

Cino v Creighton

2012 NY Slip Op 31837(U)

July 3, 2012

Supreme Court, New York County

Docket Number: 111503/2011

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

VICTOR J. CINO,

INDEX NO. 111503/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

JAN J. CREIGHTON, CALISTO J. BERTIN, and
TRENTON PETROLEUM COMPANY,

Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits 1, 2

Answering Affidavits- Exhibits 2-6

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED

JUL 12 2012

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

Dated: 7/3/12

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

----- X
Victor J. Cino,

Plaintiff,

Index Number:

- against-

111503/2011

Jan J. Creighton, Calisto J.
Bertin, and Trenton Petroleum
Company,

FILED

Defendants.

JUL 12 2012

----- X
Donna M. Mills, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for a default judgment against defendants
for failure to interpose an answer and defendants cross-move to
dismiss the complaint based upon forum non conveniens, lack of
personal jurisdiction and expiration of the statute of
limitations.

Parties' Allegations and Procedural Background

Plaintiff alleges that he is a resident of New York, that he
owned and operated several service stations in New York and New
Jersey and that, in February 1996, he met with Jan J. Creighton
(Creighton) to discuss a potential joint venture in purchasing
service stations that were closed or abandoned due to the cost of
environmental remediation (plaintiff affidavit, ¶¶ 3-6).

Plaintiff states that after phone discussions and meetings in New
York, a suitable service station in West Creek, New Jersey (the
Station) was located in May 1996 and plaintiff and Creighton
formed a joint venture (the Joint Venture) to purchase the

Venture or any other business deal with plaintiff, states that plaintiff never contributed \$20,000 towards the purchase of the Station and denies that he or Trenton conduct any business or have any customers in New York (Creighton affidavit, ¶¶ 2-7, 10). He further states that he never met with plaintiff for negotiations for the purchase of the Station or any other purpose (*id.*, ¶ 7). Bertin alleges that he resides in New Jersey and that, apart from owning some undeveloped land in Putnam County, New York, he has no business of any type in New York (Bertin affidavit, ¶¶ 3-5).

Default

Defendants assert that there was an agreement with plaintiff's counsel to extend their time to interpose an answer to plaintiff's complaint (Martini affirmation, ¶¶ 3-5). Plaintiff's counsel stated that he "consented to the extension" but that he wanted defendants' counsel to prepare a formal stipulation and that, when this was not done, he made the motion for a default judgment (Perrella affirmation dated March 7, 2012, ¶¶ 3, 7).

A default should be vacated "if the movant shows that the default was excusable and that the defense to the action is meritorious" (*Chevalier v 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413 [1st Dept 2011]). The court should take into account a variety of factors including "the length of the delay, [any potential prejudice], whether the default was willful and the

strong public policy favoring the resolution of cases on the merits" (*id.* at 413-414; *Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [1st Dept 2009]).

In this case, the delay has been relatively short, no prejudice to plaintiff has been shown, plaintiff has not established that defendants' failure to answer was wilful and defendants have presented evidence raising the substantive merits. Consequently, plaintiff's motion for a default judgment is denied.

Forum Non Conveniens

CPLR 327 provides that the court may dismiss an action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum."

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The court must consider and balance the various factors including "the burden on the New York courts, the potential hardship to the defendant, ... the unavailability of an alternative forum ... [the parties' residence] and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. ... [But,] [n]o one factor is controlling" (*id.*). Where there is "no substantial connection to this State", dismissal based upon forum non conveniens is

warranted (*Blueye Nav. v Den Norske Bank*, 239 AD2d 192, 192 [1st Dept 1997]). However, "[g]enerally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed" (*OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 702 [1st Dept 2011] [internal citation omitted]).

In this case, plaintiff is a New York resident and defendants are New Jersey residents. While defendants assert that there is no connection to New York, plaintiff has alleged that he and Creighton had meetings in New York and Creighton made phone calls to him in New York "to discuss the details of purchasing the [Station]" (plaintiff affidavit, ¶ 11). Balancing all the factors and considering that no one factor is controlling (*Islamic Republic*, 62 NY2d at 479), defendants have not shown that "the balance [of factors] is strongly in [their] favor" and, therefore, their motion to dismiss the complaint pursuant to CPLR 327 is denied (*OrthoTec*, 84 AD3d at 702; *American BankNote Corp. v Daniele*, 45 AD3d 338, 339 [1st Dept 2007]).

Statute of Limitations

In his complaint, plaintiff alleges that the wrongful conduct of the transfer of his interest in the Station occurred on June 4, 1997 (complaint, ¶ 8). Plaintiff's causes of action for conversion and breach of fiduciary duty are subject to a three-year statute of limitations (*Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995];

Monaghan v Ford Motor Co., 71 AD3d 848, 850 [2d Dept 2010])). Plaintiff's causes of action for breach of contract and breach of duty of fair dealing are subject to a six-year statute of limitations (*Mandarino v Travelers Prop. Cas. Ins. Co.*, 37 AD3d 775 [2d Dept 2007])). Since plaintiff commenced this action on October 11, 2011, the portion of defendants' cross motion that seeks dismissal of the complaint based upon the statute of limitations is granted to dismiss these causes of action.

CPLR 213 (8) provides that a cause of action for fraud is timely if it is commenced within "two years from the time the plaintiff ... discovered the fraud." Plaintiff states that he discovered the fraud in March 2011 and, since he commenced this action on October 11, 2011, his cause of action for fraud is timely. However, his cause of action under the DCL are predicated on both constructive fraud (DCL §§ 273, 273-a) and actual fraud (DCL § 276). Generally, "[c]onstructive fraud claims ... are governed by the six-year statute of limitations set forth in CPLR 213 [1], and arise at the time the alleged fraudulent conveyance is made" (*Citicorp Trust Bank, FSB v Makkas*, 67 AD3d 950, 952 [2d Dept 2009]; *Avalon LLC v Coronet Properties Co.*, 306 AD2d 62, 62-63 [1st Dept], lv denied 100 NY2d 513 [2003]; see also *Dowlings, Inc. v Homestead Dairies, Inc.*, 88 AD3d 1226, 1230 [3d Dept 2011]; cf. *Coyle v Lefkowitz*, 89 AD3d 1054 [2d Dept 2011])). Moreover, DCL § 273-a is inapplicable to this case, since plaintiff does not allege "[t]he existence of an

unsatisfied judgment [which] is an 'essential element' of a constructive fraud cause of action pursuant to [DCL] § 273-a" (*id.* at 1056 [2d Dept 2011]). Therefore, the portion of plaintiff's cause of action under the DCL relying on constructive fraud is time-barred, since plaintiff did not commence this action within six years of the alleged fraudulent conveyance, and it is dismissed.

Personal Jurisdiction

"CPLR 302 (a) (1) authorizes the assertion of long-arm jurisdiction over a non-domiciliary who 'transacts any business within the state or contracts anywhere to supply goods or services in the state' ... [so long as] the defendant's New York activities were purposeful and substantially related to the claim" (*D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro*, 90 AD3d 403, 404 [1st Dept 2011]). "Purposeful activities are those with which a defendant, through volitional acts, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal citation omitted]). The court should look at "the number, nature, and quality of the defendants' contacts with New York" (*Paolucci v Kamas*, 84 AD3d 766, 767 [2d Dept 2011] *lv denied*, 18 NY3d 803 [2012]; *Millenium Import, LLC v Reed Smith LLP*, 63 AD3d 561, 562 [1st Dept 2009]).

Bertin denies any contact with New York relating to the

matter and plaintiff has not identified any purposeful conduct by him and, accordingly, plaintiff's complaint against him is dismissed (*Fischbarg*, 9 NY3d at 380; *D&R Global*, 90 AD3d at 404).

Similarly, plaintiff has not identified any conduct by Trenton in New York and, therefore, his complaint against it is likewise dismissed.

While plaintiff has the burden to establish jurisdiction over Creighton, he "need only make out a prima facie case of personal jurisdiction, and in deciding whether the [plaintiff has] met [his] burden, the court must construe the pleadings and affidavits in the light most favorable to [plaintiff] and resolve all doubts in [his] favor" (*Brandt v Toraby*, 273 AD2d 429, 430 [2d Dept 2000]; see also *Armouth Intl. v Haband Co.*, 277 AD2d 189, 190 [2d Dept 2000]).

Viewed from this perspective, plaintiff has set forth evidence of Creighton's meetings with him in New York and Creighton's phone calls to him in New York in connection with Creighton's allegedly fraudulent conduct of inducing plaintiff to contribute \$20,000 in funds to purchase the Station, which Creighton then purportedly transferred out of the Joint Venture. Accepting plaintiff's version as true for the purpose of deciding Creighton's application to dismiss, plaintiff has set forth sufficient purposeful conduct by Creighton to sustain personal jurisdiction over him and the portion of the cross motion that seeks to dismiss plaintiff's complaint against Creighton for lack

of personal jurisdiction is denied (*Armouth*, 277 AD2d at 190; *Brandt*, 273 AD2d at 430).

Order

It is, therefore,

ORDERED that plaintiff's motion for default judgment against defendants is denied; and it is further

ORDERED that the portion of defendants' cross motion that seeks dismissal of plaintiff's complaint based upon forum non conveniens is denied; and it is further

ORDERED that the portion of defendants' cross motion that seeks dismissal of plaintiff's complaint based upon lack of personal jurisdiction is granted to the extent of dismissing plaintiff's complaint as against defendants Calisto J. Bertin and Trenton Petroleum Company and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants and the portion of defendants' cross motion that seeks dismissal of plaintiff's complaint based upon lack of personal jurisdiction over defendant Jan J. Creighton is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the portion of defendants' cross motion that

seeks to dismiss plaintiff's complaint based upon the statute of limitations is granted to the extent of dismissing the second, third, fifth and sixth causes of action and the portion of the fourth cause of action that involves constructive fraud, and is denied as to the first cause of action and the portion of the fourth cause of action that involves actual fraud; and it is further

ORDERED that defendant Jan J. Creghton is directed to serve an answer within 20 days after service of a copy of this order with notice of entry.

Dated: *July 3*, 2012

FILED

JUL 12 2012

ENTER:

[Handwritten Signature]

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

DONNA M. MILLS, J.S.C.