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

PRESENT: _____ PART 56

Justice

602016/05

Weening, Martin

- v -

Barnett, Robert

INDEX NO. ~~601523/04~~

MOTION DATE 1/11/06

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 09 2006

COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE III

Dated: 3/6/06

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

----------X

MARTIN WEENING,

Plaintiff,

Index No. 602016/05

-against-

ROBERT BARAKETT, MODES DISTEX, INC., MARK HANNA, ESTATE OF RAMSEY BARKETT, HARLENE BARAKETT, LISA BARAKETT, LINDA BARAKETT, LES GESTIONS ROBLI a/ka/ ROBLI HOLDINGS INC. and JOHN DOES 1-10,

Defendants.

----------X

Hon. Richard B. Lowe, III:

This action is related to a prior action filed by plaintiff Martin Weening against defendant Modes Distex, Inc. (Distex) and Robert Barakett (Barakett) in this court, which arises out of an employment agreement between plaintiff and Distex (the Prior Action). In the present action, plaintiff alleges that defendants fraudulently transferred valuable property or property rights of Distex, in violation of New York Debtor and Creditor Law (DCL) §§ 273-276, after the commencement of the Prior Action. Plaintiff is seeking damages in excess of $250,000.

Motion Sequence Nos. 001 and 003 are consolidated for disposition. In Motion Sequence No. 001, plaintiff seeks an order, pursuant to CPLR 3215, granting him a default judgment against defendant Distex, on the ground that Distex has not answered the complaint, nor requested an extension of time to do so. In Motion Sequence No. 003, defendants move for an order, pursuant to CPLR 3211, dismissing the complaint on the ground that this court lacks personal jurisdiction over defendants or, in the alternative, pursuant to CPLR 327 (a), on the ground of forum non conveniens. Plaintiff cross-moves, pursuant to CPLR 3211 (d), for an order

granting him jurisdictional discovery.

For the reasons set forth below, both motions and the cross motion are denied.

FACTS

The Prior Action, entitled Martin Weening v Modes Distex, Inc. and Robert Barakett (Sup Ct, NY County, Index No. 601523/04), which is still pending, involves causes of action for breach of contract, promissory estoppel, fraudulent misrepresentation, and unjust enrichment. Other than Distex and Barakett, none of the other co-defendants named in the present action, who are all family members of Barakett (the Barakett Related Defendants), were named as defendants in the Prior Action.

Pursuant to an employment agreement dated July 1, 2003, plaintiff was previously employed as the Chief Executive Officer of Distex, a Canadian corporation engaged in the business of manufacturing and selling men's apparel. Barakett is a Canadian citizen, and is the sole shareholder, sole director, president and controlling person of Distex. Distex sells its apparel under a brand known as "Robert Barakett" (the Barakett Brand).

Plaintiff alleges that both Distex and Barakett have substantial contacts with the State of New York, and that he has firsthand knowledge that they conducted significant and continuous business in New York (Weening Aff., ¶ 2). According to plaintiff, Distex maintains a showroom for the sale of its men's apparel at 745 Fifth Avenue in Manhattan (id., ¶ 3). Indeed, according to defendant's website, robertbarakett.com, Barakett maintains a showroom for the sale of the Barakett Brand at 745 Fifth Avenue (see Aff. of Steven I. Super, Esq., Exh D), and Barakett admits in his affidavit that Distex "does have a sales office in New York City" (Barakett Aff., ¶ 8).

Plaintiff further alleges that Distex has employed various sales people in New York, and that Barakett, Distex's principal and sole owner, often travels to New York to meet with vendors who manufacture the company's products, as well as customers who sell the products (Weening Aff., ¶¶ 4, 5, 10). Barakett also attends various trade shows in New York each year (id., ¶ 6). In fact, New York is such "a key market for Distex's business," that Distex included a provision in plaintiff's employment agreement requiring him to relocate to the "New York Metropolitan area" (id., ¶ 7).

In the complaint, plaintiff alleges that Distex was undercapitalized from its inception, and only survived by extensive loans from the Barakett Related Defendants. Plaintiff asserts that, in 2003, when Distex was experiencing significant problems in the management of its cash flow, Barakett caused Distex to make preferential repayments of loans to his family members, and used the proceeds that the New York showroom generated for these repayments. Plaintiff also alleges that, in early 2005, after commencement of the Prior Action, Barakett caused valuable property or property rights of Distex to be transferred in connection with a licensing agreement with Waterstone Brands, Inc., as licensee.

In the first 16 causes of action of the complaint, plaintiff alleges that, after his commencement of the Prior Action, the co-defendants participated in various fraudulent transfers of property or property rights of Distex that were in violation of New York's Debtor & Creditor Law (DCL) §§ 273, 274, 275, 276 and 276-a. The first through fourth causes of action relate to Barakett's alleged transfer of valuable property rights to the Barakett Brand, after plaintiff filed the Prior Action. The fifth through eighth causes of action relate to a $250,000 payment that Barakett allegedly caused Distex to make to defendant Mark Hanna. The ninth through twelfth

causes of action relate to a $64,396 payment that Barakett allegedly caused Distex to make to defendant Estate of Ramsey Barakett. The thirteenth through sixteenth causes of action involve a $89,410 payment that Barakett allegedly caused Distex to make to defendant Robli Holdings Inc. In the seventeenth cause of action, plaintiff alleges that Distex "has failed to observe corporate formalities" and that thus, Distex "should be deemed an agent, instrumentality or alter ego of Robert Barakett, the corporate veil between DISTEX and Robert Barakett should be pierced, and Robert Barakett should be held liable for the acts, omissions, liabilities, debts and judgments of DISTEX" (Complaint, ¶¶ 112-122).

On July 20, 2005, the summons and complaint were personally served on Distex, at its showroom located at 745 Fifth Avenue. On September 15, 2005, Barakett was also served with the summons and complaint at the showroom, pursuant to CPLR 308 (4).

By stipulation dated November 9, 2005, both parties agreed that the action be discontinued, without prejudice, against defendants Mark Hanna, Estate of Ramsay Barakett, Harlene Barakett, Lisa Barakett, Linda Barakett, Robli Holdings, Inc. and John Does 1-10. The only remaining defendants are Distex and Barakett.

DISCUSSION

I. Motion Sequence No. 001 – Motion for a Default Judgment against Distex

In support of his motion for a default judgment against Distex, plaintiff asserts that, as of August 17, 2005, the date of the motion, Distex had not appeared, answered the complaint, or requested an extension of time to do so. As of the date of the motion, plaintiff had not yet served Barakett, or any of the other defendants. On September 8, 2005, Distex responded to the motion for a default judgment by filing, along with the other defendants, a motion to

dismiss the complaint.

Plaintiff's motion for a default judgment against Distex is denied. "Public policy favors the resolution of cases on the merits" (Sippin v Gallardo, 287 AD2d 703, 703 [2d Dept 2001]). Given Distex's brief delay in responding to the complaint, its lack of willfulness, the existence of a possibly meritorious defense, the public policy in favor of resolving cases on the merits, and plaintiff's failure to show any prejudice, it is appropriate to deny plaintiff's motion for a default judgment (see Rottenberg v Preferred Property Mgt., Inc., 22 AD3d 826 [2d Dept 2005] [denying motion for a default judgment]; see also Moran v Regency Savings Bank, F.S.B., 20 AD3d 305 [1st Dept 2005] [same]; Harley v Stewart, 5 AD3d 437 [2d Dept 2004] [same]).

II. Motion Sequence No. 003 – Motion to Dismiss the Complaint

In support of their motion to dismiss the complaint, Distex and Barakett assert that this action must be dismissed against them on the ground that this court does not have personal jurisdiction over them, and that, even if this court did have a basis for asserting jurisdiction, this action should still be dismissed, on the ground of forum non conveniens.

Specifically, defendants argue that Distex, a Canadian corporation, and Barakett, a Canadian citizen, are not subject to jurisdiction in New York because they did not transact business in this state, and, even if they did, that such business "had nothing to do with plaintiff's claims" (Aff. of Myron D. Milch, Esq., ¶¶ 8, 13). Defendants also argue that Distex and Barakett were not properly served (id., ¶¶ 14, 22).

Plaintiff argues that defendants are subject to jurisdiction under CPLR 301, because they have engaged in such a continuous and systematic course of doing business in New York as to warrant a finding of their "presence" in this jurisdiction. Plaintiff also points out that

Distex and Barakett have not contested jurisdiction in the Prior Action, which is still pending, and that, in defendants' request for judicial intervention in this action (RJI), they refer to the Prior Action as a related action (see Super Aff., Exh C),

"A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of 'doing business' here that a finding of its 'presence' in this jurisdiction is warranted" (Landoil Resources Corp. v Alexander & Alexander Servs., 77 NY2d 28, 33 [1990] [citations omitted]; see also Laufer v Ostrow, 55 NY2d 305 [1982]; McGowan v Smith, 52 NY2d 268 [1981]). The test is whether "the aggregate of the corporation's activities in the State [is] such that [the corporation] may be said to be 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity'" (Laufer v Ostrow, 55 NY2d at 310 [citation omitted]).

The traditional indicia that courts rely upon in deciding whether a foreign corporation is "doing business" in New York include: "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and the presence of employees of the foreign defendant in the state" (Hoffritz for Cutlery, Inc. v Amajac, Ltd., 763 F2d 55, 58 [2d Cir 1985]; accord Mende v Milestone Tech., Inc., 269 F Supp 2d 246 [SD NY 2003]; Hinsch v Outrigger Hotels Hawaii, 153 F Supp 2d 209 [ED NY 2001]).

The evidence submitted by plaintiff, as well as defendants' admissions, demonstrate that Distex has had purposeful and continuing activity within the state of New York. Distex conducts business in New York through its sales office at 745 Fifth Avenue, and employs New York salespeople to sell the Barakett Brand. The existence of a sales office and employees

in this state clearly demonstrates an intent to take advantage of the benefits and protections of New York laws on a continuous and systematic basis so as to create a constructive "presence" within this State (see e.g. Oral-B Laboratories, Inc. v Mi-Lor Corp., 611 F Supp 460 [SD NY 1985] [corporation's presence in New York was sufficiently continuous and substantial to warrant exercise of jurisdiction pursuant to CPLR 301, where principal shareholder, national sales manager and vice-president maintained permanent office in New York]; Doris Trading Corp. v S.S. Union Enterprise, 406 F Supp 1093 [SD NY 1976] [where defendant maintained New York "sales office" which performed sales and public relations activities in New York on regular basis, such regular and systematic activities were sufficient to establish that defendant was "doing business" in New York, and subject to personal jurisdiction under CPLR 301]; Katz Agency, Inc. v Heftel Broadcasting Corp., 56 AD2d 758 [1st Dept 1977] [court had personal jurisdiction over defendant, pursuant to CPLR 301, where defendant was doing business through its agent who had an office in New York]; Vantage Steamship Corp. v Rachel V. Steamship Corp., 31 AD2d 518 [1st Dept 1968], affd 25 NY2d 984 [1969] [Alabama corporation, whose "sales director" for the eastern seaboard and Canada maintained his office in New York, which was his home base, was engaged in sufficient activities in New York to confer jurisdiction over the corporation]).

Indeed, defendants admit that Distex maintains an office and a place of business in New York (see Barakett Aff., ¶ 8). "Based upon this admission, this court finds that [Distex] is 'doing business' in New York for the purposes of satisfying CPLR 301 and that [Distex's] contacts with New York are sufficient to satisfy the requirements of due process" (GMAC Commercial Credit, LLC v Dillard Department Stores, Inc., 198 FRD 402, 406 [SD NY 2001]).

Moreover, pursuant to CPLR 311, Distex was properly served with the summons and complaint, as the process server personally served them on an agent of Distex at Distex's office in New York (see Super Aff., Exh B).

Barakett is also subject to the jurisdiction of this court because he has a "presence" in this jurisdiction through his complete dominion and control over Distex. Under New York law, "individual corporate officers may be subject to jurisdiction in New York if it is established that the corporation is acting as their agent here" (Kinetic Instruments, Inc. v Lares, 802 F Supp 976, 984 [SD NY 1992]; accord Mende v Milestone Tech., Inc., 269 F Supp 2d 246, supra). The party asserting jurisdiction must establish that the corporation acted "with the knowledge and consent of the officer and the officer must have exercised control over the corporation in the transaction" (id.).

It is undisputed that Barakett is the sole owner, sole director and "Chairman of the Board" of Distex and the company's brand of men's apparel bears his name. From the inception of the company, he has exercised complete dominion and control over Distex. To the outside world, Distex is known as "Robert Barakett." As such, Distex is clearly acting as Barakett's agent, and he is subject to personal jurisdiction in this state (see id.).

In addition, on September 15, 2004, timely service of the summons and complaint was made on Barakett, pursuant to CPLR 308 (4), by affixing a true copy to each door of 745 Fifth Avenue, and by mailing it to 745 Fifth Avenue, his actual place of business (see Super Aff., Exh B).

Furthermore, although defendants argue that, even if they transacted any business in New York, such business had nothing to do with plaintiff's claims, CPLR 301 confers general

jurisdiction over any foreign corporation "doing business" within the jurisdiction, regardless of whether the cause of action arises out of that transaction or business (Landoil Resources Corp. v Alexander & Alexander Services, Inc., 77 NY2d 28, supra). Thus, a corporate defendant that meets the requirements of the "doing business" test is subject to in personam jurisdiction for any and all claims, regardless of whether they have any relationship to the defendant's New York activity (Laufer v Ostrow, 55 NY2d 305, supra).

Defendants also argue that, even if jurisdiction is found to exist in this case, this action must, nevertheless, be dismissed on the basis of forum non conveniens, because all of the relevant documents and witnesses to the transactions at issue in plaintiff's causes of action are located in Canada.

It is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin v Mieth, 35 NY2d 414, 418 [1974]). The doctrine of forum non conveniens, codified in CPLR 327 (a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984], cert denied, 469 US 1108 [1985]). The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice (see Piper Aircraft Co. v Reyno, 454 US 235 [1981]; Capital Currency Exch., N.V. v National Westminster Bank PLC, 155 F3d 603 [2d Cir 1998], cert denied 526 US 1067 [1999]). If the balance of conveniences indicates that trial in plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (see id.).

New York courts consider the availability of an adequate alternative forum and

certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the ground of forum non conveniens (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra). The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation (id; Highgate Pictures, Inc. v De Paul, 153 AD2d 126 [1st Dept 1990]). Although not every factor is necessarily articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts (see Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; World Point Trading PTE, Ltd. v Credito Italiano, 225 AD2d 153 [1st Dept 1996]; Evdokias v Oppenheimer, 123 AD2d 598 [2d Dept 1986]). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, supra; see also In re New York City Asbestos Litigation, 239 AD2d 303 [1st Dept 1997]).

Defendants' motion to dismiss the action on the ground of forum non conveniens is denied, as defendants have failed to satisfy their heavy burden of demonstrating that New York is not a convenient forum for this action (see Shin-Etsu Chem. Co., Ltd. v 3033 ICICI Bank Ltd., 9 AD3d 171 [1st Dept 2004]).

A balancing of the equities clearly establishes that New York is an appropriate forum for this action. First, there is a substantial nexus between this action and New York. In

direct contrast to their dismissal request, defendants concede in their RJI that this matter is related to the Prior Action, which is currently pending in this court (see Super Aff., Exh C). Thus, both defendants in this case – Distex and Barakett – are already litigating a related action in this court. Moreover, plaintiffs allege that the transfer underlying the first four causes of action in the complaint is in response to the Prior Action, in an effort by Barakett to make his company judgment proof.

Additionally, significant discovery has already been taken in the Prior Action, and great time and expense has been exhausted in the prosecution of that matter. The same attorneys are presently handling both actions. Indeed, plaintiff asserts that it has obtained almost all of the evidence to support the allegations in the present complaint through discovery in the Prior Action, including documentary evidence and Barakett's deposition testimony relating to Distex's capitalization, financing and the loan repayments that form the basis of the fifth through sixteenth causes of action. There is thus no reason to dismiss this action in favor of a Canadian forum.

Defendants have also failed to make any showing that retention of this action would unduly burden New York courts. The Prior Action is a related, pending action between plaintiff and Distex and Barakett, in which New York law is being applied. Here, too, it is likely that the applicable law for the first 16 causes of action alleging fraudulent transfers will be the New York DCL.

Finally, even though defendants are located in Canada, any potential hardship on defendants is greatly minimized, because defendants have already conceded jurisdiction in the Prior Action, and have provided most of the relevant documents and other discovery that plaintiff needs in this action. Barakett, who has knowledge of all of the transactions and acts relating to

each cause of action, has been litigating the Prior Action for more than a year, and he travels to New York several times a year for business. He has already appeared for a deposition in New York, and has already exchanged thousands of documents with plaintiff.

Accordingly, a balancing of the equities demonstrates that New York is an appropriate forum, and that no superior forum for this matter exists. Therefore, defendants' motion to dismiss on forum non conveniens grounds is denied.

Defendants also request, in their motion papers, that the seventeenth cause of action be dismissed for failure to state a cause of action. This request for relief is denied. It would be procedurally improper for this court to dismiss the seventeenth cause of action, as defendants failed to include this request for relief in their Notice of Motion (see CPLR 2214 [a]; Arriaga v Michael Laub Co., 233 AD2d 244 [1st Dept 1996] [as plaintiffs failed to formally and specifically demand in notice of motion that counterclaims be stricken, the trial court did not err in denying such relief]).

Plaintiff's cross motion for jurisdictional discovery is denied as moot.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, both motions and the cross motion are denied.

Dated: March 6, 2006

ENTER:

HON. RICHARD B. LOWE, III

J.S.C.