

Freeford Limited v Pendleton
2006 NY Slip Op 30383(U)
July 5, 2006
Supreme Court, New York County
Docket Number: 0603652/2005
Judge: Helen E. Freedman
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT:

Index Number : 603652/2005

FREEFORD LTD

vs
PENDLETON, LANE P. *C*

Sequence Number : 001

DISMISS ACTION

PART 37

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided*
in accordance with the accompanying
memorandum law.

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

FILED

JUL 10 2006

CLERK'S OFFICE
NEW YORK

Dated: 7/5/06

HSO

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----- X

FREEFORD LIMITED,

Index No. 603652/05

Plaintiff,

- against -

LANE P. PENDLETON, KIRK PENDLETON,
LAIRD P. PENDLETON, CAIRNWOOD
CAPITAL MANAGEMENT, LLC,
CAIRNWOOD CAPITAL PARTNERS, LLC,
CAIRNWOOD CAPITAL INTERNATIONAL,
LTD., CAIRNWOOD GROUP, LLC, and
JOHN DOES 1 through 10,

Defendants.

----- X

FREEDMAN, J.:

Plaintiff Freeford Limited alleges that defendants fraudulently induced it to purchase securities of and loan money to the now insolvent Orient Networks Holdings, Limited (Orient Holdings). Plaintiff also alleges that defendants breached contractual obligations and fiduciary duties that they owed to it regarding the financing, management, and operations of Orient Holdings.

Defendants move for dismissal of the complaint on the grounds of lack of personal jurisdiction, the action is barred by the first filed rule, and forum non conveniens.

Background

The following allegations are taken from the complaint. Orient Holdings is a Cayman Islands corporation with its principal place of business in the Republic of Singapore. Plaintiff is an investment company, whose sole director at all relevant times was Karim Karaman, a resident of London, England.

Defendant Lane Pendleton has interests in and controls various Cairnwood entities which include defendants Cairnwood Capital Management, LLC (Cairnwood Management), Cairnwood Capital Partners, LLC (Cairnwood Partners), Cairnwood Capital International, Ltd. (Cairnwood International), and Cairnwood Group, LLC (Cairnwood Group) as well as other related entities (collectively, Cairnwood Entities). Cairnwood entities owned substantial shares of Orient Holdings. Pendleton was also co-chairman and executive director of Orient Holdings, which he effectively controlled through his control and ownership interests in the Cairnwood Entities, and as Cairnwood International's chief executive officer and managing director. In the transactions at issue, he was allegedly acting for himself, and on behalf of defendants Kirk Pendleton, Laird Pendleton, and the other Cairnwood Entities.

Defendant Kirk Pendleton is the chief executive and chairman of Cairnwood, Inc. and holds interests in various Cairnwood Entities. Defendant Laird Pendleton, an uncle of Lane Pendleton, holds interests in various Cairnwood Entities, is a principal of defendant Cairnwood Group, and a co-founder, shareholder, and director of CCC Alliance, LLC, a "family membership group" that provides investment advisory services for wealthy families. Both have been highly involved in the business affairs of Orient Holdings.

In late 1998 or early 1999, Karaman was introduced to Lane Pendleton, and, in October 2000, they met in London, England, where Lane Pendleton solicited plaintiff's investment in a telecom company then named OMM Holdings, Limited (OMM) (renamed XA Alliance Holdings, Limited and subsequently renamed Orient Networks Holdings, Limited, in February 2004). At this meeting, Lane Pendleton made oral representations about OMM's future value, as well as his intention to make a \$2 million investment in OMM. He provided Karaman with a

document entitled "OMM-Communications - Executive Summary," that was prepared to provide information about OMM to potential investors. It contained representations about OMM's future value as well as the intention of the "Cairnwood Group" to make a substantial investment in OMM. In reliance upon these representations, plaintiff invested \$1 million in OMM, pursuant to a Share Purchase Agreement, dated October 2000, for which plaintiff received 900,901 Preferred A shares of OMM at a cost of \$1.11 per share.

In July 2001, at which time OMM's name was changed to XA Alliance Holdings, Limited (XA), Lane Pendleton communicated with Karaman to solicit additional funding, and he made representations about Cairnwood's investment in XA, as well as XA's future value. Based upon these representations, in September 2001, plaintiff made a \$1 million loan to XA in exchange for a promissory note convertible into Class B Preferred Shares of XA.

