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

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ALI JOOBEEN,

Index No. 153959/13

Plaintiff,

-against-

ORANG R. JOOBEEN a/k/a ORJ PROPERTIES,

Defendant

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JOAN MADDEN, J.:

In this dispute between two brothers regarding a loan, plaintiff, appearing *pro se*, moves for summary judgment in lieu of a complaint pursuant to CPLR 3213 in the amount of $457,141.81, consisting of the principal amount of $115,000 and interest in the amount of $342,141.81. Defendant opposes the motion, and cross moves, pursuant to CPLR 327, to dismiss the action on the grounds of forum non conveniens.

Plaintiff asserts that he made cash advances to defendant in the amount of $115,000 during 1995 and 1996 based on defendant's representations regarding a "lucrative joint family investment project in Manhattan, close to Times Square and the Port Authority." In support of the motion, plaintiff submits (1) his affidavit, (2) a promissory note executed by defendant in Philadelphia, Pennsylvania, on June 1, 1996, for $115,000, which provided for interest at a rate of 8.5% per annum beginning on June 1, 1996, and provides that "it shall be construed in accordance with the laws of Pennsylvania," and (3) an agreement signed by plaintiff only entitled "Option Agreement-Buyer's Executory Undertakings with Seller to Take Back Purchase Money Mortgage over Conveyed-Property-As-Security-For-Note" (hereinafter "Option Agreement").

Defendant opposes the motion, arguing the $115,000 loan as evidenced by the promissory note was fully repaid to plaintiff, together with interest, in connection with a real estate transaction in which plaintiff used the money as partial consideration towards his acquisition from defendant of six income producing properties located in Philadelphia, Pennsylvania (hereinafter "the Philadelphia Properties"). In support of his position, defendant submits defendant's affidavit and a copy of an (1) agreement dated June 16, 1997 between defendant and his former wife, as Sellers, and plaintiff, as Buyer, for the purchase of the Philadelphia Properties in exchange for which the Buyer (i.e. plaintiff) shall "[f]orgive all loans previously made to Sellers," and "[e]nter into a Note and Mortgage to the [Sellers] in the approximate amount of $125,000 payable over 10 years at 12% interest, less encumbrances on the properties, as well as any corporate liens/judgments and taxes owed...", and (2) a deed dated June 16, 1997, between defendant and his former wife, as Grantor, and plaintiff as Grantee, evidencing the transfer of the Philadelphia Properties to plaintiff. Defendant maintains that plaintiff defaulted on the $125,000 loan and provides evidence that an action regarding such default is pending in the Philadelphia County Court of Common Pleas.

Defendant also cross moves to dismiss this action on the grounds of forum non conveniens, asserting that there is no connection between this action and New York State. Defendant maintains that he is not a New York resident and, instead, resides in New Jersey, and submits proof of bills for a mortgage on his New Jersey residence. In addition, defendant asserts that he does not work in New York and has not done business here since 2011. He also points out that the promissory note was signed in Pennsylvania and is governed by Pennsylvania law. Defendant also states that plaintiff does not live in New York. As for the Option Agreement,

which refers to Manhattan properties, defendant denies that he was ever a party to the agreement which he describes as "fictional," and notes that his signature is not on the agreement. He also asserts that plaintiff has commenced numerous lawsuits in Pennsylvania, including concerning the promissory note at issue here.

In opposition to the cross motion to dismiss on forum non conveniens grounds, plaintiff argues that defendant lives in New York, all his assets are here, including properties in New York owned through two companies, and he is represented by two New York attorneys. Plaintiff also argues that if this action were commenced in Pennsylvania, the court there would be unable to enforce a judgment against defendant's New York assets .

It is well settled that, New York courts "are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State." Islamic Republic of Iran v. Pahlavi, 62 NY2d 474, 478-479 (1984), cert denied, 469 US 1108 (1985); see also Martin v. Mieth, 35 NY2d 414, 418 (1974). "The doctrine [of forum non conveniens] rests, in large part, on considerations of public policy and . . . our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." . See Nassar v. Nassar, 52 AD3d 306, 308 (1st Dept 2008)(internal citations and quotations omitted).

The doctrine of forum non conveniens, codified in CPLR 327 (a), "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 at 479. The central focus of forum non conveniens is to ensure that the trial will be convenient, and will best serve the ends of justice. Piper Aircraft Co. v. Reyno, 454 US 235(1981); Capitol Currency

Exch. N.V. v. National Westminster Bank PLC, 155 F3d 603 (2nd Cir. 1998), cert denied, 526 US 1067 (1999). If the balance of conveniences dictates that a trial in plaintiff's chosen forum would be unnecessarily burdensome for defendant or the court, then dismissal is proper. Id.

In determining a motion to dismiss on forum non conveniens grounds, the burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors that militate against accepting the litigation. Brodherson v. Ponte & Sons, 209 AD2d 276, 277 (1st Dept. 1994). The factors to be considered include, the burden on New York courts, the potential hardship to the defendant, the availability of an alternative forum in which the plaintiff may bring suit, the residence of the parties, and where the events giving rise to the action occurred. Islamic Republic of Iran v. Pahlavi, 62 NY2d at 478-479. The court also considers whether there is similar action pending in another jurisdiction. Certain Underwriters at Lloyds, London v. Millennium Holdings, LLC, 44 AD3d 536, 537 (1st Dept 2007); Carvel Corp. v. Ross Distrib. Inc., 137 AD2d 578, 578-579 (2nd Dept. 1988).

Under this standard, the motion to dismiss on forum non conveniens grounds should be granted. As a preliminary matter, the court notes that the defendant's ownership of assets in New York is insufficient to provide a basis for finding that there is a substantial nexus between the action and New York. See Nassar v. Nassar, 52 AD3d at 306. In this connection, as the First Department has noted, the dismissal of an action on forum non conveniens grounds "does not deprive [a plaintiff] of access to [New York] courts for the purpose of ... enforcing a judgment of [another court]." Id, at 308.

Next, while the record is unclear as whether defendant has a residence in New York in addition to a home in New Jersey, defendant's residence is not dispositive here, particularly as

plaintiff is not a New York resident. Sweeny v. Hertz Corp. 250 AD2d 385, 386 (1st Dept. 1998)(the plaintiff's residence is "generally the most significant factor in determination a forum non conveniens motion"). In addition, while plaintiff alleges that the loan was given for the purpose of acquiring certain New York properties, the promissory note on which plaintiff seeks to recover was signed in Pennsylvania and is to be construed in accordance with the laws of Pennsylvania. Moreover, defendant maintains that the loan at issue in this action was paid in connection with a real estate transaction for the sale of property in Pennsylvania.

Furthermore, the record indicates that three actions are pending in Pennsylvania relating to various disputes between these parties, in which plaintiff has made filings regarding the promissory note and Option Agreement at issue here. Thus, plaintiff has an available alternative forum, and there exists related actions in another jurisdiction, both factors which militate in favor of dismissing this action on forum non conveniens grounds . See Carvel Corp. v. Ross Distribution, Inc., 137 AD2d 578, 578-579 (2nd Dept. 1988)(holding that trial court did not abuse its discretion is dismissing the action on forum non conveniens grounds where defendants were based in Texas and an action was already pending in Texas).

Lastly, the court notes that wherefore clause in defendant's papers requests that an unidentified lis pendens be vacated and defendant requested this relief at oral argument as well. However, a review of the court's on-line records show that document 11 is described as "a lis pendens to preserve the status quo" and that such document was rejected and returned for correction, and no other lis pendens was filed. Under these circumstances, the request for such relief is denied as moot.

Conclusion

Accordingly, it is hereby

ORDERED that defendant's cross motion to dismiss pursuant to CPLR 327(a) based on the doctrine of forum non conveniens is granted; and it is further

ORDERED that the Clerk is directed to dismiss the action in its entirety; and it is further

ORDERED the motion for summary judgment in lieu of complaint is denied without prejudice to renewal in an appropriate forum; and it is further

ORDERED that defendant's request to vacate a lis pendens is denied as moot.

Dated: November 25 2014

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