

Van Deventer v CS SCF Mgt. Ltd.

2007 NY Slip Op 32236(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0603151/2003

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN

PART 49

Justice

Dewenter
 Plaintiff
 - v -
CS SCF
 Defendant.

INDEX NO. 603151/03
 MOTION DATE 3/2/07
 MOTION SEQ. NO. 028
 MOTION CAL. NO. 9

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
 JUL 23 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

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

**MOTION IS DECIDED IN ACCORDANCE
 WITH ACCOMPANYING MEMORANDUM
 DECISION IN MOTION SEQUENCE**

July 16, 2007

Herman Cahn
 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
JOHN M. VAN DEVENTER, JAMES R. CLARK,
and C2C CONSULTANTS, LTD.,

Plaintiffs,

-against-

Index No. 603151/03

CS SCF MANAGEMENT LIMITED, CREDIT SUISSE
FIRST BOSTON, CREDIT SUISSE FIRST BOSTON
(USA), INC., CS CAPITAL PARTNERS, LTD., CS
STRUCTURED CREDIT FUND, LTD., CREDIT
SUISSE FUND ADMINISTRATION LIMITED, and
QUEENSGATE BANK AND TRUST COMPANY, LTD.,

Defendants.

-----X
CS SCF MANAGEMENT LIMITED, CREDIT SUISSE
FIRST BOSTON (USA), INC., CS CAPITAL PARTNERS,
LTD., and CS STRUCTURED CREDIT FUND, LTD.,

Counterclaim-Plaintiffs,

-against-

JOHN M. VAN DEVENTER, JAMES R. CLARK,
and C2C CONSULTANTS, LTD.,

Counterclaim-Defendants.

-----X

Herman Cahn, J.:

In motion sequence number 028, defendants CS SCF Management Limited (the
Manager), Credit Suisse First Boston (CSFB), Credit Suisse First Boston (USA), Inc. (CSFB
USA), CS Capital Partners, Ltd. (CS Capital), and CS Structured Credit Fund, Ltd. (the Credit
Fund) (collectively, the CS defendants) move for summary judgment dismissing the 11th and 12th

causes of action for conversion and unjust enrichment asserted in the first amended complaint, CPLR 3212.

Plaintiffs C2C Consultants, Ltd. (C2C), John M. Van Deventer, and James R. Clark cross-move to strike a declaration by nonparty Jonathan Rayner James Q.C. regarding the application of English law to these claims, and to prohibit the CS defendants from using the declaration in this action.

The underlying facts and procedural history of this complex commercial action have been fully set forth in this court's decisions and orders determining the parties' numerous motions and will not be repeated here, except as necessary for clarification.

In late 1995, the parties, or their predecessors, agreed that CSFB would create investment funds (the Funds) and that Van Deventer and Clark would manage them. Subsequently, these parties created companies and entered into numerous agreements to carry out this objective. In 1999, C2C, the CS Capital Fund, the Credit Fund, and the Manager entered into a series of agreements, including a strategic consulting agreement (the 1999-SCA), and the Funds and the Manager entered into a fund management agreement (the 1999-FMA). Nonparty Cabot Square Capital Advisors, Ltd. (Cabot Square), a sister company to C2C, entered into an investment advisory agreement (the 1999-IAA) with the Funds and the Manager.

In the 11th cause of action, C2C alleges that the CS defendants converted two software programs authored by a Cabot Square employee and used with permission by nonparty Cabot Financial (Europe) Ltd. (Cabot Financial), a portfolio company wholly owned by the Credit Fund. C2C specifically alleges that, after the CS defendants' termination of the 1999-SCA on February 28, 2003, and prior to the sale of Cabot Financial during the Funds' liquidation by

Credit Suisse Fund Administration Limited¹ (the Administrator), Cabot Square demanded return of the software. C2C alleges that the CS defendants refused and that, on February 25, 2004, the Administrator sold Cabot Financial and its assets, including the software, for more than \$184 million, resulting in a profit to the Credit Fund of more than \$100 million. C2C further alleges that \$46,860,800 of the purchase price is directly attributable to the inclusion of the software in the sale. C2C also alleges that the Administrator and certain affiliates of the CS defendants were paid fees by the Funds as a result of the sale. On these allegations, C2C seeks compensatory, special, and punitive damages, and an injunction restraining the Administrator from distributing any of the sale proceeds until an accounting of C2C's proper share of the proceeds has been obtained, together with interest, costs, and attorneys' fees.

In the 12th cause of action, C2C alleges that the CS defendants were unjustly enriched by the conversion and sale of the software programs. C2C seeks compensatory damages, together with interest, costs, and attorneys' fees.

C2C asserts these claims in its capacity as assignee of Cabot Square's intellectual property and ownership rights in the software, effective June 1, 2004.

The CS defendants now seek summary judgment dismissing the 11th and 12th causes of action, contending that the claims are fatally defective because, under English law, computer software programs are intangible property and, therefore, cannot be the subject of a tort claim for conversion.

In opposition, plaintiffs contend that the motion, although styled as one for summary

¹By decision and order dated September 23, 2005, this court dismissed defendant Credit Suisse Fund Administration Limited from this action.

judgment, is merely an improper second CPLR 3211 (a) (7) motion to dismiss the conversion and unjust enrichment claims. Plaintiffs also contend that the CS defendants have completely misconstrued the claims, that the claims are governed by the law of New York, and that they are viable under the law of either New York or England.

Contrary to plaintiffs' contention, this summary judgment motion is procedurally properly made and is not barred by the doctrine of the law of the case. The CS defendants previously moved to dismiss the 11th and 12th causes of action on grounds of failure to state a cause of action and forum non conveniens, citing CPLR 3211 (a) (1), (7), (8), and 327 (a) (see motion sequence no. 004). By decision and order dated September 14, 2005, this court denied the motion, holding, in part, that C2C had asserted factual allegations sufficient to support these claims under New York law. The CS defendants did not appeal this branch of the prior decision.

The denial of a motion to dismiss does not bar a subsequent motion for summary judgment on the same causes of action. "[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case" (Arizona v California, 460 US 605, 618, rehg denied 462 US 1146 [1983], decision supplemented 466 US 144 [1984]). However, the law of the case doctrine is not applicable here because the two motions are distinctly different. "[U]nlike a motion for summary judgment which searches the record and assesses the sufficiency of the parties' evidence, a motion to dismiss for failure to state a cause of action merely examines the adequacy of the pleadings" (State of New York v Barclays Bank of New York, N.A., 151 AD2d 19, 21 [3d Dept 1989], affd on other grounds 76 NY2d 533 [1990]; Santiago v Pyramid Crossgates Co., 294 AD2d 789, 790 [3d Dept 2002]). Thus, the CS defendants have a right to move for summary judgment on the

11th and 12th causes of action, notwithstanding their earlier motion to dismiss these claims.

Next, the parties dispute whether the law of the case doctrine requires that these claims be decided according to English law or New York law. The doctrine is not applicable here because at no time during this litigation has either side requested the court to determine which law applies to these claims, nor has the court made such a determination on the merits (see Brown v State of New York, 250 AD2d 314, 320 [3d Dept 1998]).

In the September 14, 2005, decision and order, the court held not only that the conversion and unjust enrichment claims were legally viable, but also denied that branch of the prior motion to dismiss these claims on forum non conveniens grounds, holding that New York was an appropriate venue for resolution of these claims. Upon appeal by the CS defendants of that branch of the order, the Appellate Division, First Department, affirmed the determination, recognizing that,

while [these claims] can be viewed as a narrow dispute over which of several foreign entities owns the software under foreign law, . . . [the claims] are, at the least, part of the broader dispute between the parties arising out of the joint venture . . . that has ample ties to New York. It does not make sense to fragment the case

(Van Deventer v CS SCF Management Ltd., 37 AD3d 280, 281 [1st Dept 2007] [emphasis added]). Contrary to each side's contentions, this language does not constitute a ruling on the merits regarding choice of law, but is, instead, amplification of the Appellate Division's forum non conveniens ruling.

The parties next dispute whether the conversion and unjust enrichment claims are governed by English law or by New York law.

To determine choice of law in tort claims, a New York court applies an "interest analysis," pursuant to which " 'the law of the jurisdiction having the greatest interest in the litigation will be applied and . . . the [only] facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict' " (Schultz v Boy Scouts of Am., Inc., 65 NY2d 189, 197 [1985], quoting Miller v Miller, 22 NY2d 12, 15-16 [1968]). Under an interest analysis, the significant contacts are the parties' domiciles and the location of the tort (id.; Elson v Defren, 283 AD2d 109, 115-16 [1st Dept 2001]). Discovery having been substantially completed, the record now includes undisputed evidence of numerous significant ties between the facts underlying the conversion and unjust enrichment claims and Great Britain.

In the conversion and unjust enrichment claims, C2C, a Cayman Islands company, asserts an ownership interest in two software programs based on a written assignment executed in England and the Netherlands with Cabot Square, an English company. The agreement provides that it "shall be governed by and construed in all respects in accordance with the laws of England" (Cabot Square/C2C, June 24, 2004, Assignment § 4.1). Prior to C2C's commencement of this action, Cabot Square asserted its rights to the software under English law. In letters dated October 3, and October 31, 2003, and January 10, 2004, Cabot Square demanded that the Manager and the Administrator cease using the software and return it to Cabot Square, asserting its contractual rights pursuant to 1999-IAA §§ 9.3, 12.4 (c), and 12.4 (d). The 1999-IAA provides that it "shall be construed and governed in accordance with English law" (1999-IAA § 18.1).

The software was developed in England on computers located in England by English

citizens, including nonparties Christopher Sales, then employed by Cabot Square and Cabot Financial (see Christopher Sales, Oct. 6, 2006, dep tr, vol. 1, at 5:24 to 6:7, 13:5-15, 22:4 to 23:23) and Jay I. Derrett, then a Cabot Square employee. Sales developed the software for use by Cabot Financial, an English company headquartered in England (see id. at 22:4 to 23:23), at the request of Van Deventer and Clark, and pursuant to a service agreement between himself and Cabot Financial executed in England on March 20, 2000. The agreement provides that it "is governed by and is to be construed in accordance with the laws of England" (Cabot Financial/Sales Service Agr., § 14.5).

The CS defendants' alleged act of conversion of the software – the 2004 sale of Cabot Financial, together with the software at issue – occurred in England and pursuant to a contract of sale expressly governed by English law (see Credit Fund/Cabot Fin. Holdings Group Ltd., Jan. 22, 2004, Agr. for the Sale & Purchase § 13.1).

Given these facts, it is clear that England has the greater interest in the resolution of the alleged conversion and unjust enrichment claims. Therefore, these claims are governed by English law.

The CS defendants seek summary judgment in their favor on these claims on the ground that they are not sustainable under English law. In support, the CS defendants submit a written declaration by Jonathan Rayner James Q.C. regarding English law and its application to these claims.

In opposition, plaintiffs cross-move to strike the James declaration on the ground that it is an inadmissible unsworn out-of-court statement submitted in the form of a declaration, in order

to circumvent this court's October 31, 2006 discovery order directing that expert witness disclosure be completed by November 30, 2006.

The cross motion to strike is denied. A review of the James declaration and its use by the CS defendants reveals that James is not an expert witness, in the way that term is usually used, who is expected to testify at trial, but is, instead, relied upon by the CS defendants as an expert on the principles of English law applicable to the conversion and unjust enrichment claims raised in this motion. Therefore, submission of the James declaration does not violate either this court's October 31, 2006 discovery order or the expert witness discovery rules set forth in CPLR 3101 (d) (1) (i).

The CS defendants properly submitted the James declaration in support of their request that this court take judicial notice of English law pertaining to conversion and copyright. "[A] court has discretion to apply the law of a foreign country notwithstanding the absence of advance notice or request to do so" (Burns v Young, 239 AD2d 727, 728 [3d Dept 1997], citing CPLR 3016 [e], 4511 [b]). A court may take judicial notice of the law of a foreign country, where, as here, a party annexes to its motion papers pertinent statutes and case law, as well as interpretations of the foreign law by attorneys versed in that law, and the party has adequately notified both the court and its adversaries that it intends to request the court take judicial notice of the foreign law (see Dresdner Bank AG v Edelmann, 129 Misc 2d 686, 688-89 [Sup Ct, NY County 1985], affd 117 AD2d 1024 [1st Dept 1986]; CPLR 4511 [b]).

Plaintiffs oppose the motion on grounds that the CS defendants and James have misinterpreted the conversion and unjust enrichment claims, resulting in a flawed premise and a

flawed opinion, and that the claims as asserted do not involve the authorship or ownership of the software and, therefore, are not copyright infringement claims. Plaintiffs explain that, because Cabot Financial did not sell the software and was authorized to use it, they did not assert conversion and unjust enrichment claims against Cabot Financial. They argue that they have alleged that the CS defendants were unjustly enriched through the receipt of increased proceeds and fees from the unauthorized sale of the software as part of Cabot Financial's assets and through their exercise of dominion and control over the Credit Fund, the owner of Cabot Financial.

Contrary to plaintiffs' interpretation, in the conversion and unjust enrichment claims asserted in the first amended complaint, C2C seeks to assert ownership rights over intangible property. In the conversion claim, C2C, as Cabot Square's assignee, alleges that the CS defendants improperly interfered with Cabot Square's rights to two computer software programs on loan by Cabot Square to Cabot Financial by refusing to return them to Cabot Square upon due demand and by selling them as part of Cabot Financial's assets without authorization. C2C specifically alleges that "[a]t all relevant times, Cabot [Cabot Square] retained ownership of the Software and related intellectual property rights" (First Amended Complaint, ¶ 260). In the unjust enrichment claim, C2C alleges that the CS defendants improperly received and retained monetary fees as the result of the unauthorized sale of the software.

The software programs are intangible property, as plaintiffs' own expert recognizes. They are referred to as the "Pricing Model" and the "Revaluation Model" and were used by Cabot Financial, an English company in the business of purchasing, collecting, and managing portfolios of defaulted consumer receivables. Plaintiffs' expert, Mark Bezant, described the Pricing Model

as "[s]oftware used by Cabot Financial to forecast collections from a portfolio of Assets and to inform pricing decisions on portfolio acquisitions" (Mark Bezant/LECG Ltd., Nov. 20, 2006, Valuation of Pricing Model & Revaluation Model Report, Glossary). Bezant described the Revaluation Model as "[s]oftware used by [Cabot Financial] to forecast collections on acquired portfolios of Assets" (*id.*). Further, Bezant classified the Pricing Model and Revaluation Model software programs as "intangible assets," stating that "[t]he Software formed part of the intangible assets sold" to Cabot Financial Holdings Group Limited (*id.*, at §§ 5.3. 5.7; *see* Credit Fund/Cabot Fin. Holdings Group Ltd. Agr. for the Sale & Purchase, The Subsidiary Undertakings, at 30).

Under English law, computer software programs are intangible property and are protected by copyright as a subclass of literary works under the Copyright, Designs and Patents Act 1988 (CDPA) (*see* CDPA § 3 [1] [b]; Jonathan Rayner James Q.C., Feb. 19, 2007, Declaration § 11). Further, under English law, intangible property is not capable of physical possession and, therefore, cannot be the subject of a conversion claim (*see* OBG Ltd. v Allan, [2005] EWCA Civ 106, [2005] QB 762 [holding that, under English law, the tort of conversion is applicable to goods and not to intangible property]; Torts [Interference with Goods] Act 1977 § 14 [1]; James Declaration §§ 14, 15). Therefore, in asserting ownership rights over the Pricing Model and Revaluation Model software, C2C has asserted a claim sounding in copyright infringement, a statutory tort, rather than in the common-law tort of conversion.²

² The court notes that, as of the date of this decision, the law of New York has not yet recognized a claim for conversion of computer software programs. The Court of Appeals has recently held that "we believe that the tort of conversion must keep pace with the contemporary realities of widespread computer use. We therefore . . . hold that . . . electronic records that were

For the foregoing reasons, that branch of the motion for summary judgment on the 11th cause of action for conversion is granted in the CS defendants' favor. Summary judgment relief is appropriate when the proof submitted sufficiently establishes that there is no genuine triable issue of material fact outstanding (Suffolk County Dept. of Social Servs. v James M., 83 NY2d 178, 182 [1994]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

For these reasons as well, the 12th cause of action for unjust enrichment is fatally defective. In this claim, plaintiffs reincorporate the factual allegations relating to the conversion claim, and then expressly allege that "[a]s a result of the conversion and sale of [Cabot Square's] Software by the CSFB Defendants, the CSFB Defendants have been unjustly enriched" (First Amended Complaint, § 272). By C2C's own allegations, then, the 12th cause of action arises solely out of the conversion claim. Therefore, that branch of the motion for summary judgment on the 12th cause of action is granted in the CS defendants' favor.

The court has considered the CS defendants' remaining contentions and finds them to be without merit.

The court notes that it has not decided or ruled upon the actual ownership or authorship of the computer software.

stored on a computer and were indistinguishable from printed documents are subject to a claim of conversion in New York" (Thyroff v Nationwide Mut. Ins. Co., 8 NY3d 283, 292 [2007]). The court carefully qualified this holding, stating that "[b]ecause this is the only type of intangible property at issue in this case, we do not consider whether any of the myriad other forms of virtual information would be protected by the tort" (id. at 293). Whether the court would include software programs of the type at issue here under the rubric of conversion, need not be decided now, since it is the law of England that applies.

Accordingly, it is

ORDERED that motion sequence number 028 is granted to the extent that summary judgment on the 11th and 12th causes of action in the first amended complaint is granted in favor of defendants CS SCF Management Limited, Credit Suisse First Boston, Credit Suisse First Boston (USA), Inc., CS Capital Partners, Ltd., and CS Structured Credit Fund, Ltd., and these claims are dismissed; and it is further

ORDERED that the cross motion is denied in its entirety; and it is further

ORDERED that the balance of the action shall continue.

Dated: July 16, 2007

ENTER:



J.S.C.

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