

Danders & More v Nova Capital Partners, LLC
2013 NY Slip Op 30144(U)
January 14, 2013
Sup Ct, New York County
Docket Number: 110628/2010
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Danders & Moore
-v-
Nova Capital Partners

INDEX NO. 110628/10

MOTION DATE _____

MOTION SEQ. NO. 02

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

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

MOTION IS DECIDED WITH
WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/14/13

Luy, J.S.C.
LOUIS B. YORK
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----- X
DANDERS & MORE,

Index No. 110628/2010

Plaintiff,

- against-

DECISION AND ORDER

NOVA CAPITAL PARTNERS, LLC,

Defendant.

----- X

YORK, J.S.C.:

FILED
JAN 25 2013
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Danders & Moore (D & M), a law firm located in Copenhagen, Denmark, brings this action seeking approximately eighty-thousand dollars in legal fees against defendant Nova Capital Partners, LLC (Nova), a New York-based firm that specializes in international investment banking, with offices throughout the world. The complaint alleges that Nova retained D & M in connection with a proposed acquisition of Parken Sports Entertainment A/S, a Danish corporation, which was never consummated.

Nova moves to dismiss the complaint on the following grounds: a defense founded upon documentary evidence (CPLR 3211 [a] [1]); lack of subject-matter jurisdiction (CPLR 3211 [a] [2]); failure to state a cause of action (CPLR 3211 (a) [7]); and that New York is an inconvenient forum (CPLR 327 [a]).

The retention of D & M was pursuant to a January 29, 2010 engagement letter (the engagement letter), executed by Jan Larsen

(Larsen), purportedly on behalf of Nova. The engagement letter incorporates by reference D & M's "standard terms of engagement" (the standard terms), which contain the following forum selection clause:

Danish law governs these terms of engagement and any dispute arising out of the terms will be subject to the exclusive jurisdiction of the Danish courts

(mov. aff., ¶ 2).

Nova presents two threshold issues. First, Nova relies upon the forum selection clause. Next, Nova argues that Larsen was an independent contractor of Nova, without authority to bind Nova to the engagement letter.

Nova states that Larsen was a "principal" of Nova, essentially a finder, who is only paid a percentage of any fees collected by Nova on business brought to Nova by Larsen, and was not an employee of Nova. D & M counters that Larsen had apparent authority to enter the engagement letter on behalf of Nova.

In order to grant Nova's motion based on documentary evidence (CPLR 3211 [a] [1]), the documentary evidence submitted by Nova must "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). The evidence must conclusively demonstrate that Larsen lacked apparent authority to enter into the engagement letter on behalf of Nova.

The doctrine of apparent authority

is established to prevent fraud, and proceeds also upon the ground that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury

(*Walsh v Hartford Fire Ins. Co.*, 73 NY 5, 10 [1878]).

The evidence shows that in addition to the title of "principal," Nova gave Larsen the title of "Business Development Director," resident in the London office, and gave him an email address, "jlarsen@novacapitalpartners.com," which was linked to Nova's website (ex. E to Hansen aff.).

To demonstrate the existence of apparent authority, the Court of Appeals requires a factual showing of

words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction ... [and] a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal -- not the agent

(*Hallock v State*, 64 NY2d 224, 231 [1984]).

Nova has failed to meet its burden of establishing by documentary evidence that it did not sufficiently vest Larsen with apparent authority to enter into the engagement letter on Nova's behalf, or that D & M was not justified in believing that Larsen had actual authority. Nova's actions of giving Larsen the title of "Business Development Director," and an email address

through Nova's headquarters, are sufficiently misleading, assuming Larsen lacked actual authority to retain D & M, to justify D & M in relying upon Larsen's appearance of authority to execute the engagement letter on behalf of Nova. Therefore, Nova's CPLR 3211 (a) (1) motion is denied.

The second threshold issue is whether forum selection clause is enforceable. Although the engagement letter itself does not contain a forum selection clause, this action plainly arises out of the standard terms, section 4 of which governs payment of charges for legal services rendered (*id.*). The standard terms are incorporated by reference in the engagement letter.

A Forum selection clauses is

prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court [citation and internal quotation marks omitted]

(*Hluch v Ski Windham Operating Corp.*, 85 AD3d 861, 862 [2d Dept 2011]).

Nova has not presented sufficient facts to demonstrate that any of the criteria listed in *Hluch* are present here.

Nova argues that this court lacks subject-matter jurisdiction by operation of the forum selection clause. This is not a correct analysis. The subject-matter jurisdiction of the

New York Supreme Court is not divested by a forum selection clause, which is a mere contractual provision (see *Lischinskaya v Carnival Corp.*, 56 AD3d 116, 122 [2d Dept 2008]). The dismissal resulting from enforcement of the contractual forum selection clause has been held to be more analogous to dismissal for lack of personal jurisdiction (see *id.* at 123-124). The forum selection clause is also documentary evidence, which provides a ground for dismissal pursuant to CPLR 3211 (a) (1) (see *id.* at 123).

"Absent a strong showing that it should be set aside, a forum selection agreement will control [internal citations and quotation marks omitted]" (*Hluch*, 85 AD3d at 862). "Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes, particularly those involving international business agreements [citation and internal quotation marks omitted]" (*Pratik Apparels, Ltd. v Shintex Apparel Group, Inc.*, 96 AD3d 922, 923 [2d Dept 2012]).

D & M argues that Nova waived its right to enforce the forum selection clause by participating in discovery for two years, and by asserting counterclaims and then litigating their sufficiency. The counterclaims were dismissed.

Nova asserts that it was unaware of the existence of the forum selection clause until the standard terms were produced during discovery. Thus, Nova argues that it could not have

waived a known right.

D & M has not demonstrated that Nova waived its right to enforce the forum selection clause. Nova's "participation in this litigation did not waive the defense afforded by the forum selection clause" (*Lischinskaya v Carnival Corp.*, 56 AD3d at 119.

Nor did D & M waive the defense by asserting a counterclaim.

"A defendant, who pleads a related counterclaim together with a jurisdictional objection in its answer, does not waive such objection [citation omitted]" (*Calloway v National Services Indus., Inc.*, 93 AD2d 734, 735 [1st Dept 1983] *affd* 60 NY2d 906 [1983]). Nova's failure to plead the objection in its answer can be excused based on the uncontroverted allegation that Nova did not have knowledge of the existence of the forum selection clause until it was produced in the course of discovery. "[B]y simply defending on the merits and seeking discovery, [D & M] did not expressly or impliedly waive its jurisdictional objection" (*id.*).

D & M has not established that "enforcement of the forum selection clauses would violate public policy or that a trial in [Denmark] would be so impracticable and inconvenient that [D & M] would be deprived of [its] day in court" (*Public Adm'r Bronx County v Montefiore Med. Ctr.*, 93 AD3d 620, 621 [1st Dept 2012]). Having included the forum selection clause in its own retainer documents, D & M is not well positioned to complain of its

enforcement.

Plaintiff's inconvenient forum argument lacks merit. As the Appellate Division, Second Department, observed,

[t]hus, contrary to the plaintiff's argument, even though the Supreme Court had jurisdiction of the matter despite the forum selection clause, it had no authority to grant discretionary relief to the plaintiff pursuant to CPLR 327 once it determined that the contract required that the complaint be dismissed

(see *Lischinskaya*, 56 AD3d at 124).

Accordingly, it is

ORDERED that the motion of defendant Nova Capital Partners, LLC to dismiss the complaint is granted pursuant to (CPLR 3211 [a] [1]), and the complaint is dismissed, with costs and disbursements, as taxed by the Clerk of the Court; and it is further

ORDERED that defendant shall have judgment accordingly.

Dated: 1/14/13

E N T E

FILED

R: JAN 25 2013

NEW YORK COUNTY CLERK'S OFFICE

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J. S. C.

LOUIS B. YORK
J.S.C.