

North Am. Airlines, Inc. v Wilmington Trust Co.

2010 NY Slip Op 31260(U)

May 21, 2010

Sup Ct, NY County

Docket Number: 602985-2009

Judge: James A. Yates

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: James A. Yates

PART 49

Index Number : 602985/2009

NORTH AMERICAN AIRLINES, INC.,

INDEX NO. _____

vs

WILINGTON TRUST COMPANY,

MOTION DATE _____

Sequence Number : 003

MOTION SEQ. NO. _____

DISMISS ACTION

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 ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING
DECISION AND ORDER, DATED MAY 21 2010

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

MAY 21 2010

Dated: _____

James A. Yates

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: PART 49

```

-----X
NORTH AMERICAN AIRLINES, INC.,      :
                                     :
           Plaintiff,                 :
                                     :
      -against-                       :   Decision and Order
                                     :   Index No. 602985-2009
WILMINGTON TRUST COMPANY, as Owner  :   Motion Seq. 003
Trustee, pursuant to the Trust      :
Agreement [North American Airlines  :
Inc Trust Co. 28039] dated as of    :
December 1, 2006; ALE-ONE, LIMITED, :
LOCAT S.P.A., SAN PAOLO LEASINT     :
and INTESA LEASING S.P.A.,         :
                                     :
           Defendants.              :
-----X

```

Troutman Sanders LLP, New York City (*Matthew J. Aaronson* of counsel), for plaintiff.

Vedder Price P.C., New York City (*Michael G. Davies* of counsel), for Unicredit Leasing S.p.A., as successor by merger to defendant Locat S.p.A., and Leasint S.p.A., as successor by merger to defendants San Paolo Leasint S.p.A. and Intesa Leasing S.p.A., defendants.

Hon. James A. Yates, J.S.C.

Unicredit Leasing S.p.A. ("Unicredit"), successor by merger to defendant Locat S.p.A. ("Locat"), and Leasint S.p.A. ("Leasint"), successor by merger to defendants San Paolo Leasint S.p.A. ("San Paolo") and Intesa Leasing S.p.A. ("Intesa"), move to dismiss plaintiff's complaint pursuant to CPLR 3211 and CPLR 327, or in the alternative, for an order staying this action pursuant to CPLR 2201 and/or CPLR 327. Plaintiff cross-moves for attorneys' fees and costs incurred in defending this motion pursuant to 22 NYCRR 130-1.1 and CPLR 8106. This case concerns a dispute over whether plaintiff is entitled to be reimbursed for repair work performed in Scotland on one of the aircraft's engines. For the following reasons, Unicredit and Leasint's motion to dismiss or, in the alternative, for an order staying the action is denied.

Background

The factual background in this decision and order borrows

heavily from the background relayed in the decision and order for motion sequence no. 002, dated February 8, 2010. This case concerns three contracts, all dated December 1, 2006: (1) the Trust Agreement, (2) the Aircraft Lease Agreement ("Lease"), and (3) the Aircraft Participation Agreement ("Participation Agreement"). Defendant ALE-One, Limited ("ALE"), as Trustor, and defendant Wilmington Trust Company ("WTC"), as Owner Trustee, are parties to the Trust Agreement. Plaintiff, as Lessee, and WTC, as Lessor, are parties to the Lease, where WTC agreed to lease the aircraft to plaintiff. Plaintiff, as Lessee, and ALE, as Trustor, are parties to the Participation Agreement where ALE guaranteed WTC's performance of paying plaintiff's security deposit and maintenance reserves.

On April 7, 2007, ALE assigned all of its rights to Locat, San Paolo, and Intesa. Unicredit is the successor by merger to Locat, and Leasint is the successor by merger to San Paolo and Intesa. On November 8, 2008, plaintiff removed the engine after a rotor blade failed, and plaintiff repaired it for \$2,647,501.72. WTC would not reimburse plaintiff for the costs. WTC also withdrew the security deposit for \$930,000.00, and failed to give plaintiff notice.

