

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

2014 NY Slip Op 32622(U)

October 1, 2014

Sup Ct, New York County

Docket Number: 651633/14

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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DECISION AND ORDER

JEFFREY K. OING, J.:

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
plaintiffs', Loreley Financing (Jersey) No. 3, Ltd. and No. 18,
Ltd. (collectively "plaintiffs"), complaint.

Defendants Countrywide Alternative Asset Management Inc.
("Countrywide") and Countrywide Securities Corp. ("CSC")
(collectively the "Countrywide defendants") and defendant Bank of
America Corp. join in the motion.

Plaintiffs cross-move, pursuant to CPLR 602[a], for an order consolidating this action with their prior action under Index No. 653316/2012.

Familiarity with the factual background of the underlying dispute is presumed (see 6/20/13 Transcript, Index No. 653316/2012, Docket No. 53 [the "prior action"]). The procedural posture for this action and the prior action is set forth in this Court's decision and order rendered under Index No. 653316/2012 (mtn seq. nos. 003 and 004).

Discussion

Plaintiffs' claims of rescission, fraud, fraudulent conveyance, and unjust enrichment, are subject to a six year statute of limitations (CPLR 213; Sirico v F.G.G. Productions, Inc., 71 AD3d 429, 434 [1st Dept 2010][unjust enrichment]; Goldberg v Manufacturers Life Ins. Co., 242 AD2d 175, 180 [1st Dept 1998][six year statute governs all claims related to fraud]). Plaintiffs purchased their notes on February 28, 2007 pursuant to the Offering Memorandum. Therefore, their claims are untimely if filed after February 23, 2013. Here, plaintiffs filed their action on May 28, 2014, more than a year after the statute of limitations had expired. Even taking into account the parties' tolling agreement -- which tolled the statute of limitations for 284 days -- plaintiffs would have had to file by

December 9, 2013, which, clearly, they did not (Fifth Amendment to Tolling and Forbearance Agreement, Rouhandeh Aff., 8/18/14, Ex. L). Notwithstanding this dilemma, plaintiffs argue that this action relates back to the prior action because they filed it within six months of withdrawing the appeal of the prior action (CPLR 205[a]).

CPLR 205[a] provides that where an action is terminated, "the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination." Termination, for purposes of CPLR 205[a], "occurs when appeals as of right are exhausted" (Andrea v Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C., 5 NY3d 514, 519-20 [2005]). In other words, the six month period runs "from the date of entry of the order determining [the] appeal" (Hodge v Hotel Employees and Rest. Employees Union Local 100 of AFL-CIO, 269 AD2d 330, 331 [1st Dept 2000]). The question, which appears to be one of first impression, is when does the six month period begin to run where there is a voluntary withdrawal of a timely appeal -- at the time of the voluntary withdrawal, which would necessarily require a finding that such act should be deemed an appellate determination, or at the time the appealed order herein was entered, namely July 1, 2013. In resolving this issue, this

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Court is mindful of the following observation: "it is not the purpose of the statute to permit a party to extend the time to commence a new action by merely taking appellate action" (Cohoes Hous. Auth. v Ippolito-Lutz, Inc., 65 AD2d 666 [3d Dept 1978], affd 49 NY2d 961 [1980]).

Keeping that underlying principle in mind, this Court holds that plaintiffs' voluntary withdrawal is not an appellate determination. Indeed, plaintiffs never perfected the appeal prior to withdrawing it (Hakki Affirm., 6/27/14 [Prior Action], ¶ 5; Plaintiffs' Memorandum In Opposition, 9/5/14, p. 6). By doing so, for the purposes of CPLR 205[a], plaintiffs did not take an appeal. Procedurally, had they perfected their appeal, an order would have been required to have the appeal dismissed (22 NYCRR § 600.12). In that circumstance, the six month statute of limitations would have run from that dismissal order (Hodge v Hotel Employees and Rest. Employees Union Local 100 of AFL-CIO, 269 AD2d at 331). Given that plaintiffs chose to withdraw their unperfected appeal, the "termination" date is July 1, 2013, the date in which this Court's order dismissing the prior action was entered (see, Burns v Pace Univ., 25 AD3d 334, 335 [1st Dept 2006]). As such, this action is untimely.

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Accordingly, that branch of defendants' motion to dismiss the complaint as time-barred pursuant to CPLR 205[a] and 3211[a][5] is granted, and the complaint is dismissed.

Accordingly, it is hereby

ORDERED that branch of defendants' motion to dismiss the complaint as time-barred pursuant to CPLR 205[a] and 3211[a][5] is granted, and the complaint is dismissed; and it is further,

ORDERED that plaintiffs' cross-motion to consolidate this action with their action filed under Index No. 653316/2012 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.