

**Luther Appliance & Furniture Sales, Inc. v Albrecht,
Viggiano, Zureck & Co., P.C.**

2020 NY Slip Op 32769(U)

August 25, 2020

Supreme Court, New York County

Docket Number: 160565/2019

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 160565/2019

LUTHER APPLIANCE & FURNITURE SALES, INC.,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION AND ORDER

ALBRECHT, VIGGIANO, ZURECK & COMPANY, P.C.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

In this action for accounting malpractice, incoming plaintiff Sterling National Bank ("Sterling") moves, pursuant to CPLR 1018, 1021, 3019(a) and 601, for an order substituting it as plaintiff in place of Luther Appliance & Furniture Sales, Inc. ("Luther"); amending the caption to reflect the substitution and "the realignment of Luther as the [c]ounterclaim [d]efendant" as against the counterclaims asserted by defendant Albrecht, Viggiano, Zureck & Company, P.C. ("AVZ"); substituting Cullen and Dykman LLP as attorneys of record for plaintiff in place of SilvermanAcampora LLP; and an extension of time of no less than 30 days after service of this Court's decision and order for Luther to reply to AVZ's counterclaims (Docs. 7-14). AVZ opposes the motion in part (Docs. 15-17). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In October 2019, Luther, represented by SilvermanAcampora LLP, filed a summons and complaint against AVZ, its independent public auditor, seeking damages in excess of \$2 million for accounting malpractice allegedly committed with respect to AVZ's audits of Luther's financial statements for the fiscal years of 2015 through 2017 (Docs. 1-2).

By assignment executed on December 17, 2019, Luther assigned to Sterling:

"all of [Luther's] right, title and interest, if any, in and to all debts, account receivable, contract rights, claims, suits, and causes of action and any other sums which may be owing to [Luther] ('the Claims') by [AVZ] . . . including without limitation, the causes of action asserted in and that could be asserted in that certain [v]erified [c]omplaint filed on or about October 30, 2019 by [Luther] against AVZ in Supreme Court of the State of New York, County of New York under index number 160565/2019 ('the Action')" (Doc. 11).

On January 10, 2020, AVZ interposed an answer, raising several affirmative defenses and counterclaims (Doc. 5). In its first counterclaim, AVZ claimed that Luther breached one or more of its engagement agreements and that payment of fees totaling \$124,162.50 remained outstanding for services rendered (Doc. 5). AVZ asserted a second counterclaim against Luther for \$124,162.50 based on a theory of quantum meruit (Doc. 5). Luther has not yet responded to the counterclaims.

Sterling now moves to be substituted as the plaintiff in this action because Luther assigned to it its right, title and interest in, among other things, claims, suits, and causes of action against AVZ in this action (Doc. 8 ¶ 9-13). However, Sterling maintains that AVZ's counterclaims against Luther for liability based on unpaid fees fall outside the ambit of the express language and scope of the assignment because Luther only assigned its affirmative claims for relief against AVZ, thus "requiring Luther to be realigned in this [a]ction as a [c]ounterclaim [d]efendant pursuant to CPLR § 601 and as a matter of law" (Doc. 8 ¶ 3, 14-15). Given the forgoing, Sterling requests that the caption be amended to reflect the substitution and the realignment of Luther as a counterclaim

defendant and that Cullen and Dykman LLP be substituted in as attorneys of record (Doc. 8 ¶ 16-17). Moreover, given the subject assignment and Luther's new status as a counterclaim defendant, Sterling requests that Luther be afforded an extension of 30 days after service of this Court's order to respond to AVZ's counterclaims (Doc. 8 ¶ 17).

AVZ only opposes that branch of the motion seeking to substitute Sterling as a party in place of Luther and amending the caption to "realign" Luther as a counterclaim defendant (Doc. 15 ¶ 4). AVZ argues that the proposed "realignment" would jeopardize its ability to obtain all necessary discovery to defend against the claims asserted in the complaint because only Luther, as the original plaintiff in this action and the party in sole possession and control of documents and information relevant to said claims, can adequately respond to discovery (Doc. 15 ¶ 10). AVZ further contends that the "realignment" will not accurately represent the relationship between the parties because "[L]uther cannot be a [c]ounterclaim [d]efendant in this action without also being a [p]laintiff", which would result in confusion (Doc. 10 ¶ 9). Instead, AVZ maintains that Luther should be *joined* as a plaintiff insofar as said joinder will in no way prevent Sterling's ability to control prosecution of the claims asserted (Doc. 15 ¶ 8).

In reply, Sterling attempts to refute AVZ's claim that the realignment will compromise its ability to obtain discovery from Luther, asserting that AVZ may still seek discovery from Luther as a counterclaim defendant (Doc. 18 ¶ 7). Moreover, Sterling maintains that AVZ's argument regarding discovery also lacks merit because, as stated in the complaint, Luther's assets, including Luther's business books and records, were sold as part of a UCC Article 9 sale to non-party Luther Appliance & Furniture Sales Acquisition, LLC ("Luther Acquisition") (Doc. 18 ¶ 9). Thus, argues Sterling, "both AVZ and Sterling will be looking for document discovery from Luther Acquisition" (Doc. 18 ¶ 9).

LEGAL CONCLUSIONS:

"While, generally speaking, an assignee stands in the shoes of the assignor, the plain language of an assignment determines its breadth and scope" (*Najjar Group, LLC v W. 56th Hotel LLC*, 106 AD3d 640, 641 [1st Dept 2013] [internal citations omitted]; *accord Inverventure 77 Hudson LLC v Falcon Real Estate Inv. Co.*, 2016 NY Slip Op 30712[U], 2016 NY Misc LEXIS 1437, *4 [Sup Ct, NY County 2016]).

The CPLR provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any party" (CPLR 1021). Moreover, "[u]pon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action," which is a determination that rests within the discretion of the trial court (CPLR 1018; *see 936 Coogans Bluff, LLC v 936-938 Cliffcrest Hous. Dev. Fund Corp.*, 2017 NY Slip Op 32674[U], 2017 NY Misc LEXIS 5075, *8-9 [Sup Ct, NY County 2017]). Substitution of a party is appropriate when it will not result in surprise or prejudice (*Mtge. Elec. Registration Sys., Inc. v Holmes*, 131 AD3d 680, 682 [2d Dept 2015]).

Since Luther assigned to Sterling its claims in this action and AVZ has failed to challenge the validity of said assignment or assert the existence of any prejudice, this Court, in its discretion, grants that branch of Sterling's motion seeking substitution (*see Medallion Auto Inc. v Sanders*, 272 AD2d 85, 85-86 [1st Dept 2000]; *Yick Tak Cheung v City of NY*, 2017 NY Slip Op 30717[U], 2017 Misc LEXIS 1355, *7-8 [Sup Ct, NY County 2017]; *Inverventure 77 Hudson LLC v Falcon Real Estate Inv. Co.*, 2016 NY Misc LEXIS 1437 at *8). However, that branch of Sterling's motion seeking to "realign" Luther as a counterclaim-defendant is denied because it is well-settled that "[a] counterclaim *must* assert a cause of action against *the plaintiff*" (*Mutual Benefits Offshore*

Fund v Zeltser, 140 AD3d 444, 445 [1st Dept 2016] [emphasis added] [citations omitted]; see CPLR 3019 [a]; *Ruzicka v Rager*, 305 NY 191, 196 [1953]). Since Sterling concedes that "Luther no longer has any interest qua [p]laintiff in the subject matter of this [a]ction" (Doc. 8 ¶ 10), there is no basis for allowing AVZ's counterclaim to remain as against Luther as a counterclaim defendant. Further, Sterling has proffered no authority to support its claim that such "reassignment" is permissible under the circumstances.

Additionally, since the assignment is silent with respect to Luther's potential liability in this action, there is no reason to deviate from the general rule that, as an assignee, Sterling takes Luther's assignment "subject to all claims, counterclaims and defenses that [AVZ] could have asserted" against the assignor (*Gama Aviation Inc. v Sandton Capital Partners, LP*, 2013 NY Slip Op 32648[U], 2013 NY Misc LEXIS 4887, *8 [Sup Ct, NY County 2013]; see *TPZ Corp. v Dabbs*, 25 AD3d 787, 789 [2d Dept 2006]) and "subject to any preexisting liabilities" (*TPZ Corp. v Dabbs*, 25 AD3d at 789; see generally *Chaikovska v Ernst & Young, LLP*, 78 AD3d 1661, 1663 [4th Dept 2010]; *Crispino v Greenpoint Mortg. Corp.*, 304 AD2d 608, 609-610 [2d Dept 2003]). Assuming, *arguendo*, that Sterling is not an appropriate party to defend against the counterclaims, this Court's determination does not preclude AVZ from bringing a third-party action against Luther, should it be so advised.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that Sterling National Bank's motion, pursuant to CPLR 1018 and 1021, seeking an order substituting it as plaintiff for Luther Appliance & Furniture Sales, Inc. and amending the caption to reflect the substitution is granted; and it is further

ORDERED that the portion of Sterling National Bank's motion seeking to add Luther Appliance & Furniture Sales, Inc. as a counterclaim defendant is denied; and it is further

ORDERED that the Clerk of the Court shall amend the caption of this action to read as follows:

STERLING NATIONAL BANK,

Plaintiff,

Index No. 160565/2019

v

ALBRECHT, VIGGIANO, ZURECK & COMPANY, P.C.,

Defendant.

And it is further

ORDERED that the unopposed portion of Sterling National Bank's motion seeking to substitute Cullen and Dykman LLP as attorneys of record in the place of SilvermanAcampora LLP is granted; and it is further

ORDERED that Sterling National Bank's time to reply to Albrecht, Viggiano, Zureck & Company's counterclaims is extended for a period of 30 days after service of this order, with notice of entry; and it is further

ORDERED that, within twenty days of the entry of this order, Sterling National Bank shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141 B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption and the attorneys of record herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this Court.

8/25/2020

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE