SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: _____ **J.S.C.** **PART** 3

Justice

Index Number : 653142/2012
HIGGINSON, KRAIG
vs.
LINDEN CAPITAL L.P.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 653142/12
MOTION DATE 3/18/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2

Replying Affidavits _____ **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8-2-13

EILEEN BRANSTEN **J.S.C.**

1. **CHECK ONE:** ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE: MOTION IS:** ☑ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

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

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KRAIG HIGGINSON, KENT WILLIAMS and CARL BERG,

Plaintiffs,

-against-

Index No. 653142/12
Motion Date: 3/18/13
Motion Seq. No.: 001

LINDEN CAPITAL L.P., TENOR OPPORTUNITY MASTER FUND, LTD and ARI OPPORTUNITY FUND, LTD.,

Defendants.

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BRANSTEN, J.

Defendants Linden Capital L.P., Tenor Opportunity Master Fund, Ltd., and Aria Opportunity Fund, Ltd. (collectively, "Defendants") bring the instant motion to dismiss the complaint ("the Complaint") filed by Plaintiffs Kraig Higginson ("Higginson"), Kent Williams ("Williams), and Carl Berg ("Berg"; together with Higginson and Williams, the "Plaintiffs"). Defendants' motion to dismiss Plaintiffs' Complaint is granted.

This is a declaratory judgment action, stemming from an intellectual property transaction between the parties. Plaintiffs are a group of investors, who were involved in the creation of an electric automobile company called VIA Motors. (Compl. ¶ 9). In Fall 2010, VIA Motors bought intellectual property assets from a company financed by Defendants – Raser Technologies, Inc. As part of the transaction, VIA Motors issued shares of its company to Raser in exchange for the intellectual property. *Id.* at ¶ 11. In a

separate but related transaction, Plaintiffs and Defendants entered into a contract, dated June 2, 2011 (the "June 2, 2011 contract" or "agreement"), and a commitment letter under which VIA Motors agreed to purchase back its shares from Raser. The Contingent Additional Consideration portion of the June 2, 2011 contract is at the heart of this dispute. *Id.* at ¶ 12.

In the Contingent Additional Consideration portion of the agreement, Plaintiffs agreed to pay an additional $2,000,000 to Raser if Raser and/or the Defendants obtained the release of all "liens, claims and encumbrances of any kind or nature whatsoever asserted by Pratt & Whitney Power Systems, Inc. against any intellectual property assets owned or controlled by VIA." *See* Compl. Ex. A at ¶ "Higginson Group Consideration, (b)". If Defendants met this condition, the June 2, 2011 required Plaintiffs to make payment before June 9, 2011. *Id.* at ¶ 15.

Plaintiffs allege that Defendants did not meet this mandatory provision and that payment of the Contingent Additional Consideration therefore was not warranted. *Id.* at ¶ 16.

Defendants claim that they extinguished all claims on the intellectual property; however, once it became clear that the payment from Plaintiffs was not coming, Defendants sent a letter to Plaintiffs demanding payment. This demand letter threatened

that if payment was not made by September 1, 2012, litigation would ensue. *See* Affirmation of Robert A. Rich, Ex. 3 at 2; Pls.' Opp. Br. at 4.

When payment was not made, Plaintiffs filed the instant complaint in this Court. In this action, Plaintiffs seek a declaratory judgment that they are not obligated to pay the Contingent Additional Consideration under the June 2, 2011 contract because they claimed the conditions of this payment were not met. On September 27, 2012, Defendants filed a complaint in the Southern District of New York (the "District Court Action") asserting breach of contract and seeking payment of the Contingent Additional Consideration.

II. Discussion

Defendants now bring the instant motion to dismiss the complaint filed in this Court pursuant to CPLR 3211(a)(4). Defendants contend that this action was commenced "in an improper effort to pre-empt a federal suit against them for breach of contract, and to adjudicate a baseless defense to that action as putative 'Plaintiffs.'" (Defs.' Moving Br. at 1.)

A. *Standard of Law*

CPLR § 3211(a)(4) states a party may move for a motion to dismiss if "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." CPLR § 3211(a)(4).

Dismissal under CPLR § 3211(a)(4) is warranted when the relief sought is "the same or substantially the same" with respect to the two pending actions. *White Light Prod., Inc. v. On the Scene Prod., Inc.*, 231 A.D.2d 90, 94 (1st Dep't 1997). This criteria is not met when "relief demanded is antagonistic and inconsistent, or purposes of two actions are entirely different." *Id* at 94. Furthermore, in order to reach dismissal, "it is necessary that there be sufficient identity as to both the parties and the causes of action asserted in the respective actions." *Id.*

B. *Defendants' Motion to Dismiss*

Generally, courts adhere to the "first-to-file" rule, holding that the first court to take jurisdiction is the one where the matter should be determined. *L-3 Commc'n Corp. v. SafeNet, Inc.*, 45 A.D.3d 1, 7 (1st Dep't 2007). Here, the first action filed was the action in this court. The Federal Complaint, seeking substantially the same relief, followed seventeen days later.

However, courts have eschewed a rigid application of the first-to-file rule. The rule should not be used in a mechanical way and special circumstances may warrant deviation from the rule where "the action sought to be restrained is vexatious, oppressive, or instituted to obtain some inequitable advantage." *White Light Prods.*, 231 A.D.2d at 96-97. While the chronology of actions brought to court is important, "it is not controlling, especially when commencement of the competing action has been reasonably close in time." *Id* at 97. Furthermore, on a motion to dismiss, although the "technical priority in the commencement of actions is a factor to be considered, it is not necessarily dispositive, particularly where both actions are at the earliest stages of litigation." *San Ysidro Corp. v, Robinow*, 1 A.D.3d 185, 186 (1st Dep't 2003).

1. Timing

Here, the instant Complaint was the first-filed action. However, ths instant declaratory judgment action was filed just eleven days after Defendants' demand letter, and the Federal Complaint followed seventeen days later. In *L-3 Communications Corporation v. SafeNet, Inc.*, 45 A.D.3d 1 (1st Dep't 2007) the court ruled that a court should "deviate from the first-in-time rule where one party files the first action preemptively, after learning of the party's intent to commence litigation." *SafeNet,* 45 A.D.3d 1 at 8. In this case, L-3 Communications Corporation ("L-3") accused SafeNet

Inc. ("SafeNet") of violating their contract's non-competition clause. *Id* at 5. L-3 warned SafeNet that litigation would ensue unless SafeNet stopped developing products in violation of the agreement. *Id* at 6. Rather than wait for the impeding breach of contract action, on May 7, 2006, SafeNet filed a preemptive declaratory judgment action against L-3 seeking a declaration that SafeNet was not in violation of the parties' contract. *Id.* On May 11, 2006, L-3 filed a separate action against SafeNet seeking injunctive relief and damages under the contract. *Id.* There was evidence that L-3 threatened litigation and it was clear that SafeNet commenced the declaratory judgment action preemptively. *Id.*at 9. Based on these facts, the First Department rejected the application of the first-in-time rule "on the ground that such a race to the courthouse would create disincentives to responsible litigation, by discouraging settlements due to fear of preeminent strike..." *Id.*

Thor Gallery at Beach Place, LLC v. Standard Parking Corp., 34 Misc.3d 1215(A) (Sup. Ct. N.Y. Cnty. 2012) provides a similar holding. In *Thor Gallery*, defendant-tenant sent a letter to plaintiff-landlord claiming that the lease between the parties was fraudulently induced and not enforceable based upon the plaintiff's failure to disclose certain eviction proceedings and failure to maintain certain occupancy levels. *Id* at *1-2. On May 27,2011, plaintiff filed an action seeking declaratory judgment that the lease was enforceable. *Id.* Ten days later, defendant filed a claim to dismiss the declaratory judgment action on grounds that the more appropriate breach of contract

action was pending. *Id.* The court found that if the first suit were filed preemptively, then the suit would be dismissed. *Id.* at *7. The court ruled that since the first action was filed "almost immediately after receiving a letter threatening suit" from defendant, there was evidence that the action was filed preemptively. *Id* at 8. The court dismissed the declaratory judgment action in favor of the subsequently filed action.

Moreover, the relief sought in this action also lends itself to the conclusion that this case was filed "in an attempt to deprive defendant of its choice of forum and to gain a tactical advantage." *AIG Financial Prod. Corp. v. Penncara Energy, LLC,* 83 A.D.3d 495, 496 (1st Dep't 2011) ("The format of this suit, a declaratory action, also strongly suggests that it was responsive to a threat of litigation.") (internal citations omitted).

