STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ANDRE MARONIAN, JAMESON FORTE, and VINCENT BOVENZI,

Plaintiff, DECISION AND ORDER

v.

Index #2007/07056

GREG PROVENZANO, DANNY VOLONINO, and AMERICAN COMMUNICATIONS NETWORK, INC., A MICHIGAN CORPORATION,

Defendant.

Defendants, Greg Provenzano and American Communications Network, Inc., move for an order pursuant to 2201 staying this action pending a determination by the United States District Court, in a related proceeding, as to whether there are valid agreements between the parties, incorporating binding arbitration clauses as well as non-solicitation covenants, which will allegedly impact both the scope and future course of the litigation. A cross motion is made by defendant, Danny Volonio. Though Volonio takes no position on the remaining defendants' motion, he seeks a stay in the event the other motion is granted. If neither motion for a stay is granted, he requests twenty days from the service of such order with notice of entry to answer the complaint.

In this action, plaintiffs seek recovery against defendants for claims sounding in defamation, conspiracy, conversion, and

unjust enrichment. Defendants Provenzano and ACN assert that these claims are inextricably intertwined with issues currently before the United States District Court in a related proceeding. Provenzano and ACN contend that the District Court's determination of issues, relating to whether there are valid arbitration agreements between the parties covering the claims asserted here, will significantly impact the course of this litigation.

Defendant ACM is a telecommunication service provider using a network of independent sales professionals ("Independent Representative" or "IRs") to provide such services. Plaintiffs are former IRs of ACN. Plaintiffs Maronian and Forte operated their ACN distributorships through companies known as Rebellion, Inc. and Jameson Forte, Inc., respectively. Provenzano and ACN allege that each IR of ACN, including Rebellion and Jameson Forte, was required to execute an Independent Representative Agreement, and these agreements contain a clause requiring the parties to submit disputes relating to the IR's relationship with ACN to binding arbitration under the Commercial Rules of the American Arbitration Association in Southfield, Michigan. Likewise, it is alleged that each agreement incorporates ACN's Policies and Procedures, which contains an arbitration clause as well. Plaintiffs allege, however, that Bovenzi's IR agreement includes no arbitration provisions, Maronian's IR agreement - if

there even is one - has never been produced, and that Forte terminated his IR agreement with ACN in 2003 when his rights and obligations were assigned to Jameson Forte LLC.

Plaintiffs allege that, in the fall of 2006, they grew increasingly disenchanted with ACN and began exploring other business opportunities. ACN alleges that plaintiffs engaged in actions violative of the non-solicitation provisions of the alleged IR agreement while still affiliated with ACN. On December 19, 2006, ACN suspended plaintiffs' distributorships due to the alleged violations. The next day, plaintiffs terminated their affiliations with ACN. A barrage of litigation between the parties ensued.

In January, 2007, ACN filed suit against plaintiffs, Rebellion, and Jameson Forte, Inc. in Michigan state court, seeking a TRO and preliminary injunction in aid of arbitration to prevent alleged breaches of a non-solicitation clause. The Michigan state court granted ACN some, but not all, of the TRO relief requested. Prior to the hearing on the preliminary injunction, plaintiffs removed the action to United States District Court for the Eastern District of Michigan and filed a motion to dismiss for lack of personal jurisdiction. On March 7, 2007, ACN voluntarily discontinued the Michigan action and initiated an arbitration in Southfield, Michigan pursuant to the IR agreements. Provenzano and ACN contend that plaintiffs

actively participated in the Michigan arbitration for approximately three months.

On May 30, 2007, plaintiffs commenced a special proceeding in New York Supreme Court, Monroe County, under Article 75, seeking a stay of the Michigan arbitration on the ground that no valid arbitration agreements exist. On June 22, 2007, ACN removed that action to United States District Court for the Western District of New York, based on diversity of citizenship. On June 29, 2007, ACN moved to dismiss and/or transfer the action to Michigan District Court on the ground that the Federal Arbitration Act applies and on the ground that the United Stated District Court for the Eastern District of Michigan has authority to enter orders affecting an arbitration pending within that district.

On June 6, 2007, plaintiff commenced the instant action in Supreme Court, Monroe County. The parties stipulated to extend defendants' time to answer, move, or otherwise respond. In lieu of answering, defendants served the instant motion for a stay.

Motion for a Stay: CPLR 2201

CPLR 2201 states:

> Except where otherwise proscribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.

While plaintiffs acknowledge that the issuance of a stay is

discretionary, see Research Corp. v. Singer-General Precision, Inc., 36 A.D.3d 987, 988 (3d Dept. 1971), they rely on a series of cases suggesting that a stay is warranted only where there is complete identity of parties and issues. For example in one of the cases it was stated:

> A stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions; this requires a complete identity of parties, cause of action and the judgment sought.

Somoza v. Pechnik, 3 A.D.3d 394 (1st Dept. 2004). See also, Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51, 59 (1st Dept. 2006); Green Tree Fin. Serv. Corp. v. Lewis, 280 A.D.2d 642 (2d Dept. 2001) (motion to stay state court action denied where federal action lacked complete identity of parties, causes of action and relief sought); Pierre Assoc. Inc. v. Citizens Casualty Co. of New York, 32 A.D.2d 495, 497 (1st Dept. 1969) ("What is required is complete identity of parties, cause of action and judgment sought.").

But cases from the First Department also permit a stay when there is no identity of parties and issues if judicial economy otherwise warrants one. Just this past June, the First Department held:

> Even though there was not complete identity of parties, there were overlapping issues and common questions of law and fact [citations omitted], and 'the

> determination of the prior action may dispose of *or limit* issues which are involved in the sibsequent action.'"

Belopolsky v. Renew Data Corp., 41 A.D.3d 322 (1st Dept. 2007)(quoting Buzzell v. Mills, 32 A.D.2d 897 (1st Dept. 1969)).

In Goodridge v. Fernandez, 121 A.D.2d 942, 945 (1st Dept. 1986) the court stated:

> Consideration of the other factors which influence the granting of a stay under CPLR 2201 similarly favor disposition of all the issues in the federal forum. There is similarity of parties since it is not necessary that the parties in the instant action and the consolidated federal action be identical or that the respective parties in each action assume identical positions. Barnes v. Peat, Marwick, Mitchell & Co., 42 A.D.2d 15, 344 N.Y.S.2d 645 (1st Dept. 1973); Cye, Haberdashers, Inc. v. Crummins, 142 N.Y.S.2d 683 (Sup. Ct. N.Y. County, 1955), affd. 286 App. Div. 1077, 146 N.Y.S.2d 668 (1st Dept. 1955). The federal action was commenced first and the federal court has the expertise to adjudicate the issue of common law fraud in accordance with state law. Proctor & Gamble Distributing Co. v. Lloyd's Underwriters, 44 Misc.2d 872, 255 N.Y.S.2d 361 (Sup. Ct. N.Y. County, 1964). The stay avoids the unnecessary risk of inconsistent adjudications as to the defenses asserted by both Harvey and Fernandez, respectively, in the federal and state actions, the duplication of proof, and the consequent waste of judicial resources which would result from prosecution of the instant action.

I find that similar circumstances are present here, especially in view of the fact that the FAA applies, and the Michigan arbitration carried on some three months with plaintiffs' active participation. The Fourth Department has affirmed the grant of a stay where the pending actions were "sufficiently similar such that the goals of preserving judicial resources and preventing an

inequitable result are properly served" despite the fact that one proceeding had an additional party not named in the other action. Finger Lakes Racing Assoc. v. New York Racing Assoc., 28 A.D.3d 1208, 1209 (4th Dept. 2006). Another case rejecting the complete identity criterion is National Management Corp. v. Adolfi, 277 A.D.2d 553, 554-55 (3d Dept. 2000).

I realize that, when assessing a motion for a stay, a court should be mindful that "a party is generally entitled to an unrestrained right to resort to the courts for prompt enforcement of substantial contractual rights." Pierre Assoc. Inc., 32 A.D.2d at 496. "The possibility or actuality of two trials is of no importance." Mt. McKinley Ins. Co., 33 A.D.3d at 59. But here, it makes no sense to permit the litigation to go forward until one of these federal courts decide the removed Article 75 proceeding. The requested stay was appropriately limited to consideration and disposition of defendants' motion in the removed proceeding, and not for the entirety of the arbitration in Michigan.

The motion for a stay pursuant to CPLR 2201 is granted. Volonio's motion, however is conditionally denied except insofar as he seeks twenty days from the service of such order with notice of entry to answer the complaint. That part of his requested relief is granted. The condition of denial is that no depositions be scheduled until the federal courts tell us who

will remain parties to the arbitration. This will preserve to each remaining party the right to be present at depositions and to Volonio the right not to be forced to attend duplicated depositions. Only documentary discovery may be conducted in the action against Volonio until further order of the court.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: October 10, 2007
Rochester, New York