

Shatara v Ephraim
2013 NY Slip Op 34049(U)
September 10, 2013
Supreme Court, Nassau County
Docket Number: 2349/13
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

ORIGINAL

Present: ANTONIO I. BRANDVEEN
J. S. C.

IBRAHIM B. SHATARA,

Plaintiff,

- against -

JEFFREY G. EPHRAIM, LUIZA DIGIOVANNI
and DIGIOVANNI & EPHRAIM, LLC,

Defendants.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 2349/13

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3, 4, 5, 6</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendants move pursuant to CPLR 3211(a)(8) to dismiss the complaint because the Court lacks personal jurisdiction, or if the Court declines to grant such relief then, pursuant to CPLR 327(a) to dismiss the complaint upon the ground of *forum non convenience*. The defendants further seek, pursuant to CPLR 3211(a)(7) if the Court declines to grant such relief, to dismiss the complaint for the failure to provide a basis upon which the plaintiff may properly recover against any of the defendants.

The plaintiff opposes the motion. The plaintiff asserts Ephraim and Shatara, LLC is registered to do business in the State of New York as a foreign limited liability

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corporation which is designated as conducting business in Nassau County. The plaintiff attorney points out each defendant was duly service with the summons and complaint at the Nassau County address of the defendant, Jeffrey G. Ephraim, Esq., the registered agent listed with the Secretary of State of the State of New York. The plaintiff contends Nassau County is the proper forum not the State of New Jersey, and the defendants fail to demonstrate any compelling factors which would warrant rejection of the plaintiff's choice of forum. The plaintiff avers there are valid claims in the complaint, and the defendants fail to meet their burden to dismiss.

The defense replies to the plaintiff's opposition. The defense notes the opposition is only an affirmation from the plaintiff's attorney, who is without personal knowledge, and an affirmation by the plaintiff who is an attorney unable here to present such under CPLR 2106. The defense maintains neither affirmation supports the plaintiff's contentions with evidentiary proof. The defense points out the defendant Luiza DiGiovanni, Esq. has only a New Jersey office; is not admitted to practice law in the State of New York; and is without any contacts to the State of New York. The defense reiterates the assertions regarding personal jurisdiction regarding the other defendants, and personal jurisdiction, *forum non convenience* and the failure to state a cause of action against the all of the defendants.

The plaintiff sur-replies, in a May 10, 2013 affidavit, to the defense reply. The plaintiff reiterates the assertions regarding personal jurisdiction, *forum non convenience*

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and the failure to state a cause of action against the all of the defendants.

The defense responds to the plaintiff's sur-reply, and asserts the plaintiff's May 10, 2013 affidavit must be rejected. The defense reiterates the defendants' contentions regarding personal jurisdiction, *forum non convenience* and the failure to state a cause of action against the all of the defendants.

Both sides request the Court impose sanctions against the opposition. The parties also request the award of attorney's fees.

As a general rule, in order for the courts of one state to exercise jurisdiction over an individual who is domiciled in another state, due process requires that there be sufficient minimum contacts between that individual and the forum State such that the forum State's assertion of jurisdiction will not offend "traditional notions of fair play and substantial justice" (*International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95). The minimum contacts standard is designed to protect a defendant from having to litigate in a distant or inconvenient forum with which he has established no meaningful contacts, ties, or relations (*see, Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 2181-2182, 85 L.Ed.2d 528), and to prevent the individual States from overreaching the judicial limits appropriate to "their status as coequal sovereigns" (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559, 564, 62 L.Ed.2d 490) *Shirley D. v. Carl D.*, 224 A.D.2d 60, 63-64, 648 N.Y.S.2d 650 [2d Dept 1996].

The defendants Jeffrey G. Ephraim and DiGiovanni & Ephraim, LLC have minimum contacts to the State of New York. This Court determines the defendants fail to meet their CPLR 3211(a)(8) burden of showing a lack of personal jurisdiction regarding Jeffrey G. Ephraim and DiGiovanni & Ephraim, LLC. However, there may be an issue regarding personal jurisdiction over the defendant Luiza DiGiovanni, Esq., who is

individually named in the complaint. That issue requires a traverse with respect to Luiza DiGiovanni, Esq. only.

When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must “ ‘accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory’ ”. “Whether a plaintiff can ultimately establish its allegations is not part of the calculus”

Sokol v Leader, 74 A.D.3d 1180, 1180-1181, 904 N.Y.S.2d 153 [2d Dept 2010].

This Court determines the plaintiff shows the allegations which fit within the CPLR 3211

(a) (7) standard enunciated by the Second Department, and the defendants fail to show otherwise.

“The doctrine of *forum non conveniens* permits a court to dismiss an action when, although it may have jurisdiction over a claim, the court determines that ‘in the interest of substantial justice the action should be heard in another forum’ ” (*National Bank & Trust Co. of N. Am. v. Banco De Vizcaya*, 72 N.Y.2d 1005, 1007, 534 N.Y.S.2d 913, 531 N.E.2d 634, cert. denied 489 U.S. 1067, 109 S.Ct. 1343, 103 L.Ed.2d 812, quoting CPLR 327). “The doctrine is flexible, requiring the balancing of many factors in light of the facts and circumstances of the particular case” (*National Bank & Trust Co. of N. Am. v. Banco De Vizcaya*, 72 N.Y.2d at 1007, 534 N.Y.S.2d 913, 531 N.E.2d 634). “Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose on the New York courts” (*Turay v. Beam Bros. Trucking, Inc.*, 61 A.D.3d 964, 966, 878 N.Y.S.2d 391; *see Rosenberg v. Stikeman Elliott, LLP*, 44 A.D.3d 840, 841, 843 N.Y.S.2d 433; *Brinson v. Chrysler Fin.*, 43 A.D.3d 846, 842 N.Y.S.2d 48). On a motion to dismiss the complaint on the ground of *forum non conveniens*, the burden is on the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation in that forum (*see Islamic Republic of Iran*

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v. Pahlavi, 62 N.Y.2d 474, 479, 478 N.Y.S.2d 597, 467 N.E.2d 245, *cert. denied* 469 U.S. 1108, 105 S.Ct. 783, 83 L.Ed.2d 778; *Stravalle v. Land Cargo, Inc.*, 39 A.D.3d 735, 736, 835 N.Y.S.2d 606; *Korea Exch. Bank v. A.A. Trading Co.*, 8 A.D.3d 344, 777 N.Y.S.2d 736)
Xiu Zhang Yin v. Bennett, 78 A.D.3d 936, 937-938, 911 N.Y.S.2d 422 [2d Dept 2010].

This Court considered are the residency of the plaintiff and the defendants, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose on the courts here. This Court determines the defendants fail to meet their CPLR 327, burden, which was articulated by the Second Department, by showing relevant private or public interest factors which militate against accepting the instant action here in Nassau County Supreme Court.

Conduct is frivolous within the meaning of 22 NYCRR 130-1.1 where it is “completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law” or “undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another” or “it asserts material factual statements that are false” (22 NYCRR 130-1.1[c][1], [2], [3]; *see Matter of Miller v. Miller*, 96 A.D.3d 943, 947 N.Y.S.2d 541; *Gelobter v. Fox*, 90 A.D.3d 829, 832, 935 N.Y.S.2d 59). A party seeking the imposition of a sanction or an award of an attorney’s fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof (*see Matter of Miller v. Miller*, 96 A.D.3d 943, 947 N.Y.S.2d 541)
Lebron v. Hebron, 101 A.D.3d 1009, 1010-1011, 956 N.Y.S.2d 125 [2d Dept 2012].

This Court determines, under the circumstances here, neither parties’ conduct in commencing, continuing and defending this action is frivolous. There is no evidence any party attempted to delay or prolong the resolution of the litigation or to harass or

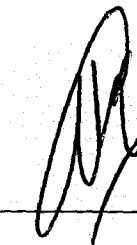
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maliciously injure another party, nor that they asserted material factual statements that are false (22 NYCRR 130-1.1(c); *see LeBron v. Hebron*, 101 A.D.3d 1009, 956 N.Y.S.2d 125 [2d Dept 2012]).

Accordingly, the motion is denied except only that branch regarding personal jurisdiction over the defendant Luiza DiGiovanni which is granted only for a traverse. This matter is referred to the Calendar Control Part for a traverse. The plaintiff shall file and serve a note of issue, together with a copy of this order, upon the calendar clerk of this court within 30 days of this order. The directive with respect to a traverse is subject to the right of the Justice presiding in Calendar Control Part to refer the matter to a Justice, Judicial hearing Officer, or a Court Attorney/Referee, as deemed appropriate.

So ordered.

Dated: September 10, 2013

ENTER:



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NASSAU COUNTY
COUNTY CLERK'S OFFICE

NON FINAL DISPOSITION