Federal courts likewise have also rejected the first-in-time rule in similar circumstances. For example, where a party sought to file a declaratory judgment in order to preempt the enforcement of the forum choice clause in its contract with the opposing party, a Southern District of New York court deemed the action "a classic example of a race to the courthouse… the misuse of the Declaratory Judgment Act to gain procedural advantage and preempt the forum choice of the plaintiff in the coercive action militates in favor of dismissing the declaratory judgment action." *Great Am. Ins. Co. v. Houston Gen. Ins. Co.,* 735 F. Supp. 581, 586 (S.D.N.Y. 1990).

The facts before this Court suggest that the Federal Defendants filed the Complaint preemptively in response to the Demand Letter. The Federal Plaintiffs clearly communicated the threat of federal court litigation through the Demand Letter on August 30, 2012. In addition, both the instant case and the Federal case are in the earliest stages of litigation. The parties represent that no motion to dismiss has been filed yet in the Federal action. *See* Affirmation of Alan M. Pollack, Ex. A. Consistent with the case law discussed above, the circumstances here present a classic exception to the first-in-time rule, and the instant Complaint is dismissed.

2. Forum Selection Clause

Plaintiffs' invocation of the forum selection clause in the parties' Commitment Letter does not alter the Court's analysis. The forum selection clause provides that the parties consent to submit themselves to the "personal jurisdiction of any state or federal court sitting in Manhattan, New York." (Compl. Ex. A at 2.) Both this Court and the Southern District of New York fit this description.

While Plaintiff contends that the forum selection clause demonstrates that action in this Court is not vexatious, Plaintiff relies on inapposite case law. Plaintiff cites to *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32 (1st Dep't 2008), in which the Court considered whether it had personal jurisdiction over non-resident defendants based on a forum

selection clause in an agreement that defendants did not sign. The Court expressly did not pass on the question of whether the action merited dismissal based on an earlier-filed complaint. *Id.* at 41 ("The defendants' claim that this action must be dismissed on the grounds of a prior action pending was not raised in their briefs and is thus deemed abandoned."). Plaintiffs also cite to CP Energy Group, Inc. v. Windy Point Partners, LLC, 29 Misc.3d 1207(A), at *2 (Sup. Ct. N.Y. Cnty. 2010), in which Justice Fried considered a motion to dismiss on forum non conveniens ground and expressly "did not decide whether the first-in-time rule requires me to deny the motion to dismiss." Plaintiffs present no other persuasive case law in support of this argument, and no case law asserting that the filing of an action in a forum sanctioned by a forum selection clause precludes dismissal under CPLR 3211(a)(4).

3. Federal Court Subject Matter Jurisdiction

Plaintiffs finally argue that the Southern District of New York lacks subject matter over the Federal Complaint, rendering the instant Complaint the only viable action. However, as Plaintiff concede, the Federal Court has not passed on the subject matter jurisdiction question yet. Moreover, Defendants represent that they will amend the Federal Complaint "to address the technical defects" raised by Plaintiffs. *See* Reply

Affirmation of Robert A. Rich, Ex. 1. Accordingly, a conclusion that the Southern District of New York lacks subject matter jurisdiction would be premature.

In the event that the Federal court determines that it lacks subject matter jurisdiction over the action, the case at that point could be remanded to state court. *See* 28 U.S.C. § 1447(c). Thus, even if this case could not proceed in the Southern District of New York on subject matter jurisdiction grounds, the case potentially could be sent back to New York Supreme Court. *Cf. Parker v. Rich*, 140 A.D.2d 177 (1st Dep't 1988) (denying CPLR 3211(a)(4) motion where first-filed action was commenced in Civil Court, which lacked the power to grant the specific performance remedy sought, and reinstating the complaint in Supreme Court).

(*Order follows on next page.*)

III. Conclusion and Order

Accordingly, for the foregoing reasons, it is

ORDERED that Defendants Linden Capital L.P., Tenor Opportunity Master Fund, Ltd., and Aria Opportunity Fund, Ltd.'s motion to dismiss the Complaint is granted with prejudice and the Complaint is dismissed with costs and disbursements to Defendants as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the Court.

Dated: New York, New York
~~July~~ August 2, 2013

ENTER

Hon. Eileen Bransten