| **S.C. Compania Nationala De Transporturi v Altarovici** |
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| 2008 NY Slip Op 31077(U) |
| April 1, 2008 |
| Supreme Court, Kings County |
| Docket Number: 0033849/2007 |
| Judge: Gloria Dabiri |
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At an IAS Term, Part 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of April 2008.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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S. C. COMPANIA NATIONALA DE TRANSPORTURI AERIENE ROMANE TAROM SA, t/a TAROM ROMANIAN AIR TRANSPORT,

Plaintiff,

- against -

Index No. 33849/07

MICHAEL ALTAROVICI, NEW EUROPE HOLIDAYS, INC., CRISTIAN ILIE, and NEW EUROPE VACATIONS, INC.,

Defendants.

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The following papers numbered 1 to 3 read on this motion:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed | 1 |
| Opposing Affidavits (Affirmations) | 2 |
| Reply Affidavits (Affirmations) | 3 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendants Michael Altarovici (Altarovici) and New Europe Holidays (NEH) seek an order dismissing the above-captioned action: (1) pursuant to CPLR 3211 (a) (5), on the grounds of collateral estoppel and *res judicata*; (2) pursuant to CPLR 3211 (a) (8), due to the lack of personal jurisdiction over Altarovici and NEH, a

defunct New York State Corporation; (3) pursuant to CPLR 3211(a) (9), due to defective service, and (4) pursuant to CPLR 3211(a) (7), for failure to state a cause of action.

## *BACKGROUND*

Plaintiff, S.C. Compania Nationala De Transporturi Aeriene Romane Tarom SA t/a Tarom Romanian Air Transport (Tarom) is a commercial airline, providing aviation services to passengers to and from Romania. Its principal place of business is in Romania. Plaintiff's complaint alleges that in 1976, Tarom opened an office in New York City and began providing such services to passengers in the United States. As part of its U.S. operations, Tarom authorized travel agencies, including NEH, to sell travel documents on its routes[1]. As remuneration, NEH and other authorized agencies received commissions on the travel documents they sold. Tatum provided NEH and its other authorized travel agencies schedules setting forth the rate of sales commissions effective February 1, 2003. The complaint alleges that the transaction of business between travel agencies and Tarom occurred through the Airlines Reporting Corporation (ARC) which provides financial transaction processing, settlement and accreditation for the travel industry. Plaintiff alleges that NEH was accredited by ARC to sell airline tickets and that, according to ARC procedure, NEH was required to electronically submit weekly sales reports to ARC which included appropriate deductions for commissions. ARC, after confirmation and settlement,

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[1]Defendant Christian Ilie (Ilie) was the manager of NEH.

would remit the amounts due to the carrier, and the agent would be authorized to retain its earned commissions.

Tarom alleges that in September of 2003 rumors began circulating that Tarom would be suspending services and that at the end of November 2003 it, in fact, terminated its flight service between New York and Bucharest.

It is alleged that, on or about December 9, 2003, Tarom determined that in October and November of 2003 NEH, in its weekly sales reports to ARC, deducted commissions totally more than 95% of the published fares. In accordance with ARC's procedures, Tarom issued Debit Memos, totaling $59,147.80, to NEH demanding payment. When NEH failed to remit payment, Tarom, by letter dated February 6, 2004, revoked its authorization to NEH to issue its travel documents.

In accordance with its procedure, ARC then conducted an investigation of the matter and found a number of violations by NEH including (a) permitting alteration, omission, or other falsification on coupons or original ARC traffic documents; (b) falsification of reports and traffic documents; (c) engaging in a pattern of potential "bust out" activity, such as a sudden, sharp fluctuation of sales which, along with other relevant information, is indicative of fraudulent activity; and (d) use or misuse of the ARC's Interactive Agency Reporting (IAR) system in a way which prevents the proper reporting of all sales or results in improperly reported sales. The investigation report characterized responses of Altarovici, the owner of NEH, to the ARC field representative, as "vague," and indicated that he failed

to identify the employee who submitted the reports. Finally, the report indicated that NEH had previously manipulated commission in its report for another carrier. Based upon its investigation, ARC terminated its relationship with NEH, and demanded the return of all ARC traffic documents and airline identification plates. It is alleged that Ilie was the NEH employee who submitted the subject reports to ARC.

It, also, is alleged that, thereafter, defendant New Europe Vacations, Inc. (NEV) took over the business and telephone numbers of NEH and now functions as an alter ego of NEH.

Plaintiff then commenced an action in the United States District Court for the Eastern District of New York. Pursuant to Fed. Rules of Civ. Pro. Rule 41 (a) (1), it filed a Notice of Dismissal Without Prejudice dated March 29, 2007. Subsequently, by summons and complaint, filed on or about September 6, 2007, plaintiff commenced this action seeking to recover damages in the amount of $44,602.44 from defendants,[2] and alleging causes of action for fraud, breach of contract and fraudulent transfer under New York's Debtor and Creditor Law.

## *DEFENDANTS' MOTION*

In lieu an answer, defendants filed this motion to dismiss the complaint (CPLR 3211). Altarovici supplies an affidavit alleging that he was never properly served with the summons and complaint. Altarovici avers that a neighbor found the summons and complaint in the lobby of their building in Hallandale, Florida and gave it to him.

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[2]Although plaintiff claims to have suffered damages totaling $59,147.80, plaintiff further states that it was able to mitigate its damages based on credits issued.

Defendants contend that the instant lawsuit is barred by *res judicata* and collateral estoppel, since identical allegations were claimed in both the Federal and State lawsuits; that in the Federal lawsuit, Altarovici and NEH moved, in lieu of an answer, to dismiss the complaint pursuant to Fed. Rules of Civ. Pro. Rule 26 on the ground that plaintiff's complaint failed to state a cause of action; that Judge Charles P. Sifton, as to the first cause of action (fraud) dismissed the complaint without prejudice to the filing an Amended Complaint within thirty days, dismissed the second cause of action (Mail and Wire Fraud) "with the conditions indicated in the record"[3] and dismissed the third cause of action (RICO) without prejudice to the filing of an amended complaint. Noting that plaintiff never filed an amended complaint, but rather filed a Notice of Discontinuance without Prejudice, defendants claim that plaintiff failed to comply with the conditions of the court's order, that the Federal court action was thus dismissed with prejudice, and that as a consequence, *res judicata* and collateral estoppel bar the plaintiffs from maintaining the present lawsuit.

Defendants also maintain that New York's Debtor and Creditor Law is inapplicable since the subsections relied upon by plaintiff relate to situations such as bankruptcy proceedings, wherein a Trustee seeks to set aside a transfer for less than fair consideration.

In his supporting affidavit, Altarovici states, that he has a good and meritorious defense to the lawsuit.

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[3] The parties do no supply a copy of the record. However, plaintiff does not assert a claim for mail and wire fraud (18 USC §§ 1341, 1343) in the instant action.

Plaintiff seeks an order denying defendants' motion, and directing that they serve and file an Answer. As to that branch of defendants' motion seeking dismissal under CPLR 3211 (a) (7), plaintiff claims that it has properly pleaded its three causes of action. It further contends that the provisions of the Debtor and Creditor Law apply, since Tarom is a creditor of NEH whose claim has not yet matured, — as it is pending the determination of the underlying fraud and breach of contract causes of action, — and that since it appears that NEH is now out of business, that Altarovici is living in Florida and that all of NEH's business has been transferred to another defendant, it is necessary, in order to preserve enough assets to satisfy a judgement, to set aside the conveyances made to the other defendant. Finally, plaintiff contends that dismissal of its federal complaint was without prejudice and not on the merits, and that in the face of Altarovici's naked denial of receipt of process, the unrebutted affidavits of service demonstrate that service on defendants was proper.

In reply, defendants describe plaintiff's conduct as "forum shopping," and characterize plaintiff's claim under the Debtor and Creditor Law as "laughable."

## *DISCUSSION*

***Res Judicata/collateral estoppel***

Rule 41 of the Federal Rules of Civil Procedure (Dismissal of Actions) provides, in relevant part:

> (a) the plaintiff may dismiss an action without a court order by filing: (I) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared. (b) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

"A voluntary dismissal without prejudice leaves the situation as if the action had never been filed." (9 Wright and Miller, Federal Practice and Procedure, section 2367). "The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought. . . . 'It carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendant, and all issues, with respect to plaintiff's claim.'. . . Neither *res judicata* nor collateral estoppel is traditionally applicable to a voluntary dismissal . . ." (*In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F2d 213, 219 [8th Cir. 1977]). This provision of the Federal Rules of Civil Procedure is similar to Civil Practice Law and Rules 3217 (c)[4] (*see Housberg v Baker,* 146 Misc2d 960, 962 [1990]).

Based upon a policy that under ordinary circumstances, a party cannot be compelled to litigate, New York law provides that absent special circumstances, such as prejudice to

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[4]Of the New York provision it has been stated: "When an action is discontinued, it is as if the action had never been; all prior orders in the case are nullified. Once an action has been discontinued, there can be no judgment or appeal, and no objection to another action for the same relief on the ground that a prior action is pending." (7A Carmody-Wait 2d, section 47:42.)

adverse parties, a voluntary discontinuance should be granted (*see Parraquierre v 27th St. Holding LLC*, 37 AD3d 793 [2007]; *Burnham Service Corp. v National Council on Compensation Ins., Inc.*, 288 AD2d 31, 32-33 [2001]; *see also* CPLR 3217[b]). Additionally, it is within the court's discretion to allow a plaintiff to voluntarily discontinue an action in one venue in order to enable the party to commence an action for the same relief in another venue (*Parraquierre,* 37 AD3d at 794). Accordingly, there is no bar to plaintiff's prosecution of the instant action.

Indeed, nothing in the order of United States District Court Judge Sifton, rendered after argument on Altarovici's and NEH's dismissal motion and annexed as an exhibit by defendants in support of the present motion, leads to a conclusion that there was an adjudication on the merits. Rather, said order permitted plaintiff an opportunity to file an amended complaint as to certain causes of action, without prejudice. Movants, who had not yet filed an answer or moved for summary judgment, offer no authority to support their stated position that plaintiff was precluded from voluntarily discontinuing the Federal proceeding in lieu of filing an amended complaint.

***Failure to state a cause of action***

On a motion to dismiss made pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *see also Gaidon v Guardian Life*

*Ins. Co. of America,* 94 NY2d 330 [1999]; *In re Loukoumi, Inc.,* 285 AD2d 595, 596 [2001]). Further, "[w]hen evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer*, 43 NY2d at 275; *Doria v Masucci,* 230 AD2d 764 [1996]).

***Plaintiff's first cause of action (fraud)***

CPLR 3016(b) provides that "[w]here a cause of action or defense is based upon misrepresentation [or] fraud, the circumstances constituting the wrong shall be stated in detail." The elements of fraud which must be alleged include a misrepresentation of or failure to disclose a material fact, falsity, scienter, justifiable reliance by plaintiff and injury (*see Linden v Moskowitz*, 294 AD2d 114 [2002]; *see also Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 307 [1995]). In the instant case, plaintiff sets forth its compliance with ARC's procedures in October and November of 2003, ARC's issuance of Agency Debit Memos in the amount of $59,147.80, NEH's failure to make payment, ARC's subsequent revocation of its authorization of NEH to issue travel documents, and its post-investigation determination of fraudulent conduct by NEH which included alteration of ARC documents. Plaintiff alleges that defendant Ilie was the employee of NEH who submitted the subject ARC reports. It further charges that defendants misrepresented material facts and

concealment of the fact that substantially-lower commissions were due to NEH in accordance with Tarom's schedule of fees, that such misrepresentations were made with the intent to, and for the purpose of, inducing ARC and Tarom to allow NEH to retain monies which were not due it, and that there was justified reliance by ARC and Tarom upon such misrepresentations by defendants. Thus construing the pleadings in a light most favorable to the plaintiff, it has adequately alleged a cause of action that defendants participated in a scheme to defraud plaintiff (*see Auguston v Spry,* 282 AD2d 489, 490 [2001], citing *Lanzi v Brooks,* 43 NY2d 778 [1977]).

***Plaintiff's second cause of action (breach of contract).***

The second cause of action adequately alleges that NEH breached its contract with Tarom. The essential elements to pleading a cause of action for breach of contract are as follows: (1) the making of an agreement; (2) due performance by plaintiff; (3) breach thereof by defendant; and (4) causing damage to the plaintiff. The complaint must set forth the provisions of the contract and the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract (*see Cerberus Capital Management, L.P. v Snelling & Snelling, Inc.,* 12 Misc3d 1187[A] [2005]). In its complaint, Tarom sets forth the terms of its agreement with participating agents, including NEH and Altarovici, the manner in which defendants breached the agreement by deducting commissions of 95% of receipts for travel fares, and the extent of damages sustained by Tarom, and thus states a cause of action.

***Fraudulent transfer (third through seventh causes of action)***

Finally, that branch of defendants' motion to dismiss plaintiffs' causes of action alleging violation of sections 273, 274, 275 and 275-a of New York's Debtor and Creditor Law are devoid of merit. Pursuant to Debtor and Creditor Law § 273, a conveyance made by a person who will thereby be rendered insolvent thereby is fraudulent as to creditors without regard to his or her actual intent if the conveyance was made without fair consideration (*see St. Teresa's Nursing Home v Vuksanovich*, 268 AD2d 421 [2000]). Direct evidence of fraudulent intent is often elusive (*see Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [1997]). Therefore, "creditors may rely upon circumstantial factors deemed 'badges of fraud' to establish an inference of fraudulent intent (*see Grace Plaza of Great Neck, Inc. v Heitzler,* 2 AD3d 780 [2003], citing *White Rose Food v Mustafa*, 251 AD2d 653, 654 [1998]; *Pen Pak,* 240 AD2d at 386 [badges of fraud found to include (1) the close relationship among the parties to the transaction, (2) the inadequacy of consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance]). Contending that (1) Tarom is a creditor of NEH whose claim has not matured as of yet, pending the determination of the underlying fraud and breach of contract causes of action, (2) it appears that NEH is out of business, (3) Altarovici is now living in Florida, and (4) all of NEH's business has been transferred, plaintiff has stated causes of action under the cited sections

of the Debtor and Creditor law, thus mandating denial of that branch of defendants' motion (*see Joel v Weber,* 197 AD2d 396 [1993]).

***Personal Jurisdiction***

By way of affidavit, Altarovici states that he resides in 2001 Atlantic Shores Boulevard, Hallandale, an 80-unit apartment building, and is presently a full-time resident of Florida. He claims that he was never served with a summons and complaint, but that "a while back, a neighbor of mine found these documents in the lobby of my building and gave them to me. I am told that they were on the floor of the lobby of my building . . ." In opposition, and in support of its contention that the court has jurisdiction over Altarovici, plaintiff annexes two affidavits of service. In the first, dated September 28, 2007, the identified process server states that on September 27, 2007, at 6:45 p.m., she served Lioudmila Dogadaeva as "co res./tenant," and on September 28, 2007, she mailed a copy of same to 2001 Atlantic Shores Blvd., unit 414, Hallandale, FL 33009.[5] Although the person served was described, this affidavit fails to supply any indication that this individual was served in "unit 414."

The second affidavit of service states that Lioudmila Dogadaeva was served with the summons and complaint at 2001 Atlantic Shores Blvd., unit 414. However, said affidavit

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[5] No such issue has been raised with respect to service on NEH, which is evidenced by an affidavit of service on the Secretary of State of New York dated September 18, 2007.

omits the state and county of execution, the name of the deponent, and the date on which it was sworn. It also states "Left at last known address as per attorney direction."

Although plaintiff correctly points out that the bare denial of service is insufficient to rebut *prima facie* proof of proper service (*see European American Bank v Abramoff,* 201 AD2d 611 [1994]; *see also Wunsch v Cerwinski,* 36 AD3d 612 [2007]), the gaps and ambiguities in the affidavits of service, as noted, warrant a traverse hearing (*see Johnson v Deas,* 32 AD3d 253, 254 [2006] [where the documentary evidence raises issues of fact as to proper service, even the absence of defendant's sworn denial of service is not fatal]). Accordingly, it is

ORDERED, that such portions of defendants' motion as seeks dismissal of plaintiff's complaint based upon CPLR 3211(a) (5) and (7) are denied, and the motion is otherwise held in abeyance pending a hearing; and it is further

ORDERED, that upon the filing of the requisite form by the parties, the matter is referred to a Judicial Hearing Officer to hear and report in accordance with this court's decision and order.

E N T E R,

J. S. C.

HON. GLORIA DABIRI