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SCANNED ON 1/29/2008

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

PRESENT: _____ PART 15

Justice

Index Number : 602536/2007
VOLO LOGISTICS LLC
VS.
VARIG LOGISTICA S.A.
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____

MOTION DATE 11/14/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/28/08

_____
J.S.C.

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 : IAS PART 56

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VOLO LOGISTICS LLC, and
CAT AEREA LLC,

Plaintiffs,

Index No: 602536/07

-against-

DECISION AND ORDER

VARIG LOGISTICA S.A. and
VOLO DO BRASIL S.A.,

Defendants.

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RICHARD B. LOWE III, J:

This action arises out of Defendant Varig Logistica S.A.'s ("VarigLog") and Defendant Volo do Brazil S.A.'s ("VDB") alleged failure to repay loans payable to Plaintiffs Volo Logistics LLC ("Volo") and CAT Aerea LLC ("CAT"). Defendants move to compel CAT to arbitrate its second cause of action pursuant to Sections 3, 4, 201-208, and 301-307 of the Federal Arbitration Act, 9 U.S.C. §§ 3, 4, 201-208, 301-307, and CPLR 7503; to dismiss the first, third, fourth and fifth causes of action pursuant to CPLR 3211(a)(7); and to dismiss the fifth cause of action to the extent it is based on the first through fifth causes of action.

BACKGROUND

Volo is a limited liability company organized under the laws of Delaware. CAT is a limited liability company organized under the laws of Delaware. CAT is a wholly owned subsidiary of Volo.

VarigLog is a corporation organized under the laws of Brazil. It is an air cargo company and the successor to the cargo business of Vacao Aereas Rio Grandense S.A. ("Old Varig"),

which at one time was Brazil's largest air transport company. VarigLog is a wholly-owned subsidiary of Volo do Brasil S.A. ("VDB"), a corporation organized under the laws of Brazil. VarigLog and VDB formerly owned 99% and 1%, respectively, of VRG Linhaus Aeareas S.A. ("VRG"), a corporation organized under the laws of Brazil. VRG is the successor to the passenger airline business of Old Varig.

Old Varig was Brazil's first airline, founded in 1927. Over time, Old Varig developed into a large commercial operation, becoming the largest airline in Brazil and in Latin America. However, in recent history, Old Varig suffered economic hardship. In June 2005, Old Varig commenced bankruptcy proceedings in Brazil and the United States. In July 2006, a Brazilian bankruptcy court approved the sale of Old Varig's remaining productive assets to VRG, a company incorporated by VarigLog and VDB for the purposes of this transaction.

In 2006 and 2007, Volo and CAT made a number of loans to VRG and its affiliates, including VarigLog and VDB. Additionally, pursuant to a Debt Assumption Agreement dated December 8, 2006 (the "December DAA") and a Debt Assumption Agreement dated (the "June DAA"), VarigLog assumed the borrower's obligations with respect to five loan agreements.

In total, eight loans are in issue in this action. Of the eight, five were assumed by VarigLog, two were made directly to VarigLog, and one was made to VDB. One loan is in the amount of $18,300,000.00 between CAT as lender and VRG as borrower, dated September 12, 2006 ("Loan 1"). A second loan is in the amount of $29,700,000.00 between CAT as lender and VRG as borrower, dated September 12, 2006 ("Loan 2"). A third loan is in the amount of $10,650,000.00 between Volo as lender and VRG as borrower, dated October 25, 2006 ("Loan 3"). A fourth loan is in the amount of $10,765,823.06 between Volo as lender and VRG as

borrower, dated November 17, 2006 ("Loan 4"). A fifth loan is in the amount of $3,307,093.60 between Volo as lender and VRG as borrower, dated December 5, 2006 ("Loan 5"). A sixth loan is in the amount of $8,852,376.74 between Volo as lender and VarigLog as borrower, dated December 13, 2006 ("Loan 6"). A seventh loan is in the amount of $5,860,232.26 between Volo as lender and VarigLog as borrower, dated December 13, 2006 ("Loan 7"). The eighth, and last, loan is in the amount of $770,000.00 between Volo as lender and VDB as borrower, dated December 13, 2006 ("Loan 8"). Each loan agreement is governed by New York law.

Pursuant to the December DAA, VarigLog assumed VRG's obligations under Loan 1, Loan 3, Loan 4, and Loan 5. Pursuant to the June DAA, VarigLog assumed VRG's obligations under Loan 2.

Under the terms of the Loan Agreements, each loan becomes due and payable upon the "Sale of BORROWER [or COMPANY]."[1] The "Sale of Borrower" or "Sale of Company" conditions are defined as a number of events, including "the disposal in one or more transactions of all or substantially all of the assets or operations owned by the BORROWER [or the COMPANY]."

In March 2007, Gol Linhas Aeareas Inteligentes S.A. ("GOL") announced that it agreed to acquire the total shares of VRG, conditional upon receiving regulatory approval. GOL further announced that VRG would be acquired by GTI, S.A. ("GTI"), a wholly-owned subsidiary of GOL. On April 3, 2007, GOL received approval to complete the transfer of VRG to GTI and, on April 9, 2007, the sale closed.

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[1]In Loans 1 through 5, the condition is the "Sale of BORROWER." In Loans 6 through 8, the condition is the "Sale of the COMPANY."

Plaintiffs contend that as a result of GTI's acquisition of all the shares of VRG, a "Sale of Borrower" (or "Sale of the Company" with respect to Loans 6 through 8) occurred on April 9, 2007. Thus, Plaintiffs contend that the loans became due and payable on April 9, 2007. Plaintiffs demanded repayment in accordance with the terms of the Loan Agreements, but have not received any payments.

Plaintiffs commenced this action asserting nine causes action - one cause of action for each of the eight Loan Agreements and a ninth cause of action for costs, expenses, and attorneys fees. Defendants move to compel CAT to arbitrate its second cause of action pursuant to Sections 3, 4, 201-208, and 301-307 of the Federal Arbitration Act, 9 U.S.C. §§ 3, 4, 201-208, 301-307, and CPLR 7503; to dismiss the first, third, fourth and fifth causes of action pursuant to CPLR 3211(a)(7); and to dismiss the fifth cause of action to the extent it is based on the first through fifth causes of action.

DISCUSSION

Motion to Compel Arbitration

VarigLog assumed VRG's obligations under Loan 2 pursuant to the June DAA. Thus, Defendants argue that because the June DAA contains a broad arbitration provision, the Court should compel arbitration of the second cause of action relating to Loan 2. The June DAA contains a clause which reads: "This Adjustment Instrument shall be governed and construed according to the laws of the Federative Republic of Brazil and any doubt or dispute arising out of it shall be settled by the CCI, according to Section Fourteen of the Purchase Agreement executed between VARIGLOG, VOLO AND GTI S/A on March 28, 2007." (Vasios Aff Ex 10, at ¶ 8.)

Plaintiffs argue that the parties did not agree to arbitrate this dispute because this dispute

arises out of Loan 2, which contains New York choice of law and forum selection clauses. Moreover, Defendants note that the June DAA makes numerous references to VarigLog's obligation to pay in accordance with the terms of Loan 2. (Vasios Aff Ex 10, at ¶¶ 2, 4, 5.)

Thus, the Court is asked to determine, as between a debt assumption agreement containing an arbitration clause and the underlying debt agreement containing New York choice-of-law and forum selection clauses, which agreement this dispute over the debt repayment arises out of. The Court finds the case in *Renis Fabrics Corp. v Millworth Converting Corp.* analogous to the instant matter (25 Misc 2d 280 [Sup Ct NY County 1960]). The court in *Renis Fabrics* stated: "[t]he fact that a party might have signified willingness to arbitrate some disputes does not bind him to arbitrate all other disputes merely because of the general identity of the adversary interests or the interrelationship of the transactions involved" (*id.* at 283). The court reasoned that

> even were it to be concluded that [plaintiffs and defendants were] bound by the agreement containing the arbitration clause, it does not logically follow, absent a clear intent to the contrary, that every dispute with defendants involving him individually or in any other capacity must also be arbitrated. The loan and collateral arrangement was entered into considerably prior to the [latter document]. The documents relating to the former appear to have been carefully drafted, and are silent as to arbitration. The latter document makes no reference to the earlier transactions. Since the instant dispute arises out of the loan agreement, it cannot be deemed arbitrable under the stockholders' agreement.

(*Id.* at 282-83.)

