

Jain v Gulati

2006 NY Slip Op 30112(U)

September 22, 2006

Supreme Court, New York County

Docket Number: 0060151/2006

Judge: Louis B. York

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: Yark
Justice

PART 2

RAVENNA K. TAN

6/15/06

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

PAULAT CALASTY

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the decision in reg #02.

FILED

OCT 11 2006

NEW YORK
COUNTY CLERKS OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: 9/22/06

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Paul
LOUIS B. YORK

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
RAJENDRA K. JAIN,

Plaintiff,

INDEX NO.: 601514/06

- against -

PANKAJ GULATI, SOTHEBY'S and PUNDOLE ART
GALLERY,

Defendants.
-----X

LOUIS B. YORK, J.

FILED
OCT 11 2006
NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are herein consolidated for disposition.

This action stems from the sale of an oil canvas painting, "two Peacocks" by K.K. Hebbar (Hebbar Painting), by plaintiff Rajendra K. Jain to defendant Pankaj Gulati, to which plaintiff now seeks rescission.

Plaintiff moves for a preliminary injunction seeking an order restraining defendants from returning the Hebbar Painting to defendant Gulati and further directing defendants to hand over possession of the Hebbar Painting to plaintiff (seq. no. 001). On May 2, 2006, the court issued a temporary restraining order (TRO) on the Hebbar Painting, which is currently in defendant Sotheby's's possession.

Defendant Gulati moves for an order: (1) denying plaintiff's application for a preliminary injunction; (2) vacating the May 2, 2006 TRO; (3) dismissing the complaint on the ground that the court lacks personal jurisdiction over defendant Gulati and/or, in the alternative, on the ground of forum non conveniens; and (4) compelling Sotheby's to return the Hebbar Painting to Pundole Exports, incorrectly sued herein as Pundole Art Gallery, Gulati's agent (seq. no. 002).

For the reasons stated herein, defendant Gulati's motion to dismiss is granted

based on forum non conveniens.

BACKGROUND

On February 15, 2005, plaintiff, a resident of the United Kingdom, and defendant Gulati, a resident of India, entered into an Agreement of Sale (Agreement) of the Hebbbar Painting (Complaint, ¶ 10). The agreed purchase price for the Hebbbar Painting was Rupees 20 Lacs in Indian currency (approximately U.S. \$40,000.00) (*id.*). Gulati paid Rupees 15 Lacs (approximately U.S. \$30,000.00) with written understanding that payment of the balance was due in six months (*id.*). According to the Agreement, as collateral for the remaining monies owed, defendant Gulati was to supply plaintiff with another painting, the ARA painting, valued at Rupees 5 Lacs for sale, with the understanding that if the ARA painting was sold for Rupees 4 Lacs, defendant Gulati would pay the remaining Rupees 1 Lac in cash (*see* Agreement).¹ Additionally, the parties agreed that the balance of Rupees 5 Lacs would “be paid in cash in 6 months if the ARA painting [was] not sold.” (Agreement). After the lapse of six months, defendant Gulati neither paid the remaining balance nor returned the Hebbbar Painting to plaintiff (Complaint, ¶ 11). Despite plaintiff’s repeated attempts to contact defendant Gulati, Gulati either ignored or grew abusive toward him (*id.*).

In December 2005, an arrangement was made between defendant Gulati and Pundhole Exports for the auction of the Hebbbar Painting with Sotheby’s in New York City in March 2006 (*see* December 28, 2005 letter to defendant Gulati from Pundhole Exports). The Hebbbar Painting had a reserve of U.S. \$60,000.00 (*id.*).

In March of 2006, plaintiff discovered a newspaper article published by Mid Day,

¹ Defendant Gulati urges that the Agreement of Sale proffered by plaintiff is a fabrication, and has provided the court with a complaint filed in India on or about May 16, 2006 alleging as such (*see* complaint filed in the Court of Learned Additional Chief Metropolitan Magistrate’s 37th Court at Esplanade, Mumbai). Defendant Gulati’s complaint was filed after Plaintiff filed his complaint in this court.

4]

a Bombay publication, concerning defendant Gulati (*id.*). Specifically, the article reported that six individuals jointly filed a complaint alleging that defendant Gulati “cheated the brokers of their brokerage in different property transactions for which they were joint brokers” (*see* *MiD* Day newspaper article “Duped of Rs 15 lakh, claim six brokers” by: Madhurima Nady dated November 20, 2003). As a result, on March 17, 2006, plaintiff’s attorney in the United Kingdom, sent a letter on plaintiff’s behalf repudiating the Agreement. According to the March 17, 2006 letter, defendant Gulati had retrieved the ARA painting, held by plaintiff as temporary collateral for the remaining money owed on the Hebbbar Painting, failing to replace the ARA painting with another as promised at that time (*id.*).

By letter dated March 24, 2006, defendant Gulati through his counsel, stated that: (a) the Agreement was a fabrication; (b) payment for the Hebbbar Painting was made in full; and (c) the ARA painting was not part of a consignment with respect to the Hebbbar Painting, but a separate transaction.

In March of 2006, plaintiff learned that the Hebbbar Painting was being auctioned by Sotheby’s in New York City on March 29, 2006 (Complaint, ¶ 13). Plaintiff informed Sotheby’s of the disputed ownership of the Hebbbar Painting (*id.*). In response, by letter dated March 21, 2006, Sotheby’s withdrew the Hebbbar Painting from auction and notified plaintiff that “[Sotheby’s] will store the property on Sotheby’s premises until your client and out [sic] consignor has resolved the matter, either through mutual written agreement or a final, non-appealable order from a court of competent jurisdiction.”

Thereafter, by letter dated April 26, 2006, Sotheby’s notified plaintiff that it would be returning the Hebbbar Painting to defendant Gulati, and further that it would be returned on May 3, 2006. On April 27, 2006, plaintiff’s counsel wrote defendant Pundhole Exports explaining that Pundhole Exports, as defendant Gulati’s representative, would likely be receiving the Hebbbar Painting from Sotheby’s; and further advised that since plaintiff repudiated the

5]
Agreement for non-payment of consideration, the Hebbbar Painting belonged to plaintiff and should not be turned over to a third party, namely defendant Gulati.

On May 1, 2006, plaintiff filed the complaint herein seeking a permanent and temporary restraining order (TRO) over the Hebbbar Painting until its disputed ownership is resolved. On May 2, 2006, the court issued a TRO restraining Sotheby's from transferring possession of the Hebbbar Painting. On May 9, 2006, the parties, with the exception of defendant Pundhole Exports, appeared for oral argument on the motion for a preliminary hearing. Defendant Gulati now moves to dismiss on the grounds that: (1) plaintiff is not entitled to a preliminary injunction; (2) the court lacks personal jurisdiction over defendant Gulati; and in the alternative, (3) venue is improper based on forum non conveniens.

DISCUSSION

Personal Jurisdiction over Gulati

Defendant Gulati contends that the court lacks personal jurisdiction in this case since plaintiff and defendants Gulati and Pundole Exports are not present in New York, and all transactions with respect to the sale of the Hebbbar Painting took place in India.

Where, as here, a defendant moves to dismiss the complaint asserting that the court lacks personal jurisdiction over them, the plaintiff bears the burden of proof (Chen v Shi, 19 AD3d 407 [2d Dept 2005], citing Brandt v Toraby, 273 AD2d 429, 430 [2d Dept 2000]; see e.g. Barrington Capital Group, L.P. v Arsenault, 281 AD2d 166 [1st Dept 2001]). However, "the plaintiff[] need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant[s]" (Chen, 19 AD3d at 408, citing Cordero v City of New York, 236 AD2d 577, 578 [2d Dept 1997]; see also Amigo Foods Corp. v Marine Midland Bank-New York, 39 NY2d 391, 395 [1976]; Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974]; Hessell v Goldman, Sachs & Co., 281 AD2d 247 [1st Dept 2001]; Federal Ins. Co. v Specialty Paper Box Co., Inc., 222 AD2d 254 [1st Dept 1995]). Moreover, the evidence presented by the parties must be viewed

in the light most favorable to the plaintiff (Brandt, 273 AD2d at 430).

Plaintiff argues that defendant Gulati's objection as to personal jurisdiction was waived, pursuant to CPLR 320, based on the appearance of counsel on his behalf at the May 9, 2006 oral argument. Therein, the court inquired about the status of service of process on defendants Gulati and Sotheby's. Counsel for both defendants acknowledged that service had been accepted. Plaintiff contends that counsel for defendant Gulati argued the merits of the case at length, although he did not submit any papers in opposition with respect to the preliminary injunction. Plaintiff contends that counsel has constructively appeared in the matter and has waived his objection to personal jurisdiction.

Generally, pursuant to CPLR 320 (b), an appearance by a defendant "is equivalent to personal service of the summons upon him" unless he moves to dismiss pursuant to CPLR 3211 (a) (8) or raises jurisdictional defenses in his responsive pleading (see Yihye v Blumenberg, 260 AD2d 371 [2d Dept 1999], quoting Matter of Fry v Village of Tarrytown, 89 NY2d 714 [1997]; Kroupova v Hill, 242 AD2d 218 [1st Dept 1997]). Courts, however, have also recognized that a "person who participates in the merits of an action appears informally and confers jurisdiction on the court" (USF & G. v Maggiore, 299 AD2d 341, 343 [2d Dept 2002], quoting Matter of Roslyn B. v Alfred G., 222 AD2d 581, 582 [2d Dept 1995] [appellant conferred jurisdiction on Family Court when he submitted to a blood grouping test and asserted denials of his paternity through his attorney without raising jurisdictional objection]; see Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C320:4, at 284 ["A defendant whose participation in an action reaches a certain level of activity will be held to have appeared informally even though the defendant has not interposed any of the three responses in CPLR 320 (a)."]).

Here, counsel for defendant Gulati's appearance at oral argument in opposition to the plaintiff's motion for a preliminary injunction did not constitute a waiver of his jurisdictional

* 7.]
objection (Matter of Town of Clarktown, 206 AD2d 377 [2d Dept 1994]). While plaintiff contends that he argued the merits of the case without reserving the right to object to personal jurisdiction, this is not the type of participation that warrants a waiver, particularly since defendant Gulati's time to answer or move against the complaint had not yet expired.

Accordingly, defendant Gulati's appearance at the oral argument did not constitute a waiver of his objections to personal jurisdiction. However, the court finds personal jurisdiction can be exercised over defendant Gulati pursuant to CPLR 302.

CPLR 302(a)(1) extends jurisdiction of the New York state courts to a nonresident who purposely availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections under its laws (see Corporate Campaign, Inc., v Local 7837, United Paperworkers Intl. Union, 265 AD2d 274 [1st Dept 1999]). Specifically, CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ..., who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state." One business transaction in New York may be enough to invoke jurisdiction, even though the out-of-state defendant never entered New York, as long as its activities in the state were purposeful and there is substantial relationship between the transaction and the claim asserted (see Johnson v Ward, 4 NY3d 516, 519 [2005] [under CPLR 302 (a) (1), a "substantial relationship" must be established between a defendant's transactions in New York and a plaintiff's cause of action]; Kreutter v McFadden Oil Corp., 71 NY2d 460, 467 [1988]).

To establish jurisdiction through the acts of an agent, a plaintiff must show that the putative agent engaged in purposeful activities in New York in relation to the transaction, that those activities were performed for the benefit and with knowledge and consent of the defendant, and that the defendant exercised some control over the agent in the matter (see Kreutter, 71 NY2d at 467).

Plaintiff contends that the transaction of business between Sotheby's, through

* 8]
defendant Gulati's agent, defendant Pundole Exports, offering the Hebbbar Painting for auction in New York is sufficient to warrant jurisdiction over defendant Gulati. The court agrees.

Pundhole Exports, on defendant Gulati's behalf, consigned the Hebbbar Painting to Sotheby's for auction in New York. The court relies on the December 28, 2005 correspondence between defendants Gulati and Pundhole Exports, as well as the facsimile entitled "Shipping Bill for Export of Duty Free Goods" with Appendix 1 attached between Sotheby's and defendant Pundhole Exports as evidence to show that defendant Gulati purposefully transacted business in New York (see Drake America Corp. v Speakman Co., 144 AD2d 529, 531 [2d Dept 1988] [holding that a shipment clause consigning freight to warehouse facilities in "the metropolitan New York City area establishes that the defendant contracted to supply goods in the State of New York"] [internal citation omitted]). Not only were facsimiles sent to New York on defendant Gulati's behalf, but defendant Gulati, via Pundhole Exports, actually shipped the Hebbbar Painting to New York for auction there. As such, the court finds that defendant Gulati has transacted business within the state.

As noted above, a transaction of business in New York, standing alone, is not enough to sustain personal jurisdiction under CPLR 302(a)(1) (see Opticare Acquisition Corp. v Castillo, 25 AD3d 238 [2d Dept 2005]). In addition, the cause of action sued upon must arise out of the transaction (see id., citing CPLR 302[a][1]; McGowan v Smith, 52 NY2d 268 [1981]). In other words, there must be "the existence of some articulable nexus between the business transacted and the cause of action sued upon" (id. citing McGowan, 52 NY2d at 272, Johnson v Ward, 4 NY3d 516 [2005] [under CPLR 302(a)(1), a "substantial relationship" must be established between a defendant's transactions in New York and a plaintiff's cause of action]).

Here, plaintiff is seeking rescission of the Agreement concerning ownership of the Hebbbar Painting, which defendant Gulati had sent to New York for auction. The court finds that there is a substantial relationship between the business transaction and the cause of action sued

upon (see Opticare Acquisition Corp., 25 AD3d at 246-247 [holding that a substantial nexus existed where the alleged contractual breaches permitted appellants to transact business in the first place]).

Accordingly, defendant Gulati's motion to dismiss for lack of personal jurisdiction is denied.

Forum Non Conveniens

Defendant Gulati argues that the only connection New York has to this matter is that the Hebbbar Painting is located in New York, and this factor alone fails to create a "substantial nexus" to New York (see Wentzel v Allen Mach., Inc., 277 AD2d 446, 447 [2d Dept 2000] ["although a New York court may have jurisdiction over a claim, it is not compelled to retain jurisdiction if the claim has no substantial nexus with New York"]). This court agrees.

The burden rests on the defendant to show that New York is an inconvenient forum (see Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 479 [1984]). Courts in New York consider and balance the following factors to determine whether dismissal based on forum non conveniens is warranted: (1) the potential hardship to the defendant; (2) the location of documents; (3) the location of a majority of the witnesses; (4) and the burden on New York courts (see Pahlavi, 62 NY2d at 479; see also Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292 [1st Dept 2005] [internal citations omitted]). No single factor is controlling and all are to be taken into account (*id.*; see also Avnet, Inc. v Aetna Cas. and Sur. Co., 160 AD2d 463, 464 [1st Dept 1990]).

Defendant Gulati contends that a more convenient forum, namely Mumbai, India, exists, as it would be less of a hardship on the parties and witnesses. While defendant Sotheby's is present in New York, there is no dispute that Sotheby's had any involvement in the underlying sale of the Hebbbar Painting, but for its current possession of the Hebbbar Painting. As to the other defendants and relevant witnesses and defendants, as well as documents, they are located in

either the United Kingdom or India (see Finance and Trading Limited, v Rhodia S.A., 28 AD3d 346, [1st Dept 2006] [granting motion to dismiss based on forum non conveniens finding that the majority of the relevant documents and witnesses were French]; see also Phat Tan Nguyen, 19 AD3d 292 [granting defendant's motion to dismiss on forum non conveniens grounds holding finding that the majority of witnesses, relevant documents were located in either France or Vietnam and court would be required to interpret either French or Vietnamese law]).

Moreover, as defendant Gulati suggests, this court would be required to apply Indian law since all negotiations relating to the sale of the Hebbbar Painting, the actual sale of the Hebbbar Painting and the alleged breach of the Agreement occurred in India. The courts of India are in much better position to interpret its own law (see Phat Tan Nguyen, 19 AD3d at 295).

"New York's interest in the subject matter of this action is practically non-existent" (see Phat Tan Nguyen, 19 AD3d 292, 295). All transactions relating to the sale of the Hebbbar Painting took place in India. The only tie this action has to New York is that the Hebbbar Painting was shipped here for auction, which the court finds is not a substantial nexus to maintain the action in New York.

The court finds that defendant Gulati has satisfied his burden in demonstrating that New York is not a convenient forum in which to litigate this action.

Accordingly, defendant Gulati's motion to dismiss the action in its entirety on the grounds of forum non conveniens is granted.

Preliminary Injunction

Plaintiff's motion for a preliminary injunction is denied as moot, and the TRO issued on May 9, 2006 is hereby vacated.

CONCLUSION

For the foregoing reasons, it is

ORDERED plaintiff Rajendra K. Jain's motion for preliminary injunction is

denied and the TRO issued on May 9, 2006 is vacated; and it is further

ORDERED that defendant Pankaj Gulati's motion to dismiss on the ground of forum non conveniens is granted on the condition that defendant waives any statute of limitations defenses and makes himself amenable to service of process if plaintiff brings this action in India; and the complaint in its entirety is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further;

ORDERED that the Clerk is directed to enter judgment accordingly.

DATE 9/22/06



J.S.C.

FILED
OCT 11 2006
NEW YORK
COUNTY CLERK'S OFFICE