Carrs v AVCO Corp.
2012 NY Slip Op 33766(U)
May 8, 2012
Supreme Court, Westchester County
Docket Number: 59133/11
Judge: Orazio R. Bellantoni
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

P R E S E N T:

HON. ORAZIO R. BELLANTONI
JUSTICE OF THE SUPREME COURT

CHRISTINE CARRS, as Administratrix of the Estate of DANIEL P. BISK, deceased,

Plaintiff,

- against -

AVCO CORPORATION, on behalf of its LYCOMING ENGINES division, KS GLEITLAGER USA, INC. f/k/a KS BEARINGS, INC., KOLBENSCHMIDT PIERBURG AG, KS KOLBENSCHMIDT GmbH f/k/a KOLBENSCHMIDT AG, SUPERIOR AIR PARTS, INC., and SWIFT AVIATION, INC.,

Defendants,

KS GLEITLAGER USA, INC.,

Third-Party Plaintiff,

- against -

ANNE LAPKIN, as Executrix of the Estate of AMIR TIROSH, deceased, and AYALON FLIGHT SERVICES INC.,

Third-Party Defendants.

SHORT FORM ORDER
Index No. 59133/11
Motion Date: 4/25/12

Defendant AVCO Corporation and Lycoming Engines, an operating division of AVCO Corporation i/s/h/a AVCO Corporation on behalf of its Lycoming Engines division (hereinafter AVCO) moves for an order, pursuant to CPLR 3211(a)(4) dismissing the action against it, or in the alternative, staying the action against it, pursuant to CPLR §2201.

The following papers were read:

Notice of Motion-Exhibits A-F	1-7
Affirmation in Opposition-Exhibits A-F	8-14
Memorandum of Law	15
Affirmation in Opposition-Exhibits A-I	16-25
Affirmation of Service	26
Reply Affirmation	27

By way of background, this action arises out of an aircraft mishap which occurred on November 22, 2009, in which plaintiff's decedent, a passenger on the aircraft, as well as the pilot Amir Tirosh, sustained fatal injuries. Plaintiff commenced the within action on November 28, 2011. Plaintiff, Zoe Anne Bisk and Caroline Dora Bisk have also filed an action in Dallas County, Texas on December 1, 2011.

CPLR 3211(a)(4) authorizes a court to dismiss or stay an action on the ground that there is another action pending between the same parties for the same cause(s) of action in another court (*see generally Whitney v. Whitney*, 57 NY2d 731 [1982]). The rule gives courts discretion, which should exercised to avoid vexatious litigation and duplication of effort, with the attendant risk of divergent rulings on similar issues (*see White Light Productions Inc. v. On The Scene Productions, Inc.*, 231 AD2d 90 [1st Dept 1997]). The court must consider in which jurisdiction litigation was first commenced, how far each litigation has progressed and which forum has a more significant and substantive nexus to the controversy and thus is the more appropriate forum for its resolution (*see San Ysidro Corp. v. Robinow*, 1 AD3d 185 [1st Dept 2003]). Basically, New York courts undertake an analysis similar to that employed in consideration of a forum non conveniens motion, by considering and balancing such factors as the situs of the underlying transaction, residency of the parties, potential hardship to the defendants, locations of the documents and of a majority of the witnesses and the burden on the New York courts (*see Flintkote v. American Mut.*, 103 AD2d 501 [2nd Dept 1984]).

In support of its motion defendant AVCO states that the New York action and Texas action arise out of the same set of facts and that the relief sought is substantially identical. In opposition, plaintiff alleges that the summons and complaint in the New

York action were filed on November 28, 2011 and the Texas action was filed on December 1, 2011. Plaintiff states that the Texas action was commenced to guard against the possibility that Superior Air Parts, Inc. (Superior), incorporated in Texas and having its principal place of business in Dallas County, might be dismissed for want of personal jurisdiction. Additionally, plaintiff alleges that the Texas action differs from the New York action in that Swift Aviation, Inc. (Swift), a New York corporation, located in Dutchess County and engaged in the aircraft maintenance business, is not a named defendant in the Texas action.

New York courts generally follow the first-in-time rule, which instructs that the court which has first taken jurisdiction is the one which the matter should be determined and it is a violation of the rules of comity to interfere (*see L-3 Communications v. Safenet*, 45 AD3d 1 [1st Dept 2007]). The parties concede that the New York courts first took jurisdiction in this matter. However, it is also clear that determining the priority of pending actions by dates of filing is a general rule that should not be applied in a "mechanical" way, and that special circumstances may warrant deviation from this rule where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage (*id.*). Here, movant presents no evidence that the current action is vexatious or oppressive in nature, nor does movant offer any evidence that plaintiff commenced the within action to gain some sort of advantage over it.

This Court must now examine the procedural posture of both actions. In the within action defendants Swift, Superior, AVCO and KS Gleitlager USA, Inc. (KS) have all been served and filed verified answers, Superior and AVCO have both filed verified amended answers as well. AVCO has filed cross-claims against the co-defendants and Superior has filed cross-claims against Swift. Swift has served a set of interrogatories upon plaintiff as well as a notice of discovery and inspection. KS has agreed to waive the defense based upon improper service. Superior has filed a certified answer to AVCO's cross-claims. Finally, AVCO has filed the present motion to dismiss the plaintiff's complaint. In contrast, plaintiff's counsel states that most of the activity in the Texas action has been based upon AVCO's attempt to remove the action to Federal court. AVCO and Superior are the only defendants to answer the Texas complaint and no discovery has been initiated in Texas. Accordingly, it would appear to this Court that both actions are in the very early stages of litigation.

Employing an analysis similar to that employed in consideration of a forum non conveniens motion, this Court finds that New York is a appropriate forum for the within action. The accident occurred in Dutchess County, witnesses and evidence pertaining to the accident, are in large part found in New York and one of the defendants, Swift, is a New York corporation whose principal place of business is in New York. It is also

alleged that the other companies conduct substantial business in New York. Additionally, plaintiff was appointed Administratrix of her husband's estate by the Westchester County Surrogates Court.

Based upon the foregoing, AVCO's motion to dismiss the action pursuant to CPLR 3211(a)(4) is denied. The branch of AVCO's motion which seeks a stay of this action, pursuant to CPLR §2201, is also denied based upon the procedural posture of the cases as recited above and based upon this Court's finding that the action is properly before the New York courts. A copy of this decision and order has been filed electronically and has been forwarded to the Preliminary Conference Part.

Dated: May 8, 2012
White Plains, New York

HON. ORAZIO R. BELLANTONI
Justice of the Supreme Court

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