Interventure 77 Hudson LLC v Falcon Real Estate Invest. Co., LP
2014 NY Slip Op 32757(U)
October 10, 2014
Sup Ct, New York County
Docket Number: 653913/13
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

INTERVENTURE 77 HUDSON LLC, HIGHLAND OWNER LLC, HIGHLAND TENANT LLC, RESTON OWNER CORP., RESTON TENANT CORP., 1300 PARKWOOD OWNER CORP., 1300 PARKWOOD TENANT CORP., 3150 BRIARPARK LP, 3010 BRIARPARK TENANT LP, MIAC OWNER CORP., MIAC TENANT LLC, WESTLAKE FOUR OWNER CORP., WESTLAKE FOUR TENANT LLC, WESTLAKE THREE OWNER CORP., WESTLAKE THREE TENANT LLC, WOODRIDGE OWNER CORP., WOODRIDGE TENANT LLC, CLEVELAND OWNER CORP., CLEVELAND TENANT LLC, BURBANK OWNER CORP., BURBANK PLAZA TENANT LLC, DISTRIBUTION I PATENT OWNER LLC, DISTRIBUTION I PATENT TENANT LLC, DISTRIBUTION I TL OWNER LLC, DISTRIBUTION I TL TENANT LLC, 7025 OWNER CORP., 7025 TENANT LLC and CRYSTAL CONDOMINIUMS, LLC, Plaintiffs, - against - FALCON REAL ESTATE INVESTMENT CO., LP n/d/b/a FALCON REAL ESTATE INVESTMENT MANAGEMENT, LTD., HOWARD E. HALLENGREN, JACK D. MILLER, DAVID A. HILL, INTERNATIONAL REAL ESTATE SERVICES, INC., WHITNEY INVESTMENT ADVISORS, and WELSH REAL ESTATE SERVICES, Defendants.	Index No. 653913/13 AMENDED DECISION AND ORDER Motion Sequence Nos. 002, 004, 006, 008

MELVIN L. SCHWEITZER, J.:

Plaintiffs bring this action against defendants alleging gross fraud in the management of real estate properties. Messrs. Hallengren, Miller and Hill and Falcon Real Estate Investment

Co., LP (Falcon) and International Real Estate Services, Inc. (IRES) move to dismiss the complaint on the basis of lack of jurisdiction, *forum non conveniens* and lack of necessary parties.[1]

Background

Plaintiffs are Delaware limited liability companies, corporations or limited partnerships that own or hold real estate interests in various commercial properties in the United States. Each plaintiff was governed by a board of directors responsible for plaintiffs' business activities.

Falcon is a Delaware company that provides advisory and management services for real estate located in the United States. Howard Hallengren (Mr. Hallengren) and Jack Miller (Mr. Miller) are the principals, owners and officers of Falcon.

At all relevant times, Falcon's headquarters and principal place of business was 570 Lexington Avenue, New York, New York. Until at least April 2012, Mr. Hallengren was a New York resident, and worked out of Falcon's New York offices.

While Mr. Miller resided in Chicago, Illinois, he communicated by phone and other means with Hallengren at Falcon's office in New York. Mr. Miller would travel to New York and work out of Falcon's New York office on plaintiffs' properties.

David Hill (Mr. Hill) was a Vice President of Falcon, and worked in Falcon's Dallas, Texas office. Upon information and belief, Mr. Hill communicated by phone and other means with personnel at Falcon's office in New York. Mr. Hill would travel to New York and work out of Falcon's New York office on plaintiffs' properties.

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[1] Defendant Hill moved to dismiss the original complaint in motion sequence no. 002. The court grants Hill's letter request to apply his motion to the Amended Complaint.

Commencing in September 1996, Falcon was engaged to manage the commercial properties of plaintiffs. Pursuant to the asset management agreements executed in 2004 through 2007, Falcon was granted broad powers to act for the plaintiffs, including the power to make all decisions on behalf of the plaintiffs in connection with the day-to-day management and operation of the properties. Indeed, Falcon personnel would be named officers of plaintiffs in order to allow Falcon to meet its day-to-day obligations. Falcon was granted the authority to hire and fire property managers, leasing brokers, professional advisors, and vendors for the properties plaintiffs owned. Falcon was also integrally involved in, and was paid substantial fees in connection with, the management of plaintiffs' properties, plaintiffs' acquisitions and financing of the properties, as well as the refinancings and dispositions thereof. Falcon agreed that it would act at all times in performance of its duties to plaintiffs as a fiduciary.

