

**Paramount Global Holdings, Inc. v Southeast Cruise Holdings LLC**

2005 NY Slip Op 30249(U)

October 20, 2005

Supreme Court, New York County

Docket Number: 0600851/2005

Judge: Bernard J. Fried

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

PRESENT: BERNARD J. FRIED  
J.S.C.

PART 600

Index Number : \*600851/2005  
PARAMOUNT GLOBAL HOLDINGS  
vs  
SOUTHEAST CRUISE HOLDINGS  
Sequence Number : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

*C*

... read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the  
accompanying memorandum decision.

SO ORDERED

**FILED**  
OCT 24 2005  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/20/05 *Bernard J. Fried*  
**BERNARD J. FRIED** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

----- X

PARAMOUNT GLOBAL HOLDINGS, INC.,

Index No. 600851/05

Plaintiff,

- against -

SOUTHEAST CRUISE HOLDINGS LLC,  
VANQUISH ACQUISITION PARTNERS LLC,  
MB CRUISES LLC, CASINOS AUSTRIA  
MANAGEMENT COMPANY LLC, CASINOS  
AUSTRIA, MARITIME, JOSEPH DEL VALLE  
and ARNOLD BLOCK, KENNETH D. POLIN,  
and the law firm of FOLEY LARDNER,

Defendants.

----- X

**FRIED, J.:**

Motion Sequence Numbers 001, 002, and 003 are consolidated for disposition.

In Motion Sequence Number 001, defendants Vanquish Acquisition Partners LLC (Vanquish) and Joseph Del Valle move, pursuant to CPLR 327 (a) and CPLR 3211 (a) (1) and (7), for dismissal of the complaint on the grounds of forum non conveniens, a defense founded on documentary evidence, and failure to state a cause of action, and pursuant to CPLR 3016 (b), for dismissal of the first cause of action on the ground that it is not pleaded with requisite particularity.

In Motion Sequence Number 002, defendants Southeast Cruise Holdings LLC (Southeast), MB Cruises LLC (MB), Casinos Austria Management Company LLC (CAMCO), Casinos Austria Maritime (CAM), and Arnold Block move for dismissal of the complaint, pursuant to CPLR 327 (a), CPLR 3211 (a) (1), (2) and (7), on the grounds of forum non conveniens, a defense founded on documentary evidence, and failure to state a

cause of action.

In Motion Sequence Number 003, defendants Kenneth D. Polin and Foley Lardner (FL) move for dismissal of the complaint, pursuant to CPLR 327 (a), CPLR 3211 (a) (1), (2) and (7), and CPLR 3016 (b), on the grounds of forum non conveniens, a defense founded on documentary evidence, failure to state a cause of action, and failure to plead fraud with the requisite particularity.

Plaintiff commenced this action to recover \$1,760,000 that it claims it lost by being fraudulently induced to accept a secured non-recourse promissory note that became worthless, because defendant devalued or destroyed the collateral securing the note.

Specifically, the complaint alleges as follows: plaintiff is a New York Corporation. Defendants MB and Southeast are Delaware corporations. Defendants CAMCO and CAM are Florida corporations. Defendant Del Valle is a senior partner of defendant Vanquish, a managing member of MB, and a chairman of Southeast. Defendant Block is a regional manager and a representative of Casinos Austria International, A.G. (CAI), Casinos of Austria, A.G. (CA), CAM, and CAMCO. Defendant Polin is a director and a member of the board of Southeast, and a partner and member of the law firm FL.

Plaintiff loaned funds to MLA Cruises, Inc. (MLA) and Majesty Enterprises of Florida, LLC (Majesty) to assist them in purchasing the vessel "The Atlantic," evidenced by a promissory note that plaintiff held, and which was secured by The Atlantic, and by shares of MLA and Majesty, the then owners of that vessel. Eventually, MLA and Majesty defaulted on the note, whereupon they entered into an agreement with plaintiff to offer to sell The Atlantic.

Sometime prior to June 2004, Del Valle, chairman of Vanquish, approached plaintiff about the purchase of The Atlantic by MB and Southeast, and, allegedly, made representations to plaintiff concerning MB's and Southeast's equity holders of MB, which included CAI, CAM, and CAMCO, the subsidiaries of CAI and CA. Block confirmed the representations, and Polin and FL also made representations as to Southeast's financial strength which, together, gave plaintiff confidence in the financial ability of the prospective purchasers to meet their payment obligations under the note.

Thereupon, plaintiff reached an agreement with the holder of the first lien on The Atlantic to consent to its sale to MB and Southeast. The note was assigned to MB, and plaintiff became the holder of a new note that was substituted for the prior note in the amount of \$1,760,000 (Substitute Note), due and owing by MB. The Substitute Note was secured under the authority of Chapter 313 of Title 46 of the U.S. Code, as amended, to secure payment to the mortgagee holding a mortgage in The Atlantic in the amount of \$1,760,000. The Substitute Note was also secured by 51% of the shares of MB under a collateral assignment by Southeast to plaintiff of MB units of shares that was executed by Del Valle, as "Chairman on behalf of Southeast Cruise Holdings, LLC."

In breach of the collateral assignment agreement between Southeast and plaintiff, and breach of an escrow agreement, Southeast never delivered the 51% of MB shares to the escrow agent as collateral for plaintiff in the event of MB's non-payment or default under the Substitute Note. Plaintiff accepted terms and conditions that it never would have accepted but for defendants' representations.

Simultaneously with the purchase of The Atlantic, defendants also acquired the vessel

“Princessa,” in an attempt to monopolize the floating gambling business in the Miami area. The Atlantic was doing substantial business until the day that MB and Southeast acquired it, but defendants never intended to operate The Atlantic. Plaintiff was also damaged by the forfeiture of docking rights of The Atlantic, and by the possible loss of its floating gambling license.

The complaint contains four causes of action. The first cause of action alleges that defendants entered into a scheme to fraudulently induce plaintiff to (1) enter and continue in the transactions with defendants; (2) deprive plaintiff of its money due and owing under the Substitute Note; (3) deprive plaintiff of the collateral; (4) monopolize the floating gambling business in the Miami area; (5) drive plaintiff out of business; (6) destroy the collateral; and (7) destroy the business and good will that plaintiff and its former partners have established in the Miami floating offshore gambling business.

The second cause of action alleges that defendants defaulted on the Substitute Note, causing damage to plaintiff in the amount of \$1,760,000. The third cause of action alleges breach of contract. The fourth cause of action alleges that, by failure to abide by the terms of the contract, and to operate The Atlantic, defendants acted willfully and maliciously.

Defendants now move to dismiss the complaint on various grounds, including the threshold ground of CPLR 327 (a), i.e., that this action should be dismissed in favor of a proceeding brought in the federal or state courts of the State of Florida, because that is the contractually agreed-upon forum, Florida is the site of the assets in question, the closing occurred in Florida, and Florida law applies to the transaction at issue. For the reasons set forth below, I am persuaded that the motions should be granted on this ground. This

determination is consistent with the policy of New York courts to enforce choice of law contractual provisions (*Indosuez Intl. Fin., B.V. v National Reserve Bank*, 304 AD2d 429 [1<sup>st</sup> Dept 2003]; *Micro Balanced Products. Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284 [1<sup>st</sup> Dept 1997]).

On February 20, 2004, MLA and Majesty, the two entities to which plaintiff originally loaned the funds with which to purchase The Atlantic, entered into an agreement to sell The Atlantic to MB (Purchase Agreement). Section 12.14 of the Purchase Agreement (“Governing Law; Waiver of Jury Trial”) provides, in relevant part:

“construction and performance of this Agreement shall be governed by the laws of Florida without regard to its principles of conflict of law.”

Section 12.15 of the Purchase Agreement (“Jurisdiction; Service of Process”)

provides:

“Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement must be brought against any of the parties in the state or federal courts located in Miami, Florida and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein. Process in any action or proceeding referred to in the proceeding sentence may be served on any party anywhere in the world” (emphasis added).

Although plaintiff is not a party to the Purchase Agreement that contains the forum selection and choice of law provisions, the Substitute Note specifically incorporates by reference the Purchase Agreement. Moreover, the Purchase Agreement was physically attached to the Substitute Note. Paragraph 2 of the Substitute Note provides, in relevant part:

“This Secured Non-Recourse Promissory Note (the ‘Note’) is issued pursuant to the terms of that certain Fourth Amendment to Purchase Agreement dated June 7, 2004, among Maker and such other parties to the Fourth Amendment to Purchase Agreement (hereinafter the ‘Purchase Agreement’) a copy of which is attached hereto as Appendix 1, and the payment and performance by Maker of its obligations under

this Note shall be secured by a third mortgage on the Vessel (as defined in the Purchase Agreement) (the 'Third Mortgage')."

Paragraph 3 of the Substitute Note provides:

"Payee agrees that all indebtedness under the Note is junior to and is expressly subordinated in right of payments to the prior payment in full of the First and Second Mortgage on the Vessel as defined in the Purchase Agreement" (emphasis added).

For a document to be incorporated by reference (1) the document to be incorporated must be identified with sufficient specificity, and (2) there must be a clear manifestation of an intent to be bound by the terms of the incorporated instrument (*Ryan, Beck & Co., LLC v Fakh*, 268 F Supp 2d 210 [ED NY], *mot to certify appeal denied* 275 F Supp 2d 393 [ED NY 2003]; *Federated Mut. Ins. Co. v Woodstock '99, LLC*, 140 F Supp 2d 225 [ND NY 2001]).

Here, the Substitute Note expressly states it is being issued pursuant to the terms of the Fourth Amendment to the Purchase Agreement dated June 7, 2004. Paragraph 17 of the Fourth Amendment provides, in part:

"Except as otherwise amended or restated by this Amendment, all of the terms and provisions of the Purchase Agreement shall remain in full force and effect. This Amendment and the Purchase Agreement shall be governed, construed and interpreted in accordance with the laws of the State of Florida, without giving effect to principles of conflicts of law."

In addition, the Substitute Note stated that the Purchase Agreement was being attached to it, thereby eliminating any doubt as to the document that was being incorporated. Thus, the Purchase Agreement was identified beyond all reasonable doubt (*Chiacchia v National Westminster Bank USA*, 124 AD2d 626 [2d Dept 1986]), and the parties had knowledge of, and assented to, the incorporated terms (*PaineWebber Inc. v Bybyk*, 81 F3d 1193 [2d Cir 1996]).

Moreover, the situation presented here satisfies the requirement that the jurisdiction chosen bear a reasonable relationship to the agreement at issue, and that it does not violate fundamental public policy of this state (*Finucane v Interior Constr. Corp.*, 264 AD2d 618, 619 [1<sup>st</sup> Dept 1999]). According to the complaint, defendants CAMCO and CAM are Florida corporations, the complaint alleges that defendants acquired the vessel “Princessa,” attempting to monopolize the floating gambling business in the Miami area, and, apparently, The Atlantic is berthed in Florida. Plaintiff has failed to overcome its “heavy burden” of establishing that the relevant law of Florida would be offensive to our public policy (*id.* at 620).

Furthermore, although plaintiff alleges that it was fraudulently induced into entering into the contractual arrangement with defendants by the allegedly false representations about the financial strength and collateral, plaintiff does not allege fraud with respect to the jurisdiction provision itself, thereby making that provision enforceable (*British West Indies Guar. Trust Co. v Banque Intl. a Luxembourg*, 172 AD2d 234 [1<sup>st</sup> Dept 1991]; *cf. DeSola Group v Coors Brewing Co.*, 199 AD2d 141 [1<sup>st</sup> Dept 1993] [forum selection clause unenforceable, because plaintiff claims entire agreement was permeated with fraud; agreement was not intended to constitute a binding contract, but only to provide a billing number so that plaintiff could be paid]).

Plaintiff’s reliance upon *Socline Corp. v Podell* (1996 WL 109076 [SD NY 1996]) is unconvincing. In *Socline*, the federal district court held that the forum selection clause contained in a loan agreement bound only the parties to that agreement, because the promissory notes sued upon did not incorporate the terms of the loan agreement. Unlike the

situation here, there was no language indicating the parties' intent that the promissory notes would incorporate the terms of the loan agreement, and the loan agreement was governed by Swiss law, whereas the promissory notes were governed by French law.

Finally, at oral argument, defense counsel for Vanquish and Del Valle requested that, in the event that the court dismisses the action based upon the forum selection clause, then it should impose a time frame and conditions for the institution of an action in Florida. I see no basis to impose such conditions here. Additionally, counsel for the Casino entities and Block, who also sought dismissal based upon the forum selection clause, requested that the court dismiss the action with prejudice as against these parties. The request is denied. Because I am granting the motion to dismiss the action on the ground that it belongs elsewhere, there remain no substantive issues for this court to adjudicate.

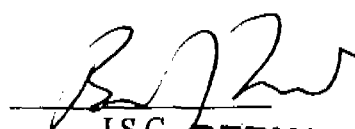
Accordingly, it is

ORDERED that Motion Sequence Numbers 001, 002, and 003 are granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 10/20/05

ENTER:



J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**

**OCT 24 2005**

NEW YORK  
COUNTY CLERK'S OFFICE