

Noah's Ark Processors, LLC v Parente

2011 NY Slip Op 31333(U)

May 6, 2011

Supreme Court, Nassau County

Docket Number: 12835-10

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
**NOAH'S ARK PROCESSORS, LLC; NOAH'S ARK
HOLDING COMPANY, LLC and TOTAL CORPORATE
RESOURCES II, LLC,**

Plaintiffs,

-against-

**ILAN PARENTE; THE PARENTE FAMILY LIMITED
PARTNERSHIP; DAWSON PARTNERS, LLC; GOLDEN
WEST GLATT CATTLE COMPANY; GOLDEN WEST
TRADING INC., TEVA MEATS, LLC; and JOHN DOE
COMPANIES 1-10, the name of which are currently
unknown to Plaintiffs,**

Defendants.

**TRIAL/IAS PART: 20
NASSAU COUNTY**

**Index No: 12835-10
Motion Seq. No: 1
Submission Date: 3/15/11**

-----X
The following papers having been read on this motion:

- Notice of Motion.....X**
- Affirmation in Support.....X**
- Amended Affirmation in Support.....X**
- Exhibits A through D.....X**
- Memorandum of Law in Support.....X¹**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Defendants' Reply Memorandum and Reply Affidavit.....X**

¹ Defendants' Memorandum of Law in Support is 38 pages long, far exceeding the 25 page limit set forth in the Rules of the Commercial Division. The Court will consider the entire Memorandum of Law in Support, notwithstanding Defendants' failure to obtain the Court's permission to submit a lengthier Memorandum of Law than the Commercial Division Rules permit.

This matter is before the Court for decision on the motion by Defendants Ilan Parente, The Parente Family Limited Partnership, Golden West Trading, Inc. and Teva Meats, LLC (collectively “Defendants”) filed on December 1, 2010 and submitted on March 15, 2011. For the reasons set forth below, the Court dismisses this action pursuant to CPLR § 327(a), pursuant to the doctrine of *forum non conveniens*, based on its conclusion that Minnesota is a more appropriate forum for this litigation.

BACKGROUND

A. Relief Sought

Defendants move for an Order 1) pursuant to CPLR § 3211(a)(8), dismissing the Complaint against the Defendants on the grounds of lack of personal jurisdiction; or, alternatively, 2) pursuant to CPLR § 327(a), dismissing the Complaint against the Defendants based on the doctrine of *forum non conveniens*.

Plaintiffs oppose Defendants’ motion.

B. The Parties’ History

The Complaint (Ds’ Ex. A) alleges as follows:

Plaintiff Noah’s Ark Processors, LLC (“Noah’s Processors”) and Noah’s Ark Holding Company, LLC (“Noah’s Holding”) (collectively “the Noahs”) are Minnesota limited liability companies (“LLCs”). Plaintiff Total Corporate Resources, II, LLC (“Total”) is a New York LLC with its principal place of business located in Nassau County, New York. Total is a member of the Noahs. The Noahs process, distribute and sell kosher meat.

Defendant Ilan Parente (“Parente”) is a resident of South Dakota. The Parente Family Limited Partnership (“PFLP”) is a Minnesota limited partnership. Dawson Partners, LLC (“Dawson”) is a Minnesota LLC. Golden West Glatt Cattle Company (“Golden West Cattle”) and Teva Meats, LLC (“Teva”) are Colorado LLCs. Golden West Trading, Inc. (“Golden West Trading”) is a California corporation.

The Complaint describes the nature of this lawsuit as an action for 1) breach, by Defendants, of their obligations under the Second Amended Operating Agreement for the Noahs (“Operating Agreements”), and 2) the “stealing” (Compl. at ¶ 11) of Plaintiff’s corporate opportunities. The Complaint contains five (5) causes of action: 1) breach of fiduciary duty by

Defendants in breaching the Operating Agreements, stealing corporate strategies of Plaintiffs and acting in bad faith, 2) unjust enrichment of Defendants who sold products in competition with Plaintiffs, 3) request for an accounting with respect to monies wrongfully received or retained by Defendants, 4) a request for a permanent injunction enjoining Defendants from, *inter alia*, using Plaintiffs' corporate strategies and trade secrets, and 5) interference with contractual relations by Teva, Golden West Glatt and Golden West Trading who knowingly and intentionally caused Parente to breach his contractual obligations to Plaintiffs.

In his Affidavit in Support, submitted on behalf of himself, PFLP and Teva, Parente affirms that he is the general partner of the PFLP, as well as a managing member of Teva, which is now dissolved. Parente used to reside in South Dakota, and currently resides and is domiciled in California, where he conducts most of his business.

Parente affirms that he is not an officer, director or member of any entity that does business in New York. He avers, further, that PFLP, Teva and Parente 1) do not have any contract with persons or entities residing in New York to act on their behalf with respect to marketing any property or services; 2) do not have offices or comparable facilities, telephone listings or mailing addresses in New York; 3) do not have a bank account or other tangible personal or real property in New York; 4) do not direct any advertising specifically toward New York residents, or advertise in any publications directed primarily toward New York residents; 5) do not sell any products in New York; 6) do not pursue sales or sales contracts in New York, and have never solicited business or directly marketed any products in New York; 7) are not licensed, authorized or registered to do business in New York; 8) do not pay, and are not required to pay, taxes in New York; 9) do not have offices, officers, director or employees in New York; 10) do not transact business in New York; 11) have never negotiated or executed any contract in New York; 12) do not travel to New York for meetings concerning any contract; 13) do not have franchisees in New York; and 14) did not contract with Plaintiffs to supply goods in New York.

Parente affirms, further, that the acts or omissions for which Plaintiffs seek to hold PFLP, Teva and Parente liable occurred outside of New York. Moreover, while PFLP is a Class C Member of and owns an 18.35% stake in Noah's Holding, Parente and Teva are not members of any of the Plaintiffs.

In his Affidavit in Support, Zack Levenson (“Levenson”) affirms that he is the Corporate Director of Golden West Trading, a California corporation with its principal place of business in California. Levenson provides similar affirmations to those provided by Parente regarding Golden West’s lack of connection to New York. Levenson affirms, further, that Golden West Trading is not a member of, does not do any business with and otherwise has no contractual relationship with any of the Plaintiffs. Any sales of kosher meats by Golden West Trading to Costco in the New York area were made solely to Costco’s distribution center which is located in New Jersey, not directly to any Costco stores located in the State of New York. Any sales of kosher meats by Golden West Trading to Trader Joe’s in the New York area were made solely to Trader Joe’s distribution centers, none of which are located within the State of New York. Levenson disputes Plaintiffs’ allegation that “[a] portion, if not a majority, of the sales by Defendants took place in this District and in the State of New York” (Compl. at ¶ 44). Levenson affirms that less than one percent (1%) of the products that Golden West Trading sells are sold to New York.

Steven Krausman (“Krausman”), a managing member of the Noahs and Total, outlines the events leading up to the execution of the purchase agreement (“Agreement”) dated January 31, 2009 (Ex. A to Krausman Aff. in Opp.), pursuant to which the Noahs agreed to transfer seventy six (76%) percent of the membership units of the Noahs to Total (“Acquisition”). PFLP and Dawson were parties to that Agreement which was signed by Parente on their behalf.

Krausman alleges that, following the Acquisition, Parente “embarked on a scheme to illegally compete with [the Noahs] and steal [their] trade secrets and business opportunities” (Krausman Aff. in Opp. at ¶ 8). Krausman outlines the manner in which this scheme was allegedly accomplished, which included Parente’s establishment of Teva. The Articles of Organization regarding Teva (Ex. C to Krausman Aff. in Opp.) reflect that it was organized in South Dakota.

Krausman affirms that the Noahs are currently the exclusive distributor of Glatt kosher meat to Costco. He asserts that 1) Costco sells kosher meat in approximately 14 store locations around the country, most of which are located in New York; and 2) Costco’s national store leaders for sales of kosher meat are located in New York. He submits that the Defendants should

not be permitted to “hide behind the technicality” (Krausman Aff. in Opp. at ¶ 23) that the delivery of the meat occurred in Costco’s distribution center in New Jersey, not in New York. Krausman submits that Defendants “targeted” (*id.*) Costco’s New York stores, particularly those located in Lawrence and Westbury.

In reply, Parente reaffirms many of the statements in his initial affidavit and affirms, further, that 1) Total is merely a silent investor in the other Plaintiffs; 2) the contracts executed by Defendants with Costco or Trader Joe’s were entered into in California; 3) Defendant Golden West Cattle has no affiliation with the moving Defendants; 4) all documents and records that Defendants possess regarding transactions involving Plaintiffs, Costco and Trader Joe’s are not located in New York; and 5) Parente is currently a plaintiff in a lawsuit against the Noahs in the courts of Minnesota.

C. The Parties’ Positions

Defendants submit that the Court should dismiss this action for lack of personal jurisdiction or, alternatively, dismiss it under the doctrine of *forum non conveniens* in light of the fact that 1) with the exception of Total, all of the parties and relevant witnesses and documents are located outside of New York; 2) the Operating Agreement (Ds’ Ex. D) that Defendants allegedly breached states that a) the principal place of business for the Noahs is in Minnesota (Operating Agreement at § 1.3); b) the Operating Agreement is governed by Minnesota law (*id.* at § 13.2); and c) the books and records of the Noahs are located at their principal place of business in Minnesota (*id.* at § 9.2); 3) none of the Defendants have contacts with New York on which personal jurisdiction over them could be based; 4) exercising personal jurisdiction over the Defendants would violate their due process rights, given that they did not purposefully avail themselves of the privilege of conducting activities within New York; 5) exercising personal jurisdiction over the Defendants violates traditional notions of fair play and substantial justice, given the substantial burden that litigating this matter in New York would impose on the Defendants; 6) given that two of the Plaintiffs are based in Minnesota, prosecution of this matter in a different forum will provide the Plaintiffs with equally effective relief, particularly given that Minnesota law provides causes of action for breach of fiduciary duty and interference with contractual relations, and permits the recovery of equitable relief and pecuniary damages; and 7) New York does not have an interest in hearing this lawsuit, given the parties’ minimal

contacts with New York.

Plaintiffs submit that 1) the Court has personal jurisdiction over the moving Defendants in light of the allegations that it was Defendants' intention to make significant sales in New York and, particularly, to direct their products to the Orthodox Jewish community in New York; 2) further discovery will establish that Defendants' contacts to New York are more substantial than their moving papers suggest; 3) Defendants have made agreements with Costco and Trader Joe's that provide for the distribution of kosher meat in New York; 4) Defendants, by creating competing entities and selling products in competition with Plaintiffs, committed tortious actions outside of New York that caused an injury to Plaintiffs' business in New York; 5) the exercise of personal jurisdiction is consistent with due process given that the Defendants purposefully availed themselves of New York laws by directing their sales of kosher meat to Costco and Trader Joe's in the New York metropolitan area; 6) Plaintiffs have made a sufficient showing to demonstrate that there is a question of jurisdiction that warrants further discovery; 7) the Court should deny Defendants' motion to dismiss on the grounds of *forum non conveniens* because New York is a convenient forum for this litigation in light of the fact that a) Total is a New York resident; b) the residencies of the remaining parties are "spread out across the country" (Ps' Memorandum of Law at p. 16); c) officers and employees of Costco and Trader Joe's, who are located in New York, are expected to be called as non-party witnesses; and d) Defendant Golden West Cattle may challenge the exercise of jurisdiction in Minnesota

In reply, Defendants distinguish the case of *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463 (1974) on which Plaintiffs rely by noting that, unlike the plaintiff in *Peterson*, Plaintiffs have not produced records, documentation or other evidence supporting their causes of action or damages they sustained. Defendants submit that the Court should grant the motion in light of considerations including the fact that 1) Plaintiffs have not produced contracts demonstrating that Plaintiffs do business in New York or sustained damages in New York, or establishing another basis for the exercise of personal jurisdiction over the Defendants in New York; 2) Total, a resident of New York, is merely a silent member of the Noahs, which are Minnesota LLCs; and 3) the parties are already involved in litigation in Minnesota.

RULING OF THE COURT

A. Relevant Legal Principles

CPLR § 302 provides, in pertinent part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent: 1) transacts any business within the state...; or 2) commits a tortious act within the state...; or 3) commits a tortious act without the state causing injury to a person or property within the state...if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Personal jurisdiction over a defendant that engages in purposeful activity is proper because the defendant has invoked the benefits and protections of our laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal jurisdiction even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Not all purposeful activity, however, constitutes a transaction of business within the meaning of CPLR § 302(a)(1). Although it is impossible to precisely fix those acts that constitute a transaction of business, it is the quality of the defendant's New York contacts that is the primary consideration. *Id.* at 380.

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).

B. Application of Relevant Legal Principles to this Case

The Court concludes that, even assuming, *arguendo*, that New York could properly exercise personal jurisdiction over the Defendants, dismissal of this action is appropriate pursuant to CPLR § 327(a), on the basis that Minnesota is the more appropriate forum for this litigation.

As outlined in the Affidavits provided, Defendants PFLP, Parente, Teva and Golden West Trading lack contacts, including property ownership and business affiliations, to New York. Moreover, the Agreement to which Krausman refers confirms that the Noahs, PFLP and Dawson are Minnesota entities. The Agreement also provides that it is “subject to and governed by the laws of the State of Minnesota without regard to its conflict of law principles” (Agreement at ¶ 9).

More significantly, Plaintiffs’ action is based on Defendants’ alleged breach of the Operating Agreement. The Operating Agreement reflects that 1) the Noahs’ principal place of business is in Minnesota and their books and records are maintained in Minnesota; and 2) the Operating Agreement and the application and interpretation thereof shall be governed exclusively by its terms and by the laws of the State of Minnesota and specifically the Act, defined in the Operating Agreement as the provisions of the Limited Liability Company Act of the State of Minnesota and any provisions of any successor act (Agreement at § 12.1),

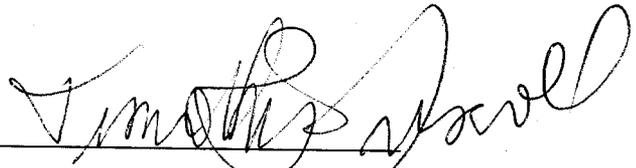
Under all the circumstances, the Court concludes that this matter should be litigated in Minnesota, and grants Defendants’ motion to dismiss pursuant to CPLR § 327(a).

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
May 6, 2011


HON. TIMOTHY S. DRISCOLL

J.S.C. **ENTERED**

MAY 12 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**