EnergySolutions, Inc. v Kurion, Inc.
2014 NY Slip Op 31135(U)
April 29, 2014
Supreme Court, New York County
Docket Number: 654060/2013
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ENERGYSOLUTIONS, INC., and ENERGYSOLUTIONS DIVERSIFIED SERVICES, INC.,

Index No.: 654060/2013

DECISION & ORDER

Plaintiffs,

-against-

KURION, INC., JOHN RAYMONT, JR., and MARK S. DENTON,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Kurion, Inc. (Kurion), John Raymont, Jr., and Mark S. Denton move to dismiss the Complaint. CPLR 327(a), 3211(a)(4), & 3211(a)(5). Defendants' motion is granted for the reasons that follow.

I. Factual Background & Procedural History

Plaintiff EnergySolutions, Inc. and EnergySolutions Diversified Services, Inc. (collectively, EnergySolutions) and defendant Kurion are companies that provide services in the nuclear energy industry. Raymont founded a company called NUKEM, which was acquired by EnergySolutions in 2007. Denton is a former employee of EnergySolutions. Raymont and Denton currently work for Kurion. The court will not discuss the details of their employment or their history with the companies in detail since, for the reasons discussed below, such issues will be litigated in California.

On March 6, 2013, more than four years after Denton ceased working for EnergySolutions, EnergySolutions sued defendants in federal district court in Utah. The litigation concerns a dispute over patents, trade secrets, and wrongful competition. Defendants

moved to dismiss, *inter alia*, for lack of personal jurisdiction. Defendants maintained that the litigation should occur in California because that is where the companies, the relevant documents, and witnesses are located. Additionally, defendants noted that one of EnergySolutions' claims was for breach of a contractual confidentiality provision in Denton's termination agreement, which contains a New York forum selection clause. In an order dated September 19, 2013, the Utah federal court dismissed the case for lack of personal jurisdiction. *See* Dkt. 25.

On September 27, 2013, EnergySolutions refiled their lawsuit in federal court in the Southern District of New York. The purported basis for federal jurisdiction was diversity under 28 USC § 1332(a)(1). EnergySolutions, apparently realizing that diversity was lacking since they and Kurion are Delaware corporations, voluntarily discontinued the action on November 4, 2013. *See* Dkt. 29.

On October 21, 2013, defendants commenced a declaratory judgment action against EnergySolutions in a California state court (the California Action), which seeks adjudication of all of the claims asserted by EnergySolutions in the myriad lawsuits discussed herein. *See* Dkt. 26. On November 22, 2013, EnergySolutions: (1) filed an answer in the California Action (Dkt. 27); (2) commenced an action against Kurion and Raymont in a South Carolina state court (Dkt. 30); and (3) commenced the instant action, the fifth case concerning the parties' dispute. On December 27, 2013, defendants moved to dismiss this action in favor of the California Action. EnergySolutions oppose, primarily relying on the New York forum selection clause in Denton's contract (despite having chosen to sue him for breach of that contract in Utah). The parties' discovery disputes are being held in abeyance pending a decision on this motion.

After this motion was fully briefed, in an order dated February 21, 2014, the California court denied EnergySolutions' motion to dismiss for lack of jurisdiction because such defense was waived when EnergySolutions filed their answer. *See* Dkt. 75 at 1-2. The California court noted the following with respect to EnergySolutions' forum non conveniens arguments:

> [A]s to [] Kurion and Raymont, [EnergySolutions] have failed to establish a contractual basis for either New York or South Carolina as a forum for this case. Indeed, the only forum selection clause is contained in Denton's [contract]. As to that provision, the Court is persuaded that Denton's reliance on that provision in convincing the Utah court to dismiss the action against him there undercuts his arguments (1) against application of the doctrine of judicial estoppel, and (2) that [EnergySolutions] have waived its enforcement under New York law by virtue of pursuing the original action in Utah. Accordingly, the Court is staying Denton's action at this time in order to see if the New York court will grant Denton's (and Kurion's and Raymont's) forum non conveniens motion now pending. Significantly, the judicial estoppel argument does not apply equally to [] Kurion and Raymont, neither of whom had a forum selection clause.
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> With respect to whether New York or South Carolina is a suitable alternate forum, it appears that **none** [emphasis in original] of the parties have a direct tie to either of these states. The defendants are headquartered in [] Utah. [Raymont and Kurion are in California and Denton is in Tennessee]. Further, it appears that witnesses and documents are spread throughout the country (California, Utah, Tennessee, South Carolina, Maryland). Rather than argue the factors that determine the suitability for the forums, [EnergySolutions'] primary arguments are in favor of the enforcement of the choice of law clauses. As to those arguments, there is no reason that a California court cannot decide how to apply the choice of law provisions in Raymont's contract. The fact that South Carolina treats covenants not to compete differently than California is not a basis by itself to warrant a change of venue. Indeed, California's strong public policy prohibiting most covenants not to compete is a factor that weighs in favor of California as the appropriate forum for this case.

Dkt. 75 at 2.

None of the parties, witnesses, or material evidence are in New York. Much of it is in California. Though, for a short period of time approximately four or five years ago, Kurion

operated as a start up in New York, it has since operated in California, and virtually all of the underlying events appear to have occurred in California. In short, other than Denton's forum selection clause, which only applies to some of the claims in this case, the parties have no connection to New York. Though, as the California court correctly observed, a technical wavier or estoppel argument based on the Utah litigation will not carry the day, as explained below, this court's decision on forum non conveniens is a discretionary matter. In this case, common sense and a prudent exercise of this court's discretion weigh heavily in favor of litigating in California.

II. Discussion

Dismissal may be granted under CPLR 3211(a)(4) when "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." The standard on a motion to dismiss under CPLR 3211(a)(4) "is similar to that undertaken in applying the doctrine of *forum non conveniens* – whether the litigation and the parties have sufficient contact with this State to justify the burdens imposed on our judicial system." *Flintkote Co. v Am. Mut. Liability Ins. Co.*, 103 AD2d 501, 506 (2d Dept 1984).

New York's forum non conveniens statute, CPLR 327(a), provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court . . . may stay or dismiss the action in whole or in part on any conditions that may be just." Specifically, a court has the discretion to dismiss "an action 'where it is determined that the action, although jurisdictionally sound, *would be better adjudicated elsewhere*.'" *Century Indem. Co. v Liberty Mut. Ins. Co.*, 107 AD3d 421, 423 (1st Dept 2013) (emphasis added), quoting *Islamic Republic of Iran v Pahlavi,* 62 NY2d 474, 478-79 (1984). "Among the factors

to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring suit. The court 'may also' consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction." *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 (1st Dept 2006), accord *Pahlavi*, 62 NY2d at 479. As the Court of Appeals explained: "No one factor is controlling. The great advantage of the rule of forum non conveniens is its flexibility based upon the facts and circumstances of each case. The rule rests upon justice, fairness and convenience and we have held that when the court takes these various factors into account in making its decision, there has been no abuse of discretion reviewable by this court." *Pahlavi*, 62 NY2d at 479 (citations omitted); *see also Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 2014 NY Slip Op 02381, 2014 WL 1356220 (NY Ct App Apr. 8, 2014) (trial court's decision on forum non conveniens motion is only reviewable "to decide whether discretion has been abused").

Where, as here, duplicative litigation exists in multiple jurisdictions, parties often argue that the first filed lawsuit takes precedence. However, the forum in which the litigation was first commenced is not the dispositive factor in deciding whether to grant a motion under CPLR 3211(a)(4). *See L-3 Comm'ns Corp. v Safenet, Inc.*, 45 AD3d 1, 9 (1st Dept 2007) ("New York courts have consistently held that even though the first-in-time rule is a factor to be considered in choosing the appropriate forum for litigation, 'it is not controlling, especially when commencement of the competing action[s] has been reasonably close in time.'" (citations omitted); *In re Topps Co. S'holder Litig.*, 19 Misc3d 1103(A), at *3 (Sup Ct, NY County 2007) (Cahn, J.) ("Although priority in the commencement of the action is a factor to be considered in

determining whether dismissal pursuant to CPLR 3211(a)(4) is appropriate, it is not necessarily dispositive"), citing *Roberts v 112 Duane Assoc. LLC*, 32 AD3d 366 (1st Dept 2006); accord *In re NYSE Euronext Shareholders/ICE Lit.*, 39 Misc3d 619, 623 (Sup Ct, NY County 2013). Indeed, the appellate and federal courts in this state have recognized that enforcing a strict "first to file" rule is tantamount to sanctioning "'procedural gamesmanship' and reward[s] a party 'for winning a race to the courthouse.'" *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 98 (1st Dept 1997), citing *Factors Etc., Inc. v Pro Arts, Inc.*, 579 F2d 215 (2d Cir 1978). The "literal application of the first to file rule under such circumstances would create disincentives to responsible litigation by discouraging settlement negotiations out of apprehension that an adversary might take advantage of the opportunity to file a preemptive suit in an advantageous forum." *Id.* at 98-99 (citation omitted); *see also In re NYSE Euronext Shareholders/ICE Lit.*, 39 Misc3d at 625-26. Thus, courts generally will not give priority to a first-filed action which merely seeks a declaratory judgment that the threatened lawsuit by the "true plaintiff" has no merit. *See Bridas Int'l. S.A. v Repsol, S.A.*, 40 Misc3d 1229(A), at *4 (Sup Ct, NY County 2013) (collecting cases).

Here, in contrast, defendants commenced the California Action only after EnergySolutions improperly sued them in federal courts in Utah and New York. There was and still is a controversy between the parties. California, aside from its convenience of location, appears to be the only jurisdiction where all of the claims can be resolved in one action. Without the California Action, EnergySolutions' claims against defendants, which substantially overlap, would be split between New York and South Carolina state courts, where virtually none of the parties or evidence are located. Simply put, there could be one, conveniently located lawsuit in

California, or two, duplicative, inconveniently located lawsuits in New York and South Carolina. Moreover, EnergySolutions' contention that defendants' forum selection is mere gamesmanship rings hollow given their own attempt to procure home state advantage in Utah and the relaxed pleading standards of South Carolina (relative to California's statutes requiring particularity of trade secrets pleadings).[1]

For these reasons, the court finds it prudent to exercise its discretion to dismiss this case in favor of the California Action. The court will not address defendants' other arguments for dismissal, such as statute of limitations, which can be decided by the California court. Accordingly, it is

ORDERED that the motion by defendants Kurion, Inc., John Raymont, Jr., and Mark S. Denton to dismiss this action in favor of the California Action is granted, and the Clerk is directed to enter judgment dismissing the Complaint without prejudice to the discussed pending litigation in other jurisdictions.

Dated: April 29, 2014

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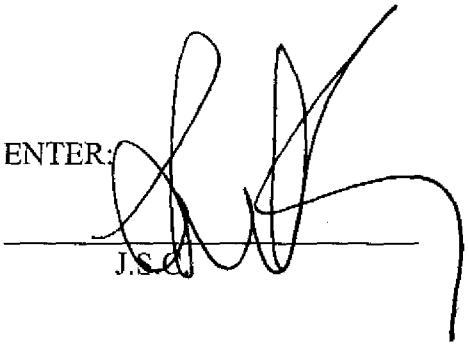

J.S.C.

[1] *See Burroughs Payment Sys., Inc. v Symco Group, Inc.*, 2012 WL 1670163, at *14 (ND Cal 2012), accord *Diodes, Inc. v Franzen*, 260 CalApp2d 244, 253 (1968).