

SUPREME COURT
STATE OF NEW YORK ONONDAGA COUNTY

DESTINY USA HOLDINGS, LLC,

Plaintiff,

vs.

Index No. 09-4157
RJI No. 33-09-2178

CITIGROUP GLOBAL MARKETS REALTY CORP.,

Defendant.

SUPREME COURT
STATE OF NEW YORK ONONDAGA COUNTY

CAROUSEL CENTER COMPANY L.P. and
CAROUSEL ENTERPRISES COMPANY L.L.C.,

Plaintiffs,

vs.

Index No. 09-7391
RJI No. 33-09-4315

CITIGROUP GLOBAL MARKETS REALTY
CORP.,

Defendant.

DECISION

SUPREME COURT STATE OF NEW YORK
NEW YORK COUNTY

CITIGROUP GLOBAL MARKETS REALTY
CORP.,

Plaintiff,

vs.

Index No. 603567/09

CAROUSEL CENTER COMPANY L.P. and
CAROUSEL ENTERPRISES COMPANY L.L.C.,

Defendant.

The requests for relief that come before this Court involve three separate actions currently pending in New York State Supreme Court. The first action, *Destiny USA*

Holdings, LLC vs. Citigroup Global Markets Realty Corp. (“the Destiny Action”) is an action that was filed in Onondaga County Supreme Court on June 9, 2009. That action deals with issues between the parties concerning a construction loan for the expansion of the Carousel Mall in Syracuse, New York. As an off-shoot to that action, and on June 12, 2009, the guarantors of that construction loan commenced an action in Supreme Court, Onondaga County, effectively seeking relief from the guarantees based on defendant Citigroup’s alleged breach of the construction loan agreement. These cases have been litigated in Onondaga County, without any apparent objection to venue. This Court granted Destiny USA’s motion for preliminary injunction on July 17, 2009, issuing a lengthy written decision with regard to the issues surrounding the request for preliminary injunction. The Appellate Division, Fourth Department, recently affirmed (as modified) that decision by virtue of its Decision and Order, dated November 13, 2009. At the time of this writing, a motion for leave to appeal to the Court of Appeals has been made by Citigroup, without decision.

The second action, *Carousel Center Company, L.P. and Carousel Enterprises Company, L.L.C. v. Citigroup Global Markets Realty Corp.* (“the Carousel Action”) was commenced by the plaintiffs on November 4, 2009, and seeks declaratory judgment and money damages as a result of an alleged wrongful rejection of Carousel Company’s requests for extension on the Mortgage and Mezzanine loans dealing with Carousel Center Mall. As alleged in the papers before this Court, on November 13, 2009, Citigroup sent notice that the Mortgage and Mezzanine loans would not be extended, confirming the Carousel Company’s allegations that it would do exactly what was alleged in the pleadings of the Carousel Action.

On the same day (the very day that this Court's July 17, 2009 decision in the Destiny Action was affirmed) Citigroup Global Markets Realty Corp. commenced yet another action in Supreme Court, however, in New York County, known as *Citigroup Global Markets Realty Corp. v. Carousel Center Company, L.P. and Carousel Enterprises Company, L.L.C.* ("the Citigroup New York Action"), rather than moving to transfer the venue of the Carousel Action, already pending in Supreme Court, Onondaga County.

The Citigroup New York Action is a "mirror image" of the Carousel Action, and is a declaratory judgment action brought in New York County, seeking, among other relief, a declaratory judgment that the Mortgage and Mezzanine loans were due and payable on January 11, 2010. Citigroup simultaneously moved, by Order to Show Cause, for consolidation of its new action with the Carousel Action pending in Onondaga County, to be venued in New York County. That request for relief was assigned to Honorable James A. Yates, J.S.C., who after hearing oral argument, issued an Interim Decision, deferring any final decision pending the decision in Onondaga County Supreme Court. Judge Yates' Decision and Interim Order, dated December 9, 2009, was delivered to all parties, and it was represented to this Court at oral argument on December 11, 2009, that Judge Yates was deferring to this Court for an initial determination of the issues.

DESTINY AND CAROUSEL'S REQUESTS FOR RELIEF

In this Court's Order to Show Cause, dated November 18, 2009, Destiny and Carousel Companies seek to have this Court enter an Order consolidating all three of the actions together for purposes of discovery and trial, with the venue of these actions being venued in Supreme Court, Onondaga County. The papers submitted to this Court

set forth an array of reasons why consolidation is necessary with regard to all three actions, and why appropriate venue is Supreme Court, Onondaga County.

CITIGROUP'S REQUESTS FOR RELIEF

Citigroup, by virtue of the its Notice of Cross-Motion, dated December 2, 2009, comes before the Court seeking three specific requests for relief. The first is a request for relief pursuant to CPLR §2201 seeking to stay any ruling on the Destiny and Carousel Companies' request for relief pending a decision on the motion to consolidate the Carousel Action and the Citigroup New York Action that was currently pending in Supreme Court, New York County. Alternatively, Citigroup seeks an Order pursuant to CPLR §511 changing the venue of the Carousel Action to New York County, and consolidating the Carousel Action with the Citigroup Action. The papers submitted with such requests include the reasons why such request has been made, including the fact that there is a mandatory provision in the Mezzanine loan documents that requires venue in the Mezzanine loan action to be in New York County. Citigroup also strenuously argues that the Destiny Action should not be consolidated with the Carousel Action and the Citigroup New York Action.

DISCUSSION

The request for relief came before this Court by oral argument on December 11, 2009. At that time, the attorneys for each side in each case had a full and fair opportunity to make argument before this Court.

What became clear from the appearances of the attorneys is that all of the attorneys agreed that the Carousel Action and the Citigroup New York Action should be consolidated for discovery and trial.

Also, at the time of oral argument, it was clear that Judge Yates' Interim Decision and Order mooted Citigroup's first request for relief - a stay of any ruling on the plaintiff's motion pending a decision to consolidate in the Supreme Court, New York County matter. As a result, this Court finds that that request is moot, and denies the request accordingly. It is clear both from the Interim Decision and Order of Judge Yates and the representations of the attorneys for all the parties before the Court on December 11, 2009, that Judge Yates was deferring any decision to this Court.

Thus, it appearing that there was no question of fact or law raised by any of the parties with regard to the consolidation of the Carousel Action and the Citigroup New York Action with regard to consolidation, this Court grants the motions of both parties with regard to consolidation of those actions. Those actions will be consolidated for purposes of discovery and trial accordingly, as the requests for relief are almost mirror images of each other, and each of those actions involve identical questions of law and fact. Therefore, should be tried before a single jury or finder of fact and discovery should proceed jointly as consolidated actions.

Destiny seeks to have, in addition to those two actions consolidated for trial, the Destiny Action consolidated for trial with them. Destiny and Carousel contend that the Destiny, Carousel and Citigroup New York Actions are all related actions, which should be consolidated for trial and venued in Onondaga County. The contention is that the Destiny Action and Carousel Action share common important rules of law, and common

substantial questions of fact, and that they involve related borrowers, the same lender, interrelated loans and agreements that comprise necessary components of an integrated and complex financing package for a single, yet complex, real estate development project. Destiny and Carousel Companies further contend that the Destiny Action and the Carousel Actions involve overlapping legal claims and issues, and that Citigroup's alleged improper conduct in refusing to fund the construction loan (the Destiny Action) and the consequences of that refusal creates a central issue to both the Destiny and Carousel Actions.

Destiny and the Carousel Companies further contend that Onondaga County is a proper venue in which to commence the Carousel Action pursuant to CPLR §502 for a number of reasons: that Carousel Center Company, one of the joined plaintiffs to the Carousel Action is a corporate resident of Onondaga County; that the First-Filed Rule and special circumstances warrant venue of the consolidated actions to be in Onondaga County; that the forum selection clauses do not prevent termination of venue in Onondaga County; and that Citigroup has allegedly waived enforcement of the forum selection clause in the loan agreements as a result of the other actions previously pending in Onondaga County.

This Court has become intimately familiar with the very complex and integrated issues involved in the Carousel/Destiny construction project. This Court has handled a significant number of complex and yet separate law suits dealing with the Carousel and Destiny project, and as a result has become intimately familiar with all of the loan documents and other transaction documents involved with each of those projects. The public policy in favor of judicial economy would seem to mandate - at least in the eyes of

this jurist - that all of the actions be venued in Supreme Court, Onondaga County. By virtue of the other actions, this Court has already become intimately familiar with the facts, circumstances and legal issues central to all three cases. Onondaga County is the corporate residence for Carousel Center Company; if, as a result of any default in the mortgage documents currently before this Court, there is some significant likelihood that a foreclosure would occur, and said foreclosure action must be venued in Supreme Court, Onondaga County. Citigroup has already agreed to venue in the Destiny Action, previously filed and litigated in this Court and the guarantors' action is currently pending in Supreme Court, Onondaga County.

This Court has already issued multiple decisions with regard to various Destiny USA actions and Carousel Center Company actions. The Appellate Division, Fourth Department, has issued no less than six (6) decisions in other interrelated, yet not identical, cases to date dealing with the complex and material issues surrounding the development of the Carousel/Destiny property. Most of the Supreme Court decisions have been authored by this jurist, and there have been thousands and thousands of pages of transcripts, documents, photographs, and other evidence which has been presented to this Court with regard to the nature of the Carousel/Destiny projects, financing, PILOT agreements, Qeze claims, Brownfield claims, tenant claims, and a whole of host of other interrelated issues presented to this Court by virtue of the development of this quasi-public/private project.

The loan documents at issue now, while independent in their own right, were all signed and agreed to on the same date, and the purpose and intent of those loan documents was to assure that there would be adequate financing set in place for the

construction of the initial phase of Destiny. These loan agreements - including the Mortgage, Mezzanine, and Construction Loans, all deal with Citigroup as lender/fiduciary, and are intimately interwoven with each other with regard to definitions, purposes, and intent, all with the purpose of financing the initial Destiny construction. To have any one of the three actions before this Court tried separately would lead to the distinct possibility of inconsistent definitions of critical terms and inconsistent application of the various provisions of each of the separate loan documents.

Consolidation is particularly appropriate for actions arising from the same and/or interrelated contracts and contractual responsibilities. Schwartz v. Environmental Research and Development, Inc., 77 AD2d 852. Indeed, it has been held that complete identity of the parties or issues is not required for consolidation, provided there are some important rules of law and some substantial issues of fact common to both actions. Metropolitan Steel Industries, Inc. v. Perini Corp., 6 Misc.3d 1002(A), 800 NYS2d 350.

In this case, it is quite clear to this Court that given the discovery and disclosure that needs to take place with regard to the issues in all three actions, that there will be multiple interrelated depositions and disclosures of documents that will have reaching affects on each of the actions. Indeed, evidence admissible in one action will be distinctly admissible in all three actions, and the claims and counterclaims are distinctly related and interrelated among all of the actions. Such an integration of issues, facts, discovery, and evidence requires consolidation, even in the face of a venue clause that would otherwise mandate venue in a particular location. *See*, Maigur v. Saratogian, Inc., 47 AD2d 982; JT Mauro, Co., Inc. v. Genesee Valley Group Health Association, 184

AD2d 998; Lynzee Transportation Co. v. Board of Education of the City of New York, 102 Misc.2d 497, 423 NYS2d 572; Deephaven Market Neutral Master Fund, LP v. Schnell, 2007 NY Slip.Op. 34107(U); In Re: Estate of Betlem, 300 AD2d 1026; Boss v. American Express Financial Advisors, Inc., 6 NY3d 242; Trump v. Deutsche Bank Trust Co. Americas, 65 AD3d 1329. While it is true that the Mezzanine loan agreement has a provision that would seem to require venue in New York County, this Court, based on the knowledge of the Carousel/Destiny project, the history of that project, and all of the loan agreements and financing agreements familiar to that project and for all of the reasons set forth above, finds that the case law adequately supports this Court's decision to keep these cases in Supreme Court, Onondaga County, and to order their consolidation for purposes of discovery and trial. *See, Lynzee, supra*; Riverbank America v. Daniel Equities Corp., 205 AD2d 476; LaSala v. E*Trade Securities, LLC, 2005 WL 2848853; Central National Gottesman, Inc. v. M.V. "Gertrude Oldendorf", 204 F.Supp.2d 675; Gardner & North Roofing & Siding Corp. v. Demko, 82 Misc.2d 922; Syracuse Plaster v. Agostino Brothers Building Corp., 169 Misc. 564.

Based on all of the above, and based on the papers submitted to this Court, as well as all of the other lawsuits previously before this Court on the Carousel/Destiny matters, the circumstances and legal issues in the Carousel Action, New York Action, and Destiny Action this Court finds that the actions cannot and should not be split. The actions should be consolidated for purposes of discovery and trial, particularly when there are multiple debt/equity tests, debt/income tests, and a multitude of other similar issues which are consistent and pervasive through all three actions. For purposes of judicial economy, it is clear that these cases should be consolidated and be venued in

Supreme Court, Onondaga County. That alone is reason enough to venue these matters, as consolidated, in Onondaga County. In addition, however, there is enormous public interest at stake with regard to the Destiny/Carousel Actions, which again supports a finding that the matters, as consolidated, should be venued in Onondaga County.

Due to the integrated nature of the loan agreements at issue, the complexity of the financing and construction arrangements, the public interest involved, and for issues of significant judicial economy, this Court determines that the consolidated cases of all three actions shall be venued in Onondaga County.

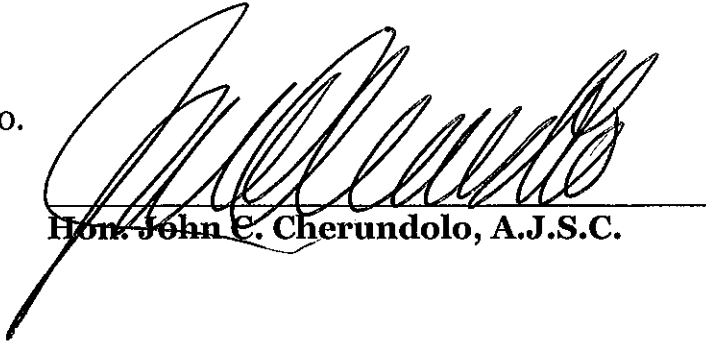
CONCLUSION

Based on all of the above, this Court hereby GRANTS Destiny/Carousel's motion to consolidate all of the above-named actions for purposes of discovery and trial, and this Court further GRANTS Destiny/Carousel's request that the venue of the actions be in Onondaga County. This Court further DENIES Citigroup's request to stay any ruling on these motions pending a decision on the motion to consolidate pending in Supreme Court, New York County, before Judge Yates, as that request is now moot given Judge Yates' Interim Decision and Order. This Court further DENIES Citigroup's motion to change the venue of the Carousel Action to New York County. This Court, in part, GRANTS Citigroup's motion to consolidate the Carousel and Citigroup Actions, but DENIES their request to separate those actions from the Destiny Actions. All actions should proceed through discovery and be tried together as one consolidated action, and the trial is ordered to take place in Onondaga County.

The attorneys for Destiny/Carousel are hereby directed to prepare the appropriate Order consistent with the terms and conditions of this Decision, and are

further directed to attach a copy of this Decision and incorporate same with that Order, and submit such Order to the Court, upon notice to the attorneys for Citigroup forthwith.

DATED: January 19, 2010.



Hon. John E. Cherundolo, A.J.S.C.