

Kenig v Rada Electronic Industries, Ltd.

2007 NY Slip Op 34206(U)

December 18, 2007

Supreme Court, New York County

Docket Number: 0119128/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD C. LOWE, III
Justice

PART 56

David Kenig
v.

Rada Electronic Industries

INDEX NO. 119128/06
MOTION DATE 8/23/07
MOTION SEQ. NO. 001
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

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE, III

Dated: 12/18/07

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X

DAVID KENIG,

Index No. 119128/06

Plaintiff,

- against -

RADA ELECTRONIC INDUSTRIES, Ltd.,

Defendant.

-----X

FILED
DEC 21 2007
NEW YORK
COUNTY CLERK'S OFFICE

HON. RICHARD B. LOWE III, J.:

Defendant, Rada Electronic Industries. Ltd. ("Rada"), moves, pursuant to CPLR 3211(a)(5), (7), and (8), to dismiss the Complaint filed by plaintiff, David Kenig ("Kenig"), pro se, seeking to recover compensation for his services as a member of the board of directors of Rada.

BACKGROUND

The pleadings include the following factual allegations. Kenig is a New York resident. Rada is an Israeli corporation engaged in the business of manufacturing electronic systems for airplanes and armored vehicles. Kenig began serving as a member of the board of directors of Rada in 1995. In 1996, Rada's shareholders approved the grant of 30,000 stock options to each board member. Kenig resigned from the board on January 5, 1999. On November 17, 1999, Rada's shareholders approved the grant of additional stock options to board members who were serving at the time. Kenig asserts the Rada shareholders specifically promised him 300,000 stock options at \$1.05 per share, pursuant to the company's bylaws and other board resolutions. Kenig also asserts that he is entitled to an additional 300,000 stock options at \$1.05 per share, as a result of matching value, pursuant to an increased allocation of stock options. Kenig claims

that he would have realized \$1,800,000 in compensation if he had been able to exercise the stock options between 2000 and 2003.

In 2001, Kenig commenced an action in Israel seeking declaratory relief or specific performance of the stock options that were allegedly promised to him in 1999. He asserts, however, that the declaratory relief and specific performance relief became obsolete due to a decline in Rada's share values. He further asserts that his counsel in the Israel action should have notified Rada that he voluntarily discontinued said action on November 20, 2006.

On December 27, 2006, Kenig commenced this action seeking to recover unpaid compensation for his service as a director of Rada. In the first cause of action, sounding in breach of contract, Kenig seeks to recover compensatory and punitive damages based on the alleged breach of a promise by Rada's shareholders to grant him 600,000 stock options. The second cause of action essentially alleges that Rada was unjustly enriched as a result of the failure to grant Kenig the 600,000 stock options. The third cause of action alleges that Kenig is entitled to recover in quantum meruit as compensation for his services as a director of Rada.

Rada now seeks to dismiss the Complaint on various grounds, including lack of personal jurisdiction; forum non conveniens, statute of limitations; and failure to state a cause of action.

DISCUSSION

Personal Jurisdiction

CPLR 302(a)(1), New York's "long arm statute," governs personal jurisdiction over nondomiciliaries, such as Rada. The statute provides, in part, that a court may exercise jurisdiction over any nondomiciliary who "transacts any business within the state" as to a cause of action arising from that business. To transact business in New York, a party must purposefully avail itself of the privilege of conducting business, thus invoking the benefits and

• protections of New York law (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

Furthermore, for a claim to arise out of a business transaction in New York, there must be a substantial relationship between that business transaction and the cause of action sued upon (*id.*). CPLR 302(a)(1) is a single act statute, and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there was a substantial relationship between the transaction and the plaintiff's claim (*id.*). Furthermore, while the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiff, in opposing a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant was subject to the jurisdiction of the court (*Alden Personnel, Inc. v David*, 38 AD3d 697, 698 [2d Dept 2007]).

Rada argues that the action against it should be dismissed since it is an Israeli corporation, which does not transact any business in New York, and that the November 17, 1999 stock option grant is wholly unrelated to New York.

In opposition, however, Kenig asserts that Rada has sufficient ties to New York for the Court to properly exercise personal jurisdiction against it. In particular, Kenig asserts that he was recruited as a director because of his location in New York, and that most of his work as a director was performed in New York. Kenig also asserts that shares of Rada have been publicly traded on New York's NASDAQ stock exchange since 1985, and that most of Rada's shareholders are in Hong Kong and New York. Kenig further asserts that some of Rada's shareholders meetings are convened in New York. In addition, Kenig maintains that Rada once had a subsidiary in New York, and retains accountants and attorneys here. Kenig further argues that many of Rada's clients are in New York; that a New York law firm has an open power of attorney to represent its business interests here; and that a April 12, 2007 Securities and

- Exchange Commission prospectus irrevocably appoints a New York agent to receive service of process in New York. Kenig asserts that the power of attorney has negotiated certain deals for Rada with United States companies. Kenig also asserts that Rada solicited investments in its stock from New York businesses. Kenig further contends that Rada maintains New York bank accounts.

The Court determines Kenig's presence in New York, where he performed most of his work as a member of the board of directors of Rada, as well as Rada's other business dealings in New York, including shareholder meetings, the appointment of an agent to receive service of process, and the maintenance of bank accounts, are sufficient to establish that Rada transacted business in this State. Furthermore, to the extent that Kenig brings this action to recover compensations for services he performed in New York as a member of the board of directors of Rada, the court may properly exercise personal jurisdiction over it. Thus, the branch of the motion that seeks to dismiss the Complaint for lack of personal jurisdiction is denied.

Forum Non Conveniens

Rada also seeks to dismiss this action on the ground that the matter should be adjudicated in the courts in Israel, where most of the evidence and witnesses are located. The doctrine of forum non conveniens permits a court to stay or dismiss an action when, although it may have jurisdiction over a claim, the court determines that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327[a]). The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). The court, after considering and balancing various competing factors must determine in the exercise of its sound discretion whether to retain jurisdiction(*id.*). 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 the plaintiff may bring suit (*id.*). The court may also consider whether the parties to the action are nonresidents and whether the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*id.*). No one factor is controlling (*id.*).

Here, Rada maintains that the underlying transaction occurred in Israel, all of the relevant evidence and witnesses are located in Israel, and Israeli law governs the November 17, 1999 stock option grant. Rada also notes that Kenig commenced an Israel action alleging claims based on the same underlying facts as in this action and seeking essentially the same remedy.

However, Kenig contends that he is a New York resident, and that his work as a director, for which he seeks compensation, was performed in New York. Kenig also asserts that many potential witnesses, including Rada shareholders, are located in New York. Kenig further argues that the application of Israeli law should not be an impediment to maintaining the action in New York. In addition, Kenig maintains that Rada was notified that he abandoned the Israeli action on November 20, 2006, and that the limitations period for refiling that action has expired.

The Court, after considering the various factors, concludes that the commencement of this New York action by Kenig, coupled with the ability to adequately resolve the parties' dispute in this State's courts and the inability of Kenig to refile the Israeli action, warrants the denial of the branch of the motion that seeks to dismiss the action based on the doctrine of *forum non conveniens*.

Statute of Limitations

Rada further contends that the claims in this action should be dismissed as time-barred. As stated, Kenig commenced this action alleging that he was deprived of the benefit of a stock

option granted on November 17, 1999. The pleading in this action, which was filed on December 27, 2006, alleges causes of action for breach of contract, unjust enrichment, and quantum meruit. It is uncontested that each of these claims is subject to a six-year statute of limitations (CPLR 213[1]; [2]). As a general rule, a cause of action accrues when all of the facts necessary to sustain the claim have occurred, so that a party can obtain relief in court (*Insurance Co. of State of Pennsylvania v HSBC Bank USA*, 37 AD3d 251, 254 [1st Dept 2007]). On a motion to dismiss, pursuant to CPLR 3211(a)(5), based on the running of the statute of limitations, the defendant must make a prima facie showing that the statute of limitations has expired (*Swift v New York Med. College*, 25 AD3d 686 [2d Dept 2006]).

Here, Rada argues that since Kenig resigned from the board on January 5, 1999, his claims must have accrued prior to January 5, 1999 and, as such, he was required to commence this action by January 5, 2005. Alternatively, Rada contends that even if Kenig uses November 17, 1999, the date that the Rada shareholders approved the grant of additional stock options, as the accrual date for his claims, the action is nevertheless time-barred.

Kenig acknowledges that the event that triggered his claim was the Rada shareholders' refusal to extend the November 17, 1999 stock option grant to him. However, Kenig urges that his loss occurred thereafter, when the value of the stocks increased and he was unable to exercise the options in the free market. Kenig further argues that CPLR 204(a) and 205 serve to toll the statute of limitations for this action.

Kenig's claim regarding the accrual date of his action is simply untenable since, as stated, a cause of action accrues upon the commission of the alleged wrongful conduct (*see Insurance Co. of State of Pennsylvania v HSBC Bank USA, supra*). Furthermore, contrary to Kenig's position, neither CPLR 204(a) nor 205 serves to toll the statute of limitations for the

claims in this action. CPLR 204(a) states that “[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.” However, CPLR 204(a) is inapplicable here since commencement of this action was not stayed by the Court. Furthermore, CPLR 205 permits a plaintiff who commences a timely, but terminated action, to “commence a new action upon the same transaction or occurrence or series of occurrences within six months after the termination.” CPLR 205 is similarly inapplicable since it only applies to prior actions commenced in the state or federal courts of New York (*DiPaolo Mach. Works, Ltd. v Prestige Equipment Corp.*, 998 F Supp 229, 236 [ED NY 1998]). Kenig’s present action is untimely, as it was not commenced within the six-year limitations period, and none of the tolling provisions on which he relies is applicable here. Thus, the branch of the motion that seeks to dismiss the Complaint in this action as time-barred is granted.

In any event, even affording the pleading the most liberal construction, accepting the facts alleged therein as true, and according the plaintiff the benefit of every favorable inference (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]), the first cause of action, sounding in breach of contract, fails to allege the existence of a valid agreement between the parties, performance by the plaintiff, the failure of performance by the defendant, and damages so as to survive a motion to dismiss (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). Similarly, the second cause of action inadequately alleges any facts to demonstrate entitlement to recovery under the equitable doctrine of unjust enrichment (*see Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]). Likewise, the third cause of action fails to allege sufficient facts to establish the elements of a claim for quantum meruit (*see Atlas Refrigeration-Air Conditioning, Inc. v Lo Pinto*, 33 AD3d 639 [2d Dept 2006]). The claim for punitive damages

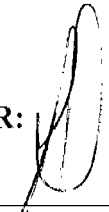
must fail since punitive damages are not available to redress a private wrong (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]).

Accordingly, it is

ORDERED that the motion to dismiss is granted and the Complaint is dismissed with cost 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.

Dated: December 18, 2007

ENTER: 

J. S. C.

WILLIAM B. LOWE, III

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