

MHR Capital Partners LP v Presstek, Inc.

2007 NY Slip Op 34284(U)

January 3, 2007

Supreme Court, New York County

Docket Number:

Judge: Richard B. Lowe

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

PART 56

Index Number : 600490/2005
MHR CAPITAL PARTNERS LP

vs
PRESSTEX INC

Sequence Number : 004

CONFIRM/REJECT REFEREE REPORT

C

INDEX NO. 600490/05
MOTION DATE 11/21/06
MOTION SEQ. NO. 004
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/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 17 2007

NEW YORK
COUNTY CLERK'S OFFICE


RICHARD D. LOWE III
J.S.C.

Dated: 1/3/07

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 : IAS PART 56

-----X
MHR CAPITAL PARTNERS LP,
MHR INSTITUTIONAL PARTNERS LP,
MHRM LP, and MHR FUND MANAGEMENT, LLC

Index No: 600490/05

Plaintiffs

- against -

DECISION AND ORDER

PRESSTEK, INC and SILVER ACQUISITIONS
CORP.

Defendants

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
RICHARD B. LOWE III, J:

Before this Court are cross-motions pursuant to CPLR 4403 to confirm and modify a determination by a Special Referee regarding jurisdiction. Plaintiff MHR Capital Partners, MHR Institutional Partners, MHRM LP, and MHR Fund Management LLC (collectively "MHR") move to confirm the Special Referee's report dated July 14, 2006 finding that New York has jurisdiction over defendant Presstek, Inc ("Presstek") and modify it with respect to the determination that New York does not have jurisdiction over defendant Silver Acquisitions Corp ("Silver"). Defendants Presstek and Silver (collectively "the Defendants") cross-move to modify the report to find that there is jurisdiction over Presstek and to confirm the report finding there is

no jurisdiction over Silver. Defendants also seek the action's dismissal pursuant to CPLR 3211(a)(8).

BACKGROUND

MHR is a limited-liability corporation organized under Delaware Law, with its place of business in New York. A.B. Dick Company ("ABD") was a supplier of goods and services to the graphic arts and imaging industry. Paragon Corporate Holdings, Inc ("Paragon") was ABD's parent company. ABD eventually filed for Bankruptcy, and MHR became its largest creditor.

Presstek is a Delaware Corporation with its principal place of business in Hudson, New Hampshire. It is a goods and services supplier for the graphic arts and imaging industry. Silver is also a Delaware Corporation with its place of business in Hudson, New Hampshire. The Defendants considered purchasing the now-bankrupt ABD's assets and proposed a stock purchase agreement.

Under the Stock-Purchase Agreement, MHR would receive fees and other reimbursements. This agreement included a New York forum-selection clause. The Defendants, however, did not sign the agreement because they were waiting for certain condition precedents to occur. Rather, they negotiated an Escrow Agreement, whereby the Stock-Purchase Agreement was escrowed for a period of time.

The Escrow Agreement contained the condition precedents. The Defendants would sign and perform under the Stock-Purchase Agreement after their financial advisor obtained a

fairness opinion for their board of directors' approval and after the Defendants' bank consented to the agreement, and provided continued funding to ABD.

A dispute arose as to whether the condition precedents were met, and on February 28, 2005, MHR commenced the instant action against the Defendants for breach of contract. On March 8, 2005, the Defendants moved pursuant to CPLR 3211(a)(8) seeking the action's dismissal on the grounds that New York does not have personal jurisdiction over them. The issue was referred to a Special Referee to hear and report on the jurisdictional issue. In the report, the special referee concluded that MHR demonstrated that

Presstek, a non-domiciliary, transacted business in New York. . .and that a significant nexus exists between Presstek and the claims asserted against it to warrant the court's exercise of personal jurisdiction over it, but that there is insufficient evidence showing that the court also has personal jurisdiction over Silver.

(Referee's Report at page 14)

In the instant motion, MHR and the Defendants cross-move to confirm and modify in part the report. MHR seeks an order confirming the report to the extent that Presstek is subject to New York's jurisdiction; modifying the report to reflect that both Presstek and Silver signed the Escrow Agreement; and modifying the report to reflect that the Defendant's execution of the Escrow Agreement creates independent grounds for New York personal jurisdiction over Presstek and Silver. The Defendants seek a modification of the report that New York has jurisdiction over Presstek, and a dismissal of the action, averring that New York does not have personal jurisdiction over either of them.

DISCUSSION

On a motion to confirm a Referee's report, a court should confirm if the record supports the referee's findings. (*Baker v Kohler*, 28 AD3d 375 [1st Dept 2006].) A Referee's report is granted deference because it is the Referee who had the opportunity to observe the demeanor and credibility of the witnesses (*Wilkenfeld v Rowen*, 262 AD2d 28 [1st Dept 1999]). It is the referee, as the trier of fact, who is at liberty to believe or disbelieve witnesses and best weigh and analyze the evidence on the record in reaching his conclusion (See *Dominguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 46 NY2d 528, 534).

I. New York's Jurisdiction over the Defendants

"A court may exercise personal jurisdiction over any non-domiciliary. . .who in person or through an agent . . .transacts any business in the state." (*CPLR 302(a)(1)*) The Special Referee, as fact-finder, issued a determination that corporate defendant Presstek had sufficient contacts with New York that subjected itself to this state's jurisdiction, but corporate defendant Silver did not. Each determination will be reviewed in turn.

a. Presstek's Contacts in New York

Here, the Special Referee's report found that Presstek subjected itself to New York's jurisdiction. The evidence proffered before the Referee supports this finding. There was persuasive testimony that Ed Marino ("Marino"), Presstek's President, as well as other company's officials, attended meetings at MHR's New York office to discuss the Stock-

Purchase Agreement. In addition, witnesses testified that telephonic conversations to New York were also conducted. While Presstek did not sign the Stock-Purchase Agreement, there is a signatory line for it, which is documentary evidence that corroborates the testimony that there were ongoing negotiations regarding the stock sale. When an individual “communicate[s] by telephone and mail with [another] in New York, and visit[s] New York on several occasions to discuss the business. . . contacts with New York were sufficient to confer jurisdiction.” (*L& R Exploration Venture v Grynberg*, 22 AD 3d 221 [1st Dept 2005].) Since there was sufficient evidence that Presstek collectively had numerous contacts with New York, the Referee’s finding that New York has jurisdiction over it was proper. Accordingly, the report is confirmed with respect to New York’s jurisdiction over Presstek.

b. The Escrow Agreement/Silver

The Special Referee concluded that MHR proffered insufficient evidence to warrant New York’s jurisdiction over Silver. Indeed, the Referee’s Report reflects that MHR’s discussion about Silver is scant at best; much of the testimony focused on Presstek’s contacts within the state.

MHR avers that the Referee’s report failed to include the fact that Marino signed the Escrow Agreement. The alleged significance is that, by signing the Escrow Agreement as the representative of both Presstek and Silver, Marino bound the Defendants to the New York forum-selection clause in the Stock-Purchase Agreement. The Defendants dispute this, contending that there is no separate basis for New York’s jurisdiction over Presstek and that the report should be confirmed with respect to the lack of jurisdiction over Silver.

It is indeed irrefuted that Marino signed the Escrow Agreement. (*Marino Aff'd at page 5, paragraph 13*) Accordingly, MHR's motion to modify the report to reflect this is granted. This Court must now address the effect the Escrow Agreement has on New York's jurisdiction over the Defendants.

"It is well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation." (*Mark J. Boss et al v American Express Financial Advisors, Inc.*, 15 AD 3d 306 [1st Dept 2005].) Here, there is no dispute that the Stock-Purchase Agreement contained a New York forum-selection clause. But the Defendants did not sign this agreement; rather they signed the Escrow Agreement.

It is true that under New York law a valid, written contract may be formed by more than one writing. (*See, Nolft Missionary Corp v Lasker-Goldman Corp*, 160 AD 2d 186 [1st Dept 1990].) The writings in the instant case, however, cannot together be viewed as a single contract. The Escrow Agreement provides that the parties *would sign and become bound* by the Stock-Purchase Agreement once the established condition precedents occurred. (*Plaintiff's Appendum, Ex. 2*) "Words in a contract are to be construed to achieve the apparent purpose of the parties." (*Hooper Associates v AGS Computer*, 74 NY 2d 487 [1989].) Taken together, it is clear that these two writings do not constitute one contract with enforceable terms that bind the parties. Rather, these are two distinct agreements with one promising to enter into the other after the occurrence of certain events. The Escrow Agreement did not incorporate by reference the Stock-Purchase Agreement's forum-selection clause. Nor did the Escrow Agreement contain a separate New York-as-forum clause. Accordingly, Marino did not secure New York's jurisdiction over

Presstek and Silver because he signed the Escrow Agreement. There is therefore no additional basis for jurisdiction over Presstek, and the Referee's Report that there is no jurisdiction over Silver is confirmed.

II. The Complaint's Dismissal

The Defendants seek the complaint's dismissal pursuant to CPLR 3211(a)(8). "A party may move for judgment dismissing one or more causes of action. . .when the court has no jurisdiction over the person of the defendant." (*CPLR 3211(a)(8)*). Here, the Special Referee determined, and this Court confirmed, that New York has jurisdiction over Presstek but not Silver. When there is no factual basis to determine that a defendant transacted business in New York, "dismissal is required pursuant to CPLR 3211(a)(8)." (*Seevers v Tang*, 268 AD 2d 249 [1st Dept 2000].) MHR failed to demonstrate that defendant Silver subjected itself to New York's jurisdiction. The complaint against Silver must therefore be dismissed.

CONCLUSION

For the foregoing reasons, it is hereby


ORDERED that the Special Referee's report is confirmed in its entirety; and it is further

ORDERED that the defendants motion to dismiss the complaint against Silver is granted and the Clerk of the court is directed to enter judgment in favor of said defendant, dismissing the complaint against it, with costs and disbursements to defendant as taxed by the Clerk; and it is further

ORDERED that the action is severed as to the remaining defendants and the action continues in all other respects.

This shall constitute the decision and order of this Court.

Dated: January 3, 2007

ENTER: 
RICHARD B. LOWE III
RICHARD B. LOWE, III, J.S.C.

FILED
JAN 17 2007
NEW YORK
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