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

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

Stephen M. Wilson & BRW Engineering
- v -
Image Sat International, N.V.

INDEX NO. 651737/11
MOTION DATE
MOTION SEQ. NO. 001
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 by defendant to dismiss the complaint is DENIED for the attached Decision and Order.

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

Dated: April 16, 2012

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

STEPHEN M. WILSON and BRW ENGINEERING, LTD.	:	
Plaintiffs,	:	Index No. 651737/11
-against-	:	DECISION AND ORDER
IMAGESAT INTERNATIONAL N.V.,	:	Sequence No. 001
Defendant.	:	

MELVIN L. SCHWEITZER, J.:

This is a motion by defendant ImageSat International N.V. ("ImageSat") to dismiss a claim brought by plaintiffs Stephen M. Wilson and BRW Engineering, Ltd. (collectively, "Wilson")[1] for indemnification of legal expenses pursuant to a provision in ImageSat's Articles of Association. ImageSat moves the court pursuant to CPLR 3211(a)(1), (5), and (8) and CPLR 327. Specifically, ImageSat alleges: (1) that New York lacks personal jurisdiction over ImageSat; (2) that this court is an inconvenient forum for the litigation of Wilson's claim; and (3) that Wilson is estopped from bringing this claim due to the preclusive effect of a prior judgment issued by the Israeli District Court in Tel Aviv-Jaffa. For the reasons discussed below, ImageSat's motion is denied.

Background

The facts are alleged as follows:

ImageSat is a limited liability company that is organized under the laws of the Netherlands Antilles and maintains its principal place of business in Tel Aviv, Israel. ImageSat

[1] In the interest of clarity, the discussion accompanying this order will not treat Stephen M. Wilson and BRW Engineering, Ltd. as distinct entities. BRW Engineering is a Cayman Islands corporation that is wholly owned and operated by Mr. Wilson, has no assets other than its ownership stake in ImageSat, and, to date, has not conducted any business outside of Mr. Wilson's consulting work for ImageSat (discussed *infra*).

began in 1994 as a joint venture between Israel Aerospace Industries Ltd. ("IAI"), a manufacturer of aircraft and aerospace technologies owned by the government of Israel, and Core Software Technology, Inc. ("CST"), a California corporation founded and operated at the time by Wilson. IAI and CST founded ImageSat with the intention of commercializing satellite imaging technologies that had theretofore been used exclusively by the Israeli military. ImageSat, initially known as West Indian Space Ltd., was first incorporated under the laws of the Cayman Islands in 1997. In 2000, ImageSat changed its place of incorporation to the Netherlands Antilles (now Curaçao) and adopted its current name a short time later. ImageSat's board of directors held numerous meetings in New York at various times between 1997 and 2007.

Wilson is a United States citizen who lives in San Juan, Puerto Rico and is in the process of moving to the New York metropolitan area, where he maintained a residence until 2004. As noted, he has been involved with the ImageSat venture since its inception. During a preliminary period between 1994 and the incorporation of the venture in 1997, Wilson was responsible for raising capital among investors in the United States. He managed to raise more than $100 million in investment capital during this period, primarily from domiciliaries of New York, and enlisted New York-based lawyers and investment bankers to handle the legal and financial complexities of the investments. When ImageSat was first incorporated in 1997, Wilson was named Chairman and CEO, a capacity in which he continued to recruit investment capital for ImageSat in addition to orchestrating ImageSat's first transactions with customers.

In 2000, Wilson was replaced as CEO of ImageSat. He remained in a functionally equivalent position for a brief period in order to finish securing a large investment from Pegasus Capital Advisors ("Pegasus"), a private equity management firm with offices in New York and

Connecticut. After closing the investment, he fully relinquished his position as an officer and director of ImageSat. Pegasus, however, requested that Wilson remain involved in ImageSat's business as a contract consultant. Accordingly, Wilson met with representatives of ImageSat and Pegasus in New York to negotiate and draft a consulting agreement, under which Wilson's obligations to ImageSat included work responsibilities similar to those he held as CEO and a promise not to compete with ImageSat for a specified period. The consulting agreement was executed by the parties on July 25, 2000 in New York and contained a choice-of-law provision selecting New York law to govern the construction and enforcement of the agreement.

