

**Active Media Services, Inc. v Grant Prideco, Inc.**

2006 NY Slip Op 30512(U)

December 4, 2006

Supreme Court, New York County

Docket Number: 603909/2004

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----x  
ACTIVE MEDIA SERVICES, INC.,

INDEX NO. 603909/2004

Plaintiff,

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

-against-

MOTION SEQ. NO. 004

GRANT PRIDECO, INC.,

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

Defendant.  
-----x

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

**FILED**  
DEC 07 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: December 4, 2005

  
\_\_\_\_\_  
KARLA MOSKOWITZ J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

-----X  
ACTIVE MEDIA SERVICES, INC.,

Plaintiff,

Index No. 603909/2004

-against-

GRANT PRIDECO, INC.,

**Decision and Order**

Defendant.  
-----X

**KARLA MOSKOWITZ, J.:**

The underlying dispute between plaintiff Active Media Services (“Active”) and defendant Grant Prideco, Inc. (“Grant”) involves a trade credit barter agreement. In its answer and counterclaim, Grant pleads breach of contract/third-party beneficiary (the second cause of action) and identifies National Westminster Bank, PLC (“NatWest”) as a third-party beneficiary of Grant’s agreements with Active. Grant acquired NatWest’s rights by assignment and now claims that Active breached its obligations to Grant and to NatWest as a third-party beneficiary. By this motion (sequence number 004), defendant moves for summary judgment, pursuant to CPLR 3212, on this, its second counterclaim, in the amount of \$2,500,088. Plaintiff opposes this motion and has submitted a cross-motion for summary judgment in its favor. Although defendant filed other counterclaims, the court previously severed the counterclaim for breach of contract/third-party beneficiary and requested a separate motion on it. (Transcript of Oral Argument, dated July 6, 2006, at 2). For the following reasons, the court denies defendant’s motion and grants summary judgment to plaintiff.

**FILED**  
DEC 07 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

## BACKGROUND

The court recites the following facts primarily based on the answer and counterclaim and the papers the parties submitted on this motion.

In March 1998, Active issued \$4.65 million in trade credits to Grant, expiring on March 31, 2001. To obtain the trade credits, Grant agreed to pay Active \$1,993,542.33 that Grant financed, in part, with an advance of \$3,443,542.33 from NatWest. Grant further agreed to pay NatWest the dollar value of any trade credits Grant used until NatWest received \$4.65 million. Reliance National Insurance Company indemnified Grant, with NatWest as the loss payee, for the value of trade credits unspent at the end of the term.

The following agreements that Active, Grant or NatWest executed for the trade credit arrangement are relevant to this motion: the Trade Finance Agreement, the Cash Advance Agreement, the Trade Credits Insurance Policy and the Trade Credit Payment Agreement.

### **I. The Trade Finance Agreement**

Active and Grant signed the Trade Finance Agreement on March 17, 1998. NatWest did not sign this agreement. The Trade Finance Agreement is the operative document in the trade barter arrangement between Active and Grant and provides conditions and obligations that each party must satisfy. Two of the conditions required Grant (1) to receive a Trade Credits Insurance Policy from Reliance and (2) to receive the cash advance of \$3,443,542.33 from NatWest.

(Trade Finance Agreement ¶¶ 1.3, 1.4 in Reply Affidavit of Richard C. Shoenstein, Exh. 1).

Pursuant to the Trade Finance Agreement, Grant would purchase media, goods or services from Active, and then Active, in its invoices to Grant, would inform Grant of the corresponding reduction of its trade credits with Active. The Trade Finance Agreement also states, "The

remaining balance of ACTIVE's invoices will be satisfied by ACTIVE making the Trade Credit Reduction and GRANT PRIDECO making a payment equal to such Trade Credit Reduction directly to NATWEST in accordance with the Trade Credit Cash Advance Agreement by and between GRANT PRIDECO and NATWEST." (*Id.* ¶ 4.3 [ii]).

