

Gusinsky v Genger

2008 NY Slip Op 32951(U)

October 28, 2008

Supreme Court, New York County

Docket Number: 600426/08

Judge: Jane S. Solomon

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

PRESENT: **JANE S. SOLOMON**

PART 55

Justice

Index Number : 600426/2008

GUSINSKY, VLADIMIR

VS.

GENGER, SAGI

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 600426-08

MOTION DATE 6/16/08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

ere read on this motion to/for _____

PAPERS NUMBERED

1-3

4-9

10-11

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

is decided together with motion 02 in accordance with the enclosed memorandum decision and order.

NB PC 12/15/08 at noon for all parties to be represented.

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

FILED

OCT 29 2008

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 10/28/08

[Signature]

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

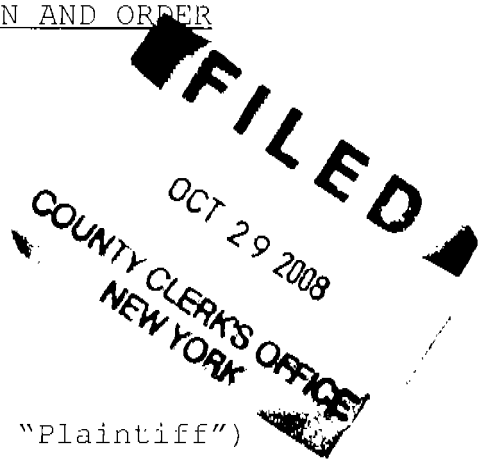
Check if appropriate: DO NOT POST REFERENCE

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

-----X
VLADIMIR GUSINSKY, :
 :
 Plaintiff, :
 :
 -against- :
 :
 SAGI GENGER and :
 AG REAL ESTATE PARTNERS, L.P., :
 :
 Defendants. :
-----X

INDEX NO. 600426/08

DECISION AND ORDER



JANE S. SOLOMON, J.:

INTRODUCTION

Plaintiff Vladimir Gusinsky ("Gusinsky" or "Plaintiff") commenced this action to recover payments due under a loan agreement. Defendants Sagi Genger ("Sagi") and AG Real Estate Partners, L.P. ("AGLP") (collectively "Defendants") move (motion sequence 001) to: (a) dismiss the complaint pursuant to CPLR 327 (forum non conveniens); (b) obtain a stay pending the resolution of a related action brought in Nova Scotia; (c) dismiss the first cause of action pursuant to CPLR 3211(a)(5) on the grounds that payment was made; and (d) dismiss the Plaintiff's complaint for failure to state a claim pursuant to CPLR 3211 (a)(7). Plaintiff also has moved (motion sequence 002) for leave to amend his complaint to add a party defendant. As set forth below, Defendants' motion is denied in its entirety and Plaintiff's motion to amend is granted.

FACTS

Arie Genger ("Arie") formed AG Properties ("AGP"), AG Holdings ("AGH"), AG Real Estate GP ("AGGP"), and AGLP (collectively the "AG Entities") for the purpose of making real estate investments. AGP was the sole shareholder of two entities which directly owned income producing real estate in Canada. AGH owned a 50% interest in AGP and AGLP was the sole shareholder of AGH. Arie's children, Sagi and his sister Orly Genger ("Orly"), both of whom reside in New York, each owned 45% of AGLP. AGGP was the general partner and owner of the remaining 10% limited partnership interest in AGLP. Arie was the sole owner of AGGP.

In 2001, Gusinsky loaned \$2,500,000 to an entity which is now known as AGH (the "Loan"). The Loan was secured by a Promissory Note (the "Note"),¹ and a Pledge Agreement made by AGLP (the "Pledge Agreement").² The Loan was negotiated in New

¹ The last sentence of the Note reads "[t]his Note shall be governed by, construed and interpreted in accordance with the laws of the Province of Nova Scotia, Canada, without giving effect to principles of conflicts of law.

² Section 9.02 of the Pledge Agreement entitled "GOVERNING LAW" provides:

This Pledge Agreement shall be governed by, and interpreted and enforced in accordance with, the laws in force in the Province of Nova Scotia, of Canada (excluding any conflict of laws, rule or principle which might refer such construction to the laws of another jurisdiction). The Pled-or [sic] irrevocably submits to the non-exclusive jurisdiction of the courts of the Province of Nova Scotia with respect to any matter arising hereunder or related hereto.

York by Arie and Gusinsky. The Note and the Pledge Agreement were drafted by New York attorneys and both documents were executed in New York.

In April of 2002, Arie and Gusinsky agreed to amend the Note so that the interest and principal due under the Note would be calculated and paid in Canadian dollars. A document entitled "Allonge to Promissory Note" (the "Note Amendment") reflecting this understanding was executed by the parties. The Note Amendment, like the other loan documents, was negotiated, drafted, and executed in New York.

In March of 2004, Arie sold his interest in AGGP to Sagi and Orly. Through subsequent transactions Sagi has purportedly become the sole owner of the AG Entities.³ Sagi resides in New York, has an office in New York, and conducts business in the state. After acquiring ownership of the AG entities, Sagi apparently sold the real estate investments owned by the AG Entities in order to make a new real estate investment in property located in Montreal, Canada using two entities - Riverside Properties (Canada) LP ("Riverside") and Riverside General Partners LP ("Riverside GP").

Arie has since resigned as director of the AG entities.

³ Sagi allegedly purchased Orly's interests in AGLP and AGGP. Orly contends in another lawsuit pending before this Court under Index No. 100697/2008 that, inter alia, the sale was invalid and fraudulently induced.

However, before doing so he insisted that "Sagi agree that before [AGP] or Riverside GP took any monies, in any form, from the Riverside investment, the loan to Mr. Gusinsky would be satisfied." Affidavit of Arie Genger at ¶ 18. Sagi agreed to do so in a written Assurance Agreement (the "Assurance Agreement") that provides, "I, therefore, hereby assure you that all funds received by [AGP] or [Riverside GP], whether from or in connection with Riverside, will be set aside for the full repayment of the Loan." The Assurance Agreement was negotiated, drafted, and executed in New York.⁴ In August of 2007, Sagi sent a check to Gusinsky in the amount of \$162,500 for payments due under the Note, together with a memorandum from Sagi on behalf of AGH to Gusinsky which stated:

Please find attached a check in for [sic] the full amount due you in 2007 under the 7/24/01 Note. At the time of execution the company was called AG Land #1. Should you have any questions feel free to call me at 212 729 5076.

The check, signed by Sagi and made out to Gusinky, was drawn on an entity named TPR INVESTMENT ASSOCIATES, INC with an address of 200 West 57th Street Suite 1208, and delivered to Gusinsky in New York in an envelope indicating that it was sent from Sagi's Park Avenuc address.

⁴That document lists 1211 Park Avenue New York, NY 10028 as the address for Sagi on the top of the page and 200 West 57 Street (Suite 1208) New York, NY 10019 as the address for Arie.

On February 13, 2008, Gusinsky commenced the instant action against Sagi and AGLP. On or about March 11, 2008, Gusinsky served an Amended Complaint which asserts causes of action for breach of contract (first and second causes of action) and anticipatory breach of contract (third cause of action). Gusinsky alleges, inter alia, that Defendants failed to make the required payments on the loan, and that funds were not properly set aside in violation of the Assurance Agreement.

Gusinsky asks the Court for: (a) judgment for the entire amount due under the Note; (b) an order requiring Defendants to pay all distributions of AGH to an account dedicated to the repayment of the Loan in conformance with the Assurance Agreement; (c) an injunction restraining Sagi and AGLP from distributing additional funds until sufficient funds are set aside for the repayment of the Loan.

After the instant action was commenced, Sagi brought two actions in Nova Scotia (the "Nova Scotia Actions") on behalf of AGH and AGP. The first, by AGH against Gusinsky, seeks a declaration that the Note Amendment "is of no force and effect". The second, brought by AGH and AGP against Arie, is for a declaratory judgment that the Assurance Agreement is not binding on them and is of no force and effect.

DISCUSSION

1. FORUM NON CONVENIENS

Pursuant to the forum non conveniens doctrine an action may be dismissed "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum." CPLR 327(a).

"The doctrine [of forum non conveniens] rests, in large part, on considerations of public policy and . . . our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York'". *American BankNote Corp. v. Daniele*, 45 A.D.3d 338, 342 (1st Dept. 2007) (quoting *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361 (1972)).

In the seminal case of *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984), the Court held that "[t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not." (citations omitted). The burden that a movant bears on a forum non conveniens motion has been described as a "heavy burden" that is not easily met. *American Banknote Corp.*, 45 A.D.3d at 339-40. Indeed, New York courts have

observed that, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Anagnostou v. Stifel*, 204 A.D.2d 61, 61 (1st Dept. 1994).

In *Pahlavi*, the Court held that the factors that a court should consider on a motion to dismiss for forum non conveniens 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 a action arose occurred primarily in a foreign jurisdiction.

Id. at 479.

The Court noted that "[n]o one factor is controlling," and observed that the "great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case." *Id.*

Defendants have not met their burden of establishing that New York is an inconvenient forum. First, all of the agreements which lie at the heart of this litigation (Pledge Agreement, Note Amendment, and the Assurance Agreement) were negotiated, drafted, and executed in New York. Second, both Sagi and Gusinsky maintain offices here. In fact, Sagi resides in New York and a New York address was listed for him on the top of the Assurance Agreement. Further, he tendered a check for payments due on the

Loan to Gusinsky in New York. The attorneys who drafted and negotiated the subject agreements have offices in New York as well. Lastly, it appears that Arie, a New York resident, is likely to be a key witness.

Defendants unpersuasively base their forum non conveniens argument on two principal grounds: (a) the Loan is governed by Nova Scotia law; (b) the subsequent Nova Scotia actions deal with related issues.

That Nova Scotia law applies does not, in and of itself make New York an inconvenient forum. See *Yoshida Printing Co., Ltd. v. Aiba*, 213 A.D.2d 275, 275 (1st Dept. 1995); *Anagnostou v. Stifel*, 204 A.D.2d 61, 62 (1st Dept. 1994); *Kronengold v. Hilton Hotels Corp.*, 166 A.D.2d 325, 326-27 (1st Dept. 1990) (citing *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust*, 62 N.Y.2d 65 (1984)). New York courts are well equipped to enforce a choice of law provision and doing so is not unduly burdensome.

To the extent that Defendants argue that the choice of law provision in the Pledge Agreement is a forum selection clause, it is belied by the fact that Nova Scotia's jurisdiction is "non-exclusive." Indeed, in the end, Defendants do not argue that this Court lacks jurisdiction over them and they correctly point out that Nova Scotia is an *alternate* forum. That does not affect the outcome of the balancing test, where other considerations weigh heavily in favor of concluding that New York is not an

inconvenient forum.

The subsequent commencement of the two related Nova Scotia Actions does not render New York an inconvenient forum for this lawsuit. Defendants make much of the fact that it may have to participate in the Nova Scotia Actions while at the same time defending this action. However, this difficulty is self-inflicted, and Defendants cannot deprive Plaintiff of his choice of an appropriate forum by later commencing lawsuits elsewhere.

Defendants have not met their burden to establish that they are entitled to dismissal based on the forum non conveniens doctrine. The relevant factors weigh decisively in favor of denying the motion.

2. Stay

While a court may, in its discretion, stay a New York action pending the resolution of another action in a foreign court, Defendants have not established that they are entitled to a stay under the circumstances herein. This action was commenced prior to the Nova Scotia Actions. Plaintiff is entitled to litigate in his chosen forum.

3. Dismissal

Those branches of Defendants' motion to dismiss the Plaintiff's first cause of action pursuant to CPLR 3211(a)(5) and to dismiss Plaintiff's complaint pursuant to CPLR 3211(a)(7) are

denied. Plaintiff has adequately set forth his causes of action and Defendants have not established their defense of payment as a matter of law.

4. Plaintiff's Motion to Amend

Plaintiff's motion to amend his complaint to add AGH as a party defendant is granted. It is well settled that leave to amend pleadings shall be "freely given absent prejudice or surprise resulting directly from the delay." *Tishman Const. Corp. Of New York v. City of New York*, 280 A.D.2d 374, 377 (1st Dept. 2001). AGH will not suffer any prejudice or surprise as a result of delay. Significantly, AGH was on notice of its involvement in this lawsuit. Furthermore, AGH will have sufficient time to prepare a defense to Plaintiff's claims since this litigation is in its infancy and discovery is not yet underway.

Defendants contend that Plaintiff's motion to amend should be dismissed because the Court lacks jurisdiction over AGH. However, a New York Court has jurisdiction over a non-domiciliary when it transacts business within the state. C.P.L.R. §302(a)(1).

A nondomiciliary transacts business within the state if he "purposefully avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." *Id* (citations omitted). Courts should examine the totality of the defendant's contacts with the state to decide whether the defendant was transacting business under

the statute. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457, n.5 (1965). Section 302 is a "single-act statute," meaning that a single transaction made by the defendant may be sufficient for a defendant to be transacting business. *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 467 (1988). The statute does not require the defendant to be physically present to transact business within the state. *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13 (1970).

AGH has transacted business within New York state such that jurisdiction is appropriate under CPLR §302(a)(1). AGH was formerly known as AG Land No.1 Company, which was the company that incurred the Loan in New York and was the obligor under the Note. The Note Amendment was negotiated, drafted, and executed by Arie for AGH in this state. Furthermore, Sagi made a payment for an amount due under the Loan on behalf of AGH in New York.

Based on the foregoing, it is:

ORDERED that Defendants' motion to dismiss is denied; and it further is

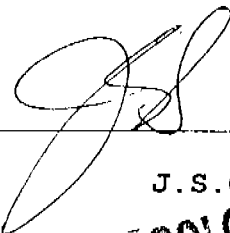
ORDERED that Plaintiff's motion to amend is granted and that the proposed amended pleading is deemed served on Defendants upon service of a copy hereof with notice of entry, and Plaintiff is directed to serve a copy of an amended summons and complaint on AGH within twenty days of entry hereof; and it further is

ORDERED that Defendants shall serve an amended answer within twenty days of receipt of a copy hereof with notice of entry; and it further is

ORDERED that all parties shall appear for a preliminary conference in Part 55 on December 15, 2008 at 12:00 noon.

October 28 , 2008

ENTER:



J.S.C.
JANE S. SOLOMON

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK