

**Marcal Fin. SA v Sutton**

2025 NY Slip Op 30964(U)

March 20, 2025

Supreme Court, New York County

Docket Number: Index No. 653351/2015

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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MARCAL FINANCE SA, BELLPOND INVESTMENTS SA,  
FRIEDA HAMWAY, RACHELLE JEMAL, JUDITH PASKIE,  
GAIL MASLATON, JOAN SITT,

Plaintiff,

- v -

ISAAC SUTTON, MIDDLEGATE SECURITIES LTD.,  
GADIEL BLUSZTEIN, KINERSIS RENEWABLES  
LIMITED, MIDDLEGATE HADAS ARAZIM LLC D/B/A MHA  
ISRAEL LLC, MIRELIS HOLDING SA AS SUCCESSOR IN  
INTEREST TO ATLAS CAPITAL, SA, HYPOSWISS  
PRIVATE BANK GENEVA, S.A. AS SUCCESSOR IN  
INTEREST TO ATLAS CAPITAL SA, JOHN DOES 1-10,  
THE ESTATE OF MAYER SUTTON, R.T. INTERAL LTD.  
A/K/A MIGDAL, DANSON COMPANY S.A., ALAIN  
KOSTENBAUM, KOSTENBAUM & ASSOCIES,  
LEONORA SUTTON, KINERSIS RENEWABLES USA  
LLC, HALMAN-ALDUBI INVESTMENT HOUSE LTD. AS  
SUCCESSOR INTEREST TO HADAS ARAZIM  
INVESTMENT HOUSE LTD.

Defendant.

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 019) 497, 498, 499, 500,  
508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 523, 524

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Isaac Sutton is not entitled to dismissal of this lawsuit based on his argument that the doctrines of *res judicata* and/or collateral estoppel disposes of the claims asserted in this case based on the entry of a judgment confirming an arbitration award in a lawsuit (the **653336 Lawsuit**) captioned *Frieda Hamway, Rachelle Jemal, Judith Paskie, Gail Maslaton and Joan Sitt v. Isaac Sutton et al.* and bearing Index No. 653336-2015 for at least two reasons.

First, and as discussed below, the entry of the judgment in the 653336 Lawsuit was not a final judgment on the merits of the claims asserted in this Court.

In the 653336 Lawsuit, the plaintiffs entered into a Settlement Agreement (NYSCEF Doc. No. 511) with Isaac and Mayer Sutton whereby the parties agreed “[s]ubject to the complete and timely performance by the Suttons of all of their obligations set forth in the [Settlement] Agreement” (*id.* at § 4), the plaintiffs released all claims against the Suttons related to the deposit of the Funds (some \$11 million entrusted to the defendants) for approximately \$7,666,400 or \$6,916,400 pending the results of an arbitration held by Jeffrey Dwek as to whether the Suttons had returned approximately \$750,000 in the period from March 2013 to May 2013.

The Suttons did not however timely perform their obligations set forth in the Settlement Agreement. Their obligations included making timely Payment No. 3 in the amount of approximately \$3.6 million (*i.e.*, 45 days after the effective date of Settlement Agreement. This they did not do. They instead chose to go to arbitration.

The parties however agreed that in such event (and following 30 days from such non-payment [*i.e.*, 75 days from the Effective Date]) that the plaintiffs could pursue claims against the Suttons including as to “all other rights as existed prior to the execution of the Settlement Agreement” and the Suttons acknowledged that “[t]he amount of the claims which the Hamway Group has against the Suttons might be higher than the amount set forth in the [Settlement] Agreement.” (*Id.* at § 3).

Thus, when the court (Ramos, J.) entered an order (the **2018 Order**; NYSCEF Doc. No. 514), dated May 2, 2018, confirming the Final Arbitration Award, he expressly provided that “the action shall continue on all claims against all Defendants, *including Isaac Sutton*.” The 2018 Order is not ambiguous. Inasmuch as it does not appear to have ever been appealed on the record before the Court, it is the law of the case and is entirely consistent with what was contemplated by the Settlement Agreement in the event of non-timely performance by the Suttons. Thus, the argument that entry of the 2018 Order precludes this litigation is entirely frivolous.

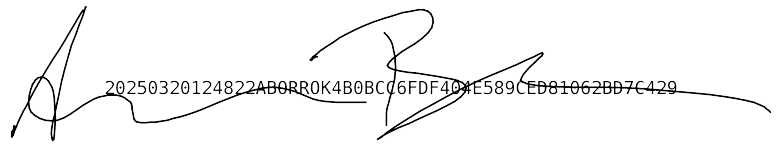
Equally importantly, the argument fails because Mr. Sutton has not pled or made any motion to dismiss in the approximately 10 years that this case has been pending a motion to dismiss on *res judicata* or collateral estoppel grounds. Thus, having never raised these defenses as an affirmative defense, they are waived (CPLR 3018; CPLR 3211; *M & E 73-75 LLC v. Fusion LLC*, 189 AD3d 1 (1<sup>st</sup> Dep’t 2020)). In addition, inasmuch as the arbitrator only determined the enforceability of the Settlement Agreement and the validity of the Sutton’s duress defense, the merits of the claims to be determined in this matter were never litigated (*North Shore-Long Island Jewish Health Systems, Inc. v. Aetna US Healthcare, Inc.* 27, AD.2d 439 (2d Dep’t 2006)). Thus, the motion to dismiss is denied.

In their opposition papers, the plaintiff requests Rule 130 sanctions in the form of reasonable attorney’s fees. 22 NYCRR 130-1.1 (c) (1) provides that conduct is frivolous if “it is completely without merit in law and cannot be supported by a reasonable argument for an extension,

modification or reversal of existing law” (22 NYCRR 130-1.1 [c] [1]). The Order is not ambiguous and expressly contemplates these claims proceeding against Isaac Sutton. As discussed above, this is consistent with the Settlement Agreement. It is also significant that Mr. Sutton never pled these defenses in the 10 years that this case has been pending (or in the 7 since the Order was entered). Although a close call, the Court is denying to impose sanctions *at this time*.

The Court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is hereby ORDERED that Isaac Sutton’s motion (Mtn. Seq. No. 019) to dismiss is DENIED.



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ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	