One of Wilson's projects under the 2000 consulting agreement involved soliciting and negotiating a long-term contract between ImageSat and the government of Venezuela. In January of 2002, Wilson and ImageSat entered into a new consulting agreement intended to allow Wilson to focus exclusively on the Venezuelan initiative. The new agreement took effect on January 8, 2002, replacing the 2000 consulting agreement. Like its precursor, the 2002 agreement contained the New York choice-of-law provision. Wilson executed the 2002 agreement in New York. In June 2003 and December 2004, Wilson and ImageSat entered into new consulting agreements revising and extending Wilson's contract employment with ImageSat. Both of these agreements contained the New York choice-of-law provision as well.

Despite initially positive indicators (including an agreement in principle between ImageSat and the Venezuelan government memorialized in a "Letter of Intent"), Wilson had not succeeded in closing the Venezuela contract by the end of 2005, at which time the December 2004 consulting agreement expired. On January 30, 2006, Wilson and ImageSat entered into a Letter Agreement providing compensation for Wilson contingent upon his taking specified steps

toward closing the Venezuela contract. Following several months without progress, ImageSat elected to terminate the Venezuelan initiative and end its contractual relationship with Wilson.

Between 2006 and 2010, Wilson led a group of minority shareholders in its pursuit of a series of claims against ImageSat and several of its officers and directors, IAI, and Elbit Systems Electro-Optics Elop Ltd. ("Elop"), a subsidiary of Israel's largest private manufacturer of military electronics that, like IAI, is a prominent shareholder of ImageSat stock. As of the filing of this complaint, IAI and Elop held a combined 60.5% of ImageSat's outstanding shares. The claims pursued by this group of shareholders alleged various acts of corporate malfeasance by IAI, Elop, and their individual representatives on the ImageSat board.

In April of 2010, ImageSat filed a lawsuit against Wilson in the Israeli District Court in Tel Aviv-Jaffa (the "Underlying Action"), alleging, *inter alia*, that Wilson fraudulently misrepresented the status of the Venezuelan initiative in order to secure extensions of his consulting contract with ImageSat. Wilson retained counsel in Israel in order to prepare his defense and requested in writing that ImageSat, pursuant to Article 37 of ImageSat's Articles of Association, advance him attorneys' fees and other costs occasioned by his defense of the Underlying Action. Article 37 provides, in relevant part:

> Indemnification
>
> 2. The Company shall have the power and, with due observance of applicable law, obligation to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action or suit by or in the right of the Company to procure a judgment in its favor by reason of the fact that such person is or was a Director, officer, employee or agent of the Company . . . against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if such person acted in good faith and in a manner such person reasonably believed to be in or not opposed to the best interests of the Company and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been finally

adjudged to be liable to the Company for improper conduct unless and only to the extent that the court in which such action or suit was brought or any other court having appropriate jurisdiction shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses, judgments, fines and amounts paid in settlement which the court in which the action or suit was brought or such other court having appropriate jurisdiction shall deem proper.

3. To the extent that a Director, officer, employee or agent of the Company has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in [paragraph 2] of this article, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

4. Expenses incurred in defending a civil or criminal action, suit, or proceeding shall be paid by the Company in advance of the final disposition of such action, suit, or proceeding upon receipt of an undertaking by or on behalf of the Director, officer, employee or agent to repay such amount if it shall ultimately be determined that such person is [not] entitled to be indemnified by the Company as authorized in this article.

Substantial portions of ImageSat's Articles of Association were planned and drafted in New York by Wilson and other representatives of the company, with the assistance of New York-based counsel, prior to its incorporation in the Netherlands Antilles in 2000.

Despite Wilson's written request (which included the promissory "undertaking" required by paragraph 4 before litigation expenses are to be advanced), ImageSat did not advance the costs incurred by Wilson in defending the Underlying Action, forcing Wilson to cover those expenses himself. ImageSat formally rejected Wilson's request for advancement in a letter dated May 11, 2010, asserting that Wilson was not an "agent" of ImageSat during the period at issue in the Underlying Action and, therefore, that Wilson was not entitled to advancement under Article 37. After other unsuccessful attempts to secure advancement of his expenses from ImageSat,

Wilson moved the court in the Underlying Action to compel the advancement in accordance with Article 37.

On February 23, 2011, after several months during which Wilson and ImageSat prepared for, subsequently postponed, and once again prepared for the impending discovery of documents relevant to the Underlying Action, ImageSat notified the Israeli court of its desire to withdraw its claims against Wilson, requesting that the court dismiss the Underlying Action without prejudice. Wilson responded by moving the court to dismiss the Underlying Action with prejudice and require ImageSat to pay "all [Wilson's] realistic expenses."[2] On April 7, 2011, the Honorable Judge Uri Shoham of the District Court in Tel Aviv-Jaffa entered a judgment dismissing the Underlying Action without prejudice, and awarding Wilson 30,000 New Israeli Shekels (equal in value to approximately $9,000.00), an amount substantially lower than the costs incurred by Wilson in defending the Underlying Action. Judge Shoham explained this decision in his judgment, which has been translated from Hebrew, as follows:

> As for the issue of the expenses, I am not of the opinion that there is a cause to impose on [ImageSat] realistic expenses in the sums requested by [Wilson]. Yet, absolute exemption is not reasonable, and I do not see a reason to avoid imposing expenses on [ImageSat], even though as stated, the motion was submitted at an early stage.

Following the disposition of the Underlying Action, Wilson continued to beseech ImageSat for reimbursement of his litigation expenses under Article 37. After several months with no success, he filed this action on June 22, 2011, seeking enforcement of the indemnification and advancement obligations contained in Article 37 of the ImageSat Articles of

[2] Based on Wilson's response and cross-motion, counsel for Wilson in Israel appears to have estimated the litigation costs incurred by Wilson prior to ImageSat's motion to dismiss at $108,000.00. It is unclear precisely what types of costs are included in this estimate and whether it purports to approximate "all . . . realistic expenses."

Association. He seeks reimbursement for costs incurred in the process of defending the Underlying Action and litigating the matter now before this court.

Procedural History

ImageSat has moved to dismiss Wilson's claim for indemnification and advancement pursuant to CPLR 3211(a)(1), (5), and (8) and CPLR 327, and the parties have submitted affidavits and briefs relating to the questions presented by ImageSat's motion.

Discussion

On a motion to dismiss prior to the filing of a responsive pleading, the complaint is to be construed liberally, and the plaintiff is to receive the benefit of every favorable inference afforded by the facts alleged in the complaint and in any affidavits he has submitted in opposition to the motion. *Held v Kaufman*, 91 NY2d 425, 432 (1998).

ImageSat's motion to dismiss raises three discrete threshold issues pertaining to this claim: (1) whether ImageSat is subject to personal jurisdiction in New York, (2) whether this court is a convenient forum for the litigation of this claim, and (3) whether this claim is estopped by the judgment dismissing the Underlying Action without prejudice. Each of these issues will be considered in turn.

A. Personal Jurisdiction

The plaintiff, as the party asserting jurisdiction, bears the burden of proof in establishing that a defendant domiciled elsewhere is subject to personal jurisdiction in New York. *Brandt v Toraby*, 273 AD2d 429, 430 (2d Dept 2000). It does not appear from the complaint or from Wilson's affidavit that ImageSat possesses any discoverable information to which Wilson's lack of access might create "undue obstacles" in meeting this burden of proof. *See* CPLR 3211(d); *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 (1974). Accordingly, Wilson must

establish a *prima facie* case of personal jurisdiction to defeat this motion. *Brandt*, 273 AD2d at 430.

It is conceded that ImageSat, a non-domiciliary that does not maintain a presence in this State through business of a continuous and systematic nature, is not subject to general jurisdiction in New York. Wilson argues that this court may nevertheless exercise specific jurisdiction over ImageSat pursuant to CPLR 302(a)(1), which grants jurisdiction over "any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state" to the extent that the claim for which jurisdiction is sought "arises from" said business.

1. ImageSat "transacted business" in New York within the meaning of CPLR 302(a)(1).

The first prong of the jurisdictional inquiry under CPLR 302(a)(1) requires the court to determine whether the defendant has "transacted business" in New York. In determining whether a non-domiciliary has engaged in the requisite transaction of business, "the proper analysis is for the court to consider the totality of circumstances surrounding defendant's activities in New York in connection to the matter giving rise to this lawsuit." *Bialek v Racal-Milgo, Inc.*, 545 FSupp 25, 34 (SDNY 1982) (interpreting CPLR 302(a)(1); *see also Bank of New York v Strumor*, 179 AD2d 736, 737 (2d Dept 1992); *Capitol Records, LLC v VideoEgg, Inc.*, 611 FSupp2d 349, 357 (SDNY 2009). The *sine qua non* of jurisdiction founded upon CPLR 302(a)(1) is evidence of activities through which the defendant has purposefully availed itself of the privilege of conducting business in New York, thereby invoking the benefits and protections of New York law. *Ellis v Smith Transfer Corp.*, 24 AD2d 871 (2d Dept 1965); *Kazlow & Kazlow v A. Goodman & Co.*, 402 NYS2d 98, (NY App Term 1977).

Here, ImageSat has engaged in several activities in connection with this matter that, cumulatively, indicate that it has availed itself of the privileges of doing business in New York and the concomitant protections of New York law. These activities begin as far back as the developmental phases of ImageSat, during which Wilson, acting as ImageSat's chief executive, raised over $100 million dollars in private investment capital for the company – a substantial portion of which, it is alleged, came from New York investors. In addition, Wilson enlisted lawyers and investment bankers in New York to deal with the legal and financial complexities of this process. ImageSat cites *PaineWebber Inc. v Westgate Group, Inc.*, 748 FSupp 115 (SDNY 1990) and *Bush v Stern Bros. & Co.*, 524 FSupp 12 (SDNY 1981) for the proposition that hiring a New York law firm or investment house is not itself sufficient to satisfy the "transacted business" requirement of CPLR 302(a)(1). In those cases, the legal and financial services performed by the entities in question had no connection to the State of New York; the location of the law firms and investment banks was entirely coincidental to their ability to provide the services sought by their clients.

New York's status as a commercial center naturally attracts leading providers of legal and financial services to the State, and courts must be careful not to exercise jurisdiction over a party simply because it has hired, by happenstance, a firm or bank that maintains an office in New York. In this instance, however, it is reasonable to infer that Wilson hired New York lawyers and bankers at least in part because they were well positioned to perform work relating to the considerable volume of private capital flowing into the company from New York investors – whose contributions, it must again be noted, had been actively solicited by ImageSat through its chief executive, Wilson. The investment made by Pegasus, a private equity management firm with an office in New York, was the largest single cash investment ever made in ImageSat and

the initial impetus, it is alleged, for ImageSat's retention of Wilson as a contract consultant. This investment took such time to solicit, negotiate, and close that in 2000 ImageSat created a new position for Wilson so that he could finish securing it despite having been replaced as CEO. The solicitation of such investments constitutes purposeful availment of the privileges of doing business within the forum, *see, e.g.*, *Kreutter v. McFadden Oil Corp.*, 71 NY2d 460 (1988), and ImageSat's retention of New York law firms and banks in connection with those investments underscores the volitional character of those actions.

In addition, ImageSat and Wilson negotiated, drafted, and executed the 2000 consulting agreement – under which Wilson began work on the ill-fated Venezuelan initiative – in New York. It is alleged that Wilson was retained after the closing of the Pegasus investment at the request of Pegasus, an allegation that is supported by the fact Pegasus was represented at the negotiations between Wilson and ImageSat over the 2000 consulting agreement. The prominent role played by Pegasus in this process is significant on two grounds. First, it provides a relevant connection between the clearly purposeful actions of ImageSat in soliciting investments in New York and the status of Wilson's contractual relationship with ImageSat, which is the subject of this action. Second, it strongly suggests that ImageSat's choice to negotiate, draft, and execute the contract in New York was not the same type of purely coincidental decision that prompted the court to deny jurisdiction in *Standard Wine & Liquor Co. v. Bombay Spirits Co.*, 20 NY2d 13 (1967).

In that case, defendant corporation's only connection to New York was an exclusive F.O.B. shipping agreement with an American shipping agent who sold defendant's products to

plaintiff, a distributor located in New York. *Id.* at 15.[3] By contrast, ImageSat chose to meet in New York to negotiate, draft, and execute the 2000 consulting agreement in order to ingratiate itself with a key investor based in the New York area. The connection between ImageSat's action and the State of New York can hardly be characterized as coincidental, and analogous conduct has regularly been found to satisfy the "transacts business" requirement of CPLR 302(a)(1). *See, e.g.*, *Moser v Boatman*, 392 FSupp 270 (EDNY 1975) (holding defendant's physical presence in New York for negotiation of the disputed contract sufficient to confer personal jurisdiction); *George Reiner & Co. v Schwartz*, 41 NY2d 648 (1977) (holding defendant's execution of an employment contract in New York with a New York corporation, despite the fact that it concerned business to be performed elsewhere, sufficient for jurisdiction under CPLR 302(a)(1)); *CAVU Releasing, LLC v Fries*, 419 FSupp2d 388 (SDNY 2005) (holding defendant's extensive negotiations in New York with plaintiff New York corporation over rights to distribute a film abroad sufficient to confer jurisdiction).

The 2003 and 2004 consulting agreements (which, despite its conclusory allegations to the contrary, ImageSat has offered no reason to believe are not relevant to Wilson's claim) were also substantially negotiated in New York. The fact that ImageSat formally executed these agreements elsewhere does not render them irrelevant to or dispositive of the jurisdictional analysis, *see Longines-Wittnauer Watch Co. v Barnes & Reinecke, Inc.*, 15 NY2d 443, 458

[3] *Standard Wine & Liquor* is additionally – indeed, perhaps more forcefully – distinguishable from the instant matter by the fact that the defendant over whom jurisdiction was sought in that case *did not execute the contract in New York*, instead signing it in England and returning it to New York to be executed there by the plaintiff. 20 NY2d at 15. Abundant precedent indicates that although the defendant's execution of a contract in issue while physically present in New York is neither necessary nor sufficient for jurisdiction, it weighs strongly in favor of it. *See, e.g.*, *Nat'l Union Fire Ins. Co. v BP Amoco P.L.C.*, 319 FSupp2d 352 (SDNY 2004); *Kaddis Mfg. Corp. v Gil-Bar Rubber Products Co.*, 103 AD2d 1010 (4th Dept 1984); *George Reiner & Co. v Schwartz*, 41 NY2d 648 (1977); *cf. Patel v Patel*, 497 FSupp2d 419 (EDNY 2007) (emphasizing the negotiation and execution of the contract in issue outside of New York as a critical factor in finding no jurisdiction). Thus, the teaching of *Standard Wine & Liquor* is of little help in assessing the jurisdictional significance of the facts presently before this court.

(1965); in fact, an out-of-state defendant's presence in the forum for intensive negotiations that lead to the disputed contract – even one involving services to be performed elsewhere – militates strongly in favor of finding jurisdiction. *See, e.g.*, *Moser*, 392 FSupp at 274 (holding the extent of negotiations over the disputed contract and defendant's travel to New York on multiple occasions to participate in those negotiations to be "factors . . . determinative even though the contract may have been formally executed [elsewhere]"); *Round One Productions, Inc. v Greg Page Enterprises, Inc.*, 566 FSupp 934, 937 (EDNY 1982) (holding that "[t]he notions of due process are not offended by . . . conferring . . . jurisdiction over the defendants under § 302(a)(1)" when the parties have engaged in "business related discussions in New York" involving substantive proposals that ultimately lead to the disputed contract).

In addition, ImageSat's board of directors held numerous meetings in New York during the time period in question, several of which involved discussions concerning Wilson's work on the Venezuelan initiative and at least one of which involved discussions concerning the termination of Wilson's contractual relationship with the company. "The attendance of a corporation's director representatives at board meetings in New York constitutes the transaction of business by the corporation." *Nordic Bank PLC v Trend Group, Ltd.*, 619 FSupp 542, 567 (SDNY 1985), *citing General Reinsurance Corp. v Plymouth Mutual Life Insurance Co.*, 280 FSupp 66 (SDNY 1968); *Streifer v Cabol Enterprises Ltd.*, 19 AD2d 948 (3d Dept 1963); *Pomeroy v Hocking Valley Railway Co.*, 218 NY 530 (1916). Where, as here, board meetings concerned matters relevant to the action before the court, they strongly favor the exercise of jurisdiction over the defendant.

Finally, it is of note that each of the consulting agreements governing Wilson's relationship with ImageSat between 2000 and 2006 contained a New York choice-of-law

provision. ImageSat is correct to note that such provisions are not themselves sufficient to confer jurisdiction over a non-domiciled defendant. *Executive Life Ltd. v Silverman*, 68 AD3d 715, 717 (2d Dept 2009). However, choice-of-law provisions identifying the law of this State as controlling the construction and enforcement of the agreement are a relevant consideration in the overall analysis of a defendant's contacts with New York, *Id.* at 717, insofar as they indicate that the defendant purposefully availed itself of the benefits and protections of New York law. *See, e.g.*, *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007).

In light of the totality of the circumstances surrounding ImageSat's connection to New York as it pertains to the instant case and the extent to which they indicate ImageSat's having purposefully availed itself of the privileges of doing business in this State, it is clear that ImageSat has "transacted business" within the meaning of CPLR 302(a)(1).

2. *This action "arises from" the business transacted by ImageSat in New York.*

Having established ImageSat's connection to New York in the abstract, the second prong of the jurisdictional inquiry under CPLR 302(a)(1) requires the court to determine whether Wilson's claim "arises from" the business constituting that connection. The nub of this requirement is "the existence of some articulable nexus between the business transacted and the cause of action sued upon," *McGowan v Smith*, 52 NY2d 268, 272 (1981), such that a non-domiciled defendant is not subjected to personal jurisdiction in New York "based upon 'random' or 'fortuitous' contacts." *Bozell Group, Inc. v Carpet Co-op of Am. Ass'n*, 2000 WL 1523282, 6 (SDNY 2000).

ImageSat argues that this action does not "arise from" the aforementioned contacts with New York because the right asserted in Wilson's complaint is created by ImageSat's Articles of Association, not by Wilson's employment with ImageSat as its founding CEO or, subsequently,

by the consulting agreements that extended his service to ImageSat for an additional six years. This excessively formalistic approach is ill-suited to answering the oblique and inexact question of whether a cause of action "arises from" a transaction of business. The right of indemnification which forms the basis of Wilson's claim is created in the abstract by Article 37, but it acquires legal force when it is bestowed upon persons by virtue of their employment relationship with the company. In Wilson's case, the circumstances surrounding that relationship have been described in detail, and they involve extensive purposeful contact with the State of New York. The legal issue to be decided in this case is not the abstract scope of the indemnification provision in Article 37, but whether Wilson, given the interaction between that provision, the terms of his employment with ImageSat, and the substance of the Underlying Action, can invoke the benefit of that provision. Wilson's claim is highly enmeshed with business transacted by ImageSat in New York.

ImageSat cites *Bozell Group*, *supra*, for the proposition that "links in the chain of events leading to the claims for which relief is sought" do not constitute an adequate nexus between the contacts and the claim. In that case, defendant's only connections to New York were two meetings with plaintiff to discuss the plan that plaintiff, defendant's advertising agent, would use to promote defendant's products. The dispute between the parties concerned whether a settlement agreement, which they reached several months after the meetings in New York, excused defendant from indemnifying plaintiff against an arbitration claim brought by a third party. The court declined to exercise jurisdiction over defendant because the settlement agreement, which determined the extent of defendant's obligation to indemnify plaintiff, was insufficiently related to the meetings, defendant's only contacts with New York. The contention that ImageSat's obligation to indemnify Wilson, which will turn on the characterization of his

relationship with ImageSat, is similarly unrelated to the agreements through which that relationship was created is manifestly incorrect. The proper analog for the settlement agreement in *Bozell Group* in the instant matter is the series of consulting agreements between Wilson and ImageSat. These are sufficiently related to ImageSat's New York contacts because, in significant part, *they are ImageSat's New York contacts*. ImageSat also neglects to mention that, unlike this indemnification suit, no contacts relevant to the underlying action in *Bozell Group* could have conferred jurisdiction because that action was brought by a third party. Needless to say, that is not the case here, and the grounds available for exercising jurisdiction over ImageSat are significantly more expansive.

In sum, many of ImageSat's connections to New York exist precisely because of the employment relationship between Wilson and ImageSat. ImageSat, then, cannot be genuinely surprised at being haled into a New York court for a lawsuit in which the legal status of that relationship is the predominant issue. Wilson has met his burden of a *prima facie* showing that ImageSat is subject to personal jurisdiction in New York under CPLR 302(a)(1).

A. Forum Non Conveniens

ImageSat further asserts that Wilson's claim for indemnification should be dismissed pursuant to CPLR 327 on the grounds of *forum non conveniens*. CPLR 327(a) provides that the court may dismiss an action when it "finds that in the interests of substantial justice the action should be heard in another forum." As the party challenging the plaintiff's choice of forum, ImageSat bears the heavy burden of demonstrating "relevant private or public interest factors which militate against accepting the litigation." *Bank Hapoalim (Switz.) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 (1st Dept 2006). To satisfy this burden, ImageSat must offer specific evidence showing that litigating the instant matter in New York would impose a substantial

hardship upon it, this court, or both relative to an alternative available forum. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984). Considering the private and public burdens, the court finds that ImageSat has not established a hardship sufficient to defeat the strong presumption favoring the plaintiff's choice of forum.

ImageSat's contention that this court is an inconvenient forum for the litigation of the instant matter rests in considerable part upon the unreported decisions of this and other courts in several previous actions involving both parties. These include *Wilson v ImageSat International N.V.*, 2008 WL 2851511 (SDNY 2008) ("*Wilson I*"), *Imaging Holdings I, LP v Israel Aerospace Industries Ltd.*, 26 Misc3d 1226 (2009)(A), and *Core Software Technology, Inc. v ImageSat International N.V.*, 2010 WL 21173 (SDNY 2010). For the following reasons, ImageSat's reliance upon those decisions is misplaced.

The residency status of the parties is significant to the *forum non conveniens* analysis insofar as it indicates the motivation behind a plaintiff's choice of forum. *Pahlavi*, 62 NY2d at 479. Where neither the residency of the parties nor the locus of the transaction giving rise to the suit make the choice of forum a facially sensible one, courts may naturally become wary of the danger of forum-shopping. This suspicion formed much of the impetus for the dismissal in *Wilson I*, in which Wilson was only one of fifteen minority shareholders in ImageSat (only four of whom were American citizens) bringing a claim against eighteen different defendants, almost all of whom were Israeli citizens or corporations doing business in Israel. Here, by contrast, the sole plaintiff is an American citizen who is in the process of reestablishing his primary residence in New York, a State with which he has many prior business and personal connections. Additionally, as addressed in the jurisdictional analysis, substantial portions of the transaction giving rise to this claim took place in New York. The significance of New York to the lone

plaintiff and the relevance of New York to this particular action strongly controvert ImageSat's suggestion that Wilson is engaged in forum-shopping, and do not provide any basis upon which this action could be dismissed.

The private interests in litigating this action elsewhere are also extremely different from those in *Wilson I*, *Imaging Holdings* and *Core Software*. The burden imposed on ImageSat by being forced to litigate this action in a foreign jurisdiction is not lost on this court, but that alone cannot be enough to warrant dismissal, as similar burdens exist in all such cases involving foreign defendants. Beyond asserting that relevant witnesses and documents are located in Israel – an assertion that is largely defanged by Wilson's more extensive explanation of the relevance of myriad documents located in New York – ImageSat has shown no hardship created by this litigation above and beyond that which a foreign defendant would naturally be expected to bear. In addition, the current representatives of the company (and witnesses whose testimony, ImageSat claims, will be indispensable to the litigation of this action) have a history of traveling to the forum without experiencing undue hardship, as they frequently flew to New York for board meetings between 1997 and 2007. It is even admitted by former ImageSat Chairman Moshe Keret that New York was chosen for several board meetings "for convenience."

The most striking contrast of all between the instant matter and the earlier dismissals upon which ImageSat relies appears, due to the total contrariety of legal issues raised, when the public interests at stake are considered. First and foremost, the earlier cases all alleged some form of corporate malfeasance by certain ImageSat directors and the company's primary institutional shareholders, a government-owned manufacturer of military air and space technologies (IAI) and a subsidiary of Israel's largest private manufacturer of military electronics (Elop). The corporate structure and managerial decisions of those businesses and of

ImageSat would have naturally stood at the center of those cases, a consideration which prompted this court to conclude in *Imaging Holdings* that "it is indisputable that Israel has a strong interest in having this case adjudicated in its courts." The present case does not concern any potentially sensitive information related to Israeli national defense, nor does it implicate Israel's "strong stake in insuring that the affairs of ImageSat are conducted with integrity," *Wilson I*; rather, it merely seeks adjudication of a single former employee's rights under the company's Articles of Association. Israel has no apparent compelling interest in jurisdiction over this claim.

Finally, the burden on the court here is minimal. This case involves the interpretation of a corporate organizing document according to the laws of the Netherlands Antilles and the construction of a series of consulting agreements according to New York law. New York courts have the benefit of abundant expertise in efficiently resolving such matters, and insofar as the only issues posed are questions of law, there is little reason to believe that this case will gum up the court's docket for any substantial amount of time. Few – if any – of the factors that so strongly favored dismissal in the previous cases are present in this case, one between different parties litigating entirely different issues that stand to create different needs for the litigants. The interests of substantial justice, therefore, do not require that this case be dismissed.

B. Collateral Estoppel/*Res Judicata*

Finally, ImageSat asserts that Wilson's claim for indemnification should be dismissed pursuant to CPLR 3211(a)(5) on the grounds that it is precluded by the judgment of the Israeli District Court dismissing the underlying action without prejudice. Whether the doctrine to be applied is collateral estoppel or *res judicata*, this argument is without merit.

Res judicata bars a party from relitigating the same claim against the same party if a valid and final judgment has already been issued on the merits of that claim. *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 (2008). Collateral estoppel, a corollary of *res judicata*, bars a party from relitigating a particular issue that was actually and finally adjudged in a previous action. *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 (1985). Although the substantive requirements for preclusive effect under each doctrine diverge in certain respects,[4] it is not necessary to determine which one applies here because to invoke the benefit of preclusion under either doctrine, ImageSat bears the burden of proving that the prior decision finally adjudicated the merits of Wilson's indemnification claim. *See, e.g. Litz Enterprises, Inc. v Standard Steel Industries, Inc.*, 57 AD2d 34, 38 (4th Dept 1977) ("[t]he burden is on the party asserting *res judicata* to show that the prior judgment or determination was on the merits"); *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 (1999) ("[t]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue"). It has failed to satisfy this burden.

At the outset, it must be noted that a dismissal without prejudice is perforce not a judgment on the merits. *Landau*, 11 NY3d at 13 ("by its terms such a judgment is not a final determination on the merits"), *citing Miller Mfg. Co. v Zeiler*, 45 NY2d 956 (1978). In order to invoke preclusion, then, ImageSat must prove that the Israeli District Court intended to issue a final adjudication of Wilson's rights under the indemnification provision without passing on any of the merits of ImageSat's claim. Given the brevity with which the issue of Wilson's expenses was treated in Judge Shoham's opinion and the language used in doing so, this court is confident

[4] The applicability of one doctrine or the other would turn on the arcane question of whether the matter of Wilson's entitlement to any indemnification is characterized as a "cause of action" or an "issue." *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984). Because both require that the preclusive determination be made on the merits, however, it is unnecessary for the purposes of this case to distinguish between the two.

that no such final adjudication was intended. Though it might be argued that Judge Shoham's mention of Wilson's "request" for expenses implies that he is ruling on the merits of Wilson's motion to compel indemnification and advancement, the two sentences devoted to that request do not mention Article 37, Wilson's employment status with ImageSat, any of the consulting agreements governing that status, or any phraseology even remotely approximating the concept of indemnification. The idea that such a treatment was meant to support a decisive determination of Wilson's right to indemnification and advancement under Article 37 beggars credulity.[5]

Judge Shoham did, however, remark that ImageSat moved to dismiss the Underlying Action at a "very early stage" of the proceedings. The mention of the Underlying Action's immaturity suggests that, rather than analyzing Wilson's rights under ImageSat's Articles of Association and the consulting agreements in determining Wilson's award, Judge Shoham was instead considering the relative magnitude of the burden placed upon Wilson by the Underlying Action. This supports the notion that the money awarded to Wilson by the Israeli District Court was a customary award of nominal expenses rather than a final determination of Wilson's legal rights. Moreover, because ImageSat moved to dismiss the underlying action a matter of days before discovery was to commence, the judgment was issued before Wilson would have had an opportunity to collect evidence that ImageSat itself asserts, in its *forum non conveniens* argument, would have been relevant to his claim. *See* CPLR R 5013 ("[a] judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise"). For these reasons, and because ImageSat has not pointed to any

[5] This is especially true when, as Wilson notes in his brief opposing ImageSat's motion, it is customary for Israeli courts to award nominal costs to a prevailing party regardless of and separate from any legal claim that party may have to recover additional expenses. *See* David Zailer, "Israel," *in* Shelly R. Grubbs *et al.*, eds., *International Civil Procedure* 342 (2003).

collateral indicators that might militate in favor of characterizing the determination as "on the merits," this court is unwilling to construe the Israeli District Court's approval of ImageSat's voluntary dismissal as precluding the claim at bar.

Accordingly, it is

ORDERED that defendant ImageSat International N.V.'s motion to dismiss the claim is denied.

Dated: April 16, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER