ITEC, LLC v Hyperion V.O.F.
2008 NY Slip Op 32171(U)
July 30, 2008
Supreme Court, New York County
Docket Number: 0602246/2007
Judge: Walter B. Tolub
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SCANNED ON 8/4/2008

[* 1]

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

PRESENT: ______________________ PART 54
Justice

Hue, LLC

INDEX NO. 602346/07

MOTION DATE ______

- v -

MOTION SEQ. NO. 1

Hyperion VOF

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on 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

FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/30/08

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 56

ITEC, LLC,

Plaintiff,

- against -

HYPERION V.O.F.,

Defendant.

Index No. 602246/07

FILED
AUG 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE III, J.:

Defendant, Hyperion V.O.F. ("Hyperion") moves, pursuant to CPLR 327, 3211(a)(1), (4), (7), and (8) to dismiss or stay this action filed by plaintiff, Itec, LLC ("Itec").

BACKGROUND

Itec brings the action to recover damages for the alleged breach of an agreement requiring Hyperion to transfer to Itec, for the sum of $25,000, Hyperion's interest in a certain computer software and other property that it had been developing for another entity, Amiga Inc. ("Amiga Washington").

Itec is a New York limited liability venture financing company with its principal place of business at 102 Prince Street, New York, New York. Hyperion is a computer software development company organized under the laws of Belgium, with its principal place of business in Antwerp, Belgium. Amiga Washington, formerly a Washington corporation, developed computer hardware and software.

On November 3, 2001, Amiga Washington, Hyperion, and nonparty Eyetech Group, Ltd. ("Eyetech") entered into a licensing and development agreement, whereby, *inter alia*, Amiga granted Hyperion and Eyetech a license to develop a new Amiga One computer, together with a new operating system, to be designated Amiga OS 4.0 ("OS 4.0"). Under the agreement, Amiga

retained ownership of its existing intellectual property and had the right to acquire the intellectual property for the Amiga OS 4.0. In the event that Amiga Washington filed for bankruptcy or became insolvent, the agreement granted Hyperion and Eyetech "an exclusive, perpetual, world-wide and royalty free right and license to develop (at their sole expense), use, modify and market the Software and OS 4 under the 'Amiga OS' trademark" (License and Software Development Agreement, Not of Mot, Exh 7, § 2.07). Furthermore, the agreement designated the Superior Court of Washington for King County or the United States District Court for the Western District of Washington at Seattle as the exclusive jurisdiction and venue of any lawsuit between the parties arising under the agreement or out of transactions contemplated thereby (*id.*, § 7.08). The parties agreed to submit to the exclusive jurisdiction and venue of such court for the purpose of such lawsuit (*id.*).

On April 24, 2003, Hyperion and Itec entered into an agreement, stating, in part:

> Hyperion confirms that for the receipt of $25,000 USD, Hyperion shall transfer the ownership of the Object Code, Source Code and intellectual property of OS 4.0 to Itec in accordance with the provisions of the November 1, 2001 agreement between Amiga, Hyperion and Eyetech and to the extent it can do so under existing agreements with third party developers whose work shall be integrated in OS 4.0

(Not of Mot, Exh 5). Furthermore, by Stock Purchase and Sale Agreement and Agreement of Assignment of Intellectual Property Rights, dated October 7, 2003, Itec transferred its rights under the April 24, 2003 agreement to non party KMOS, Inc. ("KMOS"), a Delaware corporation (Not of Mot, Exh 6). On September 30, 2004, the State of Washington administratively dissolved Amiga Washington. KMOS changed its name to Amiga, Inc. ("Amiga Delaware") on January 31, 2005. Thus, Amiga Delaware asserts that it is the

successor-in-interest to all the rights, title, and interest of Amiga Washington, including Amiga Washington's interest in the November 3, 2001 license and software development agreement.

On April 26, 2007, Amiga Delaware commenced an action entitled *Amiga, Inc. v Hyperion VOF*, CV 007-0631 RSM (the "Washington action") in the United States District Court for the Western District of Washington. The Complaint in the Washington action sought damages for breach of contract, specific performance, declaratory judgment, and injunctive relief in connection with the November 3, 2001 and April 24, 2003 agreements.

Thereafter, Itec commenced this action seeking to recover damages from Hyperion for the alleged breach of the April 24, 2003 agreement. The Complaint essentially seeks a declaration that Itec is the owner of all rights and interests in the Amia OS 4.0, as well as specific performance of licensing and development agreement.

Hyperion now seeks to dismiss or stay the action on various grounds, including lack of personal jurisdiction and the existence of an unambiguous, exclusive forum selection clause. Alternatively, Hyperion seeks to stat this action pending the resolution of the Washington action.

DISCUSSION

On a motion to dismiss, pursuant to CPLR 3211, the Court should liberally construe the Complaint, accept as true the facts alleged in the Complaint and any submissions in opposition to dismissal, and accord the plaintiff the benefit of every favorable inference (*see, 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). The standard applies to a motion to dismiss pursuant to CPLR 3211 (a)(8), where the Court must view "the allegations of the complaint in the light most favorable to plaintiff" (*see Ed Moore Adv. Agency, Inc. v I.H.R., Inc.*, 114 AD2d 484, 486 [2d Dept 1985]).

