

**Hellenic Am. Educ. Found. v
Trustees of Athens Coll. in Greece**

2008 NY Slip Op 31968(U)

July 9, 2008

Supreme Court, New York County

Docket Number: 0603770/2007

Judge: Helen E. Freedman

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

PRESENT: _____
Justice

PART _____

Index Number : 603770/2007

HELLENIC AMERICAN

INDEX NO. _____

vs

THE TRUSTEES OF

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

PARTIAL SUMMARY JUDGMENT

C

MOTION CAL. NO. _____

is motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance w accompanying memo of law

FILED

JUL 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/9/08

JTC
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: PART 39

-----X
HELLENIC AMERICAN EDUCATIONAL FOUNDATION,

Plaintiff,

-against-

THE TRUSTEES OF ATHENS COLLEGE IN
GREECE,

Index No.

603770-07

Defendant.

-----X
THE TRUSTEES OF ATHENS COLLEGE IN
GREECE,

Counterclaimant

-against

HELLENIC AMERICAN EDUCATIONAL FOUNDATION,
**and THE BOARD OF DIRECTORS OF HELLENIC
AMERICAN EDUCATIONAL FOUNDATION,**

Counterclaim-Defendants.

-----X
HELEN E. FREEDMAN, J:

Motions sequence 002 and 003 are consolidated for disposition.

In 1926, the two entities in this action, plaintiff, the Hellenic American Educational Foundation (“HAEF”) and defendant, the Trustees of Athens College in Greece (“Trustees”), established a secondary school in Greece (“Athens College”) to be jointly administered. This arrangement worked until early in this decade. Athens College was provisionally chartered by the Department of Education Board of Regents of New York in 1926 and chartered by the same in 1971. In December 2007, plaintiff, through its Board of Directors sent a termination notice to defendant. In this action, plaintiff seeks to gain control of a \$19 million Endowment Fund

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consisting of moneys raised by defendants in the United States and currently controlled and administered by them. Defendants are disputing the right of plaintiff, through its Board of Directors, to terminate its relationship with defendant and contend that they have full control rights over the Endowment Fund.

HAEF is an association consisting of sixty-seven Greek citizens and is organized under the laws of Greece with its primary place of business in Athens. It is represented by a Board of Directors ("Board") consisting of eleven Greek citizens. The Trustees are a non-profit educational corporation, organized under the laws of New York State, with its principal place of business in New York City. The Trustees consist of nineteen people many of whom are Greek-Americans. In their counterclaims against HAEF and the Board, they aver breach of contract (interference with contract) and breach of fiduciary duty. They seek *inter alia* an accounting of moneys paid to plaintiffs, a declaration that plaintiffs do not have a right to unilaterally terminate their relationship with the Trustees, and a declaration that the Endowment Fund managed by the Trustees is owned, controlled, managed and may be disposed of by the Trustees.

On February 2, 2008, this Court issued a temporary restraining order, pursuant to a stipulation by the parties, with regard to the \$19 million Endowment Fund raised and managed by the Trustees, for the benefit of Athens College.

In motion 002 defendants Trustees seek partial summary judgment on their counterclaims asking this Court to declare that plaintiffs do not have a right to unilaterally terminate their relationship with the Trustees and that the Endowment Fund managed by the Trustees are owned, controlled and managed by them and may be disposed of by them. That motion is granted to the extent of a declaration that plaintiffs do not have a right to unilaterally

terminate their relationship with the Trustees but denied with respect to a declaration concerning the ownership, management, and disposition of the Endowment Fund.

In motion 003, plaintiff/counterclaim defendants HAEF and the Board of Directors seek dismissal of the counterclaims on *forum non conveniens* grounds. They contend that Athens College is located in Greece and operates under the aegis of the Greek Ministry of Education, that all of the members of the Board and the principals of Athens College reside in Greece, HAEF is a Greek foundation, and that Greece and the Greek Ministry of Education have the most significant interest in the governing affairs of their own educational institutions. They also opine that Greek law will apply to the counterclaims inasmuch as Greece has the greatest connection to the parties and the greatest concern with the issues raised by the Counterclaims. Counterclaim/defendants also move to dismiss the counterclaims asserted against the members of the Board of Directors alleging lack of personal jurisdiction. The individual directors, according to plaintiff/counterclaim defendants, neither signed the Memorandum of Understanding (“MOU”) that the parties negotiated in 2004 in order to stave off the current rupture, nor transacted any other business in New York that would subject them to long-arm jurisdiction. That motion is denied at this time.

Background

The partnership (HAEF and the Trustees) that established and maintained Athens College in Greece was forged in 1926. According to the joint By-laws, dated 1929 and amended at various times up to and including 2001, the mission of Athens College was “to provide...the highest quality education to the most deserving candidates and to cultivate...those habits of mind

body and spirit necessary for responsible citizenship in Greece and the world....” The By-laws also provided that the President of the College, known in Greece as the Director of Athens College, shall be an American citizen established and educated in America.” Both Boards were to confer and select the President, but the process of selection was to be administered by the Trustees. With respect to real or personal property, the By-laws provide that “[A]lthough each Board is the legal owner of such real or personal property that happens to be under its control at any time, the real beneficiary at any time is Athens College, for what it represents.” The By-laws further provide, “Each Board is the custodian of any real or personal property under its control at any time for the benefit of Athens College...Therefore the management, supervision and control of all property and funds are the common responsibility of both Boards, to serve the purpose for which Athens College was founded..” Another provision states, “All real and personal property given in trust to, bequeathed to, or otherwise acquired by the Board of Trustees is controlled, managed and disposed of by this Board...” Finally, where the purpose set forth in Article I is frustrated, the Trustees have the power to “devote the assets and funds at its disposal [for educational purposes] situated outside Greece” after consultation with the Board of Directors. Meetings of the Trustees and Directors were to be held alternately in New York and Greece. There is no provision for termination of the role of either HAEF Directors or the Trustees in the By-laws or in any other document.

Starting some time in the early part of this decade, the Trustees alleged that HAEF was subverting the mission of Athens College by favoring the wealthy and legacies and interfering with the proper administrative role of the president, causing successive presidents to resign. In turn, the Directors averred that the Trustees had not continued their fund raising mission. HAEF

contended that the Trustees were unjustifiably interfering in the internal affairs and administration of the College and had stopped raising funds as they were supposed to. In 2004, the parties executed the MOU reiterating commitment to their responsibilities under the By-laws. The MOU was apparently unsuccessful in resolving the issues between the entities, and HAEF through its Directors sent a notice terminating the parties' relationship in December 2007. The Order to Show Cause for the restraining order concerning the Endowment Fund in New York followed.

Motion Sequence 002

The HAEF Directors aver that they have a right to terminate the relationship under Greek law and pursuant to New York common law. They cite cases involving contracts which hold that in the absence of a termination provision, contracts continue at the will of the parties. Defendants contend that no such right exists under the Bu-laws and that the cases cited by plaintiff involve either employment contracts or performance contracts. They aver that such cases do not apply to long term relationships established as a joint venture with By-laws governing their relationship. Both sides cite *Haines v. City of New York*, 41 N.Y.2d 769(1977). That case holds that where the parties have not clearly expressed the duration of a contract, the courts will imply that they intended performance to continue for a reasonable time.

In this case, the By-laws clearly contemplate continuation of both Athens College and joint administration with the President to be an American, chosen by both parties. For eighty-three years, the parties have operated under the By-laws and have maintained the School accordingly. Thus, any termination of the provisions of the By-laws cannot be effected unilaterally, for to do so would violate the trust residing in and relied upon by both the founders

and supporters of the institution. Under such circumstances either a mutual agreement or a Court approved procedure is necessary. For that reason, the termination action violates New York law and is thus ineffective.

With respect to the rights to manage, control and dispose of the Endowment Fund, the By-laws provisions clearly govern, but they are not wholly without ambiguity. Article V(2) that “Allproperty given in trust to,...or otherwise acquired by the Board of Trustees is controlled, managed and disposed of by this Board”, and appears to give total control to defendants. However, Article IV states that “Although each Board is the legal owner of such real or personal property that happens to be under its control at any time, the real beneficiary at any time is Athens College, for what it represents.” Article IV also states that “Each Board is the custodian of any real or personal property under its control at any time for the benefit of Athens College...Therefore the management, supervision and control of all property and funds are the common responsibility of both Boards, to serve the purpose for which Athens College was founded.” The provisions are not entirely consistent. There appears to be some common responsibility for disposition of Endowment Funds under Article IV, notwithstanding the provisions of Article V giving each Board power over its own funds. Inasmuch as this Court has determined that the termination is ineffective, it is premature to grant defendants, application with respect to the Endowment funds. Since the parties stipulated to maintenance of the Endowment Fund in New York pending resolution of the dispute, there is no particular action needed at this time.

Motion Sequence 003

With respect to Counterclaim/defendants *forum non conveniens* motion, Motions

sequence 003, both sides argue based on a few cases. HAEF and the Board, argue that the members of the Board of Directors are citizens of and work exclusively in Greece and none owns any property here, this Court does not have jurisdiction over them. Plaintiff/counterclaim defendants also aver that HAEF and the Directors are bound by Greek law and that Greek Courts are in a better position to interpret Greek law and Greek administrative directives.

Plaintiff/Counterclaim defendants cite the cases of *Hsu v. Chang*, 199 A.D.2d 309 (2d Dept. 1993) and *Banco do Estado de Sao Paulo S.A.*, 249 A.D.2d 138 (1st Dept. 1998) upholding a trial court's exercise of discretion to dismiss counterclaims based on *forum non conveniens* even though plaintiffs' claims were properly brought in New York.

Defendants/counterclaimants contend that plaintiffs, through its Board of Directors, brought the initial action in New York, that only New York Courts have the power to terminate the Trustees' interests, that relevant witnesses are on both sides of the Atlantic, that most of the Directors are fluent in English, and that to the extent necessary New York courts are fully capable of applying Greek law. They also argue that New York law governs the dispute at least as far as the right to terminate is concerned. They aver that the original contract was consummated in New York and that many of the Directors attended the bi-annual meetings of the parties in New York.

Defendants/counterclaimants cite *Amlon Metals, Inc. v. Liu*, 292 A.d.2d 163 (1st Dept. 2002) upholding denial of a *forum non conveniens* motion on a counterclaim even though the torts alleged in the counterclaim were committed in China and some of the movant's prospective witnesses resided there. Similarly, in *News Limited v. Australis Holdings Pty.Ltd et al.*, 286 A.D2d 263 (1st Dept. 2001), the First Department upheld denial of a CPLR 327 motion to dismiss

the existing and proposed counterclaims indicating that a party commencing an action should not be permitted to use the doctrine of *forum non conveniens* as a shield. That Court said that New York courts are not burdened by having to apply Australian law.

At this juncture, the Court is loathe to dismiss the counterclaims inasmuch as they are inextricably interwoven with the main claims and any satisfactory conclusion of the matters here requires full resolution of all of the issues in a single forum. The plaintiff has chosen this forum, and should not now attempt to use the doctrine of *forum non conveniens* as a shield. Moreover, while counterclaim/defendants have put forward some evidence of inconvenience, the history of activities of the parties does not justify an immediate dismissal for that reason.

Whether this Court has long-arm jurisdiction over all of the members of the Board of Directors may require a separate hearing. However, at this time, it appears that at least some of the members have attended meetings in New York where the issues and subject matter of the counterclaims have been discussed. The counterclaim/defendants should interpose a reply and may raise the jurisdictional issues there.

For these reasons the motion to dismiss the counterclaims is denied at this time and plaintiff is directed to reply within twenty days.

The conference now scheduled for August 26, 2008, may go forward depending upon the situations of the Court and parties.

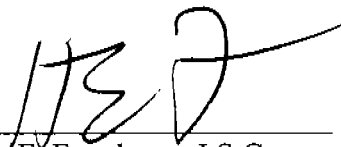
Based on the above, it is hereby

ORDERED that the 002 sequence motion for a declaratory judgment is granted only to the extent that the termination is declared not to be effective and is otherwise denied; and it is further

ORDERED that the 003 motion for dismissal of counterclaims is denied at this time.

Dated: July 9, 2008

Enter:



Helen E. Freedman, J.S.C.

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