

Eisenberg v Starkman
2008 NY Slip Op 33212(U)
December 1, 2008
Supreme Court, New York County
Docket Number: 601351/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD
Justice

PART 35

Eisenberg, Larry

INDEX NO. 601351/08

MOTION DATE 10/16/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Starkman, Gerald

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

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR§327 and CPLR §3016(b), dismissing plaintiffs' complaint is granted; and it is further

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

The Clerk may enter judgment accordingly.

That constitutes the decision and order of the Court.

FILED

DEC 02 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/1/08

[Signature]
CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
LARRY EISENBERG, L.E. TRADING, and
L.E. CONTRACTORS, LLC (d/b/a FINE GEM
IDENTIFICATION LABORATORIES)

Plaintiffs,

-against-

GERALD CECIL STARKMAN, and
LUCAS VAN ZENTEN GMBH & CO., INC.,

Defendants.

-----x
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Index No. 601351/08

DECISION/ORDER

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiffs Larry Eisenberg (“plaintiff”), L.E. Trading, and L.E. Contractors, LLC (d/b/a Fine Gem Identification Laboratories) (collectively “plaintiffs”) commenced this action for contribution, pursuant to CPLR §140, from defendants Gerald Cecil Starkman (“defendant”) and Lucas Van Zenten GMBH & Co., Inc., (collectively “defendants”) for defendants’ equitable share of a restitution judgment plaintiff was ordered to pay as a result of plaintiff’s conviction for fraud.

Defendants now seek to dismiss plaintiffs’ complaint on the grounds of *forum non conveniens*, or stay plaintiffs’ action pending the resolution of a pending action in Quebec, Canada, pursuant to CPLR §327. Alternatively, defendants seek to dismiss plaintiffs’ complaint for failure to meet the pleading requirements for fraud, pursuant to CPLR §3016(b).

*Factual Background*¹

Plaintiff, a resident of New York, is a jewel merchant who buys emeralds in Colombia for resale. Plaintiff's company, L.E. Trading ("Trading"), is a Delaware corporation authorized to do business in New York. Trading "had a principal place of business in New York City's jewelry district at 48 West 48th Street in New York City" (plaintiffs' comp., para. 9). Defendant resides in Quebec, Canada, and was the president of defendant Lucas Van Zenten GMBH & Co., Inc., ("LVZ"), a Quebec corporation (defendant's affidavit, para.1). "Until it ceased doing business, [LVZ] has had its principal, and only, office" . . . [in] Montreal, Quebec, Canada. All of Lucas' business activity has been conducted in Quebec, Canada" (*id.*).

In April 1997, plaintiff, representing Trading, entered into an oral agreement with defendant to sell gemstones to LVZ. Under the agreement, after LVZ purchased the emeralds, and after receiving shipping instructions, plaintiffs would ship the emeralds directly to LVZ's customers at the addresses on LVZ's invoices. The parties contest where the agreement was made: Plaintiffs contend that the agreement was made in plaintiff's New York offices; defendants contend the agreement was made over the telephone with defendant in Quebec. From April or May 1997 through spring 2000, LVZ used Robert Palzer/Gem Laboratory, Inc., ("Palzer") as the licensed certifier of the gems (Weiss aff., para. 5).

Defendants allege that in 2000, plaintiff telephoned defendant, who was in Canada at the time, and proposed that plaintiff's company, Fine Gem Identification Laboratories ("Fine Gem"),

¹ These facts are taken from defendants' motion, which comprises an affirmation from defendants' New York attorney Arnold M. Weiss ("Weiss aff."), an affirmation from defendants' Quebec attorney Allan J. Gold ("Gold aff.") and an affidavit from defendant Gerald Cecil Starkman, and plaintiffs' complaint.

replace Palzer as the certifier of gems.² Relying on plaintiff's assurances, defendant accepted the proposal to use Fine Gem. The modified agreement controlled the parties' business arrangement until August 2006, when plaintiff was arrested in New York for issuing false gemstone certifications. Plaintiff was indicted on September 13, 2006 for conspiracy to commit mail fraud and mail fraud in violation of 18 U.S.C. §§371 and 1341 (*see* defendants' Exhibit B).

On November 15, 2006, defendants provided plaintiffs with written notice of the damage "it had and was experiencing by virtue of [plaintiffs'] fraud and misconduct and demanded, *inter alia*, damages, and that plaintiffs notify defendants' customers that defendants had no involvement in any fraud and/or misconduct" (Weiss aff., paragraph 10). The letter also seeks damages from plaintiffs. Plaintiffs never responded to defendants' letter.

In April 2007, plaintiff pleaded guilty to and was convicted of conspiracy to commit mail fraud and mail fraud. The court held that the certifications plaintiff issued to customers were false. Plaintiff was sentenced to 33 months in prison, and ordered to pay \$1,499,625 in restitution (defendants' motion, Exhibit B, paragraphs 20-23).

On December 6, 2007, defendants filed a complaint against plaintiffs in Quebec court, seeking to recover damages for plaintiffs' alleged fraud and misconduct (the "Quebec action").

Defendants describe their cause of action as follows:

[Defendants'] Complaint in the Quebec Action details the compensatory damages in excess of \$900,000 CAD that it suffered by reason of Plaintiffs' fraud and misconduct, plus its request for \$2,000,000 CAD as punitive damages (Exh. A). Such compensatory damages includes, *inter alia*, the value of the gemstones purchased and paid for by [defendants] which [plaintiffs] never delivered to [defendants] or its customers; the value

² According to plaintiffs' complaint, defendant met plaintiff at plaintiff's New York office (Defendants' Exhibit B, paragraph 13). Also, plaintiffs characterize the nature of the modification differently. Plaintiffs contend that "they agreed that [plaintiff] would provide gem identification reports at [defendant's] request" (*id.*). From then on, Fine Gem "produced gem identification reports," plaintiffs contend (*id.* at paragraph 14).

of the other gemstones paid for by, and belonging to, [defendants] that remained in the possession of Plaintiffs; catastrophic injury to [defendants'] business and reputation from Plaintiffs' above-described misconduct, including Plaintiffs' illegal and false certification of gemstones that had been sold to [defendants'] customers during the six-year period, for such false, illegal and unauthorized Gem Certification (Weiss aff., paragraph 12).

The Quebec action is pending. On May 4, 2008, plaintiffs commenced this action for contribution against defendants (the "New York action").

Plaintiffs' Complaint

Plaintiffs relate the facts are as stated above, with the following distinctions. Plaintiffs contend that the 1997 oral agreement between the parties was negotiated and approved during meetings at defendants' New York office located at 521 Fifth Avenue, and the 2000 modification to the oral agreement was negotiated and approved during meetings at plaintiffs' New York office located 48 West 48th Street, not over the telephone with defendant in Quebec, as defendants contend (defendants' exhibit B, plaintiffs' complaint, paragraphs 11-13). Plaintiffs also argue that plaintiff prepared fraudulent gem stone identification reports through Fine Gem at defendants' request (*id.* at paragraph 19). Plaintiff prepared the reports "with the knowledge that [defendant] intended to sell the emeralds at an inflated price as investment grade emeralds," plaintiffs contend (*id.*). The emeralds remained at plaintiffs' New York offices until defendant directed that they be shipped to buyers throughout the United States, plaintiffs contend (*id.* at paragraph 17).

Plaintiffs contend that defendants were not joined as a party in the criminal action against plaintiff "because [defendants] have yet to be extradited from Canada" (*id.* at paragraph 23). However, defendants are liable "for the damages of the same fraud in that they solicited the customers, promised them inflated returns on what they represented was a risk free investment

and recouped the inflated value of the sale of the stones which they purchased for market value from Plaintiffs” (*id.* at paragraph 22). Pursuant to CPLR §1401, plaintiffs seek defendants’ equitable share of the judgment against plaintiff “in accordance with their relative culpability” (*id.* at p. 6).

Venue in plaintiffs’ complaint is designated as New York County, based on plaintiffs’ residence and principal place of business (*see* defendants’ Exhibit B, paragraphs 2-5). Defendant is listed as a resident of Quebec, and LVZ is listed as an unauthorized foreign corporation that maintained offices in New York during the relevant period complained (*id.* at paragraphs 6-7).

Defendants’ Motion to Dismiss

1. Forum non conveniens

First, defendants argue that the court should dismiss plaintiffs’ action on the ground of *forum non conveniens*, pursuant to CPLR §327, as it would be unjust, inconvenient and unduly burdensome to try the action in New York.

The fact that substantial portions of the transactions occurred in Quebec warrants dismissal. The parties’ oral agreement, which is the basis upon which all claims of misconduct arose, was accepted in Quebec. Liability under the parties’ oral agreement, as well as all substantial activity pursuant to said agreement, occurred in Quebec. Defendants argue that although they did not participate in any of the fraudulent activity of which plaintiff was convicted, all communications, *i.e.*, the fraud and calls to customers were from Quebec, would have been made in Quebec. Further, the overwhelming number of defendants’ customers were located outside the state of New York.. The 2000 modification substituting Fine Gem as the

certifier of the gems also was agreed to in Quebec. Further, invoices to the customers also indicated that Quebec law applied.

Also, New York should not be burdened with having to interpret the laws of Quebec, which would govern the above transactions. The laws of Quebec, which are based upon the Napoleonic Code, are vastly different from New York's common law. New York's choice of law rules apply the law of the forum where the injury was sustained, and the injury was suffered outside of New York. The court in Quebec is best position to interpret laws of Quebec.

Also, the evidence and non-party witnesses exist in Quebec. Defendants argue that a New York trial would deprive them of presenting several witnesses who are essential to "prove their innocence of the false charges" herein. These witnesses include LVZ's sales representatives, who have denied making any fraudulent statements upon defendants' direction. Two of the witnesses live in Quebec, and one lives in England. Each witness has indicated he is unwilling to travel to New York to testify in the case at bar. In addition, voluminous books and records relevant to this case would have to be transported to New York. Defendants also argue that appearing in New York would open them to the risk that plaintiff "would seek to embroil them in criminal proceedings" in New York (defendants' memorandum of law in support of opposition, p. 2).

Consequently, the hardship on defendants created by the inability to mount a defense against plaintiffs' action in New York militate in favor of dismissal. Additionally, some significant aspects of Canadian law would not be available to defendants in a New York action, including the availability of attorneys' fees to the prevailing party, and the prohibition against the

use of testimony of a witness in a Canadian civil trial against such witnesses in criminal proceedings.

If the New York action is dismissed, plaintiffs will not suffer because they have a suitable forum in Quebec, defendants contend. The plaintiffs' action here involves essentially the same transactions, claims and parties as the Quebec action, in that the Quebec action charges plaintiffs with fraud and misconduct in providing false and unauthorized Gemstone Certifications, and the New York action charges defendants with participating in such fraud. Thus, plaintiffs may convert their claims herein into a counterclaim in the Quebec Action, defendants contend. Further, plaintiffs have accepted service of process and have appeared in Quebec court in defendants' Quebec action. Since plaintiffs have acquiesced to jurisdiction in Quebec for at least part of the parties' controversy, plaintiffs should not be allowed to try the other portions of the same dispute in another jurisdiction, defendants contend. Thus, the existence and availability of a Quebec forum also supports dismissal.

Further, courts have dismissed actions where another action involving the same transaction was pending in another forum. Defendants' pending action against plaintiffs, which was commenced in Quebec on December 6, 2007, months before defendants commenced their action here, raises the risk of inconsistent decisions in Quebec and New York. Defendants claim that plaintiffs received earlier notice of defendants' claims in a demand letter dated November 15, 2007.

2. Failure to plead fraud with particularity

Second, defendants argue that plaintiffs' complaint should be dismissed for failure to plead fraud with particularity, in violation of CPLR §3016(b). Defendants contend that plaintiffs

failed to meet this burden because they made allegations without providing any specific dates, names or detailed communications. Instead, plaintiffs provide “a broad array of generalized and conclusory statements alleging fraud” (*id.* at paragraph 18). Defendants cite as an example, paragraph 15 of plaintiffs’ complaint, where plaintiffs describe what LVZ’s sales representatives told customers. Plaintiffs failed to provide the specific dates when these representations were made, who made the representations, to whom the representations were made and which part of the representations were “false or fraudulent,” defendants contend (*id.* at paragraph 18(a)).

In addition, defendants contest plaintiffs’ contention that plaintiff made “improper and fraudulent” gem certifications *at defendant’s request*. Plaintiffs fail to provide any details about defendant’s alleged requests, defendants argue. Plaintiffs base their complaint on the grounds that defendants “were part of the ‘fraudulent scheme’ for which [defendant] was convicted” (*id.* at paragraph 18(I)). However, plaintiffs fail to describe how defendants were part of any scheme to defraud, plaintiffs contend. “Plaintiff’s failure to plead with specificity is exacerbated by the fact that the NY Complaint relates to an eight-year-period and to multiple conversations with more than 250 [LVZ] customers,” defendants contend (*id.* at paragraph 19).

Plaintiffs’ Opposition

1. Forum non conveniens

In opposition, plaintiffs contend that defendants’ fear of being prosecuted for fraud in New York, which is the key reason for seeking dismissal, does not overcome the presumption in favor of plaintiffs’ choice of forum. Plaintiffs argue that in the government’s criminal case against plaintiff, defendants were identified as “unindicted co-conspirators” and that plaintiff was

not the “prime mover of the conspiracy.”³ Plaintiffs also insist that plaintiff created the gem certificates at defendants’ direction.

Plaintiffs contest defendants’ denial of complicity in the fraud scheme for which plaintiff was convicted (*id.* at paragraphs 9-14). Plaintiffs also argue that during the entire period complained of, defendants “maintained offices in New York County at 521 Fifth Avenue, Room 1700” (*id.* at paragraph 5). Plaintiffs go on to allege that defendant, through his company, LVZ, marketed the stones, set the price for the stones, received payments from the customers, *i.e.*, Acquisition Confirmation Form, and arranged for shipping with plaintiff by commercial carrier from LVZ’s New York office. The “DHL Shipping Form” holds LVZ out as doing business in New York. Plaintiffs claim that defendants “promoted the sale of the gems with false, fraudulent, deceptive and misleading representations through various means,” including representations on their website, mailings and “cold calling” by sales representatives (*id.* at paragraphs 6(a)-(c)).

In addition, the cause of action here arises out of a judgment of restitution imposed by a New York court.

Plaintiffs also argue that the New York action would not raise choice of law issues. Defendants do not, and cannot claim, that Quebec law governs plaintiffs’ contribution claim. Defendants also fail to determine whether any law involved would be procedural or substantive. Procedural issues are governed by the law of the forum, which in this case would be New York, plaintiffs argue. A choice of law analysis would determine whether New York or Canadian law

³ The Indictment refers to false representations made by plaintiff and “conspirators” (plaintiffs’ Exhibit A).

would govern a substantive issue, and here, defendants have not pointed to any substantive conflict between Quebec's law and New York's law governing fraud.

Plaintiffs also contest defendants' contention that witnesses would be inconvenienced by having to come to New York for trial. Plaintiffs allege that only the defendants would need to be called as witnesses in the case at bar. By contrast, plaintiffs argue, plaintiffs would not be able to pursue their claims in Quebec by consolidating their claims with the defendants' Quebec action. Plaintiff would be unable to appear in court in Quebec because he currently is in jail in the United States, "and the Bureau of Federal Prisoners will not produce him in a foreign jurisdiction" (*id.* at paragraph 17, referring to affidavit of plaintiffs' attorney Daniel Romano in Quebec). Dismissal of plaintiffs' New York action would reward defendants for their complicity in the fraudulent scheme leaving plaintiff to bear sole financial responsibility for their joint misconduct, plaintiffs contend.

Next, plaintiffs argue that the fact that an action is pending in Canada is not grounds for dismissal. The case at bar is for a different cause of action than the cause of action in Quebec: the Quebec action alleges fraud and misconduct; plaintiffs' New York action seeks contribution for a judgment imposed on plaintiff in New York "for an offense which was committed within the United States against victims all of whom are residents of the United States."

Further, plaintiffs contend that they cannot bring their claim as a counterclaim in defendants' pending Quebec action because Canada does not have jurisdiction over the defendants' claim. Citing Quebec law, plaintiffs contend that the three conditions for Canadian jurisdiction cannot be established: Defendants maintain that they are not domiciled in Quebec; nor has "the whole cause of action" arisen in Quebec; and the cause of action arose in New York,

not Quebec, as defendants allege; therefore, the Canadian court does not have jurisdiction, plaintiffs argue.

Plaintiffs also deny that they have acquiesced to jurisdiction in the Quebec action. Plaintiffs' counsel appeared in Canada on behalf of plaintiffs to contest jurisdiction and consent to a scheduling order. This does not "constitute acquiescence to jurisdiction in this jurisdiction or under Canadian law. Because plaintiff is incarcerated in the United States, the Canadian court scheduled a hearing for plaintiff's motion to dismiss for February 18, 2009 (after plaintiff is released). But even then, because of Canadian immigration law, plaintiff may not be allowed in Canada to contest defendants' claim, because of plaintiff's recent criminal record.

Even if the Quebec court granted jurisdiction over defendants' claim on the ground that the contract was formed in Quebec, plaintiffs (as defendants in the Quebec case) would still have a strong case for dismissal on the grounds of *forum non conveniens*, plaintiffs argue. Among their arguments, plaintiffs contend that they are domiciled in New York and have never done business in Quebec, while defendants "maintained offices in New York at all times throughout the business relationship of the parties"; "the gemstones referred to by [plaintiffs] in their Motion are or were all located in the State of New York"; plaintiff cannot legally travel to Canada; there are no legal obstacles to defendants' traveling to New York; a "hearing in N.Y. can proceed immediately" as opposed to being delayed until plaintiff is released from prison; and "all of [plaintiffs'] witnesses including the victims of the LVZ fraud would be subject to process" in New York. Finally, it would be "patently unfair" for defendants not to "pay their debt to society" for their role in the fraud, plaintiffs argue.

2. Failure to plead fraud with particularity

Plaintiffs contend that their claim for contribution contains all of the elements required in CPLR 1401, and they have set forth with sufficient specificity the elements of defendants' role in the underlying fraud, pursuant to CPLR §3016. "The Complaint clearly alleges that both Plaintiffs and Defendants are joint [*sic*] and severally liable for damages to the victims in the amount of \$1,499,625 and that Plaintiffs are entitled to contribution from Defendants for their wrongful conduct which contributed to at least 50% of the damages for which Plaintiff has been held liable," plaintiffs contend (plaintiffs' opposition, paragraph 36). Plaintiffs' complaint also specifically alleges defendants' role in defrauding customers (*see* defendants' Exhibit B, plaintiffs' complaint, paragraphs 15 and 17). Plaintiffs go on to repeat the list of specific allegations in their complaint. Defendants are seeking a level of detail not required by CPLR §3016, plaintiffs contend. Those details, including the names, dates and content of communications, "are more likely in the control of the Defendants," plaintiffs argue.

Defendants' Reply

Defendants contest plaintiffs' allegation that defendants are unindicted co-conspirators. "Actually, [defendant] is not even mentioned in the Indictment." Defendants further contest plaintiffs' allegations that plaintiff set the price for the stones and sold the stones to LVZ at fair market value.

Defendants contest plaintiffs' allegation that they are unwilling to appear in New York for fear of prosecution. Defendants deny that they maintained a New York office during the relevant period. The premises in New York that plaintiff refers to was nothing more than a maildrop plaintiff arranged for his own business purposes. Defendants contest plaintiffs'

allegations that defendant made fraudulent representations about the gems, and that defendant was the “prime mover of [plaintiff’s] fraudulent scheme.” Further, defendants contest plaintiffs’ allegations that defendants’ witnesses in Canada have avoided extradition. “There is absolutely no basis in the record suggesting that the government is even contemplating action against Defendants’ two key witnesses, and certainly there is nothing anywhere regarding extradition,” defendants contend (defendants’ reply, paragraph 3i).

Plaintiffs fail to adequately support their allegations that the parties’ contract was made in New York, defendants argue. The contract was accepted by defendant in Quebec, which gives the Quebec court jurisdiction over the matter. Defendants also reiterate their contention that plaintiffs waived jurisdiction by appearing at a hearing in Quebec. Citing Canadian case law, defendants argue that the appearance of a party for an *echeancier* (case management plan) is a factor a Quebec court can consider when deciding whether the court has jurisdiction over a case. The fact that plaintiffs accepted service of the Quebec summons and complaint also supports jurisdiction in Quebec.

Further, plaintiff would not be barred from entering Canada because of his criminal record. “Indeed, [Canadian Immigration Bulletin] IMM 5312E provides a route, involving an application whereby an individual, convicted of a crime outside Canada, can be admitted into that nation” (reply affidavit of defendants’ attorney Allan J. Gold (“Gold reply affidavit”), paragraph 2). Citing other provisions of Canadian law, defendants argue that “unless [plaintiff] is bent on further criminal or improper conduct after his release from prison, it is likely that he will be admitted into Canada for the limited purpose of participation in this action” (defendants’ reply, paragraph 16). Finally, defendants reiterate their argument that plaintiffs failed to plead

fraud with specificity. Plaintiffs' excuses for not providing essential details are without merit, defendants contend⁴.

Analysis

1. Forum non conveniens

A court may stay or dismiss an action if it finds “that in the interest of substantial justice the action should be heard in another forum” (CPLR §327(a)). “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 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). “This burden becomes even more onerous where the plaintiff is a New York resident” as in the case at bar (*Highgate Pictures, Inc. v De Paul*, 153 AD2d 126, 129 [1 Dept 1990]). However, a defendant can overcome this burden by showing that they will suffer disproportionate hardship. Among the factors to be considered are the residence of the parties, the location of the transaction giving rise to the cause of action, the applicability of the laws of another state or country, the location of the witnesses and any pending discovery, the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum where the plaintiff may bring suit (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479; *Daly v Metropolitan Life Ins. Co.*, 4 Misc.3d 887, 894, 782 NYS2d 530 [2004]). Further, no one factor is controlling, since the doctrine of *forum non conveniens* is flexible in application, based on the facts and circumstances of each case.

⁴ Plaintiffs also submitted a sur-reply to the court, but it was not considered in this decision because it was filed in an untimely manner.

Dismissal on the ground of *forum non conveniens* is appropriate when “plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice” (*Piper Aircraft Co. v Reyno*, 454 U.S. 235, 249, 102 SCt 252, 262 [1981]). In the case at bar, the defendants have demonstrated that they would suffer disproportionate hardship if the court denied their motion to dismiss for *forum non conveniens*. At the same time, plaintiffs have not offered persuasive reasons of convenience supporting their choice of New York as the situs of this action.

The Residence of the Parties

Defendant is a resident of Quebec and his company, LVZ, is a Quebec corporation, with its principal office located in Quebec. However, plaintiff resides in New York and the principal place of business for both of his companies, Trading and Fine Gem, is located in New York. Yet, the residence “in this state of any party to the action shall not preclude the court from staying or dismissing the action” (McKinney’s CPLR Rule 327; *see also Regal Knitwear Co., Inc. v M. Hoffman & Co., Inc.*, 96 Misc 2d 605, 609 [1978] [New York residence or domicile of a party does not bar dismissal on the ground of *forum non conveniens*]). Further, while plaintiffs’ New York choice of forum is presumptively favored, it is not dispositive, where the court finds, in the interest of substantial justice, that other factors militate in favor of having the action heard in another forum (*Wyser-Pratte Management Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 808 NYS2d 3 [1st Dept 2005]; *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 676 NYS2d 540 [1st Dept 1998]). In the case at bar, other factors weigh more heavily in favor of the motion to dismiss.

The Location of the Transaction Giving Rise to the Cause of Action

That plaintiffs' action for contribution arises from a New York prosecution and judgment based on gemstones located in New York is not controlling. The prosecution and entry of judgment are not at issue in this litigation. Nor is the alleged fact that the laboratory exams in question performed in New York, and resulting fraudulent reports, originated in New York controlling. The facts are also not at issue in this action. At issue herein are the alleged fraudulent deeds of the defendants, who are located in Quebec. Further, the place where a contract is executed, negotiated and drafted is one of the factors a court can be consider when weighing whether to dismiss for *forum non conveniens* (*Chrysler Capital Corp. v Citibank, N.A.* (186 AD2d 393, 393-394, 588 NYS2d 187, 187 [1 Dept 1992] [Motion to dismiss on the grounds of *forum non conveniens* denied considering that "most of the contracts in issue were negotiated, drafted or executed in New York and are governed by New York law" (*id.* at 393-394]). Here, plaintiff concedes that the complaint for contribution based on said judgment "result[s] from a fraud in which the Defendants were [allegedly] the principal agents" and an underlying agreement to commit fraud (Memo of Law, page 8). To the extent defendants participated in the fraud of which plaintiff was convicted, any such actions would have occurred in Quebec.

With respect to the documentation cited by plaintiffs, such documents: an "Acquisition Confirmation Form" and a DHL shipping form, do not sufficiently establish that the alleged fraudulent actions by defendants occurred in New York. The "Acquisition Confirmation Form" clearly gives a Quebec address for defendants. The only indication of defendants' presence in New York is the notation "Montreal * New York * Zurich" beneath the address. Further, although the DHL shipping form is stamped with a New York address for LVZ, defendants

maintain that the address is nothing more than a mail drop that plaintiff established to facilitate business with the defendants. Defendants further maintain that they conduct their business with plaintiffs from Quebec, and the calls to the customers were made from Quebec. Plaintiffs offer no evidence that the alleged New York offices were staffed by defendants. Therefore, plaintiffs' claim that defendants' conduct concerning the underlying transactions, *i.e.*, the oral agreement, modified agreement, and fraudulent activities giving rise to his contribution claims occurred while defendants maintained offices in New York, is unpersuasive.

The Applicability of the Laws of Another State or Country

According to the First Department, the "applicability of foreign law is an important consideration in determining a *forum non conveniens* motion and weighs in favor of dismissal" (*Shin-Etsu Chemical Co., Ltd. v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 178, 2004 N.Y. Slip Op. 03959, 6 [1 Dept 2004] [citation omitted]). In *Gonzalez v Lebensversicherung AG*, the First Department held that the motion court "properly concluded that New York was not a convenient forum for this litigation involving a contract entered into in Spain and entities, persons and events predominantly situated there" (761 NYS2d 2, 3 [1 Dept 2003] *lv to appeal denied* 1 NY3d 506, 776 NYS2d 222, 808 NE2d 358). Defendants raise the possibility that this court would need to interpret Quebec law, if indeed the oral agreement is found to have been made in Quebec. However, in the case at bar, it would be premature for the court to discuss choice of law issues at this juncture, because it is unclear whether foreign law will have to be applied in plaintiffs' case.

The Location of the Witnesses and Any Pending Discovery

Recently, the First Department affirmed a decision to dismiss a case against Canadian defendants, concluding that the "court considered the relevant factors, including the domicile of

plaintiff and many of the defendants, the site of the loss, the location of records and files, the number of witnesses in Canada and in locations other than New York, and the fact that a related action is currently pending in the Canadian courts, and appropriately determined that Canada is the more appropriate forum” (*Alberta & Orient Glycol Co., Ltd. v. Factory Mut. Ins. Co.*, 49, AD3d 276, 2008 N.Y. Slip Op. 01855, 2) [1 Dept 2008]). Although plaintiffs contend that only defendants would be the only material witnesses required to testify, plaintiffs allege that defendants’ fraud was committed via the actions of defendants’ sales representatives (plaintiffs’ opposition, paragraph 6(a)-(c)). The record indicates that three of defendants’ sales representatives would be expected to testify as to their role in any alleged fraud, and that they are not willing to testify in New York. Further, the documentary evidence to be presented by defendants are also maintained in Quebec. Plaintiff, on the other hand, does not indicate that he intends to produce any witnesses from New York. Therefore, as the location of most of the relevant and crucial witnesses in this action are located in Quebec, this factor weighs in favor of dismissal.

The Burden on the New York Courts

New York 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” (*Wilson v Pfizer, Inc.*, 20 Misc 3d 1104 [N.Y.Sup. 2008] citing *Silver v. Great Amer. Ins. Co.*, 29 NY2d 356, 361, 328 NYS2d 398 [1972]). Except for the fact that the judgment imposing financial liability upon plaintiff arose from New York, this action has no substantial nexus to New York. Unlike New York, the defendants’ home country, Canada, has an interest in sanctioning fraudulent activities conducted by its citizens. Further, if Canadian law applies, determinations

of whether such laws were violated should be made by a Canadian court. Although New York courts can apply foreign law, it is an undue burden to this court to apply foreign law where the alleged fraudulent misrepresentations of defendants leading up to the entry of judgment against plaintiff took place out of state.

The Potential Hardship to the Defendant

Defendants have established that a trial in New York would prejudice them because defendants and former sales representatives who would testify on defendants' behalf reside outside the United States (Canada and England), and relevant evidentiary documents are also located outside of the United States.

The Unavailability of an Alternative Forum Where the Plaintiff May Bring Suit

Defendants have demonstrated the availability of an alternative forum in Quebec that is ready and willing to hear an action involving the same subject matter and parties as the case at bar (*BFI Group Divino Corp. v JSC Russian Aluminum*, 481 F Supp 2d 274, 279 [2007]). "An alternative forum is generally adequate if: '(1) the defendants are subject to service of process there; and (2) the forum permits 'litigation of the subject matter of the dispute'" (*Bank of Credit and Commerce International (OVERSEAS) Ltd. v State Bank of Pakistan*, 273 F3d 241, 246 [2001]). Here, defendants have demonstrated that they are subject to process in Quebec, as they are residents of Quebec (*see* defendants' motion, Gold aff., paragraph 10, *citing* Article 3134 of the Civil Code of Quebec). Defendants also have demonstrated that Quebec will permit the litigation, as defendants have a related suit against plaintiffs pending in Quebec court (*see* defendants' motion, Exhibits H and I; *cf. Piper Aircraft Co. v Reyno*, 454 U.S. 235, 255 n. 22

[1981] [“[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute” (*id.*)].

In opposition, plaintiffs contend that their cause of action here is different from defendants’ cause of action in Quebec. Plaintiffs are seeking contribution from defendants on the grounds that defendants participated in the fraud of which plaintiff was convicted. Defendants are suing to recover damages they allegedly suffered as a result of plaintiffs’ “fraud and misconduct” (defendants’ motion, paragraph 12). However, both actions contain complaints of fraud arising from the exact same circumstances that gave rise to plaintiff’s conviction. Further, plaintiffs’ attorney in Quebec concedes as much. The attorney states in his affidavit accompanying plaintiffs’ opposition: “I, the undersigned, Daniel Romano, Attorney duly practicing in Quebec and member of the Quebec Bar Association . . . do solemnly declare the following: 1. [Plaintiffs] are named as Defendants in *a similar action based on the same facts* that has been launched in the District of Montreal, Province of Quebec” (*emphasis added*) (plaintiffs’ opposition, Romano affidavit, introduction and paragraph 1).

Other Action Pending in Another Forum

In the case at bar, the existence of a related action in Quebec is not dispositive in determining whether plaintiffs’ case should be dismissed on the ground of *forum non conveniens*, but it does weigh in defendants’ favor (*Alberta & Orient Glycol Co., Ltd. v Factory Mut. Ins. Co.*, 49 AD3d 276 [2008] [upon consideration of the relevant factors, including the fact that a *related action* is currently pending in the Canadian courts, the Court appropriately determined that Canada is the more appropriate forum]).

The First Department acknowledged that in some circumstances prior pending litigation should be allowed to run its course. In *Finance and Trading Ltd. v Rhodia S.A.* (28 AD3d 346, 347 [1st Dept 2006]), the court held that “the litigation pending in France, as well as the securities and criminal investigations there, *which predate this action*, will address the underlying facts, including the alleged fraudulent disclosures.” In *IFS Intern. Inc. v SLM Software Inc.* (224 AD2d 810 [1996]), a case involving breach of contract and fraudulent misrepresentation, the court granted the defendant’s motion to dismiss, highlighting the fact that the New York plaintiff failed to file a counterclaim against its Canadian defendant, after the defendant filed a similar action involving the same parties in Canada. The court held that “plaintiff will not be unduly prejudiced by the dismissal of this action because a forum in Ontario is currently available and poised to address the matter” (*id.*). Similarly, here, as defendants point out, plaintiffs can file a counterclaim to defendants’ action in Quebec and have their day in court. Further, the existence of similar causes of action in two forums raises the prospect of inconsistent decisions, which the court would want to avoid (*see e.g. White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 AD2d 90, 93 [1997] [“[W]here another action is pending, a major concern, as a matter of comity, is to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction”]).

Citing a First Department case, plaintiffs argue that the pendency of another case in Canada is not grounds for dismissal (*see ABKCO Industries, Inc. v Lennon*, 85 Misc 2d 465, 471 [1975]). However, the court in *ABKCO* merely makes the point that the pendency of a suit in a foreign jurisdiction *alone* is not a dispositive ground for dismissal on the grounds of *forum non conveniens*. “Nor is the mere fact that there is an English action pending between the parties . . .

in and of itself grounds for dismissal for the reason that New York is not a convenient forum. *Forum non conveniens* is an equitable doctrine. It requires a showing based upon a balancing of interests that the action is better adjudicated in another forum (*Silver v Great Amer. Ins. Co.*, 29 NY2d 356; CPLR 327)” (*ABKCO Industries, Inc. v Lennon*, 85 Misc 2d at 471).

Plaintiffs also object to defendants’ proposal that they file a counterclaim on the grounds that Quebec would not have jurisdiction over plaintiffs’ counterclaim and Quebec may not allow plaintiffs to stand trial in Quebec because plaintiff is a convicted felon. Plaintiffs contend Quebec does not have jurisdiction because the oral agreement was made in New York. Defendants contend the oral agreement was made in Quebec.

The issue of Quebec’s jurisdiction over defendants remains an issue. However, the record indicates that the Quebec court is well aware that plaintiff is imprisoned, and twice has tried to make accommodations for plaintiff’s appearance before the Quebec court. On July 7, 2008, plaintiffs appeared in Quebec to contest the Quebec court’s jurisdiction in defendants’ case. Plaintiffs “filed with the court in Montreal a request for permission to have [plaintiff] testify [about where the contract was made] from his prison in New York by means of videoconferencing” (Romano affidavit, paragraph 13). The Superior Court of Quebec granted the permission (*id.* at paragraph 14). Later, plaintiffs learned that the New York facility could not support videoconferencing technology. Plaintiffs also learned that New York was unlikely to support transferring plaintiff to Quebec to testify. So, the Quebec court agreed to suspend the hearing in defendants’ case until February 18, 2009, after plaintiff is released from prison.

Plaintiffs contend that plaintiff’s status as a convicted criminal would jeopardize his ability to defend himself in the Quebec action. However, it seems highly unlikely that after

having gone to such lengths to ensure that plaintiff is heard in a motion to contest Quebec's jurisdiction in defendants' case, the Quebec court will turn around after plaintiff is released from prison and bar that same plaintiff from testifying because of his conviction. Thus, plaintiffs' arguments in opposition are not persuasive.

Plaintiffs' reliance on *Nippon Emo-Trans Co., Ltd. v Emo-Trans, Inc.* (744 F Supp 1215 [1990]) for the proposition that their appearance in July 2008 in the Canadian action does not constitute acquiescence to Quebec jurisdiction is unpersuasive. *Nippon* involved a defendant who appeared in a Japanese court to contest that court's jurisdiction, lost on the jurisdiction issue, and subsequently defended and lost the case in Japan. The issue was whether the defendant was barred from later objecting to the Japanese court's jurisdiction in a subsequent lawsuit in New York to enforce the Japanese judgment (*Nippon* at 1221). *Nippon* interprets a New York law that requires New York to recognize a foreign money judgment if the defendant "voluntarily" appears in the foreign court, *unless* that defendant appears solely to contest jurisdiction (*see* CPLR §§5301-5309, the Uniform Foreign Money-Judgments Recognition Act ("CPLR Article 53")). *Nippon* makes clear that New York should recognize a foreign judgment if the foreign court finds jurisdiction on some basis *other than* the defendant's appearance to contest jurisdiction (for example, if the defendant conducted business in the foreign country (*id.* at 1229)). Accordingly, the court in *Nippon* held that CPLR Article 53 barred the defendant from relitigating the jurisdiction issue, because the Japanese court based its jurisdiction on grounds other than the defendant's appearance to contest jurisdiction.

In the case at bar, *Nippon* does not support plaintiffs' position at this juncture because there has been no foreign judgment against them. The issue of Canada's jurisdiction over

plaintiffs has yet to be litigated or determined; the hearing on the issue is pending plaintiff's release from prison. Accordingly, whether the Quebec court has jurisdiction remains an issue.

Upon weighing the above factors, the court is persuaded that a trial in New York would pose disproportionate hardship on defendants. Accordingly, defendants' motion to dismiss plaintiffs' complaint on the ground of *forum non conveniens* is granted.

2. Failure to Plead Fraud with Particularity

In any event, plaintiffs failed to plead fraud with sufficient particularity so as to support their claim for contribution. Fraud must be pled with sufficient particularity, as required by CPLR § 3016(b): A fraud claim must "state in detail" the "circumstances constituting the wrong." The language of §3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v D'Agostino*, 21 AD2d 60, 64, 248 NYS2d 121 [1 Dept 1964]). CPLR §3016(b) does not require a plaintiff to prove his allegations. Indeed, the Court of Appeals has specifically noted that this rule "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks*, 43 NY2d 778, 780, 402 NYS2d 384 [1977] [citation omitted] *remittitur amended by Lanzi v Brooks*, 43 NY2d 947, 403 NYS2d 896 [1978]).

In the case at bar, defendants contend that plaintiffs' complaint lacks details such as names, places and dates. Although caselaw does not require such level of specificity, plaintiffs fail to meet the requirements of CPLR §3016(b).

To state a claim for fraudulent misrepresentation, plaintiffs must allege “(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance” (*Swersky v Dreyer and Traub*, 219 AD2d 321, 326, 643 NYS2d 33 [1 Dept 1996]).

Here, the relevant paragraphs of plaintiffs’ complaint state:

1. Defendant STARKMAN resold the emeralds which he had purchased from [plaintiffs] at market value to the public as investment grade emeralds; (Complaint at ¶14).
2. LVZ acting on Defendant STARKMAN’s instructions solicited customers through its website and through cold calls to potential customers throughout the United States to purchase high-quality investment grade gemstones at a discount which they would later help broker for re-sale at a substantial profit at auctions throughout Europe and Asia, promising exponential increases in value due to increasing short supply as a result of mine depletions and political unrest in Columbia [sic] (Complaint at ¶15);
3. In fact, the emeralds were sold by LVZ at STARKMAN’s instructions at exorbitant prices well above the market value which had been paid when the emeralds were purchased from [plaintiffs] (Complaint at ¶17).

* * * * *

16. Although LVZ would, at STARKMAN’s instructions, periodically call the purchasers to advise them of the increased value of the emeralds they had purchased, when the purchasers contacted LVZ to sell the emeralds LVZ stalled them indicating that the emeralds could not be resold at the time (Complaint at ¶17) (plaintiffs’ memorandum of law, pp. 13-14).⁵

In their complaint, plaintiffs explain plaintiff’s role in defrauding customers, and plaintiffs allege that plaintiff acted upon defendants’ request. However, the complaint, on its face, fails to allege *any* facts to support a fraud claim against defendants. Plaintiffs fail to allege that defendants made any material false representations to plaintiff or defendants’ customers;

⁵ Plaintiffs also provided copies of plaintiff’s indictment and letters from the fraud victims, plaintiff’s opposition, Exhibits A and F.

plaintiffs fail to allege any intent on the part of defendants to defraud plaintiff or defendants' customers; and plaintiffs fail to allege that anyone reasonably relied on any misrepresentations made by defendants. Apart from alleging that defendants solicited customer and sold gemstones to their customers at exorbitant prices, there are no allegations that defendants made any representations to anyone with knowledge of the falsity of such statements. And, selling customers gemstones at exorbitant prices does not constitute fraud. Moreover, plaintiffs claim that defendants "promoted the sale of the gems with false, fraudulent, deceptive and misleading representations through various means," including representations on their website, mailings and "cold calling" by sales representatives, without alleging the manner in which such representations were false when made and made with knowledge of their falsity, is insufficient.

Plaintiffs provide a transcript of plaintiff's trial in which plaintiff advises the judge that he violated the law pursuant to an agreement with defendants. Plaintiffs, in their motion, also allege that defendants are "unindicted co-conspirators" (plaintiffs' opposition, paragraph 3; *see also* plaintiffs' Exhibit A). However, such conclusory allegations are insufficient to support a fraud claim. Nor do plaintiffs offer any indication that defendants were charged with or convicted of fraud and conspiracy to commit fraud. Plaintiffs do not even refer to plaintiffs as conspirators in their complaint. Therefore, plaintiffs have failed to plead fraud with particularity, in violation of CPLR §3016(b).

Therefore, notwithstanding this Court's dismissal of plaintiffs' complaint on the grounds of *forum non conveniens*, pursuant to CPLR §327, dismissal of the complaint for failure to allege fraud with the required specificity pursuant to CPLR §3016(b) is also warranted.

Conclusion

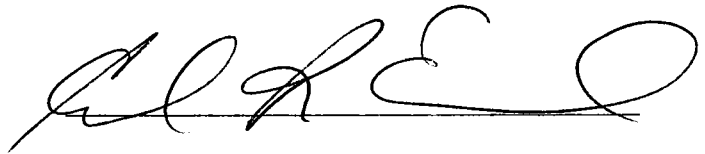
Based on the foregoing, it is hereby

ORDERED that defendants' motion for an order, pursuant to CPLR §327 and CPLR §3016(b), dismissing plaintiffs' complaint is granted; and it is further

ORDERED that defendants 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.

December 1, 2008



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

HON. CAROL EDMEAD

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby
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That constitutes the decision and order of the Court.