

Out Publ., Inc. v Lipo Liquidating Corp.

2013 NY Slip Op 31449(U)

July 1, 2013

Supreme Court, New York County

Docket Number: 601855/2007

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X
OUT PUBLISHING, INC.,

Plaintiff,

-against-

Index No.: 601855/2007
Motion Date: 12/12/12
Motion Seq. No.: 014

LIPO LIQUIDATING CORP., TIMO
LIQUIDATING CORP., SPECO
LIQUIDATING CORP., DANIEL H.
RENBURG, EUGENE KAPALOSKI and
JAMES M. FRANKLIN,

Defendants.

-----X
The following papers, numbered 1 to 3, were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1

Answering Affidavits - Exhibits No(s) 2

Replying Affidavits No(s) 3

Cross-Motion: Yes No

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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM
DECISION.

July 1
Dated: ~~June~~ July, 2013


Hon. Eileen Bransten

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

- 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 THREE

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OUT PUBLISHING, INC.,

Plaintiff,

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LIQUIDATING CORP., SPECO
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RENBURG, EUGENE KAPALOSKI and
JAMES M. FRANKLIN,

Defendants.

-----X

BRANSTEN, J.

Defendants Daniel H. Renberg, Eugene Kapaloski, and James M. Franklin (the “Individual Defendants”), together with Defendants Timo Liquidating Corp. (“Timo”) and Speco Liquidating Corp. (“Speco”), (collectively with Individual Defendants, the “Jurisdictional Defendants”) move to dismiss Plaintiff Out Publishing, Inc.’s (“Out”) Second Amended Complaint (“SAC”) pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Plaintiff opposes. For the reasons set forth below, Defendants’ motion is granted, in part, and denied, in part.

Background¹

According to the SAC, this action arises out of a transaction between Out and non-moving Defendant Lipo Liquidated Corp. (“Lipo”). Lipo purchased all of Out’s assets, primarily *Out* magazine, pursuant to an Asset Purchase Agreement dated April 4, 2000 (“APA”),² (SAC ¶ 17). Plaintiff alleges in the SAC that Lipo purchased Out expecting to convey the combined companies to a third party. (SAC ¶ 17). Accordingly, Section 13.1 of the APA provides that Lipo must pay additional consideration to Out in the event that Lipo sells substantially all of its assets for over \$15,000,000. (SAC ¶ 21). In 2005, Lipo sold all of its assets for an amount disputed by the parties, but has not paid any additional consideration to Out. (SAC ¶¶ 39, 48).

Plaintiff alleges that Lipo is part of a closely-knit corporate family along with Timo and Speco, all controlled by the Individual Defendants. (SAC ¶¶ 61, 63). Timo was a wholly-owned subsidiary of Lipo, which received some assets from Out as Lipo’s nominee under the APA.³ (SAC ¶¶ 8, 59). Timo merged with Lipo in 2007 and no longer exists. (SAC ¶ 8). In 2004, allegedly in contemplation of the 2005 sale, Lipo transferred

¹ All facts in this section are undisputed, unless otherwise noted.

² At the time of the APA, Lipo was known as “Liberation Publications, Inc.” (SAC ¶ 17).

³ At the time of the APA, Timo was known as “Triangle Marketing Services, Inc.” (SAC ¶ 28).

certain “adult” assets to a newly formed corporation, Speco. (SAC ¶ 33). Before the parties consummated the APA in 2000, Lipo had been publishing *Advocate* magazine as well as three “adult content” magazines. (SAC ¶¶ 17, 60). Lipo and Speco are both Delaware corporations with offices in Illinois. (SAC ¶¶ 7-9).

During the time period relevant to this litigation, the Individual Defendants were the only directors and officers of Lipo, Timo and Speco. (SAC ¶¶ 10-12). The Individual Defendants were also the sole shareholders of Lipo and Speco. (SAC ¶¶ 7, 9). None of the Individual Defendants are New York residents. (SAC ¶¶ 10-12).

Franklin served as CEO and President of Lipo, Timo and Speco, was involved in the negotiations with Out leading up to the APA, and ultimately signed the APA as President of Lipo. (SAC ¶ 12, Ex. 39; Affirmation of P. Kent Correll (“Correll Affirm.”) app. III, pt. 1, at 107-08).

Plaintiff avers that Renberg was not only Lipo’s controlling shareholder and chairman, but also that he personally provided the funds used to purchase Out’s assets. (SAC ¶¶ 7, 70). Renberg was also consulted weekly regarding APA negotiations and, together with Franklin, made the ultimate decision to enter into the APA. (Correll Affirm. app. III, pt. 1, at 107-08).

Kapaloski, who is Renberg’s domestic partner of fifty years, served as secretary and treasurer for Lipo, Timo and Speco, but was not “involved in any way in the

discussions leading up to the acquisition of Out.” (SAC ¶ 11; Correll Affirm. app. V, at 15).

Relevant to this motion, APA Section 18.4 is a forum selection clause that states: “Any suit brought hereon . . . shall be brought in the state or federal courts sitting in New York [and] . . . [e]ach party hereby agrees that any such court shall have in personam jurisdiction over it.” (SAC Ex. A at 37). Also relevant here, Section 18.5 provides that the APA “shall be binding upon the parties and their respective successors, assigns, and legal representatives.” (SAC Ex. A at 37).

According to the SAC, Lipo is now insolvent because it cannot pay the additional consideration owed to Out. Plaintiff alleges that Lipo’s insolvency arises from Individual Defendants “looting” the three corporate defendants through improper corporate dividends, loans and fraudulent conveyances.

Plaintiff commenced this action on June 4, 2007 and has twice amended its complaint. In the Second Amended Complaint (“SAC”), Plaintiff asserts that the acts of Lipo and the Jurisdictional Defendants constitute (i) breach of contract, (ii) constructive fraudulent conveyance, (iii) intentional fraudulent conveyance, and (iv) unjust enrichment. (SAC ¶¶ 86-110, 117-123). Plaintiff also asserts that Individual Defendants’ acts constitute tortious interference with a contract. (SAC ¶¶ 111-116). Jurisdictional

Defendants now seek dismissal of the SAC as against them for lack of personal jurisdiction. Plaintiff opposes.

I. Jurisdictional Defendants's Motion to Dismiss

The Jurisdictional Defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(8) on the grounds that this Court lacks personal jurisdiction over them. In a CPLR 3211(a)(8) motion to dismiss, the allegations of the SAC are presumed to be true and accorded every favorable inference, except to the extent that the allegations are bare legal conclusions or are completely contradicted by documentary evidence. *See Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dep't 1997). A party opposing a CPLR 3211(a)(8) motion to dismiss "need only demonstrate that facts may exist whereby to defeat the motion. It need not be demonstrated that they do exist." *Peterson v. Spartan Indus.*, 33 N.Y.2d 463, 466 (1974) (quotations omitted). In order to defeat a dismissal motion, a plaintiff need only demonstrate that jurisdictional facts may exist and that it is entitled to the disclosure expressly sanctioned by CPLR 3211(d). *Peterson*, N.Y.2d at 467.

A. *Two Individual Defendants are "Closely Related"*

Plaintiff first contends that Individual Defendants are "closely related" to APA-signatory Lipo, by virtue of their complete control over Lipo's affairs, such that they may

be subject to the APA's forum selection clause. Defendants correctly argue that generally only parties in contractual privity may enforce the terms of a contract. *See ComJet Aviation Mgt. v. Aviation Invs. Holdings*, 303 A.D.2d 272, 272 (1st Dep't 2003).

However, the First Department has held that a non-party may enforce a forum selection clause if the non-party is "closely related" to one of the signatories. *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32, 38-39 (1st Dep't 2008). A non-party is "closely related" if "enforcement of the clause is foreseeable by virtue of the relationship" between it and a signatory. *Freeford*, 53 A.D.3d at 38-39. The First Department recently ruled that a forum selection clause can bind a "closely related" non-signatory defendant. *See Tate & Lyle Ingredients Ams., Inc. v. Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 402 (1st Dep't 2012). The court in *Tate* elaborated that a "non-signatory defendant [must have] a sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applied." *Tate*, 98 A.D.3d at 402 (emphasis in original); *see also Indosuez Int'l Fin., B.V. v. Nat'l Reserve Bank*, 304 A.D. 2d 429, 431 (1st Dep't 2003) (citing *Int'l Private Satellite Partners, L.P. v. Lucky Cat*, 975 F. Supp. 483, 486 (W.D.N.Y. 1997) ("it is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses.")) (citations and quotations omitted)).

The determination as to whether the Jurisdictional Defendants are “closely related” to Lipo is a factually intensive analysis. See *L-3 Commc'n Corp. v. Channel Tech., Inc.*, 291 A.D.2d 276 (1st Dep't 2002) (“we note the absence of any factual predicate for plaintiff's contention that [defendants] bear so close a relation” that they would “have been foreseeably bound by [the forum selection clause]”); *BNY AIS Nominees Ltd. v. Quan*, 609 F. Supp. 2d 269, 275 (D. Conn. 2009) (“whether the closely related test has been satisfied is one that requires an inquiry that is highly fact-specific.”). Although in both *Freeford* and *Tate* the “closely related” parties were corporations, there are a number of cases where corporate officers and directors were found to be closely related. See *Thibodeau v. Pinnacle FX Inv.*, No. 08-CV-1662 (JFB)(ARL), 2008 WL 4849957 at *5 n.4 (E.D.N.Y. Nov. 6, 2008) (“because defendants Bell and Francis are alleged to be principals of Pinnacle and are being sued in connection with their activities at Pinnacle, it was foreseeable to plaintiff that the forum selection clause would be applicable to any lawsuit against these closely related individuals in connection with their work at Pinnacle”); *Nanopierce Techs., Inc. v. Southridge Capital Mgmt. LLC*, No. 02 Civ. 0767(LBS), 2003 WL 22882137, at *6 (S.D.N.Y. Dec. 4, 2003) (Chief Financial Officer of signatory corporation found to be closely related to transaction at issue).

Two recent cases from the Southern District of New York, applying New York law, are illustrative. In *Recurrent Capital Bridge Fund I, LLC v. ISR Systems and*

Sensors Corp., 875 F. Supp. 2d 297 (S.D.N.Y. 2012), the court stated that “the enforcement of the forum selection clause against the non-party must have been foreseeable prior to suit, which implies that the non-signatory must have been otherwise involved in the transaction in some manner.” *Recurrent*, F. Supp. 2d at 307-08. The forum selection clause provided jurisdiction over an officer and shareholder of the corporate signatory because he had extensive knowledge of, and worked on, the contract containing the forum selection clause. *Recurrent*, F. Supp. 2d at 311.

Similarly, in *Firefly Equities, LLC v. Ultimate Combustion Co., Inc.*, 736 F. Supp. 2d 797, the court found that it had jurisdiction over a non-signatory corporate officer and shareholder pursuant to a forum selection clause. *Firefly*, F. Supp. 2d at 800. The court stated that “it is difficult . . . to imagine parties more closely related” than the corporate signatory and its president and 17% owner. The “closely related” officer had been involved in contract discussions and had personal knowledge of the facts and circumstances relating to the contract at issue. *Firefly*, F. Supp. 2d at 800.

Here, Plaintiff alleges several facts that show a sufficiently close relationship between Lipo and two of the Individual Defendants, Franklin and Renberg. Plaintiff avers that Lipo was a closely-held corporation that was directed solely by Franklin, Renberg and Kapaloski. Plaintiff also alleges that Renberg “put up the money to buy Lipo and Out,” and that Renberg, Kapaloski and Franklin negotiated and approved the

APA. (Plaintiff's Memorandum in Opposition to Motion to Dismiss ("Pl.'s Br.") at 13). Akin to the facts in *Recurrent* and *Firefly*, the Court concludes that these presumptively true allegations state a "sufficiently close" relationship, such that enforcement was foreseeable, between Lipo and both Renberg and Franklin, as Lipo's officers and owners, who were both involved in APA negotiations.

However, Plaintiff's allegations against Kapaloski are flatly contradicted by its own documentary evidence. Plaintiff asserts that Kapaloski "negotiated" the APA, along with Renberg and Franklin, but points to deposition testimony that demonstrates the precise opposite. The cited testimony shows that Kapaloski had no personal involvement in the APA transaction. See Correll Affirm. app. III pt. 1, p.108, app. V, at 15; *Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dep't 1997) ("where, as here, the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence," the allegations need not be presumed true). Therefore, Plaintiff has failed to allege that Kapaloski is "closely related" to both Lipo and the APA contract at issue here. See *Tate & Lyle Ingredients Ams., Inc. v. Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 402 (1st Dep't 2012) (a "non-signatory defendant [must have] a sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applied.") (emphasis in original).

B. *Timo and Speco are Bound Under the APA*

1. *Timo*

Plaintiff next contends that Timo and Speco have consented to jurisdiction in New York because they are bound under the Asset Purchase Agreement (“APA”).

Specifically, Plaintiff maintains that Timo is Lipo’s “successor or assign” because Lipo nominated Timo to receive certain assets under the APA. Plaintiff asserts that Speco is also a successor or assign because Lipo assigned the “adult assets” to Speco in 2005.

Defendants simply argue that “there is no evidence that either [Timo or Speco] is a ‘successor’ or ‘assign’ of Lipo.”

The First Department has held that “parties to a ‘global transaction’ who are not signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause . . . if the agreements are executed at the same time, by the same parties or for the same purpose.” *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32, 39 (1st Dep’t 2008). *Freeford* declined to mandate “absolute identity of all signatories,” in order to bind a non-signatory to a forum selection clause in a global transaction. Instead, the court held that agreements executed on the same day and for the essentially the same purpose are sufficient to constitute a “global transaction.” *Freeford*, 53 A.D.3d at 39.

As in *Freeford*, the contract between Out and Lipo, which contained the forum selection clause, was part of the same business transaction as Out’s transfer of assets to

Timo. Both the APA and the documents transferring Out's assets to Timo were signed on the same day, at the same closing, by the same people and for the same purpose: completing the sale of Out's assets to Lipo. The documents transferring title to Timo not only reference the APA, but state they are being executed "pursuant to the [APA]," with Timo serving as Lipo's nominee as contemplated in the APA. Therefore, this Court has *in personam* jurisdiction over Timo because it is bound by the APA's forum selection clause as a global transaction participant.

2. *Speco*

One of the fundamental precepts of contract interpretation is that agreements are to be construed according to the parties' intent. *See, e.g., Riverside S. Planning Corp. v. CRP/Extell Riverside L.P.*, 60 A.D.3d 61, 66 (1st Dep't 2008). Because "[t]he best evidence of what parties . . . intend is what they say in their writing," a written agreement that is unambiguous on its face must be enforced per the plain meaning of its terms. *Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992); *see W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

Here, Section 18.5 states that the Asset Purchase Agreement ("APA") "shall be binding upon the parties and their respective successors, assigns and legal representatives." The SAC alleges that Lipo assigned the "adult content" assets to Speco

pursuant to a tax-free spin-off transaction. (SAC ¶¶ 33-34; Correll Affirm. Ex. 12).

Further, while other sections of the APA distinguish between assets purchased under the APA and Lipo's previously owned "adult" assets, Section 18.5 makes no such distinction. Therefore, enforcing the plain meaning of the parties' contract requires binding Speco as Lipo's assignee.

Plaintiff's remaining arguments are rendered moot. The Court has considered Jurisdictional Defendants' other contentions and finds them unpersuasive.

(Order of the Court follows on next page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that Defendant Eugene Kapaloski's motion to dismiss is granted; and
it is further

ORDERED that the remaining Jurisdictional Defendants' motion to dismiss is
denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in
Room 442, 60 Centre Street, on July 30, 2013, at 10:00 A.M.

This constitutes the decision and order of the Court.

Dated: New York, New York

June __, 2013

July 1, 2013

ENTER:


Hon. Eileen Bransten, J.S.C.