

New Optimal, Inc. v Cianci

2009 NY Slip Op 31564(U)

June 22, 2009

Supreme Court, New York County

Docket Number: 603566/2008

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 603566/2008
NEW OPTIMAL INC
 VS.
CIANCI, PAMELA
 SEQUENCE NUMBER : 001
 DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and granted

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
 JUL 16 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Dated: JUL 14 2009

J. Gis
HON. JUDITH J. GISCHE 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 10

-----X
NEW OPTIMAL, INC.

Plaintiff,

-against-

PAMELA CIANCI, in her individual capacity;
NORTH POINT COMPUTER SYSTEMS, LLC;
CORAZON ORTEGA.

Defendants

Decision/Order

Index No.: 603566/2008

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltfs not. motion [dis forum non-conv.], affirm (MTW), affid (PC), exhbts.....	1
Defrs reply, Def cross mot. [d j/mt], affid (DH) affid exhbts.....	2
Affirm support of mot [diss forum non-conv.], exhbt.....	3

-----X
Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for breach of a service contract, tortious interference with contract, fraud, deceptive business practices, and unjust enrichment. Defendants North Point Computer Systems, LLC ("North Point"), and Pamela Cianci, ("Cianci") (collectively "defendants") seek dismissal on the ground of *forum non-conveniens*. CPLR §327. Plaintiff New Optimal, Inc. ("New Optimal") opposes the motion. Although plaintiff originally cross-moved for a default judgment against Cianci and North Point, that cross-motion was withdrawn by stipulation.¹ CPLR §3215.

Defendant Corazon Ortega ("Ortega") was never served with the underlying summons and complaint.

¹ The Stipulation refers to an "amended motion to dismiss." The Court, however, was only given the original Notice of Motion.

Plaintiff is a personnel placement agency, incorporated in New York State. North Point is a limited liability company organized in Connecticut. It lists a Connecticut business address with the Commercial Recording Division of Connecticut. Cianci is the president and sole employee of North Point. Cianci is a Connecticut resident, listing a Connecticut address as her residence with the Commercial Recording Division of Connecticut.

The following claims are based upon documentary evidence, the allegations contained in the Verified complaint, verified by David Huang ("Huang"), Owner and President of New Optimal, and Huang's affidavit.

Plaintiff first met Ortega in October, 2007, while Ortega was working in Oklahoma. At that time Ortega expressed a desire to move to New York. In January, 2008, plaintiff received Ortega's resume and began seeking work for Ortega near New York.

Sometime in February, 2008, plaintiff answered an online advertisement posted by defendants, which sought a computer consultant. Plaintiff then arranged for an interview between Cianci and Ortega.

Plaintiff and North Point entered into a contract (the "North Point Contract") dated February 29, 2008. In the North Point Contract, plaintiff agreed to provide consulting services and personnel to North Point for purposes outlined in a Task Order. In the Task Order, plaintiff agreed to provide Ortega to North Point to perform computer consulting work at a General Electric ("GE") facility in Stamford, Connecticut. North Point agreed to pay plaintiff \$81.00 per hour of work by Ortega.²

² Plaintiff has failed to explain the relationship between GE and the parties to this action.

The North Point Contract also contained a clause (the "Arbitration Clause") specifically stating:

Any dispute regarding the interpretation or performance of this Agreement shall be resolved at the request of either party through binding arbitration. Arbitration shall be conducted in the State of Connecticut in accordance with the existing rules of the American Arbitration Association The parties intend that this agreement to arbitrate be irrevocable.

Additionally, the North Point Contract stated that North Point was forbidden from soliciting Ortega without Plaintiff's permission.

The plaintiff and Ortega entered into a separate contract dated February 29, 2008, where plaintiff agreed to pay Ortega \$8,333.33 monthly for her services at GE.

After signing the North Point Contract, plaintiff claims defendants became unreachable during the months of March and April, 2008.

On or about April 25, 2008, plaintiff claims it received two checks from North Point, for \$3,240.00 and \$1,944.00, respectively. On April 28, 2008, Ortega emailed her resignation to plaintiff. Plaintiff claims that Ortega continued to work at GE after she tendered her resignation. On May 9, 2008, CitiBank notified plaintiff that the two checks from North Point would not be honored, due to insufficient funds. Plaintiff claims money is still due to it under the North Point Contract.

Plaintiff filed the summons and complaint on December 5, 2008.

Arguments of the Parties

Defendants argue that New York is an inconvenient forum because the causes of action did not arise in New York. They claim the subject matter does not concern New York because, under the North Point Contract, plaintiff agreed to provide personnel to North Point in Connecticut. Defendants also argue its witnesses are not within New

York, there is an agreement to arbitrate all disputes in Connecticut, and Connecticut is an available, alternative forum. Defendants have not identified what witnesses they intend to call and where those witnesses are located.

In her affidavit, Cianci states that neither she nor North Point maintain a New York office. Further, Cianci claims that North Point does not conduct, nor has it ever conducted business in New York. Defendants provide a printout from the Commercial Recording Division of the State of Connecticut showing that North Point is a LLC, registered in Connecticut, with a Connecticut business address. The printout also lists Cianci as the president of North Point and lists a Connecticut address as Cianci's residence.

Plaintiff first argues that the motion is untimely since it was made after defendants' time to answer expired. Plaintiff also asserts that New York is the appropriate forum for this action because it is a New York corporation. It claims Cianci maintains a New York residence and holds herself out to the public as conducting business in New York on her profile on the website LinkedIn.com. Plaintiff also claims North Point currently conducts business in New York, and the North Point Contract was conveyed by fax and email to plaintiff in New York.

Plaintiff provides a document that appears to be a printout from North Point's website. It says North Point provides services to clients "in the NY Metro Area and the Nation." Another document is Cianci's profile on the website LinkedIn.com, which states North Point provides "staff to clients within the NYC Metro area and nationwide." Cianci's LinkedIn.com profile also states that she founded North Point in 2000 and "previoulsy [sic] worked for Teltech Corporation in Manhattan for several years."

Discussion

Defendant moves to dismiss this case pursuant to CPLR §327(a), claiming New York is a *forum non-conveniens* for this action. At the outset, the court rejects plaintiff's argument that defendant's motion is untimely. Plaintiff failed to file, with the court, an affidavit proving service of the summons and complaint on defendants. Service is not complete until such filing, and defendants' responsive obligations are not triggered until service is complete. CPLR §308(2). Therefore, defendants' present motion is timely.

A motion to dismiss for *forum non-conveniens* will be granted if a court "finds that in the interest of substantial justice the action should be heard in another forum." CPLR § 327(a). An in-state domicile or in-state residence of a moving party will not preclude the court from granting dismissal. CPLR 327(a).

The moving party has the burden of showing factors which necessitate a change of forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); Bader & Bader v. Ford, 66 AD2d 642 (1979). These factors include: the burden on New York courts, potential hardship to the defendant, the unavailability of alternate forum, and the location where the cause of action arose. Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 479 (1st Dept. 1984). No single factor is determinative, and a court will balance each of the factors; although the availability of another forum is considered "a most important" factor. Islamic Republic of Iran, *supra* at 479.

Furthermore, the touchstone of *forum non-conveniens* analysis is flexibility, so, in order to prevail, the moving party must show the action has no substantial nexus with New York. Silver v. Great American Insurance Co., 29 NY2d 356 (1972); Varkonyi v. S.A. Empresa De Viacao Airea Rio Grandense (Varig), 22 NY2d 333 (1968). Analysis

of *forum non-conveniens* is not a simple or rigid formula; it is an analysis rooted in flexibility and fairness taking all factors into account. Silver, *supra* at 361.

Based upon the application of such factors, the Court finds that his action should be dismissed under the doctrine of *forum non-conveniens*.

There are two highly persuasive factors supporting dismissal of this case. The first factor is that all of the causes of action arose in Connecticut. See Islamic Republic of Iran, *supra* at 479. The North Point Contract involved the employment of personnel for work in Connecticut. The North Point Contract was alleged to have been breached in Connecticut. The tortious interference with contract claim arose in Connecticut where the defendants allegedly persuaded Ortega to breach her separate contract with plaintiff. The fraud claim arose in Connecticut where North Point allegedly portrayed itself fraudulently. The deceptive business practices claim arose in Connecticut where defendants allegedly placed the Arbitration Clause into the North Point Contract. Finally, the two unjust enrichment claims arose in Connecticut where the defendants allegedly received the benefit of Ortega's work without compensating the plaintiff.

The second factor militating in favor of dismissal is that Connecticut is an available, alternate forum. Islamic Republic of Iran, *supra* at 479. This factor carries special weight and is considered "a most important" factor. Islamic Republic of Iran, *supra* at 479. Both defendants reside in Connecticut, and the plaintiff is in close proximity to the state.

Plaintiff does not argue that it cannot bring its claims in Connecticut, but merely cites hardship in doing so. The court may consider hardship on the plaintiff in an alternate forum. See Intertec Contracting A/S v. Turner Steiner International, S.A., 6

AD3d 1, 18 (2004); Gyenes v. Zionist Organization of America, 169 AD2d 451, 452 (1991). Hardship on the plaintiff in this case, however, is primarily limited to the necessity to travel to Connecticut. The Court does not consider traveling to the immediately neighboring state of Connecticut particularly significant.

Finally, each party admits that the North Point Contract contains a clause requiring all disputes be arbitrated in Connecticut. Neither party raises the issue or addresses whether such clause requires dismissal of this action in favor of arbitration. Nonetheless, such clause at least evinces an intent by the parties that their disputes be decided in the State of Connecticut, further warranting dismissal based on *forum non-conveniens*. Contracts in which the parties choose a forum for disputes are enforceable. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

This case has only a single connection to New York: the plaintiff corporation's domicile. The Court is not persuaded by plaintiff's arguments that there are more connections. Plaintiff provides no evidentiary proof that Cianci resides in New York. The only evidentiary proof supplied shows Cianci maintains a Connecticut residence. Even if Cianci maintained a New York residence, under CPLR §327(a), the in-state residence of a party will not preclude dismissal for *forum non-conveniens*. Likewise, plaintiff provides no evidentiary proof that North Point was a registered LLC in New York, has a New York process address, or is an inactive LLC in New York. The evidentiary proof supplied from the Commercial Records Division of Connecticut shows North Point is a LLC registered in Connecticut.

The North Point website, which claims to provide staff "to clients in the NY Metro area," has no bearing because all of the causes of action in this action arose in

Connecticut. Finally, whether Cianci previously worked "in Manhattan for several years," is simply irrelevant.

This case has many substantial connections to Connecticut. Plaintiff contracted with a Connecticut corporation to provide personnel in Connecticut for work to be completed in Connecticut. The alleged breach of contract took place in Connecticut. Connecticut stands as a suitable alternate forum available to litigate all the claims in this matter. Therefore, this case has a substantial nexus to Connecticut and virtually no nexus to New York State. On balance, the factors overwhelmingly weigh in favor of dismissing on the grounds of *forum non-conveniens*.

Accordingly, defendants' motion to dismiss is granted.

Conclusion

In accordance with this decision, it is hereby:

ORDERED that the motion by North Point Computer Systems, LLC and Pamela Cianci, defendants in this action, for entry of a dismissal for *forum non-conveniens*, against plaintiff New Optimal, Inc., is hereby granted; and it is further;


Any requested relief not expressly addressed herein has nonetheless been considered by the court and denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
June 22, 2009

So Ordered

FILED
JUL 16 2009
COUNTY CLERK'S OFFICE
NEW YORK


HON. JUDITH J. GISCHE, J.S.C.