

**Caesars Bahamas Invs. Corp. v Baha
Mar Joint Venture Holdings Ltd.**

2008 NY Slip Op 32533(U)

September 12, 2008

Supreme Court, New York County

Docket Number: 0600740/2008

Judge: Charles E. Ramos

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

PRESENT: Ramos
Justice

PART 33m

Caesars Bahamas Investment Corp

INDEX NO. 600740/08

- v -

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Baha Mar Joint Venture

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

FILED
SEP 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/12/08


HON. CHARLES E. RAMOS
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: COMMERCIAL DIVISION

-----X

CAESARS BAHAMAS INVESTMENT CORPORATION,

Plaintiff and
Counterclaim Defendant,

Index No.
600740/08

-against-

BAHA MAR JOINT VENTURE HOLDINGS LTD. and
BAHA MAR JV HOLDINGS LTD. and BAHA MAR
DEVELOPMENT COMPANY LTD.,

Defendants and
Counterclaim Plaintiffs,

-----X

BAHA MAR JOINT VENTURE HOLDINGS LTD. and
BAHA MAR JV HOLDINGS LTD. and BAHA MAR
DEVELOPMENT COMPANY LTD.,

Third-Party Plaintiffs

-against-

HARRAH'S OPERATING COMPANY, INC.,

Third-Party Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Plaintiff and Counterclaim Defendant Caesars Bahamas Investment Corporation (Caesars) and Third-Party Defendant Harrah's Operating Company, Inc. (Harrah's) (together, Plaintiffs) move by way of order to show cause for a preliminary injunction with a temporary restraining order (TRO) to enjoin Defendants Baha Mar Development Company, Ltd., Baha Mar Joint Venture Holdings Ltd., and Baha Mar JV Holding Ltd. (together, Baha Mar) from commencing a separate action in the Bahamas against Caesars' parent, Harrah's Entertainment, Inc. (Harrah's Entertainment), and its shareholders Apollo Management and TPG Partners (together, Caesars Affiliates), and from using

information designated by Plaintiffs as confidential pursuant to the Stipulation and Order for the Production and Exchange of Information (Stipulation) for the purpose of commencing an action in the Bahamas.

Baha Mar cross-moves to declassify certain material that was allegedly improperly designated as confidential, under the Stipulation.

Background

On January 12, 2007, Caesars and Baha Mar entered into a Subscription and Contribution Agreement (Agreement), for the potential development of a casino, golf course, and resort project in the Bahamas (the Project). (Amend. Compl. ¶ 8.) Approximately three months later, Caesars notified Baha Mar that it did not wish to continue with the Project, and that it intended to terminate the Agreement (Amend. Compl. ¶ 16.).

The Agreement contains a choice of law and forum selection clause (Forum Selection Clause), that states,

All claims, demands, controversies, disputes, actions or causes of action of any nature or character arising out of or in connection with this Agreement, whether legal or equitable, known or unknown, contingent or otherwise shall be resolved in the United States District Court for the Southern District of New York and any appellate courts thereto or if federal jurisdiction is lacking, then in the Supreme Court of the State of New York, New York County, and any appellate courts thereto (Agreement, Art. 11.5 [a]).

Further, the Agreement defines the "Parties" as Baha Mar and Caesars.

On June 13, 2008, counsel for Baha Mar informed counsel for Caesars that it intended to commence a separate action for

fraud against the Caesar Affiliates in either the Bahamas or in New York. Subsequently, Plaintiffs moved for a preliminary injunction, and the court granted a TRO pending the resolution of the application.

Discussion

A party seeking preliminary injunctive relief pursuant to CPLR 6301 must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities are in her favor. *City of New York v. Untitled LLC*, 51 AD3d 509, 511 (1st Dept 2008).

A. Likelihood of Success on the Merits

Plaintiffs argue that they are likely to succeed on the merits of their claim because the plain language of the Forum Selection Clause prohibits Baha Mar from bringing a suit arising out of the Agreement outside of New York. Additionally, Plaintiffs contend that the broad Forum Selection Clause is applicable to all entities that are involved in a dispute arising out of the Agreement, including non-signatories Baha Mar Development Company Ltd., and the Caesar Affiliates.

Conversely, Baha Mar argues that the Forum Selection Clause applies only to signatories of the Agreement, and thus, does not prevent them from commencing a suit against a non-signatory outside of New York courts. Additionally, Baha Mar argues that because New York courts do not have personal jurisdiction over the non-signatories at issue, the Caesar Affiliates, application of the Forum Selection Clause as against them would effectively

prevent Baha Mar from seeking redress. Finally, Baha Mar asserts that the Forum Selection Clause does not apply to actions for fraud.

When the terms of a written agreement are clear and unambiguous, the court should make a practical determination of the intent of the parties based on the plain language found within the four corners of the document. *W.W.W. Associates, Inc. v. Giancontieri*, 77 NY2d 157, 162 (1990). Further, New York courts have a well-established "policy of enforcing choice of law and forum selection clauses." *Indosuez Intl. Finance, B.V. v National Reserve Bank*, 304 AD2d 429, 430 (1st Dept 2003).

The Forum Selection Clause contains broad language that all controversies "of any nature" arising from the Agreement are to be litigated in New York courts.

Baha Mar argues that the parties intended the clause to apply to the parties to the Agreement only, as evidenced by the next sentence contained in the provision that specifically references the "Parties," defined as Caesars and Baha Mar. The sentence that Baha refers to states, "The Parties agree that service of process for purposes of any such litigation ... need not be personally served" (Agreement, § 11.5 [a]).

However, this sentence concerns service of process only, and does not reference choice of forum. Therefore, it does not otherwise alter the plain meaning of the Forum Selection Clause, that unambiguously states that all disputes arising out of the Agreement are to be litigated in New York.

Moreover, Plaintiffs contend that the Caesars Affiliates, comprised of Caesar's parent and shareholders, are closely related to Caesars, and therefore, may invoke the Forum Selection Clause. A non-signatory may benefit from a forum selection clause if it is an intended beneficiary entitled to enforce the clause; third party beneficiary status is not required. *Freeford Ltd. v. Pendleton*, __A.D. 3d__, NY Slip Op 03148 (1st Dept 2008). Additionally, parties who are closely related to one of the signatories may enforce a forum selection clause, if the relationship between the non-party and the signatory is "sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them." *Id.*

Plaintiffs clearly share a relationship with the Caesars Affiliates that is sufficiently close, such that enforcement of the Forum Selection Clause to include them is foreseeable. *Accord Indosuez Intl Fin., B.V.*, 304 AD2d at 431 ("Plaintiff's parent and subsidiary, although not parties to the agreement containing the choice of law and forum clause, were sufficiently close in their relation to plaintiff to be within the permanent injunction's protective ambit.").

Moreover, Baha Mar's assertion that it will be deprived of its day in court if the Forum Selection Clause is enforced because the Caesar Affiliates are not subject to this Court's jurisdiction, is without merit. Courts may set aside an otherwise valid forum selection clause if enforcement would be

"unreasonable or unjust," such that the challenging party would effectively be deprived of his day in court. *British West Indies Guar. Trust Co., Ltd. v Banque Internationale a Luxembourg*, 172 AD2d 234, 234 (1st Dept 2001). By written correspondence to this Court, the Caesars Affiliates indicated that they would voluntarily submit to the jurisdiction of New York courts in the event that Baha Mar is enjoined from bringing suit in the Bahamas. (Letter from Kearney to Ramos of 6/26/08.)

Finally, Baha Mar argues that the Forum Selection Clause does not apply to its cause of action for fraud, because it does not arise "out of the Subscription Agreement," but rather, arises out of Harrah's misrepresentations concerning its commitment to the Project. However, any alleged misrepresentations made by Harrah's in connection with its intention to go forward with the Project are necessarily and intrinsically tied to the factual circumstances surrounding the Agreement. Therefore, the Forum Selection Clause is sufficiently broad to encompass a claim for fraud. For these reasons, Plaintiffs have demonstrated a likelihood of success on the merits.

B. Irreparable Harm

Plaintiffs argue that if provisional relief is not granted they will suffer irreparable harm because they will be forced to defend litigation in the Bahamas in violation of the Forum Selection Clause. In light of Baha Mar's representation that it intended to commence an action in the Bahamas, it is evident that there is a risk of such harm.

C. Balance of the Equities

Finally, the harm of defending litigation in the Bahamas that is likely in violation of the Forum Selection Clause is greater than the burden faced by Baha Mar, who is free to bring the claim in this court. Therefore, this Court determines that the equities favor granting an injunction to enjoin Baha Mar from bringing suit in the Bahamas against the Caesar Affiliates.

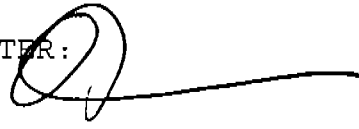
Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is granted, to the extent that defendants are enjoined from commencing an action against the Caesar Affiliates in the Bahamas, and it is further

ORDERED that the remainder of plaintiffs' motion that seeks to enjoin Defendants from using information designated as confidential, and defendants' cross-motion to declassify certain material designated as confidential, shall be referred to JHO Beverly Cohen for determination; and it is further

ORDERED that the parties are directed to contact JHO Beverly Cohen at 646-386-3719 in connection with the cross-motion.

Dated: September 12, 2008

ENTER: 

J.S.C.

HON. CHARLES E. RAMOS

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SEP 18 2008
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