Recrutor Commodities Ltd. v Australia & New Zealand Banking Group Ltd.
2012 NY Slip Op 33283(U)
January 13, 2012
Supreme Court, New York County
Docket Number: 651206/2011
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

RECRUTOR COMMODITIES LTD.,

Plaintiff,

-against-

AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED,

Defendant.

INDEX NO. 651206/2011

MOTION DATE Jan. 12, 2012

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, defendant's motion to dismiss the complaint is decided in accordance with the accompanying decision and order.

Dated: January 13, 2012

O. PETER SHERWOOD, *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 49

----------X

RECRUTOR COMMODITIES LTD.,

Plaintiff,

-against-

AUSTRALIA & NEW ZEALAND BANKING GROUP LIMITED,

Defendant.

----------X

DECISION AND ORDER

Index No. 651206/2011

O. PETER SHERWOOD, J.:

I. OVERVIEW

This is a motion (motion sequence number 001) to dismiss the complaint pursuant to CPLR 3211(a)(1) and/or CPLR 327 based on the forum selection clause of an alleged contract between the parties and for reasonable attorneys' fees pursuant to 22 NYCRR 130-1.1. The action seeks payment of a referral fee allegedly owed by defendant for placing plaintiff's candidate, Sean Mulhearn. Plaintiff cross-moves for an order pursuant to CPLR 3124, 3102(c) or 3103(a) compelling defendant to produce the employment application and complete employment contract of Sean Mulhearn.

II. BACKGROUND

Plaintiff, Recrutor Commodities Ltd. ("Recrutor"), is an employer fee-paid search and recruitment agency which is registered in Ireland and has its principal place of business in Dublin, Ireland. Non-party Jean-Pierre Renault is alleged to be Recrutor's New York operative (Compl. ¶¶ 1, 7, 9). Defendant, Australia & New Zealand Banking Group Limited ("ANZ"), is an Australia-registered banking company, with its principal office in Victoria, Australia, and which maintains a New York office in Manhattan (*Id.* ¶¶ 3-6). Renault formed a client relationship with ANZ dating back to 2008 (*id.* ¶ 10).

On or about March 6, 2009, Renault e-mailed Christophe Renaud, then Chief of Global Commodities Trading for ANZ, to schedule a meeting with an individual named Sean Mulhearn to discuss possible employment opportunities at ANZ, particularly developing ANZ's Asia markets (Compl. ¶¶24, 28). Both Renaud and Michael Correa, ANZ's Head of Markets, Asia, were interested in Mulhearn for this purpose. Mulhearn had been a managing director of a division of Merrill Lynch in 2006 and the Global Head of Commodity Sales of Standard Chartered Bank in Singapore (*id.* ¶¶ 19-20). Thereafter, Renault confirmed by e-mail a meeting between Mulhearn and Genevieve Ho, ANZ's Executive Assistant of Global Markets, and Correa to take place on July 13, 2009, in Singapore. Such meeting took place as scheduled.

On August 7, 2009, Renaud sent an e-mail to Renault requesting that he "resend" plaintiff's fee terms and conditions. Although the verified complaint asserts that this request was with reference to the Mulhearn candidacy, the e-mail indicates that it is in reference to another person with the name Vincent Elbhar (Compl. ¶¶ 42-43). Renault responded by e-mail to which he appended the terms and conditions (*id.* ¶¶ 45, 47, Exhibit "A" to the Compl.). The terms and conditions document contains a forum selection clause. Consideration of Mulhearn's hiring continued through the Fall of 2009. However, the final determination as to Mulhern's hiring was up to Renaud, who did not want to meet Mulhearn's minimum compensation demand (*id.* ¶¶ 55-58).

Renaud resigned from ANZ on December 8, 2010 (Compl. ¶ 62). Following Renaud's resignation, ANZ renewed the hiring process with Mulhearn and ultimately hired him at a starting annualized salary of $1,200,000 (*id.* ¶¶63-68). Claiming that Mulhearn's hiring was the result of Recrutor's referral to ANZ, Renault sent ANZ an invoice for a fee of $300,000 representing 25% of Mulhearn's $1,200,000 annual salary (*id.* ¶ 72). When ANZ failed to pay the invoice, Recrutor commenced the instant action to recover the $300,000, plus interest from March 1, 2011 and costs.

III. MOTION TO DISMISS

A. Defendant's Arguments in Support

In lieu of answering, ANZ has moved for an order dismissing the complaint pursuant to CPLR §§ 327 and 3211 (a) (1) on the ground that the forum selection clause of the alleged agreement between the parties provides that any dispute arising between the parties as to the terms of the contract will be under the exclusive jurisdiction of the Tribunal of Commerce of Dublin, Ireland and will be subject to Irish law or, alternatively, if the terms and conditions do not apply, dismissal should be granted for *forum non conveniens* as neither Recrutor not ANZ is headquartered in New York, both are registered outside the United States, all potential witnesses, except Renault, live and work in the Far East, and New York courts would be burdened if required to apply Irish law to this case. Defendant also requests an award of attorneys' fees as a sanction for frivolous conduct contending that plaintiff's commencement of an action in New York was in direct contravention of its own documentary evidence which provides for all disputes arising from the Terms and Conditions of the parties agreement to be heard in Dublin, Ireland under Irish law.

