

**Amica Prod., Inc. v Twentieth Century Fox Tel. a Unit  
of Twentieth Cent. Fox Film Corp.**

2009 NY Slip Op 31626(U)

July 20, 2009

Supreme Court, New York County

Docket Number: 602885/08

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PRESENT: \_\_\_\_\_ **J.S.C.**

PART 39

Index Number : 602885/2008

**AMICA PRODUCTIONS, INC.,**

vs.

**TWENTIETH**

SEQUENCE NUMBER : 002

DISMISS

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

~~CITIZON IS DECIDED IN ACCORDANCE WITH~~  
~~DOCOMPT SETTING MEMORANDUM DECISION~~

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


**FILED**

JUL 22 2009

COUNTY CLERK'S OFFICE

NEW YORK

Dated: 7/20/09



**BARBARA R. KAPNICK** J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 39

-----X  
AMICA PRODUCTIONS, INC., and  
WILLIAM DEVLIN

Plaintiffs,

Index No. 602885/08  
Motion Seq. No. 002

-against-

TWENTIETH CENTURY FOX TELEVISION  
a UNIT OF TWENTIETH CENTURY FOX  
FILM CORPORATION,

Defendant.

-----  
BARBARA R. KAPNICK, J.:

**FILED**  
JUL 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

During the Summer of 2007, plaintiff Willian Devlin ("Devlin"), a screen writer, through his agent, entered into an oral agreement with defendant Twentieth Century Fox Television a unit of Twentieth Century Fox Corporation ("Fox"), which obligated Devlin to present to Fox no less than three viable concepts for a prime-time network television series, suitable to be "pitched" to prospective licensees, for which Fox would allegedly compensate Devlin \$100,000. The terms of the oral agreement were memorialized by the parties in a Deal Memorandum dated August 3, 2007.

However, in early November 2007, the Writers Guild of America ("WGA") announced a strike which lasted until February 2008. Defendant contends that Devlin honored the strike and did not perform the complete services contemplated by the parties in the Deal Memorandum.

By letter dated January 24, 2008, Fox terminated its agreement with plaintiffs. Plaintiffs allege that such termination constitutes anticipatory breach of contract and that plaintiffs duly performed all of the terms and conditions under the Deal Memorandum up to Fox's termination.

Fox now moves for an Order, pursuant to CPLR § 3211 (a)(1), dismissing the Complaint based on documentary evidence, or in the alternative, pursuant to CPLR § 327(a) and (c), dismissing the Complaint on *forum non conveniens* grounds.

Fox contends that New York is not a convenient forum to litigate this action because: (a) neither plaintiffs nor defendant are residents of New York; (b) the events upon which the Complaint is based all occurred in California; (c) the Deal Memorandum that was exchanged between the parties was negotiated and drafted in California; and (d) all of the witnesses and documents concerning plaintiffs' claims are located outside New York, *i.e.*, primarily in California.

In opposition, plaintiffs argue that Fox is a foreign corporation registered to do business in New York and maintains business offices in Manhattan, while Devlin resides in Tenafly, New Jersey, right across the George Washington Bridge. Thus,

plaintiffs contend that it would be unduly burdensome for Devlin to bring this case in California, while litigating the case in New York would not impose a hardship on a large corporation like Fox.

The Court of Appeals has held that among the factors to be considered by the Courts in determining a motion to dismiss based on *forum non conveniens* are

the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit (citations omitted). The court may also consider that both parties to the action are nonresidents (citation omitted) and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction (citation omitted). No one factor is controlling (citations omitted). The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case (citations omitted). The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court (citations omitted).

*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), cert. denied, 469 US 1108 (1985).

Here, neither party resides in New York, as Devlin resides in New Jersey, Amica is a California corporation, and Fox is a Delaware corporation with its principal place of business in California. The oral agreement and the Deal Memorandum were not negotiated or entered into in New York, since Devlin's agent worked out of

\* 5 ]

California and Fox's representatives are based in California, and the subject matter of the transaction does not involve New York. In addition, there is no indication that any witnesses or documents are in New York. Finally, the courts in California constitute an alternative and more appropriate forum for this dispute. See *Wentzel v. Allen Mach., Inc.*, 277 AD2d 446 (2d Dep't 2000).

Accordingly, based on the papers submitted and the oral argument held on the record on May 20, 2009, defendant's motion to dismiss the Complaint is granted on *forum non conveniens* grounds. The Clerk may enter judgment dismissing this action without prejudice to plaintiffs' right to bring an action in California.

This constitutes the decision and order of this Court.

Dated: July 20, 2009

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

**FILED**  
JUL 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK