

Zul Capital, LLC v Affiliated FM Ins. Co.

2010 NY Slip Op 32895(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 114585/2009

Judge: Joan A. Madden

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

PRESENT: How Joan A Madden
Justice

PART 11

Index Number : 114585/2009

ZUL CAPITAL, LLC

vs.

AFFILIATED FM INS. CO.

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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 is decided in accordance
with the annexed Memorandum Decision + Order

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

FILED
OCT 15 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 8, 2010

[Signature]
HON. JOAN A. MADDEN 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 11

-----X
ZUL CAPITAL, LLC,

Plaintiff,

-against-

Index No. 114585/2009

AFFILIATED FM INSURANCE COMPANY
and NATIONAL CITY BANK,

Defendants.

-----X

FILED
OCT 15 2010
NEW YORK
COUNTY CLERK

Joan A. Madden, J.:

In sequence number 001, defendant Affiliated FM Insurance Company moves, pursuant to CPLR 327 and 3211 (a) (1) (4)(7), and (10), for an order dismissing the amended complaint with prejudice on a variety of grounds, including forum non conveniens, prior action pending, and failure to join an indispensable party. In sequence number 003, defendant National City Bank moves, pursuant to CPLR (a) (4) and (10), for an order dismissing the amended complaint, and awarding National City Bank reimbursement of litigation costs and reasonable attorneys' fees that it incurred in defending this action.¹

In this action, plaintiff Zul Capital, LLC, a Delaware corporation doing business in New York, seeks to recover insurance proceeds allegedly due it under a property damage insurance policy issued by Affiliated FM, a Michigan insurance company. Zul Capital is part of a family of interrelated corporate entities, including non-parties Northern Group, Inc. and FN Building LLC,

¹Motion sequence numbers 001 and 003 are consolidated herein for purposes of disposition.

which own, control, or manage commercial buildings throughout the United States. Northern Group, a Delaware corporation, is the sole member of FN Building, a Delaware limited liability company and the record owner of the building insured under the Affiliated FM policy. FN Building is a subsidiary of Zul Capital.

On May 23, 2006, FN Building executed a \$22.5 million promissory note in favor of National City Bank, and Northern Group executed an absolute and unconditional guarantee of FN Building's payment obligations under the note. The note is secured by a mortgage on the insured building, a 25-story office building located in Detroit, Michigan, known as the First National Building.

Zul Capital purchased the insurance policy in compliance with the terms of the mortgage and amended mortgage. The amended mortgage requires FN Building to keep the building insured against loss or damage by fire or flood, to name National City Bank as a beneficiary under such policy, and to pledge the insurance proceeds to National City Bank as collateral securing FN Building's obligations under the note and amended mortgage (*see* Amended Mortgage, ¶ 5 [a]).

The relevant one-year policy term commenced June 30, 2009. In relevant part, the policy provides that the insurer, Affiliated FM must pay on a claim within 60 days after it receives proof of loss and the amount of the loss is ascertained, either by written agreement between it and the insured, or by the filing of an award.

FN Building defaulted on its payment obligations under the promissory note in February 2009, when the note matured.

On August 16, 2009, the building suffered extensive flood damage and lost power when a

janitorial sink into which the building's cooling tower condensation line drained became clogged.

On August 25, 2009, National City Bank commenced an action in Michigan against FN Building and Northern Group in which it seeks to enforce the note and guarantee, and seeks judicial foreclosure and appointment of a receiver over the building to collect the rents due from tenants and to repair the damage caused by the flood (*see National City Bank v FN Bldg., LLC*, Cir Ct, Wayne County, Mich, case No. 09-021031-CK [the Michigan action]).

By letter dated September 3, 2009, FN Building assigned its rights to the insurance proceeds arising from the loss caused by the August 2009 flood to Zul Capital, FN Building's parent and the owner of the insurance policy. On September 10, 2009, Zul Capital submitted to Affiliated FM a claim arising out of the August 2009 flood, that included a sworn statement in proof of loss requesting partial advance payment of insurance proceeds in the amount of \$500,000. Affiliated FM advanced Zul Capital the requested amount. On September 29, 2009, Zul Capital delivered to Affiliated FM a second sworn statement in proof of loss, requesting the amount of \$835,684.57, in partial advance payment.

On September 24, 2009, National City Bank executed a general release in favor of FN Building's predecessors, successors, assigns, officers, employees, and agents, including Zul Capital, forever releasing them from all claims that may arise in connection with the Michigan action, including any right or claim to the insurance proceeds. The release further provides that neither FN Building nor Northern Group constitutes a released party.

By order dated September 25, 2009, the Michigan action court granted National City Bank's motion and appointed Finsilver/Friedman Management Corporation, a Michigan corporation, as receiver over the mortgage collateral, including the building, rents, and insurance

proceeds (the receivership order). Pursuant to the receivership order, the receivership became effective immediately.

Subsequently, Affiliated FM advised Zul Capital and Finsilver/Friedman (the receiver) that they had asserted competing claims to the insurance proceeds, and that Affiliated FM was not able to determine which of them was entitled to receive payment. Affiliated FM further advised that, upon adjustment of the claim and a determination identifying the proper recipient, it would promptly pay on the claim.

Meanwhile, on October 16, 2009, Zul Capital commenced the action at bar against Affiliated FM, and, on November 2, 2009, served and filed an amended complaint joining National City Bank as a direct defendant. In the complaint, Zul Capital seeks an order declaring that it is entitled to receive additional insurance proceeds of at least \$835,684.57 stemming from the August 2009 flood, pursuant to the terms of the Affiliated FM policy. Zul Capital also asserts claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and seeks to recover compensatory damages.

Both defendants now seek to dismiss this action on the related grounds of forum non conveniens, the pendency of the Michigan action, and failure to join a necessary party, contending that the factual and legal issues presented here are able to be resolved more completely in the Michigan action.

In opposition, Zul Capital contends that New York is the more convenient forum for resolution of its claims, and that, inasmuch as it and movants were not named as parties in the Michigan action until November 6, 2009, some three weeks after commencement of the instant action, the instant action is the prior pending action.

It is well-settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (*Martin v Mieth*, 35 NY2d 414, 418 [1974]). "The common-law doctrine of *forum non conveniens* . . . permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]; *see* CPLR 327 [a]). A motion to dismiss or stay on the ground of *forum non conveniens* is subject to the discretion of the trial court, and no single factor is controlling (*id.* at 479). Among the factors a court should consider 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" (*id.*). Other relevant factors include the situs of the transactions at issue, the residence of the parties, the location of witnesses and evidence, and the substantive law governing the parties' dispute (*see Blueye Navigation, Inc. v Den Norske Bank*, 239 AD2d 192, 192 [1st Dept 1997]). "The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d at 479).

Moreover, in order to avoid duplicative litigation and inconsistent judgments, CPLR 3211 (a) (4) permits the court to dismiss an action or claim where there is pending an action commenced close in time to the New York action that is between substantially the same parties, arises out of the same transaction, involves the same causes of action, and offers more complete relief than does the New York action (*see Continental Ins. Co. v Polaris Indus. Partners, L.P.*, 199 AD2d 222, 222-223 [1st Dept 1993]).

All the relevant factors militate in favor of dismissal of this action. In both the Michigan

action and the action at bar, the parties, including Zul Capital, seek a judicial determination identifying the entity entitled to receive the insurance proceeds flowing from the August 2009 flood property damage claim, in accordance with the terms of the Affiliated FM policy. The Michigan action court took jurisdiction of the subject matter of the dispute on August 25, 2009, approximately seven weeks prior to Zul Capital's commencement of the action at bar on October 16, 2009.

The Michigan court appointed the receiver, a Michigan company, pursuant to Michigan law, over the insured building, which is located in Michigan. The Michigan action receivership order was issued, with the consent of all parties, including FN Building and Northern Group, Zul Capital's affiliates, approximately three weeks before Zul Capital commenced the action here. The receivership order defines the scope of the receiver's authority to take complete control over the receivership property to include the mortgage collateral, which includes all insurance proceeds (*see* Receivership Order §§ 1.2, 1.4 [r], 6.1 [b] [I]). Thus, the Michigan action court receivership order forms the basis of the receiver's competing claim to recover the subject insurance proceeds from Affiliated FM.

Statewide Disaster Restoration, Inc., an intervener in the Michigan action, has asserted claims there against Zul Capital to compel it to disgorge the \$500,000 partial advance payment of the insurance proceeds that it received, and to pay Statewide \$486,684.71 from the disgorged funds in reimbursement of the repair work that it performed in the insured building, as a result of the August 2009 flood damage.

In addition, in the Michigan action, National City Bank alleges that Zul Capital has failed to use the \$500,000 advance that it received under the Affiliated FM policy to make repairs to the

building, and requests that Zul Capital be directed to disgorge the insurance proceeds. The court notes that National City Bank has a colorable claim to the insurance proceeds, by virtue of FN Building's assignment in the amended mortgage of its rights to the collateral to the Bank and the Bank's perfected security interest in the building's fixtures, equipment, and other personal property, including insurance proceeds.

Contrary to Zul Capital's contention, the receiver is not acting as an agent for National City Bank in the Michigan action. Pursuant to both New York law and Michigan law, a receiver appointed in a foreclosure action is an officer of the court, not an agent for the mortgagee or the owner, and the receiver's duty and obligation is to preserve and operate the receivership property within the confines of the order of appointment and any subsequent order or authorization granted by the appointing court (*see Jacynicz v 73 Seaman Assocs.*, 270 AD2d 83, 85 [1st Dept], *lv denied* 95 NY2d 761 [2000]; *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 528, 730 NW2d 481, 502-503 [Mich App 2007]; MCL 600.2926).

Moreover, Zul Capital has failed to join an indispensable party, the receiver appointed by the Michigan action court, and it appears that the receiver is not amenable to this court's jurisdiction.

Pursuant to CPLR 3211 (a) (10), the court may dismiss an action if the court cannot proceed in the absence of an entity or person who should be a party to the action. In determining whether an unnamed party is indispensable, the court must consider a number of acts, including whether the plaintiff has another, effective remedy should the action be dismissed; whether prejudice to the defendants or the unnamed party will accrue, unless the party is joined; whether and by whom prejudice might have been avoided; the feasibility of a protective order; and

whether an effective judgment may be rendered in the absence of the party not joined (*see du Pont-De Bie v Tredegar Trust Co.*, 61 AD3d 610, 611-612 [1st Dept], *lv denied* 13 NY3d 708 [2009]; *Lewis v Proctor & Gamble, Inc.*, 18 Misc 3d 1110[A], 2007 NY Slip Op 52488[U], *2-3 [Sup Ct, NY County 2007]; CPLR 1001 [a], 1003, 3211 [a] [10]).

The receiver is a necessary party here. As discussed above, the receivership order issued in the Michigan action provides that neither FN Building nor Northern Group has any rights to the income, including insurance proceeds, generated by the building, after September 25, 2009, the effective date of the receivership order, and transfers those rights to the receiver. The receiver's obligation to marshal all the receivership property, including the proceeds payable under the Affiliated FM policy as a result of the August 2009 flood, will be substantially affected, if the action at bar should continue in the absence of the receiver. In the amended complaint, Zul Capital seeks a judicial declaration that "[t]he Receiver is not entitled to the insurance proceeds and has inappropriately made a demand on [Affiliated FM] for the disbursement of the insurance proceeds" (Amended Complaint, ¶ 46). Thus, a complete and final adjudication of the rights of the parties cannot be had without joinder of the receiver.

The court notes that it appears unlikely that it may acquire personal jurisdiction over the receiver. The receiver is a Michigan corporation that maintains its principal place of business in Michigan. Zul Capital has not come forward with any evidence that demonstrates the existence of personal jurisdiction over the receiver, nor does it allege that such jurisdiction exists. Zul Capital does not represent that it has sought permission from the Michigan action court to commence legal action against the receiver, as required by the receivership order.

Contrary to Zul Capital's contentions, the September 3, 2009 assignment to Zul

Capital by FN Building of its rights to receive the insurance proceeds and National City Bank's release of Zul Capital from claims associated with the Michigan action do not, in the circumstances presented here, destroy the receiver's interest in the policy proceeds, or relegate the receiver to the status of a mere bystander. The validity and enforceability of the assignment and release pursuant to the terms of the amended mortgage and the receivership order go directly to the crux of the receiver's claim to the insurance proceeds. Any decision by this court about the validity and scope of the assignment would necessarily implicate the receiver's rights, and these questions have already been presented to the Michigan action court for resolution (*see National City Bank v FN Bldg., LLC*, Cir Ct, Wayne County, Mich, Jan. 26, 2010, Tr, at 25:18 to 26:7, Murphy, J., case No. 09-021031-CK).

Moreover, in denying Zul Capital's motion to dismiss National City Bank's second amended complaint, the Michigan action court found that:

the appointment of the receiver is equitable in nature. The release didn't waive FN's obligations under the mortgage. The mortgage spells out exactly how the insurance proceeds are to be disbursed. Disbursements must be made for the benefit of the building.

The receiver must take action to preserve and maintain the building. Its obligations [go] to lienholders but primarily [go] to the tenants in possession.

The receiver isn't just an agent of the Bank exclusively. Its obligations [are] to preserve the property. It isn't bound by the actions of the Bank. The receiver may properly proceed against Zul regarding the insurance proceeds

(*id.* at 22:15 to 23:10).

The Michigan action court also found that sufficient contacts with the state of Michigan existed to support the exercise of personal jurisdiction over Zul Capital, and that there existed no basis to transfer the matter to a New York court.

Zul Capital has also failed to join FN Building and Northern Group, both necessary parties. As the property's mortgage holder and the guarantor of the promissory note, respectively, both of these entities appear to have an interest in the outcome of this dispute. In addition, Northern Group is listed as a named insured on the Affiliated FM insurance policy, and is the sole member of FN Building, the owner of the insured building.

For the foregoing reasons, the action is dismissed. Dismissal is warranted where, as here, the New York courts lack jurisdiction over a necessary party and all indispensable parties can, or are, joined in an alternative forum (*see Horwitz v Sax*, 16 AD3d 161, 161 [1st Dept 2005]). Proceeding without the receiver is not feasible; a complete and effective judgment cannot be rendered without the receiver's presence. All necessary parties asserting competing claims to the insurance proceeds, including Zul Capital and the receiver, are present in the Michigan action.

That branch of National City Bank's motion for reimbursement of the costs of litigation, including attorneys' fees, is denied. "Attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986]). National City Bank has failed to demonstrate the existence of such an agreement or statute.

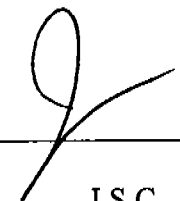
Accordingly, it is

ORDERED that motion sequence number 001 is granted and the amended complaint is dismissed in its entirety as against defendant Affiliated FM Insurance Company, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant; and it is further

ORDERED that motion sequence number 003 is granted and the amended complaint is dismissed in its entirety as against defendant National City Bank, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records accordingly.

Dated: October 18, 2010

ENTER: 

J.S.C.
HON. JOAN A. MADDEN
J.S.C.

FILED
OCT 15 2010
NEW YORK
COUNTY CLERK'S OFFICE