

NEWS & DEVELOPMENTS

No Fiduciary Duty Owed in Structured Investment Vehicle Case

The New York Court of Appeals has held that a plaintiff who purchased notes from Barclays Bank PLC issued by special investment vehicles and favorably rated by Standard & Poor's (S&P) could not recover its loss under those notes from either Barclays or S&P. [*Oddo Asset Mgmt. v. Barclays Bank PLC*](#) [PDF], 2012 WL 2399815 (N.Y., June 27, 2012). New York's highest court agreed with two lower courts that the plaintiff's complaint failed to state a claim that Barclays or S&P aided and abetted a breach of fiduciary duty owed to the plaintiff or that Barclays tortiously interfered with the plaintiff's contract.

In 2005 and 2006, Barclays sold mezzanine notes totaling \$50 million to the plaintiff, a French investment company, that were favorably rated by S&P. Those notes were issued by Golden Key Ltd. and Mainsail II. Both of those entities were SIV Lites, a structured investment vehicle that borrows money to purchase and invest in asset-backed securities. The business models of both Golden Key and Mainsail depended on their ability to generate higher returns on the asset-backed securities in which they invested (primarily residential and commercial mortgage-backed securities) than the interest paid on their borrowings. Those borrowings included capital notes issued to investors, which reflected an equity interest in the issuer by the note holder, and mezzanine notes, which reflected a debt owed by the issuer to the note holder. Barclays had arranged for the incorporation of both Golden Key and Mainsail as Cayman Island limited-liability entities, prepared the materials that solicited investments in them, and warehoused asset-backed securities for their purchase. It also selected the collateral managers for both entities who oversaw the purchase and management of investments. As a result of the financial crisis, Golden Key and Mainsail were placed into receivership in 2008, and the plaintiff suffered a \$43 million loss on the mezzanine notes it held.

The plaintiff brought suit in New York against both Barclays and S&P to recoup its loss, alleging that they aided and abetted a breach of fiduciary duty owed to it by the collateral managers. The plaintiff also alleged that Barclays tortiously interfered with the plaintiff's contracts with Golden Key and Mainsail. Those claims rose from Golden Key and Mainsail's alleged purchase at par of more than \$1 billion in "toxic" mortgage-backed securities from Barclays (the price Barclays paid for them) that Golden Key and Mainsail shortly thereafter wrote down to their fair value, which was substantially less. The New York Court of Appeals observed that, "[i]n hindsight, it is apparent that a greater degree of vigilance was necessary from all concerned before soliciting funds for, committing funds to, and rating esoteric entities with little understood risks" Nevertheless, the court agreed with the courts below that the plaintiff failed to state a claim against either Barclays or S&P.

The claim that Barclays and S&P aided and abetted a breach of fiduciary duty by the collateral managers failed as a matter of law because those managers did not owe any fiduciary duty to the plaintiff. The mezzanine notes held by the plaintiff were a form of debt, and the existence of a debtor-creditor relationship by itself under applicable New York law was insufficient to give rise to a fiduciary relationship or duties. The absence of any fiduciary relationship was further demonstrated by the lack of any direct communications between the plaintiff and the collateral managers. The court did note, however, that the receivers of Golden Key and Mainsail would be entitled to pursue any claims that existed for a breach of fiduciary duties owed to those entities by Barclays, S&P, and the collateral managers.

The court also agreed with the lower courts that the plaintiff failed to state a claim that Barclays tortiously interfered with the plaintiff's contracts with Golden Key and Mainsail. Neither of those entities breached any agreement when it purchased mortgage securities from Barclays. Rather, those acquisitions were done in a manner consistent with the terms of the applicable agreements, including the requirement therein that assets must be acquired from Barclays at par, and none of the acquisitions were in breach of the express terms of the plaintiff's agreements with Golden Key or Mainsail.

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