

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SAYBROOK TAX EXEMPT INVESTORS, LLC
and LDF ACQUISITION, LLC,

Plaintiffs,

v.

OPINION AND ORDER

12-cv-00255-wmc

LAKE OF THE TORCHES ECONOMIC
DEVELOPMENT CORPORATION; STIFEL
NICOLAUS & COMPANY, INC.; STIFEL
FINANCIAL CORP.; and GODFREY & KAHN,
S.C.,

Defendants.

Defendant Lake of the Torches Economic Development Corporation (“Lake of the Torches”) has moved this court for an order awarding it attorneys’ fees and costs for the misconduct of an opponent in a prior litigation, *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, W.D. Wis. Case No. 3:09-cv-00768-rtr. In that litigation, Wells Fargo Bank sued Lake of the Torches for breach of a Trust Indenture Agreement (“Indenture”).

At the outset, Lake of the Torches raised a defense of sovereign immunity and Wells Fargo countered that Lake of the Torches waived sovereign immunity through a clause in the Indenture. Judge Rudolph Randa found that sovereign immunity was not waived because the Indenture was void. His ruling was affirmed on interlocutory appeal by the Seventh Circuit Court of Appeals, which also remanded for a determination of “whether, now that the Indenture has been determined to be void, Wells Fargo has

standing to litigate claims on behalf of the bondholder. The court also must determine whether the collateral documents [to the Indenture], when read separately or together, waive the sovereign immunity of [Lake of the Torches].” *Wells Fargo v. Lake of the Torches*, 658 F.3d 684, 702 (7th Cir. 2011).

Seeking to avoid the standing question altogether, Wells Fargo filed a first amended complaint joining the plaintiffs who have now brought the present action, Saybrook Tax Exempt Investors, LLC and LDF Acquisition, LLC. Judge Randa initially criticized this move as inconsistent with the appellate court’s mandate, (case no. 3:09-cv-00768-rtr, dkt. #120), at which point Wells Fargo voluntarily dismissed the case without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1). Judge Randa subsequently recognized that Wells Fargo should have been allowed to add these parties because the “Seventh Circuit’s decision does not necessarily preclude the joinder,” and declined to sanction Wells Fargo or its counsel. (Case no. 3:09-cv-00768-rtr, dkt. #129 at 2.)

On the same day that Wells Fargo dismissed its case, plaintiffs filed this lawsuit. The allegations and claims contained in Wells Fargo’s revised, first amended complaint (and rejected by Judge Randa) are identical to those in the complaint in this lawsuit. As a result, Lake of the Torches calls this a duplicative lawsuit and asks the court for sanctions against Saybrook and LDF Acquisition. *See* Fed. R. Civ. P. 41(d) (“If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: . . . may order the plaintiff to pay all or part of the costs of that previous action . . .”). The flaw in this request is that this is the

first time Saybrook and LDF Acquisition have ever sued Lake of the Torches on these claims.

In the previous action, Wells Fargo brought suit in its capacity as trustee, and acted as the real party in interest, because it had an obligation to enforce the rights of bondholders under the Trust Indenture Agreement. When the Indenture was declared void by the court of appeals, Wells Fargo's direct cause of action dropped out, causing that court to question whether Wells Fargo had standing to litigate further. Wells Fargo apparently took the position that even if it could not continue to litigate, the case might proceed if it was allowed to add breach of contract claims on the bonds, along with the claims of the real parties in interest to those claims, Saybrook and LDF Acquisition. But Wells Fargo was never able to successfully amend its complaint to add these claims, nor were Saybrook and LDF Acquisition able to join the lawsuit. At most, Wells Fargo *unsuccessfully* attempted to join them, shortly before it voluntarily dismissed its suit altogether. Thus, Saybrook and LDF never were parties to the previous action and there is no basis to sanction them for filing a duplicative claim.

Even if this court were inclined to treat Saybrook, LDF Acquisition and Wells Fargo as one party for Rule 41(d) purposes, it would still decline to issue sanctions. Wells Fargo duly attempted to add Saybrook and LDF Acquisition as parties to the prior action, only filing this case when Judge Randa refused to allow amendment. This was the next best option under the circumstances. As for the cost and hassle of "duplicative" litigation, the court notes that the primary issue litigated in the previous lawsuit was the

validity of the Trust Indenture Agreement, which is no longer central to this lawsuit since this court is bound by the Seventh Circuit's previous holdings on the subject.

Indeed, the only issues from the previous case that are likely to be disputed now are the ones that were teed up by the mandate from the court of appeals, but never reached. Regardless, the court can find no fault with plaintiffs pursuing claims directly once Wells Fargo had determined it lacked standing to do so.

ORDER

IT IS ORDERED that:

- (1) defendants' motion to lift the stay and to award sanctions (dkt. #43) is DENIED; and
- (2) plaintiffs' motion for extension of time to respond (dkt. #47) is DENIED as moot.

Entered this 8th day of March, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge