Mutual Benefits Offshore Fund v Zeltser
2014 NY Slip Op 32467(U)
September 23, 2014
Supreme Court, New York County
Docket Number: 650438/2009
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

MUTUAL BENEFITS OFFSHORE FUND,

Plaintiff,

- against -

EMANUEL ZELTSER, MARK ZELTSER, STERNIK & ZELTSER, M.E. SELTSER P.C., ALEXANDER FISHKIN, INTEREL CORPORATION, and JOSEPH KAY,

Defendants.

STERNIK & ZELTSER and JOSEPH KAY,

Counterclaim Plaintiffs,

- against -

CHRISTOPHER SAMUELSON, et al.,

Counterclaim Defendants.

Index No.: 650438/2009

DECISION/ORDER

Motion Seq. 015

In this action by an investment fund to recover monies allegedly wrongfully withheld by defendants Sternik & Zeltser, counterclaim defendants Triangle International Management, Ltd., Amicorp Curacao BV, Investarit AG, Meridian Asset Management Ltd., Mutual Trust SA, Kurt Gubler, W. Shaun Davis, and Christopher Samuelson (collectively Counterclaim Defendants) move to dismiss the Amended Verified Counterclaims pursuant to CPLR 3211. Defendants/Counterclaim Plaintiffs, Sternik & Zeltser and Joseph Kay (collectively Counterclaim Plaintiffs) cross-move for (1) an order granting leave to effect alternative service pursuant to CPLR 308 (5) and deeming service on Counterclaim Defendants to have been made

nunc pro tunc or, alternatively, for an extension of time to make service pursuant to CPLR 306-b; (2) a traverse hearing; and (3) leave to take limited discovery as to service and personal jurisdiction pursuant to CPLR 3211 (d).[1]

A summary of the allegations in the complaint and the prior procedural history of this matter is recited at length in prior decisions of this Court (Fried, J.) and the Appellate Division, First Department and will not be repeated here. (See e.g. Mutual Benefits Offshore Fund v Zeltser, Sup Ct, NY County, Nov. 1, 2010, Fried, J., index No. 650438/2009, affd 93 AD3d 504 [1st Dept 2012]; Decisions and Orders [Fried, J.], dated March 30, 2012, Sept. 7, 2011 [as amended by Order dated Sept. 22, 2011], and Nov. 1, 2010.)

Of relevance to the instant motion, this Court (Fried, J.) dismissed with prejudice counterclaims brought by defendant Sternik & Zeltser "as trustee for the assets of Kayley Investments, Ltd." (Kayley) and by defendant Joseph Kay against plaintiff Mutual Benefits Offshore Fund (MBOF).[2] The Court held that Sternik & Zeltser could not maintain a counterclaim "as trustee for a beneficially interested non-party, when [Sternik & Zeltser] has been sued not as a trustee or representative but in its own right." (Nov. 1, 2010 Decision at 3.) Similarly, the Court held that Kay could not maintain a counterclaim against MBOF because

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[1] Although no appearance for Sternik & Zeltser was made at the oral argument (Oral Argument Tr. [Tr.] at 3-4), the cross-motion and opposition to the motion to dismiss were brought by counsel for both Sternik & Zeltser and Kay. The court will, therefore, treat Sternik & Zeltser as having submitted on the papers.

[2] Those counterclaims, dated August 20, 2009, were asserted against Mutual Benefits Offshore Fund, Ltd., Christopher Samuelson, The Test Trust, Mutual Trust, Kurt Gubler, W. Shaun Davis, Peter Lombardi, Steven K. Steiner a/k/a Steven Steinger, Thomas H. Davis, Sharon Davis, Mutual Benefits Offshore Fund, Inc., Triangle International Management, Ltd., Meridian Asset Management Ltd., Investarit AG, Harneys Corporate Services Ltd., Offshore Incorporations Limited, Amicorp Curacao BV, and John Does 1-10. (Gilmore Aff., Ex. A [Verified Counterclaims].) However, only MBOF's motion to dismiss was before the Court. (Tr. at 8-9.)

Kay alleged that he acted as an agent of Kayley and that the monies invested with MBOF belonged to Kayley or a separate non-party, but not to Kay individually. Thus, the Court concluded that Kay's counterclaim was also being asserted on behalf of non-party Kayley even though Kay was sued in his individual capacity. (Id.) The Appellate Division affirmed, holding that Sternik & Zeltser "lack[ed] standing to assert a counterclaim in its separate capacity as a purported trustee or representative of an entity that is not a party to the action," and that Kay "lack[ed] standing . . . because the record does not support his allegation that he has an ownership interest in plaintiff's investment or that he otherwise has a stake in the outcome of the dispute over the funds at issue." (93 AD3d at 504.)

By separate order dated November 1, 2010, the Court granted an unopposed motion for a default judgment against the non-appearing parties Mutual Trust SA (Mutual Trust), Amicorp Curacao BV (Amicorp), Investarit AG (Investarit), Triangle International Management, Ltd. (Triangle), and Meridian Asset Management Ltd. (Meridian).[3] These entities moved to vacate the default judgment, contending that the purported service of the counterclaims by service on the Secretary of State of New York and by sending a copy of the papers to each by registered international mail was defective. The Court found that Counterclaim Plaintiffs' purported service did not comply with the requirements of Business Corporation Law § 307 and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and vacated the default judgment. (March 30, 2012 Decision at 10.)[4] The

[3] Counterclaim Plaintiffs only sought a default judgment against these entities and not against the remaining Counterclaim Defendants. (Nov. 1, 2010 Decision.)

[4] The Court also found that Mutual Trust, Amicorp, Investarit, Triangle, and Meridian's excuse for non-appearance – defective service and lack of jurisdiction – was reasonable in light of the Court's holding

Court also denied Counterclaim Plaintiffs' cross-motion for jurisdictional discovery. (Id. at 12.) By separate order, also dated March 30, 2012, the Court directed Mutual Trust, Amicorp, Investarit, Triangle, and Meridian to "serve and file answers to the counterclaims herein, or otherwise respond thereto, within 20 days from service of a copy of this order with notice of entry."

Mutual Trust, Amicorp, Investarit, Triangle, and Meridian moved to dismiss the counterclaims. (Notice of Motion [NYSCEF Doc. No. 361].) As that motion was being briefed, Counterclaim Plaintiffs filed Amended Verified Counterclaims against Counterclaim Defendants and others.[5] (Gilmore Aff., Ex. D [Amended Verified Counterclaims].) By stipulation, dated November 29, 2012, Counterclaim Plaintiffs and Counterclaim Defendants withdrew without prejudice the motion to dismiss and cross-motion for alternate service and jurisdictional discovery. Counterclaim Defendants then brought the instant motion to dismiss the Amended Verified Counterclaims. Counterclaim Defendants contend, among other things, that counterclaims cannot be asserted against them unless also asserted against MBOF and that proper service was never effectuated.

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that service was not properly made. (March 30, 2012 Decision at 11.) In addition, the Court found that Mutual Trust, Amicorp, Investarit, Triangle, and Meridian stated a meritorious defense in contending that the Counterclaim Plaintiffs, Sternik & Zeltser, as trustee for the assets of Kayley Investments, Ltd., and Joseph Kay, were not proper parties to this action. (Id.)

[5] The amended counterclaims are asserted against the same parties as the initial counterclaims except that MBOF was named as a Counterclaim Defendant only in the initial counterclaims. (Gilmore Aff., Ex. D [Amended Verified Counterclaims].) One party, originally named as Amicorp Curacao BV, is named Amicorp Curacao NV in the amended counterclaims. As the court dismisses the amended counterclaims on other grounds, it need not determine whether this identification of Amicorp was simply a misnomer or whether two different parties were intended.

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court] accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].)

CPLR 3019 (a)

CPLR 3019 (a) provides: "A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable." It is well-settled that "[t]he intent of CPLR 3019 (a) . . . is to limit counterclaims against a plaintiff who sues in a particular capacity to those related to that capacity, and to limit a defendant who is sued in a particular capacity to counterclaims related to that capacity." (5-3019 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3019.08. See also Ehrlich v Am. Moninger Greenhouse Mfg. Corp., 26 NY2d 255, 259-260 [1970] [holding that where plaintiff sued to enforce guaranty in her individual capacity, defendant could not assert counterclaim for set-off against her in representative capacity as administrator of husband's estate]; Corcoran v Natl. Union Fire Ins. Co., 143 AD2d 309, 310-311 [1st Dept 1988] [holding that where Superintendent of Insurance

brought claims in his capacity as the appointed liquidator of insurance company, only defenses and counterclaims that could be raised against liquidated insurance company could be asserted against him].)

Counterclaim Defendants contend that no counterclaims can be asserted against them unless they are also asserted against plaintiff MBOF. (Counterclaim Ds.' Memo. in Supp. at 5-6.) Counterclaim Plaintiffs argue that they may plead counterclaims against Counterclaim Defendants without naming MBOF because Counterclaim Defendants "improperly seized control of MBOF and brought this action in its name to represent their own personal interests." (Counterclaim Ps.' Memo. in Opp. at 6.) Without citation to any authority, Counterclaim Plaintiffs conclude that MBOF thus "represents" Counterclaim Defendants for the purposes of CPLR 3019 (a). (Id.) Specifically, Counterclaim Plaintiffs allege that Samuelson, Mutual Trust, Davis, Triangle, and Meridian, acting together with others, "fraudulently induced Kayley's principals to invest $15 million in MBOF." (Amended Counterclaims, ¶ 5.) Samuelson is alleged to be the "director and chairman of Mutual Trust" and, in that position, to have "seized control of MBOF and caused this action to be commenced in the name of MBOF." (Id., ¶¶ 24-25.) Davis is alleged to have been a former officer and president of MBOF, who was removed from those positions in 2006 but "continues to represent himself as MBOF's sole officer and director." (Id., ¶ 28.) In addition, Davis allegedly controls Meridian which "continues to represent itself as MBOF's manager." (Id., ¶¶ 31-33.) Triangle is alleged to have been "the manager of MBOF until removed in late 2006" and to "continue[] to represent itself as MBOF's manager." (Id., ¶ 29.) Gubler is alleged to control Investarit which "has improperly seized control of MBOF." (Id., ¶ 37.) Amicorp is alleged to have "improperly seized control of

MBOF." (Id., ¶ 35.) Counterclaim Plaintiffs further allege that Samuelson and Gubler "'purport[]'" to be MBOF's "'escrow agent[s].'" (Id., ¶¶ 23, 36.)

Even were the court to accept these allegations at face value, they do not demonstrate that MBOF "represents" Counterclaim Defendants within the meaning of CPLR 3019 (a). At most, the Counterclaim Defendants are alleged to have controlled MBOF in the past or to currently control it. In similar circumstances, however, New York courts have long declined to find that individuals and corporate entities are co-extensive for the purposes of asserting a counterclaim. For example, in Ruzicka v Rager (305 NY 191 [1953], rearg. denied 305 NY 798 [1953]), a limited partnership brought suit against an individual for the return of a retainer. The Court of Appeals held that the defendant could not assert a counterclaim against the individual partners because the limited partners were not the "same" as the limited partnership. The Court reasoned that "the counterclaim must assert a cause of action against the party plaintiff and that if the counterclaim be not properly interposed against the plaintiff, it is not proper as to the others." (Id. at 880, 881 [under the similarly worded predecessor Civil Practice Act §§ 266, 271]. See also New York Indus. Centre Corp. v Natl. Biscuit Co., 14 AD2d 761 [1st Dept 1961] [also under Civil Practice Act § 271, holding that where defendant could not state breach of contract counterclaim against plaintiff, a counterclaim could not be used to bring "additional defendants . . . into an action upon a claim which does not embrace the plaintiff to the action"].) It is undisputed that Counterclaim Plaintiffs' counterclaims against MBOF were dismissed with prejudice and that no counterclaims are asserted against MBOF in the Amended Counterclaims.

Counterclaim Plaintiffs' interpretation of "a person whom a plaintiff represents" to include any individual or entity which allegedly controls a plaintiff would broaden the language

of the statute so as to render it virtually without limitation. This is not an instance where an administrator, trustee, liquidator or the like has brought suit on behalf of MBOF and Counterclaim Plaintiffs seek to assert claims directly against MBOF. Instead, Counterclaim Plaintiffs attempt to impose liability on Counterclaim Defendants in their capacities either as separate corporate entities or as individuals. Counterclaim Plaintiffs have not provided the court with any authority to support this interpretation of the CPLR, and the court has found none.[6]

In the alternative, Counterclaim Plaintiffs urge this court to convert the Amended Counterclaims into a third-party complaint. (Counterclaim Ps.' Memo. in Opp. at 7.) The court declines to do so as service has not been properly made. (See infra at 8-11.) Accordingly, the counterclaims against the moving Counterclaim Defendants must be dismissed.

In dismissing the counterclaims, the court is not rendering Counterclaim Plaintiffs without recourse against Counterclaim Defendants. Counterclaim Plaintiffs may commence a separate action against Counterclaim Defendants, if timely and otherwise proper.

Defective Service

Even if Counterclaim Defendants were proper parties to this action, they have not been properly served. According to Counterclaim Plaintiffs, Samuelson and Gubler are Swiss nationals, and Davis is a Bermuda national. (Amended Counterclaims, ¶¶ 23, 28, 36.) Of the corporate entities, only one is alleged to have offices within the United States. Mutual Trust is alleged to maintain "multiple offices throughout the World, including Brunei, Canada, Cyprus, Netherlands, New Zealand and Switzerland." (Id., ¶ 26.) Investarit is alleged to be a Swiss

[6] This motion is decided on the basis that Counterclaim Defendants are not proper parties. The court therefore need not address the contention of Counterclaim Plaintiff Sternik & Zeltser that it is not the trustee of the assets of Kayley but rather the owner. (Counterclaim Ps.' Memo. in Opp. at 4 n. 5.)

company. (Id., ¶ 37.) Triangle is alleged to be a "British Virgin Islands company." (Id., ¶ 29.) Meridian is alleged to be a Bermuda limited Liability company. (Id., ¶ 30.) Amicorp is alleged to be "a Curacao company" with "representative offices" in Florida. (Id., ¶ 34. See also Katz Aff., ¶ 5 ["All Moving Defendants reside in foreign countries."].)

Counterclaim Plaintiffs admit that they have made no further attempts to serve Counterclaim Defendants beyond those previously deemed deficient by this Court (Fried, J.), and continue to rely on the purported service made of the initial counterclaims to demonstrate jurisdiction over Counterclaim Defendants. (See Counterclaim Ps.' Memo. in Opp. at 11-15; Tr. at 17.) Rather than taking any corrective action, Counterclaim Plaintiffs contend that what controls is the service made within the first 120 days of the filing of the initial counterclaims. (Tr. at 26.) In effect, Counterclaim Plaintiffs seek to reargue the March 30, 2012 decision granting Counterclaim Defendants' motion to vacate the default judgment against them. However, Counterclaim Plaintiffs neither sought leave to reargue nor appealed that decision. Nor have they offered any basis or authority for upholding the service that was not previously presented to the Court.

Counterclaim Plaintiffs also contend that they personally served three of the Counterclaim Defendants (Mutual Trust, Amicorp, and Meridian), and that the Court did not consider the affidavits of personal service because they were not offered with the Counterclaim Plaintiffs' papers in support of the motion for a default judgment, and because they were challenged by the Counterclaim Defendants. (Tr. at 19; Counterclaim Ps.' Memo. in Opp. at 12 n. 10.) In fact, the Court reviewed the affidavits and concluded that they should be disregarded

"as unreliable because they were not offered in support of the original motion for default, and they are of dubious veracity." (March 30, 2012 Decision at 7.)

In granting the Counterclaim Defendants' motion to vacate the default judgment, the Court expressly determined that jurisdiction was not acquired over them by service of the summons and counterclaims upon the New York Secretary of State and by mailing of copies to them by international registered mail. (March 30, 2012 Decision at 6.) The Court also determined that Counterclaim Plaintiffs failed to make a reliable showing as to personal service on Mutual Trust, Triangle, and Meridian. (See id. at 6-7.) These determinations were necessary to resolve the motion to vacate on the merits and are law of the case. (See Schulz v Barrows, 94 NY2d 624, 627 [2000] [lower court's finding of lack of jurisdiction was law of the case].)

Even if the Court's March 30, 2012 Decision as to personal service on Mutual Trust, Triangle, and Meridian were not law of the case, Counterclaim Defendants fail to demonstrate on this motion that these three Counterclaim Defendants were personally served or to raise a triable issue of fact in this regard. Counterclaim Plaintiffs submit only the affidavits of service for Triangle and Mutual Trust, and those affidavits recite service dates of September 7, 2009 and November 26, 2009, respectively. The Triangle affidavit was purportedly sworn on September 8, 2009 in Florida, but a certificate of conformity pursuant to CPLR 2309 (c) was not sworn until February 2012. The Mutual Trust affidavit of service was not sworn until June 2012. These affidavits lack indicia of reliability. Moreover, neither affidavit recites that a Summons was served with the Counterclaims. (Katz Aff., Ex. 1 [Affidavits of Service].) Although counsel for Counterclaim Plaintiffs represented that he had requested the summons from prior counsel, he

had no proof that it had been served even by the time of the oral argument on this motion. (Tr. at 26.)

Alternate Service

Counterclaim Plaintiffs cross-move for leave to serve Counterclaim Defendants by alternate service and to deem their prior service effective. Counterclaim Plaintiffs have identified only cost as the basis for their claim that service pursuant to the Hague Convention is "impracticable." (Katz Aff., ¶ 5.) However, "[w]here there exists a treaty requiring a specific form of service of process such as the . . . Hague Service Convention, that treaty, of course, is the supreme law of the land and its service requirements are mandatory." (Morgenthau v Avion Resources Ltd., 11 NY3d 383, 390 [2008]. See also Sardanis v Sumitomo Corp., 279 AD2d 225, 228 [1st Dept 2001] [holding that Hague Convention on Service, rather than Bus. Corp. Law 307, governs service on foreign corporations].) Counterclaim Plaintiffs have cited no authority to this court which would excuse service under the Hague Convention on cost grounds alone. As procedures are in place for effectuating service of the defendants in Switzerland (Investarit), the British Virgin Islands (Triangle), Bermuda (Meridian), and Curacao and/or Florida (Amicorp), Counterclaim Plaintiffs' request for alternate service is denied. (Cf. Yamamoto v Yamamoto, 43 AD3d 372, 373 [1st Dept 2007].)

In light of the holdings above, the court need not, and does not, reach the parties' remaining contentions and requests for relief.

Accordingly, it is hereby ORDERED that Counterclaim Defendants' motion to dismiss the Amended Verified Counterclaims with prejudice is granted to the extent of dismissing the said Counterclaims with prejudice; and it is further

ORDERED that the cross-motion is denied; and it is further

ORDERED that the parties shall appear for a compliance conference in Part 60, Room 248, 60 Centre Street, New York, New York on October 9, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
September 23, 2014

MARCY FRIEDMAN, J.S.C.