Itec asserts that the Court may properly exercise jurisdiction over Hyperion under CPLR 302(a)(1), New York's Long arm statute. CPLR 302(a)(1) authorizes a New York court to exercise jurisdiction over any nondomiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." Under CPLR 302(a)(1), a court may exercise jurisdiction over a nondomiciliary who contracts outside this State to supply goods or services in New York even if the goods are never shipped or the services are never supplied in New York, so long as the cause of action arose out of that contract (*Alan Lupton Assocs. v Northeast Plastics, Inc.*, 105 AD2d 3, 6 [4th Dept 1984]).

The statute also permits the exercise of jurisdiction over a nondomiciliary defendant who transacts any business within the State, whether or not the defendant is physically present, as long as the business transaction is sufficiently purposeful (*id.*). To transact business in New York, a party must purposefully avail itself of the privilege of conducting business, thus invoking the benefits and protections of New York law (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Furthermore, for a claim to arise out of a business transaction in New York, there must be a substantial relationship between that business transaction and the cause of action sued upon (*id.*).

CPLR 302(a)(1) is a single act statute, and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there was a substantial relationship between the transaction and the plaintiff's claim (*id.*). Furthermore, while the ultimate burden of proof rests with the party asserting jurisdiction, the plaintiff, in opposing a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant was subject to the jurisdiction of the court (*Alden Personnel, Inc. v David*, 38 AD3d 697, 698 [2d Dept 2007]).

Here, Hyperion argues that the action against it should be dismissed since the subject agreements did not require it to ship any goods to New York. In fact, Hyperion contends that the November 3, 2001 agreement does not mention New York. Hyperion further contends that the only reference to New York in the April 24, 2003 agreement is that Itec has "an administrative seat at 102 Prince Street, NY, NY 10012, USA" (Not of Mot, Exh 5). However, Hyperion asserts that attempts to locate Itec at its stated New York address were unsuccessful. Specifically, Hyperion states that on June 20, 2007, Itec sent Hyperion a letter which contained a check purporting to be payment pursuant to the April 24, 2003 agreement. Hyperion also asserts that the check did not list an address for Itec and was drawn on a Connecticut branch of a bank. Hyperion further notes that a courier was not able to locate Itec at 102 Prince Street when its counsel attempted to return the check to Itec.

Hyperion also asserts that it never transacted business in New York nor otherwise invoked the benefits and protections of New York's laws. Specifically, Hyperion maintains that it is a Belgian corporation, and that none of its partners or employees have ever been to New York on Hyperion business. Hyperion also argues that it executed the subject agreements in Belgium, and that it performed all of its work under the agreements in Belgium.

However, Itec maintains that it is a limited liability company, which is in existence and good standing, and which has its only offices are located at 102 Prince Street, New York, New York.

Viewing the allegations in the Complaint in the light most favorable to Itec, the Court concludes that the exercise of personal jurisdiction over Hyperion is appropriate. The April 24, 2003 agreement required Hyperion to transfer the ownership of Amiga OS 4.0 to Itec in accordance with the provisions of the November 3, 2001 agreement between Amiga Washington,

Hyperion, and Eyetech. The only place contemplated or available under the April 24, 2003 agreement for delivery of OS 4.0 to Itec was New York. Thus, the factual allegations support the conclusion that Hyperion contracted to ship goods to New York. As such, the branch of the motion that seeks to dismiss the action on the ground that the Court lacks personal jurisdiction over Hyperion must be denied.

Hyperion also argues that the mandatory forum selection clause in § 7.08 of the November 3, 2001 agreement requires dismissal of the action. As noted, § 7.08 states:

> The exclusive jurisdiction and venue of any lawsuit between the parties arising under this agreement or out of transactions contemplated hereby shall be the Superior Court of Washington for King County or the United States District Court for the Western District of Washington at Seattle and each of the parties hereby submits itself to the exclusive jurisdiction and venue of such court for the purposes of such lawsuit.

Contrary to Itec's position, the April 24, 2003 agreement expressly incorporates the provisions of the November 3, 2001 agreement. Specifically, the agreement requires Hyperion to "transfer the ownership of the Object Code, Source Code and intellectual property of OS 4.0 to Itec in accordance with the provisions of the November [3, 2001] agreement ..." (Not of Mot, Exh 5).

The contractual language in § 7.08 of the November 3, 2001 agreement provides unambiguously that any dispute between the parties is to be decided in the courts of Washington. The parties waived any privilege to have their claims heard elsewhere (*see Boss v American Express Fin. Advisors, Inc.*, 6 NY3d 242, 246 [2006]). Thus, the branch of the motion that seeks to dismiss the complaint based on the forum selection clause must be granted, and the Court need not address the alternative request for a stay pending the resolution of the Washington action.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the Complaint is dismissed with cost and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: July 30, 2008

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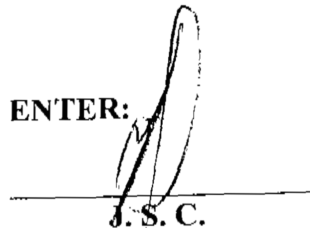

J.S.C.

HON. RICHARD B. [illegible]

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