CIVIL COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 32
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STERLING NATIONAL BANK, as assignee of NORVERGENCE, INC,

Plaintiff,

-against-

Index No. 61581/04
Mo. Cal. 08/03/05 (#5)
Papers: Motion (1), Cross Motion (2), Reply (3)

KINGS MANOR ESTATES, LLC and PAUL ANDERSON, Individually,

Defendants.

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DIANE A. LEBEDEFF, J.:

Before the court stands the seemingly typical claim of an assignee of an equipment lease demanding payments due under the lease. The reality is darker and legally unusual: this lease and eleven thousand substantially similar leases have been judicially determined to be tainted by fraud in a federal action commenced by the Federal Trade Commission, and – twenty or more state attorneys general having launched consumer fraud inquiries into these leases – many assignee banks and finance companies have agreed to forgive up to 90 per cent of the face amount of the leases, which reportedly range between $14,000 to well over $200,000. Yet, despite this fevered pitch of legal activity regarding such leases, this case is the first to require a full exploration of the Uniform Commercial Code and consumer law provisions governing the private parties involved in such a lease.

Turning to this case, based on an assignment, the plaintiff bank seeks all payments due under an equipment lease by way of a motion for summary judgment against the lessee and the lease guarantor (CPLR 3212), while defendants ask that this action be stayed pending further developments in one or more actual or potential class actions, as well as proceedings instituted by governmental officials (CPLR 2201).

For reasons explained below, the court denies summary judgment, grants a limited stay, and – because plaintiff commenced this case in the Civil Court of the City of New York, a court which restricts defendants' available remedies – will permit defendants to request transfer of this matter to a court of general civil jurisdiction if the matter is not resolved during the stay period.

Background

Plaintiff Sterling National Bank, as assignee of an equipment lease from NorVergence, Inc. ("NorVergence"), sues the lessee, defendant Kings Manor Estates, LLC ("Kings Manor" or "lessee"), and the guarantor of the lease, defendant Paul Anderson ("guarantor"). Kings Manor, a business located in Largo, Florida, was approached in Florida by NorVergence, a New Jersey company. Defendants aver that they were advised that they could achieve a 40 to 60 per cent savings on telephone bills, including local, long distance, 800 business, cellular, and high speed internet service by the leasing and use of a piece of equipment identified as a "Matrix 2003." The defendants' lease application was accepted in New Jersey by NorVergence.

The $14,271 equipment lease price, which price included the cost of the telephone service but did not mention communication service or promise such service actually would be provided, was to be paid over 60 months at a monthly charge of $237.85, with payments to commence on or about March 30, 2004. Defendants signed the lease on January 12, 2004, and accepted delivery of the Matrix equipment on January 30, 2004. The lease was executed by NorVergence on February 2, 2004. On February 10, 2004, NorVergence advised that it had assigned the lease to plaintiff Sterling National Bank, without disclosing the date of the assignment. The defendants aver that "after receipt and installation of the equipment, [we] lost all phone service" and they "never received any service" from NorVergence. Nonetheless, they made three payments and stopped making payments at approximately the end of June, 2004.

NorVergence entered Chapter 11 bankruptcy on June 30, 2004, and that proceeding was converted to a Chapter 7 liquidation on July 14, 2004. The bankruptcy court excused the telephone service providers from providing communication service to NorVergence customers.

The defendants' protests herein regarding the transaction are borne out by, and consistent with, the findings and determinations of the United States District Court of New Jersey (*Federal Trade Commission v. NorVergence, Inc.*, CIV 04-5414 [DRD], judgment and order of June 25, 2005 [Debevoise, J.]). The court found that all "Matrix" items were "standard routers or firewalls that cost between $200 and $1,550" and that – although the "rental agreements on their face ... purported to cover only the Matrix box" – the "price of the rental agreement had nothing to do with the cost of the Matrix" but was related to promised

"heavily discounted telecommunications services" (finding 8). NorVergence telecommunication services stopped in or before "August 2004, and, in some cases, [such services] have never been provided" (finding 9). The federal court found that specific false and unlawful representations were made by NorVergence to customers (findings 13, 14, and 15). The NorVergence bankruptcy trustee did not oppose the findings of the federal court.

In relation to third-party finance companies, the federal court determined that NorVergence's unlawful conduct included acts "that allowed the finance companies to ... [m]isrepresent that consumers owe money on the rental agreements regardless of whether NorVergence provided the promised telecommunications services" (finding 16). As to any financing arrangement assigned in which NorVergence had a "residual, contingent or similar right," the NorVergence interest was held void and unenforceable when the future interest became effective, and any effected consumers were to be notified within ninety days of the order (order, paras. II.C and D).

Further, in a civil suit covering customers nationwide in which this plaintiff bank has been named as a defendant, a class action was recently certified (*Exquisite Caterers v. Popular Leasing USA, Inc.*, Superior Ct. Monmouth County, Docket No. Mon-L-3686-04, class certified by an order of September 14, 2005, Coogan, J.). There are reports of at least three other pending putative class actions. And, in a variety of enforcement actions, more than twenty state attorneys general, alone or in combination, have commenced administrative or court proceedings against NorVergence and the banks and financing companies which took

assignments of these equipment leases.[1]

An Initial Assessment of the Merits

It is with this background that the court now addresses plaintiff's request for summary judgment, which can be granted only if NorVergence's assignee "establish[es] [a] cause of action ... 'sufficiently to warrant the court as a matter of law in directing judgment' in [movant's] favor (CPLR 3212, subd [b])" (*Friends of Animals v. Assoc. Fur Mfrs*., 46 N.Y.2d 1065, 1067 [1979]).[2]

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[1] The NorVergence business operations – which reportedly generated $140 million in the 2003-2004 fiscal year prior to its bankruptcy – and the general status of legal actions and administrative proceedings as they stood in early 2005 were ably summarized by Barbara M. Goodstein in her article, *Come 'Hell or High Water' Norvergence Causing a Stir over Documentation*, 24 NO. 3 LJN's Equipment Leasing Newsl. [April 2005]). Thereafter, as reported in Note, *The Latest News on Norvergence*, 24 NO. 6 LJN's Equipment Leasing Newsl. 4 (July 2005), in addition to individual action taken by state officials, some states were proceeding on a united front, as evidenced by a settlement reached by the Massachusetts Attorney General with three finance companies impacting upon 1,000 small business owners from across the country, a settlement reached with the participation of the Attorneys General of Arizona, Colorado, Connecticut, Delaware, Illinois, Kansas, Louisiana, Maryland, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington, West Virginia, the District of Columbia and the Georgia Governor's Office of Consumer Affairs.

New Jersey state officials and the New York State Attorney General have commenced administrative proceedings against NorVergence and its assignees. The Florida Attorney General's suit against financing companies, including Sterling National Bank, was dismissed upon a determination that the Florida consumer fraud statutes did not apply to business consumers (*State of Florida v. Commerce Commercial Leasing, LLC*, Cir. Ct. 2nd J.D., Leon Co., Case No. 2004 CA 2515, order of May 25, 2005 [Cole, J.], notice of appeal filed June 3, 2005).

[2] The court will look to both the pleadings and the papers presented, including material bearing upon unpleaded defenses (*Rogoff v. San Juan Racing Assn.*, 54 N.Y.2d 883, 885 [1981], proper to consider unpleaded defense which "was the principal ground relied on by defendants in support of their motion and ... fully opposed by plaintiff ... both on ... procedural grounds ... and extensively on the merits"; *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 2 A.D.3d 266, 267 [1st Dept. 2003], *lv app denied* 2 N.Y.3d 702 [2004], same result, "the

To weigh the questions of law, a threshold choice of law inquiry must be made. The lease has an "Applicable Law" provision, which states in relevant part:

> "This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which the Rentor's principal offices are located [i.e. New Jersey] or, if the lease is assigned by Rentor, the laws of the state in which the assignee's principal offices are located, without regard to such State's choice of law considerations ..."

The governing rule under the Uniform Commercial Code is that, if a parties' transaction bears a "reasonable relation to this State and also to another state ... the parties may agree that the law of either .. shall govern their rights and duties" (*see*, identical provisions, New York's U.C.C. § 1-105 [1] and N.J.S.A. 12A-1-105 [1]; *see*, *generally*, Robert A. Brazener, *What Constitutes "Reasonable" or "Appropriate" Relation to a Transaction Within the Meaning of Uniform Commercial Code § 1-105 [1]*, 63 A.L.R.3d 341; *A. S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 379 [1957], another State's "law controls the construction of this agreement, since the parties intended it to be applicable and [the transaction] has a reasonable relation to

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opponent of the motion has not been surprised and fully opposed the motion").

As to the pleadings, they lack of a detailed recitation of causes of action and defenses, which is permitted in Civil Court pleadings. The complaint is an endorsed complaint, with a brief recitation of a claim for payment on the same page as the summons (N.Y.C.C.A. § 902 [a][1], "If the plaintiff's cause of action is for money only, the cause of action may be set forth by indorsement upon the summons"; N.Y.C.C.A. § 903, "The requirements of this act or of the CPLR applicable to a formal pleading shall not be applicable to an indorsement pleading"; see, *Holloway v. New York City Transit Authority*, 182 Misc.2d 749 [Civ. Ct. N.Y. Co. 1999, Acosta, J.]). An endorsed complaint is not required to state a cause of action and neither such complaint nor the answer thereto need state the material elements of a claim or defense (David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of N. Y., Book 29A, N.Y.C.C.A.§ 903 [1989]). There is no obligation to identify statutes, in any event (*Immediate v. St. John's Queens Hospital*, 48 N.Y.2d 671, 673 [1979], *rearg denied* 48 N.Y.2d 975 [1979], "It was sufficient under CPLR 3013 that respondent pleaded the 'statute of limitations' as a defense; it was not required to identify the statutory section relied on or to specify the applicable period of limitations").

