

Viafax Corp. v Citicorp Leasing, Inc.

2007 NY Slip Op 33309(U)

October 10, 2007

Supreme Court, Nassau County

Docket Number: 2112-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

VIAFAX CORP., MARK DOYLE and
ROBERT ALLGIER,

Plaintiffs,

INDEX No. 2112/07

MOTION DATE: Aug. 31, 2007
Motion Sequence # 001, 003

-against-

CITICORP LEASING, INC.,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law..... X

This motion, by defendants, for an order dismissing the plaintiffs' complaint under CPLR §3211(a)(1), (4) and/or (7) on the grounds that there is a prior, duplicative pending action between the parties the result of which will, as a matter of law, render the above-captioned action moot, or alternatively, for a stay under CPLR §2201 on the grounds that the above-captioned action and the prior pending action involve identical parties and identical issues, together with such other and further relief as the Court may seem just and proper; and a cross-motion, by plaintiffs, for an order pursuant to CPLR §602 consolidating the instant action with the action styled Citicorp Leasing, Inc. v Vifax Corp., Mark Doyle and

Robert Allgier, presently pending in the Supreme Court of the State of New York, County of Nassau under index number 05-5554 and for such other and further relief as the Court may deem just and proper, are both determined as hereinafter set forth.

FACTS

Citicorp Leasing, Inc. (hereinafter "Citicorp") and Viafax Corporation (hereinafter "Viafax") are parties to pending litigation in order to recover upon a "Loan and Security Agreement" entered into on or about June 18, 1999 between Viafax and European American Bank. On July 7, 2001, European American Bank merged with and into Citibank, N.A., with Citibank as the surviving entity. On December 10, 2001, Citibank sold and assigned its motor vehicle lease-financing portfolio to Citicorp. In the First Action, Citibank is suing Viafax for \$9, 640, 019.00 over unpaid amounts resulting from their promissory notes and lease assignments executed by Viafax. Citibank moved for summary judgment in that action, and on October 20, 2006, this court granted and denied in part Citicorp's motion. Because Viafax raised triable issues of fact, that action continues.

In Viafax's answer to Citicorp's motion for summary judgment, Viafax raised twenty-five affirmative defenses as well as two counterclaims. This court dismissed defendants' first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, and twenty-fifth affirmative defenses in the order on October 20, 2006. As to the counterclaims, the court agreed with Citicorp that there is an express waiver to interpose any counterclaims or setoffs contained in paragraph 13(j) of the Loan Agreement and as a result, dismissed both counterclaims.

Subsequent to that order, Viafax and the individual plaintiffs commenced this second action by asserting nearly identical causes of action, as discussed in their cross motion, as new causes of action in this second action. Citicorp moved to dismiss this second action or alternatively stay this second action.

DEFENDANT'S CONTENTIONS

Citicorp asserts that Viafax, and the individual plaintiffs in this action commenced this second action by "copying the previously dismissed counterclaims almost verbatim, and asserting them as causes of action in the second action." Citicorp states that the

second action should be dismissed because: both actions “concern identical parties; the issues raised by the remaining affirmative defenses in the prior, pending first action are virtually identical to the issues raised in the second action”; and Viafax is precluded from claiming damages in the second action if Viafax and the individual defendants in the first action succeed in reducing or eliminating Citicorp’s claim for a deficiency.

Alternatively, Citicorp states that it is proper to stay a “subsequent action in favor of a prior one, where the parties are virtually identical, the issues to be resolved overlap, and there would be a risk of inconsistent adjudications, duplication of proof and the potential waste of judicial resources.”

PLAINTIFF’S CONTENTIONS

Viafax opposes Citicorp’s motion to dismiss and instead moves for consolidation.

Viafax commenced this instant action, alleging that Citicorp (i) failed to dispose of the collateral in a commercially reasonable manner (ii) did not act in a commercially reasonable manner in the sale of the collateral... (iii) wrongfully repossessed and sold the collateral, and (iv) breached its duty of fair dealing.

Although Viafax agrees that this court dismissed their counterclaims in the First Action, Viafax saw this dismissal as merely procedural and was the result of the waiver in the Loan and Security Agreement that affected the right to interpose counterclaims. Because there was no adjudication of Viafax’s claims on the merits, Viafax can raise these claims in a separate action because they can be maintained as independent claims. Also, Viafax claims that the waiver in the Agreement “cannot be enforced to bar an independent action sounding in fraud or where, as here, plaintiffs have sufficiently stated a cause of action for breach of duty of fair dealing and defendant’s breach of its implied obligation to deal honestly and in good faith”.

