CONTRACTS

Breach of Contract — Contracts — Fraud — Equitable Relief — Specific Performance

Banks should be required to fund buyout, plaintiffs claimed

Settlement $20,100,000,000

Case BT Triple Crown Merger Co., Inc., B Triple Crown Finco, LLC, and T Triple Crown Finco, LLC v. Citigroup Global Markets Inc., Citibank, N.A., Citicorp North America, Inc., Morgan Stanley Senior Funding Inc., Credit Suisse, Cayman Islands Branch, Credit Suisse Securities (USA) LLC, The Royal Bank of Scotland PLC, RBS Securities Corporation, Wachovia Bank, National Association, Wachovia Investment Holdings, LLC, and Wachovia Capital Markets, LLC -- Citigroup et. al. v. Clear Channel Communications Inc., and CC Media, et. al., No. 600899/08

Court New York Supreme

Judge Helen E. Freedman

Date 5/13/2008

Plaintiff Attorney(s)

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Facts & Allegations

On May 17, 2007 plaintiff hedge funds Thomas H. Lee Partners, LP and Bain Capital Partners, LLC agreed to a leveraged buyout of Clear Channel Communications, Inc., a media company that controlled 900 radio stations. The hedge funds organized several corporate vehicles to realize the buyout: BT Triple Crown Merger Co., Inc., B Triple Crown Finco, LLC and T Triple Crown Finco, LLC.

Under the $26 billion agreement and plan of merger, the hedge funds would acquire most of Clear Channel's stock shares for $19.5 billion, or $39.20 per share, assume some $7.8 billion of its debt and provide operational capital. In turn, Clear Channel would merge with CC Media Holdings, Inc., a holding company that the plaintiffs controlled.

The merger was to occur on June 12, 2008. To fund the transaction, the hedge funds had secured $22 billion in loan pledges from a group of investment banks and financial institutions:
Citigroup Global Markets Inc., Citibank,, N.A., Citicorp USA, Inc., Citicorp North America, Inc., Morgan Stanley Senior Funding, Inc., Credit Suisse, Cayman Islands Branch, Credit Suisse Securities, (USA) LLC, the Royal Bank of Scotland PLC, RBS Securities Corporation, Wachovia Bank, National Association, Wachovia, Investment Holdings, LLC and Wachovia, Capital Markets, LLC, Deutsche Bank AG New York Branch, Deutsche Bank AG, Cayman Islands Branch, and Deutsche Bank Securities Inc.

In the initial loan agreement, or "letter of commitment," signed in November of 2006 and restated in May 2007, the banks agreed to make the loans. The parties stipulated that New York law would apply to any disputes arising from the transaction and that the banks' potential liability in such a dispute would be limited to $600 million. Absent from the initial agreement was a standard clause allowing the lenders to exit the agreement in the event of deteriorating market conditions that made it difficult to syndicate a debt, i.e., distribute the debt and its risks to other bank creditors or investors.

The parties continued to negotiate the final terms of the agreement until December 2007 when the credit markets collapsed due to historic market losses from risky subprime mortgages. The negotiations stalled. The hedge funds sued the financial institutions for breach of contract, fraud, violation of Massachusetts statutes against unfair and deceptive trade practices, and civil conspiracy under Massachusetts common law. The hedge funds claimed that the defendants reneged on their promise to lend them the funds for the acquisition, in breach of their obligations under the commitment letter.

More specifically, the plaintiffs claimed that although the banks had aggressively pursued the prospect of financing the buyout and generating more than $360 million in fees, the banks developed a case of "lenders remorse" during the collapse of the credit markets. Lending in these new market conditions would expose the banks to $2.65 billion in potential losses, far exceeding any fees they hoped to earn from the deal, the plaintiffs alleged. Instead, the banks "plotted" to shift the losses to the hedge funds or to escape making the loans altogether. To that end, the banks threatened to back out of another unrelated loan to the hedge funds, requested unreasonable changes to the terms of the financing, thereby stalling and derailing the transaction--an anticipatory breach of the commitment letter, and failed to negotiate the terms of the final agreement in good faith.

In addition to money damages, the plaintiffs sought to compel "specific performance" of the letter of commitment, i.e., forcing the banks to complete the loan transaction under the original terms.

On the same day that the hedge funds filed suit against the defendants in New York, Clear Channel Communications and CC Media filed suit against the defendants in Texas state court for tortuous interference with the merger agreement. The Texas plaintiffs claimed that the banks refused to complete the loan transaction to avoid their contractual obligations to provide the loans. Without the loans, the merger could not proceed and the hedge funds' efforts to outbid other investment groups, such as Blackstone, for Clear Channel and win approval from federal regulators would have been wasted.

The banks counter-sued, drawing Clear Channel and CC Media into the action. The banks claimed that the commitment letter, while indeed a valid contract under New York Law, was an interim agreement whose final terms were still being negotiated. They argued that they were negotiating in good faith, albeit aggressively, and that they intended to honor their commitment to complete the loan transaction. They also argued that they could not be in breach of contract since the date of the merger, June 12, 2008, had not yet arrived; and so they could not be in breach for failing to deliver on a promise prior to the delivery date. The banks also argued that Massachusetts law did not apply because the parties had agreed to rely on New York law to resolve any disputes arising from the loan transaction. (The plaintiffs countered that the law of the jurisdiction where the injured party resided should apply, Massachusetts in this case.) Finally, the banks argued that "specific performance" was not a remedy recognized under New York law for anything other than real property. Money damages might be an available remedy if the banks failed to make the loans but the banks could not be forced to make the loans, the banks argued.

During oral arguments, defense counsel Guy M. Struve argued that if the court found that "specific performance" was an available remedy in a loan transaction, it would be the first court in New York history to do so.

Plaintiffs counsel Mark C. Hanson made a Power-Point presentation that had the judge standing for a better view of the screen. Nevertheless, he produced no New York legal citation supporting his clients' position that "specific performance" was an available remedy. Instead, he cited a New Jersey state court case finding that "specific performance" was an available remedy when a "unique asset" was at stake. Clear Channel, Hanson argued, was unique because of the combination of media and advertising outlets it controlled, including 900 radio stations. There was nothing else like it. He also cited passages from e-mails sent by bank executives that he claimed showed the banks' intent to scuttle the agreement.

The defendants moved for summary judgment seeking a declaratory judgment they had not breached the contract; that specific performance was not an available remedy; and that potential liability be capped at $600 million.

On April 25, 2008, the court dismissed the defendants' counter-claims against Clear Channel and CC Media because they were not signors of the commitment letter and because the matter was already before a Texas court.

The court granted in part and denied in part the defendants' request for summary judgment. The court opined that Massachusetts and New York fraud law were similar to each other and that under either set, the banks' alleged behavior did not arise to fraud. She found, however, that Massachusetts, unlike New York, did recognize a conspiracy to commit fraud claim but that there had to exist an underlying tort claim for the

conspiracy claim to be viable. Having dismissed the fraud claim, the court also dismissed the conspiracy claim.

Lastly, the court found a triable issue of fact as to whether the defendants presented the plaintiffs with an ultimatum to accept the new terms or lose the funding opportunity, an anticipatory breach of the agreement. The court also found a triable issue of fact as to whether Clear Channel Communication was a "unique" asset with no established market value and no alternative funding source, requiring "specific performance" as a form of equitable relief.

The matter was scheduled for a bench trial to take place on May 5, 2008.

Injuries/Damages

The plaintiffs sought to compel "specific performance" of the commitment letter that they had signed with the financial institutions, requiring them to fulfill the terms of the loan agreement and fund the buyout of Clear Channel. The plaintiffs also sought $22 billion in money damages.

Result

The parties entered into a global settlement that resolved the matters in both the New York and Texas courts.

As part of the agreement, the banks agreed to fund the buyout for $20.1 billion. The agreement provided $17.9 billion for the purchase of Clear Channel stock at $36 per share, 8 percent lower than the $39.20 per share the hedge funds initially agreed to pay, and 4 percent lower than the $37.60 per share offer that Clear Channel shareholders had earlier rejected.

The banks also agreed to fund the assumption of Clear Channel's debts and provide operating capital.

Plaintiff(s)

T Triple Crown Finco, LLC

B Triple Crown Finco, LLC

BT Triple Crown Merger Co.

Plaintiff Expert(s)

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Daniel Fischel, J.D., finance, Chicago, IL

Defense Expert(s)

None reported

Post-Trial

Clear Channel's board of directors approved the revised terms of the merger. Under the revised merger agreement, if consummated, Clear Channel shareholders would have the right to elect to receive for either a cash consideration in the amount of $36.00 or one share of Class A common stock of the CC Media, up to a maximum of 30% of the CC Media's outstanding shares, about approximately 30 million shares. In anticipation of the merger, $17.9 billion was released into an escrow fund at the Bank of

Editor's Note

This report includes information that was gleaned from court documents; a Clear Channel SEC filing; articles from the Wall Street Journal and New York Times; interviews with plaintiffs and defense counsel that confirmed technical aspects of the case; and oral arguments at the summary judgment hearing.

Written By

Eddie Vega