[that State]").

The court readily rejects the claim that the contract properly is governed by New York law, as the assignee claims. This rejection is based upon three observations: (1) no rationale indicates that the law governing the original contracting parties and their transaction prior to the assignment would be changed retroactively, in any event; (2) the U.C.C. provision quoted above requires that the transaction have a relationship with a State at the time the agreement is reached to permit its law to be chosen to govern the agreement, and New York had no relationship to the original transaction, making its law not an eligible choice;[3] and (3) the notion that there could be a "meeting of the minds" on the application of an unidentified law is antithetical to the concepts supporting an intelligent and knowing choice of law agreement, for it logically embodies no election at all.

The contract language stating that it is to be "governed by, construed and enforced in accordance with the laws of [New Jersey]" can only be read as an agreement that the contract is subject to New Jersey laws (*see*, *Medimatch, Inc. v. Lucent Technologies Inc.*, 120 F.Supp.2d 842, 861 [N.D.Cal. 2000], "express choice-of-law provision that the 'construction, interpretation and performance of this Agreement shall be governed by the local laws of the State of New Jersey'" requires such application to a transaction between New Jersey vendor and California customer). Accordingly, the court determines that the choice of law provision dictates New Jersey law would apply, including its Uniform Commercial Code and consumer

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[3] The need for a transaction to bear a relationship to this State at the time of contracting as a basis for choosing the application of New York law is underscored by the enactment of General Obligations Law § 5-1401, which permits certain contracts involving over two hundred fifty thousand dollars to elect to be governed by New York State Law, even absent a reasonable relationship to New York State.

protection laws.[4] Indeed, even absent this contract, New Jersey consumer statutes would be applicable, for reasons explained in *Boyes v. Greenwich Boat Works, Inc.*, 27 F.Supp.2d 543, 547 (D.N.J. 1998), as it found New Jersey consumer laws governed a purchase by an out-of-state consumer from a New Jersey merchant:

> "[T]he New Jersey Legislature intended its Consumer Fraud statute to apply to sales made by New Jersey sellers even if the buyer is an out-of-state resident and some aspect of the transaction took place outside New Jersey. Courts have declared that the Consumer Fraud Act 'should be construed liberally in favor of protecting consumers.' *Levin v. Lewis,* 179 N.J.Super. 193, 200, 431 A.2d 157, 161 (App.Div. 1981); *State v. Hudson Furniture Company*, 165 N.J.Super. 516, 520, 398 A.2d 900, 902 (App.Div. 1979) (noting the 'perceived need to liberally construe the act in favor of protecting consumers'). Plainly, the 'act is broadly designed to protect the public.' *Skeer v. EMK Motors, Inc.*, 187 N.J.Super. 465, 470, 455 A.2d 508, 512 (App. Div.1982). 'The available legislative history demonstrates that the Act was intended to be one of the strongest consumer protection laws in the nation.' *Huffmaster v. Robinson*, 221 N.J.Super. 315, 319, 534 A.2d 435, 437 (Law Div. 1986) (citing *New Mea Construction Corp. v. Harper*, 203 N.J.Super. 486, 497 A.2d 534 [App.Div. 1985])."

However, as to actions of the assignee which occurred in New York after the assignment, if they bear upon consumer protection issues, those issues are potentially controlled by New

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[4] Under the New Jersey Consumer Fraud Act (N.J.S.A. § 56:8-1, *et seq.*), N.J.S.A. § 56:8-2 prohibits "any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise ...." An equipment lease falls within this prohibition (N.J.S.A. § 56:8-1 [e], "The term 'sale' shall include any sale, rental or distribution, offer for sale, rental or distribution or attempt directly or indirectly to sell, rent or distribute"), as does deception in relation to services to be provided (N.J.S.A. § 56:8-1 [c], "The term 'merchandise' shall include any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale"). New Jersey consumer protection laws do apply to business entities (*Marascio v. Campanella*, 298 N.J.Super. 491, 499, 689 A.2d 852, 856 [N.J.Super.A.D.1997], "The Act protects corporate as well as private consumers"). The Florida consumer protection laws not being applicable to businesses (*see* fn. 1 above), there is no argument for ousting consideration of the New Jersey consumer protection laws.

York law (New York U.C.C. § 2-A-104 [1] and [1][c], "A lease, although subject to this Article, is also subject to any applicable ... consumer protection law of this state, both decisional and statutory"; *Freedman v. Chemical Construction Corp*., 43 N.Y.2d 260, 265, fn. [1977], recognizing certain significant public policies of the forum, such as the Statute of Frauds, "arguably cannot be controlled by voluntary agreement").

The defendants, both in the answer and an affidavit contained in the opposing papers, claim that the equipment lease was tainted by fraud and deception in the inception, was unconscionable, and gave rise to unjust enrichment. The answer specifically asserts that the bank plaintiff, knowing of the fraudulent conduct, purchased the instant equipment lease at a deep discount, and – by demanding payment thereunder – acted in a manner violating New York's consumer protection law (G.B.L. § 394).[5] The plaintiff submits no refutation by a person with knowledge of the facts in affidavit form.

Rather, plaintiff relies upon arguments of law. First, without a factual showing that it actually received an assignment or more than a conclusory statement that the plaintiff is a holder in due course, plaintiff urges it is entitled to judgment because of a "hell or high water clause" in the equipment lease (*Wells Fargo Bank, N.A. v. BrooksAmerica Mortgage Corp.,*

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[5] The first counterclaim includes claims under New York's General Business Law § 349, which declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The act complained of must be consumer-oriented, be "misleading in a material way" and cause injury, but the practice "need not reach the level of common-law fraud" (*Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 [2000]). The deception may bear upon the pricing of the product (*Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 56 [1999]). Some part of the underlying transaction must occur in New York State (*Goshen v. Mutual Life Insurance Company of New York*, 98 N.Y.2d 314, 324 [2002]; *People ex rel. Spitzer v. Telehublink Corp.*, 301 A.D.2d 1006, 1009 [2d Dept. 2003], telemarketer used New York mail address).

419 F.3d 107, 110 [2d Cir. 2005], by such a claim, the lease holder asserts that "the lessee must make payments regardless of defective performance on the part of the lessor, that is, 'come hell or high water.' See 19 Richard A. Lord, Williston on Contracts § 53:28 [4th ed. 2004]"). As a procedural matter, the party seeking to enforce a "hell or high water" clause must show that a fraud defense lacks merit (*Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70 [1st Dept. 2002], "As the party seeking summary judgment, [plaintiff] bore the burden of demonstrating that [defendant's] fraudulent inducement counterclaim was deficient as a matter of law"; *see also*, *Wells Fargo Bank, Nat. Ass'n v. Stargate Films, Inc.,* 18 A.D.3d 264, 265 [1st Dept. 2005], "Plaintiff's claim to be a holder in due course, thus entitled to enforce the 'hell or high water' clause in the lease regardless of [a] fraud defense, ... [is] premature ... [where] issues of fact remain as to whether plaintiff took assignment of the notes in good faith"). On this record, plaintiff fails to persuade that the fraud defense does not lie. The defense is supported by an unopposed affidavit and it cannot be ignored that the defendants' factual description of the claimed fraudulent acts of NorVergence, which were carried forward into an assignee's demand for payment, are virtually identical to those found fraudulent and unlawful by the federal court.

Second, plaintiff urges that the court find that the equipment lease qualifies as a "finance lease" under Article 2-A of the Uniform Commercial Code, which would usually not be subject to a fraud defense.[6] For finance lease status, it must be shown that "the lessor [did]

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[6] A finance lease can render a "lessee's promises under the lease contract ... irrevocable and independent upon the lessee's acceptance of the goods" (N.Y.S.A. § 12A:2A-407 [1]) and New York's U.C.C. § 2-A-407 [1]). As explained by New York's Official Comment 3, a finance lease arises in limited circumstances:

not select, manufacture, or supply the goods" leased (N.Y.S.A. § 12A:2A-103 [g][i] and N.Y.U.C.C. § 2-A-103 [g][i]). It is indisputable that NorVergence both selected and supplied the "Matrix" equipment. Accordingly, the court determines that this lease necessarily fails to qualify for treatment as a finance lease.

Third, although plaintiff argues that the disclaimer of warranties bars defendants' position, warranties are irrelevant to the bulk of the defenses asserted. Defendants make no assertion that the "Matrix" equipment failed. As is obvious, the claim of this customer is about something seemingly extrinsic to the contract, i.e., the failure to provide telephone service; indeed, there would be no claim of fraud had the contract required that communication service be provided. Further, because the facts presented by defendants do not contradict the face of the lease, they are entitled to show that the lease should be "explained or supplemented ... by a course of dealing or ... by course of performance" (N.J.S.A. § 12A:2A-202 and N.Y.U.C.C. § 202), and be permitted to demonstrate that telephone service was required to be provided pursuant to this contract notwithstanding the terms of the lease.