On July 8, 2009, Air Italy S.p.A. ("Air Italy") commenced a declaratory judgment action in Italy against plaintiff, seeking declarations that (1) the engine did not require a full performance restoration, (2) the work performed was not a full performance restoration, and (3) Air Italy owes no money to plaintiff.

On September 29, 2009, plaintiff commenced this action in New York for (1) breach of lease against WTC, (2) breach of covenant of good faith and fair dealing against WTC, (3) unjust enrichment against WTC, (4) breach of guaranty against Locat, San Paolo and Intesa, (5) unjust enrichment against Locat, San Paolo and Intesa, (6) breach of guaranty against ALE, (7) unjust enrichment against ALE, and (8) conversion against WTC. Unicredit and Leasint filed the instant motion to dismiss and/or stay this action, which plaintiff opposes and cross-moves for attorneys' fees and costs.

Discussion

When determining a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman,*

Millstein, Felder & Steiner, 96 NY2d 300, 303 [2001]). A CPLR 3211 dismissal "may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430 [1998]).

Unicredit and Leasint seek to dismiss plaintiff's complaint on the grounds that (1) this Court lacks personal jurisdiction over them, (2) there is a first filed action in Italy involving the same subject matter, and (3) New York is an inconvenient forum (see Notice of Motion To Dismiss And/Or Stay [Feb. 5, 2010]. In the alternative, Unicredit and Leasint seek a stay (*id.*). The Court dealt with Unicredit and Leasint's second and third arguments, and the alternative relief, in its prior decision and order, dated February 8, 2010, on WTC's motion to dismiss (*N. Am. Airlines v Wilmington Trust Co.*, Index No. 602985/2010 [Sup Ct, NY County Feb. 8, 2010]). Thus, the only issue before the Court is whether the Court has personal jurisdiction over Unicredit and Leasint, which the Court finds it does.

A. Section 11.5 of the Trust Agreement

The Trust Agreement is governed by Delaware law (affirmation of Matthew J. Aaronson [Feb. 26, 2010], exhibit B [Trust Agreement] § 11.11, at 20). Section 11.5 of the Trust Agreement provides that each party of the Trust Agreement "irrevocably submits" itself to the non-exclusive jurisdiction of the State of New York in "any suit . . . arising out of this Trust Agreement or Lease" brought by "any party" of the Trust Agreement or Lease (*id.*, exhibit B [Trust Agreement] § 11.11, at 19). Section 11.5 states, in full:

"Each of the parties hereto (i) hereby irrevocably submits itself to the non-exclusive jurisdiction of the United States District Court for the Southern District of New York and to the non-exclusive jurisdiction of the Supreme Court of the State of New York, New York County, for the purposes of any suit, action or other proceeding arising out of this Trust Agreement or the Lease, the subject matter of any thereof or any of the transactions contemplated hereby or thereby brought by any party or parties thereto, or their successors or assigns, and (ii) hereby waives and agrees not to assert, by way of motion, as a

defense, or otherwise, in any suit, action or proceeding, to the extent permitted by applicable law, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper, or that the Lease or any other Operative Document or the subject matter of any thereof or any of the transactions contemplated hereby or thereby may not be enforced in or by such courts."

(*Id.* [emphasis added].)

By virtue of ALE's assignment of its rights and obligations under the Trust Agreement, Locat, San Paolo, Intesa, and the ensuing corporate restructuring of those entities are clearly parties to the Trust Agreement and stand in the shoes of ALE for purposes of this action. The Trust Agreement states that "[a]ny assignment, conveyance or other transfer by the Trustor [ALE] of its right, title and interest in and to . . . the Trust Agreement . . . shall provide that such transferee thereby becomes a party to, and beneficiary of, this Trust Agreement and a Trustor for all purposes hereof and that *such transferee [Locat, San Paolo, and Intesa] assumes all of the obligations of its transferor under this Trust Agreement*" (*id.*, exhibit B [Trust Agreement] § 8.1, at 13 [emphasis added]).

Delaware courts recognize that an "assignee stands in the shoes of its assignor and is subject to all equities existing between assignor and [assignee]" (*Modern Dust Bag Co. v Commercial Trust Co.*, 34 Del Ch 354, 358, 104 A2d 378, 381 [1954]; see *Chrysler Corp. v Airtemp Corp.*, 426 A2d 845, 852 [Sup Ct, New Castle County 1980] ["[A]n assignment and acceptance thereof of a 'whole contract' is interpreted as an assumption by the assignee of the assignor's duties under the assigned contract, in the absence of circumstances showing a contrary intention."]), just as New York law does (*Condren, Walker & Co., Inc. v Portnoy*, 48 AD3d 331, 331 [1st Dept 2008] ["An assignee stands in the shoes of its assignor, subject to all the equities and burdens attached to the property acquired."]; see also *Banco do Comercio e Industria de Sao Paolo, S.A. v Esusa Engenharia e Construcoes, S.A.*, 173 AD2d 340, 341 [1st Dept 1991] ["It is well settled that parties to an agreement may consent to submit to the jurisdiction of a court which would otherwise not have personal

jurisdiction over them."]).¹

Unicredit and Leasint's most persuasive argument is that the Trust Agreement, containing the forum selection clause upon which plaintiff relies, "is only between the Owner Trustee [WTC] and the Trustor [ALE]. It gives no rights to a third party such as [plaintiff] NAA." (Unicredit and Leasint reply memorandum of law at 4 [Mar. 17, 2010].) Unicredit and Leasint point to section 11.4 of the Trust Agreement, which states:

"Nothing herein, whether expressed or implied, shall be construed to give any Person other than the Owner Trustee and the Trustor any legal or equitable right, remedy or claim under or in respect of this Trust Agreement; but this Trust Agreement shall be held to be for the sole and exclusive benefit of the Owner Trustee and the Trustor."

(Affirmation of Matthew J. Aaronson [Feb. 26, 2010], exhibit B [Trust Agreement], § 11.4, at 18.)

However, this argument fails for two main reasons: (1) that section 11.5, as a specific provision granting plaintiff rights to enforce the forum selection clause, prevails against section 11.4, the more general provision of the Trust Agreement, and (2) that plaintiff may enforce the forum selection clause as a party to a global transaction with the leasing company defendants.

B. Specific Provision Prevails Over General Provision

Generally, "only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions" (*NAMA Holdings, LLC v Related World Mkt. Ctr., LLC*, 922 A2d 417, 434 [Del Ch 2007]). "To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract" (*Madison Realty Co. v AG ISA, LLC*, 2001 WL 406268, *5, 2001 Del Ch LEXIS 37, *14 (Del Ch 2001)).

¹ The Participation Agreement, entered into between ALE and plaintiff, is governed by New York law (*id.*, exhibit D [Participation Agreement] § 5.2, at 2).

Although an agreement may contain "a general provision disclaiming the existence of any third-party beneficiaries, such disclaimer is belied by the Agreement's specific grant of benefits" (*Amirsaleh v Bd. of Trade of the City of New York*, 2008 WL 4182998, *5, 2008 Del Ch LEXIS 131, *16 [Del Ch 2008]). "Well-settled rules of contract construction require that a contract be construed as a whole, giving effect to the parties' intentions. Specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." (*DCV Holdings, Inc. v ConAgra, Inc.*, 889 A2d 954, 961 [Del 2005]; *cf. Green Harbour Homeowners' Assn., Inc. v G.H. Dev. & Constr., Inc.*, 14 AD3d 963, 965 [3d Dept 2005] ["Where a contract . . . employs contradictory language, specific provisions control over general provisions."].)

Here, plaintiff meets the three-part test determining whether a party is an intended third-party beneficiary. The Trust Agreement directs WTC "to cause the Aircraft to be leased to" plaintiff (affirmation of Matthew J. Aaronson [Feb. 26, 2010], exhibit B [Trust Agreement] § 3.1 [c], at 20). Indeed, the approval and execution of the "Operative Documents," including the Trust Agreement (*id.*, exhibit C [Lease], exhibit C-2, at 83), was a condition precedent under the Lease for plaintiff's "obligation to accept delivery of and take on lease the Aircraft" (*id.*, exhibit C [Lease] § 2.3, at 12). Finally, section 11.5 creates a carve out exception to section 11.4, which generally disclaims any third-party beneficiaries to the Trust Agreement. Section 11.5 of the Trust Agreement specifically grants plaintiff, as a signatory to the Lease, the benefit of bringing suit in New York "arising out of this Trust Agreement or the Lease" (*id.*, exhibit B [Trust Agreement] § 11.5, at 19).

C. Global Transaction

New York law and Delaware law are similar in that "parties to a 'global transaction' who are not signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose" (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008]; *see Indosuez Intl. Fin. B.V. v Natl. Reserve Bank*, 98 NY2d 238, 247 [incorporating forum selection clause found in six agreements into eight additional agreements where all contracts fell under "one global agreement"]; *cf. Elf Atochem N.A. v Jaffari*, 727 A2d 286, 294-295 [Del 1999] [holding claims under separate contract were all subsumed under forum selection clause in LLC Agreement, which broadly covered any claim "related

to" the LLC Agreement]; *MerchantWired, LLC v Transaction Network Servs, Inc.*, 2005 WL 468241, *5, 2005 Del Super LEXIS 61, *12-13 [Sup Ct, New Castle County 2005] ["When a contract refers to another instrument, the two are usually interpreted together as the parties' agreement."]; *Lipson v Anesthesia Servs., P.A.*, 790 A2d 1261, 1278 [Sup Ct, New Castle County 2001] ["Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties."], citing *State ex rel. Hirst v Black*, 83 A2d 678, 681 [Sup Ct, New Castle 1951]; *Fleck v J.A. Moore & Sons, Inc.*, 1999 WL 1847435, *4, 1999 Del CP LEXIS 14, *9 [Ct Common Pleas, Sussex County 1999] "[C]ontemporaneously executed documents may be read together without specific incorporation language.").

Here, the "Operative Agreements," defined in the Lease as documents which include the Trust Agreement, the Lease, and the Participation Agreement (affirmation of Matthew J. Aaronson, exhibit C [Lease], exhibit C-2, at 83), were all executed at the same time, December 1, 2006, and for the same purpose, i.e., to effect a lease of the aircraft to plaintiff. The language of the Lessee's conditions precedent as provided in the Lease also evidences that this was a global transaction. As well, the Trust Agreement and the Lease both name New York as the non-exclusive jurisdiction for the signatories to the Trust Agreement and the Lease (see *id.*, exhibit B [Trust Agreement] § 11.5, at 19; *id.*, exhibit C [Lease] § 22.4, at 64 [naming New York as non-exclusive jurisdiction for proceedings "relating to this lease or any of the other operative documents"]. Only the Participation Agreement, into which plaintiff and Unicredit and Leasint's predecessors entered, contains an ambiguous provision labeled "Governing Law; Jurisdiction", which appears to only provide the choice of law and not the forum:

"Governing Law; Jurisdiction. This Agreement shall in all respects be governed by, and construed in accordance with, the laws of the State of New York, without giving effect to principles of conflicts of law."

(*Id.*, exhibit D [Participation Agreement] § 5.2, at 2)

Since the Participation Agreement is part of the global transaction, its lack of a forum selection clause is irrelevant, and it falls under the broad forum selection clause in the Trust Agreement (see *supra* Part C ¶ 1). Thus, the Court has jurisdiction over Unicredit, as successor to Locat, and Leasint, as successor to San Paolo and Intesa, who were assignees under

the Trust Agreement in this matter. Finally, the Court does not find the instant motion to dismiss to be frivolous under the standards set forth in 22 NYCRR 130-1.1 (c).

Conclusion

Based on the foregoing, it is:

ORDERED, that Unicredit and Leasint's motion to dismiss and/or stay this action is denied; and it is further

ORDERED, that defendants are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that plaintiff's cross-motion for attorneys' fees and costs is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: May 21, 2010

MAY 21 2010

ENTER:

James A. Yates

James A. Yates, J.S.C.