## **II. The Trade Credit Cash Advance Agreement**

Grant and NatWest signed the Trade Credit Cash Advance Agreement ("CAA") on the same date of March 17, 1998. The CAA fulfilled the condition of the Trade Finance Agreement that Grant obtain \$3,443,542.33 in financing and provided the terms upon which NatWest would make the advance to Grant. With regard to NatWest's rights, the CAA states:

4. Collateral Assignment. To secure payment of the Section 3 Amounts [cash amounts equal to the reduction in the outstanding balance of the entire Trade Credit], [Grant] hereby collaterally assigns to Natwest and [Grant] hereby grants to Natwest a security interest in all of [Grant]'s right, title and interest in and to, but none of [Grant]'s obligations under or in respect of, (a) the Trade Finance Agreement, (b) the Section 3 Amounts and (c) the Policy (collectively, "Collateral"). In respect of the Collateral, Natwest shall have all the rights of a secured creditor under the Uniform Commercial Code of New York. Except as expressly contemplated by this Agreement, [Grant] shall not transfer, hypothecate, assign or pledge the Trade Credit.

(Trade Credit Cash Advance Agreement ¶ 4 in Shoenstein Aff., Exh. 2). In addition, the CAA states, "No Partnership or Joint Venture. Nothing in this Agreement shall be deemed to cause Natwest [sic] to be considered a partner of or joint venturer with the Company, EVI or Active." (*Id.* ¶ 12).

## **III. The Trade Credits Insurance Policy**

On March 30, 1998, Grant, as the Insured, and Reliance Insurance Company of Illinois ("Reliance"), as the Insurer, executed the Trade Credits Insurance Policy. The Policy insured \$4.65 million in trade credits with an expiration date of March 30, 2001 and a \$4.65 million limit

of liability. The Policy listed Active as the Trading Company and NatWest as the Loss Payee.

Endorsement 2 of the Policy states:

1. LOSS, if any, under this Policy shall be adjusted with the INSURED and National Westminster Bank PLC and shall be paid to the LENDER (Loss Payee) as its interest may appear.
2. Any payment made under this Policy to the Loss Payee shall be construed to be payment to the INSURED.
3. This endorsement confers upon the Loss Payee no status as joint INSURED nor any rights to or under the policy except to participate together with the INSURED in the LOSS adjustment and settlement process and to receive the payment of any LOSS as asserted by the INSURED, if and when such LOSS becomes payable.
4. The Limit of Liability under this Policy shall not be increased by the inclusion of such Loss Payee.

(Trade Credits Insurance Policy, Endorsement No. 2 in Schoenstein Aff, Exh. 3).

#### **IV. The Trade Credit Payment Agreement**

Also on March 17, 1998, Active, Grant and NatWest signed the Trade Credit Payment Agreement. This agreement recites Grant's payment obligations to NatWest. Grant agreed to pay NatWest "an amount equal to that portion of any invoice rendered to [Grant] for payment which is to be paid by reduction in the Trade Credit which is effected by payment of such invoice." (Trade Credit Payment Agreement, ¶ 1 in Affidavit of Jeffrey A. Mitchell, Exh. A).

Grant never used the trade credits, and, despite the terms of the above agreements, NatWest could not collect the money Grant owed it from either Grant or Reliance, the insurer. In July 2003, Grant settled with NatWest in federal court by agreeing to pay \$3.25 million. In addition, NatWest agreed to assign its claims against Active, including the claim for the full \$4.65 million, to Grant. After the federal court dismissed the claim against Active for lack of

diversity (see *Natl. Westminster Bank, PLC v Grant Prideco, Inc.*, 343 F Supp 2d 256 [SDNY 2004]), Active filed suit here. On February 23, 2006, this court granted summary judgment in part to Grant and awarded Grant the \$3.25 million that it had paid to NatWest pursuant to their settlement agreement. (Transcript of Oral Argument, dated February 23, 2006, at 99). At that time, finding Active in breach, this court also dismissed all of Active's claims. (*Id.* at 78).

By this motion, Grant renews its summary judgment claim for the difference, plus interest, between the amount it paid NatWest in the settlement (\$3.25 million) and its original debt to NatWest (\$4.65 million). This difference totals \$2,500,088. Grant contends that it is entitled to summary judgment pursuant to CPLR 3212 on the grounds that no dispute of material fact exists about the amount of damages, \$2,500,088, plus interest, that it deserves because this court already found for Grant on liability when it awarded Grant summary judgment for \$3.25 million on February 23, 2006. Active cross-moves for summary judgment pursuant to CPLR 3212 and seeks dismissal of Grant's second counterclaim with prejudice.

### **DISCUSSION**

#### **I. NatWest as a Third-Party Beneficiary to Transactions between Active and Grant**

Active and Grant debate whether NatWest entered the trade barter transaction as a signatory, and, therefore, a party with direct rights to the arrangements, or as a third-party beneficiary with only derivative rights dependent upon any claims Grant may have against Active. (Transcript of Oral Argument, dated July 6, 2006, at 20-23). Grant contends that the Trade Finance Agreement, the Insurance Agreement and the Trade Credit Payment Agreement are collective agreements. (*Id.* at 8). Active responds that NatWest entered the agreements as a third-party beneficiary to agreements between Grant and Active only. (*Id.* at 10, 23). Neither

party questions the validity of the assignment of NatWest's claim to Grant.

The court concludes that NatWest is a third-party beneficiary. First, Grant's own answer and counterclaim identifies NatWest as a third-party beneficiary. The answer states, "NatWest is and was a third party beneficiary of the agreements between Grant and Active." (Answer and Counterclaim ¶ 315). In addition, the answer alleges "Active materially breached its obligations to Grant and to NatWest as third party beneficiary . . ." (*Id.* ¶ 316).

Second, during the federal court litigation in 2003, Judge Lewis A. Kaplan of the Southern District of New York analyzed the Trade Finance Agreement and decided that NatWest is an intended third-party beneficiary of the agreement:

A third party is an intended beneficiary if: recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) performance of the promise will satisfy an obligation of the promisee to pay money to beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(*Natl. Westminster Bank v Grant Prideco, Inc.*, 261 F Supp 2d 265, 272 [SDNY 2003] [internal quotation omitted]). Because the Trade Finance Agreement required "GRANT PRIDECO [to make] a payment equal to such Trade Credit Reduction directly to NATWEST" (*see* Trade Finance Agreement ¶ 4.3 [ii], *supra* p 2), Judge Kaplan reasoned that "NatWest was to receive a direct benefit of the parties' performance" (*Natl. Westminster Bank*, 261 F Supp 2d at 273).

Third, the other agreements (the Trade Credit Cash Advance Agreement, the Trade Credits Insurance Policy and the Trade Credit Payment Agreement) also indicate that NatWest is a third-party beneficiary and not a party with direct rights in the transactions between Active and Grant. A court scrutinizes the language of agreements to determine if an entity is a party or a

third-party beneficiary and to decide the entity's rights. (*See Strauss v Belle Realty Co.*, 98 AD2d 424, 427 [2d Dept 1983] ["The contract must evince a discernible intent to allow recovery for the specific damages to the third party that result from a breach thereof before a cause of action is stated."] [citation omitted], *aff'd* 65 NY2d 399 [1985]).

Just because NatWest is a signatory along with Grant to the Trade Credit Cash Advance Agreement ("CAA") does not make NatWest a party to Grant's Trade Finance Agreement with Active. Indeed, the CAA merely fulfilled a condition of the Trade Finance Agreement – that Grant obtain financing from NatWest. Moreover, the CAA only accords NatWest the status of a "secured creditor" and explicitly states, "[n]othing in this Agreement shall be deemed to cause Natwest to be considered a partner of or joint venturer with [Grant], EVI or Active." (CAA ¶ 12, *supra* p 3).

The Trade Credits Insurance Policy is an agreement only between Grant and Reliance Insurance Company. It lists NatWest as a loss payee and merely protects NatWest should Grant not repay the \$4.65 million in trade credits. As in the CAA, the Trade Credits Insurance Policy clearly states that NatWest is not a party to any agreement Grant has with Active. The policy reads, "[t]his endorsement confers upon the Loss Payee no status as joint INSURED nor any rights to or under the policy except to participate together with the INSURED in the LOSS adjustment and settlement process . . . ." (Trade Credits Insurance Policy, Endorsement No. 2, *supra* p 4).

Active, Grant and NatWest all signed the Trade Credit Payment Agreement. Grant uses this agreement as evidence of a "third-party arrangement pursuant to which Active was a participant and signatory directly with NatWest." (Transcript of Oral Argument, dated July 6,

2006, at 7). Active responds that the Trade Credit Payment Agreement is “irrelevant” in determining NatWest’s status because it does not require Active to do anything. (*Id.* at 13). The court agrees with Active because the agreement merely recites the terms of the Trade Finance Agreement that require Grant to make payments to NatWest. These payment terms allowed Judge Kaplan to conclude in the federal lawsuit that NatWest is a third-party beneficiary to the transaction between Active and Grant. (*Natl. Westminster Bank*, 261 F Supp 2d at 273). Accordingly, this court considers NatWest a third-party beneficiary, and not a party with its own rights, in analyzing NatWest’s rights, Grant’s rights as an assignee of NatWest’s claim against Active and Active’s defenses in these motions for summary judgment.

Pursuant to CPLR 3212(b), a court grants summary judgment if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212[b]; *see also Zuckerman v New York*, 49 NY2d 557, 562 [1980]). “This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact.” (*Sbar v District Council 37 Health & Sec. Fund Trust*, 820 NYS 2d 846 [Sup Ct, NY County 2006] [internal quotations and citations omitted]).

## **II. Rights of Third-Party Beneficiaries**

Plaintiff argues that summary judgment awarding additional money to Grant for NatWest’s alleged right to this money would “give the third-party beneficiary to a contract greater rights under the agreement than those of the actual parties thereto . . . .” (Plaintiff’s Opp. Mem., p 6). As explained above, the court rejects Grant’s argument that “NatWest was a *party*

to and *express beneficiary* of the transactional documents, and therefore had its own independent right to recover \$4.65-million from Active if there was a breach.” (Defendant’s Reply Mem., p 2 [emphasis in original]). Thus, the court only considers Grant’s rights as an assignee of a third-party beneficiary’s claims.

Under New York law, “a third-party beneficiary . . . possess[es] no greater right to enforce a contract than actual parties to the contract.” (*BAII Banking Corp. v UPG, Inc.*, 985 F2d 685, 697 [2d Cir 1993]). Since the nineteenth century, the New York Court of Appeals has limited the rights of a third-party beneficiary to those of the contracting parties. (See *Dunning v Leavitt*, 85 NY 30, 35 [1881] [“[I]t would be contrary to justice or good sense to hold that one who comes in by . . . the privity of substitution should acquire a better right against the promisor than the promisee himself had.”]). “The third party is entitled only to those rights which the original parties to the contract intended the third party to have.” (*Leavitt-Berner Tanning Corp. v Am. Home Assur. Co.*, 129 AD2d 199, 203 [3d Dept 1987], citing 22 NY Jur 2d, Contracts § 271, at 130-31).

Because NatWest holds a third-party beneficiary claim, its rights can be no greater than Grant’s. This court has already ruled on Grant’s claim arising from Active’s breach of its obligations to Grant under their agreements (Transcript of Oral Argument, dated February 23, 2006, at 74) and awarded Grant \$3.25 million to compensate it for the amount it paid to NatWest in their settlement (*id.* at 99). Grant has already enforced its rights and none remain that it can enforce or that NatWest as a third-party beneficiary can enforce.

Further, when Grant became assignee of any claims NatWest might have against Active, it also assumed rights no greater than those of the assignor, NatWest. “[A]n assignee never

stands in any better position than his assignor.” (*TPZ Corp. v Dabbs*, 25 AD3d 787, 789 [2d Dept 2006], quoting *Matter of Intl. Ribbon Mills*, 36 NY2d 121, 126 [1975]). As stated in the preceding paragraph, NatWest as a third-party beneficiary has no more claims Grant can hold as an assignee because the previous rulings of this court have already awarded Grant all to which it was entitled. The court agrees with Active that “Grant cannot by so-called assignment back from NatWest assert any further claim – which in this instance also happens to amount to a windfall, inasmuch as it has already obtained the full benefit of its bargain by virtue of its settlement with NatWest and judgment against Active for all those monies.” (Plaintiff’s Opp. Mem., p 4). Accordingly, defendant no longer has a claim against Active for breach of contract that can provide the basis for its motion for summary judgment.

Having granted summary judgment in favor of plaintiff Active on the basis of the rights of third-party beneficiaries and assignees, the court therefore need not address plaintiff’s remaining arguments against summary judgment in favor of defendant Grant (i.e., plaintiff’s defenses of payment and discharge and res judicata).

#### CONCLUSION

Accordingly, it is

ORDERED that defendant’s motion for summary judgment on its second counterclaim is denied; and it is further


ORDERED that plaintiff’s cross-motion for summary judgment on defendant’s second counterclaim is granted; and it is further

ORDERED that defendant’s second counterclaim is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: December 7, 2006

ENTER

  
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J.S.C.

**FILED**  
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