

Loreley Fin. (Jersey) No. 3, Ltd. v Morgan Stanley & Co. Inc.

2014 NY Slip Op 32624(U)

October 1, 2014

Sup Ct, New York County

Docket Number: 653316/12

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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LORELEY FINANCING (JERSEY) NO. 3, LTD.,
and LORELEY FINANCING (JERSEY) NO. 18,
LTD.,

Plaintiffs,

-against-

MORGAN STANLEY & CO. INCORPORATED,
MORGAN STANLEY & CO. INTERNATIONAL LTD.,
MORGAN STANLEY CAPITAL SERVICES, INC.,
COUNTRYWIDE ALTERNATIVE ASSET
MANAGEMENT INC., COUNTRYWIDE SECURITIES
CORP., ALPHA MEZZ CDO 2007-1, LTD., and
BANK OF AMERICA CORP.,

Defendants.

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**Mtn Seq. Nos. 003 &
004**

DECISION AND ORDER

JEFFREY K. OING, J.:

Motion Seq. No. 003

Defendants, Morgan Stanley & Co. Inc. ("Morgan Stanley"),
Morgan Stanley & Co. International Ltd. ("MSCI"), and Morgan
Stanley Capital Services, Inc. ("MSCS") (collectively the "Morgan
Stanley defendants") move, pursuant to CPLR 3211, to dismiss
amended complaint.

Motion Seq. No. 004

Defendants Countrywide Alternative Asset Management Inc.
("Countrywide") and Countrywide Securities Corp. ("CSC")
(collectively the "Countrywide defendants"), also move, pursuant
to CPLR 3211, to dismiss the amended complaint.

With respect to both motions, plaintiffs, Loreley Financing (Jersey) No. 3, Ltd. and No. 18, Ltd., cross-move for an order vacating the judgment entered in this action by the New York County Clerk pursuant to CPLR 5015[a] and 5019[a]. Further, plaintiffs cross-move, pursuant to CPLR 602[a], for an order consolidating this action with another identical action (Index No. 651633/2014).

Motion sequence nos. 003 and 004 are consolidated for disposition. Familiarity with the factual background is presumed (6/20/13 Tr., Docket No. 53).

Procedural Posture

At the close of the argument in this case on June 20, 2013, this Court granted plaintiffs leave to replead, and stated that they could do so under this index number (6/20/13 Tr. p. 88). Further, this Court stated that it was dismissing the complaint and ending the current action (id.), and marked both short form orders "Case Disposed" (Orders, Aff. in Opp. of James Rouhandeh, 8/15/14, Exs. B-C). Plaintiffs filed a notice of appeal of this Court's decision and order. Thereafter, the parties entered into a stipulation staying plaintiffs' time to move to renew and reargue, and defendants' time to respond to any amended complaint until a party or the Court lifted the stay (Stipulation, Rouhandeh Aff. in Opp., 8/15/14, Ex. F, pg. 2). The stipulation also provided that the parties reserved all rights, and

defendants did not consent to an amended complaint by signing the stipulation (Id. at p. 3). While the stipulation was in effect, defendants collectively sought and obtained a judgment dismissing the action from the County Clerk's Office (Judgment, Affirmation of Adam Hakki, 6/27/14, Ex. C). At the time, although contesting entry of judgment, plaintiffs did not seek judicial intervention to vacate the judgment once the County Clerk entered it on August 22, 2013. Plaintiffs filed their amended complaint on April 3, 2014. Three weeks later, plaintiffs withdrew their appeal. They did not perfect their appeal prior to their withdrawal of the appeal (Hakki Affirm., 6/27/14, ¶ 5; Plaintiffs' Reply Memorandum, 8/18/14, p. 6). On May 12, 2014, plaintiffs gave notice terminating the prior stipulation and stay (Stipulation, Affirmation of James Rouhandeh, 6/27/14, Ex. X). Following a conference with this Court, plaintiffs filed a new, identical action under Index No. 615633/2014.

Discussion

Defendants collectively argue that this Court lacks subject-matter jurisdiction over this action because the Clerk entered judgment dismissing it. As such, the amended complaint should be declared a nullity.

The record demonstrates that the judgment of dismissal entered by the Clerk properly disposed of this action in accordance with this Court's June 20, 2013 ruling dismissing this

action and the marking "Case Disposed" on the two short form orders. Nothing in this Court's prior ruling as set forth on the record precluded defendants from exercising their rights, including having a judgment entered dismissing the action. Thus, defendants correctly point out that post dismissal filings, such as plaintiffs' April 3, 2014 amended complaint, are nullities because there is no longer an active case (Floyd v Salamon Bros., 249 AD2d 139, 140 [1st Dept 1998]). Indeed, nothing in this Court's decision to grant plaintiffs leave to file an amended complaint can be deemed to countermand the provisions of the CPLR regarding terminated actions and subsequent filings (see, e.g., CPLR 205), or defendants' right to seek entry of a judgment of dismissal. In fact, the parties' stipulation provided that the parties reserved all rights, and defendants did not consent to an amended complaint by executing the stipulation. The question that remains is whether plaintiffs are able to take refuge in the safe harbor provisions of CPLR 5019 and 5015.

CPLR 5019

CPLR 5019(a) provides that "a judgment ... shall not be stayed, impaired or affected by any mistake, defect or irregularity ... not affecting a substantial right of a party." "Where the alleged error is substantive, other than one that is clearly inconsistent with the intentions of the court and the parties as demonstrated by the record, relief should be obtained

either through an appeal from the judgment, or, if grounds for vacatur exist, through a motion to vacate pursuant to CPLR 5015(a)" (Johnson v Societe Generale S.A., 94 AD3d 663, 664 [1st Dept 2012]).

Here, plaintiffs seek vacatur of the entire judgment of dismissal, a plainly substantive relief (cf. Kiker v Nassau County, 85 NY2d 879, 881 [1995]). Contrary to plaintiffs' argument, the exclusion of language preserving their right to file an amended complaint is not "clearly inconsistent" with this Court's intentions (Johnson, 94 AD3d at 664):

THE COURT: Everything is dismissed without prejudice. You have the appellate court's decision. You don't know what's going to happen next, but you may be able to go back confer and figure out what next needs to be done.

MR. RINGER: I understand from your comments should we decide there are things that wed could or should do, we do have leave to amend.

THE COURT: Yes, I will give you the opportunity for leave to amend. You could bring it under this index number. You do whatever you want to do. I don't want to tell you which index number. You have an opportunity to amend the complaint however you want to see fit. You have that right.

MR. HAKKI: Without filing a motion, your Honor?

THE COURT: Yes, because I'm dismissing this case. So it's done. It's over with in that regard. I'll leave that as is in that point. I don't want to disclose too much on my end. I'm dismissing that action so it's clear that this action is done. What they do next is up to them and how they want to proceed. I'm not here to tell them what they want to

do next. That's for you guys to figure out. I have that up awhile ago.

(6/20/13 Tr. at pp. 87-89). Thus, while this Court noted that plaintiffs have a right to file an amended complaint, this Court did not state that such right would be absolute, and that it would not have to yield to other provisions of the CPLR. Plaintiffs' options were to appeal, or move to vacate the judgment pursuant to CPLR 5015. Here, plaintiffs took an appeal, but withdrew it prior to perfecting it. Given that plaintiffs filed an amended complaint, rather than pursue their appeal, the issue then is whether CPLR 5015 provides a basis to vacate the judgment so as to permit the amended complaint to go forward.

CPLR 5015

CPLR 5015(a) provides that a court may relieve a party from a judgment on the grounds of excusable default, newly-discovered evidence after trial, fraud, misrepresentation, or other misconduct, lack of jurisdiction to render the initial judgment, or reversal, modification, or vacatur of the initial judgment (CPLR 5015[a]). This list is not exhaustive, and a court retains the inherent power to vacate its own judgment "for sufficient reason and in the interests of substantial justice" (Woodson v Mendon Leasing Corp., 100 NY2d 62, 68 [2003]). This authority, however, is not plenary, and should only be used in cases of "fraud, mistake, inadvertence, surprise or excusable neglect"

(Long Is. Light. Co. v Century Indem. Co., 52 AD3d 383, 384 [1st Dept 2008]). Indeed, “[a] motion to vacate an order pursuant to CPLR 5015 cannot serve as a substitute for an appeal, or remedy an error of law that could have been addressed on a prior appeal” (Angela P. v Floyd S., 103 AD3d 439, 440 [1st Dept 2013]).

Here, the record clearly does not reflect the existence of any of the enumerated bases to warrant vacatur of the instant judgment pursuant to CPLR 5015[a]. Indeed, there was no fraud, and the Clerk did not enter judgment of dismissal inadvertently or by mistake. Nor can plaintiffs claim surprise or neglect, as they filed an opposition to entry of judgment before the Clerk entered the judgment (Ringer Affirm. in Opposition, Rouhandeh Aff. in Opp., 8/15/14, Ex. G). Indeed, although permitted to do so, plaintiffs did not submit a proposed counter-judgment that could have included language preserving their right to file an amended complaint. As such, any purported error in not including such language is not chargeable to the Clerk. There has been no default, no reversal of this Court’s prior decision and order, no challenge to this Court’s jurisdiction to render its prior decision and order, and no misconduct by defendants. Lastly, plaintiffs do not assert that the judgment should be vacated due to newly-discovered evidence. Under these circumstances, vacatur of the judgment is not warranted.

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Accordingly, those branches of the Morgan Stanley and Countrywide defendants' motions to dismiss the amended complaint for lack of subject matter jurisdiction are granted, and the amended complaint is dismissed.

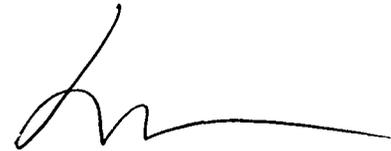
Accordingly, it is

ORDERED those branches of the Morgan Stanley and Countrywide defendants' motions to dismiss the amended complaint for lack of subject matter jurisdiction are granted, and the amended complaint is dismissed; and it is further,

ORDERED that plaintiffs' cross-motion to vacate the judgment and consolidate this action with their action filed under Index No. 651633/2014 is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/1/14



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.