation of Section 14. Accordingly, defendant's motion fails with respect to plaintiff's claim for breach of defendant's disclosure obligations.

ii. *Section 5 (j)*

Section 5 (j) prohibits Guidance from "tak[ing] any action or inaction (including, but not limited to, acceptance of any contractual offer by the Debtor) with respect to the LBF Claim without the prior written consent of the [BACP]." Defendant interprets this provision as applying only to assignment of the Primary Claim, but this interpretation runs contrary to the parenthetical "including, but not limited to, acceptance of any contractual offer by the Debtor." In any event, defendant has failed to establish that this provision cannot be reasonably interpreted to cover the

actions at issue in this case. Accordingly, defendant's motion to dismiss fails with respect to plaintiff's claim of breach of Section 5 (j).

iii. *All Remaining Sections, (5 [h], 5 [aa], 7[a], 10, and 12 [a])*

With respect to all remaining sections, defendant argues broadly that the complaint "simply makes the conclusory allegation that these Sections were breached" and alleges no facts as to how Guidance breached them (def's mem in support at 12). However, each of the remaining sections contain provisions which cover the facts as alleged in the complaint (*see* Assignment Agreement §§ 5 [h] ["Seller has not engaged (and shall not engage) in any act, conduct or omission, or had (and shall not have) any relationship with Debtor, Guarantor or any of their affiliates, that will reduce or impair or otherwise adversely affect the Assigned Rights"], 5 [aa] ["Seller has no obligation or liability related to or in connection with the Claims or the Bankruptcy Case and has not effected and will not effect (or attempt to effect) . . . any netting, set-off recoupment or other recovery of all or any portion of the Claims against any claim or obligations owed to any of Debtor, Guarantor or any of their respective affiliates"], 7 [a] ["Each Party acknowledges that the other may possess, and may come into possession of, material non-public information concerning the Assigned Rights, the status of the Bankruptcy Case, the Debtor and/or Guarantor ("Excluded Information"). . . . Excluded Information shall not limit, contradict or render untrue any representation or warranty made by Seller or Buyer herein"], 10 ["Seller shall use its reasonable efforts to maximize the value of the Claims"], and 12 [a] [indemnity provision]). Accordingly, defendant has failed its burden with respect to these claims as well.

iv. *Breach of the Implied Covenant of Good Faith and Fair Dealing*

A "claim that defendants breached the implied covenant of good faith and fair dealing [may be] properly dismissed as duplicative of the breach of contract claim [when] both claims arise from the same facts" (*Logan Advisors, LLC v Patriarch Partners*, LLC, 63 AD3d 440, 443 [1st Dept 2009]). Plaintiff has not alleged any facts that are unique to this claim – accordingly, this alternative claim made as part of the first course of action, shall be dismissed.

C. Contractual Indemnification Claim Arguments

1. Defendant's Memorandum in Support

Regarding plaintiff's claim for contractual indemnification, defendant argues that the indemnity clause has not been triggered because the clause only applies in the event of Guidance's breach and as detailed above, defendant contends it has not breached the Assignment Agreement.

Defendant also contends that plaintiff's indemnification claim is barred by judicial estoppel (*id.* at 5-8). Two requirements must be met in order for judicial estoppel to apply: "First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner" (*67 Vestry Tenants Ass'n v Raab*, 172 Misc 2d 214, 219 [Sup Ct 1997]). Defendant contends that the first element is met by the fact that, in the earlier related action, BACP argued that, under *Hooper Assoc., Ltd. v AGS Computers, Inc.* (74 NY2d 487, 489 [1989]), Section 12 (c) did not cover attorney's fees because it "does not refer explicitly to litigation between Guidance and BACP" (def's mem in support at 6, quoting Sorenson aff, exhibit D ["BACP First Action Mem"]). Defendant contends the second element was met when the court adopted BACP's position in its order dismissing the case (*see* Sorenson aff, exhibit C ["First Action Order"] at 5). Defendant also urges that the indemnification should be judicially estopped for the additional reason that it has acquiesced in BACP's former position by not appealing that portion of the First Action Order, and that it would be prejudiced by BACP's change in position (def's mem in support 7-8, citing *Uzdavines v Weeks Mar., Inc.*, 418 F3d 138, 147 [2d Cir 2005] [noting that judicial estoppel applies especially where a party's change in position "to the prejudice of the party who has acquiesced in the position formerly taken by him"]).

Finally, defendant argues that indemnification is barred under *Hooper*, since the "Indemnity Provision nowhere even mentions litigation between Guidance and [BACP]" (def's mem in support at 8-9). In support, defendant notes that the Appellate Division has held that an "indemnification clause [that] does not even refer to litigation between the parties to the agreement" does not make it "'unmistakably clear' that the parties intended that plaintiff must indemnify defendant for attorney's fees and costs arising from the instant litigation" in accordance with *Hooper* (*Parkway Pediatric and Adolescent Medicine LLC v Vitullo*, 72 AD3d 1513 [4th Dept 2010]).

2. Plaintiff's Memorandum in Opposition

Plaintiff argues that judicial estoppel does not apply because plaintiffs brought this cause of action under Section 12 (a) which is not the provision that was at issue in the previous action (pl's mem in opposition at 8-9). Plaintiff contends that, since Section 12 (a) was not at issue in the related lawsuit, its position in that action as to the interpretation of Section 12 (c) should have no bearing here.

Plaintiff contends that under *Hooper* and its progeny, "so long as Section 12(a) of the [Assignment Agreement] cannot reasonably be interpreted as being limited solely to third-party claims under standard canons of contract interpretation, Count Two of the complaint states a claim for indemnification (*id.* at 10-12, citing *Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1st Dept 1997] [finding that indemnification provision did not apply solely to third-party claims where such an interpretation would render a portion of the provision "mere surplusage were it only applicable . . . to third-party actions"] and *Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645, 645–646 [1st Dept 2013] [applying standard canons of construction and finding indemnification provision did not preclude intra-party claims where the "parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required"]).

Plaintiff argues that Section 12 (a) "cannot be interpreted as being limited solely to third-party claims under standard canons of contract interpretation" for a number of reasons (*id.*). First, Section 12 (a) provides that Section 12 (b) will be the exclusive remedy for breaches of Guidance's "representations, warranties, covenants or agreements" (Assignment Agreement § 12 [a]). Since many of these breaches would necessarily be asserted by BACP against Guidance, plaintiff would be entirely without recourse if indemnification were limited to third-party claims. Next, plaintiff notes that Section 12 (a) states that the assignment and transfer of the Assigned Rights is "without any recourse to seller, except . . . with respect to remedies resulting from breaches to Seller's representations . . . or agreements (in which case, Section 12 (b) shall apply." Plaintiff contends that "[i]t would be utterly nonsensical to read these words as excluding from the indemnification provision of Section 12 (b) all claims by BACP against Guidance" (pl's mem in opposition at 11).

Thus, plaintiff argues that, while Section 12 (b) and (c) contain parallel language, Section 12 (a) requires that Section 12 (b) include intra-party claims. Specifically, plaintiff notes the fact that Section 12 (a) provides that BACP's exclusive remedy is Section 12 (b), whereas no such provision limits Guidance's remedies. Thus, while Guidance need not rely on Section 12 (c) to bring claims against BACP (thus eliminating the need to cover intra-party disputes under that provision), BACP would be entirely without recourse against Guidance if Section 12 (b) did not cover intra-party claims.

3. Defendant's Reply Memorandum

In reply, defendant argues that BACP admitted that the parties' indemnification rights were coextensive under the Assignment Agreement when it made the following argument in the prior action: "To the extent the Court sustains a claim [by Guidance] for indemnification for costs associated with this lawsuit, [the Bank] reserve[s] the right to plead at the appropriate time a counterclaim for [its] own costs under a parallel provision of the Agreement." (def's mem in reply at 3, quoting BACP First Action Mem at 19 n 4). The language defendant quotes belies its own argument, however, since at best, this language concedes that BACP has as many rights under the indemnity provision as Guidance, not the inverse.

With respect to *Hooper*, defendant borrows language from BACP's brief in the previous action and argues that since Sections 12 (a) and (b) "can be read to cover indemnification for litigation with third parties like Lehman, and does not refer explicitly to litigation between Guidance and [BACP]" the indemnification claim must be dismissed. (*id.* quoting BACP First Action Mem at 18).

D. Analysis of Contractual Indemnification Claim

1. Judicial Estoppel

It is well settled that judicial estoppel prevents a party from taking inconsistent positions in the same or subsequent proceedings (*Matter of Martin*, 8 NY2d 226 [1960] [plaintiff precluded from bringing a Workers' Compensation claim when he had previously taken the inconsistent position that the accident was not within the course of his employment]); *Nestor v Britt*, 270 AD2d 192 [1st Dept 2000] [judicial estoppel barred petitioner from denying validity of a lease, which it had argued was binding in a prior case]). As plaintiff notes, however, the doctrine is inapplicable where a party's prior position is not contrary to the one taken in the present action (*see e.g. Schorr v Schorr*, 106 AD3d 544, 545 [1st Dept 2013] [finding plaintiff was not prohibited from advancing argument under doctrine of judicial estoppel "given that she never previously took the [contrary] position"]).

In the previous action, BACP took the position that "since [Section 12 (c)] can be read to cover indemnification for litigation with third parties like Lehman, and not does not refer explicitly to litigation between Guidance and BACP, Guidance's indemnification claim must be dismissed." Although the language of Section 12 (b) is, in relevant portion, identical to the language of Section 12 (c), plaintiff distinguishes its earlier argument on the basis that, unlike Section 12 (c), Section

12 (a) provides that plaintiff's sole remedy against Guidance for breaches listed in that section are those set forth in Section 12 (b).

The court agrees. Both Sections 12 (b) and 12 (c) are limited to litigation with third parties. However, Section 12 (a) expressly limits the rights of BACP against Guidance but reserves the right of BACP to sue Guidance for, *inter alia*, "remedies resulting from breach of Seller's representations, warranties, covenants or agreements." This Section then states that as to the enumerated remedies "Section 12 (b) shall apply." Accordingly, the Assignment Agreement, entitles BACP to invoke the remedies set forth in Section 12 (b) in connection with certain enumerated claims against Guidance. Judicial estoppel does not bar plaintiff from advancing its structural argument here.

2. Hooper

In *Hooper* (74 NY2d at 487), the Court of Appeals was tasked with determining whether an indemnity clause was "limited to attorney's fees incurred by plaintiff in actions involving third parties or also includes those incurred in prosecuting a suit against defendant for claims under the contract" (*id.* at 491). Noting "the well-understood rule that parties are responsible for their own attorney's fees," the Court held that a "court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*id.* at 492). The Court then applied normal canons of construction to find that the agreement did not indemnify intra-party claims. In particular, the Court noted the fact that the indemnity provision included a list of covered subjects, all of which were susceptible to third-party claims, and the fact that other provisions in the contract, "which unmistakably relate[d] to third-party claims" would be rendered meaningless if the indemnity clause applied to intra-party claims (*id.* at 492-493). As plaintiff notes, the First Department has repeatedly distinguished *Hooper* on the basis that, after applying standard canons of construction, the clauses at issue reasonably covered intra-party claims (*see Sagittarius Broadcasting Corp.*, 243 AD2d at 326 [finding that indemnification provision did not apply solely to third-party claims where such an interpretation would render a portion of the provision "mere surplusage were it only applicable . . . to third-party actions"]; *Crossroads ABL LLC*, 105 AD3d at 645–646 [applying standard canons of construction and finding indemnification provision did not preclude intra-party claims where the "parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required"]). Accordingly,

the fact that an indemnification provision does not explicitly include intra-party claims is not fatal under *Hooper* (*but see Parkway Pediatric and Adolescent Medicine LLC v Vitullo*, 72 AD3d 1513 [4th Dept 2010] [finding a "broad indemnification clause" did not make it "unmistakably clear" that the parties intended to indemnify intra-party claims on the basis that the clause did "not even refer to litigation between the parties to the agreement"]).

Of the above cited cases, the most factually similar is *Crossroads ABL LLC* (105 AD3d at 645). In that case, the First Department distinguished *Hooper* and found that an indemnification provision did not preclude intra-party claims, in spite of the fact that the provision did not expressly include such claims (*id.*; *see also Crossroads ABL, LLC v Canaras Capital Mgt., LLC*, 35 Misc 3d 1238[A] [Sup Ct 2012] [including full text of provision, finding that the provision at issue passed the rest in Hooper and concluding that there was "no basis by which [it could] conclude that intra-party actions were not intended to be within the ambit of the provision.]). In so ruling, the First Department noted that "the indemnification provision does not include an exhaustive list of actions for which indemnification is required, nor are there any other provisions in the servicing agreement that would be rendered meaningless if the indemnification provision is read to include any claims—intra-party or otherwise—that involve [plaintiff]" (*Crossroads ABL LLC*, 105 AD3d at 645–646). The court also noted that "parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required" (*id.* at 646).

The provision at issue in this case shares virtually all of the above elements and much more. As discussed above, Section 12 (a) expressly provides that the indemnification provision (i.e., Section 12 [b]) "shall apply" to the breaches by Guidance listed in Section 12 (a). The language of Section 12 (a) easily satisfies the rule in *Hooper*.

E. Claims for Declaratory Judgement

BACP requests declaratory judgements as to three issues: (i) it has no obligation to pay Guidance its $1.4 million share of the Security Proceeds until Guidance gives BACP Guidance's settlement communications with LBSF and an opportunity to do "due diligence"; (ii) that it may place the $4.3 million of Security Proceeds into escrow without waiving its right to challenge Guidance's rights to its $1.4 million share; and (iii) that BACP does not have to pay Guidance the $1.2 million Reserve until Guidance's appeal in the First Action is resolved, and until the

conditions in Section 2 have been satisfied. The request is DENIED as the court has already addressed these matters adequately.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is GRANTED only to the extent of dismissing the claim for breach of the implied covenant of good faith and fair dealing (pleaded in the alternative) and is otherwise DENIED; and it is further

ORDERED that plaintiff's request for declaratory relief is DENIED; and it is further

ORDERED that within twenty-one (21) days of the date of this Decision and Order, the parties shall enter into an escrow agreement for deposit of the January, 2016 Payment in an interest bearing account and within three (3) business days thereafter BACP shall deposit said payment together with any accrued interest to be held pending further order of this court; and it is further

ORDERED that defendant shall answer the complaint within twenty (20) days of service of this Decision and Order with notice of entry and counsel for the parties shall appear at a preliminary conference on October 20, 2017 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: September 5, 2017

E N T E R,

O. PETER SHERWOOD J.S.C.