EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. IRA GAMMERMAN PART 27

Justice

Nacional Financiera, S.N.C.

-v-

Bankers Trustee Company Limited

INDEX NO. C121131-98

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
NOV 17 2000
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: NOV 13 2000

IRA GAMMERMAN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MD AF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

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NACIONAL FINANCIERA, S.N.C.,

Plaintiff,

-against-

BANKERS TRUSTEE COMPANY LIMITED,

Defendants.

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INDEX NO. 121131/98
P. C. # 13099

GAMMERMAN, J.:

This action is but one of many having their origin in the collapse of a series of highly ambitious, yet seriously flawed investment transactions, which were designed to ride on the backs of numerous problematic loans made for the purchase of real property in Mexico. The outcome, unsurprisingly, has seen more litigation than profit. In the present motion, plaintiff Nacional Financiera, S.N.C. ("Nafin") seeks partial summary judgment on its second, third, fourth and fifth causes of action of its Complaint against defendant, Bankers Trustee Company Limited ("BT"). BT cross-moves for the same relief, dismissing these claims.

Facts

The basic facts underlying this action, that have been set forth in several decisions rendered in related actions[1] are

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[1]*See, Bankers Trustee Company Limited v First Mexican Acceptance Corporation, et al.*, Index No. 601313/98; *Bankers Trustee Limited v Third Mexican Acceptance Corporation*, 601314/98.

recapitulated and enlarged upon here, as necessary. BT served as the Indenture Trustee under several Trust Indentures (the "Indentures"), pursuant to which several separate "Mexican Acceptance Corporations" issued approximately $400 million in securitized senior and subordinate Notes (designated "Class A" and "Class B" Notes), intended to finance real property development in Mexico. The Mexican Acceptance Corporations were special purpose entities formed under Mexican law by non-party Grupo Sidek, S.A. de C.V. ("Sidek"), a Mexican real estate developer, and its subsidiaries (together, the "Sidek Group"), for the purpose of financing the real estate development.

The present action involves the First Mexican Acceptance Corporation ("1MAC"), and the Third Mexican Acceptance Corporation ("3MAC")(together, the "MACS"). The 1MAC Indenture closed on October 9, 1991, and issued $40 million in Class A Notes, and $10 million in Class B Notes, payable in 1996. The 3MAC Indenture closed on April 23, 1993, and issued $50 million in Class A Notes, and $25 million in Class B Notes, due in 1998. The Notes were secured by the real property involved, plus the real estate purchasers' Promissory Notes and Installment Sales Agreements (the "Receivables"), which were owned by the Sidek Group.

The rights to the Receivables were assigned by the Sidek Group to the MACS, pursuant to Receivables Assignment Agreements ("RAAs"), but were held in trust by the Property

Trustee, non-party Bancomer, S.A. ("Bancomer"), pursuant to Receivable Trust Agreements ("RTAs"). Interest and principal payments on the Receivables were collected by a "Servicer," and paid over to Bancomer. The Sidek Group also executed Pledge Agreements and Irrevocable Instructions, which were submitted to BT at the closing of each of the MAC financings. These documents allowed BT to gain title to each of the subject properties upon a default. The Indentures and RAAs also provided for the substitution of Receivables for those originally pledged, under certain conditions.

Pursuant to the Indentures, Nafin, an industrial development bank organized and existing under the laws of Mexico, was the secondary guarantor for the principal and interest of all of the Class A Notes for both MACS. Sidek was the primary guarantor under the 1MAC Indenture, and Sidek and another entity involved with Sidek's real estate projects, non-party Grupo Situr, S.A. de C.V., were the primary guarantors on the 3MAC Indenture.

The MACS defaulted on interest payments in March 1996. In September 1996, 1MAC defaulted on its obligations under the Class A Notes. 3MAC's default on its obligations on the Class A Notes followed in 1998. Nafin, as secondary guarantor, paid over $20 million of 1MAC's debt (with Sidek, as primary guarantor, paying approximately $20 million), and the debt of nearly $30 million owed by 3MAC, upon the default of the primary guarantors.

Thus, Nafin, having fulfilled its guaranty, became subrogated to the rights of the MAC Class A Note holders. The Sidek Group's total debt on these and other transactions exceeded $2 billion.

Rather than pursue its rights to the collateral on a piece-by-piece basis, Nafin, after due deliberation, agreed to participate in a restructuring of the Sidek Group. In an Exchange Offer dated January 13, 1998, Nafin accepted, in exchange for its debt obligation, "Series A Trust Certificates" from the newly-formed Sidek Creditor Trust, to be paid from the liquidation of the Sidek Group's assets. As a result (and, as I have previously found), the Sidek Creditor Trust was assigned Nafin's rights under the Indentures, and the Sidek Creditor Trust is now subrogated to the rights of the MAC Class A Note holders, *see, Bankers Trustee Company Limited v First Mexican Acceptance Corporation, S.A., et al.*, Index No. 601313/98, decision dated September 23, 1999; *Bankers Trustee Company Limited v Third Mexican Acceptance Corporation, S.A.*, Index No. 601314/98, decision dated September 23, 1999. Both of these decisions have since been affirmed by the Appellate Division, First Department, *see, Bankers Trustee Company Limited v First Mexican Acceptance Corporation, S.A.*, ___ AD2d ___, 710 NYS2d 880 (1st Dept 2000).

However, Nafin, not expecting to recover the total amount of its loss through the restructuring, specifically

reserved its right to maintain an action against BT, as Indenture Trustee, for various acts of alleged negligence and misconduct.

In the instant Amended Complaint, Nafin brings numerous claims for breach of contract and breach of fiduciary duty against BT. On the present motion, Nafin concentrates on its second, third, fourth and fifth causes of action, in which Nafin maintains that BT's negligent mishandling of the documentation concerning the Receivables, both at the respective MAC closings, and afterwards, allowed the collateral to be substantially reduced in value from that originally promised, with the result that the Receivables, as they existed in reality, could not, and did not, serve as adequate security for the MAC debts.

Discussion

Statute of Limitations

Nafin filed its Complaint on November 23, 1998. BT claims that any events that underlie the second, third, fourth and fifth causes of action, which occurred more than six years prior to the commencement of the action, are barred by Statute of Limitations applicable to contract actions, *see*, CPLR 213(2). This would implicate all events in connection with BT's receipt of the Irrevocable Instructions at the 1MAC closing on October 9, 1991 (as raised in the second cause of action), and any transactions in connection with the substitution of Receivables or release of liens alleged to have taken place prior to November

23, 1992 (as asserted in a portion of the fourth cause of action)[2].

Nafin has failed to respond in any meaningful way to these arguments. Consequently, so much of Nafin's claims as are based on events preceding November 23, 1992, including those based on the 1MAC closing on October 9, 1991, are time-barred, and are dismissed.

Summary Judgment

In the second and third causes of action, Nafin alleges that BT was negligent in failing in its "ministerial duties" to (1) execute the Irrevocable Instructions it received at the MAC closings[3], and (2) in failing to ensure that it received all of the Irrevocable Instructions at the closings. Nafin insists that executing the Irrevocable Instructions was an obligation that was necessarily implied, if not explicitly stated, in the Indentures, and that, at the least, making sure that all of the Irrevocable Instructions were accounted for upon each closing was a mere ministerial or administrative act that was implied by BT's express obligation to receive copies of all of the Irrevocable Instructions, which BT failed to perform.

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[2]Apparently, some, but not all, of the $15,944,064 that Nafin claims was improperly released by BT, was released prior to November 23, 1992.

[3]Since the second cause of action, regarding the 1MAC closing, is time-barred, the following discussion relates almost exclusively to the third cause of action.

In the fourth and fifth causes of action, BT is alleged to have negligently failed to follow the procedures for the allowable substitution of Receivables, and for the release of liens upon certain Receivables, allowing the collateral to become seriously impaired. Specifically, BT is alleged to have allowed ineligible Receivables to replace eligible ones, and to have allowed the release of liens before the underlying debts had been satisfied. Nafin claims that BT has as much as admitted its negligence in failing to procure and execute the correct number of Irrevocable Instructions, and that no issues of fact exist with respect to BT's negligence in the matter of accepting substitutions of Receivables, and in releasing liens on certain properties without proper documentation. BT counters that, as a matter of law, the Indentures do not require the level of activity and vigilance in the oversight of the Receivables that Nafin would attribute to BT, and so, seeks dismissal of these claims.

The issue is whether BT breached any actual duties owed to Nafin under the terms of the Indenture, or under New York law. "The duties of the indenture trustee are strictly defined and limited to the terms of the indenture [citations omitted]", *Elliott Associates v J. Henry Schroder Bank & Trust Co.*, 838 F2d 66, 71 (2d Cir 1988); *see also, Green v Title Guarantee & Trust Co.*, 223 App Div 12 (1st Dept 1928), *affd* 248 NY 627 (1928);

Hazzard v Chase Nat. Bank of City of New York, 159 Misc 57 (Sup Ct, NY County 1936), *affd* 257 App Div 950 (1st Dept 1939), *affd* 282 NY 652 (1940), *cert denied* 311 US 708 (1940).

> [S]o long as the trustee does not step beyond the provisions of the indenture itself, its liability is measured, not by the ordinary relationship of trustee and cestui, but by the expressed agreement between the trustee and the obligor of the trust mortgage. Where the terms of the indenture are clear, no obligations or duties in conflict with them will be implied.

Hazzard v Chase Natl. Bank of City of New York, 159 Misc, *supra*, at 80-81.

However, at least one New York court has articulated an extension to the general rule, finding that the indenture trustee is responsible for performing such basic ministerial or administrative "chores" that involve no exercise of discretion, as are necessary to accomplish the goals of the Indenture, *see, New York Medical Care Facilities Finance Agency v Bank of Tokyo Trust Company*, 163 Misc 2d 551, 559 (Sup Ct, NY Co 1994), *affd* 216 AD2d 126 (1st Dept 1995)("*Bank of Tokyo*"). Two Federal Courts have followed this aspect of *Bank of Tokyo, see, Dresner Co. Profit Sharing Plan v First Fidelity Bank, N.A., New Jersey*, 1996 WL 694345 (SD NY 1996)(an indenture trustee may be liable for failure to perform basic, nondiscretionary, ministerial tasks); *LNC Investments, Inc. v First Fidelity Bank, National Association*, 935 F Supp 1333, 1347 (SD NY 1996)(same, citing *Bank of Tokyo*); *Williams v Continental Stock Transfer & Trust Co.*,

1 F Supp 2d 836, 840 (ND Ill 1998)(describing the necessary performance of "basic, non-discretionary, ministerial tasks under New York law as "extra-contractual duties" imposed on the indenture trustee under New York law, citing *LNC Investments, Inc. v First Fidelity Bank, Natl. Assn., supra.*

In *Bank of Tokyo*, a case involving an indenture trustee's failure to present bonds pursuant to an early redemption call, or to inform its principal of the early redemption, the lower court found that the "obligation to fulfill these [ministerial and administrative] tasks is inherent in the very nature of an indenture trustee's service ... ," regardless of the lack of specific language in the Indenture requiring the indenture trustee to monitor the bonds in any way, *Bank of Tokyo*, at 559. As a result, "absent a clear and unequivocal statement in the indenture (or other pertinent document) relieving the trustee of this duty, or lowering the basic standard of care," the trustee was liable for its negligence, *id.*

However, the Appellate Division, First Department, in affirming *Bank of Tokyo*, did not go so far as to adopt its reasoning. Instead, the Appellate Court, citing to specific language in the indenture, held that the indenture *expressly* required the trustee to notify the plaintiff of the redemption call, and that this duty "clearly arose under the terms of the indenture", *New York Medical Care Facilities Finance Agency v*

Bank of Tokyo Trust Company, 216 AD2d 126, *supra*. Thus, despite the affirmance of *Bank of Tokyo*, no New York Appellate Court has held that an indenture trustee is liable for failing to perform non-discretionary, ministerial or administrative "chores" inherent, but not specified, in the indenture.

Section 8.01(a) of each of the Indentures states that "[t]he Trustee, prior to the occurrence of an Event of Default or Potential Event of Default known to it ... , undertakes to perform such duties and only such duties as are specifically set forth in this Indenture."

According to BT, the Indenture did not obligate BT to "receive, execute or examine the Irrevocable Instructions," to "secure documentation with respect to the substitution of Receivables," to "ensure payment prior to the release of liens," or to "conduct a pre-default discretionary investigation concerning the Irrevocable Instructions, substitution of Receivables or release of liens," as Nafin claims, and that, absent any such explicit duties, no claims for their breach can lie.

