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

PRESENT: BARBARA R. KAPNICK J.S.C. PART 31
Justice

Index Number : 650652/2009
KRELL INVESTOR LLC
vs
KI, INC. F/K/A KRELL
Sequence Number : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to ___, were read on 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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9/26/11

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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KRELL INVESTOR LLC and KRELL INDUSTRIES LLC,

Plaintiffs,

- against -

KI, INC. f/k/a KRELL INDUSTRIES, INC., DANIEL D'AGOSTINO, RONDI D'AGOSTINO, MICHAEL L. BELLAS AND PETRA WILDE,

Defendants.

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DECISION/ORDER
Index No. 650652/09
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

Plaintiff Krell Investor LLC ("Investor") is a Delaware limited liability company with its principal place of business in New York County. Plaintiff Krell Industries LLC ("New Krell") is also a Delaware limited liability company with its principal place of business in Connecticut.

Defendant KI, Inc. f/k/a Krell Industries, Inc. ("Old Krell") is a corporation operating under the laws of Connecticut, with its principal place of business located in Connecticut. Defendants Daniel D'Agostino ("Dan D'Agostino") and Rondi D'Agostino (collectively, the "D'Agostinos") are the principal shareholders of Old Krell. Defendant Michael Bellas ("Bellas") is the husband of Rondi D'Agostino. Defendant Petra Wilde ("Wilde") is the wife of Dan D'Agostino. All of the individual defendants reside in

Connecticut.

Background

According to the Complaint, Old Krell was, and New Krell is, in the business of designing, manufacturing, marketing, distributing and selling high performance audio components.

In the Fall of 2008, affiliates of Investor were introduced to Old Krell and the D'Agostinos and discussions ensued regarding a possible transaction between them.[1]

In or about March 2009, Old Krell was in default on its credit lines, unable to make payroll and ultimately had to discontinue operations and close its doors. On March 12, 2009, Investor, upon learning that the lender had shut down Old Krell's credit lines, entered into a junior participation agreement with Old Krell's lender, pursuant to which Investor provided the lender with

[1] Previously, in or about the spring of 2008, the D'Agostinos began discussing the possible acquisition of Old Krell by a third party. In anticipation of acquiring Old Krell, the third party loaned Old Krell $500,000.00. Shortly thereafter, Dan D'Agostino informed the third party that he did not intend to close on the acquisition transaction and the third party demanded repayment of the $500,000.00. Old Krell and the D'Agostinos had already dissipated the funds and thus failed to repay the loan. This failure resulted in a lawsuit and judgment against Old Krell for the loan balance, plus interest totaling approximately $466,000.00. Bellas loaned Old Krell approximately $466,000.00 to pay off the judgment.

$200,000.00 of cash collateral and lender then loaned $200,000.00 to Old Krell. This enabled Old Krell to reopen its doors and continue its operations.

On April 3, 2009, Old Krell and Investor entered into the Limited Liability Company Agreement of New Krell (the "LLC Agreement"), which set out terms governing the organization, management and operation of New Krell.[2] The LLC Agreement was signed by Old Krell, Investor and by the D'Agostinos, only to the extent that they agreed to be bound by Section 5.1(c) of the LLC Agreement.

At the same time, Investor, Old Krell, New Krell, and the D'Agostinos entered into a Contribution Agreement (the "Contribution Agreement"), pursuant to which the following occurred: (1) substantially all of the assets of Old Krell were transferred to New Krell; (2) New Krell assumed certain specified liabilities of Old Krell in exchange for a 60% equity interest in New Krell; and (3) Investor contributed $1,200,000.00 to the capital of New Krell in exchange for a 40% equity interest in and

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[2] Pursuant to the LLC Agreement, Old Krell acquired a 60% membership interest in New Krell, and Investor acquired a 40% membership interest. The LLC Agreement also established a Board of Managers consisting of five members, three appointed by Investor and two appointed by Old Krell. Thus, although Old Krell owned a 60% interest in New Krell, Investor obtained control over New Krell and its management.

management control of New Krell.[3] The Contribution Agreement was signed by Old Krell, the D'Agostinos, Investor and New Krell.

Also as part of this transaction, Dan D'Agostino and Rondi D'Agostino each entered into an employment agreement (the "Employment Agreement[s]") with New Krell.

The Contribution Agreement contains a choice of law and forum selection clause contained in the following provision:

> 17. Governing Law. This Agreement and the legal relations among the parties hereto will be governed by and construed in accordance with the internal substantive laws of the State of New York, United States of America (without regard to the laws of conflict that might otherwise apply) as to all matters, including without limitation matters of validity, construction, effect, performance and remedies. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the federal and state courts located in the State of New York, New York County for the purposes of any such action or other proceeding arising out of this Agreement or any transaction contemplated hereby.

The Employment Agreements contain a similar provision:

> 15. Governing Law. This Agreement and the legal relations among the parties hereto will

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[3] Among the specified liabilities assumed by New Krell were loans in the amount of $1,478,436.00 from the D'Agostinos to Old Krell. Bellas was repaid approximately $266,000.00 of his existing loan to Old Krell and, as required by the lender, he allowed New Krell to assume the $200,000.00 balance of his loan to Old Krell.

> be governed by and construed in accordance with the internal substantive laws of the State of New York, United States of America (without regard to the laws of conflict that might otherwise apply) as to all matters, including without limitation matters of validity, construction, effect, performance and remedies. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the federal and state courts located in the State of New York, New York County for the purposes of any such action or other proceeding arising out of this Agreement or any transaction contemplated hereby.

Plaintiffs commenced the instant action on November 5, 2009. The Complaint asserts eight causes of action:

(1) against Old Krell and the D'Agostinos for breach of the Contribution Agreement;

(2) against Rondi D'Agostino for breach of her Employment Agreement;

(3) against Dan D'Agostino for breach of his Employment Agreement;

(4) against the D'Agostino's and Bellas for breach of their fiduciary duties owed to New Krell based on their positions as board members;

(5) against *all* defendants for tortious interference with New Krell's agreements;

(6) against *all* defendants for tortious interference with prospective business relations;

(7) against Dan D'Agostino for conversion; and

(8) against Old Krell and the D'Agostinos for indemnification as to New Krell and Investor.

Defendants Old Krell, Dan D'Agostino,[4] Rondi D'Agostino and Bellas (collectively, the "defendants"), now move for an order pursuant to CPLR 3211 and 327, dismissing plaintiff's Complaint on the grounds that:

(1) this Court lacks personal jurisdiction over the defendants;

(2) the doctrine of *forum non conveniens* precludes this Court from hearing this case;

(3) plaintiff Investor does not have the capacity to maintain an action in New York because it is not authorized to do business in New York;

(4) there are actions pending between the parties in Connecticut;[5]

(5) the first and eighth causes of action fail to state a claim against Old Krell and the D'Agostinos and/or that

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[4] Dan D'Agostino, who is appearing *pro se*, is also a party to the relief sought herein. The other *pro se* defendant, Petra Wilde, is not a party to this motion.

[5] The instant case is the third of four pending litigations between these parties. The first and third actions were filed in New York County Supreme Court. The second and fourth lawsuits were filed in Connecticut Superior Court. The fourth action (the "Stayed Action") was stayed by Judge Blawie of the Connecticut Superior Court, pending determination of the instant action.

there is a defense founded upon documentary evidence;

(6) the third cause of action fails to state a claim against Dan D'Agostino and/or there is a defense founded upon documentary evidence; and

(7) in the alternative, this action should be stayed under CPLR 3211(a)(4).

Discussion

Personal Jurisdiction

In their Complaint, plaintiffs assert that this Court has personal jurisdiction over the defendants based on the exclusive forum selection clauses in both the Employment and Contribution Agreements, which must be enforced under New York law.[6] This Court notes that (1) Old Krell and the D'Agostinos signed the Contribution Agreement, which contains a forum selection clause; (2) Dan D'Agostino and Rondi D'Agostino each signed Employment Agreements which contain forum selection clauses; and (3) Bellas is not a signatory to any of the agreements.

The Court also notes that Bellas, who is not moving for dismissal based upon personal jurisdiction, is a *plaintiff* in a related action pending before this Court, Index No. 650607/2009.

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[6] There is no dispute that the LLC Agreement's forum selection clause is non-exclusive and therefore cannot confer personal jurisdiction.

With respect to Rondi D'Agostino, on or about May 26, 2011, she commenced another action in this Court against entities and individuals previously employed by or allegedly associated with the plaintiffs herein (Index No. 651452/2011). By so doing, Rondi D'Agostino has invoked the jurisdiction of this Court, and further specifically asserted jurisdiction over the defendants based on the same forum selection clauses she has attacked as unenforceable in this motion. Moreover, in a letter dated June 9, 2011, counsel for Old Krell, Rondi D'Agostino and Michael Bellas stated the following: "Defendants' motion to dismiss does assert that the Court lacks jurisdiction over Defendants. To that end, Defendants respectfully withdraw those jurisdictional arguments." As a result, this Court will only consider the issue of personal jurisdiction with respect to Dan D'Agostino.

During oral argument held on the record on November 3, 2010, counsel for Old Krell, Rondi D'Agostino and Bellas raised an issue with respect to whether, under *DeSola Group Inc. v. Coors Brewing Co.*, 199 AD2d 141 (1st Dep't 1993), the allegations contained in the Complaint in the Stayed Action,[7] namely that the Contribution and Employment Agreements are permeated with fraud, render the forum

[7] The Stayed Action was brought by Old Krell, Rondi D'Agostino and Dan D'Agostino in Connecticut Superior Court. Counsel stated on the record that she is not counsel to these parties in the Stayed Action.

selection clauses contained therein, unenforceable.

The Appellate Division, First Department held in *DeSola Group Inc. v. Coors Brewing Co.*, *supra* at 141-142, that:

> [e]ven assuming the Agreement is applicable, the forum selection clause contained therein is unenforceable since the record is replete with allegations indicating that the entire agreement was permeated with fraud. . . . Since plaintiff's allegations of fraud pervading the agreement would render the entire agreement void, the forum selection clause contained therein is unenforceable (citation omitted).

Moreover, Judge Blawie stated in his Decision granting the motion to stay, dated September 24, 2010, that:

> given the plaintiffs' allegations of pre-contract fraudulent acts and that **each agreement** was permeated with fraud, the court finds that the forum selection clauses contained in the agreements are of little weight, if any, in its present analysis. See *Desola Group v. Coors Brewing Co.*, supra, 605 NYS2d 83-84. As such, the court will not address the parties' arguments regarding the exclusivity of the forum selection clauses in these **three agreements**.

(emphasis added).

Based on Judge Blawie's Decision, it is clear that the Court considered both the Contribution Agreement and the Employment Agreements and found that there are allegations indicating that these agreements were permeated with fraud, and thus are

potentially void as a result. Accordingly, this Court finds the forum selection clauses contained therein unenforceable. Since the Complaint in the instant action only asserts personal jurisdiction based on the forum selection clauses, that portion of the motion seeking to dismiss the Complaint insofar as it is pled against Dan D'Agostino is granted.

Forum Non Conveniens[8]

It is well settled that

> [t]he burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation and the court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered 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. The court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. The great advantage of the rule of *forum non conveniens* is its flexibility based upon the facts and circumstances of each case. 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.

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[8] In the absence of personal jurisdiction as to Dan D'Agostino, this Court need not address the issue of *forum non conveniens* with respect to him. *See Edelman v. Taittinger, S.A.*, 298 AD2d 301, 303 (1st Dep't 2002).

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

In considering these factors, the Court recognizes that Old Krell is a Connecticut corporation, with its principal office located in Connecticut, that Bellas and Rondi D'Agostino are both Connecticut residents and that the underlying transaction took place in Connecticut. However, both Bellas and Rondi D'Agostino have invoked the jurisdiction of this Court by filing related actions here. Moreover, Bellas chose not to move to dismiss based on lack of personal jurisdiction and Rondi D'Agostino chose to withdraw her arguments with respect to lack of personal jurisdiction. Further, although Old Krell has not invoked the jurisdiction of this Court by virtue of commencing a separate action here, it also chose to withdraw its lack of personal jurisdiction argument. *See supra* at 7-8. Therefore, each of these defendants has made the decision to consent to jurisdiction here, making their arguments for dismissal based on *forum non conveniens* somewhat disingenuous. For these reasons, the Court in its discretion, denies defendants' motion to dismiss based on *forum non conveniens*.

Lack of Capacity to Maintain the Instant Action

The defendants also argue in their motion papers that

plaintiff Investor does not have the capacity to sue in New York, because although it alleges that its principal place of business is New York County, it has not shown that it is authorized to do business here and cannot maintain its action as a result.

During oral argument, the defendants argued that *both* plaintiffs Investor and New Krell were "foreign LLCs who do not have the authority to do business in the State of New York," and pursuant to Limited Liability Law Section 808, cannot maintain the instant action.

Counsel for Investor represented during oral argument that after commencing this lawsuit, Investor "did apply and did receive authorization to do business in the [S]tate." Based on this admission, the Court finds that plaintiff Investor may maintain this action. *Basile v. Mulholland*, 73 AD3d 597 (1st Dep't 2010) (holding that "plaintiff LLC's failure to obtain a certificate of authority to do business in New York before initiating the action is not a fatal jurisdictional defect and such certificate has since been obtained").

With respect to New Krell, this argument was only raised for the first time during oral argument. Accordingly, this Court refraims from making a ruling as to whether New Krell's

commencement of the instant action contravened Limited Liability Law Section 808(a).[9]

Finally, the defendants move to dismiss on the grounds that New Krell does not have the capacity to sue because the instant action was commenced without the proper authority of the Board of Managers of New Krell and in violation of Section 2.1(a) of the LLC Agreement.

Section 1.6(g) of the LLC Agreement gives New Krell the power "to sue and be sued" and Section 2.1(a)(i) provides in relevant part:

> Except as otherwise expressly provided to the contrary in this Agreement or the Act, such board of Managers (the "*Board of Managers*") shall act by a simple majority of the votes entitled to be cast by the entire membership of such Board of Managers, following notice accompanied by a description of the matter to be voted on and may act by written consent, which written consent need only be executed by

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[9] In any event, the Court notes that counsel represented during oral argument that although New Krell has "New York customers," it does not "do business in New York" and therefore is not obligated to comply with Section 808 of the Limited Liability Law before commencing a law suit in New York. Additionally, in a letter to the Court dated December 1, 2010, counsel for plaintiff New Krell enclosed a printout from the New York State Department of State website evidencing New Krell's authorization to do business in New York. Counsel for Old Krell, Bellas and the D'Agostinos objected to the Court's consideration of this letter on the grounds that it was untimely, notwithstanding the fact that defendants' argument on this point was not raised until oral argument.

> Managers entitled to cast a majority of such number of votes entitled to be cast by the entire membership of such Board of Managers.

There seems to be no dispute that a vote by the Board of Managers was not held and notice was not given prior to commencing the instant action. On the record, counsel for New Krell stated the following:

> My client, the investor, controls and appoints three of the five board members, and those three members approved this action. Because this action was not approved by a board wide vote there was no need for notice. In addition, I'll point out the action is against the other two board members, so I don't know what effect notice would have had here. I don't think the way those members voted would be in question but, nevertheless, this action was undertaken under the second method for the company acting, which does not require written notice.

(Tr. at 19-20:17-3). The Court notes, however, that despite counsel's representations on the record, this issue was not addressed in the opposition papers and the Complaint fails to allege anything regarding how this action was commenced. Even if a vote was not held, there are no allegations that written consent was executed by the requisite number of board members in accordance with the LLC Agreement. Given that defendants failed to cite to any legal authority to support their argument, and the fact that the LLC Agreement sets out two methods by which New Krell could have commenced this action, one of which counsel for Investor represented was in fact taken by New Krell, the Court reserves

ruling on whether New Krell has the capacity to maintain this action and grants plaintiffs leave to amend the Complaint within 30 days of the filing of this decision to address this deficiency.

Failure to State a Claim

The defendants next argue that the first and eighth causes of action for breach of the Contribution Agreement and indemnification, respectively, fail to state a claim against Old Krell and the D'Agostinos because (1) the Contribution Agreement is unenforceable since it was "superseded" by the Employment Agreements, which "cancel[] and supersede[] any and all prior agreements and understandings between the parties with respect to the subject matter hereof . . . ." (Employment Agreements, ¶ 13); and (2) the Contribution Agreement is not valid because it is conditioned on Old Krell and the D'Agostinos being released from certain liabilities from Wells Fargo, which, in their memorandum of law, the defendants argue has not occurred.

The Court finds that the defendants' arguments are meritless as they do not go to whether or not the plaintiffs have stated claims for breach of contract or indemnification. At best, these arguments raise potential defenses or issues of fact that cannot be decided at this juncture.

Finally, the defendants' request that this action be dismissed because there are actions pending between the parties in Connecticut or stayed pending the resolution of the Connecticut action is denied, given the fact that the Connecticut action was already stayed pending a resolution of this case.[10]

The remaining defendants are directed to serve Answers to the Complaint within 20 days of service of the Amendment provided for *supra*. All parties or their counsel shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on December 7, 2011 at 10:00 AM.

This constitutes the decision and order of this Court.

Date: 9/26, 2011

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

[10] In his Decision dated September 24, 2010, Judge Blawie specifically found that there was "a substantial nexus to New York" and that "no injustice is visited upon either side by the granting of a stay."