

**A.J. Forever, NV v JMED Holdings, LLC**

2011 NY Slip Op 31417(U)

May 31, 2011

Sup Ct, NY County

Docket Number: 105639/2010

Judge: Judith J. Gische

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SCANNED ON 6/1/2011

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

HON. JUDITH J. GISCHE

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

PART 10

Index Number : 105639/2010  
A.J. FOREVER, NV  
vs.  
JMED HOLDINGS LLC  
SEQUENCE NUMBER : 002  
PREL INJUNCTION/TEMP REST ORDER

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

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

**FILED**

JUN 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: 5/31/11

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 10**

-----X  
A.J. FOREVER, NV,

Plaintiff,

**-against-**

JMED HOLDINGS LLC, NUBE, S.L. SOCIEDAD  
LIMITADA SPAIN, and PAUL RAFFAELE,

Defendants.  
-----X

**DECISION/ ORDER**

Index No.: 105639/2010  
Seq. No.: 002

**PRESENT:**

Hon. Judith J. Gische  
**J.S.C.**

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

<b>Papers</b>	<b>Numbered</b>
Pltf's n/m [injunction] w/TG affid, exhs .....	1
Def's opp w/ED affid, exhs .....	2
Pltf's reply w/GEG affirm, exhs .....	3

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

**GISCHE J.:**

Plaintiff, A.J. Forever, NV, doing business as Bliss ("Bliss") brings this action against defendant, JMED Holdings, LLC, doing business as Pacha NYC ("Pacha NYC"). Bliss moves to: (1) enjoin Pacha NYC from prosecuting a lawsuit it commenced against Bliss in St. Maarten (the "St. Maarten Action"); (2) compel Pacha NYC to interpose all claims in the St. Maarten Action as counterclaims in the instant action; and (3) prevent Pacha NYC from taking any further legal action against Bliss in St. Maarten.

Pacha NYC opposes the motion. The remaining defendants have not appeared on this motion, although there is due proof of service.

## Underlying Facts and Arguments Presented

This case involves claims for breach of contract involving a March 2010 Agreement between Bliss and Paul Raffaele ("Raffaele") in which Raffaele allegedly promised to render DJ services at Bliss, a club located in St. Maarten, on April 24, 2010. Plaintiff states that Raffaele provided Bliss with promotional materials bearing Pacha NYC's name and logo. On April 20, 2010, the event was cancelled because Raffaele was allegedly unable to purchase plane tickets, due to volcanic activity in Iceland. Plaintiff contends that it incurred losses of \$4,514 for advertising and preparation; \$1,000 for distribution of flyers and posters; and \$40,000 in lost revenue. Bliss asserts the instant action against defendants for breach of contract (COA1); unjust enrichment (COA2); fraud (COA3); a declaration that Bliss did not infringe upon the Pacha NYC's trademark or logo (COA4); and trade slander (COA5).

In the St. Maarten Action, Pacha NYC asserts claims of trademark infringement against Bliss for allegedly using Pacha NYC's name and logo on its advertising material without permission, for the same April 24, 2010 event.

Plaintiff argues, *inter alia*, that Pacha NYC should be enjoined from prosecuting the St. Maarten Action and Pacha NYC should interpose all claims in the St. Maarten Action as counterclaims in the instant action because the instant action was commenced first in time (April 29, 2010), both cases arise out of the same operative set of facts, and the relief sought in the St. Maarten Action can be obtained in this court.

Pacha NYC contends that jurisdiction belongs in St. Maarten because plaintiff is domiciled in St. Maarten and has no ties to the State of New York; the trademark infringement occurred in St. Maarten; the cases involve different issues; and Pacha

NYC would need to commence a new action in St. Maarten to satisfy any judgment it may obtain in a New York court. Pacha NYC also argues that the rule of comity forbids granting of the injunction.

## Discussion

CPLR § 503 addresses the issue of venue and where a case can be commenced:

### 503. Venue based on residence

(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county.

(c) Corporation. A domestic corporation, or a foreign corporation authorized to transact business in the state, shall be deemed a resident of the county in which its principal office is located; except that such a corporation, if a railroad or other common carrier, shall also be deemed a resident of the county where the cause of action arose.

Here, the court finds that plaintiff properly designated venue in New York County based on defendant's place of business, pursuant to CPLR § 503(a) and (c).

However, the rule of comity "forbids the granting of an injunction to stay proceedings which have been commenced in a foreign court of competent jurisdiction unless it is clearly shown that the suit sought to be restrained was brought in bad faith, or motivated by fraud or an intent to harass the party seeking the injunction, or if its purpose was to evade the law of the domicile of the parties." Sarepa, S.A. v. Pepsico, Inc., 225 A.D.2d 604 (2d Dept. 1996); see also Sebastian Holdings, Inc. v. Deutsche

Bank AG, 78 A.D.3d 446 (1st Dept. 2010), Dover Capital Limited v. Galvex Estonia OU, 2007 N.Y. Slip Op. 31733(U) (Sup. Ct., NY County, June 11, 2007). A court's use of its injunctive power to prohibit a person from pursuing an action in a foreign court "is a power rarely and sparingly employed." Arpels v. Arpels, 8 N.Y.2d 339 (1960).

Plaintiff asserts that the St. Maarten Action was commenced in bad faith for the purpose of evading U.S. law and obtaining a tactical advantage for purposes of forcing Bliss to incur extensive legal fees. These conclusory allegations fail to establish that the St. Maarten Action was brought in bad faith, for the purpose of evading New York law, or motivated by fraud or an intent to harass. See Sebastian Holdings, Inc. v. Deutsche Bank AG, *supra* at 447. Accordingly, plaintiff's motion is denied in its entirety.

**Conclusion**

In accordance with the foregoing,

It is hereby:

**ORDERED** that plaintiff, A.J. FOREVER, NV's motion is **DENIED** in its entirety;

and it is further

**ORDERED** that the compliance conference scheduled for June 30, 2011 at 9:30 a.m. remains a scheduled appearance; and it is further

**ORDERED** that any relief requested but not expressly addressed is hereby denied and that this constitutes the decision and order of the court.

Dated: New York, New York  
May 31, 2011

**So Ordered:**

**FILED**

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

JUN 01 2011

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