

CK's Supermarket Limited v Peak Entertainment Holdings, Inc.

2006 NY Slip Op 30084(U)

July 20, 2006

Supreme Court, New York County

Docket Number: 0600426/0426

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOWE, III
Justice

PART 56

CK Supermarket Limited

INDEX NO. 600426/04

MOTION DATE 6/12/04

- v -

MOTION SEQ. NO. 001

Peal Entertainment Holdings

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

AUG 01 2006

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 7/21/06

HON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
CK'S SUPERMARKET LIMITED,

Plaintiff,

Index No. 600426/06

-against-

PEAK ENTERTAINMENT HOLDINGS, INC.,

Defendant.

-----X
HON. RICHARD B. LOWE, III:

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Defendant Peak Entertainment Holdings, Inc., ("Peak") moves pursuant to CPLR 3211(a) for an order dismissing the action on the grounds that: (1) the court lacks jurisdiction over the defendant; (2) improper service; (3) failure to state a cause of action; and (4) forum non conveniens.

Background

On or about July 10, 2002, plaintiff advanced to an entity known as Jusco UK Limited ("Jusco") the sum of 150,000 pounds to be repaid within 6 months. Jusco defaulted on repayment of the loan. On February 7, 2004, Peak, a Jusco subsidiary, guaranteed the obligations of Jusco to the plaintiff and plaintiff granted Jusco an additional three months from May 31, 2004 to repay the loan.

Jusco again failed to repay the loan and plaintiff now seeks repayment in the amount of \$376,482.00 by virtue of the written guarantee.

Plaintiff is a United Kingdom corporation that maintains offices in the United Kingdom. Defendant is a United Kingdom corporation that maintains offices in the United Kingdom. Jusco

is a United Kingdom corporation that maintains offices in the United Kingdom. Plaintiff served defendant via a designated resident agent in Nevada.

Peak moves to dismiss the action alleging a lack of jurisdiction and forum non conveniens.

Discussion

Lack of Jurisdiction

A non-domiciliary will be subject to jurisdiction under New York's long arm statute where he/she transacts any business within the state or contracts anywhere to supply goods or services in the state. (CPLR 302(a)(1)).

Defendant does not maintain offices in New York. This is established by the affidavit of its officer, Phil Ogden. Plaintiff, however, argues jurisdiction is present because the contract was negotiated by Peak's counsel who is located in New York.

An attorney's activities on behalf of its client is attributable to the client for purposes of conferring jurisdiction upon that non-resident client (*Modern Computer Corp v Ma*, F. Supp 938 [EDNY 1995]). However, jurisdiction over a non resident defendant will not be found when a contract is negotiated in New York, yet signed outside the state (*Glassman v Hyder*, 23 NY2d 354, 363 [1968]). The contract may have been negotiated in New York, however, defendant through the Ogden affidavit, establishes that all dealings between Plaintiff and Jusco occurred in the United Kingdom (Ogden Aff., March 2006). At oral argument, plaintiff's counsel conceded that the agreement was signed by both parties in the United Kingdom. Accordingly, mere negotiation of the contract by defendant's attorney in New York is not sufficient to confer jurisdiction.

BCL § 1312

Plaintiff fails to address Defendant's argument that CK has no meaningful ties to New York and, in fact, is doing business in the United Kingdom. Plaintiff even seems to acknowledge this in the affidavit of its managing director which states, "the plaintiff, which is based in Great Britain, has gone to the trouble of bringing suit in New York . . . if anyone is inconvenienced by bringing this action in New York, it is CK . . ." (Kiley Aff ¶ 8, May 5, 2006). A review of the complaint reveals only that "CK Supermarket Limited is, and at all material times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the United Kingdom" (Complaint ¶ 1). Business Corporation Law §1312 holds that a foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation is authorized to do so. Therefore, plaintiff has failed to establish that it is authorized to do business in New York and the complaint should be dismissed on these grounds as well.

Forum Non Conveniens

In determining whether to dismiss for forum non conveniens grounds, the Court must determine whether the defendant will be subject to undue hardship if required to litigate in the forum selected by the plaintiff (*Islamic Republic of Iran v Rhlavi*, 62 NY2d 474 [1984]). The burden rests upon the defendant challenging the forum to demonstrate relevant factors which militate against the court retaining jurisdiction (*Id.*). Among the factors to be considered is the burden on New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (*Id.*). The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case (*Id.*).

New York has no connection to the subject transactions at issue. In the matter at bar, it has been established that defendant signed the contract in the United Kingdom, defendant maintains offices in the United Kingdom and has no offices in the New York, and that it otherwise does not maintain a substantial presence in New York. Furthermore, the activities surrounding the breach of the guarantee took place in the United Kingdom. Plaintiff's representatives, as well, reside in the United Kingdom. Lastly, defendant has conceded that it will consent to jurisdiction in the United Kingdom, should suit be brought.

Therefore, this court finds that the matter is appropriately dismissed on forum non conveniens grounds.

Conclusion

Accordingly, based on the foregoing, the motion to dismiss is granted and the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the complaint in its entirety, with costs and disbursements to defendant as taxed by the Clerk.

Dated: July 20, 2006

ENTER

 HON. RICHARD B. LOWE, III
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