

Bond Case Briefs

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INDENTURE TRUSTEES - OKLAHOMA

Almeida v. BOKF, NA

United States District Court, N.D. Oklahoma - July 8, 2020 - Slip Copy - 2020 WL 3846731

From July 2014 through September 2015, Borrower LLC engineered a series of conduit financing transactions that generated roughly \$62 million from investors. Borrower LLC touted the offerings as vehicles to finance the development of senior living facilities. According to the plaintiff bondholders, the offerings were also vehicles for a fraud that bilked investors out of millions.

Borrower LLC's alleged fraud, the plaintiffs claim, would not have been possible without the aid, or at least the negligence, of BOKF, the bank serving as Indenture Trustee on the offerings. The plaintiffs assert that BOKF's role in the bond offerings entailed a duty to look out for investors, but the bank ignored that duty in favor of its own interests.

Although BOKF, by way of the Indentures, agreed to accept the issuers' interests in the Loan Agreements, the bank disclaimed nearly all responsibility for policing the Borrower LLCs' compliance with its obligations.

BOKF, arguing that the plaintiffs' allegations failed to state a claim, moved to dismiss. BOKF argued generally that the plaintiffs' tort claims fail as a matter of law because they are based on common law duties that BOKF, as an indenture trustee, did not owe. BOKF argued that, because it had no responsibility under the Indentures to verify the Borrower LLCs' representations in the Official Statements or to otherwise police their conduct, BOKF could not be held liable in tort.

The Court found that this overstated the case. While it is true that the pre-default duties of an indenture trustee are generally limited to those imposed under the indenture, an indenture trustee's power to disclaim responsibility does have limits. Exculpatory clauses cannot relieve one from liability for fraud, willful injury, gross negligence or violation of the law. Moreover, courts have found indenture trustees to have two kinds of pre-default duties beyond those found in their trust indentures. First, courts have held that indenture trustees have a duty not to profit at the expense of bondholders. Second, indenture trustees must perform "basic, nondiscretionary, ministerial functions" with "due care." Even though BOKF disclaimed any duty to police the conduct of the Borrower LLCs, the plaintiffs might be able to state a claim if BOKF's alleged misconduct was willful, perpetrated a fraud, or breached an extra-contractual duty.

The Court found, in short, that BOKF was not responsible for the promises Borrower LLC made to investors and it had no duty to investigate the Borrower LLCs' compliance with their contractual obligations. Accordingly, even assuming that Oklahoma would recognize a claim for aiding and abetting fraud, such a claim would only be viable upon allegations (1) that BOKF had actual knowledge that Borrower LLC was defrauding investors by commingling and misappropriating funds, and (2) that BOKF, by its silence, intended to aid in the fraud. The Court concluded that plaintiffs' complaint failed to plead actual knowledge of the underlying fraud.

The Court found that - as with aiding and abetting common law fraud - the question of whether a cause of action for aiding and abetting breach of a fiduciary duty exists in Oklahoma is unresolved.

Even were Oklahoma to recognize a claim for aiding and abetting a breach of a fiduciary duty, any such claim would require an allegation that the defendant had knowledge of the primary actor's wrongful conduct and no such knowledge was alleged.

As to Plaintiffs' allegation of negligence, the Court found that BOKF had expressly disclaimed any duty to monitor the Borrower LLCs management practices and use of bond proceeds. "The plaintiffs try to work around this fact by casting the alleged acts and omissions as breaches of BOKF's extra-contractual duty to carry out ministerial tasks with due care, but this argument is wafer thin. The Court cannot interpret 'ministerial tasks' to include duties that, by virtue of the Indentures, did not exist. Reading the ministerial-tasks exception so broadly would swallow whole the general rule that an indenture trustee's pre-default duties are exclusively governed by the terms of the trust indenture."

The Court found that the remaining alleged negligent acts *did* implicate extra-contractual duties: 1) BOKF's alleged failure, pursuant to the Continuing Disclosure Agreement ("CDA"), to require the Borrower LLCs to submit certain information and financial statements to EMMA; and 2) the alleged conflicts of interest, in which the bank did owe a duty not to seek a personal benefit at the expense of bond holders; and 3) BOKF's alleged failure to post notice of material events.

Having concluded that the plaintiffs' allegations implicated BOKF's pre-default duties to avoid conflicts and complete ministerial tasks with due care, the question became what standard of care applied to those duties.

The Court noted that an indenture trustee's pre-default duties are not fiduciary in nature and that a trustee may contractually limit liability for its own negligence if the limitation is explicitly and unambiguously provided for in the agreement. "This unambiguously precludes the imposition of liability on a theory of mere negligence. As a result, the plaintiffs must allege gross negligence, which Oklahoma defines as an 'intentional failure to perform [a] manifest duty in reckless disregard of consequences.'"

The Court found that the plaintiffs' allegations regarding BOKF's alleged failure to post notice of material events and to avoid conflicts of interest plausibly stated a claim for gross negligence under this standard.

As to the plaintiffs' claim for breach of fiduciary duty, the Court held that the plaintiffs must clearly allege (1) an Event of Default, (2) BOKF's actual knowledge of the default, if other than a failure to make payment, and (3) BOKF's subsequent failure to prudently exercise its powers to protect the interests of bondholders. As they failed to do so, they failed to state a claim for breach of fiduciary duty.