

CPI NA Parnassus B.V. v Ornelas-Hernandez

2009 NY Slip Op 30259(U)

January 27, 2009

Supreme Court, New York County

Docket Number: 600997/08

Judge: Richard B. Lowe III

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

PRESENT: HON. RICHARD B. LORIE, JR.
Justice

PART 56

CPI NA Parnassus BV

INDEX NO. 600997/08

MOTION DATE 10/6/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Salvador Francisco Onyiah Hernandez

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 ACCORDANT MEMORANDUM DECISION

FILED

FEB 06 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LORIE, JR.

Dated: 1/27/09

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: IAS PART 56

-----X
CPI NA PARNASSUS B.V.,

Plaintiff,

INDEX NO.: 600997/08

- against -

SALVADOR FRANCISCO ORNELAS-HERNANDEZ,

Defendant.
-----X

RICHARD B. LOWE III, J:

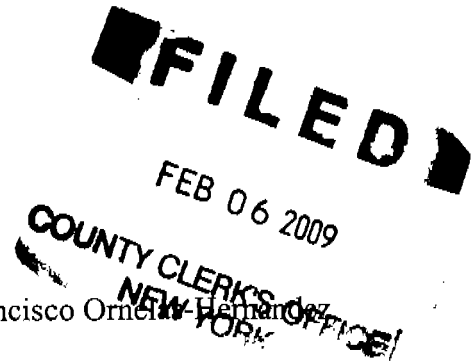
In this breach of contract action, defendant, Salvador Francisco Ornelas-Hernandez, moves, pursuant to CPLR 327 and 3211 (a) (1), (4), (8) and (9), for an order dismissing the complaint against him on the following grounds: (1) improper service; (2) lack of personal jurisdiction; (3) under the doctrine of forum non conveniens; and (4) for failure to state a cause of action.

For the following reasons, defendant's motion is denied.

Background

Plaintiff CPI NA Parnassus B.V. is a Netherlands private limited liability company with its principal place of business in Amsterdam, The Netherlands. Defendant is a Mexican citizen and resident of Cancun, Mexico.

In May 2006, plaintiff, in its capacities as lender and as assignee pursuant to an assignment agreement between it and non-party CCP NA Equity I LLC (CCP), loaned over \$30 million to non-party Desarrollos Pami S.A. de C.V. (Desarrollos). CCP is a Delaware limited liability corporation, with its principal place of business in New York. The loan was made to facilitate the construction of a hotel, resort and spa complex in Cancun, Mexico. Defendant guaranteed the loan.



According to plaintiff, defendant, through his agent, began negotiating the structure of a loan with members of Citi Property Investors, a business unit group of Citigroup Alternative Investments, LLC (CAI). CAI advised and negotiated the loan on behalf of CCP. The loan was negotiated on behalf of defendant and Desarrollos, the borrower, under the loan agreement by Baker & McKenzie, among others. Defendant and his agents frequently sent e-mails and initiated numerous telephone calls to the CCP's New York business team, and attended several meetings in New York.

The terms of the loan are set forth in certain loan documents (Loan Documents), which include: (1) a loan agreement dated May 11, 2006 (Loan Agreement); (2) promissory note dated May 11, 2006 (May 2006 Note); (3) additional advance promissory note dated December 22, 2006 (December 2006 Note); (4) irrevocable guaranty trust agreement number F/00357, dated May 11, 2006 (Trust Agreement); (5) cash management agreement, dated May 11, 2006; and (6) repayment and limited indemnity guaranty, dated May 11, 2006 (Repayment Guaranty). On October 4, 2006, CCP assigned its interests in the loan to plaintiff.

Defendant signed the Loan Agreement in the limited role as Sponsor, pursuant to which he oversaw construction of the hotel in Mexico. In addition, defendant executed the Repayment Guaranty, which plaintiff claims was breached.

Paragraph 17 (A) of the Repayment Guaranty states:

“THIS GUARANTY AND THE LOAN DOCUMENTS SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO § 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW ... THIS GUARANTY WAS NEGOTIATED IN THE STATE OF NEW YORK, WHICH STATE SPONSOR AGREES HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY ... SPONSOR

* 4]
UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS GUARANTY AND THE LOAN DOCUMENTS.”

Paragraph 17 (b) of the Repayment Guaranty provides:

“ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER ARISING OUT OF OR RELATING TO THIS GUARANTY OR THE LOAN DOCUMENTS MAY BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK ... AND SPONSOR WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON ... FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND SPONSOR IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. SPONSOR DESIGNATES AND APPOINTS, WITH DOMICILE AT: CT CORPORATION, 111 EIGHTH AVENUE, NEW YORK, NEW YORK 10011 AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING ANY ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND NOTICE OF SAID SERVICE MAILED AND DELIVERED TO SPONSOR IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON SPONSOR IN ANY SUCH SUIT ACTION OR PROCEEDING IN THE STATE OF NEW YORK.

Plaintiff claims that Desarrallos made a number of defaults on the loan. On January 11, 2008, a notice of events of default was sent to Desarrallos and defendant, enumerating the specific defaults that had occurred to date, notifying them of the acceleration of the Loan, and demanding payment for the entire loan amount, with interest, fees and costs then due, in the amount of close to \$58 million from Desarrallos. On January 21, 2008, Desarrallos paid plaintiff \$533,314.23. No further payments were made.

On March 26, 2008, plaintiff made a demand for the entire amount from defendant pursuant to the Repayment Guaranty. Defendant has not submitted any payment to plaintiff.

Discussion

The court will first address whether service on defendant was properly made. When there is a question as to whether service of process was proper, the plaintiff has the burden of showing compliance with statutory requirements (*Matter of 72A Realty Assocs. v New York City Envtl. Control Bd.*, 275 AD2d 284, 285-286 [1st Dept 2000], citing *Stewart v Volkswagen of Am., Inc.*, 81 NY2d 203, 207 [1993] [other citations omitted]). Defendant claims that plaintiff failed to effectuate proper service on him. Plaintiff argues, however, that defendant was properly served through his designated agent, CT Corporation, as provided for in § 17 (B) of the Repayment Guaranty. This court agrees. When parties to a contract designate an agent for service, service on that agent is sufficient (*Orix Credit Alliance, Inc. v Fan Sy Prods., Inc.*, 215 AD2d 113 [1st Dept 1995]; see also *Orix Credit Alliance Inc. v Pasta Tree Café, Inc.*, 2008 WL 620569 [Sup Ct, NY County Feb 29, 2008]). The court holds that plaintiff has effected service for purposes of CPLR 318.

Defendant also argues that the court lacks personal jurisdiction under CPLR 302 (a) (1). Where, as here, defendant moves to dismiss the complaint asserting that the court lacks personal jurisdiction over him, the plaintiff bears the burden of proof (*Chen v Shi*, 19 AD3d 407 [2d Dept 2005], citing *Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]; *Barington Capital Group, L.P. v Arsenault*, 281 AD2d 166 [1st Dept 2001]). However, "the plaintiff[] need only demonstrate that facts may exist to exercise personal jurisdiction over the defendant" (*Chen*, 19 AD3d at 408 [internal quotation marks and citation omitted]). Moreover, the evidence presented by the parties must be viewed in the light most favorable to the plaintiff (*Brandt*, 273 AD2d at 430).

CPLR 302 (a) (1) extends jurisdiction of the New York state courts to a nonresident who purposely availed himself of the privilege of conducting activities within New York and thereby invoked the benefits and protections under its laws (*see Corporate Campaign, Inc. v Local 7837, United Paperworkers Intl. Union*, 265 AD2d 274 [1st Dept 1999]). Specifically, CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ..., who in person or through an agent transacts any business within the state or contracts anywhere to supply goods or services in the state... ."

A transaction of business in New York, standing alone, is not enough to sustain personal jurisdiction under CPLR 302 (a) (1) (*see Opticare Acquisition Corp. v Castillo*, 25 AD3d 238 [2d Dept 2005]). In addition, the cause of action sued upon must arise out of the transaction (*see Deutsche Bank Sec. Inc. v Montana Bd. of Invs.*, 7 NY3d 65 [2006]; *Opticare*, 25 AD3d at 243). In other words, there must be "the existence of some articulable nexus between the business transacted and the cause of action sued upon" (*Opticare*, 25 AD3d at 243; *see Johnson v Ward*, 4 NY3d 516, 518 [2005] [under CPLR 302(a)(1), a "'substantial relationship' must be established between a defendant's transactions in New York and a plaintiff's cause of action"]).

