UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 12-27-JST (MLGx) Date: October 4, 2012
Title: IndyMac Resources, Inc. v. Brian N. Carter

Present: **Honorable JOSEPHINE STATON TUCKER, UNITED STATES DISTRICT JUDGE**

Ellen Matheson	N/A
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:	ATTORNEYS PRESENT FOR DEFENDANT:
Not Present	Not Present

PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS THIRD-PARTY COMPLAINT (Doc. 36)

Before the Court is Defendant Federal Deposit Insurance Corporation's ("FDIC's") Motion to Dismiss Third-Party Plaintiff Brian N. Carter's ("Carter's") Third-Party Complaint Against the FDIC as Receiver for IndyMac Bank, F.S.B. and Receiver for IndyMac Federal Bank, F.S.B. (Mot., Doc. 36.) Carter filed an Opposition on June 4, 2012. (Opp'n, Doc. 41.) The FDIC filed a Reply on June 18, 2012. (Reply, Doc. 45.) Having read and considered the papers, heard oral argument, and taken the matter under submission, the Court GRANTS IN PART and DENIES IN PART the FDIC's Motion to Dismiss.

I. BACKGROUND

Carter is a former employee of IndyMac Bank, F.S.B. ("the Bank") and IndyMac Resources, Inc. ("Resources") (collectively, "IndyMac"). (Third-Party Compl. ("TPC") ¶ 6, Doc. 13.) The employment agreement ("Employment Agreement") between Carter and Resources provides for severance in the event of termination without cause. (Employment Agreement § 5.2.5, Req. Judicial Notice, Ex. 3, Doc. 38.) The Employment Agreement also provides that "[i]f [Resources] is in default (as defined in Section 3(x)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (x)(1)), all obligations under this Agreement shall terminate as of the date of default, but Employee's vested rights shall not be affected." (*Id.* § 8.10.3.)

Beginning in 2007, IndyMac began to suffer as a result of the decline of the mortgage industry. (TPC ¶ 8.) To incentivize employees to remain with IndyMac, IndyMac offered retention loans ("Retention Loans") to its employees. (*Id.* ¶ 9.) On May 15, 2008, Carter received a Retention Loan from the Bank, and executed a promissory note ("Promissory Note") in the amount of $375,000. (Compl., Ex. 1, Doc. 1.) Section II.c of the Promissory Note (the "Offset Provision") provides that in the event of Carter's involuntary termination without cause, "any payment of principal and interest due upon acceleration . . . shall be deducted from any earnings payments, contractual severance amounts," or other payments due to Carter. (*Id.*) IndyMac assured Carter that the Retention Loan would need to be repaid only as a set-off against severance, and would not be due in the event of termination without cause. (TPC ¶ 10.)

On July 7, 2008, Rayman Mathoda ("Mathoda"), Resources' CEO and the Bank's Executive Vice President and Chief Administrative Officer, told staff in an email that the Bank "will not be asking for the retention loans back . . . but will W2 them (so they will be included on people's income for 2008)." (*Id.* ¶ 13.) Also on July 7, 2008, Mathoda told Carter that Carter was being involuntarily terminated and that his last day of employment would be September 15, 2008. (*Id.* ¶ 19.) Mathoda also stated, "Between now and then, you will continue to receive your regular pay and your benefits will continue . . . . You will also receive your actual incentive earned during that time, paid on the existing schedule." (*Id.*)

On July 11, 2008, the FDIC was appointed as the Bank's receiver. (*Id.* ¶ 15.) At the same time, the FDIC was also appointed conservator of IndyMac Federal Bank F.S.B. ("IndyMac Federal"), a new entity created to manage the assets and deposit liabilities of the Bank. (Mot. at 3.) [1] From July 11, 2008, until September 15, 2008, Carter was employed by IndyMac Federal. Between July 2008 and September 2008, IndyMac Federal sent out three emails to all employees that IndyMac Federal "did not anticipate changes to … pay or benefits coverage." (Opp'n, Ex. 2-4.) None of the emails made any specific reference to severance payments.

[1] Because this Motion is brought in part as a factual challenge to subject matter jurisdiction under Rule 12(b)(1), the Court includes some facts outside the pleadings. *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

On March 9, 2009, IndyMac Federal was placed into receivership, and the FDIC was appointed as receiver ("Receiver") for both the Bank and IndyMac Federal. (Compl. ¶ 18.) In accordance with Section 1821(d)(3)(B)(i) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the FDIC's appointment as receiver of Resources was published in the *Los Angeles Times* and the *Wall Street Journal* on July 16, August 15, and September 15, 2008, and May 28, June 29, and July 29, 2009. (Mot. at 6.) These publications informed claimants of Resources to "submit their claims . . . [through the FIRREA administrative remedies process] by October 14, 2008 [("the Bar Date")] …" and that "failure to file such claims by the Bar Date w[ould] result in disallowance by the Receiver." (Req. Judicial Notice, Ex. 2.) On November 12, 2009, the FDIC determined that the assets of the Receiverships were insufficient to make any distribution on claims of general unsecured creditors, pursuant to 74 Fed. Reg. 59,540 (Mot. at 4.)

Carter paid income taxes on the full amount of the Retention Loan. (TPC ¶ 21.) On January 6, 2012, Resources filed this action, asserting claims for declaratory relief and breach of contract, and seeking repayment of the Promissory Note. On January 9, 2012, Resources served Carter with this lawsuit. (Proof of Service, Doc. 6; TPC ¶ 22.) Thereafter, Carter filed claims with the FDIC, seeking severance and other unpaid wages. (TPC ¶ 24.) Carter asserts that he exhausted his administrative remedies on January 17, 2012. (*Id*.) Carter then filed a Third-Party Complaint ("TPC") on February 24, 2012, asserting claims for breach of contract and breach of implied contract based on denial of severance, violation of California's unfair competition law, and misrepresentation. Carter also seeks equitable relief enjoining Resources from collecting under the Promissory Note and a declaratory judgment that Resources is not entitled to collect funds stemming from the Promissory Note.

On May 21, 2012, the FDIC filed this Motion to Dismiss Carter's TPC, under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), on three grounds: (1) the Court lacks subject matter jurisdiction because Carter failed to timely exhaust his administrative remedies; (2) the Court lacks subject matter jurisdiction and/or Carter fails to state a claim upon which relief can be granted because there are insufficient assets in the receiverships of the Bank and IndyMac Federal Bank to make distributions to general unsecured creditors, mooting Carter's claims; and (3) Carter fails to state a claim upon which relief can be granted because the relief requested would constitute a prohibited golden parachute payment. (Mot. at 1.)

II. LEGAL STANDARDS

A. 12(b)(1)

"A jurisdictional challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting extrinsic evidence." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). In other words, a motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) can be facial or factual. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984-985 (9th Cir. 2008). "By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Meyer*, 373 F.3d at 1039 (finding defendant's 12(b)(1) motion to be factual, where defendant challenged whether grass residue constituted solid waste under the Resource Conservation and Recovery Act). "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.* However, "[a] Court may not resolve genuinely disputed facts where the question of jurisdiction is dependent on the resolution of factual issues going to the merits." *Roberts v. Carrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Here, the FDIC asks the Court to look outside the pleadings, and thus, has mounted a factual attack.

B. 12(b)(6)

When evaluating a Rule 12(b)(6) motion, the Court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*, 32 F.3d 1382, 1384 (9th Cir. 1994). To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Twombly*, 550 U.S. at 555).

III. DISCUSSION

Administrative claims must be submitted through the FIRREA administrative remedies process prior to the Bar Date and in accordance with 12 U.S.C. § 1821(d)(3)(B), or the claim is lost and may not be pursued in any court. 12 U.S.C. §§ 1821(d)(5)(C)(i) and (13)(D); *see also Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1285 n.11 (9th Cir. 1994). In this Circuit, compliance with the claims Bar Date is a jurisdictional requirement. *Id.* at 1284. Nonetheless, *Intercontinental* left open the possibility that the Bar Date may be tolled in the case of "affirmative misconduct or intentional disregard of the mail notice requirement by the FDIC." *Id*. at 1285. Accordingly, the Court concludes that compliance with the Bar Date is jurisdictional, but that the Bar Date may be tolled.

It is undisputed that Carter failed to submit a claim to the FDIC until January 2012, over three years after the Bar Date. Nonetheless, Carter argues that he was not required to exhaust his administrative remedies, under the exception set forth in *Sharpe v. F.D.I.C.*, 126 F.3d 1147 (9th Cir. 1997). In *Sharpe*, the Ninth Circuit held that a breach of contract claim for a contract fully performed by the claimant but not repudiated by the FDIC is not subject to the FIRREA claims process.[2] *Id.* at 1156, *abrogated in part on*

[2] As the receiver for an insured depository institution, the FDIC was authorized to disaffirm or repudiate any contract which the institution entered into before default if it determined, in its discretion, that: (1) performance would be burdensome; and (2) disaffirmance or repudiation would promote the orderly administration of the institution's affairs. 12 U.S.C. § 1821(e)(1). A party can then bring a claim against the FDIC for compensatory damages. *See Sharpe*, 126 F.3d

other grounds by McCarthy v. F.D.I.C., 348 F.3d 1075, 1078 (9th Cir. 2003). Carter asserts that his breach of contract claim, based on the FDIC's failure to pay his severance, falls within this exception. (Opp'n at 11-12.) In the alternative, Carter argues that the FDIC's misconduct should toll the Bar Date. (*Id.* at 9-11.)[3]

Although Carter characterizes his claim as one for breach of contract, the Court notes that Carter has not been clear—in his TPC, his Opposition to this Motion, or at oral argument—about which contract or contracts are the subject of this action. In fact, the TPC alleges that "Carter had contracts and implied contracts with [Resources] and [the Bank] . . . entitling him to severance compensation if he was involuntarily terminated in a layoff." (TPC ¶ 26.) Because the analysis of the parties' arguments depends on the nature of the contract, the Court will discuss each of the three plausible characterizations raised by the TPC.

A. Failure to Exhaust

1. Full Severance under the Resources Employment Agreement

The Employment Agreement between Resources and Carter explicitly provides for severance in the event of involuntary termination. However, the appointment of the FDIC as receiver, on July 11, 2008, constituted an event of default, as defined by 12 U.S.C. § 1813 (x)(1). Accordingly, under 12 C.F.R. § 563.39(b)(4), "all obligations under the [Agreement] . . . terminate[d] as of the date of default," except for Carter's "vested rights." *See Aronson v. R.T.C.*, 38 F.3d 1110, 1113 (9th Cir. 1994); *Williams v.*

at 1155 ("Section 1821(e) allows the FDIC to disaffirm or repudiate any contract it deems burdensome and pay only compensatory damages.").

[3] Carter relies on *Carlyle Towers Condo. Ass'n v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999), for the argument that "any deadline for filing" . . . "would not be a cause for denying jurisdiction, because it would warrant tolling, based upon the Government's failure to provide notice of such limitations period." (Opp'n at 9.) The Ninth Circuit has not adopted the Second Circuit's conclusion in *Carlyle* that the Bar Date operates like a statute of limitations, "subject to waiver, estoppel, and equitable tolling," instead of as a jurisdictional requirement. *See Carlyle*, 170 F.3d at 310 (citations and internal quotation marks omitted).

F.D.I.C., 11-35812, 2012 WL 3939964, at * 1 (9th Cir. Sept. 11, 2012) ("when the FDIC takes over as receiver, 'all obligations under the [employment] contract shall terminate as of the date of default' except for any 'vested rights of the contracting parties[.]'") (quoting 12 C.F.R. § 563.39(b)(4)).[4]

Carter asserts that he did not file an administrative claim until January 2012 because he was unaware until then of the FDIC's position regarding repayment of the retention loan. (TPC ¶ 22.) In his Opposition, Carter argues that he is excused from exhausting his administrative remedies because of the FDIC's misconduct. Specifically, he asserts that the FDIC waited for the Bar Date to pass before "ambushing" him with its position regarding repayment of the Retention Loan. (Opp'n at 13.) He summarizes his argument with respect to notice this way: "Simply put, Mr. Carter was neither aware of the claims deadline nor aware of any reason to investigate it, because the retention incentive was portrayed by the FDIC/IndyMac as fully resolved at all times before the claims deadline." (*Id.*)

However, Carter seeks the full amount of his contractual severance, under the Employment Agreement, in this suit. (TPC ¶ 58; Carter Decl. ¶ 27, Doc. 42.) He was certainly aware that he did not receive the full $750,000 severance when he was terminated on September 15, 2008. Nonetheless, he still failed to file a claim for over three years. Under these circumstances, the Court concludes that tolling the bar date is

[4] Carter does not argue, and could not argue, that his full severance under § 5.2.5 had directly vested as of July 11, 2008. Instead, Carter alleges that his "entitlement to *keep the retention incentive payment* had vested" on July 7, 2008, the date Carter alleges he was told in a staff email that IndyMac would not be asking for the retention loans back. (TPC ¶ 13 (emphasis added).) Carter alleges that he was "notified by IndyMac Bank, F.S.B., that the compensation reflected in the Promissory Note (*i.e.*, "the retention loan") was vested and considered fully earned compensation" in 2008, (*Id.* ¶¶ 47-48), and that he relied upon these assurances "in paying taxes on the wages and investing and spending this money for the benefit of him and his family." (*Id.* ¶ 48.) Viewed in the light most favorable to Carter, the Promissory Note's Offset Provision and reassurances from IndyMac that the Retention Loan would not have to be repaid may imply that there would be *some* severance by which to offset repayment of the Retention Loan, but they could not have caused the right to severance under the Employment Agreement to vest. It is premature to determine at this stage whether the Retention Loan "vested."

inappropriate. Furthermore, Carter's right to severance under the Employment Agreement terminated on July 11, 2008, leaving nothing for the FDIC to repudiate. *See supra*, note 4. Hence, the *Sharpe* exception does not apply to a claim under the Resources Employment Agreement. Accordingly, Carter's claim for severance based upon the Resources Employment Agreement cannot proceed because Carter failed to exhaust his administrative remedies.

2. "Earned Severance"

Carter also suggests that his right to severance may not derive directly from the Employment Agreement, but instead from other "implied" contracts. (TPC ¶ 26.) One characterization of the allegations—threads of which run through Carter's papers and oral argument—is that he had a contract with IndyMac in which his severance was paid, at least in part, in advance when he received his Retention Loan. In other words, he "earned" part of his severance—an amount equal to the Retention Loan—at the time that he agreed to stay with IndyMac to "try to build the companies back to solvency, or at least minimize the losses to [IndyMac's] depositors and investors." (*Id.* ¶¶ 9-11.) Carter further alleges that he "believe[s] the FDIC provided written approval for the severance and retention incentive enticements." (*Id.* ¶ 20.)

Under the "earned severance" characterization of the implied contract at issue, Carter had fully performed when he agreed to stay with IndyMac, and the FDIC did not repudiate this contract. Although Carter's claim for the full amount of his severance does not fall within the *Sharpe* exception, as discussed above, because any right to future severance terminated as a matter of law, the "earned severance" portion, i.e., the amount of the Retention Loan, could plausibly fall within the *Sharpe* exception as the bargained-for benefit of a fully performed implied contract. Accordingly, under this characterization, Carter was not required to exhaust his administrative remedies with respect to the "earned severance," and Carter's claim for equitable and declaratory relief with respect to the amount of the Retention Loan can proceed.

3. Implied Contract with FDIC and IndyMac Federal

A third interpretation of the allegations, which is also hinted at in Carter's papers, is that even if the Resources Employment Agreement terminated, various assurances by the FDIC and IndyMac Federal that Carter's "pay and benefits" would continue implied that he would be entitled to his contractual severance, and the FDIC never repudiated *that* implied contract, even if the Employment Agreement terminated as a matter of law. This interpretation is supported by Carter's statements in his declaration and supporting documentation that Mathoda wrote in an email on July 7, 2008, that "between [July 7, 2008] and [September 15, 2008], you will continue to receive your regular pay and your benefits will continue . . . ." (Carter Decl. ¶ 21.) Carter further alleges that "[a]fter the takeover, the FDIC and IndyMac Federal continually promised that my compensation and benefits would remain intact." (*Id.* ¶¶ 22-24.)

Like the claim for "earned severance," this implied contract characterization also falls within the *Sharpe* exception because Carter has a colorable claim that this implied contract was fully performed when Carter's employment terminated, but was never repudiated by the FDIC. The FDIC contends that IndyMac Federal "could not have ratified or revived [Carter's] employment agreement because it terminated by operation of law." (Reply at 12.) However, the FDIC's argument that the Employment Agreement terminated as a matter of law is not applicable to an implied contract formed with IndyMac Federal and/or the FDIC.

Accordingly, although Carter's claim under the Resources Employment Agreement is dismissed for failure to exhaust administrative remedies, his claims based on earned severance and an implied contract with the FDIC and IndyMac Federal survive a failure to exhaust argument and must be analyzed for mootness.

B. Mootness

"Courts have dismissed claims against the FDIC brought by general unsecured creditors on jurisdictional grounds after determining that the FDIC lacked sufficient assets to satisfy the plaintiffs' claims." *Landwehr v. F.D.I.C.*, 734 F. Supp. 2d 161, 167 n.4 (D.D.C. 2010) (citing *Henrichs v. Valley View Dev.*, 474 F.3d 609, 615 (9th Cir.

2007)). "Courts have also concluded that prudential mootness warrants the dismissal of claims against the FDIC where the worthlessness of those claims has been established by an insufficient assets determination." *Id.* "[T]he FDIC's argument that the insufficient assets determination conclusively establishes the worthlessness of the plaintiffs' monetary claims turns on its assertion that the plaintiffs are, at best, general unsecured creditors of the receiverships." *Id.* at 166.

Carter asserts that he is not a general unsecured creditor because his severance should be considered an administrative expense, under 12 C.F.R. § 360.4, or akin to a deposit liability, under 12 C.F.R. § 360.3. (Opp'n at 18.) The Court will first consider whether his claim for "earned severance" qualifies as an administrative expense. The Court will then consider whether his claim for the total amount of his severance pursuant to an implied agreement entitles him to priority above that of a general unsecured creditor.

1. "Earned Severance"

Administrative Expenses are those "necessary expenses incurred by the receiver in liquidating … a failed insured depository institution. Such expenses shall include pre-failure and post-failure obligations that the receiver determines are necessary and appropriate to facilitate the smooth and orderly liquidation … of the institution." *Battista v. F.D.I.C.*, 195 F.3d 1113, 1119 (citing 12 C.F.R. 360.4). The FDIC, interpreting this rule when it was first promulgated in 1993, noted that administrative expenses "generally . . . do not include expenses such as severance pay claims, golden parachute claims and claims arising from contract repudiations." *Id.* (citing 58 Fed.Reg. 43,069, 43,070 (1993)).

While administrative expenses do not generally include severance, Carter's characterization of the retention loan as "earned severance," and the allegation that Carter received a W2 for that compensation, are sufficient for the Court to conclude, at this stage of litigation, that the "earned severance" may be an exception to the general rule set forth in 12 C.F.R. § 360.4.

Carter also argues that his severance is a deposit liability. (Opp'n at 24.) Notably, however, he refers only to his "earned compensation," which presumably is equivalent to the "earned severance" as a deposit liability. Accordingly, the Court concludes that Carter's claim for "earned severance," in the amount of the retention loan ($375,000) may proceed under the "earned severance" characterization.

2. "Full Severance" Pursuant to an Implied Agreement

While Carter's claim for that portion of his severance that was "earned severance" may qualify as an administrative expense at this stage of litigation, there is nothing about the remainder of his severance that would except it from the general rule that administrative expenses do not include severance. Carter's claim for the total amount of his severance pursuant to an implied agreement therefore does not entitle him to priority above that of a general unsecured creditor. Accordingly, even if Carter has stated a claim for the full amount of his severance under an implied agreement, this claim is moot, and therefore dismissed.

C. Golden Parachute

The Court concludes that it is inappropriate to determine at this stage of litigation whether the "earned severance" is an improper golden parachute. *See Landwehr*, 734 F. Supp. 2d at 172.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS IN PART and DENIES IN PART Defendant's Motion to Dismiss.

Specifically, the Court concludes that (1) it lacks subject matter jurisdiction with respect to Carter's claim for full severance under the Resources Employment Agreement because Carter failed to timely exhaust his administrative remedies; (2) Carter's claim for full severance under an implied contract characterization is mooted because there are insufficient assets in the IndyMac receiverships to make distributions to general unsecured creditors; and (3) Carter's claim for "earned severance" in the amount of the Retention Loan may proceed.

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