DECISION

Motion to Dismiss

The rule in motions to dismiss due to the pendency of another case is stated in CPLR § 3211. The rule provides, in pertinent part:

“A party may move for judgment dismissing one or more causes of action asserted against him on the ground that ...(4) there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires ...”

CPLR § 3211 (a)(4).

Paragraph 4 is a much-exercised ground under CPLR 3211(a), which “vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties for the same cause of action.” (State v. Lunking, 2003 WL 22673976, N.Y. Sup., 2003, citing Whitney v. Whitney, 57 N.Y.2d 731, 454 N.Y.S.2d 977). “For the action to qualify for dismissal on the ground of the other’s pendency, the other must have been commenced first.” (Siegel Practice Commentary McKinney’s Cons Laws of N.Y., Book 7B, CPLR 3211, p. 21). Additionally, if the claims in both actions are identical, the second is to be dismissed in deference to the more diligently prosecuted first one. (See generally Reckson Associates Realty Corp. v. Blasland, Bouck & Lee, Inc., 230 A.D.2d 723, 645 N.Y.S.2d 873, 2nd Dept., 1996).

To dismiss the present action because of the pendency of another one, the two actions must be “ ‘sufficiently similar’ and the relief sought must be ‘the same or substantially the same’ ” (Montalvo v. Air Dock Systems, 37 A.D.3d 567, 830 N.Y.S.2d 255, 2nd Dept., 2007; quoting White Light Prods. v. On The Scene Prods., 231 A.D.2d 90, 660 N.Y.S.2d 568). CPLR 3211 requires a two-pronged inquiry: (1) do both suits arise out of the same actionable wrong or series of wrongs? and (2) as a practical matter, is there any good reason for two actions rather than one being brought in seeking the remedy? “If the first question is answered yes and the second one no, the court should apply paragraph 4 and dismiss the action.” (Siegel Practice Commentary McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211, p. 29).

In a factually similar case, the court dismissed the second action. In Frank Pompea, Inc. v. Essayan, 36 A.D.2d 745, 320 N.Y.S.2d 441, 2nd Dept, 1971, the plaintiff had sued the defendant and the defendant interposed counterclaims. Then the

VIAFAX CORP., et al v CITICORP LEASING, INC. Index no. 002112/07

defendant brought a separate suit against the plaintiff on the same claims. The court found that claims pleaded in the complaint in the second action were "identical in every respect" to the counterclaims voluntarily interposed by the defendant in the first action. (*Id.*), the court dismissed the second action on the ground of the pendency of the first action.

In *Essayan*, the court never ruled on the counterclaims in the initial action yet still dismissed the second action because "[u]nder the factual pattern here, the making of an order which justice requires necessitates the dismissal of Action No. 2, that clearly being the preferable result to having identical causes of action prosecuted at the same time in separate actions." (*Id.* at 746).

Viafax and Citicorp discuss how Viafax's new causes of action were asserted as counterclaims in the pending litigation and dismissed because of the express waiver of the right to interpose any counterclaims or setoffs contained in paragraph 13(j) of the Loan Agreement. They both omit that all of Viafax's new causes of action were also asserted in Viafax's affirmative defenses and are either still part of the pending litigation or have already been dismissed because Viafax failed to raise triable issues.

Viafax is claiming in its first cause of action that Citicorp did not act in a commercially reasonable manner in disposing of the collateral. In the motion for summary judgment, Viafax raised triable issues as to whether the timing of the publication of the Notice of Secured Party Sale, and the auction itself, where Citicorp was the only bidder, was commercially reasonable.

In the motion for summary judgment, this court found that Citicorp did not meet the "burden of establishing that all aspects of the sale of the [collateral] was commercially reasonable (see UCC 9-626[a][2])." (See **Ford Motor Credit Co., Inc. v. Racwell Constr., Inc.**, 24 A.D.3d 500, 501; see also, **Assocs. Commer. Corp. v. Liberty Truck Sales & Leasing, Inc.**, 286 A.D.2d 311, 312). Citicorp failed to submit proof that the collateral was disposed of "(1) in the usual manner on any recognized market; (2) at the price current in any recognized market at the time of the disposition; or (3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition." (UCC-9-627[b]). Because of this, the summary judgment motion was not granted and these facts are in dispute in the pending litigation, making this first cause of action duplicative of the causes of action in dispute in the first action.

In the second cause of action in this second action, Viafax is claiming that Citicorp, in essence, had a duty to Viafax to act in good faith and to deal fairly and impartially with Viafax. These arguments were in the affirmative defenses that were already dismissed in the first action. In the first action, Viafax's third, fourth, and fifth affirmative defenses asserted that Citicorp breached its "duty of good faith owed" to Viafax and also that Citicorp's causes of action and claims are barred as a result of bad faith perpetrated by Citicorp.

Because these affirmative defenses have already been dismissed because they were "merely plead[ed] conclusions of law without supporting facts," making them insufficient", Viafax cannot try to bring them as new causes of action in this new case. (**Petracca v. Petracca**, 305 A.D.2d 566, 567; **Bentivegna v. Meenan Oil Co.**, 126 A.D.2d 506, 508). Additionally, as Citicorp notes, this appears to arise from the failure to conduct a commercially reasonable sale and therefore is still being litigated in the First Action.

In the first action, Viafax "[could]obtain full redress of their rights [addressed in the second action] ...by raising the claims asserted in this action as affirmative defenses and counterclaims in the summary proceeding." (**Spain v. 325 West 83rd Owners Corp.**, 302 A.D.2d 587, 587-588, 755 N.Y.S.2d 303, 2nd Dept., 2003; citing, **Post v. 120 East End Ave. Corp.**, 62 N.Y.2d 19, 1984; **Cohen v. Goldfein**, 100 A.D.2d 795, 796-797, 474 N.Y.S.2d 519, 1st Dept., 1984). Because Viafax did, in fact, raise these claims in the first action, motions for removal and consolidation may be denied and, the motion to dismiss the action pursuant to CPLR 3211(a)(4). (*Id.*), may be granted.

Because it is appropriate to dismiss the present suit because of the pendency of another one as long as both are "for the same cause of action," this case is appropriately **dismissed**. It is clear that both causes of action are nearly identical to those causes of action that have been ruled on in the first action.

Motion to Stay Proceedings

The rule in motions to dismiss due to the pendency of another case is stated in CPLR § 2201. The rule states that, "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." (*Id.*)

VIAFAX CORP., et al v CITICORP LEASING, INC. Index no. 002112/07

A motion to stay proceedings is appropriate when the other action is pending outside the state, whether in another state's court or in a federal court. (Siegel, New York Practice, 4th ed., p. 443). Because both of these actions are pending in the same court, it is therefore inappropriate.

Additionally, a stay is can be granted when their a “unique legal problem” that may require a separate court’s “expertise in the area,” such as patent validity which is often left to federal courts. (**Research Corp. v. Singer-General Precision, Inc.**, 36 A.D.2d 987, 988, 320 N.Y.S.2d 818, 3rd Dept., 1971). As a result, the state court, “in the interest of comity, orderly procedure, and uniformity, [may] properly exercise its discretion in granting the stay and deferring” to another court. (*Id.*) This is not applicable herein. All of the issues raised in the first action are addressed in the first action and a second action is unnecessary. As a result, there is no justification to grant the stay.

Motion to Consolidate Actions

The rule in motions to dismiss due to the pendency of another case is stated in CPLR § 602. Under rule 602, consolidation is proper “[w]hen actions involving a common question of law or fact are pending before a court” in order “to avoid unnecessary costs or delay.” (*Id.*)

Although Viafax is correct that the dismissal of the counterclaims was procedural because it relied upon the provisions of the Loan and Security Agreement and not based on the merits, the Affirmative Defenses were based upon the merits. Also, Viafax asserts that it has a “legally subsisting cause of action upon which it can maintain an independent claim.” (**Telmark, Inc. v. C & R Farms, Inc.**, 115 A.D.2d 966, 967, 4th Dept., 1985) (citations omitted). Although this may be true, Viafax failed to present any evidence of an absence of good faith dealings in Viafax’s cross-motion in the first action, resulting in dismissal of that affirmative defense. Viafax also successfully presented evidence of triable issues of fact as to the commercial reasonableness issue, making that claim still part of the first action.

In **Firequench, Inc. v. Kaplan**, (256 A.D.2d 213, 682 NYS2d 369, 1st Dept., 1998), the court specifically stated that if “consolidation [would] serve to “delay either action”, then it should not be granted. Consolidation of these cases would only result in delay because Viafax already had the opportunity to raise these issues and in fact succeeded on the claims for failure to dispose of the collateral in a commercially reasonable manner.