Messrs. Hallengren, Miller, and Hill (Individual Defendants) were each officers of Falcon, as well as officers of plaintiffs. Further, Mr. Hallengren served as a director of the board of each of plaintiffs. Falcon and the Individual Defendants had full custody and discretionary authority over plaintiffs' bank accounts, and they each owed fiduciary duties as plaintiffs' asset manager and as directors and/or officers of plaintiffs themselves.

Plaintiffs allege that the Individual Defendants breached their fiduciary duties to plaintiffs and caused Falcon to breach its fiduciary duties and its management agreements by, among other things (i) misappropriating, misallocating and/or failing to appropriately safeguard plaintiffs' funds; (ii) causing the plaintiffs to hire third party vendors who, pursuant to arrangements that were concealed from the disinterested directors and shareholders of plaintiffs, were required to secretly pay a portion of their compensation to the Individual Defendants and/or the companies

they owned and controlled such as IRES, Whitney Investment Advisors and Welsh Real Estate Services (WRES), all at plaintiffs' expense, and (iii) approving, or negligently failing to stop, the payment of unauthorized and unearned compensation and fees to the Individual Defendants, the companies they owned and controlled (such as IRES, Whitney Investment Advisors and WRES), and/or third parties.

In short, plaintiffs entrusted Falcon and the Individual Defendants to manage more than $1 billion of commercial real estate, for which defendants received tens of millions of dollars in compensation. From at least 2006 through 2011, defendants allegedly betrayed that trust and breached their fiduciary duties by extracting illicit payments from vendors, transferring to themselves unearned fees, and in several cases, blatantly misappropriating plaintiffs' funds without any basis.

In May 2009, a consultant was retained to review the plaintiffs' investments and Falcon's records pertaining thereto. Plaintiffs began by requesting information from Falcon informally. However, shortly after the information requests began, Falcon engaged the New York office of Kasowitz Benson Torres & Friedman LLP (Kasowitz Firm).

Rather than aid the resolution, the Kasowitz Firm on behalf of defendants, stymied plaintiffs inquiry. Despite repeated demands, defendants would not provide plaintiffs with the most basic of information. It was only when plaintiffs allegedly caught defendants red-handed taking improper payments, that defendants acknowledged the problem. They did not correct it, however; and indeed they still have not.

After discovering defendants' misconduct, plaintiffs also began the process of terminating Falcon as asset manager and recapturing control of the properties' financial records, accounts and

operations. However, defendants' lack of cooperation delayed the termination process with respect to many of the properties. This delay was an apparent effort to keep open the sources of defendants' "revenue," *i.e.* the properties' bank accounts from which they paid themselves, and to prevent plaintiffs from learning the true extent of defendants' misappropriation and misconduct. Mr. Hallengren resigned from plaintiffs' boards of directors in April 2010.

On February 10, 2012, plaintiffs commenced an arbitration (the Arbitration) before the American Arbitration Association (AAA) alleging breach of contract claims against defendant Falcon, as well as various tort claims against the defendants also named in this action, including, *inter alia*, breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference, conversion and unjust enrichment. In their Demand for Arbitration (Demand), plaintiffs alleged, among other things, that defendants misappropriated plaintiffs' funds, approved the payment of unauthorized and unearned compensation and fees to the individual defendants and their companies, and engaged in a massive kickback scheme in connection with the hiring of third party vendors.

In the Demand, plaintiffs asserted causes of action against defendants for (i) breach of the asset management agreements, (ii) breach of fiduciary duty, (iii) fraud, (iv) negligent misrepresentation, (v) conversion, (vi) unjust enrichment, and (vii) an accounting. Mr. Miller was not named in the Demand.

On March 6, 2012, Messrs. Hallengren, Hill, IRES and WRES, but not Falcon, commenced a proceeding in court seeking to stay the Arbitration as to them (Prior Action). Specifically, Mr. Hallengren argued that if plaintiffs "want to assert claims against [Hallengren and others], they must pursue those claims in an appropriate court of law . . ."

In a decision and order dated September 18, 2012, the court (Sherwood, J.) ordered that the petition to stay the Arbitration was granted with respect to Messrs. Hallengren, Hill, IRES and WRES. Plaintiffs filed a notice of appeal on October 18, 2012.

In May 2013, despite the appeal, the Kasowitz Firm moved the court to be removed as counsel of Mr. Hill, IRES and WRES in the Prior Action. On June 28, 2013, Justice Sherwood issued an order that relieved the Kasowitz Firm as counsel for Mr. Hill, IRES and WRES "upon filing of proof of compliance with the following conditions." The Order directs that the former clients obtain new counsel within 45 days and file an appearance. The corporate parties were advised that they must appear by counsel.

On July 19, 2013, Mr. Hill filed a notice of appearance in the Prior Action representing that he was appearing *pro se*. Counsel for IRES never filed any such notice of appearance. Plaintiffs' position is that the conditions were not met with respect to IRES as it failed to file a notice of appearance by counsel.

The parties proceeded with the Arbitration. In connection with plaintiffs' demands for discovery in the Arbitration, the parties submitted a joint report to the panel in which Falcon, Messrs. Hallengren and Hill, and IRES (among others) agreed to (i) make all of Falcon's files relating to plaintiffs available for inspection and copying in Dallas, Texas, the cost of which would be split between plaintiffs and Falcon, and (ii) agreed to produce claim specific documents pursuant to the agreed upon requests that were attached to the joint report.

Falcon – at its own cost – sent all of its files that it maintained in Dallas and its other offices, as well as personal computers, to its office in Chicago, Illinois, for cataloguing, bates-stamping and production. While defendants suggest that the information was made

available to plaintiffs, Falcon continued to obstruct plaintiffs by unilaterally changing its mind as to what documents were available, where they were located and when. No substantive discovery took place in the Arbitration.

On December 5, 2012, the Arbitration was stayed in favor of a mediation. Due to numerous scheduling issues and delays, the mediation was not held until May 9, 2013. Following the mediation, the parties continued to negotiate with the assistance of the mediator. The matter has not been resolved, and the Arbitration is still stayed.

Notably, throughout the course of the Arbitration and Mediation, neither Falcon nor any of the other defendants have produced any documents or information despite its agreements to provide documents.

On November 8, plaintiffs filed a summons with notice. By email dated November 11, 2013, Mr. Hallengren agreed to accept service.

Pursuant to CPLR 303, plaintiffs attempted to serve IRES via the Kasowitz Firm on November 19, 2013. The Kasowitz Firm, through attorney David Rosner, rejected service. Plaintiffs served the Clerk of the Court with the summons with notice for Mr. Hill and IRES. Shortly thereafter, Messrs. Hallengren and Hill made demands for the complaint.

On January 22, 2014, plaintiffs filed their original complaint in this action. On March 3, 2012, plaintiffs filed an amended complaint, which arises from similar misconduct as is asserted in the Demand in the Arbitration. The complaint alleges causes of action against defendants for (i) breach of fiduciary duty, (ii) aiding and abetting breach of fiduciary duty, (iii) fraud and conspiracy to defraud, (iv) misappropriation, (v) interference with contract, (vi) negligence,

(vii) negligent supervision, (viii) tortious interference, (ix) unjust enrichment, and (x) an accounting.

Plaintiffs served a Notice of Plaintiffs' First Request for Production of Documents and Information on Messrs. Hallengren and Hill and IRES (Requests). The Requests include both jurisdictional discovery regarding defendants' contacts with New York and merits-based discovery. Plaintiffs requested responses to the Requests by March 31, 2014. Mr. Hallengren has not responded to the Requests. Mr. Hill responded late to the Requests. In response to the requests served on Mr. Miller, he served myriad objections.

On April 11, 2014, plaintiffs sent a letter to Mr. Hallengren's counsel demanding production of all documents by April 18, 2014 and informing Mr. Hallengren of his waiver of objections. A similar letter was sent to Mr. Hill.