B. Plaintiff's Opposing Arguments/Cross Motion

Plaintiff opposes defendant's motion claiming that ANZ is not asserting that the Terms and Conditions brochure is binding upon them, but is simply "cherry picking" a single provision to defeat plaintiff's action. Plaintiff contends that ANZ cannot choose one provision, without accepting the entire contents of the brochure. In his affidavit in opposition, Renault states that he adopted the forum selection provision from prior versions of the brochure used by other companies for which he worked and that it never had any particular relevance prior to ANZ's motion.

Renault further avers that at all times in his dealings with ANZ he was a resident of New York and when he initially referred Mulhearn to ANZ, Mulhearn was also a New York resident, and Renaud worked for Société Générale in New York. ANZ also maintained an office in New York where it was served with the summons and complaint in this action. Renault contends that Recrutor currently has less than 200 Euros in its bank account so that requiring it to commence an action in a foreign jurisdiction would essentially be fatal to its claim as it does not have the funds to do so.

Recrutor also cross moves to compel disclosure of Mulhearn's employment agreement with ANZ. At oral argument, plaintiff's counsel withdrew the cross-motion, advising that the parties had resolved the issue.

IV. DISCUSSION

A. Standard on Motion To Dismiss Based upon Documentary Evidence

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support therefor (*see, Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]).

Notwithstanding these principles, where documentary evidence conclusively establishes a defense, dismissal may be warranted under CPLR § 3211 (a) (1) but only where such documentary evidence submitted resolves all factual issues and definitively disposes of plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Wallach v Hinckley*, 12 AD3d 893 [3d Dept. 2004]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]).

B. Forum Selection Clause/ *Forum Non Conveniens*

Paragraph 4 of Recrutor's Conditions of Appointment titled "Domicile and Jurisdiction" states: "Both parties are domiciled at the address of their registered offices. Any dispute which may arise between the two parties, as to the terms of the contract, will be under the exclusive jurisdiction of the TRIBUNAL OF COMMERCE OF DUBLIN, and the irish [sic] law will be applied."

Forum-selection clauses are *prima facie* valid (*see Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). As the Court of Appeals stated in *Boss v American Express Financial Advisors* (6 NY3d 242, 246 [2006], "'Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes'" (quoting *Brooke Group*). The "very point" of such clauses is to avoid litigation over personal jurisdiction or the application of the long arm statute (*see Sterling National Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept 2006]) and "are not to be set aside unless a party demonstrates that the enforcement of such 'would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging

party would, for all practical purposes, be deprived of his or her day in court'" (*id.* at 222 quoting *British W. Indies Guar. Trust Co. Ltd. v Banque Internationale A Luxembourg,* 172 AD2d 234 [1st Dept 1991]).

The contractual provision here is clear and unambiguous and there are no allegations of fraud or overreaching with respect to the provision. However, Recrutor argues that the Court should disregard the forum designation contained in the agreement because if enforced it would, for all practical purposes, be deprived of its day in court as it does not have the financial means to litigate in a foreign jurisdiction. Recrutor also adds that ANZ is improperly seeking to both deny the enforcability of the agreement, as well as enforce the forum selection clause. In *Sterling National Bank* (35 AD3d 222, 223[1st Dept 2006]), the Appellate Division, First Department held that "where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court's jurisdiction on *forum non conveniens* grounds." However, whether the Recrutor terms and conditions brochure constitutes a binding contract is an open issue. For this reason it cannot be said that the document "conclusively establishes" a defense pursuant to CPLR 3211(a)(1) sufficient to mandate dismissal of the complaint.

With respect to the alternative ground for dismissal, on a motion to dismiss on the ground of *forum non conveniens*, the defendant challenging the forum bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran v Pahlavi,* 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Straville v Land Cargo, Inc.,* 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran,* 62 NY2d at 479). Among the factors to be considered are "the residency of the parties, the potential hardship to proposed witnesses, the

availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville,* 39 AD3d at 736, [internal quotation marks omitted]).

While both parties are foreign corporations, one incorporated in Ireland and the other in Australia, both maintain offices in New York, the key representatives of both parties were residents of New York at the time of the initial negotiations, and the subject proposed employee, Mulhearn, was a resident of New York at the time of the initial negotiations. Moreover, plaintiff's representative negotiated the subject matter of this litigation from New York. None of the relevant discussions took place in or was connected to Ireland. None of the witnesses is located there. It does not appear that there is a more convenient forum available or that maintaining this action in New York would pose any undue burden on the court or the parties. The fact that the job for which Mulhearn was eventually hired is located in Singapore should not militate against the court retaining jurisdiction of the case.

Defendant's request for an award of attorney fees pursuant to NYCRR 130-1.1 is denied. It cannot be said that plaintiff has engaged in frivolous litigation by failing to commence litigation in the forum identified in the forum selection clause in the parties' alleged agreement.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the complaint based on the forum selection clause of the alleged contract and alternatively on the ground of *forum non conveniens*, is DENIED; and it is further

ORDERED that the motion for an award of attorney fees is DENIED; and it is further

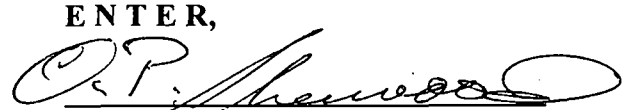
ORDERED that defendant shall serve and file its answer within twenty (20) days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED that counsel shall appear for a preliminary conference on Wednesday, March 7, 2012 at 9:30 AM, in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the Court.

DATED: January 13, 2012

E N T E R,



O. PETER SHERWOOD
J.S.C.