Here, plaintiff is suing for breach of contract on a loan that was negotiated with CAI, located in New York, and prepared by CAI in New York. Defendant and his agents communicated via telephone and e-mail with respect to the negotiation of the Loan Agreement, Promissory Notes and Repayment Guaranty (*see Deutsche Bank*, 7 NY3d at 71-72; *Fischbarg v Doucet*, 38 AD3d 270 [1st Dept], *aff'd* 9 NY3d 375 [2007]). The court finds that there is a substantial relationship between the business transaction and the cause of action sued upon (*see Opticare*, 25 AD3d at 246-247 [holding that a substantial nexus existed where the alleged

contractual breaches permitted appellants to transact business in the first place]).

Accordingly, defendant's motion to dismiss for lack of personal jurisdiction is denied.

The court now turns to the issue of whether the case should be dismissed based on forum non conveniens. Pursuant to CPLR 327, the court is permitted to dismiss an action in the interest of substantial justice upon finding that it should be heard in another forum (*Travelers Cas. & Surety Co. v Honeywell Intl. Inc.*, 48 AD3d 225 [1st Dept 2008]).

Defendant argues that although New York may have jurisdiction over the case, New York has no connection to this matter and therefore, the matter should be dismissed on the grounds of forum non conveniens (*see Wentzel v Allen Mach., Inc.*, 277 AD2d 446, 447 [2d Dept 2000] [although a New York court may have jurisdiction over a claim, "New York courts are not compelled to retain jurisdiction in any case which has no substantial nexus to New York"]).

Plaintiff counters, however, that defendant is barred from raising forum non conveniens as a defense based on the terms of the Repayment Guaranty, which are protected under NY-GOL § 5-1402.

NY GOL § 5-1402 provides that an action based on a contract may be maintained in a New York court against a non-resident where: (1) the contract contains a choice of law clause pursuant to NY-GOL § 5-1401; (2) the transaction covers one million dollars or more; and (3) contains a provision where the foreign corporation or non-resident agrees to submit to jurisdiction in New York.

NY-GOL § 5-1401 (1) provides:

The parties to any contract, agreement, or undertaking contingent or otherwise ... relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, ... may agree that the law of this state shall govern their rights and duties in whole

or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state....”

Here, there can be no dispute that the Repayment Guaranty maintains a choice of law provision with New York (*see* Repayment Guaranty, § 17 (A), and that the provision is applicable to the case at bar (*see L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 9-10 [1st Dept 2007], citing *Banco do Comercio e Industria de Sao Paulo S.A. v Esusa Engenharia e Construcoes, S.A.*, 173 AD2d 340 [1st Dept 1991]). The first element is therefore satisfied.

Likewise, the second element is satisfied as the transaction at issue relates to the guaranty of a loan, the principal of which totals \$30.5 million (see NY-GOL § 5-1401 [\$250,000 threshold] and NY-GOL § 5-1402 [\$1 million threshold]).

The question, therefore, is whether defendant submitted to the jurisdiction of New York via the Repayment Guaranty. Paragraph § 17 (B) of the Repayment Guaranty states:

ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER ARISING OUT OF OR RELATING TO THIS GUARANTY OR THE LOAN DOCUMENTS MAY BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATION LAW AND SPONSOR WAIVERS ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDINGS, AND SPONSOR IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING ... [emphasis added]

Defendant contends that the provision is not applicable to the instant matter since he only agreed to submit to the jurisdiction in New York as to actions under the Repayment Guaranty against the Lender. Defendant counters that the use of the term “Lender” was a scrivener’s error. However, looking at the plain language of the provision, it is clear that the use of the terms “any such” refers back to the prior reference. For example, the term “any such suit” refers back to

“any legal suit, action or proceeding against the Lender”. So too, therefore, does the term “any such court” refers back to “any federal or state court in the city of New York, county of New York”. Regardless of defendant’s contention, there is no question that the language “and Sponsor irrevocably submits to the jurisdiction of any such court [i.e., federal or state court in the city of New York, county of New York] in any suit, action or proceeding” (emphasis added) represents a submission by defendant to jurisdiction in New York.

Moreover, the court finds the opinion letter to CCP, written by Baker & McKensie, as counsel to defendant and the Desarrallos, confirming defendant’s submission to jurisdiction in New York particularly persuasive (Lenhart Aff., Exh. A). Specifically, the opinion letter states “[t]he Borrower and Guarantor have validly submitted to the jurisdiction of the state and federal courts located in the State of New York in connection with any controversy related to the Loan Documents to which they are a party ...” (*id.*). As such, the third element has been met.

Accordingly, the court holds that defendant is barred from raising forum non conveniens as a defense pursuant to NY-GOL § 5-1402.

Even if the court were to find that defendant was not barred from raising the forum non conveniens defense, the convenience factors do not favor suit in Mexico.

Courts in New York consider and balance the following factors to determine whether dismissal based on forum non conveniens is warranted: (1) the residency of the parties; (2) the potential hardship to the defendant; (3) the location of documents; (4) the unavailability of another forum; (5) the location of a majority of the witnesses; and (6) the burden on New York courts (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]); *see also Bank Hapoalim (Switzerland) Ltd. v Banca Intesa, S.p.A.*, 26 AD3d 286 [1st Dept 2006]). No single

factor is controlling and all are to be taken into account (*id.*). The burden rests on the defendant to show that New York is an inconvenient forum (*Pahlavi*, 62 NY2d at 479).

In support of his motion, defendant contends that Mexico is a more convenient forum since: (1) the parties are non-residents of New York; (2) the loan defaults occurred in Mexico; (3) the fact witnesses are located in Mexico; (4) Mexican courts provide an adequate forum; and (5) a burden would be imposed on New York courts and its citizens.

Plaintiff counters that the factors support the court's retention of jurisdiction in this case. Specifically, plaintiff claims that the court should retain jurisdiction because: (1) New York is the site of the underlying transaction; (2) the documentary evidence (most of which is written in English) and potential witnesses are in New York; (3) plaintiff and CCP are present in New York; (4) New York has an interest in adjudicating the matter.

Defendant has not satisfied his burden in demonstrating that New York is not a convenient forum in which to litigate this action. Rather, the record shows that there is substantial nexus between this matter and New York (*see Travelers Cas. & Surety Co.*, 48 AD3d at 226). While defendant maintains that the loan defaults occurred in Mexico, the Repayment Guaranty to which defendant is a party, maintains a New York choice of law clause (*see e.g. Arbor Commercial Mtge. L.L.C. v Martinson*, 18 Misc 3d 178 [Sup Ct, Nassau County 2007]). There is no question that New York courts are in the best position to interpret its own laws. Moreover, the handling of this matter would not be a great burden New York courts (*Van Deventer v CS SCF Mgt. Ltd.*, 37 AD3d 280 [1st Dept 2007]), especially, where as here, New York maintains an interest in adjudicating the matter (*J. Zeevi & Sons, Ltd. v Grindlays Bank (Uganda) Ltd.*, 37 NY2d 220 [1975]) [New York has a specific governmental interest in litigation

where defendants came to New York to solicit investors and obtain capital]; *see also Indosuez Intl. Finance B.V. v National Reserve Bank*, 279 AD2d 408 [1st Dept 2001], *aff'd* 98 NY2d 238 [2002]).

In addition, despite defendant's contention that the fact witnesses are located in Mexico, defendant fails to identify who those witnesses may be and has made no showing that litigating the matter in New York as opposed to Mexico will result in hardship or unavailability (*see Borden Chem., Inc. v Growth Products, Inc.*, 28 AD3d 337 [1st Dept 2006]). In fact, defendant admits to traveling to New York with respect to this matter in January 2008. Plaintiff, on the other hand, has identified the names of a dozen witnesses to testify in the action who are present in New York.

Accordingly, defendant's motion to dismiss the action in its entirety on the grounds of forum non conveniens is denied.

Conclusion

Accordingly, it is,

ORDERED that the motion to dismiss by defendant Salvador Francisco Ornelas-Hernandez is denied in its entirety; and it is further

ORDERED that defendant is directed to serve his answer to the amended complaint

within 20 days of receipt of this order with notice of entry.

Dated: January 27, 2009

ENTER

J.S.C.

HON. RONALD B. LOWE, JR.

FILED
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COUNTY CLERK'S OFFICE
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