

Willis Group Holding plc v Smith

2011 NY Slip Op 33824(U)

July 8, 2011

Sup Ct, New York County

Docket Number: 650161/11

Judge: Anil C. Singh

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

PRESENT: ANIL C. SINGH
Justice

PART 61

WILLIS GROUP HOLDING PUBLIC LIMITED COMPANY
- v -
ERIC B. SMITH, et al

INDEX NO. 650161/11
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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 is decided in accordance with the annexed decision and order.

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

Dated: July 8, 2011

[Signature]
HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

-----X

WILLIS GROUP HOLDING PUBLIC
LIMITED COMPANY,
Plaintiff,

DECISION AND
ORDER

-against-

Index No.
650161/11

ERIC B. SMITH, WILLIAM "GRIFF" MOODY and
MARSH USA INC.,
Defendants

-----X

HON. ANIL C. SINGH, J.:

Defendants move to dismiss the complaint with prejudice pursuant to CPLR 327, contending that plaintiff failed to comply with Business Corporation law section 1312(a) and that New York is forum non conveniens. In the alternative, defendants move to stay this action pending resolution of an action commenced in the State of Georgia. In the event the entire complaint is not dismissed or stayed, defendants ask the court to dismiss the second, third and fourth causes of action for failure to state a valid claim. Plaintiff opposes the motion.

Plaintiff is a global insurance broker whose main office is in London. Through its subsidiaries, plaintiff provides a variety of insurance brokerage and related financial services.

Defendants Eric B. Smith (Smith) and William "Griff" Moody (Moody) are former employees of one of plaintiff's subsidiaries, Willis Insurance Services of

Georgia, Inc. (Willis), whose main office is in Atlanta, Georgia. Willis is not a party to this suit. On January 14, 2011, these defendants resigned from Willis and, within a few days, became employees of defendant Marsh USA Inc. (Marsh), one of Willis's competitors.

Plaintiff brings this action against defendants based upon alleged violations of the restrictive covenant provisions in stock option agreements executed by Smith and Moody. The amended complaint sets forth six causes of action.

The first cause of action seeks an injunction. The second, third and fourth causes of action allege that defendant Eric B. Smith breached restrictive covenants in three separate "Options Agreements." The fifth cause of action alleges that defendant William "Griff" Moody breached restrictive covenants by soliciting plaintiff's clients, customers and employees. The sixth cause of action alleges that defendant Marsh USA, Inc., tortiously interfered with contracts. Plaintiff seeks injunctive relief, compensatory and punitive damages, and attorney's fees.

Subsequent to this action, defendants filed a declaratory relief action in the Superior Court of Fulton County, State of Georgia, Case No. 2011CV19644 (the Georgia Action) against plaintiff and Willis. Defendants seek the invalidation of the restrictive covenant provisions under Georgia law.

Defendants move to dismiss this action on the ground of forum non

conveniens. Alternatively, they seek a stay pending the outcome of the Georgia Action. In moving for dismissal, defendants argue that Smith and Moody are Georgia residents and that Marsh maintains its office in Atlanta. They also argue that: (1) Georgia is the situs of the underlying transaction; (2) the material witnesses and documents are in Georgia; (3) Georgia is an available and more convenient forum; and (4) the maintenance of this action in New York would be an undue burden on the court.

Defendants contend that the forum selection provision, which is in each of the option agreements at issue, is not exclusive or compulsory, and would not bar dismissal on forum non conveniens grounds. The particular provision states that the employee agrees to irrevocably submit himself to the jurisdiction of the courts of the State of New York in the event that a dispute occurs involving the restrictive covenant issue. Defendants contend further that the option agreements themselves are void as a matter of law in that they violate the public policy of Georgia with respect to trade practices.

Defendants seek dismissal on the ground that plaintiff, a foreign corporation in New York, is not registered here and lacks the capacity to maintain this action. Finally, they argue that if the court does not grant their motion to dismiss or stay, the court should dismiss the second, third and fourth causes of action in the

complaint, which sound in breach of contract against defendant Smith, because the contracts in question are not valid and enforceable. Defendants also argue that each option agreement contains a provision that states that it will apply only if Smith is not already subject to a pre-existing enforceable covenant not to compete. As such, each option agreement allegedly cancels out the other two because each has a pre-existing restrictive covenant. They assert that plaintiff has failed to include copies of the option agreements with its papers, which would call into question the way plaintiff would interpret said agreements. However, plaintiff's counsel has submitted copies of the agreements in the opposition papers.

In its opposition to this motion, plaintiff contends that, since Smith and Moody had voluntarily agreed to the terms of the forum selection provisions when they executed their option agreements, they are precluded from moving to dismiss on forum non conveniens grounds. Plaintiff argues that these provisions are exclusive and valid and that defendants have not provided a valid reason for setting them aside. Plaintiff claims that it is black letter law that the provisions are enforceable. Even if certain factors were applicable in the argument for dismissal, plaintiff states that the following factors would favor this state as the proper forum: (1) the stock option agreements have a substantial nexus with New York; (2) New York would be a convenient forum for material documents and witnesses;

(3) plaintiff claims not to be subject to personal jurisdiction in Georgia; and (4) New York would not be subject to an undue burden.

Plaintiff also argues that the restrictive covenant provisions are fully enforceable and not contrary to public policy. According to plaintiff, the choice of law provisions in the agreements must be honored. Plaintiff contends that, in any event, the option agreements have sufficient contacts with this state.

Plaintiff states that it is not doing business in New York, and is not barred by section 1312 of the Business Corporation Law from bringing an action. As for the dismissal of the third, fourth and fifth causes of action, plaintiff argues that it is permitted by law to plead in the alternative.

“A defendant relying upon Business Corporation Law section 1312(a) as a statutory barrier to a plaintiff’s lawsuit bears the burden of proving that the plaintiff-corporation’s business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction” (Highfill, Inc. v. Bruce and Iris, Inc., 50 A.D.3d 742, 473 [2d Dept. 2008] (internal quotation marks and citations omitted)). “Absent sufficient evidence to establish that a plaintiff is doing business in this State, the presumption is that the plaintiff is doing business in its State of incorporation ... and not in New York” (Highfill, at 743-744 (internal quotation marks and citation

omitted); see also S&T Bank v. Spectrum Cabinet Sales, Inc., 247 A.D.2d 373, 373-374 [2d Dept. 1998]).

Here, the Court finds that defendants' submissions are insufficient to meet their burden. Under New York law, a foreign parent corporation is not deemed to be "doing business" in New York within the meaning of BCL Section 1312 merely because it has a subsidiary "doing business" in the State (see Commodity Ocean Transp. Corp. of N.Y. v. Royce, 221 A.D.2d 406, 407 [2d Dept. 1995]).

We turn next to the branch of the motion seeking dismissal based upon forum non conveniens.

Under the doctrine of forum non conveniens, "[a]lthough a New York court may have jurisdiction over a claim, it is not ... compelled to retain jurisdiction if the claim has no substantial nexus with New York." *Banco Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 73 (1984). The question as to whether jurisdiction should be retained under the doctrine of forum non conveniens requires the balancing of several factors, including the difficulties defendants will face in litigating the claim in this state, the burden on the state court in addressing the suit, and the availability of another more convenient forum. *Id.*

Defendants assert that maintaining this action here would be an inconvenience for both defendants and this court. They aver that Georgia would

be a more convenient forum and that Georgia has a stronger nexus with the transactions underlying this action. Plaintiff argues that the forum selection provisions in the subject agreements are clear in designating New York as the appropriate forum.

“Forum selection clauses are prima facie valid and will not be set aside except for fraud or overreaching or if enforcement would be so unreasonable and unjust as to make a trial in the selected forum so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court [internal quotation marks and citation omitted].” *Matter of Fidelity & Deposit Company of Maryland v Altman*, 209 AD2d 195 (1st Dept 1994).

The provisions in the option agreements state that with respect to the matter of restrictive covenants set forth in the agreements, the courts of the state of New York are deemed the forum in which disputes relating to said matter shall be determined. The parties to the agreements shall irrevocably submit to the jurisdiction of these courts. The courts here have traditionally been strongly supportive of the enforcement of provisions of this nature. *See id.* In the absence of any proof of coercion or fraud, the parties voluntarily assented to the forum selection clause.

Regarding the request for a stay, it is significant that plaintiff is alleging that it may have suffered damages in excess of \$1 million dollars. The amended complaint alleges:

To date, Defendants have succeeded in diverting over \$100,000 of annual business away from Willis. Upon information and belief, this is just the tip of the iceberg, and Defendants will continue to chip away at the Construction Team's \$5 million book of business, thereby causing irreparable harm to Willis.

In AIG Financial Products Corp. v. Penncara Energy, LLC, 83 A.D.3d 495

[1st Dept. 2011], the Court wrote:

GOL [General Obligations Law] 5-1402 permits parties to maintain an action in New York state courts pursuant to a contractual agreement providing for a choice of New York law and forum in cases involving \$1 million or more. Thus, "it preclude[s] a New York court from declining jurisdiction even where the only nexus is the contractual agreement." Indeed, CPLR 327, which allows a court to dismiss or stay a case on the basis of inconvenient forum, specifically states that it has no application to an action arising out of an agreement to which GOL 5-1402 applies (subd.[b]). Thus, GOL 5-1402 and CPLR 327(b) prevent a party that has agreed to jurisdiction in New York from later asserting that the New York courts are inconvenient or that they lack jurisdiction.

(AIG, 83 A.D.3d at 496-497) (internal citation omitted).

Because the instant action involves a contractual agreement to which GOL 5-1402 applies, the instant action cannot be stayed pursuant to CPLR 327.

Next, we turn to the branch of the motion seeking to dismiss the second,

third, and fourth causes of action for failure to state a cause of action. Defendants contend that plaintiff cannot maintain a cause of action of any of defendant Smith's agreements "because of their inverse relationships."

"On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (Kopelowitz & Co., Inc v. Mann, 83 A.D.3d 793, 796-797 [2d Dept., 2011] (internal quotation marks and citations omitted)). "The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference" (Id.)

Plaintiff asserts correctly that causes of action may be stated alternatively, as the enforceability of all three agreements are at issue in this action. *See Finkelstein v Warner Music Group, Inc.*, 14 AD3d 415 (1st Dept 2005).

It is unclear at this early stage of the litigation which, if any, of the three contractual agreements in issue were valid and enforceable. Accordingly, the motion to dismiss causes of action alleging breach of contract must be denied.

In their reply memorandum, defendants argue for the first time that the option agreements are unenforceable by plaintiff because the optionees failed to

exercise their options prior to their resignation. “The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion.” *Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 (1st Dept 2006), quoting *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992). In considering defendants’ new argument, the court shall disregard it since plaintiff has been denied the opportunity to respond to same.

Accordingly, it is

ORDERED that defendants’ motion to dismiss the complaint on the grounds of forum non conveniens is denied; and it is further

ORDERED that defendants’ motion to stay this action pending the outcome of the Georgia action is denied; and it is further

ORDEED that the motion to dismiss the second, third and fourth causes of action is denied.

The above constitutes the decision and order of the court.

DATE: July 8, 2011


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**