

Kartez v Goldberg

2014 NY Slip Op 30205(U)

January 23, 2014

Sup Ct, New York County

Docket Number: 652513/2013

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 652513/2013
KARTEZ, ZACHARY I
vs.
GOLDBERG, BARRY
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3, 4

Answering Affidavits — Exhibits _____ No(s). 5

Replying Affidavits _____ No(s). 6

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 1/23/2014

[Signature]
HON. EILEEN A. RAKOWER J.S.C.

- 1. CHECK ONE: [X] 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: PART 15

-----X

ZACHARY I. KARTEZ,

Plaintiff,

- against -

BARRY GOLDBERG and PHILIP NEISS,

Defendants.

-----X

Index No.
652513/2013

**DECISION
and ORDER**

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

This is an action commenced by plaintiff Zachary I. Kartez (“Plaintiff” or “Kartez”) for breach of contract and breach of fiduciary duty based on defendants Barry Goldberg (“Goldberg”) and Philip Neiss’ (“Neiss”) alleged failure to perform under a partnership agreement executed on April 16, 2012 (“the Partnership Agreement”).

As alleged in the Verified Complaint, the purpose of the Partnership Agreement was to establish a management company to operate a charter school in Broward County, Florida, which would be located on property owned by Kartez and Neiss. The Complaint alleges that the Agreement provided that the partners “would contribute equal capital to cover prior and future expenses of forming and organization the School,” “would organize a management company” to manage the School once the School was operating, and each of the partners would receive an equal share of the School’s revenue.

The Complaint alleges that the Agreement was negotiated and executed while both Kartez and Neiss resided in and were located in New York and that Neiss has since relocated to Florida. Goldberg is alleged to be a Florida resident.

The Complaint alleges that Neiss and Goldberg subsequently breached the Partnership Agreement by refusing to abide by the Partnership Agreement and to

organize the management company once the School was operational.

Presently before the Court is Defendants' motion to dismiss Plaintiff's Complaint pursuant to CPLR §§302(a) and/or 327(a) for lack of personal jurisdiction and forum non-conveniens. Plaintiff opposes.

Goldberg submits an affidavit, in which he avers that he is a resident and domiciliary of Florida with an address of 27071 Mora Road, Bonita Springs, Florida 34135, has no contacts with New York at this time or during any time in which any cause of action alleged by Plaintiff arose, has not transacted business within the state of New York nor entered into any contracts to supply goods or services in New York, and has not committed any tortious actions within the State of New York nor has he defamed Plaintiff's character. Goldberg further avers that he does not derive revenue from interstate or international commerce and does not own real estate in New York.

Neiss submits an affidavit, in which he avers that he is a resident and domiciliary of Florida, has no contacts with New York at this time, has not transacted any business in New York, other than trying to sell his home in Oceanside, New York, has not knowingly committed any tortious actions within the state of New York, and does not derive substantial revenue from interstate or international commerce.

Kartez submits an opposing affidavit, averring the following transactions: Neiss resided in New York during many of the events that gave rise to this action, Neiss solicited Kartez while in New York to allow Goldberg to join the partnership, Kartez transacted with Goldberg to complete partnership activity while both Neiss and Kartez were located in New York, and the parties used entities with New York offices to start the Partnership by initially maintaining bank accounts in New York to operate the Partnership, Kartez and Neiss identifying themselves as New York residents in the Partnership Agreement, and hiring a New York attorney to assist in drafting promissory notes. Kartez further states that Goldberg sent the executed Partnership Agreement to New York, sent \$37,000 to New York as his investment in the Partnership, sent various communications to Kartez in New York, Neiss and Kartez used New York addresses on retainers with Florida attorneys, and authorized Kartez to perform various Partnership tasks in New York.

Kartez further contends that New York is a proper forum because he is a resident and domiciliary of New York and has chosen New York to bring this action, that “there are no necessary witnesses/documents that are unreachable by the parties” if this Court retains jurisdiction, and that traveling to Florida to commence this action would be an inconvenience to him.

CPLR §3211(a)(8) states:

. . . A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(8) the court has not jurisdiction of the person of the defendant

. . .

CPLR §302(a)(1) states, in relevant part:

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary . . . who in person, or through an agent:

(1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or

(2) commits a tortious act within the state . . .

(3) commits a tortious act without the state causing injury to a person or property within the state, . . . if he

(I) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue

from interstate or international commerce; or

4. owns, uses or possesses any real property situated within the state.

The common law doctrine of forum non conveniens, codified in CPLR §327, permits a court to dismiss an action when, “in the interest of substantial justice the action should be heard in another forum . . . and the burden is on the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere . . . [a]mong the factors to be considered are the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum.” (*Grizzle v. Hertz*, 305 AD2d 311[1st Dept. 2003]). These factors must weigh heavily in defendant’s favor before a plaintiff’s choice of forum should be disturbed.

“The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation” *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [N.Y. 1984].

Here, the Partnership Agreement at issue in this action provides that, “By this agreement, the Partners enter into a general partnership ... in accordance with the State of Florida. The rights and obligations of the Partners will be as stated in the applicable legislation of Florida, except as otherwise provided here.” The “purpose of the Partnership Agreement will be to establish a management company for the purpose of operating a charter school in Broward County, Florida” and the “principal place of business of the Partnership will be located at 10020 Coconut Road, Suite 138-308, Bonita Springs, Florida 34135.” As for the “deposit of initial funds and preliminary record keeping,” the Partnership Agreement provided “that in the absence of a bank account for the still undetermined entity, funds can [sic] deposited into the ZAP LLC account.”

Furthermore, both Defendants reside in Florida. While Neiss moved to Florida after execution of the Partnership Agreement, Goldberg was always a

Florida resident. Additionally, while Plaintiff resides in New York, Plaintiff owns property in Florida.

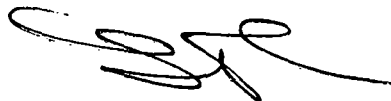
Upon considering the parties' submissions and balancing the appropriate factors, Defendants have met their burden of demonstrating that the action would be best adjudicated in the State of Florida.

Wherefore it is hereby

ORDERED that Defendants' motion to dismiss for forum non conveniens is granted; and the Complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: JANUARY 23, 2014



EILEEN A. RAKOWER, J.S.C.