

Alden Global Distressed Opportunities Master Fund, L.P. v Smulyan
2011 NY Slip Op 33828(U)
July 14, 2011
Sup Ct, New York County
Docket Number: 650402/2011
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
J.S.C.
Justice

PART 45

ALDEN GLOBAL DISTRESSED OPPORTUNITIES
MASTER FUND, LP, derivatively
on behalf of EMMIS COMMUNICATIONS CORP
JEFFREY H. SHULYAN et al

INDEX NO. 650402/2011
MOTION DATE _____
MOTION SEQ. NO. 005
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 by defendant to dismiss
the Complaint pursuant to CPLR 321(a)
is GRANTED for the attached
Decision and Order.

Dated: July 14, 2011

Melvin L. Schweitzer
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 : PART 45

-----X
ALDEN GLOBAL DISTRESSED OPPORTUNITIES :
MASTER FUND, L.P., derivatively on behalf of :
EMMIS COMMUNICATIONS CORPORATION, :

Plaintiff, :

-against- :

JEFFREY H. SMULYAN, PATRICK M. WALSH, :
SUSAN B. BAYH, GARY L. KASEFF, :
RICHARD A. LEVENTHAL, PETER A. LUND, :
GREG A. NATHANSON, LAWRENCE B. SORREL, :
and JS ACQUISITION, LLC, :

Defendants. :

-and- :

EMMIS COMMUNICATIONS CORPORATION, :

Nominal Defendant. :
-----X

Index No. 650402/2011

DECISION AND ORDER

Sequence No. 005

MELVIN L. SCHWEITZER, J.:

This *forum non conveniens* motion to dismiss the complaint herein arises out of a set of obligations incurred by a corporation to its shareholders. It involves weighing a variety of factors to determine the appropriate venue for this litigation.

Background

Plaintiff Alden Global Distressed Opportunities Master Fund, L.P., derivatively on behalf of Emmis Communications Corporation (“Alden”), filed the complaint here against defendants Jeffrey H. Smulyan, Patrick M. Walsh, Susan B. Bayh, Gary L. Kaseff, Richard A. Leventhal, Peter A. Lund, Greg A. Nathanson, Lawrence B. Sorrel (“Directors”), JS Acquisition, LLC

("JSA") and Emmis Communications Corporation ("Emmis") on February 15, 2011.

Defendants move this court seeking dismissal pursuant to, *inter alia*, CPLR 327 (a).

The Going Private Transaction

In May 2010, Emmis announced that it had entered into a definitive merger agreement with JSA whereby JSA would purchase all outstanding shares of Emmis's Class A common stock ("Going Private Transaction"). The Going Private Transaction would allow Mr. Smulyan, Emmis's founder, CEO, Chairman, and President, to acquire all outstanding shares of Emmis's common stock so that, following the merger, he would be the sole owner of Emmis. JSA was formed by Mr. Smulyan for the purpose of taking Emmis private. The Going Private Transaction included (1) a tender offer by JSA to purchase all shares of Emmis's Class A common stock, (2) an offer by Emmis to exchange all of the outstanding shares of its 6.25% Series A Preferred Stock, \$0.01 par value per share, for newly issued 12% senior subordinated notes of Emmis, which first required a majority vote of shareholders to approve certain amendments to Emmis' Articles of Incorporation, and (3) a securities purchase agreement between JSA and Alden, whereby JSA would issue to Alden an interest in JSA in exchange for Alden's agreement to finance the tender offer ("Securities Purchase Agreement").

In July 2010, a group of preferred shareholders announced that they had entered into an agreement to vote down the proposed amendments in an effort to block the Going Private Transaction. Following this announcement, Alden, JSA, and Emmis attempted to negotiate a deal with this group that would have allowed the Going Private Transaction to proceed upon mutually agreeable terms. After negotiations failed, Alden exercised its contractual right to terminate the Securities Purchase Agreement in September 2010. Thereafter, JSA terminated the merger agreement, and the Going Private Transaction was effectively terminated as well.

The Indiana Litigation

In September 2010, Mr. Smulyan hired Taft Settinus & Hollister LLP to file suit against Alden on behalf of JSA in Indiana state court. JSA alleged that Alden breached a separate oral agreement that purportedly modified the terms of the written, fully integrated Securities Purchase Agreement. After Alden removed the lawsuit to the United States District Court for the Southern District of Indiana, Indianapolis Division, JSA hired Bose McKinney & Evans LLP (“Bose McKinney”), an Indiana law firm, and filed an amended complaint in December 2010. Alden is represented by Krieg DeVault LLP, an Indiana law firm, and attorneys out of the Dallas, Texas office of Fulbright & Jaworski LLP.

The Form 10-Q

In January 2011, Emmis filed its Form 10-Q for the quarterly period ending in November 2010. The Form 10-Q disclosed that Emmis was experiencing serious liquidity problems. Specifically, Emmis disclosed that while it anticipated meeting its liquidity needs through the end of February 2011, recent economic conditions had jeopardized Emmis’s ability to meet its financial covenant requirements going forward. The Form 10-Q additionally disclosed that certain covenants provided by Emmis’s credit facility that enabled Emmis to meet its financial obligations in the past expire in September 2011. As a result, Emmis is being forced to sell off assets to increase liquidity in order to meet its financial covenants in the credit facility.

The Challenged Transaction

In December 2010, Emmis committed to invest up to \$200,000 in support of the prosecution of JSA’s claim against Alden in exchange for first recoupment from JSA of any recovery of up to 150% of the amount invested by Emmis in the Indiana lawsuit. On February 3, 2011, Alden challenged this agreement by making a demand on Emmis’s Board of Directors

that, among other things, it rescind the agreement. It stated that if Emmis did not comply, Alden would pursue legal remedies. The demand letter was sent by Alden's Texas counsel to Emmis and its Board of Directors in Indianapolis. On February 8, 2011, Scott Enright sent Alden a letter on behalf of Emmis acknowledging the receipt of the demand letter, stating that it had been forwarded to the Board of Directors and that it would be addressed at the Board's next regularly scheduled meeting. On February 9, 2011, Alden sent the Board of Directors a second demand letter to which Scott Enright replied that the Board had considered the demand and would consider it again at its next regularly scheduled meeting.

The New York Lawsuit

On February 15, 2011, Alden filed this lawsuit asserting that Emmis's Board of Directors had breached their duties of loyalty and care and committed corporate waste, and that JSA breached a fiduciary duty to Emmis and conspired with the Board of Directors to breach fiduciary duties to Emmis. Defendants JSA, the Board of Directors, and Emmis seek dismissal of Alden's complaint on the ground of inconvenient forum.

Discussion

Alden's lawsuit here seeks (1) rescission and revocation of the loan extended to JSA, (2) an injunction prohibiting the Board of Directors from causing Emmis to transfer any funds to Mr. Smulyan and/or JSA to be used in connection with JSA's lawsuit against Alden, (3) an injunction prohibiting Mr. Smulyan and/or JSA or any of their agents from spending any funds that have already been transferred from Emmis to JSA pursuant to the loan extended to JSA, (4) the imposition of a constructive trust for the benefit of Emmis's shareholders covering any funds that have already been transferred from Emmis to Mr. Smulyan and/or JSA pursuant to the loan extended to JSA, (5) an injunction prohibiting the Board of Directors from causing Emmis

to enter into any further agreements with Mr. Smulyan, JSA, and/or their affiliates, (6) monetary damages in an amount equal to the value of any funds provided to Mr. Smulyan and/or JSA pursuant to the loan plus the value of any attorney's fees or other costs incurred by Emmis in connection with pursuing and implementing the loan extended to JSA, (7) a mandatory injunction requiring the Board of Directors to cause Emmis to make all public disclosures that may be necessary in connection with rescinding the loan extended to JSA and other relief, (8) Alden's costs and disbursements incurred in this derivative lawsuit, including reasonable attorney's fees, costs, and expenses, (9) pre- and post-judgment interest, and (10) any other relief, at law or in equity, to which Alden may be justly entitled.

CPLR 327 (a) provides, in pertinent part, that “[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just” New York courts routinely have recognized that the burden on a *forum non conveniens* motion rests squarely with the defendant. *See e.g. Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984) (“The burden rests upon the defendant challenging the forum to demonstrate relevant private or public factors which militate against accepting the litigation.”).

The factors to be considered by a court in determining whether to dismiss an action for *forum non conveniens* include the residency of the parties, the location of the alleged misconduct, the potential hardship to the defendant, the unavailability of an alternative forum in which plaintiff may bring suit, the burden on the New York courts, and the relative interests of each jurisdiction in adjudicating the dispute. *Id.* at 480. No one factor is dispositive, and the doctrine of *forum non conveniens* is flexible and rests upon considerations of justice, fairness, and convenience. *Id.* at 479.

This court is of the opinion that continuing this litigation in New York is improper. The various factors to be taken into consideration are overwhelmingly in favor of dismissing the action pursuant to the doctrine of *forum non conveniens*.

As the first factor to consider is the residency of the parties, Alden, the derivative plaintiff here, is not a New York resident. Rather, it is a Cayman Islands limited partnership with its principal place of business in the Cayman Islands. Defendants JSA and Emmis are based in Indiana, and seven of the eight Directors are residents of Indiana, California, or Florida. Only one Director, Lawrence B. Sorrel, is a resident of New York.

Alden's effort to show that New York is a convenient forum focuses on Emmis's alleged substantial ties here. For example, Alden highlights that Emmis owns and operates three radio stations in New York from which it derives substantial revenue. Importantly, however, Emmis is merely the nominal defendant in this suit. A nominal defendant's New York contacts are not sufficient to maintain this suit in New York courts. *See Koster v (American) Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 531-32 (1947) (applying to nominal defendants the proposition that state courts will decline jurisdiction of an action against a foreign corporation where a determination of the litigants' rights involves the regulation and management of the corporation's internal affairs dependent on the laws of the foreign state).

The second factor is the location of the alleged misconduct. Alden contends that although the various board meetings that were held in relation to the challenged transaction were conducted telephonically with all Directors dialing in to Indiana from wherever they were at the time, there is a strong likelihood that Director Sorrel, the New York resident, voted to approve the agreement and, in so doing, breached his fiduciary duties in New York. Alden further argues that Emmis's New York lawyers likely participated in these telephonic board meetings from

New York. Again, one Director's location during the telephonic board meeting and the nominal defendant's lawyers involvement in these board meetings are not enough to warrant the continuance of this suit in New York.

More illuminative is the fact that the challenged transaction involved was negotiated and executed in Indiana between an Indiana corporation (Emmis), and an Indiana limited liability company (JSA). In fact, the challenged transaction itself was the funding of litigation pending in Indiana. Both of Alden's demands to rescind the agreement were sent by its Texas counsel to Emmis and its Board of Directors in Indiana. Thus, the majority of the alleged misconduct clearly did not occur in New York and this second factor also warrants dismissal.

The third factor is the potential hardship to the defendants. Defendants contend that because the challenged transaction occurred in Indiana, the majority of witnesses and relevant documents most likely to be needed for trial are located in Indiana. As such, continuing this suit in New York would create a significant hardship to the defendants who would have to travel from their respective locations to New York solely for this suit.

The fourth factor is whether there is an alternative forum in which the plaintiff may bring the suit. Indiana is indeed an alternative forum in which Alden may bring this suit and, therefore, this factor also warrants dismissal. All of the defendants would be subject to personal jurisdiction in Indiana, making it the preferable forum. Further, this suit involves unique Indiana law, with which the Indiana courts are more conversant in interpreting and applying.

The fifth factor is the burden on the New York courts. This is the strongest factor warranting dismissal of this suit. Although this court specializes in commercial disputes, the interpretation and application of Indiana law in a case such as this one where all the other factors favor Indiana as the more appropriate forum more properly should be left to Indiana courts. The

Indiana Business Corporation Law defining the applicable standards of conduct for directors are unique to the State of Indiana and vary from the laws of New York. *See* Ind. Code § 23-1 et seq. (2009).

The sixth factor is the relative interests of each jurisdiction in adjudicating the dispute. As discussed, *supra*, Indiana has a much greater interest in adjudicating this dispute than does New York. The suit does not involve New York law, but rather requires interpretation of unique Indiana law. Any resolution of this case in New York would have little precedential value to the New York courts. Conversely, the further interpretation and application of Indiana law to unique situations may be of significant precedential value to Indiana courts. Accordingly, this factor also warrants dismissal.

Taking these six factors as a whole, it is clear that this case must be dismissed on the grounds of *forum non conveniens*. This court can find no reason for continuing this litigation here.

Accordingly, it is

ORDERED that defendants' motion to dismiss the complaint pursuant to CPLR 327 (a) is granted.

Dated: July 14, 2011

ENTER:


J.S.C.