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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : CIVIL TERM : PART 53

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FORTRESS CREDIT CORP. and FCOF US  
INVESTMENTS, LLC

Plaintiffs,

-against-

Index No.  
603819/09

DECHERT, LLP,

Defendant.

-----x

June 10, 2010  
60 Centre Street  
New York, NY 10007

B e f o r e:

HON. CHARLES E. RAMOS, Justice.

A p p e a r a n c e s:

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MINUTES OF PROCEEDINGS

Reported By:  
William L. Kutsch  
Senior Court Reporter

1 Proceedings

2 THE COURT: Okay. This is Defendant's motion for  
3 summary judgment.

4 Why doesn't plaintiff give us a little background  
5 of the case and then we'll get right into it.

6 MR. KASOWITZ: Sure. I'd be delighted to.

7 Marc Kasowitz for Fortress.

8 As your Honor notes, this case --

9 THE COURT: Fortress is a big lender.

10 MR. KASOWITZ: Fortress is a lender, your Honor.  
11 And in this case, the claims arise from an opinion letter  
12 that was given to Fortress in connection with a \$50 million  
13 loan that Mr. Dreier had arranged ostensibly to be made to  
14 his purported client, Solow Realty.

15 And as part, as one of the conditions of that  
16 loan, was that Fortress would receive from the law firm an  
17 opinion letter which related to the *bona fides* of that  
18 loan, of the transaction.

19 Now, this transaction took place in 2008.

20 In 2006, there had been a couple of earlier and  
21 smaller loans arranged by Mr. Dreier ostensibly for Solow  
22 Realty from Fortress. Those were smaller amounts. And  
23 there was a local firm on Long Island that had been  
24 designated by Mr. Dreier to give the opinion letters.

25 When the loan amount got bigger, and when the loan  
26 transaction --

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2 THE COURT: Those loans were also fraudulent, the  
3 smaller ones?

4 MR. KASOWITZ: Yes, they were, your Honor. They  
5 were fraudulent loans, but interest was paid on those loans  
6 from the period of 2006 when they were entered into until  
7 2008 when this larger transaction was going to be done.

8 THE COURT: Who paid the interest? Was there some  
9 sort of a dummy company that was making these payments?

10 MR. KASOWITZ: The interest supposedly was being  
11 paid by Solow. But, in fact, we understand that it was  
12 being made from fraudulent proceeds by Mr. Dreier from who  
13 knows where.

14 And so by the time it came to this transaction,  
15 and the amount was larger, twice as large, \$50 million,  
16 Fortress insisted that in order to do the transaction, it  
17 would require an opinion letter from a larger  
18 internationally known firm, and the firm that was proposed  
19 by Mr. Dreier was Dechert. And so in connection with that  
20 transaction, Dechert gave an opinion relating to the *bona*  
21 *fides* of the transaction.

22 Strikingly, your Honor, the first sentence of the  
23 opinion letter says that Dechert represents Solow Realty.  
24 And, in fact, that was a requirement of the loan documents.  
25 It wasn't just good enough that some lawyer or some firm  
26 opined about a set of documents. It was important to

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Fortress that the firm that was giving the opinion actually be retained by Solow Realty and be familiar with the company.

THE COURT: One of your claims obviously is that Sheldon Solow never retained Dechert.

MR. KASOWITZ: That's correct, your Honor, never did retain Dechert. And as it turned out, the loan was an entire sham.

Now, it was entirely in reliance on this opinion that Fortress loaned the money. And when the opinion turned out to be false in every respect, including in the respect that Dechert didn't even represent Solow, of course that's what's brought us here to your Honor.

We have alleged in the complaint, as you may have seen, as you will hear, that Dechert never took a single step to confirm even the fact that they represented Solow Realty, not a single phone call, not a single e-mail, not a single meeting, not a single exchange of correspondence.

THE COURT: They communicated only with Marc Dreier?