On April 18, 2014, Falcon and Messrs. Hallengren and Miller each filed their instant motions to dismiss and motions to stay the action. Together with their six motions, Falcon, Messrs. Hallengren and Miller also filed a letter with this court seeking to stay discovery pending the court's decision on defendants' motions to dismiss and motions for a stay. Defendants' letter admits that the Arbitration is stayed and no discovery is proceeding.

During the May 15, 2014 discovery conference in this action, Falcon's, Messrs. Hallengren's and Miller's application to stay discovery was rejected. Plaintiffs contacted counsel for Falcon, Messrs. Hallengren and Miller to demand discovery, including most importantly jurisdictional discovery sought by the Requests in advance of filing the instant opposition. Falcon, Messrs. Hallengren and Miller refused.

Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211 (a) (7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319 (1st Dept 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept 2003).

Personal Jurisdiction

This court has personal jurisdiction over Messrs. Hallengren and Hill, and IRES pursuant to CPLR 303. CPLR 303 states that

> The commencement of an action in the state by a person not subject to personal jurisdiction is a designation by him of his attorney appearing in the action or of the clerk of the court if no attorney appears, as agent, during the pendency of the action, for service of a summons pursuant to section 308, in any separate action in which such a person is a defendant and another party to the action is a plaintiff if such separate action would have been permitted as a counterclaim had the action been brought in the supreme court.

CPLR 303. The basis for such jurisdiction is that "plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court. . . . It is the price which the state may exact as the condition of opening its courts to the plaintiff." *Adam v Saenger*, 303 U.S. 59, 67-68 (1938); *see also Rockwood Nat. Corp. v Peat, Marwick, Mitchell & Co.*, 406 NYS2d 106, 107 (2d Dept 1978); *Waterman S.S. Corp. v Ranis*, 141 Misc 2d 772 (Sup Ct NY Cnty 1988) (same).

In a recent decision, Justice Kornreich succinctly stated the effect of CPLR 303:

> Thus, a non-domiciliary who commences an action in a New York court becomes amenable to the service of a summons for a new action by a defendant in the first action. The only restriction is that the claims in the new action must be such as could have been brought as counterclaims in the first action had the action been brought in supreme court. Since New York supreme court is a court of general subject-matter jurisdiction, this places practically no limit on the possible subject matter of the new action.

AQ Asset Management LLC v Levine, 42 Misc 3d 971, 973 (Sup Ct NY Cnty 2014). *See also Norry v Land*, 44 Misc 2d 556, 557 (Sup Ct Monroe Cnty 1964) (explaining that in the context of CPLR 303, a "'counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable'. . . . It is evident that in view of New York's broad counterclaim rules, it is not presently necessary that the two actions be related.").

Messrs. Hallengren and Hill and IRES commenced the Prior Action in this court in order to petition the court to stay the Arbitration as to them. By that act, Messrs. Hallengren and Hill and IRES made themselves subject to the personal jurisdiction of this court for the adjudication of any claims that plaintiffs could assert as counterclaims in the Prior Action. As set forth above, Mr. Hallengren accepted service, and Mr. Hill and IRES were served via the Clerk of the Court and attempted service on the Kasowitz Firm. Under CPLR 303, the court has personal jurisdiction over Messrs. Hallengren and Hill and IRES.

Mr. Hallengren contends that this court is without jurisdiction under CPLR 303 because (1) plaintiffs did not serve the Kasowitz Firm, or the substituted firm or the Clerk of the Court in connection with Mr. Hallengren, and (2) Justice Sherwood's September 18, 2012 Decision and

Order was a "final judgment" terminating the Prior Action, and thus there was no pending action as required by CPLR 303. Mr. Hallengren's arguments are without a basis in law or fact.

As an initial matter, Mr. Hallengren (through his counsel) agreed to accept service of the summons with notice. Plaintiffs were not required to serve Mr. Hallengren at all. Leaving that aside, CPLR 303 is not just a "service statute," as Mr. Hallengren argues. CPLR 303 confers jurisdiction over litigants to the court and separately provides for an agent of service of process within New York for parties that seek to utilize the statute. *See* CPLR 303. *See also AQ Asset Management LLC*, 42 Misc 3d at 973 ("CPLR 303 not only confers jurisdiction over the person of a non-domiciliary plaintiff, but it also explicitly designates New York agents to accept service of the summons on behalf of that non-domiciliary. . . ."). Such designation of an agent for service of process is not mandatory as Mr. Hallengren contends, but rather permissive in order to provide parties with a party to serve within the state.

Further, Section 303 jurisdiction lasts so long as the action of the out of state party commenced in New York remains pending, which means until a final judgment has been entered by the court. *See Banco Do Brasil v Madison S. S. Corp.*, 307 NYS2d 341, 344 (Sup Ct NY Cnty 1970). In New York, "[e]ntry does not occur, however, until the clerk files the judgment after signing it." CPLR 5016 (a). *See also* Siegel, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 7B, CPLR 5016, at 641. A judgment is entered only after it has been both signed and filed by the County Clerk. CPLR 5016 (a). As a matter of law, Justice Sherwood's September 18, 2012 Decision and Order is not a final judgment.

No such final judgment has ever been filed in the Prior Action or entered by the Clerk of the Court. Defendants' actions also demonstrated their knowledge that the Prior Action is still

pending. Mr. Hallengren substituted counsel in January 2013. Motions and hearings were held in the Prior Action in May and June of 2013, including the Kasowitz Firm's motion by Order to Show Cause to be relieved as counsel for Mr. Hill and IRES. Interestingly, Justice Sherwood granted the motion conditionally, which conditions were not fulfilled with respect to IRES. Mr. Hill then filed a notice of appearance in the Prior Action on July 19, 2013. Plaintiffs served the Kasowitz Firm, as agent for service of process for IRES. The docket of the Prior Action is evidence of the fact that no final judgment has ever been entered by the Clerk of the Court.

For these reasons, the court has personal jurisdiction over Messrs. Hallengren and Hill and IRES.

Messrs. Hallengren, Miller and Hill and IRES

This court has personal jurisdiction over Messrs. Hallengren, Miller and Hill and IRES pursuant to CPLR 302 (a) (1) and (2). CPLR 302 (a) (1) and (2) state, in pertinent part:

> 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 . . .

CPLR 302 (a) (1) and (2). CPLR 302 (a) (1) is a single act statute, such that proof of one transaction in New York is sufficient to invoke jurisdiction. *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988).

Messrs. Hallengren and Miller make substantially the same arguments that the court cannot establish personal jurisdiction over them pursuant to CPLR 302 and that it would be against due process for the court to do so. Messrs. Hallengren's and Miller's main argument appears to be that "jurisdiction over the individual officers of a corporation may not be based

merely on jurisdiction over the corporation." Messrs. Hallengren and Miller misapprehend New York law and plaintiffs' allegations.

New York has rejected the fiduciary shield doctrine for purposes of analyzing jurisdiction. *See Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 472 (1988). Jurisdiction can be exercised over officers for their actions on behalf of a company. The *McFadden* case is particularly instructive. In *McFadden*, an individual defendant (acting as a corporate agent) had not physically entered New York, but had acted on behalf of non-domiciliary corporations transacting business in New York, specifically the purported sale-leaseback of an oil rig with plaintiff. The court held that "[the agent] represented two corporations during their participation in purposeful corporate acts in this State and if he acted improperly in representing them, the fact that he acted for one or both of the corporations should not necessarily relieve him from responding to plaintiffs' claims against him."

The facts are even more clearly in favor of jurisdiction here. Falcon is headquartered here in New York, and Mr. Hallengren engaged in the alleged tortious activity and breaches of fiduciary duties while working out of Falcon's New York office. While Mr. Miller may have been based in Chicago, he often traveled to Falcon's New York office in order to assist Falcon, Mr. Hallengren and the other co-conspirators in connection with their fraud on plaintiffs. The same is true for Mr. Hill. Under such facts, New York courts have personal jurisdiction. *See e.g. Stardust Dance Prods., Ltd. v Cruise Group Int'l, Inc.*, 63 AD3d 1262, 1264 (3d Dept 2009) ("[A] meeting of parties in New York, even for just one day, may be enough to subject defendants to New York jurisdiction"). *M. Fabrikant & Sons, Inc. v Adrianne Kahn, Inc.*, 144

AD2d 264, 265-66 (1st Dept 1988) (jurisdiction existed over out-of-state defendant who attended one meeting in New York, and conducted remainder of its business by mail and phone).

That defendants' participation and activities in furtherance of their fraudulent scheme centered in New York at Falcon's headquarters also provides a basis for long-arm jurisdiction. *See Al-Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428-29 (1st Dept 2013) (finding personal jurisdiction over individual defendant based on acts in furtherance of conspiracy, including efforts to dissuade plaintiffs from taking any action against defendants, communicating with the plaintiffs regarding their investments, and reassuring plaintiffs that he was in touch with MMS's virtual New York office). *Tucker v Sanders*, 75 AD3d 1096, 1096 (4th Dept 2010) (finding personal jurisdiction over non-domiciliary defendant corporation and its principal based on their conduct and that of their co-conspirator/agent in transmitting fraudulent statements and committing acts in furtherance of the fraud in New York). *National Union Fire Ins. Co. of Pittsburgh v Archway Ins.*, Index No. 653173/2012 (Schweitzer, J.), 2013 WL 3816529, *9-10 (Sup Ct NY Cnty July 11, 2013) (finding president of corporations subject to jurisdiction based on certain activities in New York in furtherance of fraud).

Defendants' tortious conduct in furtherance of a fraud perpetrated out of Falcon's New York office provides this court with personal jurisdiction over Messrs. Hallengren, Miller and Hill and IRES. Defendants' conclusory and self-serving affidavits cannot defeat plaintiffs well-pled facts and evidence submitted in support of the instant motion.

Defendants' jurisdictional motion is denied.

Forum Non Conveniens

"The common-law doctrine of *forum non conveniens*, also articulated as CPLR 327, permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere." *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 (1984). Defendants have the burden of proof when challenging the forum to "demonstrate relevant private or public interest factors which militate against accepting the litigation." "'[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *See Anagnostou v Stifel*, 204 AD2d 61, 61 (1st Dept 1994) *quoting Waterways Ltd. v Barclays Bank*, 174 AD2d 324, 327 (1st Dept 1991). Defendants do not meet this heavy burden.

Falcon's, Messrs. Hallengren's and Miller's contention that the action should be dismissed on *forum non conveniens* grounds is rejected. Falcon is a resident of New York, is headquartered here in New York with offices at 570 Lexington Avenue, New York, New York, and, during the relevant times alleged in the complaint, Mr. Hallengren lived in New York and worked out of Falcon's New York office. Defendants themselves have recognized that New York is a convenient forum multiple times. First, Falcon and Messrs. Hallengren and Miller negotiated the asset management agreements between Falcon and the plaintiffs, and during those negotiations Falcon agreed to have "the City of New York" as the situs for any arbitration determining any controversy or claim between the parties and selected New York law to govern its relationship with plaintiffs. Falcon's *forum non conveniens* argument rings particularly hollow in light of its express selection of New York as the situs for any arbitration between the parties. For this reason alone, defendants' *forum non conveniens* argument is

rejected. *See e.g. Humitech Dev. Corp. v Comu*, 2007 Slip Op. 51354(U) (Ling-Cohan, J.), 2007 WL 2004175, *12 (Sup Ct NY Cnty July 11, 2007) (denying motion on *forum non conveniens* grounds based on forum selection clause of New York and New York choice of law provision).

Mr. Hallengren also selected New York as a convenient forum when he, Mr. Hill and IRES petitioned this court to stay the Arbitration with respect to them. This fact also directly undercuts Mr. Hallengren's *forum non conveniens* argument. *See e.g. Irrigation & Indus. Dev. Corp. v Indag S.A.*, 37 NY2d 522, 525 (1975) ("the fact that defendant chose to use our courts so as to utilize the simplified procedure under CPLR 3213 is one factor the lower courts should consider in passing on a motion to dismiss on the grounds of *forum non conveniens*"). *Ahearn v Burch*, 90 AD2d 635, 636 (3d Dept 1982) ("the doctrine of *forum non conveniens* may not be used as a shield by parties who have themselves selected the forum"). *Sambee Corp. Ltd. v Moustafa*, 216 AD2d 196, 198 (1st Dept 1995) (denying motion to dismiss under doctrine of *forum non conveniens* where defendant had already sued plaintiff in New York.

Defendants fail to meet their high burden to show that New York is an inconvenient forum because they have not demonstrated an alternative, more convenient forum in which all parties are amenable to being sued. *Islamic Republic of Iran*, 62 NY2d at 479. *Berger v Scharf*, N.Y. Slip Op. 50519(U), at *2 (Sup Ct NY Cnty Mar. 29, 2006). It appears that defendants are arguing that witnesses and documentary evidence are scattered in various states, such as Illinois, Texas, California, New Jersey, Virginia, Georgia, Tennessee and Arizona. Messrs. Hallengren and Miller contend that there are parties that reside in Europe and the Middle East that are necessary parties to the instant dispute. The absence of a convenient alternative forum to the dispute is grounds to deny the motion. *See Al-Lawati*, 102 AD3d at 429 ("the court providently

exercised its discretion in declining to dismiss action on *forum non conveniens* grounds 'based on the fact that this is a multijurisdictional action with no single convenient forum amenable to all the parties.'"). *Anagnostou*, 204 AD2d at 62 ("the likely presence of witnesses to the subject events in Greece, while a significant factor, does not automatically override plaintiffs' choice of forum"). *Theatrical Servs. & Supplies, Inc. v GAM Prods., Inc.*, 2012 WL 466913, *5-6 (Sup Ct Suffolk Cnty Feb 10, 2012) ("Books and records (unless particularly voluminous) are portable, and it would not be significantly more burdensome to ask GAM's witnesses to travel to New York than to expect plaintiff's witnesses to journey to California").

Other factors weigh in favor of New York as a convenient forum for the instant dispute. Falcon is a New York resident. *See Islamic Republic of Iran*, 62 NY2d at 479. Falcon hired the Kasowitz Firm to represent it in addressing plaintiffs' questions during their inquiry into a basis for their claims and plaintiffs' subsequent termination of Falcon as asset manager. Such previous retention of New York counsel to represent Falcon and its principals and officers is a factor weighing in favor of New York as a convenient forum. *See e.g. Rational Strategies Fund v Hill*, Index No. 651625/2013 (Schweitzer, J.), 40 Misc 3d 1214(A), *4 (Sup Ct NY Cnty July 18, 2013) (citing retention of New York law firm to work on underlying transaction and its further representation as factor contributing to the court's denial of the motion to dismiss on *forum non conveniens* grounds).

The motion to dismiss on this ground is denied.

Pro se

IRES's "motion" to dismiss is deficient as a matter of law. CPLR 321 (a) states, in pertinent part, that a "party . . . may prosecute or defend a civil action in person or by an attorney,

except that a corporation or voluntary association shall appear by attorney. . . ." *See* CPLR 321 (a) (emphasis added). *See also Monte Carlo, LLC v Yorro*, 195 Misc 2d 762, 762 (Dist Ct Nassau Cnty 2002) (holding that limited liability company must appear by an attorney pursuant to CPLR 321 (a)).

Mr. Hill and IRES are aware that IRES is required to appear by counsel. In the Prior Action, Justice Sherwood issued an order directing IRES to appear by counsel. Mr. Hill subsequently filed a notice of appearance *pro se* in the Prior Action.

On March 4, 2014, plaintiffs' counsel informed Mr. Hill and IRES that IRES had to appear by counsel. Plaintiffs told IRES and Mr. Hill that it would seek a "default judgment or similar relief against IRES in this action unless it appears by counsel." To date, counsel has not appeared on behalf of IRES.

Where a corporation makes a motion without counsel, such motion should be dismissed. *See e.g. Hilton Apothecary, Inc. v New York State*, 89 NY2d 1024, 1024 (1997) (dismissing motion for leave to appeal because corporation "must appear by attorney").

IRES's motion to dismiss is denied.

Necessary Parties

Dismissal is not an appropriate remedy for lack of a necessary party. If the court finds a necessary party absent, then it should order that said party be summoned. If jurisdiction over that party cannot be obtained, then the court must determine whether the action should proceed. *Éclair Advisor Ltd. Jindo Am., Inc.*, 39 AD3d 240, 244 (1st Dept 2007).

In determining whether to allow the action to proceed, the court shall consider the following:

> (1) whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; (2) the prejudice which may accrue from the nonjoinder to the defendant or the person not joined; (3) whether and by whom prejudice might have been avoided or may in the future be avoided; (4) the feasibility of a protective provision by order of the court or in the judgment; and (5) whether an effective judgment may be rendered in the absence of a person who is joined.

Defendants' motion provides no basis to dismiss the complaint. Defendants' motion does not explain why the individuals named therein are necessary parties. Defendants just repeatedly state that those individuals are necessary parties to any resolution of the claims made by plaintiffs complaint because "[they] were necessary actors in the action Plaintiffs complain of in their Amended Complaint." Defendants then assert that the purported necessary parties had knowledge of, or directed, certain actions alleged in the complaint. Leaving aside the circular nature of this argument, defendants appear to be suggesting that these individuals are witnesses, not necessary parties. But witnesses are not parties.

To the extent that defendants are suggesting that the named individuals are necessary parties because they are liable to plaintiffs, or defendants, in this action, defendants' argument is wrong as a matter of law. New York law is clear that joint tortfeasors are not necessary parties. *Siskind v Levy*, 13 AD2d 538, 539 (2d Dept 1961). *Smith v Pasqua*, 110 AD3d 710, 710 (2d Dept 2013). CPLR 1002. *Hecht v City of New York*, 60 NY2d 57, 62-63 (1983). Given that plaintiffs have only asserted tort claims in the complaint, the named individuals are not necessary parties.

If defendants are claiming that these individuals are somehow necessary to protect defendants' interests, then their remedy is to implead those parties. *Éclair Advisor Ltd. v Jindo Am., Inc.*, 39 AD3d 240, 246 (1st Dept 2007).

Defendants' motion with respect to necessary parties is denied.

Capacity to Sue

CPLR 3211 (a) (3) states that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the party asserting the cause of action has no legal capacity to sue.

3150 Briarpark L.P. is "no longer in existence and good standing under the laws of the state of Delaware." *See* 3150 Briarpark L.P. Delaware Certificate of Standing. On August 7, 2012, 3150 Briarpark L.P. filed a Certificate of Cancellation.

3010 Briarpark Tenant L.P. is "no longer in existence and good standing under the laws of the state of Delaware." *See* 3010 Briarpark Tenant L.P. Delaware Certificate of Standing. On October 16, 2012, 3010 Briarpark Tenant L.P. filed a Certificate of Cancellation.

A limited partnership voluntarily files a Certificate of Cancellation. By filing a certificate of cancellation, the company is stating that it has been dissolved and it is in the completion of winding up. (Del Code 17-203)

Under Del Code 17-803(b) a limited partnership can "prosecute and defend suits, whether civil, criminal or administrative" only "until the filing of a certificate of cancellation as provided in 17-203[.]."

Under Del Code 17-803, once they filed the certificates of cancellation, 3150 Briarpark L.P. and 3010 Briarpark Tenant L.P. were no longer able to prosecute or defend a suit.

3150 Briarpark LP filed this action over fifteen (15) months after filing its certificate of cancellation. 3010 Briarpark Tenant LP filed this action approximately thirteen (13) months after

filing its certificate of cancellation. Neither 3150 Briarpark LP nor 3010 Briarpark Tenant LP was able to prosecute a suit at the time they filed this action.

Defendants' motion to dismiss all causes of action concerning 3150 Briarpark L.P. and 3010 Briarpark Tenant L.P. because of lack of capacity to sue is granted.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied on all grounds except it is granted for lack of capacity to sue as to plaintiffs 3150 Briarpark L.P. and 3010 Briarpark Tenant L.P.; and it is further

ORDERED that the motion of defendant IRES is dismissed; and it is further

ORDERED that any defendant who has not yet answered the Amended Complaint shall do so within 20 days of service of the Notice of Entry of this Amended Decision and Order.

Dated: October 10 , 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER