

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 49

Index Number : 653394/2013
CERBERUS REAL ESTATE CAPITAL
vs.
IAN BRUCE EICHNER AND HARLEM
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits No(s).
Answering Affidavits -- Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING
TRANSCRIPT, DATED 8/26/14

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8-26-14

[Signature] J.S.C.
O. PETER SHERWOOD

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 49

-----X

CERBERUS REAL CAPITAL MANAGEMENT, LLC ESTATE,

Plaintiff(s),

- against -

IAN BRUCE EICHNER and HARLEM PARK ACQUISITION, LLC,

Defendant(s).

-----X
Index No. 653394/2013

August 26, 2014
60 Centre Street
New York, New York

B E F O R E: HONORABLE O. PETER SHERWOOD, JSC

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1 THE CLERK: Matter of Cerberus Capital Management
2 versus Eichner and Harlem Park Acquisition, index number
3 653394 of 2013.

4 Counsel, your appearances for the record, please.

5 GERSHMAN: Joseph Gershman from Rich, Intelisano
6 & Katz on behalf of the defendants.

7 MR. SOLOWAY: Good afternoon, your Honor. Todd
8 Soloway and Cecilia Orlando from Pryor Cashman for the
9 plaintiff.

10 THE COURT: Good afternoon, everyone. This is
11 your motion, Mr. Gershman.

12 GERSHMAN: Correct, your Honor.

13 THE COURT: I will hear from you.

14 GERSHMAN: Your Honor, as a matter of law the
15 second cause of action must be dismissed because the lender
16 expenses provision in the term sheet that the plaintiff
17 relies on does not support a claim for the reimbursement of
18 attorneys' fees and expenses incurred in litigation between
19 the partners, what is referred to first-party litigation
20 expenses.

21 THE COURT: Is it clear to you that what the
22 amendment is addressed to are the litigation-related
23 attorneys' fees only or as well as fees related to the
24 transaction?

25 GERSHMAN: It seemed to me when I looked at it,

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1 your Honor, it was the attorneys' fees and expenses
2 incurred in litigation.

3 THE COURT: In the litigation. Okay.

4 I gather, Mr. Soloway, that's your view too?

5 MR. SOLOWAY: Yes, your Honor. And the other
6 expenses to the extent that they have not -- that they have
7 not been covered, there will be more expenses from the
8 transaction itself as well. So we have a million dollars
9 in the break-up fee that they owe, and there also may be
10 fees from the transaction as well that they owe. We
11 haven't seen whether or not they are covered.

12 THE COURT: But this motion doesn't go to that.

13 MR. SOLOWAY: That's correct.

14 THE COURT: That's all I wanted to know.

15 GERSHMAN: Your Honor, this motion is governed by
16 the American Rule and the Court of Appeals decision in
17 Hooper. The American Rule provides that in America
18 litigants bear their own attorneys' fees and costs unless
19 contract or statute provide otherwise. New York has
20 adopted the American Rule. And the standard to opt out of
21 the American Rule by contract is high, and it is
22 particularly high for intra-party litigation expenses.

23 Plaintiff is essentially trying to rewrite the
24 contract to avoid the American Rule and turn a garden
25 variety lender expenses provision for the reimbursement of

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1 lender's due diligence expenses into a broad sweeping
2 provision that would indemnify plaintiff for any
3 attorneys's fees and expenses incurred in litigation
4 arising out of the term sheet.

5 Hooper and its progeny provide the following
6 rubric for the evaluation of a claim for indemnification or
7 reimbursement of intra-party attorneys' fees:

8 First, unless the contractual provision contains
9 language demonstrating an unmistakably clear intent to
10 cover attorneys' fees and expenses incurred in first-party
11 litigation, there will be no indemnification for attorneys'
12 fees and expenses. The test is whether the intent to
13 indemnify is unmistakably clear from the language of the
14 promise, not whether the agreement could be read to provide
15 for indemnification.

16 Second, unless the clause refers exclusively or
17 unequivocally to claims between the indemnitor and
18 indemnitee, the Court must find the agreement to be lacking
19 evidence of requiring intent to cover such claims.

20 Third, in New York, indemnification clauses are
21 strictly construed.

22 Fourth, an indemnification clause will be read in
23 conjunction with all the provisions in the agreement to
24 avoid inconsistencies or an interpretation which would
25 render another provision superfluous or without force and

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1 effect.

2 Your Honor, apply these principles to the term
3 sheet in this case, and it is clear that plaintiff's claim
4 for attorneys' fees must be dismissed.

5 Defendants' interpretation of the lender's
6 expenses provision, which is the provision which is issue,
7 is that it is a garden variety provision designed to
8 reimburse lender for the cost of due diligence incurred
9 while vetting the transaction, and it doesn't cover any
10 litigation expenses.

11 Plaintiff's interpretation is that this provision
12 requires defendants to reimburse plaintiff for all of its
13 expenses, including its reasonable attorneys' fees incurred
14 in connection with any matter arising per the agreement,
15 including any litigation expenses.

16 If we take a look at the language of the lender
17 expense provision and if we look at the contract, we see
18 that the plaintiff's interpretation simply doesn't work.

19 If I could turn your Honor's attention to the
20 lender's expense provision at Page 7 of the term sheet,
21 which is Exhibit B to -- and I could give you a copy, your
22 Honor, if you would like.....

23 THE COURT: You do not need to.

24 GERSHMAN: Okay. It is Exhibit B to my
25 affirmation.

Rachel C. Simone, CSR, RMR, CRR

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THE COURT: I am reading it, counselor.

GERSHMAN: The lender expenses provision provides: Guarantor and owner jointly and severally agree to pay or to reimburse --

THE COURT: Mr. Gershman, I have read it.

GERSHMAN: Sorry, your Honor.

So, your Honor, in looking at the provision, there are three things that make it clear just looking at the language of this provision that it doesn't cover intra-party litigation expenses.

First, there is no express language indicating it applies to intra-party litigation.

Second, there is no language suggesting that it applies to litigation expenses at all, whether intra-party or with anybody else.

Third, it includes a list of expenses that it does cover, and they are all expenses associated with the due diligence for the transaction, not litigation. "The fees of all third-parties relating to the due diligence review undertaken by lender and its attorneys and third-party consultants." There is nothing in the language of this provision which makes it unmistakably clear that it is intended to cover the costs of first-party litigation expenses.

THE COURT: The provision does say, does it not,

1 that it covers "fees and expenses which shall include but
2 not limited to," yada, yada yada?

3 GERSHMAN: It does say that, your Honor.

4 THE COURT: So the question, then: For purposes
5 of CPLR 3211, is there enough here to require dismissal
6 of -- the denial of the motion at this point?

7 GERSHMAN: I would say, your Honor, given the
8 very strict standard that it must be unmistakably clear,
9 "including but not limited to" Doesn't get you there.

10 In addition --

11 THE COURT: And that's all based on Hooper?

12 GERSHMAN: Yes, Hooper and its progeny. There
13 are dozens of cases who have held similarly to Hooper that
14 as to broad indemnification provisions, if it is not
15 unmistakably clear, no first party claims.

16 But in addition to the language here, your Honor,
17 if we look to the other provisions in the contract and
18 interpret the contract as a whole, it makes it clear that
19 the lender expenses provision cannot be interpreted as
20 broadly as plaintiff suggests and it can't be designed to
21 cover all expenses, including all litigation expenses
22 because to do so would render two other provisions of the
23 contract without force and effect, and it would create
24 inconsistencies with two other provisions.

25 First, the two provisions that we believe would

1 be rendered without force and effect are the broker's fee
 2 provision and the environmental indemnity provision.

3 If plaintiff is correct that this provision
 4 covers all expenses, there would be no need to have
 5 separate indemnification provisions for specific items. It
 6 would be unnecessary. They would be rendered superfluous
 7 and mere surplusage. But, your Honor, this contract has
 8 two. It has a broker's fee provision at Page 9 which
 9 provides: Owner and guarantor jointly and severally agree
 10 to indemnify defendant and hold harmless lender from and
 11 against any and all claims of any broker or finder relating
 12 to the financing arrangement outlined herein.

13 Then, your Honor, there is a separate
 14 environmental indemnity at Page 4 in the term sheet, and
 15 that provision provides: Borrower and guarantor shall
 16 indemnify lender for any and all costs or losses arising in
 17 connection with the environmental conditions at or about
 18 the collateral.

19 Your Honor, we submit plaintiff's very broad
 20 interpretation that lender expenses provision covers all
 21 expenses that might possibly incur, including litigation
 22 expenses here, is inconsistent with these two provisions.
 23 It would render them to be superfluous. Therefore, that
 24 interpretation cannot be accepted.

25 In addition, there are two provisions which it

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1 appears are inconsistent with the defendants'
2 interpretation. If plaintiff's interpretation is accepted,
3 it would be inconsistent with two provisions that call for
4 the return of any unspent portion of the expense deposit at
5 the conclusion of the transaction as opposed to at the
6 conclusion of any litigation arising from the term sheet.
7 And the first of those two provisions is the due diligence
8 provision which is at Page 7. And within the due diligence
9 provision there is a clause that provides: If at any time
10 lender elects to terminate this term sheet, the lender will
11 return the expense deposit less lender expenses incurred by
12 lender as of the date of such termination.

13 Then in the expense deposit provision, your
14 Honor, which is at Page 8, the contract provides: In the
15 event lender elects in its sole and absolute discretion not
16 to approve or close the transaction contemplated by this
17 term sheet, lender shall disburse or cause to be disbursed
18 any portion of the expense deposit that exceeds lender's
19 actual lender expenses.

20 So both of these provisions tie to the return of
21 any unspent expense deposit to the transaction and
22 conclusion of the transaction. And if it was intended that
23 the lender expense provision was also to include litigation
24 expenses, we submit that those provisions would have read
25 differently and would say either "at the conclusion of the

1 transaction," or if there is litigation pending, "at the
2 conclusion of the litigation."

3 So in sum, your Honor, we believe that our
4 interpretation that the lender expense provision is limited
5 to the reimbursement of due diligence expenses harmonizes
6 all these provisions of the contract. We believe it is
7 consistent with Hooper. And we believe that the
8 plaintiffs's interpretation creates inconsistencies within
9 the contract would render a couple of provisions
10 superfluous and creates inconsistencies.

11 In terms of the case law, your Honor, Hooper is
12 the primary authority. There are dozens of cases since
13 Hooper that have dismissed claims for first-party
14 indemnification fees on the grounds that it was not
15 unmistakably clear in the contractual provision that the
16 parties intended to waive the benefit of the American Rule.
17 Parkway Pediatric, Sequa, Gem Advisors, 2626 Broadway. And
18 these cases are always tied to how clear -- is it made
19 clear the first-party expenses are going to be covered, not
20 to the breadth of the indemnification provision.

21 Turning to plaintiff's cases, plaintiff relies on
22 seven cases in support of their position that they have a
23 claim for attorneys' fees and expenses here. Two of them
24 are wholly inapplicable because they are cases that have a
25 prevailing party provision in them. So in those cases one

1 party prevailed and they got attorneys' fees. There is no
2 prevailing party in this case so they don't apply. US Home
3 Corp. and Vincent Smith are the cases.

4 Two other cases are cases where the Court held
5 that the indemnification provision did entitle the parties
6 to first-party indemnification because to hold otherwise
7 and to limit to third-party claims would have rendered
8 certain provisions of the contract without force and
9 effect.

10 Again, we don't have that here. We have the
11 opposite. There has been no contention in plaintiff's
12 papers that failing to hold the lender expense provision
13 applies to first-party indemnification costs would result
14 in other provisions of the term sheet not having force and
15 effect. And the two cases that the Court so held were
16 Sagittarius Broadcasting and DLJ Mortgage Capital.

17 Crossroads, the case that plaintiff relies most
18 heavily on is also distinguishable here. Crossroads was a
19 case that had a broad indemnification provision, and the
20 Court concluded it also applied to first-party litigation
21 claims. However, there were three things that were present
22 in Crossroads, none of which are present here, that the
23 Court relied on in making this decision.

24 First, the Court noted in Crossroads that the
25 provision there did not include a list of actions for which

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1 indemnification was required. Second, it noted that in
2 applying the provision to first-party claims it would not
3 render any other provision in the agreement meaningless.
4 And third, it was very clear that the indemnification
5 provision there did apply to litigation. The
6 indemnification provision applied to any an all claims,
7 actions, suits or proceedings.

8 Here none of those things are present. First,
9 there is a list of the types of proceedings to which the
10 lender expense provision applies. Second, if it was
11 held -- if the provision was held to apply to first-party
12 claims, it would render two other provisions of the
13 contract meaningless and without force and effect. And
14 last, it is not unmistakably clear here; and, in fact, it
15 is not clear at all that the lender expense provision is
16 intended to apply to litigation. So we submit that none of
17 the bases for the Crossroads decision are present here.

18 Square Mile, the sixth case, is a four-page
19 decision. There isn't much to really glean from that case.
20 The one thing we can tell is that the indemnification
21 provisions in Square Mile clearly applied to litigation.
22 It was very explicit, and that's not the case here.

23 The last case is Klock. Plaintiff's reliance on
24 this case is a little perplexing because in that case the
25 Fourth Department held that the party seeking

1 indemnification was not entitled to indemnification for
2 prosecuting its claims as a matter of law and was only
3 entitled to indemnification of its defense costs, which
4 seems to undercut the plaintiff's position here a bit. At
5 any rate, that provision also was broader here and clearly
6 applied to litigation, which the provision at issue does
7 not.

8 In sum, your Honor, we submit that the lender
9 expenses provision interpreted in light of the entire
10 contract and the applicable law does not support a claim
11 for intra-party attorneys' fees and expenses in this case;
12 that the second cause of action should be dismissed; and
13 that this contract and lender expense provision do not make
14 it unmistakably clear that the parties intended to cover
15 first-party litigation expenses.

16 THE COURT: Okay. Let me hear from Mr. Soloway.

17 MR. SOLOWAY: Thank you very much, your Honor.

18 I just want to give a little bit of context, your
19 Honor, to refresh everyone's recollection here.

20 This case arises from Mr. Eichner's, the
21 developer, from what we will submit and show you on summary
22 judgment is his egregious violation of the exclusivity
23 clause months before he claimed terminating it. He was
24 shopping, financing around, you will see, with Goldman
25 Sachs, with multiple lenders. We have --

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1 THE COURT: That's not the issue before me this
2 afternoon.

3 MR. SOLOWAY: I just wanted to give you the
4 context.

5 THE COURT: Why are we wasting time on that?

6 MR. SOLOWAY: I just wanted to make sure your
7 Honor understands the context.

8 THE COURT: I already decided the motion to
9 dismiss, remember?

10 MR. SOLOWAY: Yes, sir.

11 THE COURT: Would you like me to revisit that
12 one?

13 MR. SOLOWAY: No. I appreciate that, your Honor.
14 Your Honor, right off the bat here your Honor
15 touched on something in my able adversary's presentation
16 which I think bears on the fact on this motion to dismiss.

17 At the very outset of their motion papers, in
18 their memo of law in support of the motion to dismiss in
19 the preliminary statement they argue that the provision at
20 issue was merely intended to reimburse plaintiff for
21 expenses it incurred in negotiating and performing due
22 diligence. And then in the reply brief they go on to say
23 that the attorneys' fees claim provides a non-exhaustive
24 list of the type of expenses it applies to.

25 THE COURT: Let's assume the latter. What say

1 you?

2 MR. SOLOWAY: What I say is, just as your Honor
3 noted, where commercially sophisticated parties make broad
4 clauses as to liability for fees, then they mean what they
5 say and say what they mean.

6 THE COURT: I am glad you put it that way. So
7 let's talk about what the sophisticated parties on both
8 sides had to say.

9 MR. SOLOWAY: Sure, your Honor.

10 THE COURT: Here is that they had to say:
11 Guarantor and owner jointly and severally agree to pay or
12 reimburse lender upon demand whether or not the loan is
13 consummated in whole or in part the reasonable fees,
14 including reasonable attorneys' fees, out-of-pocket
15 expenses incurred by the lender -- and I am going to skip
16 around -- in connection with the matters and transaction
17 contemplated hereby.

18 Where does that conjure up the notion of
19 reimbursement of attorneys' fees in a litigation?

20 MR. SOLOWAY: The matter --

21 THE COURT: Keep in mind you are a sophisticated
22 entrepreneur.

23 MR. SOLOWAY: Sure. And this is consistent, by
24 the way, and we will get to it in terms of the case law;
25 but it talks about "matters and transactions contemplated

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1 hereby."

2 THE COURT: Is litigation contemplated hereby?

3 MR. SOLOWAY: Yes, your Honor.

4 THE COURT: Where?

5 MR. SOLOWAY: In the very next page of the letter
6 of intent between the parties you have the clause that
7 deals with the exclusivity provisions and says they will
8 owe us a million dollars in damages --

9 THE COURT: Break-up. It says you get a break-up
10 fee. It doesn't say a word about litigation.

11 MR. SOLOWAY: No, but I have to take issue with
12 that.

13 THE COURT: Show me the word "litigation"
14 anywhere in the document.

15 MR. SOLOWAY: The word "litigation" doesn't
16 appear, but it does not have to appear is what the law
17 says.

18 THE COURT: Which takes you to Hooper?

19 MR. SOLOWAY: No, not to Hooper.

20 THE COURT: It doesn't?

21 MR. SOLOWAY: No.

22 THE COURT: Hooper doesn't apply?

23 MR. SOLOWAY: The reason Hooper is different --

24 THE COURT: Does Hooper apply or not?

25 MR. SOLOWAY: It doesn't. I will explain why.

1 THE COURT: Thanks.

2 MR. SOLOWAY: Hooper was a case where they had
3 itemized the particularized indemnifications that they were
4 entitled to. So the Court said if you are entitled to A, B
5 and C and it doesn't say E, F and G, you are not entitled
6 E, F and G. to those. It was not a broad clause in Hooper,
7 it had specific enumerated items.

8 THE COURT: So you are telling me that Hooper is
9 limited to its facts?

10 MR. SOLOWAY: Hooper is limited to the facts of a
11 very specific indemnification.

12 THE COURT: Counsel, all I can say to you is that
13 there are four appellate division departments that have a
14 different takeaway on Hooper, but go ahead.

15 MR. SOLOWAY: Well, I would like to read from the
16 decision in the Crossroads case and what the Court said
17 about that. And also I will note that in the --

18 THE COURT: Counsel, you can do that later on,
19 but let's now talk about what the parties intended.

20 MR. SOLOWAY: Sure.

21 THE COURT: That's really that this is about.

22 MR. SOLOWAY: Well, you have the provision here
23 that says they are going to pay for any and all
24 out-of-pocket expenses including reasonable attorneys' fees
25 in the transactions and matters contemplated by --

1 THE COURT: It says: In the transactions and
2 matters contemplated hereby. Then it goes on to say: Fees
3 and expenses shall also include but are not limited to fees
4 of all third-parties relating to the due diligence. And
5 then it goes on from there. It really is pretty darn
6 specific. And missing from this list of various fees that
7 you are entitled to is the word "litigation."

8 MR. SOLOWAY: But it also does include the words
9 "included but not limited to," so the parties were
10 clearly intending --

11 THE COURT: You heard me mention that to your
12 adversary, correct? I didn't miss it.

13 MR. SOLOWAY: I know.

14 THE COURT: I didn't overlook it.

15 MR. SOLOWAY: Sure. I appreciate that.

16 THE COURT: And I looked in vain for the word
17 "litigation."

18 MR. SOLOWAY: The word "litigation" does not
19 appear.

20 THE COURT: You have a problem.

21 MR. SOLOWAY: Your Honor, the point on that is I
22 would just read to you that -- for example, in the
23 Crossroads case the indemnification proceeding is extremely
24 broad applying to any and all claims, demands, actions,
25 suites or proceedings.

1 In the Square Mile case there was no reference at
 2 all to litigation in the Square Mile case, and in DLJ as
 3 well. The point there is that where the indemnification
 4 provision is broad and where a party is appearing before
 5 the Court arguing about what the intention of the provision
 6 was, I would submit to you, your Honor, doesn't warrant
 7 dismissal of the cause action for the attorneys' fees.

8 In the language of -- I actually called the lower
 9 Court in Square Mile because the Appellate Division case
 10 unfortunately doesn't have the full quote of the language.
 11 And the language in the agreement says: And hold them
 12 harmless from any and all losses, judgments, costs,
 13 damages, liabilities, fines, claims, expenses including
 14 attorneys' fees, which shall be paid or incurred by reason
 15 of any action, act, or inaction which is determined by the
 16 managing member in good faith to have been in the best
 17 interest of the parties.

18 That's what it says.

19 THE COURT: That's a lot more than you've got
 20 here.

21 MR. SOLOWAY: But what we have here --

22 THE COURT: It's a lot broader than what you
 23 have.

24 MR. SOLOWAY: But, your Honor, what we do have
 25 here is a provision that says "in connection with any and

1 all matters and transactions," and it says "including but
2 not limited to," and you have a party who expressly
3 violated the exclusivity clause forcing us to go out and
4 actually have to collect on that.

5 Your Honor, this is a lender who has --

6 THE COURT: But that's not what was negotiated
7 for. You negotiated for fees in connection with the
8 transaction. That's what you negotiated for, that's what
9 is in your agreement. Crossroads doesn't help you. Do you
10 want me to tell you why?

11 MR. SOLOWAY: I think you already said that to
12 me.

13 THE COURT: It is because it makes reference to
14 litigation. This doesn't.

15 MR. SOLOWAY: But the fact of the matter is that
16 when parties make broad statements and when they are
17 arguing about what the intention of it was on a motion to
18 dismiss, we should be afforded the opportunity to present
19 that claim.

20 THE COURT: That's if the clause that is at issue
21 is ambiguous as interpreted by the prevailing law. I am
22 suggesting to you that maybe this clause isn't so
23 ambiguous.

24 MR. SOLOWAY: Sure. But let me give you another
25 idea to think about.

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1 THE COURT: Hey, we agree.

2 MR. SOLOWAY: Let me give you something to think
3 about.

4 They've even stood here before you and said, your
5 Honor, when they cited that it has to be clear and
6 unequivocal as saying, well, we are saying it is not clear.
7 The question is --

8 THE COURT: Mr. Soloway, "in connection with the
9 matters and transactions contemplated hereby" is what I
10 keep going back to. "Is contemplated hereby" is just what
11 you were talking about. This is a transaction. They
12 didn't contemplate litigation. That's the point.

13 MR. SOLOWAY: Let me just share a thought with
14 you about that, your Honor.

15 This is a term sheet on a deal where my client
16 was expending a great deal of time and money to recover --

17 THE COURT: That's why there's a million dollar
18 break-up fee.

19 MR. SOLOWAY: Right. So the contemplation of the
20 parties is that there are going to be a lot expenses
21 incurred. There's actually an obligation to reimburse when
22 you get below a certain number on lenders.

23 THE COURT: Agreed. There's a lot of detail,
24 right?

25 MR. SOLOWAY: There is some detail.

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1 THE COURT: A lot detail, right?

2 MR. SOLOWAY: There is detail in here but --

3 THE COURT: Only a little bit?

4 MR. SOLOWAY: There's plenty of detail in the
5 right places.

6 THE COURT: Thank you. That's what I was trying
7 to get you to concede.

8 MR. SOLOWAY: The fact remains, though, your
9 Honor, that there is a provision that says that they were
10 going to be responsible for third-party reasonable legal
11 fees in connection with the matters and transactions
12 herein. and we're trying to enforce the provision.

13 THE COURT: That's right, the matters and
14 transactions.

15 MR. SOLOWAY: But the matters is more than the
16 transaction. It says "the matters and transactions
17 herein." And the matters here are that we have an
18 exclusivity clause which they are obligated to comply with
19 which we are enforcing which causes us to incur capital L
20 Lender expenses.

21 THE COURT: You would be in great shape if you
22 were in London. Unfortunately you are not.

23 MR. SOLOWAY: If your Honor has any further
24 questions I am happy to answer.

25 THE COURT: I am going to grant the motion. It

1 appears to the Court that the clause here, which appears in
2 Exhibit B to the Gersham affidavit, provides for the
3 payment of reasonable attorneys' fees and expenses incurred
4 by the lender, that's the plaintiff here, in connection
5 with the matters and transactions contemplated hereby. It
6 goes on and gives additional details with respect to fees
7 and expenses. It says it shall also include but not be
8 limited to the fees of all third-parties relating to the
9 due diligence review to be undertaken by the lender and its
10 attorneys, third-party consultants, construction
11 consultants and on and on and on. Nowhere in here, in this
12 clause, is there any indication that it is intended to
13 extend beyond the matters and transactions as contemplated.
14 And that is to extend to the realm of litigation should the
15 parties end up in a dispute.

16 The parties are, everybody agrees, sophisticated
17 parties. They could have, if they chose, provided for
18 including fees associated with litigation. They chose not
19 to do that.

20 The reference of the Crossroads decision does not
21 advance plaintiff's claim. There the operative provision
22 made explicit reference to litigation, so it really doesn't
23 apply. Likewise, Square Mile again references -- clearly
24 references litigation.

25 Under those circumstances, the Court is of the

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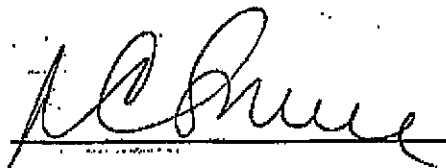
view that the lender expenses clause means just that, lender expenses associated with the transaction. It is not an attorneys' fees reimbursement provision. The agreement could have included such a clause. It does not.

It appears to me that the agreement of the parties is one that did not contemplate reimbursement of attorneys' fees. So to the extent that the complaint seeks to recover for attorneys' fees arising out of the litigation as opposed to arising out of the transaction, the motion is granted.

Thank you, gentlemen.

* * *

The foregoing is hereby certified to be a true and accurate transcript of the proceedings:



Rachel C. Simone
Senior Court Reporter