**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AN FOR NEW CASTLE COUNTY**

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| VINCENT TOMEI,<br>Plaintiff, | ) | |
| 5. | ) | C.A. No. 01C-05-278 CHT |
| GLOBALSTAR CAPITAL CORP.,<br>and GLOBALSTAR, L.P.,<br>Defendants. | ) | |

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| MIRIAM BOURGEOIS and<br>JAMES STEFANO,<br>Plaintiffs, | ) | |
| v. | ) | C.A. No. 01C-02-199 CHT |
| GLOBALSTAR CAPITAL CORP.,<br>and GLOBALSTAR, L.P.,<br>Defendants. | ) | |

Submitted: September 6, 2001
Decided: December 31, 2001

On the Defendants' Motions to Dismiss

**MEMORANDUM OPINION**

Jeffrey S. Goddess, Esquire, ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., P.O. Box 1070, Wilmington, DE 19899-1070, Attorney for the Plaintiffs.

Donald E. Reid, 1201 North Market Street, P.O. Box 1347, Wilmington, DE, 19899-1347, Attorney for the Defendants.

**TOLIVER, JUDGE**

## FACTS AND PROCEDURAL POSTURE

These motions to dismiss arise from actions filed by the Plaintiffs, Vincent Tomei, Miriam Bourgeois and James Stefano, in their individual capacities, as well as on behalf of all others similarly situated, against the Defendants, Globalstar Capital Corporation and Globalstar L.P. Oral argument was heard by the Court on the motions on September 6, 2001. All briefing having been completed, that which follows is the Court's resolution of the issues so presented.

The Defendants are Delaware corporations that are in the satellite telecommunications business. In an effort to fund those businesses, the Defendants sold four issues of bonds to the public during 1997 and 1998. Each of the Plaintiffs purchased varying degrees of these bonds with varying due dates. On January 16, 2001, the Defendants announced that they would henceforth discontinue any payments under the bonds. It is undisputed that the Defendants have, in fact, failed to make interest payments that were due on the bonds.

The Plaintiffs instituted the Bourgeois v. Globalstar litigation on February 20, 2001 and the Tomei v. Globalstar litigation May 31, 2001 respectively. The Bourgeois v. Globalstar Complaint was subsequently amended on May 31, 2001.[1] Both however, in essence allege that the Defendants have breached their obligations to the Plaintiffs by repudiating payment of certain interest and principal, both past and future on Globalstar bonds purchased by members of the class.

On April 23, 2001 and June 28, 2001, the Defendants filed motions to dismiss both actions with the Prothonotary. They contend that the Plaintiffs fail to state a claim upon which relief can be granted. This contention is based on two theories. First, the Plaintiffs' claims are barred because they seek payment for principal and interest that is not yet

[1] The essence of the amendment was to include, in addition to their repudiation claim, a claim for breach of contract and to list the class representatives as both class representatives and as individual plaintiffs.

due. Under New York law, the Defendants argue, there is no recognized cause of action for the repudiation of a contract that requires the payment of money. The Plaintiffs reply that there is simply no authority that holds that they may not sue for breach of contract until each of the obligations underlying the bonds become due. At a minimum, they are entitled to bring an action for the unpaid interest installment payments due and owing.

Secondly, the Defendants allege that even if the Plaintiffs' actions were permissible under New York law, the express "no action" clauses[2] in the indentures associated with the bond sales forbid the bringing of a suit against Globalstar. To avoid the "no action" clause, holders of at least twenty-five percent (25%) of the principal amount of the

[2] Section 6.06 of the indenture, entitled "Limitation on Suits", states that in order to bring a viable cause of action, 25% of the holders of the bonds must notify the Trustee of any default under the indenture; the holders must make a written request on the Trustee to seek a remedy; and the Trustee fail to comply with the request before a suit may be brought. This clause is expressly not applicable for claims to seek payment of principal, premium or interest and liquidated damages.

notes are required to make a written demand on the Trustee and the Trustee must thereafter fail to pursue a remedy before suit may be brought. Since the Plaintiffs have failed to comply with these terms, the Defendants contend that the complaints must be dismissed. In response, the Plaintiffs assert that the "no action" clauses are inapplicable to actions for principal and interest; which is specifically what they seek. As a result, the motions are without merit for that reason as well.

## DISCUSSION

When reviewing a motion to dismiss, the Court must view the record in a light most favorable to the nonmoving party. All reasonable inferences must be construed most strongly in favor of the plaintiff. Greenly v. Davis, Del. Supr., 486 A.2d 669, 670 (1984); and Harmon v. Eudaily, Del Super., 407 A.2d 232 (1979), aff'd, Del. Supr., 420 A.2d 1175 (1980). In that regard, such a motion will not be granted if the plaintiff may

recover under any reasonably conceivable circumstances. Spence v. Funk, Del. Super., 396 A.2d 967 (1978); Battista v. Chrysler Corp., Del. Super., 454 A.2d 286 (1982); and Bissell v. Papastavros' Assocs. Medical Imaging, Del. Super., 626 A.2d 856 (1993).

**New York Law**

As is indicated above, the Defendants move to dismiss the complaints because the relief sought is unavailable under current New York law, i.e., because it seeks the anticipatory repudiation of a contract where the contract is for the future payment of money.[3]

In support of their position, the Defendants cite to numerous New York cases wherein the courts held that payments on contracts which are not yet due provide no cause of action

[3] Neither party disputes that New York law applies to the conflict at hand. Moreover, the indentures themselves prescribe that New York law is the applicable law for any disputes that arise between the parties. Therefore, no conflict of laws analysis is necessary.

to the plaintiff until the obligation to pay comes to fruition. See Manheimer v. Nederlansche Amerikaansche Stoomvaart Maatschappij, S.D.N.Y., 6 F. Supp. 564, 564-5 (1934); Indian River Islands Corp. v. Mfrs. Trust Co., N.Y. App. Div., 2 N.Y.S.2d, 860, 862-3 (1938); McCready v. Lindenborn, N.Y. Supr., 65 N.E. 208, 210 (1902); and Werner v. Werner, N.Y. App. Div., 154 N.Y.S. 570, 574 (1915). This is the law of that jurisdiction. The Plaintiffs' claims to any future payments are therefore barred until the date that payment is due and the Defendants fail to make such payment. This would obviously exclude all installment payments that the Defendants failed to make prior to the filing of the Plaintiffs' complaint and amended complaint, which do provide a cause of action upon which the Plaintiffs may proceed.

As to the latter category of relief, the Defendants also contend that payments already missed do not provide the Plaintiffs a basis to bring this action because payments already missed do not constitute an action for repudiation of

a contract. Stated differently, because the Plaintiffs' complaints couch their claims as actions for "repudiation" of a contract, they must be dismissed because payments already missed cannot provide a basis for a repudiation action. Instead, a cause of action based upon a repudiation of a contract can only apply to future payments. This contention is without merit. The Plaintiffs' claims for relief are aptly titled "Breach of Contract" and ¶13 specifically state,

> "[i]n conformity with its repudiation, Globalstar *has failed to make interest payments due* on the bonds, in breach of the Bond Documents. . . ." (emphasis added)

Stated is their simplest terms, these are breach of contract actions and the Defendants breached the contracts by failing to make the payments just like they said they would.

In addition, ¶C of the Plaintiffs' prayers for relief asks for,

> "[a] judgment awarding plaintiffs and the other members of the Class compensation for the damages in the amount of all unpaid interest and principal on the bonds *which they have sustained as a result of the*

> *Defendants' breaches*, together with pre-judgment and post-judgment interest;" (emphasis added).

There can be no doubt that the Plaintiffs seek judgment in their favor for the Defendants' anticipatory repudiation of the contracts. However, there likewise can be no doubt that the Plaintiffs seek judgment in their favor for breach of the contracts for payments already missed. No other reading of the Tomei Complaint or the Bourgeois Amended Complaint is plausible. The Plaintiffs' actions for past due amounts therefore provide a viable cause of action.

**No Action Clause**

Next, the Defendants assert that the action must be dismissed because the terms of the express "no action clause" in the indentures have not been satisfied. Section 6.06, the "no action clause" of the indentures provides:

> Limitations on Suits. *Except to enforce the right to receive payment of principal, premium (if any) or interest and Liquidated Damages (if any) when due*, no

> Securityholder [sic] may pursue any remedy with respect to this Indenture or the Securities unless:
>
> (1) the Holder gives to the Trustee written notice stating that an Event of Default is continuing;
>
> (2) the Holders of at least 25% in principal amount of the Securities make a written request to the Trustee to pursue the remedy;
>
> (3) such Holder or Holders offer to the trustee reasonable security or indemnity against any loss, liability or expense;
>
> (4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of security or indemnity; and
>
> (5) the holders of a majority in principal amount of the Securities do not give the Trustee a direction inconsistent with the request during such 60-day period.
>
> . . . (emphasis added).

The remedies sought by the Plaintiffs fall outside the parameters of the "no action clause" because they specifically seek principal and interest due. As such, the Plaintiffs' claims are not bound by the conditions contained in the "no action clause" and therefore are not foreclosed by that provision.

## CONCLUSION

Accordingly, based on the reasons set forth above, the Defendants' motions to dismiss must be **granted** as they pertains to any future payments that may be due and **denied** as they pertain to any payments that the Defendants failed to make prior to the present complaints.

**IT IS SO ORDERED.**

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TOLIVER, JUDGE