In November 2001, Lane Pendleton again communicated with Karaman about additional funding for XA, representing that XA had "book value - \$100 million after one year of operations," and, in January 2002, Lane Pendleton made additional representations to Karaman about Cairnwood's intended financing of XA. Thereupon, on January 29, 2002, plaintiff acceded to the request to convert its \$1 million promissory note into 250,000 Class B Preferred Shares of XA at a purchase price of \$4.00 per share. The conversion was part of a transaction whereby a new investor (GEMS) and its wholly-owned subsidiary, Alexandrite International Finance Limited, invested in XA pursuant to (1) a Share and Option Purchase and Warrant Exercise Agreement, dated January 30, 2002, among XA, Cairnwood Management, Lane Pendleton, and others, and (2) a Substitute Shareholders Agreement, dated January 30, 2002.

In 2003, Lane Pendleton had further oral and written communications with Karaman

concerning additional financing for XA. At a July 9, 2003 meeting, Pendleton provided Karaman with an "Investment Memo," prepared on the stationery of Cairnwood International about a new "Series C" round of financing, and which contained representations about the value of XA. The memo also referred to an initial public offering for XA, anticipated to occur in late 2004 or early 2005.

In August 2003, Lane, Laird and Kirk Pendleton met with Akram Khattab, who was affiliated with an entity that defendants knew shared investment information with plaintiff for the purpose of issuing a report that was forwarded to Karaman. Lane Pendleton endorsed the report and sent the report and accompanying e-mails containing representations about XA's finances. Plaintiff relied on the report in making additional investments in XA.

As part of an additional financing transaction, plaintiff entered into a Shareholders Purchase Agreement, September 26, 2003, and an Amended and Restated Substituted Shareholders Agreement, dated September 26, 2003, pursuant to which plaintiff was to pay XA \$2 million, \$500,00, and \$250,000 on October 21, 2003, December 23, 2003, and January 9, 2004, respectively. These payments were to be made in conjunction with investments by NewFirst Limited, a Cairnwood entity that Lane Pendleton controlled. Because defendants failed to cause NewFirst Limited to comply with its obligations pursuant to the terms of the 2003 Share Purchase Agreement, however, plaintiff has not made the remainder of its payments under that agreement.

Plaintiff alleges that defendants' representations were false and misleading, and, in reliance thereon, plaintiff has suffered damages, because Orient Holdings is insolvent, and plaintiff's 900,901 Preferred A Shares and 250,000 Preferred B Shares of Orient Holdings are

worthless.

The complaint contains 14 causes of action for (1) fraud, negligent misrepresentation, promissory estoppel, and breach of implied contract regarding plaintiff's purchase of Preferred Class A Shares; (2) fraud, negligent misrepresentation, promissory estoppel, and breach of implied contract regarding the \$1 million convertible promissory note and conversion to \$250,000 preferred B shares; (3) fraud, negligent misrepresentation, promissory estoppel, and breach of implied contract regarding investments that plaintiff made in 2003 and 2004; (4) aiding and abetting fraud; and (5) breach of fiduciary duty.

According to the complaint, this Court has jurisdiction and venue is properly laid, because of forum selection and choice of law provisions contained in various Share Purchase and Shareholder's Agreements involved in this action. Plaintiff invokes CPLR 501 ("Contractual provisions fixing venue") and General Obligations Law § 5-1402 (1) ("Choice of forum") which pertain to international contracts involving transactions of not less than \$1 million in which the parties have agreed to the application of New York law and to the jurisdiction of this court as the basis for jurisdiction and venue.

Defendants seek dismissal of the action on three grounds. They first argue that there is no basis for jurisdiction over them, because neither they, nor plaintiff, nor the transactions that are the subject of the complaint, bear any relation to New York. They assert that they have not consented to jurisdiction in New York, because plaintiff relies upon specific contracts that are not at issue in this action. Second, they contend that the action should be dismissed because this is an inappropriate forum. Third, they aver that plaintiff commenced an action in Singapore covering the same subject matter, and it should not be permitted to litigate the same claims in

two fora.

Discussion

Jurisdiction

The burden of establishing jurisdiction rests on plaintiff as the party asserting jurisdiction (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199 [1st Dept 2003]). Plaintiff has met its burden.

It is undisputed that none of the defendants are domiciled in New York, or that any of the transactions occurred within this state. Plaintiff relies upon the forum selection clause contained in each of the five agreements described in the complaint for jurisdiction over defendants. For example, the Substitute Shareholders Agreement, dated January 30, 2002, to which plaintiff and defendants Cairwood Group and Cairwood Partners, among others, are parties, contains the following provision:

“6.1 Governing Law; Consent to Jurisdiction

This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and to be performed wholly therein, without regard to principles of the conflict of laws thereof. Each party hereto hereby agrees that any suit or judgment entered by any court in respect thereof may be brought to the extent permitted by applicable law in the Supreme Court of New York County, New York, or in the United States District Court for the Southern District of New York, as the party commencing such suit, action or proceeding may elect in its sole discretion; and each party hereto hereby irrevocably submits to the jurisdiction of such courts and any appellate court or body thereof for the purpose of any suit, action, proceeding or judgment (and waives for such purpose any other preferential jurisdiction by reason of its present or future domicile or otherwise). Each party irrevocably waives any objection which it may now or hereafter have to the laying of the venue of any suit, action or proceeding arising out of or relating to this Agreement brought in the Circuit Court of New York County, New York or in the United States District Court for the Southern District of New York and hereby further irrevocably waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum.”

The other four agreements (Share Purchase Agreement, dated October 30, 2000; Share and Option Purchase and Warrant Exercise Agreement, dated January 30, 2002; Share Purchase Agreement, dated September 26, 2003; and Amended and Restated Substituted Shareholders Agreement, dated September 26, 2003) contain substantially similar provisions pertaining to forum selection and governing law.

Parties to a contract may freely select a forum that will resolve any disputes over the interpretation or performance of a contract (*Brooke Group Ltd. v JCH Syndicate* 488, 87 NY2d 530 [1996]). The elimination of jurisdiction uncertainties by agreeing in advance on a forum selection acceptable to the parties is an indispensable element in international trade, commerce, and contracting (*Micro Balanced Prod. Corp. v Hlavin Indus. Ltd.*, 238 AD2d 284 [1st Dept 1997]).

General Obligations Law § 5-1402 specifically mandates that a clause designating New York as the forum shall be enforceable in cases involving \$1 million or more. (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228 [1st Dept 1999]). As discussed below, all defendants are bound by the forum selection clause in the various agreements.

1. Cairnwood Partners and Cairnwood Group.

The court has jurisdiction over Cairnwood Partners and Cairnwood Group because they and plaintiff are parties to the Substitute Shareholders Agreement, dated January 30, 2002. The forum selection clause in that agreement extends to any controversy “arising out of or relating to the agreement at issue,” and, as such, is sufficiently broad to cover the allegations contained in this action. That the complaint does not expressly allege a breach of this agreement is inconsequential. Forum selection clauses are not restricted to pure breaches of the contracts

containing the jurisdiction clauses, but also cover claims related to the agreement (*Roby v Corporation of Lloyd's*, 996 F2d 1353, 1361 [2d Cir], *cert denied* 510 US 945 [1993]; *Nanopierce Tech. v Southridge Capital Mgt. LLC*, 2003 WL 22882137 [SD NY 2003]). Here, the alleged wrongs are inextricably intertwined with the agreements containing the forum selection provisions, because they are instruments used to facilitate the alleged wrongs.

2. Lane Pendleton and Cairnwood Management.

The court also has jurisdiction over Lane Pendleton and Cairnwood Management, because they are parties to the Share and Option Agreement, dated January 30, 2002, in which Lane Pendleton executed the agreement in an individual capacity, as well as on behalf of XA (i.e., Orient Holdings) in his capacity as co-chairman. Although plaintiff is not a party to this agreement, the agreement was entered into on the same date as the Substitute Shareholders Agreement, in which plaintiff, as well as Cairnwood Group and Cairnwood Capital Partners, are parties, and both of which contain the forum selection clause.

These agreements are related in nature and in time, and thus, they must be read together in that they both pertain to plaintiff's continuing investments in Orient Holdings at the alleged behest of defendants. In the absence of any intention to the contrary, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, must be read and interpreted together, because they are, in the eye of the law, one instrument (*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850 [1st Dept 1985]). The agreements should be read together because, based upon their alleged participation in the wrongs complained of, these Cairnwood Entities, as well as Lane Pendleton, have a pecuniary interest in achieving a uniform resolution of the claims and can be deemed third-party beneficiaries of the agreement

(*Roby v Corporation of Lloyd's*, 996 F2d at 1358; *Direct Mail Prod. Serv. Ltd. v MBNA Corp.*, 2000 WL 1277597 [SD NY 2000]).

Although Lane Pendleton and Cairnwood Management are not parties to the Share Option Agreement, in which plaintiff is a party, they may still be deemed to be bound by the forum selection provision in that agreement (see *National Union Fire Ins. Co. of Pittsburgh, Pa. v Turtur*, 892 F2d 199 [2d Cir 1989]). The fact that both agreements took effect on the same day, January 30, 2002, supports the argument that they may be considered interdependent (*Cooperative Centrale Raiffeisen-Boerenleen Bank B.A. v Northwestern Natl. Ins. Co. of Milwaukee, Wis.*, 778 F Supp 1274 [SD NY 1991]).

Furthermore, because of the alleged close relationship between the Cairnwood Entities and Lane Pendleton, it was reasonably foreseeable that plaintiff would seek to enforce the forum selection clause contained in the Substitute Shareholders Agreement as against him as well as against Cairnwood Management (*Dogmoch Intl. Corp. v Dresdner Bank AG*, 304 AD2d 396 [1st Dept 2003]). The allegations against these defendants are dependent upon the complaints against Cairnwood Partners and Cairnwood Group, both of whom are parties to the Substitute Shareholders Agreement, dated January 30, 2002, as is plaintiff (see *Nanopierce Tech. v Southridge Capital Mgt. LLC*, 2003 WL 22882137, *supra*).

3. Kirk Pendleton and Laird Pendleton.

The court also has jurisdiction over Kirk Pendleton and Laird Pendleton, because they are closely related to the dispute such that it was foreseeable that they would be bound by the forum selection clause (*Dogmoch Intl. Corp. v Dresdner Bank AG*, 304 AD2d 396, *supra*; *Lipcon v Underwriters at Lloyd's, London* (148 F3d 1285 [11th Cir 1998], *cert denied* 525 US 1093

[1999]). Kirk Pendleton is chief executive officer and chairman of Cairnwood, Inc., and the complaint alleges that both Kirk Pendleton and Laird Pendleton participated in the making of false representations to induce plaintiff's investments.

4. Cairnwood Capital International, Ltd.

The court appears to have jurisdiction over Cairnwood International as an alleged aider and abettor of the actions of the other defendants (*see Travelers Indem. Co. v Inoue*, 111 AD2d 686 [1st Dept 1985]). Allegations of its involvement in the alleged wrongdoing are contained in paragraphs 19, 56-57, and 71 of the complaint. Although plaintiff argues in its brief that Cairnwood International was a participant or conspirator, the complaint does not expressly allege a conspiracy. Nevertheless, under an agency doctrine, jurisdiction may be conferred upon an agent where the principle submits to jurisdiction or where under the facts alleged it may be inferred that a party allegedly acted as a co-conspirator (*see Battanta v. Bunzl et al.*, 239 AD2d 167 [1st Dept. 1997]; *Travelers Indemn. Co. V. Inoue*, 111 AD2d 686 [1st Dept. 1985]).

Forum Non Conveniens

Defendants' assertion for dismissal based upon the doctrine of forum non conveniens is misplaced. CPLR 327 (b) provides that a court shall not dismiss any action on the ground of inconvenient forum where, as here, the action applies to a contract to which Section 5-1402 of the General Obligations Law applies (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, *supra*; *Creative Resources v Rumbellow*, 244 AD2d 383 [2d Dept 1997]).

Another Action Pending

Defendants' reliance upon CPLR 3211 (a) (4) for the proposition that the court should

dismiss this action, because of a pending action in Singapore between the same parties for the same cause of action, is unavailing. Assuming that there were substantial identity of parties and subject matter between the two actions, dismissal on this ground is nevertheless unavailable, because that CPLR provision is only applicable when the other action is “in a court of any state or the United States,” which is not the case here (*ABKCO Indus. v Lennon*, 85 Misc 2d 465 [Sup Ct, NY County 1975], *affd in part, mod in part on other grounds* 52 AD2d 435 [1st Dept 1976]).

Moreover, dismissal of the action based upon another action pending may be warranted only where there is a sufficient identity of parties, and the relief sought is substantially the same (*White Light Prod. v On The Scene Prod.*, 231 AD2d 90 [1st Dept 1997]). Here, there is an absence of substantial identity of the parties because only two of the seven defendants are named in the Singapore Action – Lane Pendleton and Cairnwood International – and, of those two, Cairnwood has not been served, and has not answered or appeared.

Furthermore, it appears that, based upon the forum selection clauses in the pertinent agreements, New York is the only jurisdiction where plaintiff can obtain jurisdiction over all of the relevant parties. The Court will consider an application for a stay if the Singapore action proceeds expeditiously and full relief is obtainable.


Accordingly, it is

ORDERED that the motion to dismiss is denied, and defendants are directed to serve their answers to the complaint within 20 days of receipt of a copy of this order.

The parties are directed to appear for a preliminary conference on August 15, 2006 in
Room 208 at 9:30 A.M.

Dated: July 5, 2006

ENTER:



J.S.C.

FILED
JUL 10 2006
COUNTY CLERK'S OFFICE
NEW YORK