MR. KASOWITZ: They did. And the problem with that, your Honor, was that not only did Dechert insist -- did Fortress insist on having counsel give an opinion that was of the stature of Dechert and that that counsel represent Solow, it was also important, and Fortress relied

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on this, that the firm that gave the opinion be independent of Marc Dreier.

In the earlier two transactions in 2006, the firm had been brought by Mr. Dreier. Dreier had relationships with them. It was important that the firm be independent of Marc Dreier in this new, larger, more important transaction.

And so, of course, as our complaint alleges in detail, Dechert, when it rendered its opinion, not only was it not independent of Marc Dreier, it was totally dependent on Mr. Dreier. All of the information that it received, with respect to the *bona fides* of this transaction that should have come from Solow, came from Dreier. Nothing came from Solow. Nothing whatsoever.

Now, the argument that you are about to hear, and I don't want to anticipate --

THE COURT: Why don't we wait for that and see what they say, and we'll come back to you.

MR. KASOWITZ: Thank you, your Honor.

THE COURT: For the motion.

MR. MILLER: Your Honor, may I hand up to the court copies of the two documents that are relevant here: The opinion letter of Dechert and the term loan agreement which refers to --

THE COURT: They are in the papers; aren't they?

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MR. MILLER: If you have them. Thank you, your Honor.

Your Honor, the statements made by counsel are not supported either by the complaint in relevant part or by the documents.

First of all, the prior loans totaled \$60 million. They weren't a smaller amount. In fact, they were a larger amount. It was a \$25 million loan, \$35 million loan, and then they were extended as a \$60 million loan. Dechert was brought into the picture on the third loan in 2008. And the term loan agreement makes it very clear that Dechert is going to be the firm giving the opinion but says nothing about Dechert being independent of Dreier. Nothing at all about that. And that is the important part of this case.

And let me explain that to you. If you look at --

THE COURT: Are we necessarily constrained to only consider the terms of the written retainer? Or can there be in this case a claim of statements or representations made that are outside the corners, the four corners?

MR. MILLER: Yes. And there's only one statement or representation outside of the agreement which is alleged.

One, I would like to draw the court's attention to paragraph 26 of the complaint because that is the only place where plaintiff alleges any statement to Dechert.

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2 And I would like to read that to you, your Honor. It says,  
3 "In or about June, 2008, counsel for Fortress specifically  
4 informed Dechert through Wood --" who was a partner --  
5 "that Fortress required an opinion of counsel who, unlike  
6 Dreier, was not a principal in the transaction." Not a  
7 principal. Dreier was a principal because he was the  
8 guarantor of the loan as well as counsel for Solow. But he  
9 was a guarantor.

10 Dechert's role in the transaction was memorialized  
11 in a 2008 loan agreement which required as a condition  
12 precedent of the funding that Fortress receive an opinion  
13 of Dechert, quote, independent counsel to Solow Realty and  
14 the guarantors.

15 THE COURT: But there is the reference of  
16 independent counsel.

17 MR. MILLER: Right. "Independent counsel,"  
18 meaning not a party to the transaction.

19 THE COURT: Well, we're talking here -- I'm not  
20 saying that ultimately that won't be the finding, but we're  
21 talking here about, this is not summary judgment, this is a  
22 motion to dismiss; correct?

23 MR. MILLER: And I'm reading from the paragraph of  
24 the complaint. What I'm telling the court is the  
25 allegation in the complaint is that the language of the  
26 term loan agreement, "independent counsel" meant not a

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principal in the transaction. That is what the term meant.

THE COURT: Let me make sure we all understand the playing field here.

On a 3211 motion, the court considers the pleading itself, obviously very important, the documents, and any claims made by plaintiff's counsel that are in furtherance of the claim, that are consistent with the claim.

MR. MILLER: That are well-pled.

THE COURT: They don't have to be pled. If you look at the cases on 3211 -- my purpose on a 3211 motion is to find out is there a recognizable and perhaps potentially meritorious cause of action. It's not as technical as the old demurrer motions.

So when the plaintiff comes forward and says, "We intended this to be independent counsel," the very fact that there is a reference to independent counsel in the document is sufficient to sustain, if necessary an amended complaint, but to sustain their claim that they intended the Dechert firm to be independent of Marc Dreier.

MR. MILLER: No. They plead they intended Dechert to be independent of the transaction, which it was, i.e., not a participant.

THE COURT: I think plaintiff is saying they want it independent of Marc Dreier. Trust me. At this stage of the proceeding, not necessarily summary judgment, but at

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this stage of the proceeding, that's still going to be part of the case. It is. It is.

MR. MILLER: Your Honor, that's contrary to the documents. It's contrary to the --

THE COURT: What is there in the documents that makes it inconsistent?

MR. MILLER: The document says that Dechert has been retained as special corporate counsel to the loan parties, which means both Solow and Dreier. There is nothing that says that Dechert cannot deal with one client or the other client.

THE COURT: Well, they obviously have to deal with the clients. You can't have an attorney-client relationship without dealing with the client.

MR. MILLER: According to the allegation now, they were only allowed to deal with one client but not the other.

But let me continue, your Honor, if I may.

That statement was not part of the opinion letter. And it's not material. And that is an important point here. This was --

THE COURT: Can't I consider the retention letter as well?

MR. MILLER: This is the retention letter, your Honor. But the retention letter was an opinion letter.

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2 THE COURT: Just because it's not part of the  
3 opinion letter doesn't mean it's not relevant or  
4 admissible.

5 MR. MILLER: Well, it's not a material part. And  
6 there's nothing to show there was reliance upon that.

7 What the opinion letter does is --

8 THE COURT: This sounds more like a summary  
9 judgment motion than a 3211 motion. I think it's a bit  
10 premature here. You are making good arguments, but on  
11 3211, you're really -- it's like you're at the bottom of a  
12 well and you're shouting up at me, "Dismiss the complaint  
13 please," and I say, "What did you say?" because we don't  
14 favor 3211 motions that much. Something has got to bounce  
15 off the face of the complaint that says, "This is just a  
16 waste of time."

17 MR. MILLER: Well, it does, your Honor. It does.

18 In that paragraph, they tell you that the word  
19 "independent" means not a participant in the transaction.  
20 And Dechert was not a participant. And it was independent.  
21 And Fortress accepted --

22 THE COURT: Putting aside -- I don't think that  
23 this complaint hinges on whether or not this was  
24 independent counsel. It hinges on what Fortress says was  
25 the total falsity of the opinion letter, that there wasn't  
26 even a retention by Solow of Dechert in this case.

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MR. MILLER: Well, there was a retention letter, your Honor, that was signed by Solow, forged by Mr. Dreier, and the opinion letter says that Dechert has assumed the accuracy of signatures and has not done an investigation, and so there was --

THE COURT: Which for me raises a very troublesome point in terms of Fortress doing their own due diligence. If as I think it's your argument that it was up to them to determine the accuracy and the *bona fides* of the various signatures on the documents, then one would think that in doing their due diligence, they would have discovered that Sheldon Solow never signed the documents.

MR. MILLER: Well, they loaned \$60 million without even discussing it with the borrower. And now they come to counsel who gave them a very limited opinion on the second \$50 million loan.

THE COURT: When was this loan made? In '08 or '07?

MR. KASOWITZ: 2008, your Honor.

THE COURT: Wasn't the market collapsing by then?

MR. KASOWITZ: Well, at some point it was, your Honor.

MR. MILLER: At some point. I don't know whether it was -- this was June, 2008.

THE COURT: Maybe it was kind of early somehow, or

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2 when did Lehman go under?

3 MR. KASOWITZ: September, 2009, your Honor.

4 MR. MILLER: A year later.

5 THE COURT: Okay. We were still feeling good  
6 about ourselves.7 MR. MILLER: Your Honor, may I at least address  
8 the fraud cause of action?

9 THE COURT: Sure.

10 MR. MILLER: The fraud cause of action, even under  
11 what your Honor has said, can't stand. There is no  
12 allegation of scienter. There is no allegation that  
13 Dechert intentionally did this. It's conceded that this  
14 was a fraud by Dreier which took in everybody. There would  
15 be no reasonable reliance either here that --16 THE COURT: The whole purpose of an opinion letter  
17 is to rely on it.18 MR. MILLER: Of course. But as to the opinions,  
19 your Honor. The opinions are accurate. It's not any real  
20 dispute that the opinions in the opinion letter are  
21 accurate given the limitations that Dechert was not  
22 vouching for the accuracy of signatures.23 THE COURT: If that's the case -- and I'm not  
24 saying it isn't, but if that's the case, then what's an  
25 opinion letter worth?

26 MR. MILLER: Well, the opinion letter was accurate

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2 as to the opinions. There's no question that the opinions  
3 were accurate.

4 If you look at the Dewey Ballantine case, which is  
5 the Court of Appeals case, remember that case, Dewey  
6 Ballantine gave an opinion similar to this, a closing  
7 opinion as to the effectiveness of the documents. One of  
8 the documents had a \$90 million I think error in it. It  
9 was supposed to be a \$92 million document, and it was a  
10 \$92,000 document. And Dewey Ballantine's opinion said that  
11 it was an -- it was an effective transaction, the documents  
12 were effective.

13 The lender sued saying that Dewey Ballantine was  
14 negligent, and the court threw out the case because Dewey  
15 Ballantine had not vouched for the dollar amount of the  
16 document.

17 Opinion letters are read exactly that way.

18 THE COURT: But this is more, much more than that.  
19 The whole basis of the opinion letter was that Dechert  
20 represented Solow. Forget the fact that -- it's quite  
21 possible, for example, that Sheldon Solow would have  
22 authorized Dreier to sign his name to the retention.  
23 That's quite possible. So we don't have to focus in on the  
24 signature. But there has to have been a legitimate  
25 retention by Solow. That never happened. That undermines  
26 the entire document. I think Dechert has got a big problem

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here.

MR. MILLER: Your Honor, there is no basis for a fraud claim. There is no basis for a fiduciary duty claim. The only possible claim here --

THE COURT: Well, why do you say there is no basis? It's one thing to say that they haven't pled anything.

MR. MILLER: That's what I'm saying. They have not pled fraud. They have not pled any scienter or recklessness. The only recklessness pled is totally --

THE COURT: Let's see what they actually do plead and as stated in the affidavit.

They recite all the false statements before they get to their various causes of action.

What's the matter with paragraph 61 and 62?

MR. MILLER: There is no scienter pled.

THE COURT: "With reckless indifference and, two, and disregard for the truth, it falsely stated to Fortress that Dechert was legal counsel to and represented Solow Realty."

MR. MILLER: But scienter requires an intent to defraud. It requires some intent. There is no statement here that there was any intent by Dechert. Dechert was hauled into this thing innocently and was taken the way everybody else was. And recklessness was just the same

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2 statement that Dechert did not represent Solow. That's not  
3 reckless. That is the same statement they are alleging as  
4 negligence and a negligent misrepresentation. It's not a  
5 ground for a fraud claim. There should be no fraud claim  
6 here, your Honor.

7 THE COURT: You may prevail at trial. You might  
8 prevail at trial. But I just don't think I'm on solid  
9 ground if I were to say that an attorney can represent --  
10 that the firm represents a client when, in fact, it doesn't  
11 represent the client, and that I can just dismiss the  
12 complaint or dismiss that cause of action stating that it  
13 couldn't possibly be a fraudulent misrepresentation.

14 The firm Dechert could have had a basis upon which  
15 it made the representation that it represented Solow. And  
16 what you are telling me is that because they dealt with --  
17 the question is is it reasonable for Dechert to make that  
18 representation having never met Solow in this transaction.

19 MR. MILLER: In this circumstance it's --

20 THE COURT: By the way, did Dechert ever represent  
21 Solow before?

22 MR. MILLER: Not at all with respect to this  
23 transaction.

24 THE COURT: So they had no relationship?

25 MR. MILLER: No relationship during this period of  
26 time.

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2 But, your Honor, first of all, the representation  
3 isn't that they represented Solow. It's that they were  
4 retained by Solow Realty as the borrower and Dreier as the  
5 guarantor.

6 THE COURT: But if there had been a prior  
7 representation, if they had a relationship, that might be a  
8 factor.

9 MR. MILLER: But that wasn't what was requested.

10 THE COURT: I understand. I'm not trying to  
11 change the rules in midstream. I just want to get an  
12 understanding of the whole picture.

13 MR. MILLER: Getting back to the fraud claim, your  
14 Honor, there's no scienter alleged, and to charge this law  
15 firm with fraud based upon an opinion letter that is  
16 accurate except for one piece of it which is not part of  
17 the opinion letter, it's an introductory and I think non  
18 material statement that they were retained by the borrower.

19 THE COURT: Do you have any authority for the  
20 proposition? I would like a Court of Appeals decision or  
21 Appellate Division, First Department, that when an attorney  
22 says they represent a client, that that's not a material  
23 representation.

24 MR. MILLER: We have cited your Honor the Tribar  
25 opinion, and in one of the treatises, yes, that's the way  
26 the opinion letters are done. If you look at the papers,

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2 you will see that. They are basically negotiated between  
3 the lender's counsel --

4 THE COURT: I agree with everything you're saying  
5 and everything you're going to say except that what you're  
6 doing is, you're reducing an opinion letter to a worthless  
7 document.

8 MR. MILLER: It's not worthless at all, your  
9 Honor. The opinions were accurate. The opinions were  
10 accurate based upon the limitation obviously that Dechert  
11 was not investigating whether or not the signatures were  
12 genuine. But that's the way these are done.

13 THE COURT: Putting aside the signatures, what you  
14 are essentially telling me is that it's almost like Alice  
15 in Wonderland.

16 MR. MILLER: No, it's not, your Honor. May I be  
17 heard on that? It's not. What Fortress is looking for is  
18 an opinion that the documents create a --

19 THE COURT: The entire transaction, as I  
20 understand it, the entire transaction was a fraud.

21 MR. MILLER: Right. But Dechert wasn't the  
22 investigator to determine that. Dechert is hired to give a  
23 very limited opinion that certain documents were valid and  
24 enforceable with the limitation that Dechert had not  
25 reviewed the signatures and that type of thing. To say  
26 that Dechert represented -- may I finish?

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THE COURT: Just because -- and I'm trying to focus in on what I think is going to be the basis of my decision. Just because Dechert didn't go and verify the signatures doesn't mean that the transaction itself can be a total fraud. If the opinion letter is supposed to mean anything, there must be some validity to the transaction, that yes, this is a transaction between my client and the lender.

MR. MILLER: Dechert was not hired to give that type of an opinion. It was hired to give a legal opinion as to the validity and enforceability of specified documents. Those documents were valid and enforceable.

THE COURT: But they weren't enforceable.

MR. MILLER: Except in the limitation in the Dechert letter.

THE COURT: Forget the signature. They weren't enforceable because they were total frauds.

MR. MILLER: Yes, your Honor, but the opinion disclaimed that point and with that disclaimer, which is common in these opinions --

THE COURT: Look. I'm going to repeat myself and I'm going to cut you really short, and I apologize for doing it, but we have a big calendar today.

This motion is premature. This is really a summary judgment motion. After we have discovery, we'll

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2 know what we're talking about here. You are raising  
3 interesting issues, but I'm not going to dismiss any part  
4 of this complaint. Nice argument. Thank you.

5 (At this time the proceedings were concluded.)

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## 7 C E R T I F I C A T I O N

8 This is to certify the within is a true and  
9 accurate transcript of the proceedings as reported by me.

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14 William L. Kutsch, SCR  
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