UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MUKTA PATEL, ASHOK PAREKH, JITU PATEL, and ANDREA BOSWELL, and PHIL BOSWELL, on behalf of themselves and all others similarly situated, Plaintiffs, v. MUKESH C. PATEL, R.C. PATEL, EDWARD L. BRISCOE, SCOTT DIX, BRIJ M. KAPOOR, MUKUND R. PATEL, NARENDA D. PATEL, DHIRU G. PATEL, and BALVANT PATEL, Defendants.	CIVIL ACTION NO. 1:09-CV-3684-CAP

O R D E R

This matter is before the court on the motion of the Federal Deposit Insurance Corporation as Receiver of Haven Trust Bank to intervene, stay the proceedings, and extend time for filing a pleading in intervention [Doc. No. 36].

I. Factual Background

Horizon BanCorp was founded in 2000 by the defendants Mukesh Patel and R.C. Patel; the company's name was changed in 2005 to Haven Trust Bancorp, Inc. [Doc. No. 23, ¶¶ 13, 14]. The company was organized as a holding company for Haven Trust Bank and had no business operations other than the Bank, its sole and wholly-owned subsidiary [Id. at ¶ 33]. The Bank was a Georgia state-chartered bank headquartered in Duluth, Georgia; the Bank operated four

branches in Atlanta and had loan production officers in Alabama and Oklahoma. The company was a vehicle to obtain cash for the Bank by selling the company's common stock to investors, including the plaintiffs here. Haven Trust and the Bank were operated and controlled by the defendants [Id. at ¶¶ 13-23]. As directors of both the company and the Bank, the defendants were responsible for and controlled the operations of both entities [Id. at ¶¶ 23, 127-129]. In addition, as the founders, the defendants Mukesh Patel (Chairman of Haven Trust), his brother R.C. Patel, and Edward Briscoe (Haven Trust's President and Chief Executive Officer) shared in the daily operations of the company and the Bank [Id. at ¶¶ 13-14].

From its inception, Haven Trust grew at a rapid pace, from $29 million in assets in its first year of operation in 2000 to approximately $575 million by 2008 [Id. at ¶ 35]. This rapid growth was largely predicated on the use of non-core funding, including brokered deposits, which were used for risky acquisition, development, and construction (ADC) loans and other types of commercial real estate (CRE) lending [Id. at ¶¶ 38-44]. Haven Trust initially marketed itself to the Indian and Asian-American communities and likewise focused much of its efforts to sell the company's common stock to those communities [Doc. No. 23, ¶ 33].

The defendants solicited investors through private placement memoranda (PPM's), which were drafted and approved by the defendants [Id. at ¶¶ 22 and 26]. The first stock offering was in March 2006, with a second offering in March 2008 [Id. at ¶¶ 61-71 and 73-88]. The plaintiffs contend that the 2006 and 2008 PPM's concealed the true financial condition and business operations of Haven Trust and specifically failed to disclose the Bank's excessively risky lending practices, the defendants' self-dealing transactions, violations of laws and regulations related to loan underwriting deficiencies, and the defendants' complete failure to address and correct the numerous known operative improprieties that had been repeatedly identified by federal and state regulators [Id. at ¶¶ 2-3, 36-37, 45-59].

On December 12, 2008, the Georgia Department of Banking and Finance announced publicly that the Bank had been closed and the FDIC appointed as receiver [Doc. No. 23, ¶ 3]. At that time, the Bank had assets (or outstanding loans) of $572 million and customer deposits of only $515 million [Id. at ¶ 57]. The Bank's collapse rendered Haven Trust's stock worthless, resulting in damage to the plaintiffs' investments [Id. at ¶¶ 37 and 89].

II. Legal Analysis - Intervention as of Right

To intervene as of right under Rule 24(a)(2), a party must establish: "(1) the application to intervene is timely; (2) the

applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit. Sierra Club, Inc. v. Leavitt, 488 F.3d 904, 910 (11th Cir. 2007).

A. Whether the application is timely

The first element that must be established for intervention as of right under Rule 24(a)(2) is that the application to intervene is timely. Id. To determine whether a motion to intervene was timely filed, a court considers: "(1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was timely." Georgia v. United States Army Corps of Engineers, 302 F.3d 1242, 1259 (11th Cir. 2002).

