

**Exeon Inc. v Superior Essex, Inc.**

2007 NY Slip Op 34103(U)

December 14, 2007

Supreme Court, New York County

Docket Number: 0108413/2007

Judge: Helen E. Freedman

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

PRESENT: HELEN E. FREEDMAN

PART 39

*Justice*

Exeon Inc. f/k/a Essex Electric, Inc.,

INDEX NO. 108413/07

Plaintiff,

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

- v -

Superior Essex, Inc. f/k/a Superior Telecom Inc. et al.,

MOTION SEQ. NO. 001

Defendants

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**  
DEC 18 2007

Cross-Motion:  Yes  No

NEW YORK  
COUNTY CLERK'S OFFICE

In this declaratory judgment action to determine the right to proceeds of a settlement of a federal court action, defendants pursuant to CPLR 3211(a)(4) and Rule 327 for an order dismissing this lawsuit on the grounds of *forum non conveniens*, or in the alternative staying it until the disposition of a related action that is pending in the Superior Court of Cobb County, Georgia. For the reasons set forth below, the motion is denied.

*Factual Background* – Under a Purchase and Sale Agreement dated October 2002 (the “Sale Agreement”), plaintiff Exeon Inc. (“Exeon”), a subsidiary of non-party The Alpine Group, Inc. (“Alpine”), acquired substantially all of the assets of the electrical wire business (the “Assets”) of Superior TeleCom Inc., which was succeeded in interest after bankruptcy reorganization by defendant Superior Essex, Inc. (“Superior”). Pursuant to the Sale Agreement,

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

the sold Assets included all claims arising out of the seller's wire business, except for any recovery or settlement proceeds that the seller received in connection with two specific antitrust lawsuits that were identified on a schedule to the Sale Agreement (the "Scheduled Proceeds."). The listed lawsuits included *Heliotrope Gen., Inc. v. Sumitomo Corp.*, Case No. 00701679 and *R. W. Strang Mech. v. Sumitomo Corp.* Case No. 00701680, both of which were pending in the Superior Court of California, County of San Diego (the *Sumitomo* Lawsuits). *Heliotrope Gen., Inc.* and *R. W. Strang Mech.* The two actions were class actions filed on behalf of Superior and other copper purchasers against Sumitomo Corporation ("Sumitomo"), in which the plaintiffs alleged that the company had manipulated the price of copper cathode and copper futures prices from 1993 through 1996

In June 2003, Exeon commenced another lawsuit in the U.S. District Court for the Western District of Wisconsin against non-party J. P. Morgan Chase & Co. and other banks (the "Exeon *J.P. Morgan* Lawsuit"). Exeon's central claim was that the defendant banks had violated antitrust laws by conspiring with Sumitomo to manipulate the copper market so as to overcharge for particular transactions. None of those transactions were at issue in the *Sumitomo* Lawsuits. Exeon further alleged that defendants' price fixing caused economic injury to the wire business that Exeon had acquired from Superior.

In July 2003, Superior filed another lawsuit in the same court (the "Superior *J.P. Morgan* Lawsuit") in which it made similar allegations that defendants had injured its wire business. Superior asserted that it had standing to assert these claims despite the sale of the Assets to Exeon. Thereafter, the *J.P. Morgan Chase* Lawsuit and the "Superior *J.P. Morgan* Lawsuit" were consolidated with a number of related actions brought by various plaintiffs (the "Consolidated Actions.>").

In December 2006, defendants asserted to Exeon that the proceeds of the Exeon *J.P. Morgan* Lawsuit belonged to Superior. In their motion papers, plaintiff alleges that the disputed

claims to the proceeds of the Exeon *J.P. Morgan* Lawsuit impeded the prosecution and possible settlement of the Consolidated Actions. After negotiation, Exeon and Superior agreed in January 2007 to place all of the disputed settlement proceeds into escrow. Thereafter the Consolidated Actions were settled and the settlement proceeds were distributed to the various plaintiffs and into the escrow account.

On June 18, 2007, Exeon commenced this action by filing the complaint, which asserts claims for (1) a declaratory judgment that the settlement proceeds of the Exeon *J.P. Morgan* Lawsuit belong to Exeon and that Superior did not retain them pursuant to the Sale Agreement. Exeon also asserts a claim against Superior for breach of the Sale Agreement.

Two days after plaintiff commenced this action, Superior filed an action in the Georgia state court against Exeon, Alpine, and an individual officer of Alpine, which seeks a declaration that Superior is entitled to the Proceeds. *Sup. Essex Inc. v. Exeon Inc.*, No. 07-1-5146-28 (Sup. Ct. of Cobb Co., Ga. June 20, 2007). Superior also claims that Alpine and its officer breached their fiduciary duties when negotiating the pabr.

*Motion* – Defendants have not met the burden required to dismiss this action pursuant to the doctrine of *forum non conveniens*. The burden lies with the defendant to show “relevant private or public interest factors” that weigh in favor of dismissal. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984), *cert. denied*, 469 U.S. 1108 (1985). The doctrine is flexible and requires the Court to weigh competing factors in light of the circumstances of the particular case. *Natl. Bank & Trust Co. of N.A.*, 72 N.Y.2d at 1007. Among the factors to be considered are “the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit ....” *Islamic Republic of Iran*, 62 N.Y.2d at 479 (1984). Other factors include the residency of the parties and the locus of the claims. *Id.*

New York, which plaintiff selected as the forum for this lawsuit and which has

jurisdiction over all of the parties, is an appropriate forum in which to resolve the parties' dispute over the terms of the Sales Agreement. When the parties executed it, the sellers and purchasers were headquartered in the New York City area, and were represented by New York City-based law firms. The Sale Agreement was drafted, negotiated, and executed in the greater New York City metropolitan area, and the transaction closed in Manhattan.

Defendants fail to meet their burden of showing that Georgia is the more appropriate forum for this action. They fail to identify relevant documents that are located outside of this state or witnesses with relevant information who reside outside of New York, and their broad allegations that witnesses and documents are located outside of the state do not suffice. *See Banco Ambrosiano, S.p.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 74 (1984). They point that this action will require a New York court to apply the law of Delaware, but "[t]he application of the law of sister States does not present an undue burden." *Zainal v. Am.-Europe-Asia Intl. Trade & Mgt. Consultants, Ltd.*, 248 A.D.2d 279, 279 (1st Dept. 1998).

Defendants' second argument that this action should be stayed in favor of the Georgia action, *Sup. Essex Inc.*, is unavailing. While entertaining a motion to dismiss or stay an action for a "prior action pending" pursuant to CPLR 3211(a)(4), a court applies an "analysis [that] is similar to that employed in entertaining a motion predicated on *forum non conveniens*." *White Light Prods., Inc. v. On the Scene Prods., Inc.*, 231 A.D.2d 90, 93 (1st Dept. 1997). Moreover, a movant invoking CPLR 3211(a)(4) must establish that the "prior action" was commenced first. *See Reckson Assocs. Relaty Corp. v. Blasland, Bouck & Lee, Inc.*, 230 A.D.2d 723, 725 (2d Dept. 1996).

Defendants have failed to show that they are entitled to relief under the doctrine of *forum non conveniens*. In addition, this action was filed before the Georgia action.

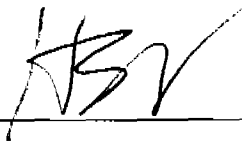
ORDERED that the motion to dismiss is denied, and it is further

ORDERED that defendants are directed to serve answers to the complaint within ten days

after plaintiff serves them with a copy of this order and decision, and it is further

ORDERED that, as previously directed, the parties shall appear for a preliminary conference before the Court on January 22, 2008 at 9:30 a.m.

Dated: December 14, 2007



Helen E. Freedman, J.S.C.

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Check if appropriate:     DO NOT POST

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