

**Springwell Navigation Corp. v San Luis Corporation,
S.A.**

2005 NY Slip Op 30238(U)

December 7, 2005

Supreme Court, New York County

Docket Number: 0600743/2005

Judge: Bernard J. Fried

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SCANNED ON 12/12/2005

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

SPRINGWELL NAVIGATION CORP.,

Plaintiff,

INDEX NO. #600743-2004

MOTION DATE _____

- v -

SANLUIS CORPORATION, S.A.,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

PAPERS NUMBERED _____
FILED
DEC 12 2005
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 12/07/05

Bernard J. Fried
J.S.C. **BERNARD J. FRIED**
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

SPRINGWELL NAVIGATION CORP.,

Plaintiff,

v.

INDEX NO.: 600743/045

SANLUIS CORPORACION, S.A.,

FILED

Defendants.

-----X
DEC 12 2005

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Springwell Navigation Corp. (Springwell) alleges that it purchased what is now a \$1 million interest in notes issued by Defendant San Luis Corporacion, S.A. (SanLuis) in 1998. Springwell further alleges that SanLuis has failed to pay semi-annual interest payments at 8.875 percent per annum between September 18, 2001 and September 18, 2004. Springwell has calculated the total amount of outstanding interest payment, excluding accrued interest, at \$310,625. Based on these allegations, Springwell now moves for Summary Judgment in Lieu of Complaint pursuant to CPLR 3213.

SanLuis does not dispute that it failed to make interest payments on the notes it issued in 1998. However, SanLuis asserts several defenses to Springwell's motion. First, SanLuis objects to service of process on the grounds that process was mailed to the wrong address. Second, SanLuis argues that because Springwell is not a "holder" of the notes, the action is barred by the indenture accompanying the notes. Third,

SanLuis argues that Springwell has not established that it held a beneficial interest in the notes during the period from 2001 to 2004. Fourth, SanLuis argues that the notes do not give Springwell any right to payment from SanLuis. On these grounds, SanLuis opposes the motion for summary judgment and cross-moves for dismissal pursuant to 3211(a)(7) and (8).

SanLuis first argues that service was improper because it was mailed to the wrong address. The address plaintiff used to serve the defendant had a different floor number than the floor number with which SanLuis agreed to accept service. San Luis, in the indenture accompanying the notes, consented to receiving service by registered mail at Monte Pelvoux 220-8, Col. Lomas de Chapultepec, Mexico D.F. 110000. (Indenture §§ 1.5, 1.13) Mistakenly, service was sent to Monte Pelvoux 220-Piso 4, Col. Lomas de Chapultepec, Mexico D.F. 110000. The difference in address was only a mistake in the floor number. SanLuis further argues that the registered mail return receipt was not signed, and therefore, that Springwell lacks proof of service.

Although SanLuis argues that service was improper, SanLuis' General Counsel has conceded that SanLuis did actually receive service of process. Because the mistake in address was minor and did not prevent delivery to SanLuis, the defect is not fatal to personal jurisdiction. (See The Cadle Co, v Tri-Angle Associates, N.Y. App. Div. Lexis 4291 [1st Dept., Apr. 26, 2005] [Court found in applying Conn. law

that a “[m]inor error on the envelope [apartment # 164 instead of # 16H] was inconsequential because it did not impair delivery].”

The next issue is whether Springwell is entitled to summary judgment pursuant to CPLR 3213. Under CPLR 3213, when an action is based on an instrument for the payment of money only, the plaintiff may serve with the summons a notice of motion for summary judgment in lieu of complaint. The First Department in Technical Tape, Inc v. Spray Tuck Inc, 131 A.D. 2d 404, 405-406 (1987) has explained that

CPLR 3213 affords a speedy and efficient remedy to secure a judgment in certain cases where service of formal papers would be unnecessary for the expeditious resolution of the dispute between the parties. This accelerated procedure applies solely to an action based upon a judgment or an instrument for the payment of money only. In order to succeed on the motion, the cause of action must be proven by the instrument itself and a failure to make payments according to its terms. (e.g., Maglich v. Saxe, Bacon & Bolan, 97 AD2d 19, and cases cited therein; Logan v. Williamson & Co., 64 AD2d 466).

The plaintiff can only succeed on the motion “where a right to payment can be ascertained from the face of a document, without regard to extrinsic evidence.” (Matas v. Alpargatas S.A.I.C., 274 A.D.2d 327, 328 [1st Dept 2003]).

In Matas, the plaintiff presented, in support of its 3213 Motion for Summary Judgment in Lieu of Complaint, “custodial receipts representing a beneficial interest of \$ 1,440,000 in a portion of the 9% convertible bonds of defendant”. (Id. at 328)

The Court, noting that the “custodial receipts” were not subscribed by the defendant, held that it could not “be ascertained from the face of these documents, without regard to extrinsic evidence, that plaintiffs have a right to repayment and, accordingly, they do not possess an “instrument for the payment of money only”.

Springwell has presented as evidence: 1) a “Repurchase Transaction” receipt showing that Springwell acquired a beneficial interest of \$5,000,000 in the notes (exh. 1) ; 2) the affidavit of John Baxivanos, director of Springwell, stating that Springwell purchased a \$5 million interest in the notes in 1998, sold \$2 million of the interest on September 15, 2001, and sold another \$2 million interest on September 19, 2001; 3) a “Statement of Open Forward Transactions” from Standard Bank of London showing that from 01/18/2001 to 05/23/2005, Springwell owned a \$1 million interest in the notes (exh. 4) ; 4) the affidavit of Patrick R.G. Chalmers, a Manager of Standard Bank of London, that Springwell has held a beneficial interest of \$1 million at Standard Bank of London from January 18, 2001 to the present day.

In this case, the plaintiff appears to allege that the “instrument” on which it relies to demonstrate defendant’s money obligation is either the indenture agreement,¹ or the notes issued by the defendant.² Since the plaintiff has failed to

¹ This was the instrument referred to in plaintiff’s Amended Notice of Motion for Summary Judgment in Lieu of Complaint.

² Baxivanos Aff par. 2, 4 & 5; Oral Arg. at p. 12.

demonstrate that it is a registered holder under the Indenture Agreement, it lacks standing to sue under the Indenture. (See MacKay Shields LLC v. Sea Containers, Ltd., 300 AD 165 [1st Dept., 2002]). However, plaintiff claims that it is a beneficial owner of defendant's Notes to the extent of \$1 million. Plaintiff failed to produce the Notes in its moving papers. The First Department has explained that under such circumstances a 3213 motion will be denied since "on a motion for summary judgment in lieu of complaint the moving party must prove the obligation by the instrument itself, the failure to submit that instrument is fatal." (Technical Tape, Inc v. Spray Tuck Inc, supra, 131 AD 2d at 406). The plaintiff may be entitled to sue as a beneficial owner of Notes with a face value of \$1 million (see Friedman v. Airlift International, Inc, 44 A.D. 459 [1st Dept., 1974]) but the proof of the plaintiff's beneficial ownership of the "instrument" has not been demonstrated in its moving papers. The plaintiff has failed to produce the "instrument" which shows its indirect ownership of the Notes so as to allow it to sue in its own capacity for the interest arrears. Springwell's right to payment cannot be ascertained without looking at extrinsic evidence. Therefore, it has failed to establish its entitlement to summary judgment under CPLR 3213.

For these reasons, Springwell's Motion for Summary Judgment in Lieu of Complaint is denied.

The only remaining question is whether to grant SanLuis's motion to dismiss. SanLuis argues that this action is barred by the indenture because *Springwell* is not a

“holder” of the notes. A “Holder” is defined in the indenture as: “each person in whose name a note is registered in the Register, and, for so long as the notes are registered in the name of DTC or its nominee, shall mean DTC or its nominee.”³ Additionally, the indenture specifically states that “each Holder shall have the right, which is absolute and unconditional, to receive payment of the principle ... and interest ... on such note at the Stated Maturity or Maturities, any Interest Payment Date or other payment date.” (5.8)

Although Springwell may hold a beneficial interest in the note, it is not a “Holder” as defined by the indenture. However, Springwell argues that as a beneficial interest holder, it still has standing to sue where “the obligation to pay interest arises from the note or bond itself.”

The First Department has held that the bond and the indenture are two distinct agreements, and furthermore, that “[r]estrictions against suit in an indenture are not effective unless the face of the bond gives adequate notice of the restriction.” (Friedman v. Airlift Int’l, Inc., 44 A.D.2d 459, 460 [1st Dept., 1974] citing Cunningham v. Pressed Steel Car. Co., 238 AD 624 [1st Dept., 1933], affd. 263 N.Y. 671 [1934]).

3

It is undisputed that the Depository Trust Company (DTC) is the registered holder of the bonds, holding them for the beneficial interest of investor participants in the DTC.

In Friedman, the plaintiff, “owner and holder” of bonds issued by the defendant, brought suit for payment of unpaid interest under the bond. The Court held that mere references to the indenture were not adequate notice of restrictions from bringing suit under the bond. (Id. at 461) Additionally, the Court found it of no significance that the bonds were not registered in the name of the plaintiff. For these reasons the Court found that the plaintiffs, as beneficial interest holders were entitled to interest payments under the bond.

The note issued by SanLuis does not adequately give notice that the right to bring suits for the payment of interest is limited to registered holders. However, defendant disputes whether plaintiff is in fact a beneficial owner of the notes. While it is clear that plaintiff has not supplied the required “instrument” to obtain summary judgment under CPLR 3213, there is certainly a sufficient claim, and some supporting evidence, to establish that it may be a beneficial owner of the note at issue.⁴ At this juncture, it would be premature to dismiss plaintiff’s claim for interest based on its claimed status as a beneficial owner. Thus, this issue requires further factual development. As a result, the defendant’s motion to dismiss is denied.

⁴

Defendant disputes that any supporting evidence has been produced, but concedes that plaintiff may be a beneficial owner of the note.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment in lieu of complaint is denied; and it is further

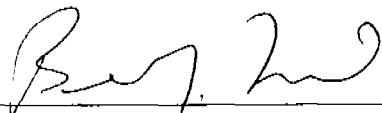
ORDERED that defendant's cross motion to dismiss is denied; and it is further

ORDERED that plaintiff shall serve a formal complaint upon defendant's attorney within 20 days of service on plaintiff's counsel of a copy of this order with notice of entry and defendant shall move against or serve an answer to the complaint within 20 days after service of the complaint.

Dated: 12/07/05

FILED
DEC 12 2005
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.