This case is still in its early stages. There is currently a stay in place until the court rules on the pending motion to dismiss [Doc. Nos. 22 and 27]. Also, as the FDIC was not a party to this case, it was not served with process or otherwise notified of its existence by the plaintiffs. The FDIC states that it did not learn of this case until late June 2010, when a FDIC lawyer listened to a CLE webinar in which members of the defense counsel's firm participated as presenters and discussed this case as an example. The FDIC then investigated to determine whether intervention was appropriate and filed this motion to intervene in October 2010. As a result, the court finds that the application to intervene is timely.

B. Whether the FDIC has an interest in this case

The second element that must be established for intervention as of right under Rule 24(a)(2) is that the intervening party has an interest in this case. The court agrees with the plaintiffs and the defendants that the FDIC does not have an interest in this case.

The FDIC claims that the plaintiffs' claims are derivative and belong solely to the FDIC. However, the plaintiffs allege claims exclusively under the federal Securities Exchange Act of 1934, the

Georgia Securities Act of 1973,[1] and Georgia common law arising out of the plaintiffs' purchases of Haven Trust stock via PPM's at artificially inflated prices. These claims are not derivative claims against the Bank but are instead direct claims against the defendants regarding the marketing and selling of the holding company's stock. While the FDIC controls derivative claims against the bank's former officers, it does not control claims against the holding company's officers. Lubin v. Skow, Nos. 10-10011 and 10-10068, 2010 WL 2354141 at *4, n. 9 (11th Cir. June 14, 2010) ("Under FIRREA [Financial Institutions Reform, Recovery and Enforcement Act of 1989], the FDIC succeeds to the rights of the Bank only. Therefore, where the Trustee is suing to vindicate the rights of the Holding Company against its own officers, FIRREA is not invoked."). This is in accord with 12 U.S.C. § 1821(d)(2)(A)(I), which provides that the FDIC succeeds only to "all rights ... of the insured depository institution, and any [rights] of the stockholder ... of such institution with respect to the institution and the assets of the institution." In this case, the plaintiffs assert their claims not as stockholders of the FDIC-

[1] On July 1, 2009, the Georgia Securities Act of 1973 was repealed and replaced by the Georgia Uniform Securities Act of 2008. The class period alleged in this case ends on December 12, 2008; as a result, the Georgia Securities Act of 1973 governs the conduct of the defendants.

insured failed Bank, but instead as shareholders of the holding company. As such, the plaintiffs' claims are not derivative claims to the FDIC's claims.

The FDIC also contends that it may have a right to recover from an officers and directors liability insurance policy underwritten by Travelers Insurance Company and accordingly has an interest in preserving sources of potential recoveries on any claims it may assert. In the Eleventh Circuit, "a contingent economic interest in insurance policy proceeds does not rise to a 'legally protectable' interest and fails to provide grounds for intervention under Rule 24(a)." United States v. South Florida Water Management District, 922 F.2d 704, 710 (11th Cir. 1991). The FDIC has no rights with respect to this insurance policy except as a potential claimant against certain of the policy's insured parties. These potential future rights are insufficient to establish that the FDIC has an interest in this case that justifies intervention as of right.

For the reasons stated above, the FDIC does not have a "legally protectable interest relative to the property or transaction that is the subjection of the action," and as a result, its motion to intervene as of right [Doc. No. 36] is DENIED.

III. Legal Analysis - Permissive Intervention

In the alternative to intervention as of right, the FDIC seeks leave of the court for permissive intervention. A court may grant permissive intervention under Rule 24(b) if (1) the application is timely, and (2) the intervenor's claim and the main claim have a common question of law or fact. The decision whether to grant permissive intervention is left to the court's discretion, and a court may deny intervention even if both requirements are met. Chiles v. Thornburgh, 865 F.2d 1197, 1213 (11th Cir. 1989).

The court has already found that the FDIC's motion to intervene was timely, and the court now finds that the FDIC's claims are likely to involve a common question of law or fact. However, in its motion to intervene [Doc. No. 36], the FDIC stated that it was in the process of investigating the Bank's failure and evaluating potential legal claims that may be asserted as a result of that failure, including possible claims against a number of the Bank's former officers and directors named as defendants in this case. The FDIC also requested a stay of further proceedings in this matter and an extension of time to file a pleading in intervention as required by Rule 24(c). In the interest of judicial economy, the court finds that intervention is inappropriate as intervention would needlessly delay the current proceedings while the FDIC investigates to determine whether it has

any legitimate claims against the defendants.

IV. Conclusion

For the reasons stated above, the FDIC's motion to intervene [Doc. No. 36] is DENIED.

SO ORDERED, this 29th day of December, 2010.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge