

Transportation Displays Inc. v Kamber Group

2002 NY Slip Op 30136(U)

February 28, 2002

Supreme Court, New York County

Docket Number: 603690/01

Judge: Richard F. Braun

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Braun
Justice

PART 23

Transportation Display

INDEX NO. 603690-01

MOTION DATE 12

MOTION SEQ. NO. 901

MOTION CAL. NO. _____

- v -

The Kanber Group

The following papers, numbered 1 to _____ were read on this motion to ~~for~~ dismissal forum non conveniens grounds, cross motion to strike issues

Notice of Motion/ ~~Order to Show Cause~~ Affidavits — Exhibits ...
Notice of cross motion
Answering Affidavits — Exhibits

SCANNED
MAR 07 2002

PAPERS NUMBERED	
1	_____
2,3	_____
4,5	_____

Replying Affidavits

in all cases, Plaintiff's attorney should cite to the official reporter, include the pages to which reference is made, and the court and department, where appropriate, and state that the citation is to a dissent when it is such.

Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Upon the foregoing papers, it is ordered that this motion *is granted to the extent of dismissing the action, conditioned on Defendant's accepting service of process for commencement of an action by Plaintiff on the subject dispute between the parties in an appropriate forum in the courts of Washington D.C., and, if Defendant does not, then the action may be brought by Plaintiff,* and it is further

ORDERED that the Clerk shall enter judgment accordingly, and it is further ORDERED that the cross motion is denied.

See separate Opinions.

Dated: New York, New York February 27, 2002 *ENTERED*
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23**

-----X
TRANSPORTATION DISPLAYS INCORPORATED,

Index No. 603690/01

Plaintiff,

OPINION

-against-

THE KAMBER GROUP,

Defendant.

-----X

RICHARD F. BRAUN, J.:

In this action, Plaintiff sues Defendant for breach of contract. In its Verified Complaint, Plaintiff alleges that it is a corporation with its principal place of business in New York, New York, which is engaged in the business of providing advertising space and related advertising services. Defendant is a corporation doing business in Washington, D.C., which, among other things, contracts with suppliers of media services. Defendant contracted with Plaintiff to provide advertising space. Plaintiff claims that it did so, and that Defendant owes Plaintiff \$270,496, plus 86,504 Canadian dollars. Defendant states that Plaintiff failed to provide Defendant with proofs of performance, which are standard in the industry, and that Defendant received complaints from its clients regarding the propriety of Plaintiff's posting of advertising.

Defendant moves to dismiss this action on the ground of forum *non conveniens*, pursuant to CPLR 327. Plaintiff cross-moves to strike Defendant's Amended Answer, and for costs and attorneys' fees against Defendant and its attorney, pursuant to 22 NYCRR 130-1.1.

Plaintiff contends that, although forum *non conveniens* was raised as an affirmative defense in Defendant's Amended Answer, that pleading should be stricken as untimely, and the failure by Defendant to raise forum *non conveniens* as an affirmative defense in the original Answer constituted

a waiver of the defense. The argument is misplaced because Defendant did not have to plead forum *non conveniens* in either the Answer or the Amended Answer.

Although the Appellate Division, First Department has stated that the forum *non conveniens* ground for dismissal is an affirmative defense (*Mirabella v Banco Indus. De La Republica Argentina*, 43 AD2d 489, 490 [1st Dept 1974]; see, *Tesoro Petroleum Corp. v Holborn Oil Co. Ltd.*, 118 AD2d 506 [1st Dept 1986]), that does not mean that the ground can only be asserted that way. CPLR 327 provides for a party's raising the ground of forum *non conveniens* by motion, not as a defense. Thus, the failure of Defendant to raise in its Answer the ground as an affirmative defense is not a waiver thereof (*cf.*, *Harp v Malyn*, 166 AD2d 848, 849 [3rd Dept 1990] [the making of a CPLR 3211 motion to dismiss did not preclude the movant from subsequently moving to dismiss on inconvenient forum grounds, pursuant to CPLR 327]). Defendant has the right to assert the ground by the motion here.

The party moving for dismissal on the basis of forum *non conveniens* has the burden of showing that the forum elected is not appropriate (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). No one factor is controlling on such a motion, and various competing factors should be weighed in a court's exercising its sound discretion as to whether jurisdiction should be continued over the action or proceeding before the court. (*id.*) The factors should be balanced under the facts and circumstances of each individual case (*Natl. Bank and Trust Co. of No. Am., Ltd. v Banco De Vizcaya, S.A.*, 72 NY2d 1005, 1007 [1988]). "Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted)." (*Islamic*

Republic of Iran v Pahlavi, 62 NY2d, supra, at 479.)

Here, Defendant's senior vice president states in her Affidavit that all of Defendant's clients for the advertisements at issue are based in Washington, D.C. and in her Reply Affidavit that none of the clients or the advertising are located in New York. She further alleges in her Affidavit that the only connection that the subject dispute has to New York State is that Defendant was required to send its payments to Plaintiff's New York office. Furthermore, she avers in her Affidavit that all of the work by Defendant was done out of its Washington, D.C. office; that none of the ads by Defendant were sent to New York; that all of Defendant's contacts with Plaintiff's clients were through Plaintiff's Washington D.C. representatives; that none of the ads were purchased from or in New York, produced in New York, or placed or seen in New York; and that none of the advertising locations were in New York, but many were in Washington, D.C. In addition, she says that nothing in the agreement with Plaintiff specifies that any lawsuit must be brought in the New York courts. Finally, she states that all of Defendant's witnesses and supporting documents are in Washington, D.C.

Considering all of the relevant factors for determination of the *forum non conveniens* motion, Defendant has sustained its burden of showing that the motion should be granted. There is an insufficient connection between this action and the State of New York. The subject transactions occurred in Washington D.C. Requiring Defendant to defend this action might work substantial prejudice to Defendant because its witnesses, including non-parties, are outside of and beyond the subpoena power of this jurisdiction. Plaintiff does not submit in opposition to the motion or support of the cross motion any affidavit from a person with personal knowledge but only Affirmations by Plaintiff's attorney. Plaintiff's submissions are not sufficient to defeat the motion (*cf.*, *Rafter v Newark Ins. Co.*, 30 NY2d 819 [1972] *affg on the opn at 37 AD2d 825 [1st Dept 1971]*, *cert denied*,

409 US 972 [1972] [the forum *non conveniens* motion was granted because the plaintiff did not offer any factual support for the conclusory allegation in his complaint that he had a New York residence]).

Plaintiff's attorney contends that this action was commenced in New York because Defendant's executives had evaded service of process in Washington, D.C. Pursuant to CPLR 327, the motion may be granted "on any conditions that may be just." Therefore, the motion has been granted by the separate Decision and Order of this Court conditioned on Defendant's accepting service of process for commencement of an action by Plaintiff on the subject dispute between the parties in an appropriate forum in the courts of Washington, D.C. If Defendant does not, then Plaintiff may obtain a vacatur of the dismissal of this action.

The branch of the cross motion seeking the striking of the Amended Answer has been denied because it is academic. The part of the motion seeking costs and attorneys' fees has been denied, because they are not merited under the circumstances.

Dated: New York, New York
February 28, 2002



RICHARD F. BRAUN, J.S.C.