

Levin Group, L.P. v Bowater Inc.

2008 NY Slip Op 30201(U)

January 23, 2008

Supreme Court, New York County

Docket Number: 0108447/2007

Judge: Herman Cahn

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

PRESENT: Justice Cahn
Justice

PART 49

Index Number : 108447/2007

INDEX NO. 108447/07

LEVIN GROUP, L.P.

MOTION DATE _____

vs

BOWATER INC.

MOTION SEQ. NO. 1

Sequence Number : 001

MOTION CAL. NO. _____

DISMISS COMPLAINT

The following papers, numbered 1 to _____ is 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

FILED
JAN 25 2008
NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE.....**

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

Dated: January 23, 2008 [Signature]
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 49

-----X
 THE LEVIN GROUP, L.P., :
 :
 Plaintiff, :
 :
 -against- :
 :
 BOWATER INC., :
 :
 Defendant. :
 -----X

Index No. 108447/07

FILED
 JAN 25 2008
 NEW YORK
 COUNTY CLERK'S OFFICE

Herman Cahn, J.

Defendant Bowater Incorporated ("Bowater") moves to: (1) dismiss the Complaint for *forum non convenienc*e; (2) dismiss the breach of contract claim in the Complaint, based on documentary evidence or, in the alternative, for summary judgment; and (3) dismiss all other claims in the Complaint for failure to state a claim, CPLR 327(a), 3211(a)(1), (7), 3212.

Plaintiff The Levin Group ("Levin") cross-moves, seeking an injunction of a related action currently pending in South Carolina, CPLR 6301.

Background:

Levin is a mergers and acquisitions advisory firm. Bowater produces newsprint and publication papers for magazines and catalogs.

Plaintiff seeks to recover more than \$70,000,000 for advisory work it allegedly performed on a merger between Defendant and Abitibi-Consolidated, Inc. ("Abitibi"), which is also a paper and forest products company.

In October 2006, Plaintiff and Defendant executed a letter agreement ("the Agreement"), on Levin stationary, which was backdated to July 2006. The Agreement specified that Levin was to provide Bowater with strategic and financial services, as well as review certain potential

acquisitions and divestitures. For these services, Bowater would pay Levin a fixed monthly fee of \$100,000.00 and a Transaction Fee equal to 2% of the value of certain acquisitions and divestitures. Agreement, Houpt 9/21/07 Aff, Ex A, ¶¶ 2(a), (b).

Thereafter, on January 29, 2007, Bowater and Abitibi announced a proposed merger. Plaintiff claims it is entitled to 2% of the multi-billion dollar value of the combined firm, estimated at more than \$70,000,000.00.

Defendant disputes Levin's claim of entitlement to a Transaction Fee. It argues that Plaintiff's breach of contract claim is conclusively refuted by the language in the Contract, which was drafted by Levin. Def Br at 1. It further argues that the fraud and equitable claims are thinly disguised attempts to rewrite the contract, to preserve the Transaction Fee while excising the limits on its application. *Id.* Bowater also argues that the action should be dismissed for *forum non conveniens*, and litigated in South Carolina. *Id.* Most significantly, it argues that the Agreement specified South Carolinian courts as the forum for any disputes arising thereunder.

Discussion:

Forum:

The Agreement contains a forum selection clause, which provides that the parties:

hereby irrevocably consent to personal jurisdiction and venue in any court of the state of South Carolina or a Federal court in either case sitting in the State of South Carolina for the purpose of any suit, action or other proceeding arising out of this letter agreement or any of the agreements or transactions contemplated hereby, which is brought by or against [either party], and hereby agree that all claims in respect of such suit, action or proceeding may be heard and determined in any such court.

Agreement, Houpt 9/21/07 Aff, Ex A, ¶ 7(a).

Plaintiff argues that the jurisdiction clause at issue is permissive only, not mandatory. Opp Br at 3. It places great emphasis on the use of the word “may” at the end of the provision and argues that this jurisdiction clause does not use such words as “exclusive,” “must” or “only.” It further argues that it is rare for a plaintiff’s choice of forum to be disregarded. These arguments, however, are unpersuasive.

“It is well-accepted policy that forum selection clauses are *prima facie* valid.” *British West Indies Guar. Trust Co., Ltd., et al. v Banque Internationale A Luxembourg, et al.*, 172 AD2d 234, 234 (1st Dep’t 1991). Indeed, in *Boss, et al. v American Express Fin Advisors*, 6 NY3d 242, 246-47 (2006), the Court of Appeals affirmed the dismissal of a complaint, where the law and courts of another state was specified. There, too, the plaintiff argued that the clause was permissive but not mandatory, yet the Court of Appeals determined that the language at issue was unambiguous. *Id.* at 246. As with the instant action, the language in that forum selection clause also did not include such limiting words as “exclusive,” “must” or “only,” and their lack in no way created any lack of clarity as to the meaning of the clause.

In the instant action, the wording of the Agreement contains an explicit selection of South Carolina as the forum for filing any action that arises under it and between the parties. As such, the motion is granted and complaint is dismissed.

Choice of Law:

It is worth noting that the Agreement specifies that it “shall be deemed made in the State of South Carolina” and that controversies stemming from or arising under the Agreement “shall be governed by and construed in accordance with the laws of the State of South Carolina.” Agreement, Hourt 9/21/07 Aff, Ex A, ¶ 7(a). In fact, the parties do not dispute that South

Carolinian law is to be used in the resolution of any disputes stemming from the Agreement.

“As a general rule, choice of law provisions . . . are valid and enforceable in” New York. *Marine Midland Bank, N.A. v United Missouri Bank, N.A.*, 223 AD2d 119, 122-23 (1st Dep’t 1996). Thus, an examination of the dispositive issue of forum selection under South Carolinian law is appropriate, and it only strengthens the Court’s determination. For, as with the law of this state, South Carolina’s law is that where the forum selection clause unambiguously provides for another state to have jurisdiction, the court construes the meaning of the provision in “the plain, ordinary, and popular sense.” *Ashley River Prop. I, LLC, et al. v Ashley River Prop. II, LLC, et al.*, 648 SE2d 295, 299 (SC Ct App 2007) (affirming dismissal of an action that had an forum selection clause specifying New York).

Plaintiff also argues that the choice of law clause does not limit jurisdiction, noting that the Commercial division routinely interprets the law of other states. Although the Commercial Division is certainly capable of applying the law of the state of South Carolina, South Carolinian law does not completely sever the issues of the forum and the choice of law for a dispute. In affirming the dismissal of an action for lack of personal jurisdiction, the Supreme Court of South Carolina held that “[a]lthough not controlling, a choice of law provision is relevant in deciding whether to exercise personal jurisdiction” and the explicit choice of another state’s law “indicates” that the parties “did not intend to avail itself of the benefits and protections of South Carolina law.” *Coggeshall, et al. v Reproductive Endocrine Assoc. Of Charlotte, et al.*, 2007 SC LEXIS 422, at *12 (SC Dec 20, 2007).

Indeed, this is in no way dissimilar to the policy in New York. Where contractual provisions specify the same non-New York state for its choice of law and as a forum for

litigation, New York courts “will not require a more explicit expression of consent to the jurisdiction of the courts of a particular State, especially where the law of the designated forum is exclusively applicable to the controversy.” *Koob v IDS Fin. Serv.*, 213 AD2d 26, 33-34 (1st Dep’t 1995).

Injunctive Relief:

Plaintiff contends that following its commencement of the action, Bowater filed a complaint against it in the Court of Common Pleas, in Greenville, South Carolina.¹ Opp Br at 24. The South Carolina action seeks a declaration that Bowater does not owe the Transaction Fee in dispute pursuant to the Agreement. In that action, Levin has moved for dismissal of Bowater’s complaint, or for a stay. Bowater has moved for an order from that court, to enjoin the instant action. *Id.*

Plaintiff places much emphasis on its allegation that the instant action was filed earlier than the related South Carolina case. Defendant counters, *inter alia*, that the injunction of an action in a foreign court is an extraordinary relief, to be granted in only exceptional circumstances.

Inasmuch as the Court has determined that the forum selection clause in the Agreement is controlling, Plaintiff’s cross motion is denied as moot.

Remaining Arguments:

The Court expresses no opinion on the merits of the parties’ other arguments. They can and should have been made to a court in South Carolina, the forum the parties to the Agreement

¹ The Court notes that neither party provided many particulars regarding this clearly related action. *See* Def Br; Opp Br; Def Reply Br.

selected.

Accordingly, it is

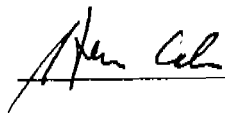
ORDERED that Defendant's motion to dismiss the Complaint is granted; and it is further

ORDERED that Plaintiff's cross motion is denied; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: January 23, 2008

ENTER:



J.S.C

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JAN 25 2008
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