

**Sandella v Gulf Coast Purveyors Inc.**

2008 NY Slip Op 30215(U)

January 23, 2008

Supreme Court, Suffolk County

Docket Number: 0011715/2005

Judge: Elizabeth H. Emerson

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

\_\_\_\_\_  
LOUIS SANDELLA,

Plaintiff,

-against-

GULF COAST PURVEYORS INC., JOANN LACASSE  
ROMANO, CHARLES ROMANO, ROSA  
HOCHBRUECKNER, individually and as officers and  
shareholders of defendant GULF COAST PURVEYORS  
INC., a Florida Corporation,

Defendants.

MOTION DATE: 6-28-07  
SUBMITTED: 8-22-07  
MOTION NO.: 02-MG CASE DISP

MARCEL WEISMAN, LLC  
Attorneys for Defendants  
45 Broadway - 12<sup>th</sup> Floor  
New York, New York 10006

ANTHONY P. GALLO, P.C.  
Attorneys for Plaintiff  
6080 Jericho Turnpike Suite 216  
Commack, New York 11725

Upon the following papers numbered 1 to 14 read on this motion to Dismiss; Notice of Motion and supporting papers 1-10; Answering Affidavits and supporting papers 11-13; Replying Affidavits and supporting papers 14; it is,

**ORDERED** that the branch of the motion dated June 28, 2007, fully submitted on August 22, 2007 seeking dismissal by defendants Gulf Coast Purveyors, Inc. ("Gulf Coast"), Joann Lacasse Romano, and Charles Romano, individually and as officers and shareholders of defendant Gulf Coast Purveyors Inc., pursuant to CPLR 3211 (a) (8) is granted only as to defendant Joann Lacasse Romano; and it is further

**ORDERED** that the branch of the motion by all defendants fully submitted on August 22, 2007 seeking dismissal of the entire complaint pursuant to CPLR 327 (a) on the grounds of forum non conveniens is granted.

This case arises out of a business relationship between the plaintiff and Gulf Coast. Plaintiff alleges that in or about December 2002, he transferred \$225,000.00 to the defendants in exchange for a one-third ownership interest in Gulf Coast. Gulf Coast is a Florida corporation which owned and operated a Florida restaurant. Plaintiff further alleges that since the date of his

investment, defendants have excluded him from the decisions affecting Gulf Coast and have refused to account to plaintiff for any profits and/or have failed to pay plaintiff his appropriate share of the profits of Gulf Coast. The complaint alleges nine causes of action against all defendants.

The defendants, Gulf Coast, Joann Lacasse Romano, and Charles Romano, individually and as officers and shareholders of defendant Gulf Coast Purveyor, Inc., seek dismissal of the complaint arguing that this court lacks personal jurisdiction over them. In support of this claim, these defendants contend that Gulf Coast has no office, agent or representative doing business in the State of New York and that it is neither qualified to do business in New York nor does it solicit business in New York. Furthermore, they argue that Charles Romano and Joann Lacasse Romano (the "Romano Defendants") are both residents of Florida and that neither of them regularly travel to New York. Charles Romano argues that he was the only individual who dealt with the plaintiff concerning the transactions in this matter and all such dealings, including plaintiff's oral agreement to invest in the restaurant, occurred in Florida. Defendants argue that these claims support their contention that this Court lacks personal jurisdiction over the Romano Defendants and/or Gulf Coast.

In addition to seeking dismissal based on the court's lack of personal jurisdiction, all the defendants, including Rosa Hochbrueckner, argue that the complaint should be dismissed on the grounds of forum non conveniens. In support of this claim, defendants argue that there is no relationship between the defendants and the State of New York, that the third-party witnesses reside in the State of Florida and that, since Gulf Coast is a Florida Corporation, all of the corporate documents, books and records are located in the State of Florida. Furthermore, the defendants claim that the subject matter of this litigation is in Florida and the contract which plaintiff alleges was breached was entered into in Florida, supporting their contention that there is no nexus between the causes of action raised in the complaint and New York. The defendants have raised these affirmative defenses in their answer, therefore, preserving the arguments raised in the within motion.

In opposition to this portion of the motion, plaintiff contends that this court has acquired personal jurisdiction over all defendants in this action. Plaintiff argues that the transaction which brought rise to his claims were negotiated and consummated in New York. He further argues that he was represented at the time by a New York attorney who structured the transaction on his behalf and that Gulf Coast was represented by a New York attorney at the time of the transaction. Plaintiff also alleges that the defendants continued to reach out to him in New York when they required additional money to run the restaurant.

In opposition to the portion of the motion to dismiss based on forum non conveniens, the plaintiff argues that both attorneys who represented the parties in connection with the transaction underlying this matter maintain offices and reside in the State of New York, as well as the defendant Rosa Hochbrueckner. Plaintiff claims that all material witnesses and evidence are located in New York and that venue in New York is proper. In an attempt to support this contention, plaintiff annexes to his opposition a promissory note in the amount of \$33,000.00 which he claims was a subsequent investment in Gulf Coast, structured as a loan for personal

reasons. This promissory note states that it shall be governed by the laws of the State of New York. However, the Court notes that plaintiff's affidavit in opposition states that this "loan" was fully repaid and does not appear to be the subject matter of this litigation.

Preliminarily, the Court notes that the record reveals certain discrepancies in the defendants' arguments. Specifically, defendants' statements that Joann Lacasse Romano is the sole shareholder of Gulf Coast, yet the affidavits, including the defendants' affidavits, reference plaintiff's "investment" in the corporation. Additionally, the affidavit of Rosa Hochbrueckner which states in paragraph 5 that she was "never a shareholder of Gulf Coast" is contradicted by documents provided by plaintiff which indicate Rosa Hochbrueckner is the holder of 100 shares of the 300 issued and outstanding shares of Gulf Coast. This document is purportedly signed by Rosa Hochbrueckner.

#### Personal Jurisdiction

Turning first to the branch of the motion to dismiss for lack of personal jurisdiction by the Romano Defendants and Gulf Coast, it is well settled that the court should resolve any objections to in personam jurisdiction before turning to the forum non conveniens issue (*see, Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618). Furthermore, once jurisdiction is challenged, the burden of proving jurisdiction lies with the plaintiff (*see, Green Point Savings Bank v Taylor*, 92 AD2d 910). The plaintiff must come forward with sufficient evidence, through affidavits and relevant documents, to prove the existence of jurisdiction (*see, Rocha Toussier y Asociados, S.C. v Rivero* 91 AD2d 137).

In the case now before the court, the Romano Defendants claim first that the court lacks jurisdiction pursuant to CPLR 301 since neither the individual moving defendants, nor Gulf Coast, reside in New York, maintain an office in New York, or are doing business in New York. They further claim that the Court does not have jurisdiction pursuant to CPLR 302, which provides in relevant portion that the court may exercise personal jurisdiction over any non-domiciliary who in person or through an agent transacts business within the state or regularly does or solicits business or engages in any other persistent course of conduct in the state, if the cause of action asserted, arises out of that transaction. An essential criterion in all cases is whether the quality and nature of the defendant's activity is such that it is reasonable and fair to require him to conduct his defense in the state (*see, Kimco Exchange Place Corp. v Thomas Benz, Inc.*, 9 Misc 3d 1125[A] *aff'd* 34 AD3d 433). Furthermore, when deciding a motion to dismiss, the Court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see, Leon v Martinez*, 84 NY2d 83; *Guggenheimer v Ginzburg*, 43 NY2d 268; *Rovello v Orofino Realty Co.*, 40 NY2d 633).

In support of their motion, the defendants assert that Gulf Coast is a Florida corporation whose sole asset was a restaurant located and operated in Florida. It was not authorized to do business in New York, nor did it have offices in New York. However, through its agent, Charles Romano, Gulf Coast transacted business in the State of New York on more than one

occasion. The plaintiff argues that Charles Romano, acting on behalf of himself and Gulf Coast, sought out plaintiff for the purpose of investing in a restaurant in Florida. In addition, Gulf Coast sought a loan from plaintiff in New York and the loan documents show that all notices to Gulf Coast were to be sent to its attorney located in New York. The plaintiff further claims that the negotiations and the process leading up to both his investment and the subsequent loan were conducted in New York and both he and the defendants were represented by New York attorneys.

The Court finds that defendant Gulf Coast through its agent Charles Romano and Charles Romano individually, transacted business in the State of New York and are subject to the jurisdiction of this Court. As to defendant, Joann Lacasse Romano, the Court finds that the plaintiff has failed to meet his burden as to this defendant in her individual capacity. Plaintiff fails to argue that Joann Lacasse Romano ever contacted plaintiff in his individual capacity or that she transacted business in the State of New York. Therefore the Court grants defendants' motion to dismiss as to this defendant only in her individual capacity.

#### Forum Non Conveniens

Turning now to defendants' motion to dismiss based on forum non conveniens. CPLR 327(a) permits the court to stay or dismiss an action in the interest of substantial justice if the action should be heard in another forum (see, **Berger v Spring Partners**, 2005 NY Slip Op 51752(U)). When determining a motion to dismiss pursuant to forum non conveniens, the courts consider several factors including the existence of an adequate alternative forum; the state of incorporation; the existence of a substantial nexus between New York and the action; potential hardship to the defendant; and the burden on New York Courts (*Id* at 2). Furthermore, the defendant has a heavy burden in attempting to establish that New York is an inappropriate forum before plaintiff's choice of forum is disturbed (see, **Highgate Pictures, Inc. v De Paul**, 153 AD2d 126). The fact that one or more of the parties is a resident of New York does not preclude dismissal (see, **Glaser v Kratz** 2006 Slip Op 51946U). Where the action involves the questionable acts of a foreign corporation, New York has an interest in protecting its citizens from such acts, only when the foreign corporation has significant contact with New York (see, **Broida v Bancroft**, 103 AD2d 88).

This action arises out of plaintiff's investment in a Gulf Coast, a Florida Corporation whose sole asset was a restaurant based in Florida<sup>1</sup>. The corporation did not have offices in New York, nor did it conduct business in New York. The records show that the only contacts with this state are the plaintiff's residence; that one of the defendants, Rosa Hochbrueckner, resides here; and one of the defendants contacted plaintiff in New York concerning the initial investment. While that single transaction was sufficient to subject certain defendants to the personal jurisdiction of this Court, it is not sufficient to establish a substantial nexus with New York, where Florida would be a more appropriate forum. As the record shows, all of the corporation's books and records are located in Florida. It is argued by the defendants that Sandella agreed to invest in the corporation in Florida while visiting that state and that certain material witnesses the defendants intend to call to testify reside in Florida. In addition, the defendants have agreed to accept service of process and waive any personal jurisdiction and statute of limitations defenses in Florida. Upon consideration of all of the relevant factors involved, the court finds that this action would be better adjudicated in

---

<sup>1</sup> The record indicates that this restaurant was subsequently sold to another Florida corporation and Gulf Coast's sole remaining asset, is the note which it holds from the buyer.

Index No.: 11715-05

Page 5

Florida, and therefore grants defendants' motion to dismiss the complaint, pursuant to CPLR 327, forum non conveniens.

DATED: January 23, 2008

**HON. ELIZABETH HAZLITT EMERSON**

J. S.C.