

**North Ocean Ventures, Inc. v Occunomix  
International, LLC**

2006 NY Slip Op 30240(U)

March 31, 2006

Supreme Court, New York County

Docket Number: 0601788/2005

Judge: Marilyn Shafer

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

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Index Number : 601788/2005

NORTH OCEAN VENTURES

vs

OCCUNOMIX INTERNATIONAL

Sequence Number : 002

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is resolved pursuant to attached Reur*

**FILED**  
APR 10 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/31/06

[Signature]  
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: IAS PART 36

-----X  
NORTH OCEAN VENTURES, INC., formerly  
known as OCCUNOMIX INTERNATIONAL, INC.

Plaintiff,

-against-

Index No.: 601788/05

OCCUNOMIX INTERNATIONAL, LLC,

Defendant.

-----X  
SHAFFER, J.:

**FILED**  
APR 10 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff, a New York corporation and former designer and manufacturer of personal safety equipment for workers that sold its assets to defendant, seeks a declaration that, in contravention of the Asset Purchase Agreement (APA), defendant wrongfully and incorrectly demanded indemnification. Plaintiff also seeks attorneys' fees, costs and disbursements under the APA.

Defendant moves to dismiss the complaint, pursuant to 3211(a)(1), based on a Seller's Subordination Agreement (Subordination Agreement)<sup>1</sup> executed by the parties and a non-party lender, Webster Business Credit Corporation f/k/a Whitehall Business Credit Corporation (the Senior Lender). Defendant argues that the Subordination Agreement bars plaintiff from commencing this action without the prior written approval of the Senior Lender.

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<sup>1</sup>"The purpose of a subordination agreement is [to] set out the relative positions of lenders in respect to their right to receive payments from the borrower. The use of subordination agreements is common where the senior creditor . . . is interested in taking a low risk with respect to repayment" (*Minority Equity Capital Co., Inc. v Jackson*, 798 F Supp 200, 202 [SD NY 1992]). In other words, lenders seek to allocate risk through the use of such agreements.

According to the Amended Verified Complaint (Amended Complaint), plaintiff sold its assets to defendant in 2003 for \$10,440,000. For part of the sale price, defendant executed three promissory notes, payable to plaintiff (the Notes). The Senior Lender was also involved in the financing of the sale.

A copy of the APA has not been provided to the court. The Amended Complaint states that the APA contains an indemnification clause which provides that defendant, the buyer, shall be indemnified by plaintiff, the seller, “from and against any Adverse Consequences [buyer] may suffer resulting from, arising out of, relating to, or caused by the inaccuracies of Seller’s . . . representations and warranties . . . .” (Amended Complaint, ¶ 8, quoting APA, § 6 [d] [1]). In addition, the Amended Complaint states that the APA also provides that if the seller fails to promptly pay an indemnification amount owing thereunder, the buyer “shall have the right, but not the obligation, to set-off against its obligations to pay any amount payable [i.e., of the purchase price under the APA] pursuant to any of the Notes . . . up to an aggregate amount of Nine Hundred Thousand Dollars . . . .” (*id.*, ¶ 9, quoting APA, § 6 [g] [1]). The Amended Complaint further states that the APA provides that:

“ [n]o customer . . . whose annual volume of purchases . . . exceeded \$25,000 during Seller’s fiscal year ended December 31, 2002 or during the period between such date and the Closing, has informed Seller, Stockholders or any of the officers or directors of Seller that it intends to cease doing business with Seller or materially decrease (in the case of customers) . . . the amount or pricing of the business done with Seller.”

(*id.*, ¶ 7, quoting APA, § 3 [r]).

Plaintiff alleges that by notice, dated April 5, 2004, defendant demanded indemnification in the amount of \$1,500,000 for damages it claimed to have suffered as a result of an alleged

misrepresentation regarding a specific customer's business. Defendant further advised plaintiff that in the event that payment was not received in full, defendant would set-off \$900,000 of its claim against the Notes. Plaintiff alleges that it rejected defendant's set-off demand as being false, inaccurate, improper, illegal, and not contemplated by, or within the scope of, the APA, and refused to indemnify defendant upon the grounds that no misrepresentation was made, and no provision of the APA breached.

According to plaintiff, as of April 16, 2004, defendant had exercised a \$900,000 set-off against the Notes, but did not thereafter commence a lawsuit against plaintiff concerning the indemnification claim. Plaintiff alleges that defendant's demand for indemnification was a pretext to mask its inability and failure to make payments on obligations to plaintiff and other parties. Plaintiff also asserts that it is suffering potential damages of the interest that would be accruing on some or all of defendant's alleged \$1,500,000 claim.

In support of its motion to dismiss the complaint defendant submits the Subordination Agreement which states:

“until the Senior Debt is paid in full in cash and all commitments of Senior Lender in regard thereto terminated, Junior Creditor shall not, without the prior written consent of Senior Lender, take any Collection Action with respect to the Junior Debt . . . ”

(Horowitz Aff., Exh. B, at 6, § 2.4 [a]). The term “Senior Debt” refers to defendant's debt obligations to the Senior Lender. Plaintiff is the Junior Creditor. “Junior Debt” is defined as all of the obligations of the defendant to plaintiff under any of the Junior Debt Documents. “Junior Debt Documents” is defined as “the [Notes] and all other documents, agreements and Instruments evidencing, Guaranteeing, securing or otherwise pertaining to all or any portion of

the Junior Debt” (*id.* at 2, § 1).<sup>2</sup>

The term Collection Action is broadly defined to mean, among other things:

“(a) to demand, sue for, take or receive from or on behalf of the borrower or any Guarantor of the Junior Debt, by set-off or in any other manner, the whole or any part of any moneys which may now or hereafter be owing by the Borrower or any Guarantor with respect to the Junior Debt, (b) to initiate or participate with others in any suit, action or proceeding against the Borrower or any Guarantor to (I) enforce payment of or to collect the whole or any part of the Junior Debt or (ii) commence judicial enforcement of any of the rights and remedies under the Junior Debt Documents or applicable law with respect to the Junior Debt, (c) to accelerate any Junior Debt . . . ”

(*ibid.*).

In the original complaint, in addition to a declaration that defendant wrongfully and incorrectly set-off against the Notes, plaintiff demanded the full amount of the principal due on the Notes as damages for breach of the APA which, plaintiff stated, contains a provision that permits reinstatement of incorrectly set-off amounts at increased interest rates. According to correspondence that defendant has submitted on the motion, despite plaintiff’s professed willingness to consider amending the complaint to withdraw the damages claim, thereby leaving only the request for declaratory relief, the Senior Lender’s counsel advised plaintiff that the Senior Lender did not consent to, and plaintiff should cease pursuit of, this action.

Defendant argues that because plaintiff realized it was barred by the Subordination Agreement from commencing a direct suit on the Notes, it amended its complaint, styling its action as one for a declaration regarding defendant’s entitlement to assert a \$900,000 set-off. Defendant further argues, that although plaintiff has amended the complaint, this action is still

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<sup>2</sup>While many of the terms used in the Subordination Agreement are defined therein, others are defined in the Senior Credit Agreement which has not been submitted by either of the parties.

within the Subordination Agreement's definition of a "Collection Action" and, is barred, absent the written consent of the Senior Lender. Plaintiff argues that the Amended Complaint is plaintiff's attempt to perform an end run around the Subordination Agreement, and a backdoor attempt to defeat defendant's set-off rights against the Junior Debt.

Plaintiff responds that this action is premised on defendant's breach of the terms of the APA, is not a collection action, and does not implicate any right of the Senior Lender. Among other things, plaintiff also argues that defendant incorrectly attempts to imply that the Subordination Agreement gives the Senior Lender the right to attempt to bar plaintiff from bringing this action.

Pursuant to CPLR 1001(a), a court should order joinder of a party where not doing so will jeopardize the outcome of the action, because complete relief cannot be accorded the existing parties to the action, or the absentee may be inequitably affected by the judgment. The primary reason for compulsory joinder of parties is to avoid multiplicity of actions and to protect non-parties whose rights should not be jeopardized if they have a material interest in the subject matter (*Matter of Martin v Ronan*, 47 NY2d 486 [1979]; *Matter of Cassidy v New York City Department of Corrections*, 95 AD2d 733 [1st Dept 1983]). Joinder also protects against inconsistent judgments (*Matter of Red Hook/Gowanus Chamber of Commerce v New York City Bd. of Standards and Appeals*, 5 NY3d 452, 458 [2005]).

As to absentees, prejudice may accrue if they have a practical interest that could be disadvantaged by the outcome of an action that was litigated without them (*see Matter of Martin v Ronan*, 47 NY2d 486, *supra*). Thus, "[j]oinder rules serve an important policy interest in guaranteeing that absent parties at risk of prejudice will not be embarrassed by judgments

purporting to bind their rights or interests where they have had no opportunity to be heard”

(*Matter of Red Hook/Gowanus Chamber of Commerce*, 5 NY3d at 458, quoting *First Natl. Bank of Amsterdam v Shuler*, 153 NY 163, 170 [1897]). A court may always consider whether there has been a failure to join a necessary party (*City of NY v Long Island Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]).

Clearly plaintiff claims that the Subordination Agreement has no effect here, while defendant claims otherwise. The Senior Lender is a party to the Subordination Agreement and may be inequitably affected by the court’s interpretation of the agreement’s scope, provisions, and application here. Therefore, in order to prevent possible prejudice to the Senior Lender, it should be joined, until which time this motion will be marked off the calendar without prejudice.<sup>3</sup>

Accordingly, it is

ORDERED that the motion is denied without prejudice to renewal following plaintiff’s submission to the court of proof of service of a supplemental complaint on Webster Business Credit Corporation f/k/a Whitehall Business Credit Corporation within 30 days after entry of this Order.

Dated:

3/31/06

**FILED**  
APR 10 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Enter:

RECEIVED  
J.S.C.

<sup>3</sup>The court expresses no opinion as to the merits of the claim or the motion.