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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of October, two thousand and four.

PRESENT:

HON. WILFRED FEINBERG
HON. RICHARD J. CARDAMONE
HON. BARRINGTON D. PARKER, JR.,
Circuit Judges,

Banco Espirito Santo de Investimento, S.A.,
Plaintiff-Appellant

**SUMMARY ORDER
No. 04-0622-cv**

v.

Citibank, N.A.,
Defendant-Appellee

COUNSEL FOR PLAINTIFF-APPELLANT: EUGENE D. GULLAND, PETER D. TROOBOFF,
MICHAEL L. ROSENTHAL, Covington & Burling.
Washington, DC. LINDA C. GOLDSTEIN, Covington
& Burling. New York, NY.

COUNSEL FOR DEFENDANT-APPELLEE: DAVID L. CARDEN, JAYANT W. TAMBE, TODD R.
GEREMIA, Jones Day. New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New

1 York (Mukasey, C. J).

2
3 ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND
4 DECREED that the judgment of the District Court be and it hereby is AFFIRMED.
5

6 Banco Espirito Santo de Investimento, S.A. (“BESI”) appeals from a judgment of the
7 District Court for the Southern District of New York (Mukasey, C.J.) dismissing claims brought
8 against Defendant-Appellee Citibank, N.A. (“Citibank”) pursuant to Fed. R. Civ. P. 12(b)(6). In
9 addition to dismissing BESI’s complaint, the District Court denied BESI leave to amend on the
10 grounds that, given the facts alleged by BESI, amendment would be futile. Familiarity with the
11 relevant facts, procedural history, and the issues raised on appeal is presumed. We review
12 dismissals under Rule 12(b)(6) *de novo*. *Moore v. Paine-Webber, Inc.* 189 F.3d 165, 169 (2d
13 Cir. 1999).

14 In March 1997, BESI invested \$10 million in income notes in a financing entity known as
15 Captiva Finance Ltd. (“Captiva I”) and in May 1998, BESI invested \$15 million in a similar
16 fund, called Captiva III Finance Ltd. (“Captiva III”). Both Captiva I and Captiva III were
17 established in 1995 by Citibank as a vehicle for investing in Collateralized Loan Obligations,
18 which were notes issued against pools of high-yield debt securities. The funds were marketed by
19 Citibank, which provided various management and advisory services.

20 After the investments failed, BESI filed a seven-count complaint against Citibank. BESI
21 asserted claims for, *inter alia*, breach of its contract with Citibank, breach of contracts between
22 Citibank and the Captiva entities to which it claimed it was an implied third-party beneficiary,
23 and breach of an implied covenant of good faith. It also alleged breach of fiduciary duties,
24 promissory estoppel, and fraud. In essence, BESI alleged that Citibank, through a series of

1 deliberate misstatements and promises, had fraudulently induced BESI to invest and then failed
2 to fulfill its promised supervisory role.

3 The District Court dismissed all claims. It concluded that BESI's contract and
4 promissory estoppel claims, based on promises allegedly made orally by Citibank personnel,
5 failed in the face of explicit language in the offering documents cautioning investors about the
6 representations on which they were entitled to rely. The District Court rejected the contention
7 that noteholders were third-party beneficiaries of administrative agreements between Captiva and
8 Citibank. The Court also concluded that BESI's fraudulent inducement claim did not adequately
9 allege falsity or intent to deceive and that various disclaimers in the investment and marketing
10 documents precluded BESI's arguments of reliance. The District Court concluded that BESI's
11 breach of fiduciary duty claim failed because it merely traded the contract claims for claims of
12 breach of fiduciary duty, and the parties had only a conventional, arm's length business
13 relationship. Finding these flaws fatal after dismissing the complaint, the Court concluded that
14 any attempts to amend would be futile.

15 We hereby affirm for essentially the reasons stated by the District Court in its thoughtful,
16 comprehensive opinion.

17
18 FOR THE COURT:
19 Roseann B. MacKechnie, Clerk

20
21 By: _____
22