SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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SPRINGWELL NAVIGATION CORP.,

Plaintiff,

-against-

SANLUIS CORPORACION, S.A.,

Defendant.

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DECISION/ORDER
Index No. 600600/09
Mot. Seq. No. 001

BARBARA R. KAPNICK, J.:

This action for breach of contract arises out of the alleged failure of defendant Sanluis Corporacion, S.A. ("Sanluis") to make principal, interest and other payments under the terms of certain notes issued by Sanluis pursuant to an Indenture Agreement dated March 18, 1998 (the "Indenture Agreement") entered into between Sanluis and The Chase Manhattan Bank, as Trustee.

The Notes are structured so that the investors' interests are represented by a single global note (the "Unrestricted Global Note" or "UGN") registered in the name of the Depository Trust Corporation ("DTC") or one of its nominees. DTC's nominee, Cede & Co. ("Cede"), a non-investor, is the registered holder of the global note.

Plaintiff Springwell Navigation Corp. ("Springwell"), an investor, holds a beneficial interest in the global note.

Springwell previously brought an action for breach of the same contract against Sanluis in this Court (Index No. 600743/05). Although judgment was granted to the plaintiff on a motion for summary judgment by the IAS Judge in 2007, the decision was reversed and the action dismissed by the Appellate Division, First Department, which found as follows:

> Plaintiff was the beneficial holder of a $1 million interest in an Unrestricted Global Note issued by defendant. The court properly found that as such, plaintiff had no right to sue upon an indenture agreement for interest payments *(see MacKay Shields v. Sea Containers,* 300 A.D.2d 165, 751 N.Y.S.2d 485 [2002]), since that document specifically reserved that right to the registered holder of the Note. However, the court erred in finding that plaintiff had a right to sue on the Note itself, inasmuch as plaintiff was not the holder of a negotiable instrument (*see Caplan v. Unimax Holdings Corp.*, 188 AD2d 325, 591 NYS2d 28 [1992]; *cf. Friedman v Airlift Intl.*, 44 AD2d 459, 355 NYS 2d 613 [1974]). Nor is there any basis for its finding that a right to sue for interest payments is bestowed upon plaintiff by the Trust Indenture Act of 1939, whose purpose was to prevent majority investors from taking collective action to make amendments to an indenture affecting the rights of other holders (*see In re Board of Directors of Multicanal S.A.*, 307 B.R. 384, 388-389 [SDNY 2004]).

Springwell Navigation Corp. v Sanluis Corporation, S.A., 46 AD3d 377 (1st Dep't 2007).

Defendant now moves for an order dismissing this action in its entirety (i) pursuant to CPLR § 3211(a)(3), on the ground that plaintiff does not have legal capacity to sue; (ii) pursuant to

CPLR § 3211(a)(5), on the ground that the cause of action may not be maintained because of collateral estoppel and res judicata; and (iii) pursuant to CPLR § 3211(a)(8), on the ground that the Court does not have personal jurisdiction over the defendant.

Defendant's primary argument is that plaintiff's Complaint must be dismissed on collateral estoppel and res judicata grounds, because plaintiff has already had a full and fair opportunity to litigate the issue of whether, as a beneficial owner and not a registered holder of the Notes, it could sue under the Indenture Agreement and Notes.

Plaintiff, however, contends that it now has standing to bring this action because after considerable negotiation, the registered holder of the UGN, i.e., Cede, through one of its directors, has given permission to Springwell to proceed under the terms of the Indenture Agreement.[1]

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[1] Section 2.2(e) of the Indenture Agreement provides that

> [s]ubject to the provisions of Section 2.2(b), the registered Holder may grant proxies and otherwise authorize any Person, including participants in the case of Notes registered in the name of DTC or its nominee, and Persons that may hold interests through such participants, to take any action that a Holder is entitled to take under this Indenture or the Notes.

It is clear from a reading of the Appellate Division decision in the prior action, that the First Department based its dismissal of the action solely on the ground that plaintiff did not have the right to sue on the Note as it was not the registered holder, citing *Caplan v Unimax Holdings Corp.*, 188 AD2d 325 (1st Dep't 1992). The Appellate Division never reached the merits of the case.

While defendant argues that Springwell could have attempted to obtain the authorization from Cede during the pendency of the prior litigation, once plaintiff became aware that defendant was challenging plaintiff's standing to pursue that case, plaintiff argues that it had a good faith basis based on the case law at that time to argue that it did have standing to sue on the Note. In fact, the IAS Court agreed with plaintiff and granted its motion for summary judgment.

What is clear, however, is that the Appellate Division never reached the merits of Springwell's claim and never dealt with the issue of plaintiff's capacity to sue under Section 2.2(e) of the Indenture Agreement. Thus, this case is not barred by the doctrines of res judicata or collateral estoppel.

Defendant next argues that even if this Court were to find that this action is not barred by res judicata or collateral estoppel, it must nevertheless be dismissed because plaintiff still does not have standing to sue under either the Indenture Agreement or the Note, and that the letter from Cede does not cure that defect.

Section 5.8 of the Indenture Agreement specifically provides that

> [n]otwithstanding any other provision in this Indenture to the contrary, each Holder shall have the right, which is absolute and unconditional, to receive payment of the principal of and interest and any Additional Amounts on such Note ... and individually to institute suit for the enforcement of any such payment, and such right shall not be impaired without the consent of such Holder

and, as noted supra, Section 2.2(e) provides that "the registered Holder may grant proxies and otherwise authorize any Person [such as Springwell] ... to take any action that a Holder is entitled to take under this Indenture or the Notes."

Nevertheless, defendant contends that the Cede letter cannot confer standing on plaintiff based on the decision in *Oaktree Capital Mgmt., L.L.C. v. DGS Int'l Fin. Co. B.V.*, Index No. 602881/02 (Sup. Ct., N.Y. Co. April 4, 2003), where the Court held that "[w]here, as here, the plaintiffs, who are not registered

holders of the notes, seek to enforce the indentures, that, by their terms, reserve the right of enforcement to registered holders, the plaintiffs are without standing," (*citing MacKay Shields v Sea Containers, supra*).

However, the Court in *Oaktree* never addressed any indenture provision in that case that was similar to the language contained in Section 2.2(e) of the Indenture Agreement relevant to this action, which provides that the registered Holder could grant a proxy. Thus, the fact that the plaintiffs in *Oaktree* had submitted letters from Cede, which was also the registered holder of the Notes in that case, by which Cede allegedly ratified the actions that *Oaktree* had undertaken, did not effect the end result there.

Plaintiff relies instead on the Second Circuit's decision in *Allan Applestein TTEE FBO D.C.A. v Province of Buenos Aires*, 415 F3d 242 (2nd Cir. 2005) in which the indenture provided, similar to here, that "the Holder of any Note shall have the right, which is absolute and unconditional, to receive payment of the principal of and interest and any Additional Amounts on such Note ... and to institute suit for the enforcement of any such payment." Id. at 243. Moreover, the notes' Offering Memorandum provided that "DTC (or its nominee Cede & Co.) may grant proxies or otherwise authorize its participants (or persons holding beneficial interests

in the Global Registered Notes through such participants) to exercise any rights of a holder or take any other actions which a holder is entitled to take under the Indenture or the Notes." Id. at 243-244.

In that case, Applestein, concededly the beneficial owner rather than the registered holder of the note, obtained permission from the registered holder to sue and the district court found that Applestein had standing. The Circuit Court affirmed.[2]

Similarly, this Court finds that Springwell has been properly authorized to bring this action and has standing to sue.

Alternatively, defendant argues that this action must be dismissed on the ground that the Court does not have personal jurisdiction over the defendant. Defendant was allegedly served by registered mail, return receipt requested, to defendant's address in Mexico, but the envelope did not contain any form requesting that defendant provide written acknowledgment of service. Defendant argues that said service did not comply with either New York's requirement for service on a foreign corporation or the terms of the Indenture Agreement.

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[2] The other issue raised in the *Applestein* decision, which is not relevant here, was that such permission was ineffective because it was obtained after the action was initiated. However, the Circuit Court held that that was "not a persuasive basis on which to reverse" the district court's judgment for the plaintiff. Id. at 245.

The Court, however, finds that Sanluis has now been served through its registered agent and by mail, in compliance with the service provisions of the Indenture Agreement, and thus service is proper.[3]

Finally, defendant argues that to the extent that this action seeks payment for interest due over six years prior to the filing of this action on February 25, 2009 (i.e., the first three interest payments due under the notes), those claims are barred under the relevant Statute of Limitations. See, CPLR § 213(2).[4]

Plaintiff, however, argues that pursuant to the specific language of the UGN and the Indenture Agreement, once an interest payment is missed under the Note, the original due date ceases to exist and Sanluis has a continuing obligation until maturity (March 18, 2008) to make that payment.

However, it is well settled that "when a contract provides for the payment of money in installments, such as interest installments, the Statute of Limitations runs on each installment from the date it becomes due (citations omitted)." *Vigilant Ins. Co. of America v Housing Auth. of El Paso, Tex.*, 87 NY2d 36, 45

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[3] This Court notes that the issue of lack of jurisdiction based on improper service was never raised by either party during oral argument on the record on October 14, 2009.

[4] This issue was also not raised during oral argument.

(1995). Thus, plaintiff's claim with respect to the first three interest payments is time barred.

Defendant shall serve an answer to plaintiff's Complaint within 30 days of the filing of this Decision/Order.

The parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street - Room 208 on February 23, 2010 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: December 15, 2009

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.