

**New York Merchants Protective Co., Inc. v General
Elec. Capital Corp.**

2007 NY Slip Op 34030(U)

December 5, 2007

Supreme Court, Nassau County

Docket Number: 2963-07/

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

NEW YORK MERCHANTS PROTECTIVE
CO., INC.,

Plaintiff,

-against-

GENERAL ELECTRIC CAPITAL CORPORATION,
SAFE FINANCIAL LLC, COOPER, WHITE &
COOPER LLP, REED SMITH LLP, HOWARD
NOROWITZ, CINDY TUNG, ANDREA GOLDMAN
and JAY ROGERS,

Defendants.

TRIAL/IAS, PART 6
NASSAU COUNTY

INDEX No. 012963/07

MOTION DATE: Oct. 31, 2007
Motion Sequence #001,002,003 &
004

The following papers read on this motion:

Notice of Motion.....	XXXX
Affirmation in Support.....	X
Reply Affirmation	X
Memorandum of Law.....	XXXX
Reply Memorandum of Law.....	XXX

These motions, by defendant Reed Smith LLP; Safe Financial LLC; and General Electric Capital Corporation ("GE Capital"), Howard Norowitz, Cindy Tung, Andrea

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Goldman and Jay Rogers, for an order pursuant to CPLR 3211(a)(1), (2), (5), and (7) dismissing the complaint are **granted** to the extent that the complaint is **dismissed** as against all movants pursuant to CPLR 3211(a)(2).

This motion for the *pro hac vice* admission of Brett Ingerman allowing him to participate in this case for the purpose of representing defendants GE Capital, Harold Norowitz, Cindy Tung, Andrea Goldman and Jay Rogers is **granted**, without opposition.

The plaintiff, New York Merchants Protective Co. ("NYMPCo"), a New York corporation with offices in Freeport, is a New York State licensed alarm dealer. It installs and monitors electric burglar and fire alarms in commercial and residential properties. On June 21, 2001, defendants GE Capital Corporation and Safe Financial LLC, a division of GE Capital, lent NYMPCo. approximately 12 million dollars. The parties' Loan Agreement provides:

"Except as otherwise expressly provided in any of the loan documents, in all respects, including all matters of construction, validity and performance, this agreement and the obligations arising hereunder shall be governed by, and construed and enforced in accordance with, the laws of the State of California, applicable to contracts made and performed in such state, and any applicable laws of the United States of America."

The parties' Loan Agreement further provides:

"Borrower hereby consents and agrees that the state or federal courts located in San Francisco, California shall have exclusive jurisdiction to hear and determine any claims or disputes pertaining to this agreement or any of

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the other loan documents or to any matter arising out of or related to this agreement or any of the other loan documents."

The parties' Loan Agreement was amended on December 31, 2002 to extend the period of NYMPCo.'s interest only payments. On or about May 21, 2003, GE Capital and Safe Financial declared NYMPCo. in default as a result of which on November 13, 2003, the Loan Agreement was again amended. On November 18, 2004, GE Capital and Safe Financial declared NYMPCo. in default yet again, as a result of which on March 25, 2005, a Forbearance Agreement was entered, at which time NYMPCo. executed a Release and Covenant not to sue. The Forbearance Agreement provides that the governing law shall for all purposes be the substantive law of New York State. It also provided a Release and Covenant as follows:

"As a material inducement to [GECC and SAFE] to enter into this Agreement, [NYMPCo.], on behalf of itself and all successors and assigns:

- a. does hereby release, acquit, satisfy and forever discharge SAFE and [GECC] all of their respective past, present and future officers, directors, employees, agents, attorneys, representatives, participants, successors, and assigns, and their subsidiaries and affiliates from any and all manner of claims, demands and causes of action of any nature whatsoever, whether at law or in equity, either now accrued or hereafter maturing, which [plaintiff] now has or may have with respect to any matters, transactions, occurrences, agreements, actions, events arising out

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- of, in connection with or relating to
(i) this Agreement, the Loan Agreement
and the transactions described therein or
the indebtedness or obligations evidenced
and secured thereby, and (ii) the Collateral
or the acquisition or financing thereof; and
- b. does hereby covenant and agree never to
institute or cause to be instituted or continue
prosecution of any suit or other form of
action or proceeding of any kind or nature
whatsoever against SAFE or [GECC] or
any of their respective past, present or
future officers, directors, employees, agents,
attorneys, representatives, participants,
successors or assigns and their subsidiaries and
affiliates, by reason of or in connection with any
of the foregoing matters, claims or causes of
action”.

On August 8, 2005, GE Capital and Safe Financial declared the NYMPCo. in default again, as a result of which on January 19, 2006, GE Capital and Safe Financial threatened "to enforce all of their rights and remedies under the Loan Documents. . . ." Ultimately, on January 27, 2006, NYMPCo. paid off the loan. The pay-off letter contained the following Release:

"[NYMPCo.] on behalf of itself and any person or entity claiming by through, or under it (collectively referred to as "Releasers"), unconditionally remises, releases, and forever discharges [GECC and SAFE] and their past and present officers, directors, shareholders, agents, accountants, auditors, parent corporation, trustees, administrators, attorneys, predecessors, successors, and assigns (collectively referred to as the "Releasees"),

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of and from any and all actions, causes of action, suits, debts, covenants, contracts, agreements, promises, warranties, guarantee, representations, liens, judgments, claims, counterclaims, cross-claims, defenses, and/or demands (collectively referred to as "Claims"), which any of Releasors ever had, now have, or may have against any of the Releasees, for or by reason of any cause, matter, or thing whatsoever, including but not limited to, any and all Claims relating to or arising from the lending or any other relationship between the Releasees and [plaintiff]; provided, however, that this release shall not include a release of any obligations of the Lenders arising pursuant to this letter."

This action was commenced 18 months later, on July 26, 2007. In its complaint, NYMPCo. alleges that as a condition of its loan, GE Capital and Safe Financial required, **inter alia**, that it have all of its accounts receivable deposited directly into a lock box account which GE Capital and Safe Financial controlled, thereby enabling them to entirely control the plaintiff's financial viability and its business. NYMPCo. alleges that GE Capital and Safe Financial wrongfully declared it in default of the Loan Agreement on or about March 15, 2003, based upon its failure to provide a satisfactory financial report. This, NYMPCo. alleges, enabled GE Capital and Safe Financial to raise the applicable interest rates considerably and concomitantly, NYMPCo.'s monthly payment. NYMPCo. further alleges that that caused it to suffer an operating cash shortfall, including an inability to pay its United States and New York State withholding taxes, which in turn caused it to endure substantial interest payments and penalties. NYMPCo. further alleges that by refusing to release funds from the lock box to enable it to pay its Certified Public Accountant, GE Capital and Safe Financial also caused its inability to supply an audit report for 2002 which was required by the Loan Agreement, which allegedly resulted in GE Capital and Safe Financial imposing \$200,000 in penalties on plaintiff. NYMPCo. additionally alleges that GE Capital and Safe Financial miscalculated and withheld excessive amounts of monies. All of these acts allegedly perpetrated NYMPCo.'s first alleged default and allowed GE Capital and Safe Financial to instigate a total default and threatened NYMPCo.'s possible forfeiture of its collateral, whose value,

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NYMPCo. alleges, far exceeded its loan balance.

NYMPCo. alleges that the defendant law firms, Cooper, White & Cooper & Reed Smith LLP, as well as the individual defendants, acted in concert with GE Capital and Safe Financial in their fraudulent behavior. NYMPCo. further alleges that it was compelled to cooperate with GE Capital and Safe Financial in order to pay off their loan and avoid foreclosure, at great costs.

As and for its first cause of action, NYMPCo. alleges that it overpaid GE Corporation and Safe Financial \$800,000 when it settled and paid off its outstanding loan.

As and for its second cause of action, NYMPCo. alleges that it was coerced by GE Capital as well as Reed Smith to give GE Capital a warrant to purchase NYMPCo.'s stock at well beneath market price.

As and for its third cause of action, NYMPCo. alleges that it was coerced by GE Capital and Safe Financial, which were aided and abetted by Reed Smith, to pay Reed Smith excessive legal fees.

As and for its fourth cause of action, NYMPCo. alleges that GE Capital and Safe Financial knowingly made an over collateralized loan to it, and aided and abetted by Cooper White & Cooper and Reed Smith, embarked upon a plan to declare it in default and to cause and perpetrate its default to enable them to acquire its assets at far below market value.

As and for its fifth cause of action, NYMPCo. alleges that GE Capital and Safe Financial encouraged it to purchase American Security Technologies d/b/a Worldwide by agreeing to continue and extend its loan if that purchase was made, even though they knew that Worldwide had a non-performing loan that was in default with them and that Worldwide held unenforceable contracts of little or no value. NYMPCo. alleges that this purchase enabled GE Capital and Safe Financial to adequately collateralize Worldwide's debt by spreading the collateral to include NYMPCo.'s assets. NYMPCo. alleges that having accomplished that, GE capital and Safe Financial then refused to continue and extend its loan.

As and for their sixth cause of action, NYMPCo. alleges that GE Capital and Safe Financial always intended to cause its default and acquire its business at far less than its

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worth.

The moving defendants seek dismissal of the complaint on several grounds: They maintain that NYMPCo. has repeatedly issued covenants not to sue and releases of all of the claims advanced in this action; the first time when the Forbearance Agreement was entered on or about March 25, 2005 and again when the loan was settled on January 27, 2006. They also maintain that plaintiff is required by the Loan Agreement's forum selection clause to bring this action in California. Lastly, defendants allege that NYMPCo. has failed to state a claim against the individual defendants.

Whether the forum selection clause applies must be decided first. That is a jurisdictional issue. LSPA Enterprises, Inc. v Jani-King, 31 AD3d 394 (2nd Dept., 2006).

"Enforcement of forum selection clauses provide certainty and predictability in resolving disputes, particularly those involving international business agreements." (Premium Risk Group, Inc. v Legion Insurance Company, 294 AD2d 345, 2nd Dept., 2002; see, Brooke Group v JCH Syndicate 488, 87 NY2d 530, 1996). A "contractual forum selection clause is **prima facie** valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." (LSPA Enterprises, Inc. v Jani-King, *supra*, citing Brooke Group Ltd. v JCH Syndicate 488, *supra*; see, Best Cheese Corp. v All-Ways Forwarding Intl., 24 AD3d 580, 581, 2nd Dept. 2005; Fleet Capital Leasing/Global Vendor Fin. v Angiuli Motors, 15 AD3d 535, 2nd Dept. 2005). In fact, even a great economic hardship does not defeat a forum selection clause: The party opposing enforcement must demonstrate "that enforcement of the clause would, in effect, deny him his day in court. . . ." (Chiarizia v Xtreme Rydz Custom Cycles, 43 AD3d 1353, 4th Dept., 2007), citing Bell Constructors v Evergreen Caissons, 236 AD2d 859, 860, 4th Dept., 1997). And, "[t]he fact that New York may be a more convenient forum is immaterial [here] because defendant's motion is based on the parties' contract and not on the doctrine of *forum non conveniens*." (Chiarizia v Xtreme Rydz Custom Cycles, *supra*, citing Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 477, 1984, *cert den.* 469 U.S. 1108, U.S.N.Y. 1985).

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The forum selection clause applies here. NYMPCo.'s attempt to avoid its application fails. In the Forbearance Agreement, the parties changed the choice of law, not the choice of forum. In light of the restrictions in the Loan Agreement which provide that it cannot be "changed, waived, discharged or terminated" unless done so in writing, NYMPCo. may not accomplish a change in forum selection based solely on its bald assertion that that was the parties' intent. (See, New York General Obligations Law § 15-301; Rose v Spa Realty Assocs., 42 NY2d 338, 1977; Irving O. Farber, PLLC v Kamalian, 16 AD3d 506, 2nd Dept., 2005). Nor does NYMPCo.'s fashioning of its claims to sound in fraud render the selection of forum clause inapplicable because NYMPCo.'s claims still depend upon the existence of a contract between them. (See, Direct Mail Prod. Servs. Ltd. v MBNA Corp., 2000 WL 1277597, S.D.N.Y. 2000); Albany Ins. Co. v Banco Mexicano, S.A., 1998 WL 730337, S.D.N.Y. 1998); Sarad v Lawson Software, Inc., 2004 WL 2093512 (S.D.N.Y. 2004). The forum selection clause specifically applies to "any matter arising out of or related to the [Loan Agreement] or any of the other loan documents," which NYMPCo.'s claims plainly do. Lastly, the inconvenience of a San Francisco, California, forum does not dispense with the forum clause's application under these circumstances. See, Chiarizia v Xtreme Rydz Custom Cycles, supra.

In conclusion, the moving defendants motions are **granted** to the extent that the complaint is **dismissed** as to the movants pursuant to CPLR 3211(a)(2) for improper forum.

The action against the defendant Cooper, White and Cooper LLP, is **severed** and **continued**.

A Preliminary Conference has been scheduled for January 22, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated DEC 5 2007

Stephen A. Bucare

ENTERED

DEC 11 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**