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INDEX
NO. 16777/02

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 1-13-03

Submission Date: 3-14-03

Motion Sequence No.: 001,002/MOT D

INTERNATIONAL BUSINESS COMMUNICATIONS, INC.,
Plaintiff, X

COUNSEL FOR PLAINTIFF
Moss & Kalish, PLLC
122 East 42nd Street - Suite 2100
New York, New York 10168

- against -

CONTINENTAL PAPER BOX CO., INC.
d/b/a CONTINENTAL PAPER BOX
COMPANY, PAUL T. FREUND
CORPORATION and CONTINENTAL
FREUND, LLC,
Defendants.

COUNSEL FOR DEFENDANT
Woods, Oviatt & Gilman, LLP
700 Crossroads Building
2 State Street
Rochester, New York 14614

X

ORDER

The following papers were read on Defendant's motion to dismiss and Plaintiff's motion to consolidate:

- Notice of Motion dated December 4, 2002;
- Affidavit of Rick Frederick sworn to on December 4, 2002;
- Order to Show Cause dated February 25, 2003;
- Affirmation of James Schwartzman, Esq. dated February 20, 2003;
- Affidavit of Robert Schoonmaker sworn to on February 20, 2003;
- Affidavit of Robert D. Hooks sworn to on February 26, 2003;
- Affidavit of Robert D. Hooks sworn to on March 5, 2003;
- Defendant's Reply Memorandum of Law;

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Affirmation of James Schwartzman, Esq. dated March 13, 2003;
Affidavit of Robert Schoonmaker sworn to on March 13, 2003;
Affidavit of Robert Schoonmaker sworn to on March 18, 2003;
Letter of Robert D. Hooks dated March 19, 2003.

Plaintiff moves for an order pursuant to CPLR 602 seeking to remove an action pending in Wayne County and to consolidate the Wayne County action with this Nassau County action. Defendant cross-moves to dismiss this action pursuant to CPLR 3211(a)(1).

BACKGROUND

This action was commenced on October 17, 2002 by filing of the summons and complaint with the County Clerk, Nassau County ("Nassau County action").

A second, later action, captioned Continental Freund, LLC -against- Shell Containers, Inc., NY, was commenced on December 4, 2002 in Supreme Court, Wayne County by filing a summons and complaint with the County Clerk, Wayne County ("Wayne County action").

It is undisputed that the Nassau and Wayne County actions arise from the same transaction. On August 20, 2002, a purchase order and a revised purchase order were issued by "Shell Containers, Inc. NY, a subsidiary of International Business Communications, Inc." to Continental Freund, LLC, a wholly owned subsidiary of Paul T. Freund Corporation ("Freund"), for the manufacture of 180,000 boxes and related components for Wild Turkey liquor.

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Plaintiff in the Nassau County action, International Business Communications, Inc. ("IBC"), alleges that, when the purchase orders were issued, Defendants were advised that the goods were specially designed and manufactured and that the goods had to be delivered timely. IBC further alleges that the some of the goods ordered were not delivered and others were delivered late. As a result of the non-delivery or late delivery, IBC was unable to deliver goods to its customers resulting in damage to IBC.

Plaintiff in the Wayne County action alleges that it manufactured and shipped all of the goods and that Shell Containers, Inc. NY ("Shell Containers") has failed pay to for some of the goods shipped. The complaint seeks damages for goods sold and delivered and on an account stated.

It is unclear what relationship, if any, Continental Paper Box, Co., Inc. d/b/a Continental Paper Box Company ("Continental Box") has to either Freund entity or the transaction at issue in these actions. There is no proof that the summons and complaint has been served on Continental Box.

Freund's defense to the Nassau County action is that it had a contract with Shell Containers. Since IBC was not a party to the contract, it has no standing to bring the action.

IBC counters by arguing that Shell Containers is a trade name used by IBC. IBC is a domestic corporation. Shell Containers was a corporation organized and existing

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pursuant to the laws of the State of Delaware that was authorized to do business in the State of New York. IBC had owned all of the outstanding shares of Shell. In 1995, IBC and Shell merged. The surviving corporation continued to do business as IBC. In that same year, IBC filed a Certificate of Assumed Name with the New York Department of State indicating that IBC would be conducting its business in New York and Nassau Counties under the assumed name of Shell Containers.

IBC asserts that the checks issued as partial payment for the goods were IBC checks.

DISCUSSION

A. Defendants' Motion to Dismiss

CPLR 3211(a)(1) permits the court to dismiss an action on the grounds that “a defense is founded upon documentary evidence.” In order to obtain the dismissal of an action based upon documentary evidence, “the documents relied upon must definitely dispose of Plaintiff’s claim.” (Greenwood Packing Corp. v. Associated Telephone Design, Inc., 140 A.D.2d 303, 305 [2nd Dept., 1988]) and “the documents relied upon must resolve all of the factual issues as a matter of law. (citations omitted).” Weiss v. Cuddy & Feder, 200 A.D.2d 665, 667 (2nd Dept., 1994).

The documentary evidence in this case does not definitely dispose of Plaintiff’s claims or resolve all of the factual disputes as a matter of law. The purchase order which gives rise to the transaction underlying this litigation reflects that Shell Container,

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Inc. NY is a subsidiary of IBC. The checks issued in partial payment were issued by IBC - Shell Container. These documents do not establish a defense to the action as a matter of law.

IBC has further established that Shell is an assumed name used by IBC in connection with its business and that it has properly registered that name with the Secretary of State and the County Clerks in the counties in which it does business using that name.

Freund's argument that General Business Law ("GBL") §130(9) prohibits IBC from maintaining this action is without merit. Section 130(1)(b) requires a corporation doing business using an assumed name to file with the Secretary of State a certificate indicating the assumed name being used, the corporate name, the location at which the business is being transacted and the counties in which the corporation is transacting business under the assumed name. Upon filing an assumed name certificate, GBL §130(5)(b)(2) requires the Secretary of State to transmit to the appropriate county clerks copies of the assumed name certificate.

GBL § 130(5)(a)(1) requires the County Clerk receiving such certificates to keep an alphabetical file of all such certificates. Any business that does not comply with the filing requirements is barred from maintaining an action in its assumed name until the certificate required by the statute has been filed and the statutory fees paid GBL § 130 (9).

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The purpose of GBL §130(9) is to provide protection to the public by providing the public with information regarding the identity of persons conducting business under an assumed name and to prevent deception or confusion. Holiday Point Realty Co., v. Kemper Corp., 118 A.D.2d 545 (2nd Dept. 1986). This allows one dealing with a business to know who will be responsible for the liabilities or obligations of the business. Grand Central Art Galleries, Inc. v. Milstein, 89 A.D.2d 178 (1st Dept. 1982).

Defendant's contention is that it was misled by the purchase order which indicates Shell as a subsidiary of IBC. However, the actual corporate name appears on the purchase order. Furthermore, a check with the County Clerk of Nassau County reveals that the assumed name certificate was properly filed.

IBC has complied with GBL §130. Defendants argument regarding non-compliance with this statute is without merit. IBC is the proper and only party which has the right to maintain the Nassau County action. Shell's corporate existence terminated in 1995 upon its merger into IBC.

B. Plaintiff's Motion to Consolidate

CPLR 602 (a) permits the Supreme Court to consolidate actions pending before the court which involve common questions of law and fact. The parties concede that the Nassau County action and Wayne County action involve common questions of law and fact and should be consolidated or tried jointly. They disagree as to the county in which the trial should be held.

Where actions brought in different counties are joined for the purposes of trial,

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venue of the trial of the should be in the county where the first action was commenced, unless special circumstances are present. Deutsch v. Wegh, 269 A.D.2d 487 (2nd Dept. 2000). The determination of whether special circumstances are present is one addressed to the discretion of the court. Mattia v. Food Emporium, Inc., 259 A.D. 2d 527 (2nd Dept. 1999).

It is undisputed that the Nassau County action was commenced prior to the Wayne County action. Plaintiff in the Wayne County action asserts that the cases should be tried in Wayne County because the calendar in Wayne County is less congested than is the calendar in Nassau County. Calendar congestion is a factor to be considered in determining the venue in which actions pending in different counties should be consolidated. Padilla v. Greyhound Lines, Inc., 29 A.D. 2d 495 (1st Dept. 1968); and Dalen v. Rosenberg, 26 A.D. 2d 829 (2nd Dept. 1966). In support of its argument that the action should be tried in Wayne County, counsel for Plaintiff in the Wayne County action cites statistics showing that over 20,000 actions are pending in Nassau County while only 238 actions are pending in Wayne County. From this, counsel infers that the actions will be tried more quickly if the actions are consolidated in Wayne County.

This action has been assigned to the Commercial Division of the Supreme Court, Nassau County. There is presently no backlog of trial ready cases in the Commercial Division. The Court is scheduling a Preliminary Conference by this order. At the Preliminary Conference, the parties will establish a discovery schedule and will be

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assigned a day certain for trial taking into account the complexity of the case and discovery needs of the parties. In most instances, cases assigned to the Commercial Division are settled or tried within one year of the Preliminary Conference. Therefore, it is likely that this action will be reached for trial as quickly, if not more quickly, than a trial of this matter would in Wayne County.

Since the Plaintiff in Nassau County action is the Defendant in the Wayne County action and vice versa, a joint trial not consolidation is appropriate. See, Siegel, *New York Practice* 3rd §127.

Accordingly, it is,

ORDERED, that the motion of Defendants Paul T. Freund Corporation and Continental Freund, LLP for an order pursuant to CPLR 3211(a)(1) dismissing the Nassau County action is **denied**; and it is further,

ORDERED, that the motion of the Plaintiff International Business Communications, Inc., for an order pursuant to CPLR 602 directing consolidation of the Nassau County action and the Wayne County action is **granted** to the extent of directing joint discovery and a joint trial of those actions in Nassau County; and it is further,

ORDERED, that the County Clerk, Wayne County, upon presentation of a certified copy of this order and upon payment of the necessary fees shall promptly transmit to the County Clerk, Nassau County, the file maintained by the County Clerk, Wayne County for an action captioned Continental Freund, LLC -against- Shell

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Containers, Inc., NY, under Wayne County Index No., 52538; and it is further,

ORDERED, that the caption of this matter is hereby amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

INTERNATIONAL BUSINESS COMMUNICATIONS,
INC. X

Plaintiff,

- against -

Nassau Index No.
16777-02

CONTINENTAL PAPER BOX CO., INC., d/b/a
CONTINENTAL PAPER BOX COMPANY, PAUL
T. FREUND CORPORATION, and CONTINENTAL
FREUND, LLC

Defendants.

_____ X

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

CONTINENTAL FREUND, LLC. X

216 Park Avenue
Palmyra, New York 14522

Plaintiff

- against -

Wayne Index No.
52538

SHELL CONTAINERS, INC., NY,
1981 Marcus Avenue
Lake Success, New York 11042

Defendant

-----X;

and it is further,

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ORDERED, that counsel for the parties shall appear before the Court for a
Preliminary Conference on July 29, 2003 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: Mineola, NY
July 2, 2003



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

JUL 14 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE