

Tawil v Middlegate Sec., Ltd.
2018 NY Slip Op 31573(U)
February 6, 2018
Supreme Court, New York County
Docket Number: 653633/2015
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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LEON TAWIL,

Plaintiff,

Index No.: 653633/2015

-against-

MIDDLEGATE SECURITIES, LTD., MIDDLEGATE
ASSET MANAGEMENT LLC, MIDDLEGATE
COMMODITIES, LLC, MIDDLEGATE FACTORS, LLC,
MIDDLEGATE FUNDING, LLC, MIDDLEGATE HCV 6
LLC, MIDDLEGATE VENTURES, LLC, ISAAC SUTTON,
MEYER SUTTON, ALBERT SUTTON, ELLIOT SUTTON,
AND MORRIS SUTTON,

DECISION AND ORDER

Defendants.

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SALIANN SCARPULLA, J.:

In this action, *inter alia*, to recover damages for breach of contract, defendants Middlegate Securities, Ltd., Middlegate Asset Management LLC, Middlegate Commodities, LLC, Middlegate Factors, LLC, Middlegate Funding, LLC, Middlegate HCV 6 LLC, Middlegate Ventures, LLC (collectively referred to as "Middlegate"), Albert Sutton ("Albert"), and Elliot Sutton ("Elliot") move to dismiss the complaint insofar as asserted against them (motion sequence 001); defendant Isaac Sutton ("Isaac") moves to dismiss the complaint insofar as asserted against him (motion sequence 002); plaintiff Leon Tawil ("Tawil") moves to sever the claims asserted against Isaac from the claims asserted against defendant Meyer Sutton (motion sequence 003); and Tawil moves

(1) to substitute the Estate of Leon Tawil as plaintiff, (2) to lift the automatic stay occasioned by Tawil's death, (3) to either lift the second automatic stay occasioned by defendant Meyer Sutton's death for the limited purpose of considering Tawil's motion for severance, or appoint a temporary administrator for Meyer Sutton's estate for the purpose of this action and substitute the administrator as defendant in this action, and (4) to amend the caption (motion sequence 004). The motions are consolidated for disposition.¹

According to the allegations of the complaint, Isaac, Albert, Elliot, defendant Meyer Sutton, defendant Morris Sutton jointly owned and/or operated Middlegate. Tawil alleged that defendants offered their financial management services to Tawil in or about May 2011. Isaac informed Tawil that his family and Middlegate were the fiduciaries for more than ten million dollars.

Defendants allegedly offered to deposit Tawil's funds in an Israel money market account earning 4.5% interest annually, in exchange for one half percent of the account balance. Tawil agreed to deposit approximately two million euros with defendants, and they directed Tawil to wire the funds to defendants' account at Bank Hapoalim in Israel.

Tawil alleged in the complaint that, on May 5, 2011, "Sarain" transferred two million, thirteen thousand, two hundred six euros and forty-two cents to Bank Hapoalim. Tawil claimed that, in or about April 2014, he requested that defendants return the funds but they failed to do so.

¹ Motion 001 was resolved as per stipulation dated April 5, 2017, in which plaintiff agreed to dismiss the claims asserted against Middlegate, Albert Sutton and Elliot Sutton.

In his complaint Tawil asserted causes of action for breach of contract, unjust enrichment, breach of fiduciary duty, conversion, fraud, negligent representation, and negligent supervision.²

In March 2016, Isaac moved to dismiss the complaint insofar as asserted against him (motion sequence 002). In April 2016, the parties notified the court that Tawil had passed away. In November 2016, the parties notified the court that defendant Meyer Sutton had passed away, and his counsel informed the court that Meyer Sutton had left little or no estate for distribution, and there was no executor or other administrator. Meyer Sutton's counsel indicated that it had no further authority to act on his behalf. Because of Tawil's and Meyer Sutton's deaths, this action was automatically stayed.

Even though the action was stayed, Tawil moved to sever the claims asserted against Isaac from those asserted against Meyer Sutton (motion sequence 003). With the motion, Tawil's counsel submits a stipulation substituting the Estate of Leon Tawil as plaintiff. Counsel argues that Tawil's estate has been prejudiced because the action cannot proceed against any defendant until the completion of Surrogate's Court proceedings concerning Meyer Sutton's estate, proceedings which have not yet been commenced.

In opposition, Isaac argues that plaintiff improperly brought this motion because

² As per stipulation dated December 10, 2015, the action was indefinitely stayed as against Morris Sutton and "the parties mutually agree that said stay can be lifted by plaintiff and defendant Morris Sutton will be required to answer on thirty (30) days written notice emailed from counsel for plaintiff to counsel for defendant Morris Sutton."

the matter is stayed. Isaac also argues that, in any event, severance would be improper because the claims asserted against Isaac and Meyer Sutton are identical and involve common facts and legal issues. Isaac notes that any claimed prejudice is due to Tawil's delay, in that counsel failed to proceed with an application for substitution of Tawil's estate for a year after Tawil's death, and failed to file an application with the Surrogate's Court to appoint an administrator for Meyer Sutton's estate, even though he passed away six months ago.

Subsequently, Tawil separately moved (1) to substitute the Estate of Leon Tawil as plaintiff; (2) to lift the automatic stay occasioned by Tawil's death; (3) to either lift the second automatic stay occasioned by defendant Meyer Sutton's death for the limited purpose of considering plaintiff's motion for severance, or to appoint a temporary administrator for Meyer Sutton's estate for the purpose of this action and to substitute the administrator as defendant in this action; and (4) to amend the caption (motion sequence 004). The parties consent to the relief sought in Motion 004, except for that branch of the motion seeking to lift the stay.

Therefore, the outstanding motions are: (1) Isaac's motion to dismiss the complaint insofar as asserted against him; (2) Tawil's motion to sever the claims asserted against Isaac from those asserted against Meyer Sutton; and (3) Tawil's motion to lift the stay in this action occasioned by defendant Meyer Sutton's death.

The death of a party divests a court of jurisdiction to conduct proceedings in an action, including severance, until a proper substitution has been made pursuant to CPLR 1015(a). *See Harding v. Noble Taxi Corp.*, 155 A.D.2d 265 (1st Dept. 1989). No action

has been taken by any party in this action for substitution and to appoint an administrator for the deceased Meyer Sutton, and in fact, it took Tawil's counsel approximately a year after Tawil's death to proceed with substitution of Tawil's estate for the decedent.

"Although the jurisdictional issue may be waived under special circumstances, where there has been active participation in the litigation by the personal representative who would have been substituted for the decedent under CPLR 1021," *Silvagnoli v. Consolidated Edison Employees Mut. Aid Soc.*, 112 A.D.2d 819, 820 (1st Dept. 1985), here the parties have presented no evidence to allow me to determine the administrator who could be substituted. *Cf. Rusch Factors, Div. of BVA Credit Corp. v. Sheffler*, 58 A.D.2d 557 (1st Dept. 1977).

In the interest of preventing further delay in this action, Tawil is directed to, within thirty days of the date of this order, either commence proceedings in Surrogate's Court to appoint an administrator for Meyer Sutton's estate, or to dismiss the claims asserted against Meyer Sutton without prejudice.³

In accordance with the foregoing, it is hereby

³ As stated above, I am unable to conduct any proceedings in this action until there is an administrator appointed for Meyer Sutton and a substitution has occurred. In any event, if I were to reach the issue of severance, I would find that severance would be improper given that there has been no showing that Tawil's substantial rights would otherwise be prejudiced, the claims arise out of one transaction and involve all the parties, and the interests of judicial economy and consistency of verdicts would be better served by having a single trial. *See Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52 (1981); *News Ltd. v. Australis Holdings Pty, Ltd.*, 293 A.D.2d 276 (1st Dept. 2002); *Andresakis v. Lynn*, 236 A.D.2d 252 (1st Dept. 1997).

ORDERED that the motion of defendants Middlegate Securities, Ltd., Middlegate Asset Management LLC, Middlegate Commodities, LLC, Middlegate Factors, LLC, Middlegate Funding, LLC, Middlegate HCV 6 LLC, Middlegate Ventures, LLC, Albert Sutton, and Elliot Sutton's to dismiss the complaint insofar as asserted against them (motion sequence 001) is resolved as per stipulation dated April 5, 2017 dismissing the action insofar as asserted against those defendants; and it is further

ORDERED that defendant Isaac Sutton's motion to dismiss the complaint insofar as asserted against him (motion sequence 002) remains stayed; and it is further

ORDERED that plaintiff's motion to sever the claims asserted against Isaac from those asserted against Meyer Sutton (motion sequence 003) remains stayed; and it is further

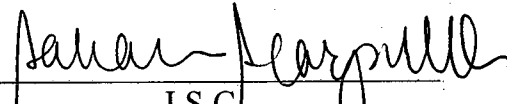
ORDERED that plaintiff's motion sequence 004 is resolved between the parties as follows: (1) the Estate of Leon Tawil is substituted for Leon Tawil as plaintiff, (2) the caption is amended to reflect the substitution of the Estate of Leon Tawil for plaintiff Leon Tawil and all future papers filed with the court will bear the amended caption; (3) the stay occasioned by defendant Meyer Sutton's death remains in effect; and (4) within thirty days of the date of this order, plaintiff is directed to either commence proceedings in Surrogate's Court to appoint an administrator for Meyer Sutton's estate or dismiss the claims asserted against defendant Meyer Sutton without prejudice; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support

Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

This constitutes the decision and order of the court.

Dated: February 6, 2018
New York, New York



J.S.C.
HON. SALIANN SCARPULLA