

GATX Flightlease Aircraft Co. Ltd. v Flightlease Holdings (Guernsey) Ltd.

2007 NY Slip Op 30646(U)

January 3, 2007

Supreme Court, New York County

Docket Number: 0650194/2005

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

FBEM

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GATX FLIGHTLEASE AIRCRAFT COMPANY LIMITED,
Plaintiff,

and

FLIGHTLEASE HOLDINGS (GUERNSEY) LIMITED, by its
Joint Liquidators Stephen John Akers and Nick Stuart Wood,
Plaintiff-Intervenor,

-against-

AIRBUS S.A.S. (f/k/a Airbus Industrie),
Defendant.
-----X

650194
INDEX NO. 604361/2005 E
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
FILED

Cross-Motion: Yes No

Upon the foregoing papers, it is

The Decision and Order of December 20, 2006 is withdrawn before filing and replaced with the accompanying Decision and Order.

ORDERED, Clerk directed to amend caption in accordance with accompanying Decision and Order.

Dated: January 3, 2007

KARLA MOSKOWITZ J.S.C.

MDAIF

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: I.A.S. PART 3

-----X
GATX FLIGHTLEASE AIRCRAFT COMPANY
LIMITED,

Plaintiff,

Index No. 604351/2005

and

FLIGHTLEASE HOLDINGS (GUERNSEY)
LIMITED, by its Joint Liquidators Stephen John
Akers and Nick Stuart Wood,

Plaintiff-Intervenor,

DECISION and ORDER

-against-

AIRBUS S.A.S. (f/k/a Airbus Industrie),

Defendant.

FILED

JAN 09 2007

NEW YORK
COUNTY CLERK'S OFFICE

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KARLA MOSKOWITZ, J:

By this motion (seq. no. 002), defendant Airbus S.A.S. ("Airbus") moves for partial summary judgment on plaintiff GATX Flightlease Aircraft Company, Ltd.'s ("GFAC") and plaintiff-intervenor Flightlease Holdings (Guernsey) Limited's ("FHG") claims for breach of contract and the implied covenant of good faith and fair dealing. Although Airbus moves for summary judgment, it is worth noting that, at the time Airbus made this motion, little to no discovery had occurred in this case. GFAC has adopted FHG's reasoning as its opposition to Airbus' motion for partial summary judgment. (*See* GFAC Opp. Mem. at pgs. 2-3). For the following reasons, defendant Airbus' motion is denied with leave to renew pending the close of discovery on the salient issues in this motion.

BACKGROUND

The court derives the following facts from the GFAC's complaint and other papers that the parties have submitted on this motion.

Parties

Plaintiff GFAC is a Cayman Islands joint venture. GFAC's two shareholders are GATX Third Aircraft Corp ("GATX") and plaintiff-intervenor FHG. FHG was a wholly owned subsidiary of Flightlease AG that Swiss Air Group ("SAIR") owned. Defendant Airbus is a French airplane manufacturer.

The AI Agreement

On September 16, 1999, GFAC and Airbus contracted for the purchase and manufacture of 38 or 41 aircraft (the "AI Agreement"). Clause 22.3 of the Agreement provides that the AI Agreement "will be governed by and construed and the performance thereof will be determined in accordance with the laws of the State of New York." Under the AI Agreement, GFAC was supposed to make pre-delivery payments ("PDPs"). The parties tied these PDPs to the projected month of delivery for the aircraft. (*Id.* § 3.2)

Section 20.1(6) permitted Airbus to terminate the agreement if GFAC was "unable to pay its debts as they come due." Alternatively, Airbus could terminate if GFAC failed to make any PDP once 15 business days had elapsed from the date Airbus provided notice of non-payment. (*Id.* § 20.2). Section 20.1(7) allowed Airbus to terminate if GFAC "becomes the object of any liquidation, winding up or analogous event." Clause 20.5 provided that Airbus could terminate the AI Agreement in the event of a default event by GFAC.

