

**McGuire v W.R. Schmidt L.L.C.**

2009 NY Slip Op 32072(U)

September 1, 2009

Supreme Court, Nassau County

Docket Number: 18845-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----x  
**MICHAEL MCGUIRE,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 18845-08**

**W.R. SCHMIDT L.L.C., WILLIAM R. SCHMIDT  
and VIRGINIA H. MOORE,**

**Motion Seq. No: 2  
Submission Date: 7/2/09**

**Defendants.**

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**The following papers having been read on this motion: <sup>1</sup>**

- Notice of Motion, Affidavits in Support (2),**
- Affirmation in Support and Exhibits.....x**
- Affirmation, Affidavit in Opposition and Exhibits.....x**
- Plaintiff's Memorandum of Law in Opposition.....x**
- Reply Affidavit(s), Reply Affirmation and Exhibits.....x**

This matter is before the Court for decision on the motion by Defendants W.R. Schmidt L.L.C., William R. Schmidt and Virginia H. Moore, filed February 23, 2009 and submitted July 2, 2009, seeking dismissal of this action pursuant to CPLR §§ 3211(a)(2) and (8) or, alternatively, pursuant to CPLR § 327(a). The Court dismisses this action pursuant to CPLR § 327(a), pursuant to the doctrine of *forum non conveniens*, concluding that North

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<sup>1</sup> In addition to the listed submissions, the Court received a letter from Plaintiff's counsel dated May 7, 2009, advising the Court that the case of *Bogal v. Finger*, which Defendants cited in their moving papers, was reversed by the Appellate Division in a decision dated February 24, 2009.

Carolina is a more appropriate forum for this litigation.

### BACKGROUND

#### A. Relief Sought

Defendants W.R. Schmidt L.L.C. (“LLC”), William R. Schmidt (“Schmidt”) and Virginia H. Moore (“Moore”) move for an Order 1) dismissing this action for lack of subject matter and personal jurisdiction, pursuant to CPLR §§ 3211(a)(2) and (8); or 2) dismissing this action, pursuant to CPLR § 327(a), on the basis of *forum non conveniens*.

Plaintiff Michael McGuire (“McGuire”) opposes Defendants’ motion.

#### B. The Parties’ History

In support of their motion, Defendants provide Affidavits of Schmidt and Moore. Schmidt affirms the following:

Schmidt has resided in North Carolina since 1996. He and Moore, his wife, are the sole members of LLC, a general contracting company that was formed in North Carolina in 1998. Schmidt provides documentation from the North Carolina Department of the Secretary of State confirming the date of LLC’s formation in North Carolina.

Schmidt submits that he has no connection to the State of New York, as demonstrated by his affirmation that 1) he does not own or lease any real or personal property in New York; 2) he has no interest in any company formed or doing business in New York; 3) he does not maintain any office, telephone number or post office box in New York; 4) LLC does not own or lease any real or personal property in New York; 5) LLC is not authorized to conduct business in New York; 6) LLC has no interest in any company formed or doing business in New York; 7) LLC does not maintain any office, telephone number or bank account in New York; and 8) LLC does not advertise or solicit business in New York.

Schmidt and Moore have known McGuire for approximately 25 years. In the summer of 2004, after visiting other friends in South Carolina, McGuire visited Schmidt and Moore in North Carolina. During that visit, McGuire met with a salesperson of the St. James Plantation development (“Development”) regarding the acquisition of undeveloped land or a home in that Development. In September 2004, McGuire sent to Schmidt the floor plan of a home in Leland, North Carolina, that McGuire liked.

Between 2004 and 2006, McGuire visited Schmidt and Moore several times and

discussed his desire to retire to the Development. During 2005 and 2006, McGuire contacted Schmidt several times to discuss his proposed retirement to North Carolina.

In 2006, McGuire advised Schmidt that he had inherited approximately \$800,000 and retired shortly thereafter. It is Schmidt's belief that McGuire sold his home, located in Glen Cove, New York, shortly thereafter. During 2006 and 2007, McGuire traveled to North Carolina several times and stayed with Schmidt and Moore, and again mentioned his interest in retiring to North Carolina.

Schmidt and Moore own a vacant parcel of land in the Development ("Property") that they purchased in 1998. In March 2007, while McGuire was in North Carolina, he asked Schmidt and Moore to sell him the Property for \$120,000 and they agreed. At the same time, McGuire asked Schmidt to build McGuire a new home on the Property and Schmidt, on behalf of LLC, agreed.

On April 13, 2007, at Schmidt and Moore's home in North Carolina, Schmidt, on behalf of LLC, and McGuire signed a commitment letter ("Commitment") regarding LLC's agreement ("Agreement") to build a home on the Property. Schmidt and McGuire agreed, on that date, that LLC would build a home on the Property for cost plus 13%. Schmidt provides a copy of the Commitment, which states that it is an "informal letter of commitment" between McGuire and Schmidt for LLC and that it is "for the benefit of both parties to commit to build a home on [the Property site]." Schmidt and McGuire signed the Commitment on April 13, 2007. The Commitment does not contain any price terms.

In paragraph 24 of the verified complaint ("Complaint"), McGuire alleges that Schmidt and Moore attended a celebration in New York at the Glenwood Fire Department ("New York Visit") in or about May 2007 that McGuire also attended. McGuire alleges that, during the New York Visit, the parties finalized the specifics of the Agreement, and Defendants said that they would begin construction of McGuire's home in accordance with the figures that the parties discussed in March 2007, and with plans that Plaintiff had purchased. Schmidt disputes McGuire's allegation that the Agreement was finalized at the New York Visit. Schmidt submits that his New York Visit was unrelated to Schmidt and, although Schmidt and McGuire discussed the Agreement during the New York Visit, the Agreement had been finalized in North Carolina in March and April 2007.

In May 2007, McGuire opened a checking account in a North Carolina bank and deposited \$439,000 into that account. McGuire authorized LLC to withdraw funds from that account as work on the Property progressed. After construction began, McGuire stayed with a friend in North Carolina and visited the Property site nearly every day.

In early 2008, McGuire advised Schmidt that, due to medical issues and his doctors' location in New York, he had reservations about leaving New York. McGuire did not, however, cancel the project.

Later in 2008, McGuire flew to North Carolina to check on construction at the Property. He then advised Schmidt and Moore of his desire that the project be completed, and requested design changes including expensive upgrades. Schmidt and Moore reiterated to McGuire, as they had done since LLC began the project, that his continued requests for changes would increase the price of construction. McGuire replied that he did not care because he "loved the house" and could afford the construction.

In later summer or early fall 2008, McGuire called Moore from New York and told her that he could not afford the house. McGuire asked Moore whether she and Schmidt would buy the house from him, as McGuire's investments had dropped in value, and Moore replied that they would not. At that point, McGuire owed LLC \$200,000 on the house. The parties did not discuss the matter further and McGuire filed the Complaint on or about October 14, 2008.

By letter dated January 30, 2009, Ward and Smith, P.A., a North Carolina law firm representing Defendants, notified Plaintiff's counsel that the closing on the Property was scheduled on February 13, 2009 at 9:00 a.m., Defendants were prepared to convey title, and Plaintiff would be required to pay \$266,510.54, representing the balance of the purchase price, at the closing. Plaintiff did not attend the closing and has not paid Defendants the balance of the money he owes them.

In further support of Defendants' contention that this matter should be litigated in North Carolina, Schmidt affirms that LLC employed approximately forty four (44) subcontractors and suppliers in building the house, all of whom are located in North Carolina. Moreover, on February 6, 2009, Plaintiff commenced a related action against Defendants in Brunswick County, North Carolina, and filed a *lis pendens* in North Carolina in connection with the North Carolina action.

Moore reaffirms many of Schmidt's allegations, and also affirms that 1) she did not attend the celebration in New York to which Schmidt refers; 2) that celebration in fact occurred on June 16, 2007, not May 2007 as Schmidt alleges; and 3) all of Moore's conversations with Schmidt regarding the Property took place in North Carolina.

In support of his opposition to Defendants' motion, Plaintiff provides an Affidavit of McGuire in which he affirms:

The parties reached an agreement in Glen Head, New York, following numerous telephone calls to each other between March and June 2007. McGuire avers that it was during the parties' conversation in Glen Head that the parties agreed on the time frame, materials and cost of the project. He also affirms that an individual named William Basdavanos heard this conversation, but does not provide an affidavit from Mr. Basdavanos.

With respect to the Commitment, McGuire avers that Schmidt mailed that document to McGuire in New York, where McGuire signed it and returned it to Schmidt. McGuire also affirms that he signed the Commitment after May 2007, but that he did not place the handwritten notation "4-13-07" on the Commitment. McGuire also "question[s] the validity of the purported [Commitment]," affirming that he contracted with LLC, not "Schmidt Builders," the entity listed on the Commitment, but does not dispute that he signed it.

McGuire also disputes Schmidt's affirmation regarding McGuire's discussion of an inheritance. McGuire affirms that the friend from whom he inherited money passed away in 2006, not 2007, but McGuire was not able to collect his inheritance until June 2007. McGuire, however, concedes that he did receive an inheritance in May or June 2007, at which time he decided to commit to the project with Defendants.

McGuire also submits that Defendants are "downplaying their New York contacts in an effort to evade jurisdiction." Specifically, McGuire contends that 1) Schmidt uses his standing as a Long Island fireman to solicit retirees to North Carolina; 2) Schmidt has negotiated with certain Long Island fire departments to secure equipment, vehicles and supplies for his newly-formed fire department in Saint James, North Carolina; 3) during the Project's sixteen (16) month construction period, Schmidt and his agents regularly telephoned and sent correspondence to McGuire in New York; and 4) Michael Maher ("Maher"), Schmidt's personal financial advisor, would testify at trial that he received a call at his Garden City, New York office from

Schmidt in October 2008, directing Maher to initiate a \$170,000 wire transfer from McGuire's account to North Carolina.

McGuire also disputes Defendants' description of the frequency with which McGuire visited North Carolina, affirming that he did not reside in North Carolina for the duration of the project and describing his stay in Sunset Beach [North Carolina] as "marginal in comparison to the 16 month period of construction." He also avers that he and Schmidt never had conversations regarding proposed upgrades, or the cost of different changes that McGuire requested.

McGuire also takes issue with Defendants' contention that McGuire has chosen North Carolina as a forum for this litigation. McGuire submits that he filed the action in North Carolina so that he could "domesticate" a *lis pendens* in Brunswick County, North Carolina, and in response to Defendants' *ex parte* removal of the original *lis pendens* that was filed concurrently with the matter *sub judice*.

McGuire also disputes Defendants' claim that most of the witnesses to this matter are located in North Carolina, submitting that he (McGuire) never contracted with any of the witnesses that Defendants mention in their moving papers. Moreover, much of the documentation related to the Project is in New York as a result of Defendants' forwarding that documentation to New York in October 2008. McGuire submits that this documentation establishes the cost of the construction, thereby "mitigating" the need for live testimony. He contends, further, that these North Carolina witnesses have no first hand knowledge of whether the parties agreed to a price based on a per-square-foot rate, or percentage of cost approach, which is a central dispute in this litigation.

Finally, McGuire submits that the Defendants will suffer no greater hardship by litigating this matter in New York than McGuire would suffer if the litigation were transferred to North Carolina. McGuire avers that Defendants have family members who live on Long Island, apparently suggesting that they would have accommodations if they had to stay in New York during the trial.

### C. The Parties' Positions

Defendants, who are North Carolina residents, seek dismissal of this action based on a lack of personal jurisdiction over them. Specifically, Defendants submit that there is insufficient

evidence that they transact any business within New York, or contract anywhere to supply goods or services within New York, and thus Defendants have insufficient minimum contacts to warrant the exercise of long-arm jurisdiction over them.

Alternatively, Defendants seek dismissal of the action based on a lack of subject matter jurisdiction, submitting that New York may not determine the rights and obligations regarding property located outside New York. As Plaintiff seeks relief including specific performance, declaratory judgments and constructive trusts regarding the Property which is located in North Carolina, a New York court may not make those determinations.

Finally, Defendants submit that the Court should dismiss this action based on the doctrine of *forum non conveniens*. Defendants contend that the facts that 1) numerous witnesses reside in North Carolina; 2) Plaintiff has commenced an action against the same Defendants in North Carolina; 3) the Property is located in North Carolina; 4) many, if not all, of the negotiations took place in North Carolina; 5) all Defendants reside in North Carolina; and 6) there is a lack of nexus between New York and the Property in dispute, militate in favor of litigating this matter in North Carolina.

Plaintiff opposes Defendants' motion to dismiss for lack of personal jurisdiction, submitting that Plaintiff's sworn allegations that 1) the parties negotiated material terms of the contract in New York; 2) Defendants contacted Plaintiff and his agent in New York during the course of the negotiations; and 3) Defendants use New York as a platform to secure other employment and opportunities, provide a sufficient nexus between Defendants and the state of New York to exercise personal jurisdiction over them.

Plaintiff also opposes Defendants' motion to dismiss for lack of subject matter jurisdiction, submitting that a New York court with jurisdiction over the parties may preside over a suit for specific performance or a trust involving land in another state or county.

Finally, Plaintiff opposes Defendants' motion to dismiss on the ground of *forum non conveniens*, submitting that 1) the North Carolina witnesses to whom Defendants refer can only serve to corroborate documentary evidence that is now located in New York; 2) the North Carolina witnesses have no personal knowledge regarding the price terms which, Plaintiff submits, are at the crux of the parties' dispute; and 3) Plaintiff filed the action in North Carolina solely in response to Defendants' allegedly unilateral removal of Plaintiff's initial *lis pendens*.

In light of the foregoing, Plaintiff submits that Defendants have not met their burden of demonstrating that dismissal on the basis of *forum non conveniens* is appropriate.

#### RULING OF THE COURT

The Court concludes that dismissal of this action is appropriate pursuant to CPLR § 327(a), on the basis that North Carolina is the more appropriate forum for this litigation.

The doctrine of *forum non conveniens* permits a court that has jurisdiction over the parties and the claim nevertheless to dismiss the action when the court believes that, in the interest of substantial justice, the action should be heard in another forum. *Sarfaty v. Rainbow Helicopters*, 221 A.D.2d 618, 618-619 (2d Dept. 1995), CPLR § 327(a). The burden rests on the defendant challenging the forum to demonstrate that private or public interests militate against litigation going forward in this State. *Sarfaty*, 221 A.D.2d at 619, quoting *Stamm v. Deloitte & Touche*, 202 A.D.2d 413 (2d Dept. 1994). Among the factors that the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden that will be imposed on the New York courts, with no one single factor controlling. *Sarfaty*, 221 A.D.2d at 619. This determination is within the discretion of the trial court. *Koutras v. Lacorazza*, 248 A.D.2d 514 (2d Dept. 1998). All of these factors weigh in favor of a determination that North Carolina is the more appropriate forum for this case.

First, although Plaintiff resides in New York and Defendants reside in North Carolina, the Court concludes that Plaintiff has a more compelling connection to North Carolina than Defendants have to New York. Plaintiff expressed and acted on his desire to move to North Carolina. By contrast, Defendants' contact with New York is limited to having friends and relatives whom they speak to and visit from time to time.

Second, there is clearly an alternative forum, as Plaintiff has filed an action against Defendants in North Carolina. Notwithstanding Plaintiff's position that he filed that action in response to Defendants' removal of the *lis pendens* in New York, there exists a viable action in North Carolina.

Third, the situs of the underlying action is undoubtedly North Carolina, as this dispute involves property located in North Carolina. Although Plaintiff submits that the details of his contract with Defendants were finalized in New York (an allegation that remains seriously in

dispute), the contract involved the construction of a home in North Carolina. Thus, this factor favors litigation of this matter in North Carolina.

With respect to the potential hardship to witnesses, *Brinson v. Chrysler Financial*, 43 A.D.3d 846 (2d Dept. 2007) is instructive. In *Brinson*, the Court reversed the trial court's order denying defendant's motion to dismiss the complaint, pursuant to CPLR § 327, on the ground of *forum non conveniens*. *Id.* *Brinson* involved a lawsuit arising out of plaintiff's involvement in a single-vehicle accident in North Carolina. The plaintiff produced a North Carolina driver's license after the accident, and provided the police at the accident scene with a North Carolina address. He later executed a written statement listing his address as a location in North Carolina and his business address as a location in Staten Island, New York. Plaintiff received medical treatment in North Carolina, the damaged vehicle was towed from the scene by a North Carolina company and repaired by another North Carolina company, and Plaintiff purchased another vehicle in North Carolina after the accident, providing a North Carolina address during that purchase. *Id.* at 847.

The plaintiff in *Brinson* commenced an action in Richmond County, New York, alleging that he was a resident of that county and that the accident was caused by a defect in the vehicle. *Id.* Defendant moved to dismiss the complaint on the ground of *forum non conveniens*, submitting that North Carolina was the more convenient forum in light of the North Carolina witnesses including police personnel, emergency service workers and physicians for whom travel to New York would constitute a hardship. *Id.* The plaintiff opposed the motion, submitting in a conclusory manner that 1) he was a New York resident and operated a business in New York; and 2) injuries that he suffered in the accident would make travel to North Carolina a hardship for him. *Id.* at 847-848. The Second Department reversed the trial court's denial of defendant's motion to dismiss, concluding that given the "questionable dual residency of the plaintiff," the action's "marginal nexus" to New York, the presence of numerous essential nonparty witnesses in North Carolina and plaintiff's conclusory opposition papers, the trial court improvidently exercised its discretion in denying defendant's motion. *Id.* at 848.

Here, the parties' dispute involves issues including 1) where they finalized the terms of their agreement; 2) whether Plaintiff requested certain upgrades; and 3) whether Defendants warned Plaintiff about the costliness of those proposed upgrades. The North Carolina witnesses

may well be able to provide testimony about whether those upgrades were, in fact performed. They may also have personal knowledge of the parties' conversations regarding those upgrades, which might bear on the parties' respective credibility on one or more of these issues and, therefore, on their overall credibility. Moreover, Defendants are not required to consent to the introduction of documentary evidence, which is allegedly in New York, in lieu of calling live witnesses to testify to relevant matters. Thus, the presence of this documentation in New York is not dispositive of this issue.

Under all the circumstances, the Court concludes that this matter should be litigated in North Carolina, and grants Defendants' motion to dismiss pursuant to CPLR § 327(a).

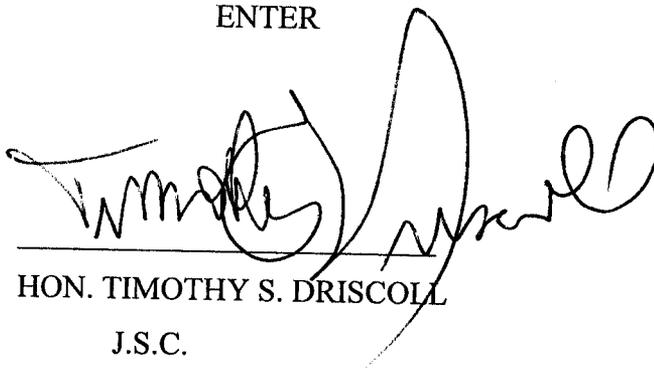
In light of the Court's determination, the Court declines to reach the issues of whether the court has personal jurisdiction over the Defendants and/or subject matter over the action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY  
September 1, 2009



HON. TIMOTHY S. DRISCOLL  
J.S.C.

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**ENTERED**  
SEP 04 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE