

**Embraer Fin. Ltd. v Servicios Aeros  
Profesionales, S.A.**

2008 NY Slip Op 30479(U)

February 13, 2008

Supreme Court, New York County

Docket Number: 0603107/2005

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

EMBRAER FINANCE LTD.,

Plaintiff,

-against-

SERVICIOS AEROS PROFESIONALES, S.A.,

Defendant.

INDEX NO. 603107/05

MOTION SEQ. NO. 003

FILED  
FEB 21 2008  
NEW YORK  
COUNTY CLERKS OFFICE

Cross-Motion: [ ] Yes [X] No

**Upon the foregoing papers, it is ordered that:** Motion sequence numbers 003, 005 and 006 are consolidated herein for decision. This action was brought, pursuant to CPLR 3213, by motion for summary judgment in lieu of complaint based upon an instrument for the payment of money only. The instrument is a promissory note in the amount of \$2.8 million which the defendant issued to the plaintiff Embraer Finance Ltd. ("EFL") on September 3, 1999 in connection with its purchase of an airplane from the plaintiff at an agreed price of \$3.3 million, pursuant to a written sales contract, entitled "Aircraft Sale Agreement," which the parties executed on July 21, 1999. The agreement called for a down payment in the amount of \$500,000 to be followed by 36 monthly installments of \$89,039.25 which were to be secured by the promissory note at issue herein.

Under the agreement, the plaintiff was required to (1) equip the aircraft at issue with two refurbished Pratt and Whitney engines, (2) provide all of the aircraft's log books, maintenance and operating records, airworthiness certificates and any other documents necessary for registering the plane in the Dominican Republic, the country where the defendant maintains its principal offices. In addition, the agreement provided that, as an inducement to the defendant, EFL would cause its parent company, Embraer-Empresa Brasileira de Aeronautica S.A. ("Embraer") to enter into a "Training and Warranty Agreement" with the defendant on the closing date of the sale under which Embraer would provide the defendant with, *inter alia*, ground school and flight simulator training, as well as mechanic's training. A copy of the proposed Training and Warranty Agreement was attached to the Aircraft Sale Agreement.

On the closing date, July 21, 1999, Embraer and the defendant entered into the Training and Warranty Agreement. As required, the defendant made the \$500,000 down payment, received delivery of the aircraft and then made the first fifteen monthly payments in full. The defendant alleges that during the period when these payments were made, it complained to the plaintiff that the aircraft was unusable because the plaintiff had failed to provide the refurbished engines, the log books, the airworthiness certificate and other documents necessary to register the aircraft for commercial use. The defendant also claims that it was assured by plaintiff that these deficiencies would be remedied and, on that basis, it continued to make payments until November, 2001. According to the defendant, when the deficiencies had still not been corrected by that time, it ceased making any further payments because the airplane could not be registered and was essentially unusable. Over the next few years, the parties attempted unsuccessfully to resolve the matter. In early 2006, the defendant commenced an action against the plaintiff in the Dominican Republic and filed a complaint with the U.S. Federal Aviation Administration.

Meanwhile, in August, 2005, the plaintiff commenced the present action seeking to recover the balance of \$1,869,282.28 due under the note, together with interest at a rate of 9% per annum. After the defendant failed to appear, the court issued a decision and order, dated December 12, 2005, granting on default the plaintiff's motion for summary judgment in lieu of complaint. Thereafter, a judgment in favor

of the plaintiff and against the defendant was entered on April 17, 2006. The defendant then moved to vacate its default, pursuant to CPLR 5015(a)(1). By decision and order dated May 25, 2006, this court vacated the default, finding that the defendant had a reasonable excuse for its failure to timely appear and a meritorious defense based on its claim that the airplane it purchased was essentially unusable. In addition, upon vacating the default, the court ruled that the Aircraft Sale Agreement and the promissory note were “inextricably intertwined” since the consideration which defendant received for the note was the sale of a usable aircraft and the note itself specifically stated that all of the terms and conditions of the Aircraft Sale Agreement were “hereby incorporated by reference herein to the extent necessary for the enforcement hereof.” The court therefore concluded that the defendant’s breach of contract allegation raised a triable issue of fact as to the enforceability of the note which precluded summary judgment in lieu of complaint. The plaintiff was thus directed to serve a complaint upon the defendant’s attorney and defendant was given 20 days to then serve an answer.

After its receipt of the complaint, the defendant served and filed an answer in which it asserted a four counterclaims. The first, second and third counterclaims alleged, respectively, that EFL had breached the Aircraft Sale Agreement, the Training and Warranty Agreement and the promissory note, thus causing monetary damages in excess of \$2.5 million. The fourth counterclaim alleged unjust enrichment in that EFL had received \$1,880,588.70 from the defendant in exchange for an “worthless” airplane. The defendant sought the return of this money, together with interest.

Thereafter, on appeal, the First Department, by order dated July 26, 2007, modified this court’s May 25, 2006 order by affirming the determination to vacate the defendant’s default but reversing the court’s denial of plaintiff’s motion for summary judgment in lieu of complaint. *See Embraer Finance Ltd. v. Servicios Aeros Profesionales, S.A.*, 42 AD3d 380 (1<sup>st</sup> Dept 2007). In its decision, the First Department held that the “plain language of the promissory note establishes as a matter of law the defendant’s absolute, unconditional obligation” to make the requisite 36 installment payments and that since the note had incorporated by reference the terms and conditions of the Aircraft Sale Agreement only to the extent necessary for the enforcement of the note, the two agreements are not, as this court had previously found, “inextricably intertwined.” *Id.* at 381. The First Department’s order directed the Clerk to enter judgment in plaintiff’s favor in the amount of \$1,869,824.25, plus interest from October 18, 2001. Thereafter, the First Department denied the defendant’s subsequent to reargue or, alternatively, for leave to appeal to the Court of Appeals. Meanwhile, on August 6, 2007, EFL entered judgment against defendant in New York County in the amount of \$2,852,069.40.

In motion sequence number 003, EFL has now moved for an order awarding it attorney’s fees, pursuant to the terms of the promissory note, in the amount of \$340,175.90. In motion sequence number 005, the defendant has moved for an order, pursuant to CPLR 3212(e), staying execution of the judgment until the resolution of the counterclaims which it has asserted against EFL. In motion sequence number 006, EFL has moved for summary judgment dismissing the four counterclaims. After the motion was served, the defendant agreed to withdraw its third and fourth counterclaims.

## **Discussion**

### **A. EFL’s Motion to Dismiss the Four Counterclaims**

**1. The First Counterclaim** – The first counterclaim alleges that EFL breached the terms of the Aircraft Sale Agreement. In support of its summary judgment motion, EFL first argues that the claim is time-barred. Although the statute of limitations on a breach of contract claim is generally 6 years, *see* CPLR 213, EFL has pointed out, without dispute from the defendant, that the defendant’s claim is governed by the four-year statute of limitations, running from the date of delivery, applicable under the Uniform Commercial Code to agreements predominantly involving the sale of goods. *See* UCC § 2-725(1). *See also Richard A./ Rosenblatt & Co., Inc. v. Davidge Data Systems Corp.*, 295 AD2d 168, 169 (1<sup>st</sup> Dept 2002). The plaintiff thus argues that since the airplane was delivered to the defendant in September, 1999,

the defendant was required to assert its breach of contract claim by September, 2003 unless, pursuant to CPLR 203(d), it was still timely as of the commencement of this action, in which case it could be asserted as a counterclaim at anytime during the prosecution of the plaintiff's claim. Since this action was commenced by the plaintiff in 2005, the defendant's subsequent assertion of its first counterclaim is, according to EFL, time-barred.

The problem with EFL's argument is that, under CPLR 203(d), a counterclaim which was otherwise time-barred at the time that the claims asserted by the plaintiff were interposed is not barred to the extent of the amount of monies sought in the complaint if the counterclaim "arose from the transactions, occurrences or series of transactions or occurrences upon which a claim asserted in the complaint depends." Here, even though, as the plaintiff argues, the promissory note and the Aircraft Sale Agreement cannot, in view of the First Department's decision, be considered to have been "inextricably intertwined," they nevertheless were part of the same "series of transactions" involving the sale of an airplane. The money required to be paid under the promissory note was for the purchase of the airplane pursuant to the Aircraft Sale Agreement. The fact that, as the First Department held, the promissory note was enforceable regardless of whether a usable airplane was delivered to the defendant does not mean that the two agreements did not comprise a series of transactions, as that term is employed under CPLR 203(d). Indeed, the defendant's first cause of action is clearly an attempt to "recover-back" the amount it otherwise owes under the promissory note based on the fact that the note was issued as a mechanism for the payment of an airplane, sold pursuant to the Aircraft Sale Agreement, which defendant alleges was useless because of the plaintiff's failure to live up to its contractual obligations. See *Matter of SCM Corep [Fisher Park Lane Co.]*, 40 NY2d 788, 791 (1976); *Coppola v. Coppola*, 260 AD2d 774, 776 (3<sup>rd</sup> Dept 1999); *X.L.O. Concrete Corp. v. Rivergate Corp.*, 190 AD2d 113, 118 (1<sup>st</sup> Dept 1993). Since the first counterclaim thus arose from the same series of transactions upon which the plaintiff's claim is based, it is not time-barred to the extent of the demand asserted in the complaint.

The plaintiff's second argument in support of its summary judgment motion is that the plaintiff's breach of contract claim under the Aircraft Sale Agreement is barred by the liability disclaimer contained in that agreement which specifies that the airplane was sold "as is." The problem with this argument, as the defendant points out, is that the disclaimer, by its very terms, does not apply to the "conditions, warranties, representations or terms" expressly provided elsewhere in the agreement and in the bill of sale. Since the agreement contains specific terms and conditions which the defendant alleges were breached, the defendant is entitled to assert a claim herein that EFL is liable for its alleged breach of those terms and conditions. The court is thus persuaded that the plaintiff's motion for summary judgment dismissing the defendant's first counterclaim must be denied.

**2. The Second Counterclaim** – In its second counterclaim, the defendant claims that EFL breached the terms of the Training and Warranty Agreement by failing to provide it with certain types of training and with the airplane's maintenance records. EFL, however, was not a signatory to this agreement. Rather, the defendant entered into the agreement with a separate company, Embraer. The fact that Embraer is EFL's parent company and that it allegedly failed to live up to the agreement does not render EFL liable for the breach. In the Aircraft Sale Agreement, EFL did not guarantee Embraer's performance. It merely promised that it "would cause" Embraer to enter into the Training and Warranty Agreement and, indeed, it complied with this requirement. Although the Training and Warranty Agreement was attached to the Aircraft Sale Agreement, there is nothing in the Aircraft Sale Agreement which states that the terms of the Training and Warranty Agreement were thereby incorporated by reference or that EFL was responsible for complying with those terms. The defendant has not cited any case, and the court has found none, where, under similar circumstances, a nonsignatory is liable for another party's breach of contract. Since EFL did not sign the Training and Warranty Agreement, it cannot be liable for its breach and the second counterclaim must therefore be dismissed.

**B. The Defendant's Motion to Stay Enforcement of the Judgment** – The defendant has moved, pursuant to CPLR 3212(e)(1), to stay execution of the \$2,852,069.40 judgment which has been entered against it until its counterclaim against plaintiff has been resolved. CPLR 3212(e)(1) provides that where summary judgment is granted as to one or more causes of action, the entry thereof may be held in abeyance pending the determination of any remaining cause of action. As the Court of Appeals has recognized, this device may be used to stay the execution of a judgment in a case where there are remaining claims and counterclaims. See *Robert Stigwood Organisation, Inc. v. Devon Co.*, 44 NY2d 922, 923 (1978). However, the Court has also recognized that such a stay should be imposed only if there exists some articulable reason for concluding that the failure to do so “might result in some prejudice, financial or otherwise” to the party against whom summary judgment has been granted “should that party subsequently prevail on the unsettled claims.” *Id.* at 923. Here, the defendant argues that if it is now required to pay the judgment which has been awarded to the plaintiff, it may be unable to recover this amount in the event it prevails on its counterclaim because the plaintiff is a foreign company which is not authorized to do business in this state and does not maintain any office in this State. The defendant, however, which itself is a foreign company having a principal place of business in the Dominican Republic, has not provided any evidence which even suggests that it would be unable to collect any judgment it may obtain against the plaintiff in a jurisdiction where the plaintiff does, in fact, maintain an office. Moreover, the defendant has not cited any case which hold that a stay of execution, either pending appeal or pending the resolution of unsettled claims, is required merely because the judgment creditor is a foreign company.

Finally, the courts have held that a stay under CPLR 3212(e)(1) is inappropriate where, as here, a party's claim upon a promissory note is not “inextricably intertwined” with the other party's related claim so that each of the two claims is separately enforceable. See *Inner City Telecommunications Neytwrok, Inc. v. Sheridan Broadcasting Network, Inc.*, 260 AD2d 257 (1<sup>st</sup> Dept 1999); *Banco De Estado De Sao Paulo, S.A.*, 249 AD2d 137 (1<sup>st</sup> Dept 1998). See also *Robert Stigwood Organisation, Inc. v. Devon Co.*, 44 NY2d at 923-924. Under the circumstances, the plaintiff's motion to stay execution or enforcement of the plaintiff's judgment must be denied.

**C. Plaintiff's Application for Attorney's Fees** – The defendant has not disputed that the plaintiff, as the prevailing party on its claim to enforce the promissory note, is entitled to an award of attorney's fees. However, it disputes the plaintiff's claim that it is entitled to attorney's fees in the amount of \$340,175.90 and argues that the amount sought does not bear a reasonable relationship to the work performed on plaintiff's behalf to enforce the promissory note. The court is persuaded that the issue of the reasonable attorney's fees and other expenses which the plaintiff has incurred in prosecuting its claim against the defendant to enforce the promissory note, should be referred to a Special Referee to hear and report with recommendations.

Accordingly, in motion sequence number 003, the plaintiff's motion for an award of attorney's fees is granted to the extent that the issue of the reasonable attorney's fees and other expenses which the plaintiff incurred in the prosecution of its motion for summary judgment in lieu of complaint and its appeal from this court's denial of the motion is hereby referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine this issue.

A copy of this order with notice of entry shall be served on the Special Referee Clerk at 60 Centre Street, Room 119, New York, New York to arrange a date for the reference to a Special Referee.

In motion sequence number 005, the defendant's motion for an order staying the execution and enforcement of the plaintiff's \$2,852,069.40 judgment is denied.

In motion sequence number 006, the plaintiff's motion for summary judgment is granted to the extent that the defendant's second, third and fourth counterclaims are hereby dismissed. The motion is

otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on March 18, 2008 at 10:00 a.m. for a status conference.

ENTER ORDER

*MGD*

Dated: 2-13-08

MARYLIN G. DIAMOND, J.S.C.

Check one:  FINAL DISPOSITION  
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