SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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RAKUTEN BANK, LTD. (f/k/a EBANK CORPORATION),

Plaintiff,

- against -

ROYAL BANK OF CANADA, RBC CAPITAL MARKETS CORPORATION, and ROYAL BANK OF CANADA EUROPE LIMITED,

Defendants.

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Decision and Order

Index No. 652057/2013
Motion Seq. No. 001

SALIANN SCARPULLA, J.:

Plaintiff Rakuten Bank, Ltd. ("Rakuten") commenced this action seeking, *inter alia*, to rescind a contract for the purchase of one billion Japanese worth of notes issued by a collateralized debt obligation known as Logan CDO III. Rakuten alleges that defendants Royal Bank of Canada, RBC Capital Markets Corporation, and Royal Bank of Canada Europe Limited (collectively "RBC") fraudulently induced Rakuten to purchase the Logan III notes through misrepresentations concerning the credit quality of the notes and the notes' underlying collateral. The defendants move to dismiss the complaint based on a forum selection provision, *forum non conveniens*, failure to state a claim, and/or statute of limitations pursuant to CPLR §§ 3211(a)(1), (2), (5), (7), 3013, and 3016(b).[1]

[1] The defendants assert that RBC Capital Markets, LLC was incorrectly sued as RBC Capital Markets Corporation, and that RBC Europe Limited was incorrectly sued as Royal Bank of Canada Europe Limited.

Background[2]

1. The Parties

Rakuten is a Japanese bank, established in 2000, that offers internet-based banking services. Its principal place of business is in Tokyo, Japan. Rakuten does not maintain any offices outside of Japan, except for a representative office in Hong Kong. In March 2007, Rakuten had a total capitalization of Y 32.3 billion Japanese yen (approximately $329 million dollars) and 175 employees.

Royal Bank of Canada is a chartered bank incorporated in Canada. RBC Capital Markets Corporation ("RBC Capital Markets Corp.") is a Minnesota corporation that maintains an office in New York, New York. Royal Bank of Canada Europe Limited ("RBC Europe") is registered to do business in England and Wales. Both RBC Capital Markets Corp. and RBC Europe are wholly-owned subsidiaries of Royal Bank of Canada.

2. Logan III

Rakuten alleges that, in the first half of 2007, the defendants became aware that their investments backed by subprime mortgages were declining in value. To insure these subprime investments and transfer the risk of loss to other investors, the defendants allegedly established Logan III, a nominally independent investment vehicle, and entered into "a series of credit default swaps by which Logan III sold protection to RBC on reference obligations" that were predominantly made up of residential mortgage-backed

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[2] For purposes of this motion, the facts alleged in the complaint are assumed to be true.

securities ("RMBS") and collateralized debt obligations ("CDOs"). According to Rakuten, the defendants essentially operated Logan III "to disguise the sale of RBC's damaged and toxic investments at inflated prices" at a time when the actual sale of these investments would have significantly damaged RBC's overall financial status.

Rakuten further alleges that, in order to market and sell the Logan III notes, the defendants engaged in a series of knowing misrepresentations that they communicated to Rakuten through a pitchbook, email correspondence, and other marketing communications. Specifically, the defendants allegedly misrepresented to Rakuten that: (a) the notes had a AAA credit rating; (b) the Logan III portfolio consisted of "High Grade CDOs and RMBS" and that Standard and Poor's had given a AAA rating to 51% of the assets; © the notes were protected by a $66 million dollar tranche of other notes; (d) RBC would retain 30% of the most subordinated tranche; (e) Logan III would perform similarly to two other CDOs, Logan I and II, which were performing within expectations for high grade deals and maintained over 99% of par value as of March 31, 2007; (f) the portfolio was marked to market on a regular basis; and (g) the defendants applied strict criteria to selecting the underlying collateral and diligently monitored these investments.

According to Rakuten, the defendants marketed Logan III as a way to invest alongside them "in a portfolio of high grade structured products" and they emphasized their managers' experience in selecting high quality RMBS and CDO assets. The defendants allegedly targeted Rakuten because it is a small Japanese bank that did not

have access to the information available to the defendants – who were significantly involved in mortgage origination, servicing, and securitization – and therefore knew that their subprime mortgage assets were losing significant value in early 2007.

On June 11, 2007, Rakuten ultimately agreed to invest one billion Japanese yen in Class A-2B Notes issued by Logan III. Rakuten claims that, by the time that Logan III closed, the notes were already likely underwater; the notes subordinate to Rakuten's were already at a loss; RBC's subordinated tranche had already declined in value; Logan I and II had an embedded loss of tens of millions of dollars; and the portfolio was not routinely measured or monitored. By December 2008, the notes ultimately became worthless and Rakuten allegedly sold them for a "nominal sum equal to one U.S. cent."

3. The Transaction Documents

A. Constituting Instrument

The issuer Logan CDO III Limited entered into a Constituting Instrument with Royal Bank of Canada Europe Limited, Royal Bank of Canada, London branch, and four other named entities "for the purposes of (a) constituting and/or securing the Notes and (b) setting out the terms of the agreements made between the Issuer and each of the other parties hereto in relation to the Notes."

Section 13 of the Constituting Instrument is entitled "GOVERNING LAW AND JURISDICTION." Paragraph 13.1 states that the Constituting Instrument "shall be

governed by and construed in accordance with English law." Section 13 also contains a forum selection clause that provides the English courts with non-exclusive jurisdiction.[3]

B. Conditions of the Notes

Schedule 2 of the Constituting Instrument contains the conditions of the notes ("the Notes Conditions"). The Notes Conditions state that the note holders "are entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Constituting Instrument and all documents incorporated by reference therein."

Section 21 of the Notes Conditions is entitled "GOVERNING LAW AND JURISDICTION." Paragraph 21.1 states that the Notes and the Constituting Instrument "are governed by, and shall be construed in accordance with, English law." Paragraph 21.2 contains a forum selection clause entitled "Jurisdiction." This clause states that "[t]he courts of England are to have jurisdiction to settle any disputes which may arise out of or

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[3] The forum selection clause of the Constituting Instrument states:

> 13.2 The Issuer irrevocably agrees for the benefit of the Trustee and each other party hereto that the courts of England shall have jurisdiction to hear and determine any suit, action or proceedings, and to settle any disputes, which arises out of or in connection with this Constituting Instrument (respectively, the "Proceedings" and "Disputes") and, for such purposes, irrevocably submits to the jurisdiction of such courts.
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> 13.3 Each of the parties hereto irrevocably waives any objection which it might now or hereafter have to the courts of England being nominated as the forum to hear and determine any Proceedings and to settle any Disputes, and agrees not to claim that any such court is not a convenient or appropriate forum.
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> 13.4 The submission to the jurisdiction of the courts of England shall not (and shall not be construed so as to) limit the right of the parties or any of them to take Proceedings in any other court of competent jurisdiction, nor shall the taking of Proceedings in any one or more jurisdictions preclude the taking of Proceedings in any other jurisdiction (whether concurrently or not) if and to the extent permitted by law.

in connection with the Notes and accordingly any legal action or proceedings arising out of or in conjunction with the Notes may be brought in such courts ("Proceedings"). The Issuer has in the Constituting Instrument irrevocably submitted to the jurisdiction of such courts."

4. Rakuten's Complaint and Defendants' Motion to Dismiss

Rakuten asserts three causes of action under Japanese law for: (1) rescission based on fraud; (2) rescission/invalidation based on mistake; and (3) unjust enrichment. In the alternative, Rakuten asserts a fourth cause of action for rescission based on fraud, and a fifth cause of action for unjust enrichment under New York law. As remedies, Rakuten seeks rescission of the contract and a payment of one billion Japanese yen converted in U.S. dollars, plus interest, costs, prejudgment interest, and attorney's fees.

Defendants move to dismiss the complaint on the following grounds: (1) the forum selection clause set forth in the Conditions of the Notes requires this action to be commenced in England; (2) New York is an inconvenient forum; and (3) the complaint fails to state a claim and/or is barred by documentary evidence. The defendants further argue that the unjust enrichment claim is barred by the statute of limitations.

Discussion

1. Forum Selection

The defendants assert that the complaint must be dismissed because the forum selection clause set forth in the Notes Conditions provides the courts of England with exclusive jurisdiction. The defendants argue that the language of the clause – which states that the courts of England "are to have" jurisdiction – means that no other courts are permitted to have jurisdiction. They further assert that the combination of an English choice of law clause and an English forum selection clause requires proceedings to be brought in England. In addition, the defendants argue that Article 23 of European Union Regulation No. 44/2011 of 22 December 2000 ("the Brussels Regulation") provides that any jurisdiction agreement is exclusive unless the parties agree otherwise.

Rakuten asserts that the forum selection clause is permissive. Rakuten emphasizes that the forum selection clause states that any legal action "may" be brought in English courts, but does not require proceedings to be brought in such courts. According to Rakuten, the Constituting Instrument and the Notes Conditions should be viewed as a single, integrated contract, and Rakuten is also entitled to benefit from the permissive forum selection clause in the Constituting Instrument. Rakuten contends that the Brussels Regulation does not apply, and even if it applies, the parties have otherwise agreed to a permissive forum selection clause in the Notes Conditions.

The New York courts recognize that "parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract." *Brooke Grp. Ltd. v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). Forum selection clauses are *prima facie* valid and enforceable because "they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements." *Id.*; *Sterling Nat. Bank as Assignee of NorVergence, Inc. v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 223 (1st Dep't 2006).

The Constituting Instrument and the Notes Conditions both contain choice of law clauses stating that they shall be construed under English law. I will therefore apply English law in interpreting the forum selection clauses contained in those documents.[4]

Under English law – similar to New York law – the "ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties have meant." *Rainy Sky S.A. v. Kookmin Bank*, [2011] UKSC 50. The "relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract." *Id.* The interpretation of a contract "is a matter of construing the words used in accordance with their natural meaning and in the light of the surrounding

[4] At oral argument, counsel for both Rakuten and the defendants agreed that a hearing to determine the proper construction of the forum selection clause under English law is unnecessary.

circumstances in which the contract was made." *S. & W. Berisford Plc. and Another v. New Hampshire Insurance Co.*, [1990] 2 Q.B. 631, 638.

The parties do not dispute that Rakuten is bound by the forum selection clause contained in the Notes Conditions, and that Rakuten's claims fall within the scope of that clause. Indeed, the forum selection clause – Paragraph 21.2 of the Notes Conditions – governs any dispute that "may arise out of or in connection with the Notes." The parties disagree, however, as to whether the forum selection clause provides the English courts with exclusive jurisdiction.

In interpreting whether a jurisdiction agreement is exclusive, "the question is whether on its true construction the clause obliges the parties to resort to the relevant jurisdiction irrespective of whether the word exclusive is used." *S. & W. Berisford Plc. and Another v. New Hampshire Insurance Co.*, [1990] 2 Q.B. 631 (quoting *Dicey & Morris, The Conflict of Laws*, 11th ed. (1987) at 404.

The forum selection clause states that the "courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with the Notes and accordingly any legal action or proceedings arising out of or in conjunction with the Notes may be brought in such courts." The defendants assert that the phrase, the "courts of England are to have jurisdiction" indicates exclusive or mandatory jurisdiction, while Rakuten claims that the phrase stating that any action or proceeding "may be brought" in English courts indicates permissive jurisdiction.

In construing the language of the clause, I find that while the language reflects the parties' agreement that the English courts may have jurisdiction, it does not require proceedings to be brought in England. The exact language contained in the clause has been construed by the English Courts to establish non-exclusive jurisdiction. *Bank of New York Mellon v. GV Films*, 2009 EWHC 2338 (Comm); *Credit Suisse First Boston (Europe) Ltd. v. MLC (Bermuda) Ltd.*, [1999] C.L.C. 579 (1998) (construing forum selection provision as non-exclusive which states the "courts of England are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement and accordingly any legal action or proceedings arising out of or in connection with this Agreement"). The word "may" reflects the possibility that the note holder "may at its option bring proceedings . . .outside of Europe." *Credit Suisse*, C.L.C. 579.

Moreover, the forum selection clause states that "the Issuer has in the Constituting Instrument irrevocably submitted to the jurisdiction of such courts." If the forum selection clause were exclusive, it would be unnecessary to state that the Issuer irrevocably submits to the jurisdiction of English courts because all parties would be required to exclusively submit to the jurisdiction of those courts.

The defendants argue that the forum selection clause must be exclusive because it combines an English choice of law clause and an English forum selection clause. The cases presented by the defendants, however, concern forum selection clauses with markedly different contractual language that do not bear directly on the construction of the

forum selection clause here. *See British Aerospace PLC v. Dee Howard Co.* [1993] 1 Lloyd's LR 368, 373. The defendants also contend that English jurisdiction is mandatory pursuant to the Brussels Regulation. The Brussels Regulation supplies a default rule that any jurisdiction agreement is exclusive in the absence of a forum selection clause otherwise. Because the forum selection clause at issue provides the English courts with permissive jurisdiction, the Brussels Regulation does not apply to give exclusive jurisdiction to the English courts.

For the reasons above, I deny the defendants' motion to dismiss the complaint based on the forum selection clause.

2. *Forum Non Conveniens*

Next, the defendants argue that the complaint should be dismissed on *forum non conveniens* grounds. They argue that the transaction at issue occurred in a foreign jurisdiction; all of the parties are foreign corporations except for RBC Capital Markets; the complaint requires the application of Japanese law; witnesses and documents related to this action are located in England; and England and Japan are adequate alternate forums.

In opposition, Rakuten asserts that the defendants fail to show that New York is an inconvenient forum. Rakuten argues that New York has a substantial interest in the notes transaction because Logan III was conceived, developed, and marketed "in substantial part by RBC personnel in New York." Rakuten further argues that the burden on New York courts to apply Japanese law is minimal, the defendants' hardship of litigating in New

York is minimal; and that England and Japan are not better forums in terms of location, available evidence, or discovery procedures. In the alternative, Rakuten argues that the Court should permit Rakuten to conduct forum-related discovery before dismissing the complaint.

CPLR § 327(a) codifies the common law doctrine of forum non conveniens and provides that when "the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." The decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to the trial court's discretion. *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129, 137 (2014).

In determining whether to dismiss an action on *forum non conveniens* grounds, the court should consider and balance the following factors: the burden on the New York courts, the potential hardship to the defendant, the unavailability of an alternative forum, whether the parties are nonresidents, and whether the transaction out of which the cause of action occurred primarily in a foreign jurisdiction. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 (1984); *Ghose v. CNA Reins. Co. Ltd.*, 43 A.D.3d 656, 660 (1st Dep't 2007).

Here, there are several relevant factors that weigh in favor of dismissal on *forum non conveniens* grounds. First, Rakuten's claims requires application of Japanese and/or

English law. The plaintiff is a foreign corporation, as are all of the defendants except for one subsidiary of RBC.

Moreover, the parties' agreed upon forum selection clauses weigh in favor of dismissal. *Brooke Group Ltd. v. JCH Syndicate*, 87 N.Y.2d 530, 535 (1996). Both the Constituting Instrument and the Conditions of the Notes provide for dispute resolution in England. While these forum selection clauses are not mandatory, by embodying the selection of English courts for adjudication of disputes concerning the transaction the parties clearly contemplated that any litigation arising between them would likely be brought in England, not New York.

The majority of the arguments put forth by the parties concern the nature and location of the transaction at issue, and whether the transaction has any connection with New York. The defendants note that this action involves "a foreign plaintiff's purchase of the notes of a foreign issuer from a foreign seller in a foreign country in a completely foreign transaction that is governed by foreign law." Rakuten asserts that the transaction has a nexus to New York because Logan III was allegedly developed and marketed, in part, by some members of the RBC Principal Finance team located in New York.

It is undisputed that the purchase of the notes occurred in Japan. Also, Rakuten acknowledges that it received the defendants' alleged misrepresentations in Japan, made its decision to purchase the notes in Japan, and suffered its losses in Japan.

In opposition, Rakuten relies primarily on it claim that four RBC Capital Markets Corp employees located in New York were allegedly involved in developing and marketing Logan III. However, Rakuten does not allege that it had any contact with these employees, or that its purchase of the notes had any direct connection with New York. Even assuming the facts alleged in the complaint to be true, Rakuten's allegations "failed to create a substantial nexus with New York, given that the events of the underlying transaction otherwise occurred entirely in a foreign jurisdiction." *Viking Global Equities, LP v. Porsche Automobil Holding SE*, 101 A.D.3d 640, 641 (1st Dep't 2012).

In balancing the above factors, I find that the defendants have met their burden of demonstrating that New York is an inconvenient forum for this action. Accordingly, I grant the defendants' motion to dismiss the complaint based on *forum non conveniens*.

In accordance with the foregoing, it is hereby

ORDERED that defendants Royal Bank of Canada, RBC Capital Markets Corporation, and Royal Bank of Canada Europe Limited's motion to dismiss the complaint with prejudice pursuant to forum selection clause is denied; and it is further

ORDERED that defendants Royal Bank of Canada, RBC Capital Markets Corporation, and Royal Bank of Canada Europe Limited's motion to dismiss the complaint with prejudice based on *forum non conveniens* is granted, and this action is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendants dismissing this action.

This constitutes the decision and order of this Court.

Date: New York, New York
January 21, 2015

ENTER:

Saliann Scarpulla, J.S.C.

HON. SALIANN SCARPULLA