

CBS Outdoor Inc. v Santa's, LLC

2008 NY Slip Op 32108(U)

July 28, 2008

Supreme Court, New York County

Docket Number: 0102658/2007

Judge: Carol R. Edmead

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

CAROL EDMÉAD
J.S.C.

PRESENT: _____

PART 30

Index Number : 102658/2007

CBS OUTDOOR

vs.

SANTA'S, LLC

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. _____

MOTION DATE 4/18/08

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

this 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

The instant motion is decided in accordance with the annexed Memorandum Decision. It is hereby

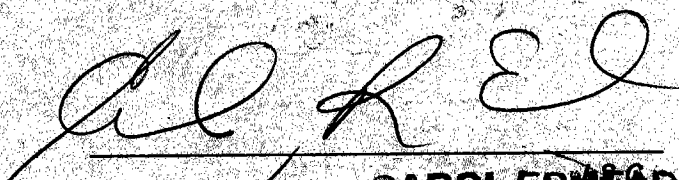
ORDERED that the motion by defendant to dismiss the complaint pursuant to CPLR 3211(a)(7), CPLR 3211(a)(2), *forum non conveniens*, and for summary judgment is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry on all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
JUL 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/28/08



CAROL EDMÉAD
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 35

_____^x
CBS OUTDOOR INC., a Delaware corporation, formerly
known as VIACOM OUTDOOR INC., a
Delaware corporation,

Plaintiff,

-against-

SANTA'S, LLC, an Arizona limited liability company,

Defendant.

_____^x
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Index No. 102658/07

MEMORANDUM
DECISION

FILED
JUL 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

Defendant, Santa's, LLC ("defendant"), moves to dismiss the complaint of plaintiff, CBS Outdoor, formerly known as Viacom Outdoor Inc. ("plaintiff"), pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and CPLR 3211(a)(2) for failure to establish jurisdiction over the defendant.¹ Defendant also seeks an order dismissing this action under the theory of *forum non conveniens*, and granting defendant summary judgment dismissing the Complaint.

Factual Background

Plaintiff, a provider of outdoor advertising space, commenced this breach of contract action against defendant, a company which operates a Christmas holiday extravaganza in Phoenix, Arizona. In its Complaint, plaintiff claims that defendant, "by and through its authorized agent," entered into four contracts with plaintiff: (1) a June 2005 Bulletin Agreement,

¹ Although defendant cites to CPLR 3211(a)(2), which authorizes dismissal of the Complaint for want of subject matter jurisdiction, in defendant's discussion of *forum non conveniens*, it acknowledges that "jurisdiction may technically exist as to both subject matter and of the person" and fails to proffer any arguments that the Court lacks subject matter jurisdiction.

(2) a June 2005 Mall Agreement, (3) a July 2005 Bulletin Agreement, and (4) an August 2005 Contract for Transit and & Street Furniture Advertising (collectively, the “Outdoor Media Agreements”), requiring plaintiff to perform certain advertising services. Plaintiff alleges that it complied with all material obligations under the Outdoor Media Agreements and that defendant failed to pay plaintiff pursuant to the terms therein.

Defendant’s Motion to Dismiss

Defendant argues that since it cannot be held liable under the Outdoor Media Agreements, this Complaint, based exclusively on such Outdoor Media Agreements, should be dismissed for failure to state a cause of action.

According to defendant, on May 18, 2005, it contracted with Molina Lopez (“Molina”), an advertising agency, for Molina to run an advertising campaign for defendant’s “Santa’s World 2005” event, with a \$700,000 budget, of which Molina would receive 15% (the “Advertising Agreement”). Under this Advertising Agreement, Molina would act as a middle man between defendant and any entity which provided the actual media space. Incorporated into the Advertising Agreement was a one page rider which identified various sorts of advertising, including radio and television stations and newspapers, and how much each would receive during the three month period of the advertising campaign. Although “Out of Home” advertising (“OOH”) (printed media affixed in public places, such as a billboards) was provided a budgetary allocation, there was no specific reference as to which media source would be utilized.

Defendant alleges that the Advertising Agreement does not indicate that Molina would contract with any particular provider of OOH space and grants no authority as to OOH media, other than the amount of money allocated.

[* 4]

Defendant also argues that it has no obligation to plaintiff under any of the Outdoor Media Agreements. Defendant points out that its name is absent from all four of the Outdoor Media Contracts, and is referred to only generically. Specifically, as to the June 2005 Bulletin Agreement, although the “advertiser” is listed as “Santa’s World Christmas 2005,” no space is provided for the advertiser to sign or approve this agreement. The subsequent July 2005 Bulletin Agreement identifies the “advertiser” as “Santa’s World Holiday.” The June 2005 Mall Agreement identifies the “advertiser” as “Santa’s World c/o Molina Lopez.” The August Contract for Transit and & Street Furniture Advertising lists the “advertiser” as “Molina Lopez” and defendant’s name is found under the reference to “brand name” as “Santa’s World-Christmas Entertainment.” Although plaintiff used the same representative in all four Outdoor Media Agreements, defendant was never referred to by its name or otherwise in the same way twice. The Outdoor Media Agreements indicate that the specific identity of the defendant was unknown to plaintiff. And, the specific identity of the “advertiser” was not of much concern to plaintiff, since the “advertiser” is referred to in the Outdoor Media Agreements in four different ways. Plaintiff’s salesperson in Arizona could have obtained the correct name of the “advertiser” as a matter of course or the New York office could have required this information before executing the Outdoor Media Agreements.

According to defendant’s President, Jimmy Knips (“Knips”), defendant was never made aware of the Outdoor Media Agreements until after they had expired. Defendant never authorized Molina to execute any of the contracts on its behalf. Defendant’s obligation was to pay Molina directly and Molina has received the full sum it was due under the Advertising Agreement.

Defendant argues that the net effect of these four contracts is that plaintiff dealt directly with Molina and had no direct dealings with defendant. Molina signed the documents to further its business as a middle man between defendant and the company which provided the OOH advertising, so as to realize a commission fee of 15%. Finally, while plaintiff may have a cause of action against Molina under such Agreements, plaintiff has no basis to sue defendant. In fact, Molina indicated in an e-mail to plaintiff, dated June 26, 2006, that it was “totally responsible for all debt.”

Furthermore, Molina never had authority to bind defendant to the Outdoor Media Agreements. Both Bulletin Agreements contain language that Molina is “authorized to execute same on behalf of” defendant, and that Molina fully approved such Agreements. However, defendant never gave Molina this authority and plaintiff never reached out to defendant prior to the execution of such Agreements to “double check.” Molina’s misrepresentation of authority cannot provide a basis for liability of defendant who never authorized the putative agent, *i.e.*, Molina, to enter into such Agreements. Since plaintiff relied solely upon the actions of Molina when it entered into and performed under the Outdoor Media Agreements, Molina cannot be deemed to possess apparent authority to act unilaterally on defendant’s behalf.

Even if Molina is deemed to be defendant’s agent in this matter, any such agency is limited to the scope of their actual relationship. Defendant states that it agreed to spend a certain amount of money on billboards and other public advertising which Molina was to procure; whatever authority it had to locate and re-sell the space cannot extend to numerous collateral provisions to which Molina voluntarily obligated itself but which defendant never even knew about. Thus, according to defendant, contractual provisions relating to attorney’s fees, default

interest, and forum selection are at best tangentially related to renting advertising space; it was never part of Molina's scope of the authority to bind defendant to such contractual provisions.

Furthermore, the Outdoor Media Agreements provide no clear indication that plaintiff and Molina had any intention to confer a direct benefit on defendant. Plaintiff was selling its product (advertising space) and Molina acquired a commodity which it used to generate a 15% commission, payable by plaintiff in the form of a like "discount." Thus, Molina, the advertising agency, is the client of the media provider, plaintiff, and defendant is no more than an incidental beneficiary of the business arrangement between plaintiff and Molina. Although not at issue herein, it is unclear whether defendant would have standing as a third-party beneficiary under the Outdoor Media Agreements if it chose to sue plaintiff. However, even if defendant has sued as a third-party beneficiary, it still is not amenable to a suit under the contract by the plaintiff, since there is no proof that defendant authorized Molina to enter into the Outdoor Media Agreements.

Even if the Court finds that defendant was a third-party beneficiary, defendant still has no obligation under the Outdoor Media Agreements. The Outdoor Media Agreements were not referred to or incorporated into defendant's Advertising Agreement with Molina, and there is no indication that defendant ever agreed to assume the obligation of Molina. Nor did Molina have authority to bind defendant to the forum selection, attorneys' fees, or the higher default rate.

Therefore, defendant argues that it is also entitled to summary judgment. Defendant alleges that the Complaint raises only one issue, that is, whether Molina acted as the agent of defendant to the extent of binding it to the Outdoor Media Agreements. The Advertising Agreement between defendant and Molina controls the relationship between these two entities, and absent from the Advertising Agreement is any indication that Molina could bind defendant to

[* 7]
the sort of provisions which are set forth in the Outdoor Media Agreements.

Finally, the Complaint should be dismissed pursuant to the doctrine of *forum non conveniens*, as this matter lacks such significant New York contacts to warrant the acceptance of the case. Under these circumstances, it would be unjust for defendant, whose offices and employees are in Arizona, to be required to defend this action in New York. Defendant contends that its president and clerical workers with direct knowledge of the payments made to Molina would need to come in from Arizona to testify. Likewise, defendant's so called "agent" Molina, an essential party which was not brought in directly by plaintiff, is an Arizona company, whose employees with knowledge of this matter reside in Arizona. It is inconvenient for witnesses to be dragged from Arizona to try a case involving this relatively insignificant sum in controversy. Thus, this matter does not belong in New York State regardless of the court's findings as to whether the Outdoor Media Agreements apply to defendant.

Plaintiff's Opposition

Plaintiff argues that Molina was defendant's general agent with respect to the placement of advertising for its 2005-2006 holiday show season. According to Molina's President, Manuel Molina, soon after the Advertising Agreement was signed, defendant asked Molina to take over all aspects of their marketing campaign, including marketing to general markets through the use of print, radio and television media, resulting in an increased budget of approximately \$1.1 million. Defendant's admission that it retained Molina to "coordinate advertising" on its behalf, is inconsistent with its claim that Molina was plaintiff's client.

Further, defendant specifically authorized Molina to enter into the Outdoor Media Contracts. After Molina requested proposals from multiple media vendors in the Phoenix area

for different forms of advertising media, defendant's principals, Knips and Danny Brand, personally selected the billboard locations that they wanted along the interstates. Defendant's principals also instructed Molina to negotiate pricing with plaintiff and other applicable billboard owners. Molina states that defendant's principals verbally approved Molina's execution of the Outdoor Media Contracts. Therefore, it is inconceivable that defendant now alleges that it "never authorized Molina to execute any of [the Advertising Agreements with plaintiff]" and that it was unaware of the existence of the Outdoor Media Contracts with plaintiff "until well after the 2005 Christmas season had concluded."

Where an agent is authorized by its principal to execute third party contracts of a certain character, the principal sued by a third party on a contract executed by such agent is not entitled to prove limitations on the agent's authority which were not expressly disclosed to the third party. Here, defendant never provided Molina with any express or implied limitations on Molina's authority to contract on its behalf. Therefore, no such limitations were expressed to plaintiff. As such, defendant is fully and legally bound to all of the obligations set forth in the Outdoor Media Contracts, including the forum selection, legal fees, and rate of interest clauses therein.²

As the final paragraph of each of the Outdoor Media Contracts contain a valid and enforceable forum selection clause, jurisdiction has been properly conferred upon this Court and as a matter of law, this Court is a convenient forum for this action.

² Molina also adds that its liability to plaintiff for the overdue amount is joint and several with defendant, as the advertiser and disclosed principal of Molina. And, regarding joint and several liability, a creditor can opt to pursue collection for debts against either, or both, of the obligors. Plaintiff is only pursuing collection from defendant, since Molina represented that defendant did not make payment of all its obligations to Molina concerning the advertising performed by plaintiff and other media vendors.

Finally, plaintiff also seeks sanctions against defendant for delaying the progress of this dispute and for harassing plaintiff and its counsel. In support, plaintiff contends that it initially commenced its action in Arizona, in spite of the forum selection clauses, on the basis that Arizona would be a more convenient forum for all of the parties involved. Defendant was duly served, but failed to timely appear. Following its application for a default judgment, plaintiff was contacted by Kevin M. Judiscak, who claimed to be defendant's attorney. Judiscak pointed to the subject forum selection clauses, and stated that the Maricopa County Superior Court lacked jurisdiction over the Arizona action. Judiscak further advised that if plaintiff did not voluntarily dismiss the Arizona action, defendant would seek monetary sanctions. On the basis of such threat, plaintiff agreed to dismiss the action in Arizona and to commence this action against defendant in New York County. Yet, defendant's instant motion advances an argument directly opposed to the argument raised by defendant's Arizona counsel. There is no rational explanation for defendant's contradictory behaviors in this regard, except to delay and harass plaintiff and its counsel.

Defendant's Reply

Defendant contends that plaintiff failed to raise any issues of fact that would defeat defendant's right to the relief.

Defendant contends that plaintiff does not provide any facts which, as a matter of law, establish a general agent relationship. Molina brokered advertising services between defendant and media providers such as plaintiff, making its gross profit through retention of a "15% discount" granted by plaintiff. Such mutually beneficial brokerage relationship between defendant and Molina is not one of principal and agent.

Plaintiff fails to provide any actual probative proof that Molina was defendant's general agent or any evidence to establish that defendant gave Molina actual authority to sign the boilerplate-ridden Outdoor Media Contracts, which are the sole predicate of this lawsuit. And, Molina's statement that "Mr. Knips personally authorized me to enter into the subject [Outdoor Media Contracts]," without stating the words Mr. Knips used or indicating whether Outdoor Media Contracts were forwarded to defendant, provides no concrete support for the claim that actual authority was granted.

Plaintiff has an initial obligation to ascertain whether an agency exists, and if so, whether the character of the agency to be "general" or "limited." Plaintiff points to no actions of defendant which created an appearance of apparent authority. Further, a finding of authority requires proof of affirmative actions on the part of the putative principal, and plaintiff provides no example of where defendant manifested an intention that Molina bind it to the Outdoor Media Contracts.

Finally, the reliance by defendant's Arizona counsel on the forum selection clause to obtain a voluntary dismissal was not a concession that defendant could be sued on the Outdoor Media Contracts in New York State.

Analysis

Before the court addresses whether the Complaint states a cause of action, the Court addresses whether it should exercise subject matter jurisdiction over this action (*see Berger v Scharf*, 11 Misc 3d 1072, 816 NYS2d 693 [Supreme Court New York County 2006]).

Forum Non Conveniens

Dismissal of the Complaint pursuant to CPLR 327(a)'s *forum non conveniens* provision is warranted when “the court finds that in the interest of substantial justice the action should be heard in another forum” However, under CPLR 327(b), “Notwithstanding the provisions of subdivision (a) of this rule, the court shall not . . . dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.” While defendant insists that the balancing of the interests and conveniences of the parties warrant removal of this action to Arizona under CPLR 327(a), plaintiff maintains that defendant agreed, through its general agent Molina, to the forum selection clauses included the Outdoor Media Contracts. Thus, dismissal on the ground of *forum non conveniens* turns on whether defendant is bound to the forum selection clause in the Outdoor Media Contracts.

According to the Third Restatement of Agency (2006), an agency is defined as the

. . . fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.

(REST 3d AGEN § 1.01 & 1.02)

“Agency is a fiduciary relationship created as a result of conduct by parties manifesting that the principal party is willing to allow the other party, upon such other party's consent, to act for it subject to the principal's control and within the limits of the authority thus conferred”

(*Pensee Associates, Ltd. v Quon Industries, Ltd.*, 241 AD2d 354, 660 NYS2d 563 [1st Dept 1997])

citing *L. Smirlock Realty Corp. v Title Guarantee Co.*, 70 AD2d 455, 464, 421 NYS2d 232, *mod. on other grounds* 52 NY2d 179, 437 NYS2d 57).

Except for the Contract for Transit and Street Furniture Advertising, Molina disclosed its capacity as agent for defendant in the Outdoor Media Contracts, by referring to the advertiser therein as “Santa’s World . . .” and indicating that the “agency . . . [is] authorized to execute same on behalf of the advertiser” Therefore, such documents indicate that Molina acted as the agent for a disclosed principal (*see Tobron Office Furniture Corp. v King World Productions, Inc.*, 161 AD2d 355 [1st Dept 1990]). Further, that the Contract for Transit and Street Furniture Advertising did not contain a reference to Molina’s agency does not preclude a finding of agency (*see Byrne v McDonough*, 114 Misc 529, 186 NYS 807 [N.Y.Sup. 1921] [where a writing is signed by one who is an agent, but who does not disclose his agency or give the name of his principal, the agent is personally liable and the undisclosed principal may be held liable under proof of the signer’s agency]).

Based on the foregoing, the Court finds that the plaintiff sufficiently states a claim that defendant, through its agent Molina, entered into the Outdoor Media Contracts. By engaging Molina to secure advertising through radio, television, and outdoor print, Molina’s execution of the contracts to secure such advertising was incidental and necessary to the fulfillment of its powers. In other words, Molina possessed implied authority to enter into contracts in order to procure advertising. Notably, there is no indication that defendant rejected any of the advertising services performed by plaintiff. The absence of any objection to the advertising services it received through the efforts of Molina is entirely consistent with the Molina’s authority to run an advertising campaign (*see Tobron, supra*).

Thus, through its agent Molina, defendant is bound to the Outdoor Media Contracts and the terms therein, including the forum selection clause.

That defendant is not a signatory to the Outdoor Media Contract does not warrant a different result. It is clear that the parties to the Outdoor Media Contract are plaintiff and Molina, and that defendant did not execute and is not a signatory to any of these Contracts. However, a non-signatory to a contract containing a forum selection clause may be bound to its terms where the non-signatory bears “so close a relation to” the signatory and the agreement “so as to have been foreseeably bound by and thus implicitly included within the agreement’s forum selection clause” (*cf. L-3 Communications Corp. v Channel Technologies, Inc.*, 291 AD2d 276 [1st Dept 2002]). While the absence of a factual predicate to support a claim that the parties are closely related, will preclude enforcement of a forum selection clause against a non-party to the agreement (*Triple Z Postal Servs. v United Parcel Serv, Inc.*, 13 Misc 2d 1241 [Supreme Court, New York County 2006]), the alleged agency relationship between Molina, the signatory, and defendant, the non-signatory, is sufficiently close to include defendant within the forum selection clause.

In any event, defendant failed to establish entitlement to dismissal under CPLR 327(a).

CPLR 327 (a) permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (*Islamic Republic of Iran v Pahlavi*, 62 N.Y.2d 474, 478, 478 NYS2d 597 [1984], *cert denied* 469 US 1108 [1985]; *see, generally*, Siegel, NY Prac, § 28; 1 Weinstein-Korn-Miller, NY Civ Prac, par 327.01, pp 3-469-3-470). “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 N.Y.2d 474, 478, 478 NYS2d 597 [1984], *cert denied* 469 US 1108 [1985]).

Though no one factor is controlling, the factors to be considered on such a motion include: (1) the burden on the New York courts, (2) the potential hardship to the defendant, (3) the unavailability of an alternative forum in which plaintiff may bring suit, (4) that both parties to the action are nonresidents, and (5) that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (*Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 777 NYS2d 69 [1st Dept 2004] *citing Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479, 478 NYS2d 597 *cert. denied* 469 US 1108, 105 SCt 783).

“The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case” (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478, 478 NYS2d 597 [1984]; *Martin v Mieth*, 35 NY2d 414, 418, 362 NYS2d 853; *Silver v Great Amer. Ins. Co.*, 29 NY2d 356, 361, 328 NYS2d 398). Furthermore, it is well established law that “unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed . . .” (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 571 NYS2d 208 [1st Dept 1991]; *quoting Gulf Oil Corp. v Gilbert*, 330 US 501, 508, 67 SCt 839, 843 [1947]; *Bata v Bata*, 304 NY 51, 56 [1952]; *Hacohen v Bolliger Ltd.*, 108 AD2d 357, 360, 489 NYS2d 75 [1st Dept 1985]).

In the case at bar, defendant argues that:

. . . it would be unjust were [defendant] required to defend this collection action in New York. Its offices are in Phoenix, Arizona and all of its employees are in Phoenix, Arizona . . . Any issue of fact . . . would be resolved only through the testimony of Arizona residents . . .

However, defendant's reliance on witnesses does not automatically defeat plaintiff's choice of forum, particularly where defendant has failed to come forward with the names of witness or potential testimony of such witnesses or any basis, other than sheer speculation, to believe that any such testimony will be unobtainable in New York (*see Anagnostou v Stifle*, 204 AD2d 61, 611 NYS2d 525 [1st Dept 1994]; *Avnet, Inc., v Aetna Cas. and Sur. Co.*, 160 AD2d 463, 554 NYS2d 134 [1st Dept 1990]) *see also*, *Moschera v Muraca*, 148 AD2d 591, 539 NYS2d 56 [2d Dept 1989]). It is noted that plaintiff, and potentially its witnesses, are located in New York. Finally, defendant does not meet its heavy burden of demonstrating that plaintiff's selection of New York as the forum for the within litigation is not in the interest of substantial justice (*see American BankNote Corp. v Daniele*, 45 AD3d 338, 845 NYS2d 266 [1st Dept 2007]; *Anagnostou v Stifel*, 204 AD2d 61, 61, 611 NYS2d 525 [1994]; *see also Mionis v Bank Julius Baer & Co.*, 9 AD3d 280, 282, 780 NYS2d 323 [2004]). The parties' nonresidence is one, but only one, factor that may show inconvenience (*see American BankNote Corp. v Daniele*, 45 AD3d 338, 845 NYS2d 266 [1st Dept 2007]; *Bank Hapoalim [Switzerland] Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287, 810 NYS2d 172 [1st Dept 2006]). "[A] defendant's 'heavy burden' remains despite the plaintiff's status as a nonresident" (*see American BankNote Corp. v Daniele*, 45 AD3d 338, 845 NYS2d 266 [1st Dept 2007] *quoting* 287, 810 NYS2d 172, *citing Mionis and Anagnostou*). Defendant's assertion that it would experience significant hardship defending this action is unsupported by the record. Therefore, defendant's request to dismiss this action pursuant to CPLR 327(a) is denied.

CPLR 3211(a)(7): Failure to State a Cause of Action

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205, 660 NYS2d 726 [1st Dept 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR § 3026), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]). Further, where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS2d 532 [1st Dept 1989]).

A disclosed principal is responsible to make payment for goods and services purchased by its agent within the exercise of the agent's express or implied authority (*News America Marketing, Inc. v Lepage Bakeries, Inc.*, 16 AD3d 146, 791 NYS2d 80 [2005] [finding advertiser

liable for amounts due to printer pursuant to order addressed to advertising agency "as agent for" advertiser] citing *Tobron Off. Furniture Corp. v King World Prods.*, 161 AD2d 355, 356 [1990]). According the plaintiff the benefit of every possible favorable inference, plaintiff has stated a cause of action for breach of contract against defendant as the principle bound by the Outdoor Media Contracts entered between its agent, Molina, and defendant.

Summary Judgment

The branch of defendant's motion for summary judgment dismissing the Complaint on the ground that Molina did not act as the agent of defendant to the extent of binding it to the Outdoor Media Agreements is denied. Contrary to defendant's contention, the Advertising Agreement between defendant and Molina, coupled with the Outdoor Agreements, indicate that Molina could bind defendant to provisions set forth in the Outdoor Media Agreements.

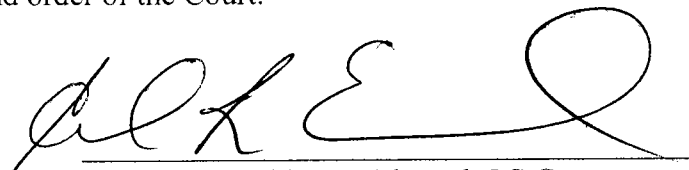
Based on the foregoing, it is hereby

ORDERED that the motion by defendant to dismiss the complaint pursuant to CPLR 3211(a)(7), CPLR 3211(a)(2), *forum non conveniens*, and for summary judgment is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: July 28, 2008


Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMOAD
J.S.C.
FILED
JUL 29 2008
NEW YORK
COUNTY CLERK'S OFFICE