

Springer Science & Bus. Media S.A. v Delman

2014 NY Slip Op 30673(U)

March 12, 2014

Sup Ct, New York County

Docket Number: 159126/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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SPRINGER SCIENCE + BUSINESS MEDIA S.A., INDEX NO. 159126/12

Plaintiff,

-against-

SCOTT DELMAN,

Defendant.

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JOAN A. MADDEN, J.:

Defendant Scott Delman moves for an order pursuant to CPLR 327 dismissing the complaint on grounds of forum non conveniens. In response, plaintiff Springer Science + Business Media S.A. (“Springer”) cross-moves for a order pursuant to CPLR 327 for “supplemental relief.” Springer states it is willing to consent to the dismissal without prejudice and for the parties’ dispute to be resolved in Germany, but only “upon the narrowly tailored and reasonable terms and conditions” set forth in its proposed order of dismissed. Delman opposes Springer’s cross-motion and submits his own proposed order of dismissal. Delman objects that Springer’s proposed order is “unreasonable” since it does not take into account the counterclaims and third-party claims Delman intends to assert against Springer and certain of its parents, subsidiaries and affiliates in the proceeding before the German court, and would “unduly restrict” his ability to pursue those claims. In response, Springer objects that Delman’s proposed order is “inappropriate” since he made this motion before answering, and therefore has not asserted any counterclaims or third-party claims in this action, and did not seek such relief in his original motion papers.

Despite the parties’ consent to the dismissal of this action, they are in sharp disagreement

as to the terms and conditions of dismissal. The court, therefore, will consider the merits of Delman's motion to dismiss on forum non conveniens grounds. If Delman sustains his burden on the motion, the court will then consider whether dismissal should be "on any conditions that may be just," pursuant to CPLR 327.

The doctrine of forum non conveniens permits a court to dismiss an action when, "in the interest of substantial justice the action should be heard in another forum." CPLR 327; Grizzle v. Hertz Corp., 305 AD2d 311, 312 (1st Dept 2003). "The doctrine is based upon justice, fairness and convenience and the burden is the party challenging the forum to demonstrate that the action would be best adjudicated elsewhere" (citations omitted). Id. In determining a motion to dismiss on forum non conveniens grounds, the factors to be considered include 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, the burden on New York courts, and the availability of an alternative forum. Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 479 (1984), cert denied, 469 US 1108 (1985); Grizzle v. Hertz Corp., supra. The applicability of foreign law is another important consideration that weighs in favor of dismissal. See Flame S.A. v. Worldlink International (Holding) Ltd., 107 AD3d 436 (1st Dept), lv app den 22 NY3d 855 (2013).

Consideration of the relevant factors leads to the conclusion that Delman has sustained his burden. The complaint states that Springer "is the Luxembourg holding company of the Springer Group," and that Delman is a "natural person residing at 165 West 66th Street, Apr. 7A, New York, New York." The complaint asserts just one cause of action for breach of contract, alleging that on June 21, 2006, Delman and Springer executed a Loan Agreement in which

Springer agreed to loan Delman the amount of EUR 171,955.02. The complaint alleges that under Section 2 of the Loan Agreement, Delman “was to repay the loan ‘immediately prior, but subject to, a Sale, Asset Sale or Listing’ of the assets in the Plaintiff (the ‘Shares’) Defendant acquired indirectly through another entity.” The complaint alleges that on February 2, 2012, “the Shares were transferred due to the completion of a Sale, which transaction triggered Defendant’s repayment obligations under Section 2 of the Loan Agreement.” The complaint alleges that Delman “failed and/or refused to repay the balance of the loan in the amount of EU 76,875.12,” despite Springer’s repeated demands that he do so, and that by “failing and/or refusing to repay the loan, Defendant has breached his contractual obligations under the Loan Agreement.” Annexed to the complaint is a copy of the purported loan agreement, which states that the loan “shall be governed by German law.” The complaint is verified by D. Ulrich Vest, a Director of Springer Science+Business Media S.A., whose business address is listed as Heidelberger Platz 3, 14197 Berlin; the verification is dated “Berlin, January 24, 2013.”

In support of the motion, Delman submits an affidavit that Springer is a Luxembourg company with its corporate headquarters in Germany. He explains that his employment with Springer ended in February 2006, and “in connection with my departure, I entered into a Separation Agreement and Side Agreement.” He submits a copy of the Side Agreement, which was signed by Springer’s CEO in Berlin, Germany on February 24, 2006, and expressly states that it “shall be governed by German Law.” Delman further explains that pursuant to the Side Agreement, he retained his partnership interest in Springer’s management equity program following the termination of his employment, and that with respect to his shares in the company, he was to be treated in the same manner as all other managers.

Delman concedes that on June 21, 2006, he “entered into a Loan Agreement with Springer,” which was signed by Dr. Ulrich Vest on Springer’s behalf in Berlin, Germany. Delman states that under the Loan Agreement, “the amount of my repayment obligations, if any, were expressly dependent upon, and interconnected with, the amount of proceeds I would receive from a sale of shares of Springer.” Delman received a letter dated February 22, 2010, advising that Springer was sold to EQT funds/GIC on February 2, 2010, and providing a “valuation of my equity interest in the company, as well as a basic calculation of the net proceeds purportedly due me relating to the sale.” The letter also advised that any proceeds from the sale would first be used to repay any outstanding loans. Delman alleges that the transactions relating to such sale occurred in Germany.

Defendant states that he believed his share of the sale proceeds was “substantially less” than what he “reasonably expected,” so he retained counsel who wrote to Springer on May 27, 2010, seeking documents regarding the sale, documents verifying that Springer was treating him “equally to the other managers” with respect to his partnership interest, and documents regarding the valuation of the business at the time Springer was put up for sale. By letter dated June 14, 2010, Springer’s counsel in Germany, responded that Delman or his counsel could “inspect the clauses being relevant for the determination of the purchase price at our office in Munich. Please understand that a confidentiality letter has to be signed in advance by the reviewing person” Delman states that after Springer confirmed that the relevant documents concerning the sale were located in Germany, he hired an independent German law firm to represent him in connection with his dispute concerning his rights under the Side Agreement. Delman explains that his German counsel has not been able to review the documents in Germany, because the parties

could not agree to the terms of a confidentiality agreement.

Delman identifies several current or former managers of Springer, and alleges that they have not been required to pay any monies to Springer under their respective loan agreements, which violates Springer's obligation under the Side Agreement "to treat me equally to other managers." He states that Springer's treatment of other current or former managers, "most of whom are located in Germany, with respect to the valuation of their shares in the company and their corresponding obligations under their respective loan agreement is clearly relevant to this dispute, and would be subject of extensive discovery."

Delman asserts that he is "fully prepared to litigate" the instant action in Germany, he has retained German counsel to represent him with respect to this matter, and he is also prepared to litigate his own claims for breach of the Side Agreement against Springer in Germany. He further asserts that it would be "unduly burdensome and inconvenient" for him to defend the instant action in New York, since "key witnesses and documents are located in Germany, and the relevant agreements are governed by German law." He states that if his motion to dismiss is granted, he "will consent to the jurisdiction of the German courts to resolve this dispute and stipulate that the filing date of an action in Germany for breach of the Loan Agreement will be deemed to be as of the date plaintiff's complaint was filed in New York."

Delman also submits an affidavit from Andreas Scherdel, the attorney in Germany who Delman retained in April 2013. Scherdel states that Delman retained his firm, Alexander & Partner, "to represent him in connection with his dispute with Springer and its affiliated companies concerning, among other things, Springer's obligations" under the February 2006 Side Agreement. Scherdel states that in May 2013, his firm filed, on Delman's behalf, "a

complaint in the Regional Court, Berlin against Springer Science + Business Media Management Beteiligung GmbH & Co, KG, and its general partner, Chess Erste Verwaltungsgesellschaft mbH. Scherdel explains that the German action “seeks, among other things, damages relating to the alleged unequal and improper treatment of Delman in connection with the sale of Plaintiff on or about February 2, 2010, and the Side Agreement.” Scherdel states that Springer’s claims against Delman in the instant action, “relating to Delman’s alleged breach [of] a written loan agreement with Springer, is expected to resolved as part of the German Action, inasmuch as the amount of Delman’s purported loan obligations will be determined by the German Court.”

As noted above, Springer does not oppose dismissal under certain conditions. Springer and Delman have each submitted a proposed order of dismissal, to which the other party objects. Springer also objects to the affidavit from Delman’s counsel in Germany, and responds with a affidavit from Alice Broichmann, “an attorney with the law firm in Germany” representing the defendants in Delman’s German lawsuit. Broichmann asserts that the plaintiff in the instant action, Springer Science + Business Media S.A., is not a party in the German action, which names different Springer entities that neither employed Delman nor signed the Loan Agreement with Delman. Broichmann also asserts that “[n]either the amount of the loan between Defendant and Plaintiff in this case, nor Defendant’s obligations under the loan agreement, are subject to the proceedings before the German Court,” and since Plaintiff is not a party to the German action, the “German Court therefore, as the case is presently constituted, has no authority to determine the scope of Defendant’s obligations to the Plaintiff.”

In view of the relevant factors and Springer’s consent, the court concludes that it would be in the interest of substantial justice for this action to be litigated in Germany, since it is

undisputed that German law governs the Loan Agreement and other agreements between the parties, the documentary evidence is located in Germany, and Germany is a viable alternative forum. See Flame S.A. v. Worldlink International (Holding) Ltd, *supra*. Moreover, Springer does not dispute Delman's assertion that the witnesses he has identified are also located in Germany. Notably, even though Delman is a New York resident and this court has jurisdiction over him, he wants to litigate this action in Germany, and not in New York.

The question remains as to whether, pursuant to CPLR 327, the court should impose any "conditions that may be just," in connection with the dismissal of this action. In granting a CPLR 327 motion to dismiss on forum non conveniens grounds, courts often impose conditions requiring the defendant to waive the right to assert defenses based on lack of jurisdiction, and the statute of limitations. See Emslie v. Recreative Industries, Inc, 105 AD3d 1335 (4th Dept 2013); Jackam v. Nature's Bounty, 70 AD3d 1000 (2nd Dept 2010). This court concludes that the dismissal of this action should be conditioned on Delman's waiver of his jurisdictional and statute of limitations defenses in the German Court; as noted above, Delman has explicitly consented to the imposition of those identical conditions. However, the court declines to include the additional language in Delman's proposed order which, *inter alia*, specifically addresses his rights to assert counterclaims and third-party claims, and to conduct discovery. Absent plaintiff's consent, those issues should be resolved by the court in Germany. Moreover, since Delman made this motion before answering the complaint, he has not yet asserted any defenses, counterclaims or third-party claims in this action.

Accordingly, it is

ORDERED that the motion by defendant Scott Delman to dismiss the action pursuant to


CPLR 327 on forum non conveniens grounds, is granted, and the action is dismissed without prejudice, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion by plaintiff Springer Science + Business Media S.A. is granted to the extent that the foregoing dismissal of this action is conditioned on defendant Scott Delman's consenting to the jurisdiction of the German Court, and his waiving his right to assert in the German Court, the defenses of lack of subject matter, personal or local jurisdiction, and the defense of statute of limitations; and it is further

ORDERED that within thirty (30) days after the entry of this decision and order, the parties shall execute any documents as may be required by German law or the German Code of Civil Procedure, whether in the German or English language, consenting to proceeding before the German Court, and acknowledging and consenting that the German Court is competent to resolve this dispute, and the parties shall otherwise cooperate and participate to ensure that the instant matter is instituted, litigated and resolved in the German Court.¹

DATED: ~~February 2, 2017~~ *March 12, 2017*

ENTER:



J.S.C. **HON. JOAN A. MADDEN**
~~J.S.C.~~

¹The parties' proposed orders include a similar provision. Plaintiff's German counsel explains that "under German law, both parties must consent to proceeding before the Specific regional German Court (i.e. Regional Court Berlin), and they must acknowledge and agree that the German Court is competent to resolve the dispute, in order for the cases to proceed in the German Court."