

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	
401 Properties Limited Partnership,)	
)	
Debtor.)	Case No. 14 B 44983
_____)	
)	
Rock Solid Gelt Limited Partnership)	
and Legacy Re, Ltd.,)	
)	
Plaintiffs,)	
)	
v.)	Adv. No. 15 A 00499
)	
401 Properties Limited Partnership,)	
et al.,)	
)	
Defendants.)	Judge Jacqueline P. Cox

Order on Plaintiffs’ Motion for Leave to Amend the Complaint (Dkt. No. 54)

The Plaintiffs seek in their complaint, filed on July 9, 2015, a determination as to, among other matters, the validity, priority and extent of the lien, if any, securing the purported claim of 401 LaSalle Lenders, LLC (“LaSalle Lenders”) and Bridgeview Bank Group (“Bridgeview”).

Guterman Partners Energy, LLC (“Guterman”) and/or Excel Acquisitions, LLC (“Excel”) claim to be successors in interest to the claims of LaSalle Lenders and Bridgeview. LaSalle Lenders has now filed for bankruptcy relief under chapter 11 of the Bankruptcy Code in Bankruptcy Case No. 15-39922.

Rule 15(a) of the Federal Rules of Civil Procedure, which applies to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7015, provides that, where leave of court is required to amend a pleading, “[t]he court should freely give leave when justice so requires.” Fed. R. Bankr. P. 7015(a)(2). Justice requires that the proposed amendments be allowed in this case.

Background

The Debtor, 401 Properties Limited Partnership, is an Illinois limited partnership with offices in Chicago, Illinois. Its primary asset is an office building located at 401 South LaSalle Street, Chicago, Illinois (the “401 Building”), which it owns and operates.

The Plaintiffs allege that they are each a partial assignee of a promissory note in the principal amount of \$3,236,308.81 (the “Junior Note”), which is secured by a mortgage on the 401 Building. One of the objectors to the effort to amend, 330 South Wells, LLC (“330 LLC”), is also a partial assignee. The original holder of the Junior Note was Fortuna Stream L.P., which assigned its interest in the Junior Note to 330 LLC and the Plaintiffs in separate transactions.

At the time the Junior Note and mortgage were executed, Bridgeview held two notes in the principal amounts of \$6,274,288.46 and \$1,600,711.54. Those notes are the senior notes (the “Senior Notes”). A mortgage in the amount of \$7,875,000 (the “Senior Mortgage”), an Assignment of Lease and Rents and a Security Agreement were recorded to secure the repayment of the Senior Notes.

Bridgeview assigned the Senior Notes and the Senior Mortgage to LaSalle Lenders. LaSalle Lenders assigned the Senior Mortgage back to Bridgeview. Before the last transaction, LaSalle Lenders assigned its rights in the Senior Notes and Senior Mortgage to Guterman. Excel

acquired all of Bridgeview's right, title and interest in the LaSalle Lenders Note and Security Agreement and extinguished Guterman's rights in and obtained title to the Senior Notes and Senior Mortgage through a sale conducted under the Uniform Commercial Code ("U.C.C.") in November 2015.

According to the complaint, the following represents the ownership of the Junior Note:

Rock Solid Gelt Limited Partnership - 18.7192% ;

Legacy Re, Ltd. - 9.7537%; and

330 South Wells, LLC - 71.5271%.

Discussion

The Plaintiffs want to amend the complaint to include Excel and Guterman as defendants.

Excel objects to the Plaintiffs' request to amend the complaint because the Plaintiffs are neither holders of the Junior Note nor are they in possession of the Junior Note; essentially, that the Plaintiffs lack standing. 330 LLC has joined in Excel's opposition to the effort to amend the Complaint.

At count one of the proposed amended complaint, the Plaintiffs add allegations relating to their claim that they are a secured creditor of the Debtor's bankruptcy estate. Excel objects because the Plaintiffs, by their citation to the U.C.C. at paragraph 16 of the proposed amended complaint, establish that they are not creditors of the Debtor's estate, secured or otherwise. They note that they are partial assignees of the Junior Note. Excel argues that, for that reason, they have no rights against the Debtor's estate as creditors. Paragraph 16 of the proposed amended complaint states "Fortuna transferred to Plaintiffs less than the entire Junior Note. Accordingly, Section 3-203(d) of the Illinois Commercial Code applies to such transfer. Section 3-203(d)

provides as follows: “[i]f a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.”

The Plaintiffs also refer to a portion of the Official Comment 1 to Section 3-203(d), which provides that the right to enforce an instrument and ownership of the instrument are two different concepts. The Plaintiffs also quote Official Comment 5 to Section 3-203(d), which provides that a partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee.

Excel contends that under Illinois law a negotiable instrument such as a note may be enforced by either the holder of the instrument or a non-holder in possession of the instrument who has the rights of the holder, in reliance on *Bank of New York Mellon Trust Co., N.A. v. Rangel*, 2012 WL 4094516, at * 3 (N.D. Ill. September 14, 2012). Excel contends that, because the Plaintiffs do not allege that they hold the Junior Note or are non-holders in possession of it, they are not secured creditors and lack standing to assert the rights of a secured creditor. *See Deutsche Bank Nat. Trust Co. v. Tapla*, 2013 WL 4804855, at *2 (N.D. Ill. Sept. 9, 2013).

The Plaintiffs respond that there is no legal prohibition against assigning a portion of an indebtedness evidenced by a negotiable instrument, in reliance on *Tompkins Printing Equip. Co. v. Almik, Inc.*, 725 F.Supp. 918, 920 (E.D. Mich. 1989), and that the partial assignment of a contract right is valid, *see Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 723 (7th Cir. 2003).

Excel argues that *Chemetall* is inapplicable because it deals with an employee trade secret agreement. Excel is reading *Chemetall* too narrowly. Excel is correct that the Plaintiffs can not

proceed under the U.C.C. as holders in due course, however, they can enforce the rights they hold under Illinois law.

Conclusion

The Motion for Leave to Amend is granted. This Court cannot say as a matter of law that the proposed amendments are futile or not based on law.

This adversary proceeding is set for a status hearing on March 2, 2016 at 10:00 a.m.

Dated: February 18, 2016

ENTERED:

Jacqueline P. Cox
United States Bankruptcy Judge