BT asserts that, besides certain provisions in the Indentures that strictly limit its duties and obligations as Indenture Trustee, the Indentures also contain specific exculpatory language that strictly limits BT's liability for negligence, which bars Nafin's attempts to expand BT's

obligations and duties with implied duties beyond the scope of the Indentures.

The Irrevocable Instructions

The issue with regard to the Irrevocable Instructions is whether BT had any real duties to execute the Irrevocable Instructions, or to see to their completeness or correctness, under the terms of the Indentures.

The plain language of section 2.01 of each Indenture requires only the "delivery by each Sidek Subsidiary to the appropriate Property Trustee of the Irrevocable Instructions, with a copy thereof to the Trustee" before the Notes would be issued at the MAC closings.[4]

According to BT, its *only* express obligation with regard to the Irrevocable Instructions under the Indentures was to receive a copy of them, as indicated in the above language. BT insists that, under the Indentures, the Property Trustee, and not BT, was responsible for taking custody of the Irrevocable Instructions, because the Property Trustee, and not BT, "had the duty of administering the trusts that held title to the real estate."

Nafin contends that section 2.01 contains inherent duties that were non-discretionary and ministerial in nature (such as would obligate BT to act under *Bank of Tokyo*), to wit:

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[4]*See*, 1MAC, § 2.01(vii); 3MAC § 2.01(viii).

that BT was obligated to ensure upon receipt of the Irrevocable Instructions that the copies that it received comported in number and in content with the Irrevocable Instructions that the Sidek Group had delivered to the Property Trustee; in short, that the Irrevocable Instructions were correct and complete. Nafin also claims that BT was obligated to execute the Irrevocable Instructions upon receipt.

BT concedes in its Complaint in a related action, *Bankers Trustee Company Limited v Kidder, Peabody International Limited, et al.*, Index No. 601999/99 ("*Bankers Trustee*"), that the Sidek Group did not deliver the Irrevocable Instructions to the appropriate Property Trustee, with a copy to BT, and that "most such irrevocable instructions and pledges were never made, and that many that may have been made did not comply with the applicable requirements ... ." Nafin asserts that these statements constitute admissions by BT of its negligence in failing to monitor the number and content of the Irrevocable Instructions, and serve as grounds for summary judgment in Nafin's favor.

Nafin errs. First, section 8.01(d) of the Indentures provides that, while BT will be relieved of its own negligence for any failure to act on its contractual duties, or its own "wilful misconduct".

> (i) unless an event of Default or Potential Event of Default known to it shall have occurred and be

> continuing, the duties and obligations of the Trustee shall be determined *solely by the express provisions of this Indenture*, and the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Indenture and the Notes, and no implied covenants or obligations shall be read into this Indenture against the Trustee ... [emphasis supplied].

id., § 8.01(d)(i). Thus, specific language in the Indenture exculpates BT from liability for negligence in the performance of duties not expressly set forth in the Indentures.

The plain language of section 2.01 of the Indentures states only that the Sidek Group must deliver the appropriate Irrevocable Instructions to the Property Trustee (here, Bancomer), and that copies of the Irrevocable Instructions that the Property Trustee received must then be sent to BT. The Indentures do not instruct BT (or any party other than Sidek) to act in any manner with regard to the Irrevocable Instructions. If, in fact, BT is required by New York law to complete any such non-discretionary, ministerial tasks as may be implied by section 2.01 (which is doubtful), such duties extend no further than insuring that it received copies of the same Irrevocable Instructions that the Sidek Group delivered to Bancomer. There is no language that would require BT to go beyond this simple act, or to require it to execute the Irrevocable Instructions, to inspect them for correctness or completeness, or to compare them to the list of Receivables contained in other documents that it had received as part of the closings. The fact that such an

investigation might have been an "inordinately simple" one to perform, as Nafin claims is irrelevant, since BT had no express or implied duty to investigate. Thus, BT cannot be held liable for its failure to perform acts that it was not required by the Indentures to perform.[5]

BT also relies on sections 8.01(d)(ii) and (iii), and 8.02(a) and (g) of the Indentures. Section 8.01(d)(ii) provides that:

> (ii) In the absence of the Trustee's bad faith, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificate or opinions furnished to it; but, in the case of any certificates or opinions which by any provisions hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture ... ,

while subsection (iii) continues that "the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer or Officers."

Section 8.02(a) states further that:

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[5]In the Federal action, *Williams v Continental Stock Transfer & Trust Company* (1 F Supp 2d 836, *supra*), in which the Illinois District Court adopted the standard set forth in *Bank of Tokyo* with regard to the duties of an indenture trustee, the Court held that language in an indenture requiring the delivery of documents to the trustee at closing, did not impose any obligations on the trustee to obtain these documents, so that the trustee was not negligent in closing without all of the documentation that it was to have received under the indenture. This parallels the present facts.

> the Trustee ... may rely upon, and shall be protected in acting or refraining to act upon, any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties and the Trustee ... shall have no responsibility to ascertain or confirm the genuineness of any signature of any such party or parties ... .

Finally, section 8.02(g) provides that "the Trustee shall not be bound to make any investigation into the facts or matters stated in any instrument delivered to it pursuant hereto," but that BT may, in its own discretion, make any investigation "into such facts or matters as it may see fit ... ."

Prior to the 3MAC closing[6], BT received an opinion letter from the Sidek Group's special Mexican counsel, and an "Officer's Certification," in which the Sidek Group attested that all of the relevant agreements and documents had been duly executed and delivered by the Sidek Group, and that "all conditions precedent to the issuance of the Notes and the Sidek Guaranty, if any, therein set forth shall have been satisfied." In the Officer's Certificate, the Sidek Group further warranted that "Sidek has performed all of its obligations hereunder to be performed on or before the Closing Date ... ." Pursuant to the terms of the Indentures set forth above, BT was permitted to rely on the Sidek Group's certification that the underlying

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[6]Since any claim arising from BT's alleged negligence in its conduct of the 1MAC closing is time-barred, only the events of the 3MAC closing are addressed here.

documentation was complete at the 3MAC closing. Consequently, BT is entitled to the dismissal of Nafin's second and third causes of action.

Substitution of Receivables

Nafin charges that BT "permitted" the Sidek subsidiaries to substitute ineligible Receivables without compliance with the Indentures or RAAs, and "approved" substitutions without asking for proper documentation. BT has conceded that it never received the proper certification for certain substitutions related to the Indentures. BT denies, however, that it had any responsibility with respect to any of the Receivables, and claims that it was Bancomer's function, not BT's, to determine whether substitute Receivables met the criteria set forth in the RAAs.

In defense of the charge that it was negligent in allowing substitutions of inferior Receivables, BT argues that it was obligated under the Indentures to allow for substitutions if it received a request from the Sidek Group to do so, and, pursuant to section 8.02(a), was within its rights in relying upon the documentation supplied by the Sidek Group. Further, under section 8.02(g), BT claims that it was not required to make any investigation into the validity of the Sidek Group's documentation, and is absolved from any failure to do so by section 8.01(iii).

"[A] trustee's power to release or substitute collateral can arise only from the terms of the indenture itself. Apart from the authority contained therein, a trustee concededly has no right to release or substitute any collateral", *Hazzard v Chase Natl. Bank of City of New York, supra,* 159 Misc, at 80. However, the *Hazzard* court went on to confirm the general rule that no obligations or duties in conflict with the provisions clearly set forth in the indenture will be implied, and that New York has not followed the lead of other jurisdictions that would impose on the trustee "'the care and diligence which would naturally be expected of an intelligent person acting in like circumstances to protect his own mortgage'", *id.*, at 80-81, citing *Patterson v Guardian Trust Co. of New York,* 144 App Div 863, 867 (3d Dept 1911).

Section 3.12 of the Indentures deals with "Substitution and Purchase of Receivables," and permits the Sidek Group to substitute Receivables, "provided that any such substitution shall conform to, and shall be effected in compliance with, Clause NINTH of the Receivables Assignment Agreement, which provisions are incorporated by reference herein as if set forth in full herein." Clause Eighth of the RTAs also allows the Sidek Group to Substitute new Receivables in place of existing Receivables, also in compliance with Clause NINTH of the RAAs.

Section 3.13 in both Indentures that addresses "Eligible Receivables," contains the Sidek Group's warranty that all of the requirements with respect to any Substitute Receivable will be satisfied as of the date of the substitution. Section 3.13(b) lists the requirements necessary to make a Substitute Receivable an "Eligible Receivable." The 3MAC Indenture (but not the 1MAC Indenture) provides that the Sidek Group will certify to 3MAC, through its General Counsel, with a copy to BT, that all of the requirements of section 3.13(b) have been met for the substitution of a Receivable. Section 3.13 of each Indenture states that BT "shall not be responsible for determining whether a Receivable (including a substitute Receivable) is an Eligible Receivable", 1MAC Indenture, § 3.13(c); 3MAC Indenture, § 3.13(d).

The only contractual language obligating BT to act with regard to the substitution of Receivables is found in section 3.11(b)(1) of the 1MAC Indenture. Section 3.11 is concerned with "Priorities of Payment." Section 3.11(b)(1) requires BT to disburse amounts on deposit in the Principal Account[7] prior to any default, and upon the written request of the Sidek Group, for, *inter alia*, "the purchase of Substitute Receivables as described in Section 3.12 hereof and Clause Ninth of the [RAA]." The 3MAC Indenture has no comparable provision.

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[7]The section states that BT "shall" apply the amounts in the Principal Account to the enumerated purposes.

BT was not a signatory to either the RAAs or the RTAs, which were executed in Mexico, and written in Spanish, among the various members of the Sidek Group, the applicable MAC, and Bancomer.[8] These, among other documents, contain the obligations that the Sidek Group undertook with regard to the creation and maintenance of the Receivables, including their substitution under the appropriate circumstances, but do not create any obligations on BT's part.

By virtue of section 8.01(a) of each Indenture, BT was only obligated to "perform such duties as are specifically set forth in this Indenture." Only after a default was BT obligated to "use the same degree of care and skill" in the exercise of its duties "as a prudent person would exercise under the circumstances in the conduct of its own affairs." The language of the Indentures closely follows the standards set forth in *Hazzard*, and reiterates that court's finding that the "prudent person" standard does not apply to pre-default actions by BT, as long as BT performs the explicit duties set out for it in each Indenture, *see also, Dresner Co. Profit Sharing Plan v First Fidelity Bank, N.A., New Jersey, supra*, 1996 WL 694345, at *4 (language of indenture may provide that prudent person standard does not apply prior to event of default).

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[8]English translations of all relevant documents have been provided.

As in *Dresner, supra*, Nafin is unable to point to any section of the Indentures that required BT to "inspect or inquire about the collateral". Under the express terms of the Indentures, as set forth above, BT acted properly when it permitted the substitution of Receivables on the written request and certification of the Sidek Group, and was not required to determine the suitability of the substitutions. The Indentures did not require BT conduct an investigation into the suitability of the substitutions; they made such an inquiry discretionary, Section 8.07. Since there is no express obligation in the Indentures to investigate, the failure to do so does not constitute negligence, Section 8.01. BT is entitled to the dismissal of all claims based on its alleged failure to monitor or investigate the substitution of the Receivables.

Release of Liens

As with the substitution of collateral, the language of the Indentures absolves BT from any alleged negligence in the matter of the release of liens. Section 3.14(b), which is concerned with the "Release of Receivables Paid in Full," provides that

> [t]he Trustee shall, to the extent requested to do so by Sidek, a Sidek Subsidiary or the Receivables Trustee, execute a release indicating that it no longer retains a lien on, or an interest in, a specified Promissory Note, Installment Sale Agreement and/or related Property, provided that such Promissory Note or Installment Sale Agreement has been paid in full by or on behalf of the applicable purchaser.

Nafin claims that this section obligated BT to investigate to insure that the Receivable in question had been satisfied before the lien was released. However, pursuant to section 8.01 and 8.02 of the Indentures, BT could, and did, rely on the certification of the Sidek Group with respect to the satisfaction of each lien, and no further obligation on BT's part is established by the terms of the Indenture.

Conclusion

BT is entitled to partial summary judgment, dismissing the second, third, fourth and fifth causes of action because the terms of the Indentures executed by BT do not create the liability necessary to implicate BT for its alleged negligence with regard to its care of the collateral, and because certain claims, as set forth above, are barred by the applicable Statute of Limitations.

Accordingly, it is

ORDERED that Nafin's motion for partial summary judgment is denied; and it is further

ORDERED that BT's cross motion to dismiss the second, third, fourth, and fifth causes of action (designated "Counts" in the Complaint), is granted, and the second, third, fourth, and fifth causes of action are dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 13, 2000

J.S.C.

IRA GAMMERMAN