

Tops Markets' Ch. 11 Claims Against Morgan Stanley Survive

By **Vince Sullivan**

Law360 (October 12, 2022, 7:08 PM EDT) -- A litigation trustee's \$375 million in Chapter 11 fraudulent transfer claims against private equity investor Morgan Stanley can continue after a New York bankruptcy judge denied motions to dismiss the suit over a series of dividends that allegedly left debtor Tops Markets insolvent.

In a 109-page opinion Wednesday, U.S. Bankruptcy Judge Robert D. Drain said that the claims by the litigation trust are not time-barred and that the complaint provides adequate details about allegedly fraudulent transfers to Morgan Stanley in the form of dividend payments over several years.

"[T]he complaint makes several other non-conclusory allegations that, taken together, plausibly support its contention that when Tops paid \$105 million of dividends on October 9, 2009, Tops was insolvent or rendered insolvent, was left with unreasonably small capital, and intended or believed it would be unable to pay its debts as they matured," the opinion said.

A Morgan Stanley-led group of private equity investors bought Tops in 2007 for \$300 million, \$227 million of that funded by debt issued by Tops, and sold it in 2013 to a group of Tops executives for \$21 million. The company filed for Chapter 11 in February 2018, and Judge Drain approved a \$455 million reorganization plan that November.

A litigation trust was established and in February, trustee Alan Halperin filed suit alleging that Morgan Stanley drove Tops into bankruptcy by causing it to pay out more than \$375 million in "lavish and illegal dividends" while running up \$426 million in debt and leaving the company with \$515 million in liabilities from underfunded pension plans.

Morgan Stanley, along with other investors and individual directors named in the suit, had moved for dismissal on grounds including arguments that, contrary to Halperin's claims, the company was solvent when the dividends were paid.

The trust argued that Morgan Stanley withheld information about massive pension contribution obligations when seeking solvency opinions ahead of the dividends issuances.

Judge Drain granted the motions to dismiss breach of fiduciary duty claims against two Tops directors and attendant aiding and abetting claims against Morgan Stanley.

"We are happy with the decision and look forward to prosecuting the case for the benefit of the

creditors of Tops," Kyle Lonergan of McKool Smith said on behalf of the litigation trustee.

Representatives for the defendants could not immediately be reached late Wednesday for comment.

Halperin is represented by Kyle A. Lonergan, James H. Smith, Joshua Newcomer, Mike McKool and Lewis T. LeClair of McKool Smith PC.

Morgan Stanley is represented by Pamela A. Miller, Peter Friedman, Daniel S. Shamah and Patrick D. McKegney of O'Melveny & Myers LLP.

The adversary case is Alan D. Halperin v. Morgan Stanley Investment Management Inc. et al., case number 20-08950, in the U.S. Bankruptcy Court for the Southern District of New York.

—Additional reporting by Rick Archer. Editing by Peter Rozovsky.