> "3. The relationship of the three parties to a transaction that qualifies as a finance lease is best demonstrated by a hypothetical. A, the potential lessor, has been contracted by B, the potential lessee, to discuss the lease of an expensive line of equipment that B has recently placed an order for with C, the manufacturer of such goods. The negotiation is completed and A, as lessor, and B, as lessee, sign a lease of the line of equipment for a 60-month term. B, as buyer, assigns the purchase order with C to A. If this transaction creates a lease (Section 2A-103(1)(j)), this transaction should qualify as a finance lease. Section 2A-103(1)(g)."

An example of such a classic finance lease appears in the frequently cited case of *General Electric Capital Corp. v. National Tractor Trailer School, Inc*., 175 Misc.2d 20 (Sup. Ct. Onondaga Co. 1997).

Finally, the plaintiff does not address the defense of unconscionability. As provided by N.J.S.A. § 12A:2A-108 (1) and N.Y.U.C.C. § 108 (1), if a "court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made the court may refuse to enforce the lease contract ...." Some recent New York authority supports the position that a factual issue also may be raised regarding the unconscionability of the process by which a lease agreement was negotiated, even by a small business lessee (*see*, addressing provision identical to N.J.S.A. § 12A:2A-108 [2], *Advanta Business Services Corp. v. Colon*, 4 Misc.3d 117, 118 [App.Term 2d Dept., 2004],"Although UCC 2-A-108 [2] limits the procedural unconscionability remedy provided therein to consumer finance leases, ... the Official Comment to said section makes clear that '[t]he remedies of this section are in addition to remedies otherwise available for the same conduct under other law'"). The court finds that defendants have presented sufficient evidence to raise a triable issue of fact as to this question which could be finally determined only after the parties have "a reasonable opportunity to present evidence" on the issue (N.J.S.A. § 12A:2A-108 [3] and N.Y.U.C.C. § 2-a-108 [3]).

Based upon the foregoing, the court finds that the plaintiff has not demonstrated a right to judgment as a matter of law. As to the guarantee, given that the underlying obligation is found subject to questions of fact, in the absence of a demonstration of New Jersey law, the court declines to apply at this time the New York principles embodied in *Citibank, N.A. v. Plapinger,* 66 N.Y.2d 90 (1985). Accordingly, plaintiff's request for summary judgment at this juncture and upon these papers is denied.

Defendants' Request for a Stay

Defendants request a stay of this action under CPLR 2201 (if a stay is not "prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just"). The Civil Court has the power to grant a stay (N.Y.C.C.A. § 212). The application is addressed to the court's discretion (*Asher v. Abbott Laboratories*, 307 A.D.2d 211 [1st Dept. 2003]), and, where other litigation is the reason for seeking a stay, the stay request invokes "considerations of orderly procedure and judicial economy" (*Procter & Gamble Dist. Co. v. Lloyd's Underwriters*, 44 Misc.2d 872, 874-875 [Sup. Ct. N.Y. Co. 1964, Silverman, J.]; *Gen. Aniline & Film Corp. v. Bayer Co.*, 305 N.Y. 479, 485 [1953]).

The court considers three specific factors currently on the legal horizon bearing upon the parties' involvement with the NorVergence leases, which are claims presented to various forums asserting that these leases are the product of a consistent pattern of fraud applicable to all such leases. First, there is a practical consideration that, pursuant to the order issued in *Federal Trade Commission v. NorVergence, Inc.*, *supra*, NorVergence has recently or shortly will be identifying the contracts in which it has a future interest – and which future interest was determined to be void – and a modest amount of time will be required for the parties to gain access to that information and assess any impact upon their claims, as well as to reflect upon the impact of the entire decision and order upon their postures herein.

Second, the factor of a pending class action based upon claims of a broad fraud is a sound ground for a stay of this individual case (*Bank of New York v. Levy*, 123 A.D.2d 589, 590 [2d Dept. 1986], where "Federal class action suit alleging massive securities and other

fraud and a pattern of racketeering activity which defrauded hundreds of investors including the defendant's decedent" and possible "resolution of the Federal suit may encompass the plaintiff's claim herein and in view of the identity of parties and issues in both cases, it was appropriate for Special Term to stay the proceeding before it"). Certainly, a stay is appropriate pending notice to the class and any decision to opt-in or opt-out, as governed by Rule 4:32-2 of the Rules Governing the Courts of the State of New Jersey.

Third, above and beyond these two specific litigation developments, there are the swiftly unfolding administrative and judicial proceedings commenced by various attorney generals, some of which may already have a bearing on this case (see footnote 1, above).

That these companion matters present some differences is not an impediment to a stay for the related actions need not be identical nor involve parties in currently identical positions (*Goodridge v. Fernandez,* 121 A.D.2d 942, 944 [1st Dept. 1986]). At a minimum, it is sufficient that this court sees a significant possibility that the matter might be resolved by developments in other proceedings (*Grand Central Building Inc. v. New York Harlem Railroad Company*, 59 A.D.2d 207, 210 [1st Dept. 1977], stay would be inappropriate if "the action sought to be stayed will have to be determined no matter which way the [other matters are] decided"; internal quotation and citation omitted). Finally, "neither party will suffer undue detriment or gain undue advantage" by a stay of this action, for both sides must develop a knowledgeable position on the present status of these other matters (*Trinity Products, Inc. v. Burgess Steel LLC*, 18 A.D.3d 318, 319 [1st Dept. 2005]).

For these reasons, the court finds a stay is appropriate. However, in the seemingly always complicated NorVergence context, there is yet another consideration to be resolved

before the nature, scope and conditions of the stay can be determined.

Plaintiff's Election of Recourse to a Court with Limited Subject Matter Jurisdiction

Plaintiff has commenced this suit in the Civil Court of the City of New York, a city-wide court of limited jurisdiction. The plaintiff's choice of forum places limits upon the defendants solely because the plaintiff has chosen to sue in a court which, for want of a better term, has "crippled" subject matter jurisdiction.

Plaintiff asserts its choice of forum is appropriate under a lease clause, which bears the title "Applicable Law" and states in essential part:

> "all legal actions relating to this lease shall be venued exclusively in a state or federal court in [the] State [in which the assignee's principal office is located], such court to be chosen exclusively at ... assignee's sole option."

Although defendants do not request dismissal by reason of this clause, it does seem unlikely that out-of-state defendants would have had any reason to believe they would be – or even have a reason to investigate the possibility of being – haled into a court which limited the availability of defenses and counterclaims otherwise typical to this type of suit. Nor do defendants question whether the Civil Court satisfies the contractual requirement that litigation be "venued exclusively in a state or federal court," perhaps assuming that the Civil Court of the City of New York arguably is a state court (Judiciary Law § 2, "Each of the following courts of the state is a court of record ... [12] The civil court of the city of New York").

The above forum selection clause in the contract is called a "floating" forum selection clause because the designated forum changed from NorVergence's home state of New Jersey

to the assignee's home state of New York. Indeed, to date, almost all reported NorVergence court decisions have centered upon this clause, with some courts finding the clause invalid.[7]

Because the court must consider the possibility that this case might go forward at the end of the stay granted, the question arises whether it is just and proper that this case proceed in the Civil Court thereafter. The starting point for analysis is that the Civil Court of the City of New York's subject matter jurisdiction is limited by both the New York State Constitution

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[7] This clause has been held invalid by a New York judge (*Sterling National Bank v. Borger, Jones & Keeley-Cain,* n.o.r., N.Y.L.J. 4/28/2005, p. 21, col. 3 [Civ. Ct. N.Y. Co., Scarpulla, J.]). It appears this clause is unenforceable under New Jersey decisional law (*Copelco Capital, Inc. v. Shapiro,* 331 N.J. Super. 1, 5, 750 A.2d 773, 776 [N.J.Super.A.D. 2000],"circumstances ... weigh against enforcement of [a forum-selection] clause .... [where] a prospective lessee cannot identify the jurisdiction in which an action will be brought, as the contract states in the most general terms that the proper forum is contingent upon the location of an unnamed assignee's principal office"). New York public policy does not require a New York forum here (*compare*, *In re Betlem*, 300 A.D.2d 1026, 1026-1027 [4th Dept. 2002], [1], "EPTL 13-2.3 bars the enforcement of the forum selection clause at issue" because the statute "embodies a strong public policy to ensure that a New York court has subject matter jurisdiction over the assignment of an interest in the estate of a New York domiciliary").

Other cases are collected in an article by Stephen Levin and Jonathan K. Moore, entitled *'Floating' Forum-selection Clauses: The M/S Bremen Afloat in the Wake of NorVergence*, 24 NO. 4 LJN's Equipment Leasing Newsletter [May 2005]). Among the cases refusing to honor this clause are: *IFC Credit Corp. v. Aliano Bros. General Contractors, Inc.*, 2005 WL 643288, *4 (N.D.Ill. 2005), Illinois public policy requires specificity as to named forum; *Lyon Fin. Servs., Inc. v. Reno Sparks Ass'n of Realtors*, 2004 WL 234405 at * 1 (D.Minn. Feb.4, 2004); *IFC Credit Corp. v. Eastcom, Inc.*, 2005 WL 43159 (N.D.Ill. 2005); *Preferred Capital, Inc. v. Aetna Maintenance, Inc.*, 2005 WL 1398549 (N.D.Ohio 2005), *rearg denied* 2005 WL 1683867 (N.D.Ohio 2005), noting a pre-existing master agreement between NorVergence and Preferred governed the assignment at issue; and, *Preferred Capital, Inc. v. Sarasota Kennel Club*, 2005 WL 1799900, *3 (N.D.Ohio 2005), noting NorVergence failed to disclose to customer identity of assignee selected prior to contract execution, which "constitute[d] overreaching, even if not outright fraud, sufficient to invalidate the forum selection clause").

Among the cases finding the clause enforceable are: *Commerce Commercial Leasing, LLC v. Jay's Fabric Center*, 2004 WL 2457737 (E.D.Pa. 2004); *IFC Credit Corp. v. Burton Industries, Inc.*, 2005 WL 1243404 (N.D.Ill. 2005), but found invalid as to guarantor; *Lyon Financial Services, Inc. v. Will H. Hall & Son Builders, Inc.*, 2005 WL 503371 (D.Minn. 2005); and, *Popular Leasing USA, Inc. v. Terra Excavating, Inc.*, 2005 WL 1523950 (E.D.Mo. 2005), citing numerous unpublished decisions.

and the New York City Civil Court Act.[8] These restrictions are inescapable (*Priel ex rel. Priel v. Linarello*, 7 Misc.3d 64, 67 [App.Term 2d Dept.], "the Supreme Court is a court of general jurisdiction and the Civil Court of the City of New York is not. The [Civil Court's] subject matter jurisdiction stems from article VI of the New York Constitution, and no court may exercise powers beyond those granted to it by the New York Constitution and legislation

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[8] Section 15 (b) of Article VI of the New York State Constitution limits the jurisdiction of the Civil Court to specified types of civil cases, generally with claims not exceeding "twenty-five thousand dollars exclusive of interest and costs, or such smaller amount as may be fixed by law." Similarly, under N.Y.C.C.A. § 202, jurisdiction is limited to a claim for money, recovery of chattels, and foreclosures where "the value of the property does not exceed $25,000," and pursuant to N.Y.C.C.A. § 213, the Civil Court may consider "actions for rescission or reformation of a transaction if the amount in controversy does not exceed $25,000."

Jurisdiction for declaratory judgment purposes exists only in relation to the "obligation of an insurer to indemnify or defend a defendant in an action in which the amount sought to be recovered does not exceed $25,000." (N.Y.C.C.A. § 212-a).

As to equitable issues, Section 15 (b) of Article VI of the New York State Constitution provides that the Civil Court "shall further exercise such equity jurisdiction as may be provided by law ...." The Civil Court lacks general equitable jurisdiction (*European-American Banking Corp. v. Chock Full O'Nuts Corp.*, 109 Misc.2d 615, 620 [App. Term 1st Dept. 1981], "the Civil Court has clearly circumscribed and limited equitable powers" and even a "waiver would be ineffective to create jurisdiction where there is no statutory conferral" [citation omitted]).

N.Y.C.C.A. § 905, relating to the pleading of defenses, does permit the Civil Court to "consider any defense to a cause of action or claim asserted by any party, whether such defense be denominated or deemed legal or equitable in nature." The "equitable" defenses covered by this clause are generally claims of laches, unclean hands, and the like. Any such "equitable defense brought in a court lacking general equity power, such as Civil Court, may be used only as a 'shield and not a as a sword,' meaning that it may be used to defeat a proceeding but not as a basis to obtain affirmative relief" (*Baptist Temple Church, Inc. of New York v. Mann*, 194 Misc.2d 498, 502 [Civ. Ct. N.Y.Co. 2002, Feinman, J.], quoting *220V Elec. Dealer Supply, Inc. v. Rondat, Inc.*, 111 Misc.2d 100, 102 [Sup. Ct. N.Y. Co. 1981, Lehner, J.]).

The Civil Court's jurisdiction over counterclaims is limited by N.Y.C.C.A.§ 208 to monetary counterclaims (subd. [a] and [b]), a counterclaim for rescission or reformation of the transaction upon which the plaintiff's cause of action is founded, if the amount in controversy on such counterclaim does not exceed $25,000 (subd. [c][1]), for "an accounting between parties after the dissolution of the partnership, where the book value of the partnership assets does not exceed $25,000 and the plaintiff's cause of action arises out of the partnership (subd. [c][2]), and certain housing related proceedings (subd. [d]).

authorized by it. Subject matter jurisdiction cannot be created by the courts themselves, whether erroneously, accidentally or intentionally. Jurisdiction of the subject matter cannot be conferred on the court by any consent or stipulation of the parties, nor can a court's lack of subject matter jurisdiction be cured by waiver, consent, estoppel, laches or anything else" [citations and internal quotation marks omitted]).

In particular, the Civil Court's circumscribed subject matter jurisdictional restriction bars these defendants from requesting declaratory judgment relief (*Zuckermann v. Spector*, 287 A.D.2d 402, 402 [1st Dept. 2001], "declaratory relief ... is not within Civil Court's subject matter jurisdiction"; *see also*, *Feierstein v. Moser*, 306 A.D.2d 27 [1st Dept. 2003]). Because a declaratory judgment claim allows a party to seek the "practical end [of] quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v. Alderton Dock Yards*, 256 N.Y. 298, 305 [1931], *rearg denied* 256 N.Y. 298 [1931]), such a claim would have an obvious appeal here, for it would permit defendants to ask simply that one or more of the contract provisions, or an obligation thereunder, be determined null and void, in whole or in part, and seek desired discovery in relation thereto. The defendants, barred in the Civil Court from pleading any declaratory judgment counterclaim, have not interposed one here nor can they move to add such a counterclaim.

But plaintiff's choice of a "crippled" forum necessarily precludes defense counsel from following good practice by weighing a full range of civil pleading options (David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3014:6 [1991], "Good practice, in fact, usually mandates that the pleader set forth everything on

which there is a reasonable chance to succeed. Success on the first defense, for example, may win the case for the defendant without any need to prove the others. But the possibility of failure on the one requires that the others be there, too"; *see also*, *Conley v. Gibson*, 355 U.S. 41, 48 [1957], interpreting Fed.R.Civ.P. 12 [b][6], federal rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits"). Further, it works a possible prejudice to defendants by denying them the right to take advantage of the liberal policy of the CPLR, which permits pleading a full range of inconsistent and alternative claims (CPLR 3014; see, David D. Siegel, N.Y. Practice § 224, *Counterclaims, Generally*, "the notion that a defendant with a related claim can safely withhold [a related claim] and sue on it later can be misleading and perilous"). This restriction is not one which may be fairly imposed by an opposing party.

And, treacherous for both sides, a Civil Court success is not assured to have a *res judicata* effect. This issue has been called "murky and evasive" for reasons explained as follows:

> "In [some] areas, which lack statutory guidance but in which policy suggests strictures on incidental findings made in lower court ... proceedings, the New York courts ... lack a clear set of guideposts. Relevant decisions seem murky and evasive. A cure would be to recognize that the limited or special nature of the court from which the issue seeking the estoppel comes, or the issue's relatively incidental status in its lower court context, are themselves items that must be weighed into the balance before a determination is made of whether the issue has earned an estoppel. Treat this factor, in other words, as one of the sui generis items to be considered in applying the full and fair opportunity test." (David D. Siegel, N.Y. Prac. § 469, *Effect When Different Courts Involved* [4th ed.]; *see*, as to the full and fair opportunity test, *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-501 [1984]).

Because this inquiry must be made in the context of "a practical inquiry into the realities of

litigation" (*Singleton Management, Inc. v. Shakim Compere*, 243 A.D.2d 213, 217 [1st Dept. 1998]), it is especially worthy of note that the pending New Jersey class action increases the need for both sides to assess the potential *res judicata* effect of this litigation.

To remove these impediments, should defendants desire to interpose a declaratory judgment counterclaim, the readiest alternative would be to recognize the limited subject matter jurisdiction on this court and transfer the matter to the Supreme Court, a court of general jurisdiction with full plenary powers (N. Y. Const. Art. 6, § 19 [f], "The courts for the city of New York ... shall transfer to the supreme court ... any action or proceeding which has not been transferred to them from any of said court[] and over which the said courts for the city of New York have no jurisdiction"; Siegel, N.Y. Prac. § 24, *Mistake in Choice of Courts* [4th ed.]). Because such a counterclaim could bear upon all issues in this case, a full transfer would likely be warranted (*compare*, *Pratt Institute v. Niehoff Realty, Inc.*, 120 Misc. 2d 845 [Civ. Ct. N.Y. Co. 1983], and *Apollon Waterproofing & Restoration Corp. v. Brandt*, 172 Misc.2d 888 [Civ. Ct. N.Y. Co. 1997], third party declaratory judgment action transferred; *compare*, *Garfinkle v. Kaplan*, 77 Misc.2d 1097 [Civ. Ct. N.Y. Co. 1974, Sherman, J.], counterclaim which could not be interposed in a summary proceeding severed and transferred). While effectuating a transfer might pose administrative difficulties (*Mallardi v. District Council 37 Health & Sec. Plan Trust*, 128 Misc.2d 696 [Civ. Ct. Kings Co. 1985, Harkavy, J.]), it would offer a positive opportunity for one of the parties to request that all NorVergence cases be assigned to a single justice who could become familiar with the status of the class action or actions, as well as the status of the most relevant Attorney General proceedings.

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Taking the foregoing into consideration, the motion for summary judgment is denied and the motion for a stay is granted. This matter shall be stayed pending further order of the court and, three months hence, a conference before the court shall be held to determine whether the matter has been resolved or whether defendants request that this matter be transferred to the Supreme Court after the expiration of such stay. As to any transfer, the court reserves the power to direct that the costs, including the cost of any Request for Judicial Intervention, be borne by plaintiff. The court does not reach the question of whether the plaintiff, having elected this forum, has waived a right to request transfer of this matter.

This decision constitutes the order of the court.

Dated: October 6, 2005

____/s/_____
J.C.C.