Here, the Court cannot find that, at this stage, Defendants have met their burden in demonstrating that, as a matter of law, the arbitration clause contained in the June DAA must be given such broad scope as to include a dispute over the condition for repayment under Loan 2. Indeed, the June DAA provides that VarigLog owes Volo a sum certain, "which shall be paid

according to the Loan Agreements executed between Volo and VRG." (Vasios Aff Ex 10, ¶ 5). Accordingly, Defendants fail to demonstrate that the instant dispute arises out of the June DAA such that application of the arbitration clause contained therein is warranted.

Motion to Dismiss

Defendants argue that Plaintiffs cannot demonstrate a breach of contract because the December DAA constitutes a novation under which VarigLog was substituted as the defined term "BORROWER." Thus, as a result of the novation, the liability of VRG under the loan agreements was substituted with the liability of VarigLog. Furthermore, Defendants argue that not only was liability substituted, but the condition for repayment was also substituted. Specifically, the novation caused the "Sale of BORROWER" condition to refer to the sale of VarigLog, the substituted "BORROWER," rather than the sale of VRG, the original "BORROWER."

Plaintiffs argue that the December DAA did not effect a novation. Further, even if the December DAA did effect a novation, a novation would not result in a substitution of the repayment terms.

The elements of a valid novation are: (1) a previous valid obligation; (2) agreement of all parties to a new contract; (3) extinguishment of the old obligation; and (4) sufficient consideration (*Town & Country Linoleum & Carpet Co. v Welch*, 56 AD2d 708, 708 [4th Dept 1977]; *Wasserstrom v Interstate Litho Corp.*, 114 AD2d 952, 952 [2d Dept 1985]; *Moskowitz v Rajadhyax*, 263 AD2d 858, 859 [3d Dept 1999]; *see also DCA Adver., Inc. v Fox Group, Inc.*, 2 AD3d 173, 174 [1st Dept 2003]).

Despite the complex factual background in this matter, the issue is elementary: whether the condition for repayment to become due has occurred. Defendants urge the Court to hold that a novation, by operation of law, also alters the condition for repayment. Thus, the more apt question is whether the December DAA had the effect of substituting the condition for repayment.

Generally, the effect of a novation is the substitution of liability (Restatement (Second) of Contracts, § 280, comment b). Such straightforward substitutions are referred to as "simple novations" as compared to more complex substitutions referred to as "compound novations." (*Id.*) "Novation is thus briefly defined: A transaction whereby a debtor is discharged from his *liability* to his original creditor by contracting a new obligation in favor of a new creditor by the order of the original creditor" (*Griggs v Day*, 136 NY 152, 160 [1892] [emphasis added]). The touchstone of determining the effect of a novation beyond substitution of liability is the intention of the parties (*Flower v Lance*, 59 NY 603, 607 [1875] [no novation because there was no intention by the parties to make a novation]; *see Ventricelli v DeGennaro*, 221 AD2d 231, 232 [1st Dept 1995]; *Healey v Healey*, 190 AD2d 965, 966 [3d Dept 1993]; *Beck v Manufacturers Hanover Trust Co.*, 125 Misc 2d 771, 779 [Sup Ct NY County 1984]). Accordingly, the Court cannot find that because a novation has the effect of substituting an obligation, a novation *ipso facto* has the effect of substituting a condition of repayment.

Notwithstanding, the Court may find that the parties intended the June DAA to substitute the condition for repayment, irrespective of whether a novation occurred, so long as plain, unambiguous language in the DAA compels the Court to do so (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002]; *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]

[when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]]).

Defendants cite a clause in the DAA that reads: "the CREDITORS and VARIGLOG acknowledge that the Loan Agreements shall forthwith and with immediate effect be amended and restated as necessary to give effect to this Contract." Defendants argue that the recital, fairly read, can only be read as acknowledging that an alteration of the condition for repayment in the loan agreements would be necessary in order to implement the December DAA. Accordingly, because the Court concludes that, as a matter of law, the "amended and restated as necessary clause" is susceptible of a meaning other than one proffered and favorable to Defendants, Defendants motion to dismiss must be denied (*Locke v Aston*, 1 AD3d 160, 160-61 [1st Dept 2003]).

CONCLUSION

Therefore, based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss is denied.

Dated: January 16, 2008

ENTER:

JUSTICE RICHARD B. LOWE III

J.S.C.