UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UMB BANK, NATIONAL ASSOCIATION, solely in its capacities as Senior Trustee and Security Trustee

Plaintiff,

vs.

AIRPLANES LIMITED and AIRPLANES U.S. TRUST

Defendants.

Case No.: 16-cv-7717 (PAE)

OPPOSITION OF UMB BANK, NATIONAL ASSOCIATION, TO DEFENDANTS' RULE 12(C) MOTION FOR JUDGMENT ON THE PLEADINGS

After UMB Bank filed its Amended Complaint ("**Am Compl.**") [Doc. No. 10], Defendants filed their Answer and Counterclaim ("**Defs. Ans.**") [Doc. No. 19], UMB Bank filed its Answer to Defendants' Counterclaim ("**UMB Ans.**") [Doc. No. 27], and UMB Bank filed a motion for partial judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) ("**UMB 12(c) Br.**") [Doc. No. 30].[1] Defendants opposed that motion and cross moved for judgment on the pleadings, asserting, *inter alia*, that no Events of Default have occurred under the Indenture ("**Defs. Br.**") [Doc. No. 47]. The overlapping portions of the parties' motions address the propriety of Airplanes Limited's "Reserve" for its subsidiary's potential tort liability, and whether such Reserve has caused an Event of Default (the Payment Default) for failing to make required payments on the Notes. Those issues have been fully briefed and, pursuant to this Court's order [Doc No. 42], were heard on February 6, 2017, the same date this brief is being filed. The relevant facts are set forth in UMB Bank's 12(c) brief, which UMB Bank incorporates herein.

UMB Bank files this opposition solely to address the non-overlapping portions of Defendants' cross-motion. Specifically, Defendants seek judgment on the pleadings on UMB Bank's claims that: (i) the entry of the Transbrasil Judgment against Airplanes Holdings resulted in an Event of Default under the Indenture (the "**Judgment Default**"); and (ii) Airplanes Limited and/or its subsidiary, Airplanes Holdings, has engaged in unauthorized business activities in violation of Section 5.02(e) of the Indenture, causing an Event of Default (the "**Unauthorized Business Activity Default**"). *See* Defs. Br. § 2, pp. 23-25.

I. THE TRANSBRASIL JUDGMENT CAUSED AN EVENT OF DEFAULT THAT AIRPLANES LIMITED HAS FAILED TO CURE

The Amended Complaint plausibly alleges that the Transbrasil Judgment issued by the Brazilian court in 2010 and the Orders to Pay that followed gave rise to an Event of Default under section 4.01(h) of the Indenture. *See* Am. Compl. ¶¶ 34-38, 83-85.[2] That section provides that an

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[1] Capitalized terms used but not defined herein have the meanings ascribed to them in the UMB 12(c) Br. and, unless otherwise stated, exhibits cited herein are attached to the December 22, 2016 Declaration of Benjamin I. Finestone in support thereof [Doc. No. 31].

[2] The standard for granting a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is "identical to that of a Rule 12(b)(6) motion for failure to state a claim." *MyPlayCity, Inc. v. Conduit Ltd.*, No. 10-cv-1615, 2011

Event of Default occurs where "any judgment or order for the payment of money in excess of $100,000,000 shall be rendered against the Issuer . . . or any Issuer Subsidiary and . . . there shall be *any* period of 10 consecutive days during which a stay of enforcement of such judgment or order, by reason of a pending appeal or otherwise, shall not be in effect." Indenture § 4.01(h).

Here, the amount due under the Transbrasil Judgment was calculated as between $165 million and $198.5 million by Transbrasil's bankruptcy trustee and its former owner, respectively. Am. Compl. ¶ 37. Defendants denied possessing knowledge or information sufficient to form a belief as to that allegation in the Amended Complaint. *See* Ans. ¶ 37. The Transbrasil Judgment also resulted in two "Orders to Pay" being issued by a lower court in Sao Paolo in June 2012. Am. Compl. ¶ 38; Ans. ¶ 157. The total amount due under the Orders to Pay was a sum of approximately $139 million. *Id.*

Between February 2010 when the Transbrasil Judgment was entered, and June 8, 2010 when GECAS appealed the Transbrasil Judgment, there were at least 10 consecutive days during which a stay of enforcement of the judgment was not in effect. Am. Compl. ¶ 84. Likewise, despite a pending appeal, a lower court in Sao Paulo issued the Orders to Pay in or about June 2012. Ans. ¶ 157. Those orders were not cancelled until October 2013. *Id.* ¶ 158. Defendants do not argue to the contrary. Thus, the requirement that the judgment be in force without a stay of enforcement for 10 consecutive days is satisfied for both the Transbrasil Judgment and the Orders to Pay.

Defendants do not dispute that the Amended Complaint plausibly alleges that the Transbrasil Judgment and the Orders to Pay met the $100 million threshold in section 4.01(h) of the Indenture. Nor could they, given that they reserved $190 million based upon the judgment and the orders. Instead, Defendants' only argument is that any Judgment Default has been remedied

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WL 3273487, at *2 (S.D.N.Y. July 29, 2011) (citing *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir. 2011)). "In both postures, the district court must accept all [of the non-moving parties'] allegations . . . as true and draw all inferences in the non-moving party's favor." *Patel*, 259 F.3d at 126.

by the October 2013 Reversal and subsequent cancellation of the Orders to Pay. *See* Defs. Br. 23-24. Defendants are incorrect.

The Amended Complaint plausibly alleges that Airplanes Limited has not remedied the Judgment Default. Am. Compl. ¶ 85. Defendants rely on section 4.01 of the Indenture, which governs Events of Default, and which provides that each "Event of Default shall be deemed to exist and continue so long as, but only so long as, it shall not have been remedied." Ex. A (Indenture) § 4.01. Here, UMB Bank certainly agrees with Defendants that the October 2013 Reversal left no present liability against Airplanes Holdings. Nonetheless, Airplanes Limited *increased* its Reserve for the non-existent liability (Am. Compl. ¶ 51), improperly withholding funds from the Noteholders. Section 4.01(h) of the Indenture allows UMB Bank, as Indenture Trustee, to declare an Event of Default and enforce remedies to collect its debt before a judgment creditor can enforce that judgment to the detriment of the Noteholders. But by holding far more than $100 million to pay a potential judgment creditor ahead of the Noteholders, Airplanes Limited is improperly imposing the consequences of a more than $100 million judgment against the Noteholders, while simultaneously trying to take away the protection in the Indenture designed for just such a scenario. Defendants fail to even address how that could possibly mean that the Judgment Default has been "remedied." Indeed, Defendants do not address the meaning of that term in the Indenture at all.

II. THE UNAUTHORIZED BUSINESS ACTIVITIES OF AIRPLANES LIMITED AND AIRPLANED HOLDINGS HAS CAUSED AN EVENT OF DEFAULT

GECAS's conduct (as agent of Airplanes Holdings), in connection with Transbrasil, violated the Indenture's requirements that Airplanes Limited and its subsidiaries engage only in permitted business activities. *See* Am. Compl. ¶¶ 36, 86. The Transbrasil Judgment found that GECAS acted "malicious[ly]" and litigated in "bad faith," and that GECAS's conduct violated Brazilian law. *See* UMB 12(c) Br. 7-9 (citing Ex. F (Transbrasil Judgment) 89-90, 98).

As set forth in UMB's 12(c) brief and reply ("**UMB Reply**") [Doc. No. 52], which UMB Bank incorporates herein, GECAS's actions are not permitted business activities under section

5.02(e) of the Indenture. *Id.* at 18-19; *see also* UMB Reply 7-9. Even if Airplanes Limited ultimately establishes that GECAS did not act maliciously or in bad faith, there would still be an Event of Default if GECAS violated Brazilian law. That is because, as explained in UMB's 12(c) brief (pp. 18-19), the Indenture requires that in operating its business, Airplanes Limited and its subsidiaries must comply in all material respects with all Applicable Laws. *See* Ex. A (Indenture) § 5.03(b). Applicable Law is defined in § 1.01 of the Indenture and includes Brazilian law. *Id.* § 1.01, p. 4.

Defendants argue that *everything* related to the Transbrasil Litigation must be a permitted business activity because it relates to efforts to collect on a promissory note. Defs. Br. 24. That position is absurd. Under Defendants' theory, stealing money from a lessee that owed money on a note would be a "permitted business activity" simply because it related in some way to collection of a debt. *See* UMB 12(c) Br. 18-19.

Defendants also seek judgment on the pleadings that the Reserve does not violate section 5.02(e)(ii) of the Indenture. *See* Defs. Br. 24-25. Section 5.02(e)(ii) prohibits Airplanes Limited from "'guaranteeing or otherwise supporting the obligations and liabilities of any [Airplanes Limited subsidiary]' where doing so 'would materially adversely affect the Noteholders.'" *Id.* at 24 (quoting Ex. A (Indenture) § 5.02(e)(ii)). Defendants assert that this Event of Default was not alleged in the Amended Complaint (Defs. Br. 24-25), but rather was only asserted in the Default Notices. That is incorrect. The Amended Complaint alleges that in addition to GECAS's conduct, the improper Reserve was not a permitted business activity, and thus *also* (and separately) caused an Event of Default under Section 5.02(e) of the Indenture. *See* Am. Compl. ¶ 86.

In any event, Defendants are not entitled to the declaration they seek that this Event of Default has not occurred. The Reserve is undoubtedly "support" for liabilities of Airplanes Limited's subsidiary, Airplanes Holdings. Moreover, the Reserve is causing a materially adverse effect on the Noteholders because it is diverting (or at the very least delaying) funds that should be paid to the Noteholders. Defendants do not argue otherwise. Instead, they merely repeat their argument that the Reserve is on account of an "Expense" under the Indenture, and that Airplanes

Limited is required to pay its subsidiaries' expenses under the Intercompany Loan Agreement ("**ILA**"). Defs. Br. 24-25. But as set forth in UMB Bank's 12(c) Motion and Reply, the Reserve is not for an Expense, and nothing in the ILA supports Defendants' position. Accordingly, Defendants' argument should be rejected.

CONCLUSION

For the reasons set forth above, UMB Bank respectfully submits that the Court should deny Defendants' 12(c) motion.

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