Subsequent Events and Subsequent Agreements

In May 2001, FHG and GATX decided to dissolve the GFAC joint venture, although they would not memorialize this decision until October 2001. On July 26, 2001, in anticipation of this dissolution, Airbus consented to the allocation of aircraft between FHG and GATX. (The

“Maui Agreement,” attached as Exhibit B to the Affidavit of Christopher Mourey, sworn to March 31, 2006 [“Mourey Aff.”]).

According to defendant, by October 1, 2001, GFAC had failed to tender the PDPs due under the AI Agreement. On October 3, 2001, Airbus sent GFAC a notice that it owed approximately \$7.5 million in PDPs allegedly due on August 1, 2001 and October 1, 2001. However, GFAC apparently did not receive this letter until October 9, 2001.

Plaintiff denies that money was due at this time because GFAC had previously overpaid by \$15,464,376. Apparently, during 2001 Airbus and GFAC had agreed to postpone the delivery date of certain aircraft to the third quarter of 2005, that, according to plaintiff, postponed the corresponding PDPs. As GFAC had already paid PDPs for the postponed airplanes, there was a surplus to use towards PDPs for other airplanes. (Affidavit of Stephen John Akers, sworn to April 28, 2006 [“Akers Aff.”] ¶ 10 and Exhibits C, D at 5-6, E and I). In addition, plaintiff contends that FHG was not supposed to contribute its portion of the October 1, 2001 PDP pending negotiations with Airbus of new contracts that the parties had previously agreed to negotiate. (Akers Aff. ¶ 12 and Exs. F, G and I).

On October 4, 2001, FHG and GATX agreed to dissolve the GFAC joint venture and split responsibility for the aircraft (the “Split Agreement,” Mourey Aff. Ex. D). According to the Split Agreement, GATX assumed responsibility for 21 of the aircraft on order and FHG assumed responsibility for 19 of the 40 remaining Aircraft on order. (*Id.*).

GATX and FHG also contemplated negotiating separate, new agreements with Airbus to replace the AI Agreement. (*Id.*). FHG and GATX also agreed to split the \$227,637,864 PDPs already on deposit with Airbus as follows: \$77,834,754 to GATX and \$149,803,110 to FHG.

(*Id.*). Although the Split Agreement references that FHG and GATX had “previously agreed to dissolve their joint venture” (Mourey Aff. Ex. D) and as part of that dissolution to split responsibility for the aircraft, plaintiff contends that the dissolution of GFAC could only occur once Airbus had worked out new agreements with both itself and GATX. (Akers Aff. ¶ 12 and Exs. G and I) According to plaintiff, “GFAC was never wound up and/or dissolved officially under Cayman law, nor were any steps taken in this regard.” (Akers Aff. ¶ 11). However, FHG’s liquidators did take steps in June 2004 when they initiated an action in the Grand Court of the Cayman Islands seeking a compulsory winding up of GFAC. (*See* discussion pg. 7 *infra.*).

On October 9, 2001, allegedly GATX and its parent GATX Financial Corporation (“GFC”) reached an agreement in principle with Airbus regarding the airplanes assigned to GATX under the Split Agreement (the “New GATX Agreement”). FHG was not a party to the New GATX Agreement. In that agreement, Airbus agreed to give GFC full credit for approximately \$78 million in PDPs allocated to GATX under the Split Agreement. (Mourey Aff. Ex. E, pg. 2). In that same agreement, the parties memorialized that “[i]t has been widely reported that the Swissair group of companies, of which FHG is part, is having severe financial difficulties” and that “GFC has notified Airbus of its belief that GFAC will not be able to comply with its obligations under the GFAC Purchase Agreement [i.e. the AI Agreement] if FHG is unable to fund its share of [PDPs] payable by GFAC under the GFAC Purchase Agreement.” (*Id.* pg. 1). The new GATX Agreement required Airbus to deliver to GATX the same aircraft it previously was supposed to deliver to GFAC under the AI Agreement. (*Id.* Schedules 1 and 2 and Akers Aff. ¶ 17).

Airbus and FHG never executed a new agreement. However, Airbus had prepared a

September 5, 2001 "Memorandum of Understanding for the Purchase of Six (6) A340-300 Aircraft by Flightlease. (See Akers Aff. Ex. G). The MOU expressly acknowledged that "[t]he termination of the [AI Purchase Agreement] shall be subject to . . . signature of the GATX Agreement and the Flightlease Agreement." (Akers Aff. Ex. G pg. 3)

On October 11, 2001, Airbus sent GFAC another letter, this time purporting to terminate the AI Agreement because of non-payment:

You made it clear in our various conversations in recent days with senior executives of your company and its parent companies, following the moratorium on debt enforcement affecting the Sair Group and its Flightlease division announced last week, that GATX Flightlease Aircraft Company Ltd. no longer intends to fulfill its obligations to purchase the Aircraft pursuant to the Agreement. This amounts to a repudiation of the Agreement by GATX Flightlease Aircraft Company Ltd. and this repudiation, together with your failure to make the Pre-delivery Payments of USD \$7,478,669.46 due on October 1, 2001 as described in the Notice of Non-Payment, leave us with no option but to, and we hereby do, cancel and terminate the agreement in full with respect to all remaining undelivered Aircraft.

(Mourcy Aff. Ex. F). Airbus reported that it intended to retain all pre-delivery payments (approximately \$228 million) it had already received. (*Id.*). On October 17, 2001, the parties to the New GATX Agreement executed that agreement.

On October 31, 2001, GFAC responded to Airbus' October 11, 2001 letter. GFAC claimed that Airbus could not terminate the AI Agreement because Airbus had failed to give formal notice of non-payment and had ignored the grace periods the parties contemplated in the AI Agreement:

We do not accept that Airbus is entitled to terminate the Agreement. Airbus has failed to give formal notice of non-payment and has totally ignored the grace periods provided by the Agreement. . .

In our view, Airbus' action was in total disproportion to the circumstances of the

October payment date being missed. Correspondence up until 3 October made it clear that Airbus considered there to be a surplus of moneys on deposit, owing to the progress of the payments made under the Agreement thus far and to the envisaged reallocation of these payments pursuant to the Memorandum of Understanding signed in July. The Memorandum of Understanding contemplated that the order for aircraft under the Agreement would be divided between the shareholders of GATX Flightlease and that pre-delivery payments would follow that division. Discussions at that time indicated that under the proposed arrangements, Flightlease Holdings (Guernsey) Limited would benefit from a \$16 million surplus in pre-delivery payments.

This division of the joint order was understood to be progressing at the time we received your Notice of Non-Payment and we understand that one of the proposed new contracts has been concluded with GATX Third Aircraft Corporation.

At the time of our discussions with Airbus at the beginning of this month, we were led to believe that Airbus intended to abide by its earlier agreement to separate the joint order and allocate the deferred deliveries to Flightlease Holdings (Guernsey) Limited. We cannot accept that there was anything in these discussions which could be construed as an intention by us to cease performing under the Agreement or as a repudiation of the Agreement.

(Mourey Aff. Ex. G).

In that letter GFAC expressed a certain willingness to continue the AI Agreement:

We do not consider that a termination would be fair under the circumstances given that we are still willing to continue the Agreement and had relied in good faith upon Airbus being willing to do the same and to work with us in these difficult circumstances.

In light of the above, should Airbus pursue the termination of this Agreement, we do not and cannot accept that the amount of pre-delivery payments held by Airbus represents a fair estimate of loss and damage.

In our view, any termination of this Agreement at this time would be without cause and in bad faith. We have a number of alternative solutions with respect to the aircraft . . . and we would welcome the opportunity to discuss these with you.

(Mourey Aff. Ex. G).

On November 15, 2001, Airbus sent GFAC another letter reiterating that it was

terminating the AI Agreement. (Mourey Aff. Ex. H). To date, GFAC has never tendered its allegedly overdue PDPs.

Proceedings in the Cayman Islands

On June 9, 2004, FHG filed a petition in the Grand Court of the Cayman Islands seeking a compulsory winding up of GFAC and the appointment of liquidators. The purpose of this appointment was to enable the liquidators to pursue GFAC's claims against Airbus. GATX applied to the Grand Court to strike out FHG's points of claim and dismiss the petition.

On June 23, 2005, the Honorable Justice Henderson granted that relief (the "Cayman Judgment"). (See Exhibit B to the Affidavit of Andrew John Jones, sworn to April 3, 2006). Justice Henderson noted that GFAC's only potential asset was its possible lawsuit against Airbus and that, because the shareholders were deadlocked, there was no way for GFAC to start that lawsuit. (*Id.* pg. 8). Justice Henderson also recognized that the need for the winding up proceeding was to clear the way to the lawsuit by installing FHG liquidators as liquidators of GFAC. (*Id.*). Thus, the court scrutinized the merits of the proposed lawsuit (now this one) with "considerable caution." (*Id.*).

Because the parties had adduced "[n]o evidence of foreign law relating to the viability of the proposed lawsuit," Justice Henderson assumed that the law of the State of New York was the same as that of the Cayman Islands and applied the law of that jurisdiction. (*Id.* pg. 3). Justice Henderson found that by the date of Airbus' October 11, 2001 letter, GFAC was "hopelessly insolvent" by virtue of FHG being insolvent, was unable to inject the necessary capital and that GATX "had no obligation or intention to make up the deficiency." (*Id.* pgs. 9-10). Justice Henderson also found that, assuming Airbus's October 11th letter was a "wrongful repudiation"

of the contract, GFAC exercised its option to affirm the contract and perform rather than accepting the repudiation and treating the contract as at an end:

GFAC had two options: it could accept the repudiation and treat the contract as at an end, demanding the return of the PDPs. It did not do that. The other alternative was for GFAC to reaffirm the contract and perform its obligations under it. Mr. Geysel's letter of October 31st, adopts this second course.

(Id. pg. 10).

Justice Henderson therefore held that, by the time of the November 2001 termination letter,

Airbus was:

entitled to end the agreement and retain the PDPs either on the ground of GFAC's insolvency or because of its failure (after notice) to satisfy the demand for payment. Either was a good and sufficient reason at that point.

(Id. pg. 11).

Based on the conclusion that Airbus validly terminated the AI Agreement, Justice Henderson granted the strike out petition and dismissed FHG's winding up proceeding. FHG has appealed the Cayman judgment. It is undisputed that the Cayman court did not have any more (and may have had considerably less) documentation than I do on this motion when it rendered its decision.

This Proceeding

Undeterred by the Cayman Judgment, in September 2005, FHG commenced a shareholder derivative action in this court on behalf of GFAC. In October 2005, GFAC commenced this action seeking damages and restitution resulting from Airbus' alleged breach of the AI Agreement. Subsequently, FHG agreed to discontinue without prejudice its derivative lawsuit. (*See* Transcript, dated February 16, 2006 at pg. 40). At the same time, FHG sought to

intervene as plaintiff in this action. I granted that application on February 16, 2006. (*Id.* at pg.

33). Accordingly, the caption now should read:

-----X
GATX FLIGHTLEASE AIRCRAFT COMPANY
LIMITED,

Plaintiff,

65094
Index No. 604351/2005

and

FLIGHTLEASE HOLDINGS (GUERNSEY)
LIMITED, by its Joint Liquidators Stephen John
Akers and Nick Stuart Wood,

Plaintiff-Intervenor,

- against -

AIRBUS S.A.S. (f/k/a Airbus Industrie),

Defendant.
-----X

This motion for partial summary judgment against both GFAC and FHG followed my granting
FHG's motion to intervene.

DISCUSSION

I. DOES COLLATERAL ESTOPPEL WARRANT DISMISSAL OF THIS LAWSUIT

A. Choice of Law

Airbus contends that the Cayman Islands Judgment precludes this suit. It contends that
under the New York law of collateral estoppel, this court must adopt the position of the Cayman
Court that essentially plaintiff has no cause of action against Airbus. The problem with Airbus'
argument is that Cayman Island's law of collateral estoppel applies, not that of New York.

Although case law in this area is a bit unclear, under New York's choice of law rules, to

determine the preclusive effect of a foreign court's judgment, courts must look to the law of the foreign jurisdiction. The foreign judgment must receive the same preclusive effect that it would enjoy in the foreign jurisdiction. (See *Kim v Cooperative Centrale Raiffeisen-Boerenleenbank, B.A.*, 364 FSupp2d 346, 349 [SDNY 2005]); *Weiss v La Suisse, Societe D'Assurances Sur La Vie*, 293 FSupp2d 397, 404 [SDNY 2003]; see also *Watts v Swiss Bank Corp*, 27 NY2d 270 [1970]; *Schoenbrod v Siegler*, 20 NY2d 403, 409 [1967]; Haig, *Commercial Litigation in New York State Courts*, § 14:29 ["the type of preclusive effect that should be afforded a foreign country judgment is generally the same preclusive effect it would be afforded in the rendering foreign country"]).

Although it is true, as Airbus points out, that New York courts often give preclusive effect to foreign country judgments using New York rules of collateral estoppel, those courts have generally not discussed whether there was a conflict between the jurisdictions or whether the parties had raised choice of law as an issue in the first place. (See, e.g., *Stumpf v Dyenergy Inc.*, 32 AD3d 232 [1st Dept. 2006] [applying New York law of collateral estoppel without discussion of which country's laws applied to collateral estoppel analysis]; see also *Alfadda v Fenn*, 966 F Supp. 1317, 1326 [SDNY 1997], *aff'd* 159 F3d 41 [2d Cir 1998] [noting the "sparse case law" dealing with the issue of whose laws of collateral estoppel should apply and noting that "the New York courts which had given preclusive effect to foreign country judgments had generally not specified the source of the applicable law."]).

Airbus argues that the above analysis applies to res judicata only, but this is a distinction without a meaning. There is no reason that a different choice of law analysis should govern collateral estoppel as opposed to res judicata when dealing with a foreign country's judgment.

New York applies the law of the rendering jurisdiction to determine the collateral estoppel effect of the decisions of sister states. (*See Schultz v Boy Scouts of Am., Inc.*, 65 NY2d 189, 204 [1985] [preclusive effect of New Jersey state court judgment would “be determined by whether the courts of New Jersey would hold plaintiffs barred by the prior action”]). By analogy then, New York should apply the law of the foreign tribunal to determine the collateral estoppel effect of decisions that tribunal renders. To hold otherwise would only promote forum shopping and exhibits a disrespect for the principles underlying comity.

Thus, the law of the Cayman Islands applies to determine the preclusive effect of the Cayman Islands judgment. Airbus concedes that the Cayman court “would not give preclusive effect” to its own judgment. (June 29, 2006 Tr. at pg. 18). Therefore, this court cannot give the Cayman Judgment preclusive effect either.

II. WHETHER AIRBUS VALIDLY TERMINATED THE AI AGREEMENT

Because this court cannot give collateral estoppel effect to the Cayman judgment, the court must now turn to the merits of this motion. Airbus contends that this court should find as a matter of law that Airbus validly terminated the AI Agreement by its October 11, 2001 or November 15, 2001 letter.

A. Election of Remedies

Plaintiff argues that, having delivered a demand for payment on October 9, 2001, Airbus could not terminate the AI Agreement on October 11, 2001, because it was required to afford GFAC a 15 day grace period to pay. Therefore, plaintiff reasons, Airbus’ October 11 letter amounts to a wrongful termination of the contract that entitles GFAC to a return of the PDPs.

Airbus argues that, even assuming its attempt to terminate the AI Agreement on October

11 amounts to wrongful repudiation, plaintiff cannot prevail. Airbus reasons that GFAC elected its remedies in its October 31, 2001 letter when it: (1) expressed a willingness to continue the contract, (2) did not state that it was treating the contract at an end and (3) failed to demand a return of the PDPs. At this point, Airbus reasons, GFAC was required to tender payment. As it never did, Airbus claims it had the right to terminate the AI Agreement on November 15, 2001.

This court respectfully disagrees. This motion precedes discovery in this case. Based on a review of the relevant case law in this state, this court cannot rule as a matter of law that GFAC elected to continue the contract because it is an issue of fact at this juncture.

For the purposes of this discussion, I will assume, as the Cayman Court did, that Airbus repudiated the AI Agreement. In determining which election the non-repudiating party has made, “the operative factor is whether the non-breaching party has taken an action (or failed to take an action) that indicated to the breaching party that he had made an election.” (*AG Properties of Kingston, LLC v Besicorp-Empire Dev. Co., LLC*, 14 AD2d 971, 695 [3d Dept 2005] [citing *Bigda v Fishbach Corp*, 898 F Supp 1004, 1013 [SDNY 1995]; see also *Lucente v International Business Machines Corp.*, 310 F3d 243, 258 [2d Cir. 2002] [citations omitted]). In addition, “there is no particular time within which the non-breaching party must make the election. . . He may refuse for a time, to acquiesce in the repudiation, and urge the repudiator to perform without waiving any of his rights.” (*In re Randall's Island Family Golf Centers, Inc*, 261 BR 96, 101-102 [SDNY 2001] [citations omitted]).

However, until there is an election, both parties remain liable for their contractual obligations. (*Id.*). “If the nonrepudiating party defaults on the contract before it elects to accept the breach, the other party has a right to act upon that default. (*Silver Air v Aeronautic*

Development Corp Ltd., 656 F. Supp. 170, 177 [SDNY 1987]). In addition, in order to recover damages based on the other party's anticipatory repudiation, the non-breaching party must show that he was ready, willing and able to perform his own contractual obligations. (*See In re Asia Global Crossing, Ltd.*, 326 BR 240, 257 [SDNY 2005]).

In this court's view, GFAC's October 31, 2001 letter is not clear as to whether GFAC elected to continue the contract after what it considered to be Airbus' anticipatory breach. In support of the conclusion that GFAC considered the termination to be an anticipatory breach, one can consider GFAC's accusations of bad faith and claims that Airbus had no right to terminate the agreement. In addition, that GFAC made no further payments under the AI Agreement suggests that GFAC was not electing to continue the AI Agreement. On the other hand, because GFAC did not expressly characterize defendant's attempted termination as a breach and expressed its willingness to continue with the agreement, one can read the letter as implying that defendant would treat the AI Agreement as continuing.

In addition, plaintiff has raised a question as to whether a surplus existed so that GFAC owed no PDPs in October 2001. The documents plaintiff has attached to the Akers Affidavit show that the parties agreed to postpone the delivery dates for certain aircraft for which GFAC or FHG had already made PDPs. Airbus claims that a surplus for one aircraft cannot excuse GFAC from paying the PDPs due on different aircraft because the Purchase Agreement requires the PDPs "be paid on an aircraft -by-aircraft basis." (Reply Mem. At 5). That may be, but Airbus does not show where the AI Agreement precludes applying overpayment on one aircraft towards what is due on another. Airbus also cites section 5.7.2, that the AI Agreement required that the PDPs "be made in full, without set-off, counterclaim, deduction or withholding of any kind."

This language also does not prevent the application of PDPs from one aircraft to another.

Further, this language typically would prevent FHG from asserting set-off as a defense to a suit for payment, not, as here, a suit for a return of the PDPs.

In these circumstances, GFAC's actions cannot be said as a matter of law to constitute an election of remedies as opposed to a willingness to proceed with the AI Agreement in the event that Airbus agreed to retract its repudiation. The law does not require that, where a party has renounced a contract, a continued willingness to receive performance is anything more than an indication that if the repudiator withdraws its repudiation, the contract may proceed. (*See AG Properties supra*, 14 AD2d at 697). Consequently, it is an issue of fact whether GFAC elected to continue the contract and Airbus cannot prevail on summary judgment on this issue.

B. Did Airbus' November 15, 2001 letter validly terminate for nonpayment of PDPs

To the extent Airbus argues that, if its October 11, 2001 letter did not validly terminate the AI Agreement, its November 15, 2001 letter did, the court rejects that argument. "A party will be relieved or discharged from the performance of futile acts or conditions precedent, including the tender of payment, upon the failure or refusal by a party to honor its obligations under their contract." (*Special Situations Fund III L.P. v Versus Technology Inc.*, 227 AD2d 321 [1st Dept 1996]; *see also MK West Street Company v Meridien Hotels, Inc.*, 184 AD2d 312, 312-313 [1st Dept 1992] [defendant's "unconditional letter of termination that failed to offer any opportunity to cure. . . relieved plaintiff MK West of any obligation to effectuate a cure and entitled plaintiff MK West to treat the contracts as terminated and attempt to mitigate its damages"]).

Although GFAC still did not tender by November 15, 2001 the PDPs it allegedly owed,

there is still an issue of fact as to the existence of a surplus. Also, as Airbus had previously indicated that it was terminating the contract, even if that previous notification was defective, there is question as to whether GFAC could and did treat the first letter as an anticipatory repudiation making futile further payment. Accordingly, the court cannot rule as a matter of law at this juncture that Airbus' November 15, 2001 letter properly terminated the AI Agreement.

C. GFAC's Ability to Pay Debts

Through multi-tiered reasoning, Airbus claims that it also could terminate the AI Agreement pursuant to § 20.1(6) because GFAC was insolvent. Airbus reasons that GFAC was insolvent because FHG lacked the resources to infuse the necessary capital to enable GFAC to make payments on the aircraft because of the insolvency of its parent, SAIR. However, Airbus did not cite GFAC's insolvency as a reason for termination in either its October 11, 2001 letter or in its November 15, 2001 letter.

GFAC's state of solvency in October 2001 is not clear on this pre-discovery record. It is true that GFAC was supposed to receive funding on a 50/50 basis from FHG and GATX, and it is also true that FHG did not infuse additional capital in October 2001. However, plaintiff's position is that nothing was due at the time because there was a surplus. FHG may have eventually encountered cash flow problems because of its parent's insolvency.¹ But in October 2001, FHG had assets such as airplanes it could have liquidated. (Akers Aff. ¶¶ 27-29). Further, the issue is not FHG's solvency. GFAC's is. GFAC's other shareholder GATX was solvent. Neither shareholder was willing to provide any additional funds to GFAC, perhaps because they

¹ Indeed, FHG did declare bankruptcy in 2004, but this does not prove whether or not it could infuse capital into GFAC in 2001.

believed there was a surplus or perhaps because of FHG's inability to pay. Only development of a full record will reveal the reason.

D. Was GFAC the Object of Liquidation or Analogous Event?

Finally, Airbus argues that it could terminate pursuant to § 20.1 (7) of the AI Agreement that allowed for termination if GFAC "becomes the object of any liquidation, winding up or analogous event." This portion of the agreement is under the heading "Termination for Insolvency." Airbus concedes that GFAC was "not the object of a judicial liquidation or winding up proceeding in the Cayman Islands in October 2001." (Reply Mem. at 11). Airbus instead points to the Split Agreement and the "non-judicial" efforts the two shareholders (FHG and GATX) made to dissolve the joint venture, claiming this is tantamount to winding up. According to plaintiff, "GFAC ceased operations relating to performance of the AI Purchase Agreement on or about the time of Airbus' repudiation of the Agreement in October 2001," but continues to engage in certain other operations such as maintaining directors and a bank account. (Akers Aff. ¶ 39). Plaintiff claims that the AI Agreement (and GFAC) would only terminate if Airbus signed a new agreement with it. As Airbus never signed a new agreement, plaintiff reasons that both the AI Agreement and GFAC remain in existence. Plaintiff claims that it and GATX made no efforts to wind up GFAC.

It is not clear from this record whether FHG and GATX ever completely wound up GFAC. There has never been a finalized winding up proceeding, and there is some evidence in the record that GFAC still has a bank account and directors. Indeed, GFAC's initiation of this lawsuit indicates that it is still a going concern. Accordingly, whether the AI Agreement is extant and concomitantly whether GFAC was the object of a winding up proceeding remain issues of

fact. Accordingly, whether or not Airbus could terminate the AI Agreement because GFAC was the object of a winding up proceeding remains an open issue at this juncture in the litigation.


Accordingly, it is

ORDERED THAT Airbus' motion for partial summary judgment is denied.

The parties are directed to attend a settlement conference on January 19, 2007 in the courtroom, room 248, 60 Centre Street and should contact the court for particulars, such as whether or not principals should attend.

The Clerk is directed to amend the caption accordingly.

Dated: January ¹⁷~~12~~, 2006



J.S.C.

FILED
JAN 09 2007
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