

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: CIVIL TERM: PART 56

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4 RITA MARIA SANCHEZ DE HERNANDEZ, et al.,

5 Plaintiffs,

6 - against -

7 BANK OF NOVA SCOTIA a/k/a SCOTIABANK,

8 Defendant.

9 -----x

10 Index February 25, 2009
11 No. 601518/06 60 Centre Street
12 New York, New York

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14 B E F O R E: HON. RICHARD B. LOWE, III,

15 Justice, Supreme Court

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1 THE COURT: Whose summary judgment motion
2 is this?

3 MR. GRAHAM: I'm sorry, your Honor?

4 THE COURT: Whose summary judgment motion
5 is this?

6 MR. GRAHAM: It's the defendant's motion
7 for summary judgment, Bank of Nova Scotia.

8 THE COURT: Proceed.

9 MR. GRAHAM: Your Honor, defendant Bank of
10 Nova Scotia. My name is Philip Graham. The
11 defendant Bank of Nova Scotia has moved for
12 summary judgment on four principal grounds.
13 With the court's permission, I would like to
14 address two of them, which are the statute of
15 limitations and the argument that the expert
16 reports permit summary judgment because of
17 certain errors of law. And Mr. Neuhaus will
18 address the Mexican law issues on the new
19 contract claims and the argument that the issue
20 of manipulation does not raise issues of fact.

21 I would like to start with summary
22 judgment, and first simply address the point in
23 the decision of last August. The court, as
24 your Honor may recall --

25 THE COURT: Let me interrupt you and posit

1 this question to both of you.

2 You have a cross-motion; is that correct?

3 MR. HACKERMAN: No, your Honor, we don't.

4 THE COURT: You don't. The issues that
5 remain as a result of the court's previous
6 decision are breaches of fiduciary duty?

7 MR. GRAHAM: No.

8 THE COURT: Which --

9 MR. GRAHAM: Your Honor ruled, made two
10 previous rulings. In the first you dismissed
11 three counts on statute of limitations grounds.
12 And that left three counts, which your Honor
13 dismissed, on Mexican law, failure to state a
14 cause of action, including that there was no
15 such thing as a fiduciary duty claim under
16 Mexican law.

17 THE COURT: Right.

18 MR. GRAHAM: At that time your Honor said
19 that the complaint could also support a breach
20 of contract claim which had never been pleaded,
21 and, in effect, invited a pleading, which
22 plaintiffs naturally accepted. And so there is
23 now a single count, which is for breach of
24 contract. This is the first motion addressed
25 to the breach of contract claim.

1 THE COURT: Go ahead.

2 MR. GRAHAM: And the first issue is
3 statute of limitations. I will simply say
4 that, although your Honor in that prior ruling
5 had noted possible grounds for a contract
6 claim, and it said that the claim could run
7 from the purchase of shares in GFI, which is
8 the Mexican holding company, by Bank of Nova
9 Scotia in 2003, we do not believe that those
10 issues have been decided, that contract cases
11 never before have been on motion before your
12 Honor, until today; that there was no briefing,
13 no argument, no discussion at oral argument
14 about a contract claim, much less about statute
15 of limitations. So under the rule of the law
16 of the case, like collateral estoppel, res
17 judicata, that applies only in cases where
18 there has been a full, fair opportunity to be
19 heard. We do not believe that there is any law
20 of the case on this issue because this is the
21 first time it's been argued in any respect on
22 any aspect of the contract claim.

23 So when the new complaint was served, it
24 appears from the complaint -- and we confirm
25 this with interrogatories directed at the new

1 complaint -- that the breach of contract that's
2 being alleged occurred in March of 2000, when
3 it's alleged in paragraphs 146 and 154 of the
4 complaint, that the defendant Bank of Nova
5 Scotia caused false statements to be made to
6 the accounting firm KPMG, which in turn relayed
7 those statements to the government of Mexico,
8 as a result of which no shares were issued to
9 the plaintiffs.

10 Under binding New York precedent -- the
11 Court of Appeals decision in the
12 Ely-Cruickshank case -- in contract cases,
13 unlike tort cases, and many other kinds of
14 cases, the statute of limitations runs from
15 breach. Not from damages, not from injury, not
16 from discovery, not from subsequent effects of
17 the breach, but from the moment of breach. And
18 the moment of breach here is March of 2000.

19 The first complaint in this case which did
20 not allege a contract claim, but the very first
21 claim that alleged anything, was in May of
22 2006. And so even if there had been a contract
23 claim in that complaint, it was out of time.

24 Now in their responsive papers, plaintiffs
25 do not address the Ely-Cruickshank case. They

1 don't cite it, they don't discuss it, although
2 it is clearly controlling precedent on the
3 question of whether the statute of limitations
4 runs from breach or some later time. They
5 offer two ways around Ely-Cruickshank, without
6 citing it.

7 The first is, they say that in order to
8 receive shares in GFI, the Mexican company,
9 from the Mexican government, seconded, they had
10 to be determined by the Mexican government or
11 its designees to be eligible, and that that
12 determination of eligibility did not occur
13 until 2004.

14 This is a wrong reading of the contract on
15 which they rely. The contract on which they
16 rely -- which is called on some days the
17 clean-up guidelines, on other days the existing
18 shareholders agreement, but it's just one
19 agreement -- that agreement says that to
20 receive shares, plaintiffs have to be eligible.
21 And a footnote fully defines eligibility. And
22 it doesn't say anything about there having to
23 be a determination. It says to be eligible,
24 your loans have to have a certain status as of
25 November of 1996. So there is nothing about a

1 condition that's required in order to bring
2 your case.

3 And what the Roldan case that plaintiffs
4 cite and quote in their brief says, is the time
5 starts to run when you can truthfully allege
6 the elements of your claim. The elements of
7 plaintiffs' claim were that they were eligible,
8 not that they had to be determined by some
9 administrator to be eligible, but that they
10 were eligible, and that the alleged
11 manipulation occurred and that they were
12 entitled to shares. They could have done that
13 any time after March of 2000. And under
14 Cruickshank, the time began to run as soon as
15 those elements came together. And there is
16 simply not a word in the contract that they
17 rely on about that being a precondition of
18 determination. And, in fact, when the
19 plaintiffs brought their lawsuit in 2006, a
20 hundred of them sued, and not one of them
21 alleged in the complaint that there had been a
22 determination of eligibility as to them. And
23 in fact, half of them had already been declared
24 ineligible by the Mexican government. So it
25 was clear at the time that they didn't think

1 they had to have a determination of eligibility
2 in order to prevail, in order to start their
3 case. It's a late-breaking idea that comes
4 because the statute runs, as they now know,
5 from breach, and the breach was in 2000.

6 THE COURT: What is, in fact, the case?

7 MR. GRAHAM: I'm sorry?

8 THE COURT: What is, in fact, the case?

9 Meaning your interpretation of the contract.
10 Is it that eligibility must be determined, or
11 is it that they determined that they are
12 eligible?

13 MR. GRAHAM: No. The plaintiffs are
14 allowed to simply assert that they are
15 eligible. The agreement says shareholders who
16 are eligible to receive shares will get them,
17 will get some shares, and then will get more
18 shares if a formula is met, that we will get
19 to. It says nothing about --

20 THE COURT: What determines eligibility?

21 MR. GRAHAM: The facts as they existed on
22 November 30, 1996, as they are set out in the
23 footnote.

24 THE COURT: Go ahead.

25 MR. GRAHAM: Plaintiff's second argument

1 is that there was a continuing breach here,
2 that after making false statements, allegedly,
3 and in manipulating KPMG, allegedly, in March
4 of 2000, they don't allege any further false
5 statements, but they say that there is a
6 continuing truth-telling duty in effect to stop
7 the government from acting on the false
8 statements that were made.

9 This is wrong as a matter of law. It's
10 clear under the cases that silence after a
11 breach, or a failure to cure a breach, does not
12 constitute a further breach that keeps the
13 statute open and starts it running again.

14 We cited a number of cases on this point.
15 I would like to just mention one, which was
16 First American Title, which is somewhat close
17 to this. It's also a case, although it's a
18 Southern District case, it surveyed in New York
19 law, New York State law, on the subject.

20 In first American Title, the title agent
21 was obliged immediately after the closing to
22 record the mortgage, and he failed to do so.
23 He failed to do so immediately after the
24 closing, and he failed to do so the next month,
25 and the month after, and until the property was

1 sold, without the mortgage being recorded. And
2 the new buyer was a bona fide purchaser, and
3 wiped out the lender, who then sued. The court
4 held that the original failure to record the
5 mortgage was the breach, and that the failure
6 to fix that breach by filing the next month and
7 the month after was irrelevant under
8 Cruickshank and its progeny.

9 And this is precisely the same situation.
10 In fact, if this case were to be a continuing
11 breach, it would in effect have the exception
12 to swallow the Cruickshank ruling. Because in
13 Cruickshank, the broker who sued claimed that
14 there were secret negotiations that were the
15 first breach, but that the breach didn't come
16 to maturity until the defendant who was selling
17 the building had actually allowed the building
18 to be sold and a commission to be earned and
19 then not paid. The court held that it was the
20 secret negotiations that were the breach and it
21 didn't matter that there was a subsequent
22 failure to honor the commission obligation or
23 not to sell the building without the
24 commission. So making this case into a
25 continuing duty case would, in effect, overrule

1 the Court of Appeals decision in Cruickshank.

2 I will touch very briefly on this second
3 issue that I am going to address because I
4 realize time is short. In this case, the
5 plaintiffs, in order to prevail, not only have
6 to show that there was the manipulation that
7 they allege, they also have to show that under
8 the contract they were otherwise entitled to
9 recover shares. And there is a complicated
10 formula for determining when additional shares
11 would be given by the Mexican government for
12 free to the former shareholders, old
13 shareholders, of the Mexican holding company.

14 And because the formula required
15 application of a series of terms, both sides
16 retained experts and they did their
17 calculations under the formula. And we
18 exchanged reports and had depositions of the
19 experts.

20 Ordinarily that would not be something
21 that could be ripe for summary judgment,
22 because differing opinions of experts, of
23 course, is a matter that can't be decided on
24 undisputed law. This case is different. And
25 the reason it's different is that plaintiff's

1 expert made two errors in interpreting the
2 contract, that led her to apply two erroneous
3 factors to the formula. And there is no
4 dispute about what the numbers are for the
5 purposes of this motion. One, that she failed
6 to add, and the other that she subtracted when
7 she shouldn't have. The only dispute is
8 whether the contract and the formula in the
9 contract called for the addition of the one
10 number and the subtraction of the other. And
11 that's an issue that can be decided within the
12 four corners of the contract.

13 The contract is complicated. The formula
14 looks more forbidding than it actually is. But
15 complexity is not the same as ambiguity. And
16 this could actually be determined by looking at
17 the definitions of the contract. All of that
18 is in our briefs.

19 And I think I will just mention very, very
20 quickly, that under the definition that applies
21 in the circumstances of this case, which was
22 called Model B, the numerator of the formula,
23 which is the only thing that we are disputing
24 about on this motion, is a single term. And
25 that single term is defined as the losses of

1 GFI after a date in September of 1997 -- I am
2 sorry -- the losses simply through July of
3 2000, that were covered by the Mexican
4 government.

5 Here's what is not in dispute. What is
6 not in dispute is what the financial statement
7 says about those losses. What is not in
8 dispute is, and it was admitted by plaintiffs'
9 expert on her deposition, that the place
10 defining those losses for these purposes is the
11 financial statements, and what those numbers
12 actually are. All undisputed. The only
13 question is whether one should be added and the
14 other subtracted.

15 We also accepted for purposes of this
16 motion, that we would use the plaintiffs'
17 entire denominator where the complicated part
18 of the formula is, and just check all that, and
19 check her calculations, and check her interest
20 determination, and check everything else, for
21 the purpose of showing that if these two errors
22 are corrected, then under her application of
23 the formula, the plaintiffs' application, there
24 would be no recovery, regardless of whether
25 there is proof of manipulation and fraud or the

1 other things that they allege.

2 Very briefly, Judge, the first of the two
3 things was a failure to add losses after
4 September of '97, through July of 2000. And
5 that that should have been added is evident on
6 the face of the complaint, which refers to
7 losses, specifically to losses, to liabilities,
8 after September of '97.

9 The second issue is the issue of a very
10 large amount, 29 billion pesos, of so-called
11 collections that plaintiffs subtracted from the
12 numerator number, which is simply meant to be
13 the losses of GFI.

14 There is no question that the losses of
15 GFI are a given number that both sides agree
16 to. We accept this 29 billion collection
17 number solely for purposes of arguing whether
18 or not it should be subtracted.

19 I will mention just one reason why it's
20 clear it should not be, one reason, and that is
21 in this very same formula, this very same
22 contract, when the parties wanted to adjust
23 losses by collections, they did it by creating
24 a separate term in the formula called
25 collections. They put it in a denominator of

1 the formula, that had to be added for the
2 plaintiffs' benefit down there. There is no
3 such factor in the numerator. There is no
4 basis for saying that the drafters had used a
5 separate term and instructed that this be added
6 in the denominator, and asked the parties to
7 guess that it should subtracted in the
8 numerator.

9 I will stop there.

10 THE COURT: Please, please do.

11 Do you want to address this now, or do you
12 want co-counsel to address the other two?

13 MR. HACKERMAN: Your Honor, what we would
14 like to do, if it's okay with you, is go ahead
15 and address those. However you would like to
16 do it. I think it might be easier if we speak
17 to the ones they have raised, and then they can
18 say whatever else they have to say.

19 THE COURT: Go ahead.

20 MR. HACKERMAN: With your Honor's
21 indulgence, I'm Steve Hackerman, for the
22 plaintiffs. With me is Mr. Frankel, also for
23 the plaintiffs. We also, with your indulgence,
24 will split up the argument. Mr. Frankel will
25 address the statute of limitations. And then I

1 will respond to Mr. Graham on the damages. If
2 that's all right with your Honor.

3 THE COURT: Yes.

4 MR. FRANKEL: May I approach, your Honor,
5 just for a second?

6 THE COURT: No, no. Just argue the case.
7 This is painful.

8 MR. FRANKEL: You have already ruled. In
9 the last order that you issued in August, on
10 the very issue of limitations, you said the
11 allegations allow us to interpose a breach of
12 contract claim, and the claim is timely. Those
13 were your words. Because the breach occurred
14 in 2003. And the contract law says you have
15 got -- the limitation law says you have to sue
16 within six years. And we fell within that
17 period. So that's where we started.

18 You are looking at it. Maybe you looked
19 at it in the context of fiduciary duty. As I
20 read your order, you ultimately concluded no,
21 it's not fiduciary duty. It's a contractual
22 duty, it's not fiduciary duty. So that's where
23 we started.

24 We amended our complaint, added the
25 contract, elaborated on the facts, called it a

