

Bristol Invest. Fund Ltd. v ID Confirm, Inc.

2008 NY Slip Op 30128(U)

January 14, 2008

Supreme Court, New York County

Docket Number: 0600540/2007

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART _____

Index Number : 600540/2007
BRISTOL INVESTMENT FUND LTD.

INDEX NO. _____

vs
ID-CONFIRM INC.

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered _____ in this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

JAN 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/14/08

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

BRISTOL INVESTMENT FUND LTD.,

Plaintiff,

-against-

ID CONFIRM, INC.,

Defendant.
-----X

Decision/Order

Index No.: 600540/07

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's motion [dismiss] w/TAB affid in support, memo	1
Pltf's cross mtn [sanc] & affid in opp (AW) w/exhs, memo	2
Def's reply & affid in opp (TAB) w/exhs, memo	3

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

The underlying action is for breach of contract in connection with the sales of certain securities. This is defendant's pre-answer motion to dismiss for lack of both subject matter and personal jurisdiction. CPLR § 3211 (a). Plaintiff opposes the motion and cross moves for costs and sanctions.

Defendant is a foreign corporation, organized under the laws of Nevada, with its principal place of business in Denver, Colorado. Plaintiff is also a foreign corporation, organized under the laws of the Cayman Islands, with its principal office in George Town, Grand Cayman Islands.

Most of the relevant facts are undisputed or are established by documentary evidence. On October 27, 2005, defendant issued and sold to certain purchasers

securities pursuant to a Securities Purchase Agreement (the "Agreement"). Plaintiff was one such purchaser. Pursuant to the Agreement, defendant received gross proceeds of \$2,428,000 and issued \$2,890,476 of convertible debentures, convertible into 4,817,460 shares of common stock at the option of the debenture holder (the "transaction"). As part of the transaction, plaintiff received from defendant a debenture in the principal amount of \$250,000 and warrants to purchase 843,170 shares of common stock pursuant to the closing of the private placement on November 14, 2005.

Plaintiff contends that the transaction had substantial connections to New York. It is undisputed that the closing of the transaction took place in New York at the offices of Feldman Weinstein LLP ("Feldman Weinstein"), located at 420 Lexington Avenue, Suite 2620. Affixed to the Agreement were numerous exhibits, including the following: [1] Senior Secured Convertible Debenture (the "Debenture Agreement"); [2] Registration Rights Agreement; [3] Common Stock Purchase Warrant; [4] Security Agreement; [5] Subsidiary Guarantee; and [6] Short Term Common Stock Purchase Warrant.¹ The Agreement and the exhibits are defined as the transaction documents. Defendant claims that the "Debenture Agreement was neither signed nor negotiated in New York. " The transaction documents were filed with the SEC as part of defendant's October 27, 2005 Form 8-K.

The parties specifically agreed to a New York choice of law and forum selection clause in the Agreement, which provides as follows:

¹ Defendant, in its motion papers, has attached a copy of the Senior Secured Convertible Debenture, impliedly claiming that this document governs the transaction. However, this document is an exhibit to the Agreement.

5.9 Governing Law. All questions concerning the construction, validity, enforcement and interpretation of the Transaction Documents shall be governed by and construed and enforced in accordance with the internal laws of the State of New York... Each party agrees that all legal proceedings concerning the interpretations, enforcement and defense of the transactions contemplated by this Agreement and any other Transaction Documents... shall be commenced exclusively in the state and federal courts sitting in the City of New York. Each party hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts sitting in the City of New York, borough of Manhattan for the adjudication of any dispute hereunder or in connection herewith or with any transaction contemplated hereby or discussed herein (including with respect to the enforcement of any action or proceeding, any claim that it is not personally subject to the jurisdiction of any such court, that such suit, action or proceeding is improper or inconvenient venue for such proceeding. Each party hereby irrevocably waives personal service of process and consents to process being served in any such suit, action or proceeding by mailing a copy thereof via registered or certified mail or overnight deliverY0 to such part at the address in effect for notices to it under this Agreement and agrees that such service shall constitute good and sufficient service of process and notice thereof" (hereinafter referred to as the "Governing Law provision").

The Governing Law provision is also contained in several of the transaction documents, including the Debenture Agreement.

Defendant now moves to dismiss the complaint on jurisdictional grounds.

Defendant states that it is not authorized to do business in New York, has not transacted or solicited business in New York, nor does it have offices, employees, agents or bank accounts in New York. Defendant maintains that "[t]he only connection between the Debenture [Agreement] and New York State is the " 'Governing Law' provision." Defendant argues that the Debenture Agreement "is legally insufficient, standing alone, to subject [it] to the jurisdiction of the court." Defendant also claims that this action does not fall under any of the categories authorized under BCL § 1314(b), and therefore, "this court does not have subject matter jurisdiction over this dispute." Defendant additionally argues that as a matter of public policy, this court should not

enforce the forum selection clause contained in the Agreement because plaintiff's damages are less than \$1 million.

Plaintiff opposes the motion and cross moves for costs and sanctions. Plaintiff claims that BCL § 1314(b) does not apply, but rather, this case falls within CPLR R 327(b), GOL §§ 5-1401, 5-1402, "because this action arises out of a financing far in excess of \$1 million, the parties agreed that New York law would govern the transaction, and the parties specifically agreed to litigate any dispute regarding the transaction in New York."

With respect to the cross motion for costs and sanctions against defendant, plaintiff claims that defendant has acted with bad faith in that defendant's motion is not only frivolous, but relies on "perjurious statements."

Discussion

Under New York law, forum-selection clauses are *prima facie* valid. British West Indies Guar. Trust Co., Ltd. v. Banque Internationale a Luxembourg, 172 A.D.2d 234 (1st Dept. 1991). CPLR § 501 explicitly authorizes parties to select venue by means of a pre-litigation contractual provision with only one exception to the parties' freedom of choice: where a change of venue is necessary to insure an impartial trial. CPLR § 510(2).

GOL § 5-1402(1) provides contains a statutory mandate that a clause designating New York as the forum "shall" be enforceable, in cases involving \$1 million or more, regardless of any inconvenience to the parties. This action clearly arises out of a transaction covering, in the aggregate, more than \$1 million. Defendant argues that the proper analysis under GOL § 5-1402 is the amount in dispute, as opposed to

the aggregate value of the transaction. This argument conflicts with the unambiguous statutory language and is rejected by the court. Because plaintiff's claims arise from the Agreement to sell securities totaling in excess of \$1 million, the requisite amounts of both §§ 5-1401 and 1402 have been met. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 690 N.Y.S.2d 57 (1st Dept. 1999); see also Cambridge Nutrition A.G. v. Fotheringham, 840 F.Supp. 299 (S.D.N.Y., 1994).

Moreover, while "fraud, undue influence, or overweening bargaining power" might provide a basis for refusing to enforce a forum selection clause, defendants have not even claimed the existence of any such circumstances. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12-13 (1972); see also DeSola Group, Inc. v. Coors Brewing Co., 199 A.D.2d 141 (1st Dep't 1993). Therefore, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power ... should be given full effect" unless "the party seeking to escape his contract [is able] to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." M/S Bremen v. Zapata Off-Shore Co., *supra* at 12-13.

As to personal jurisdiction, defendant has specifically consented to personal jurisdiction over it in the courts of New York, by virtue of the Governing Law provision, and thereby waived any basis to dispute New York's jurisdiction. See, e.g. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 690 N.Y.S.2d 57 (1st Dept. 1999).

Defendant's reliance on Farrell v. Piedmont Aviation, Inc., 411 F.2d 812 (2d Cir. 1969) is wholly misplaced. Farrell involved New York administrators of estates of nonresidents who sought to attach liability policies of defendants over whom New York

could not assert personal jurisdiction. Farrell is inapplicable here; this is a breach of contract action and defendant contractually chose New York as a forum for any dispute arising under the same contract.

Defendant's remaining arguments are equally without merit. This court's jurisdiction is not based on CPLR § 302, therefore, it is of no moment whether defendant has any other ties to New York.

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false. Here, defendant's position is legally unsupportable and cannot be supported by any reasonable extension of law. The controlling contract and applicable statute make it abundantly clear that this court has jurisdiction. This motion has resulted in a waste of the court and plaintiff's respective resources.

Accordingly, defendant's motion to dismiss is hereby denied in its entirety and plaintiff's cross motion for costs and sanctions is hereby granted to the extent that the issue of what sanctions plaintiff may reasonably recover from defendant shall be referred to a Special Referee to hear and report. Plaintiff shall serve a copy of this order on the Office of the Special Referee, 60 Centre Street, Room 119.

Defendant shall serve his answer within twenty (20) from the date of this decision and order. Plaintiff may reply within the time provided by the CPLR.

This matter is hereby scheduled for a preliminary conference on March 13, 2008 at 9:30 a.m. in Part 10, 80 Centre Street, Room 122.

This shall constitute the decision and order of the Court.

Dated: New York, New York
January 14, 2008

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
JAN 16 2008
COUNTY CLERK'S OFFICE
NEW YORK