Stevenson v AMP Solar Group, Inc.
2015 NY Slip Op 30771(U)
May 11, 2015
Supreme Court, New York County
Docket Number: 65197/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ANDREW STEVENSON, individually and derivatively, as a minority shareholder, on behalf of YALLINGUP CANADA I CORPORATION,

Index No.: 651971/2014

DECISION & ORDER

Plaintiff,

-against-

AMP SOLAR GROUP, INC., AMP SOLAR LIMITED PARTNERSHIP, POTENTIA SOLAR, INC., PAUL EZEKIEL, and DAVE ROGERS,

Defendant,

-and-

YALLINGUP CANADA I CORPORATION,

Nominal Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Defendants AMP Solar Group, Inc. (AMP Inc.), AMP Solar Limited Partnership (AMP LP), Potentia Solar, Inc. (Potentia), Paul Ezekiel, and Dave Rogers move, pursuant to CPLR 3211(1), (7), & (8) and CPLR 327(a), to dismiss the complaint. Defendants' motion is granted for the reasons that follow.

I. Procedural History & Factual Background

The facts recited are taken from the complaint, the documentary evidence, and the affidavits submitted in connection with the jurisdictional allegations. As this is a motion to dismiss, the court assumes the truth of plaintiff's allegations.

Plaintiff Andrew Stevenson, a Connecticut resident, is a financial consultant with experience in the solar, wind, and biofuel industries. The individual defendants, Ezekiel, a New York resident, and Rogers, a resident of Ontario, Canada (collectively, the Individual Defendants), control a number of Canadian clean energy investment and development

companies. According to the complaint, the Individual Defendants control AMP LP, which is a joint venture of AMP, Inc. and Potentia. The Individual Defendants are the majority owners of AMP, Inc., but it is not clear who owns and controls Potentia. AMP LP, AMP, Inc., and Potentia (collectively, the Corporate Defendants) are incorporated and do business in Ontario. The Corporate Defendants do not conduct business in New York.

In February 2010, the parties began discussing the possibility of Stevenson consulting on solar development projects in Canada. In September 2010, Stevenson allegedly began "devoting his full attention to those projects." Stevenson, however, does not allege what services he provided other than attending a few meeting with banks and a ratings agency and preparing some presentations in an attempt to obtain funding for the projects.[1] The parties agreed that Stevenson would not be paid for these services. Instead, defendants allegedly orally agreed to provide Stevenson with 12% of the profits the Corporate Defendants obtained.

In February 2011, the parties' executed a written Consulting Agreement (the Agreement).[2] The Agreement is a contract between Stevenson and nominal defendant Yallingup Canada I Corporation (Yallingup), a Nova Scotia, Canada unlimited liability company. Yallingup, an affiliate of AMP Inc., was formed by defendants in 2010 for the purpose a creating and managing an investment in a solar energy project. The Agreement, which is governed by New York law and has a mandatory arbitration clause, is unambiguously clear that Stevenson's

[1] Defendants claim Stevenson only met with Bank of America and Moodys, and that neither meeting resulted in financing of any of defendants' projects. Stevenson claims he attended more meetings, but provides scant specifics. However, for the purposes of this motion to dismiss, the court will accept the truth of Stevenson's allegations. That being said, it should be noted that Stevenson does not allege that his work caused the effectuation of the deal at issue in this case (with the Toronto School District).

[2] The court limits its discussion of the Agreement to the issues pertinent to this motion, as Stevenson does not assert a breach of contract claim.

relationship with Yallingup is only as an independent contractor, and that he does not have any other employment or business relationship with Yallingup.[3] The single exception to this caveat is that the Agreement provides that Stevenson is entitled to 12% of Yallingup's equity in exchange for his consulting services. This 12% equity stake is the only compensation Stevenson was entitled to receive for his services. The complaint does not indicate when or how Stevenson received his Yallingup equity. Indeed, it is unclear if Stevenson actually owns Yallingup equity (a predicate to commencing a derivative action).

Section 4.1 of the Agreement explains that Yallingup expected to provide financial services to AMP Inc. Section 4.1 further states that Stevenson has no claim to any equity or rights of any kind with respect to AMP Inc. Nowhere in the Agreement is it provided that Stevenson has any claim to the profits of AMP Inc. or that Yallingup is entitled to any portion of AMP Inc.'s business. Rather, Stevenson's claim that the Individual Defendants were required to transfer profits from AMP Inc. to Yallingup is based on an alleged collateral oral agreement. However, section 4.8 of the Agreement, a merger clause, disclaims all such agreements.

Stevenson commenced this action on June 27, 2014. His complaint asserts seven causes of action, numbered here as in the complaint: (1) a derivative cause of action for breach of fiduciary duty, asserted on behalf of Yallingup against the Individual Defendants; (2) a derivative cause of action for aiding and abetting breach of fiduciary duty, asserted on behalf of Yallingup against the Individual Defendants and Potentia; (3) a derivative cause of action for civil conspiracy, asserted on behalf of Yallingup against all defendants; (4) a derivative cause of action for tortious interference with prospective business relations, asserted on behalf of

[3] Though the Agreement contains incredibly broad restrictive covenants, such covenants are likely not enforceable under New York law, except to the extent they prohibit disclosure of confidential information.

Yallingup against the Individual Defendants, AMP LP, and Potentia; (5) a derivative cause of action for unjust enrichment, asserted on behalf of Yallingup against all defendants; (6) a direct cause of action for tortious interference with prospective business relations asserted against all defendants; and (7) a direct cause of action for unjust enrichment asserted against all defendants.

The complaint is extremely confusing. For instance, while Stevenson does not assert a claim for breach of contract or fraudulent inducement of the Agreement, his complaint and briefs focus on his performance under the Agreement and the circumstances under which the Agreement was entered into. None of these issues are relevant to the claims Stevenson actually pleads. Moreover, the complaint is unclear about how much work Stevenson actually claims to have performed and whether such work had anything to do with the profits of AMP Inc., profits Stevenson claims Yallingup is entitled to. Defendants, in contrast, take a very precise position about which specific meetings Stevenson attended and their irrelevance to the deal with the Toronto School District. Nonetheless, by construing the complaint as broadly as possible, Stevenson can be said to be asserting a derivative claim against defendants for failure to transfer unspecified "profits" from the Corporate Defendants to Yallingup under two theories: (1) defendants' fiduciary duties mandate that the profits go to Yallingup; and (2) the failure to transfer those profits violates the parties' alleged oral agreement.

The court, however, need not address the complaint's pleading defects. As explained below, this court lacks personal jurisdiction on the claims against all defendants except Ezekiel, the only defendant who lives in New York. Additionally, the individual claims against Ezekiel are dismissed for lack of viability on the merits. Moreover, the derivative claims asserted against Ezekiel, which concern the internal affairs of Yallingup, a Canadian company, are dismissed on *forum non conveniens* grounds and must be litigated in Canada.

II. Discussion

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Personal Jurisdiction

All of the defendants, except Ezekiel, move to dismiss for lack of personal jurisdiction. It is undisputed that the defendants asserting jurisdictional arguments are located in Canada and do

not continually and systemically do business in New York. General jurisdiction, therefore, does not exist over them under CPLR 301. *See Peters v Peters*, 2015 WL 1893977, at *1 (1st Dept Apr. 28, 2015) (general jurisdiction requires that defendant is "essentially at home" in New York), citing *Daimler AG v Bauman*, 134 SCt 746 (2014), and *Goodyear Dunlop Tires Operations, S.A. v Brown*, 131 SCt 2846 (2011); *see also Magdalena v Lins*, 123 AD3d 600 (1st Dept 2014) ("there is no basis for general jurisdiction pursuant to CPLR 301, since [the defendant corporation] is not incorporated in New York and does not have its principal place of business in New York.").

Stevenson, thus, must establish specific jurisdiction. New York's long-arm statute, CPLR 302, provides for specific jurisdiction over out-of-state defendants when plaintiff's cause of action arises from one of four circumstances. Stevenson argues that two of these circumstances are present. First, Stevenson asserts that jurisdiction exists under CPLR 302(a)(1), which provides jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state." *Johnson v Ward*, 4 NY3d 516, 519 (2005). CPLR 302(a)(1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful **and there is a substantial relationship between the transaction and the claim asserted**." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (1988) (emphasis added);[4] *see generally Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014).

[4] To satisfy due process, plaintiff must also demonstrate that defendants have the requisite minimum contacts with New York. *See generally Walden v Fiore*, 134 SCt 1115, 1122-23 (2014), accord *Burger King Corp. v Rudzewicz*, 471 US 462 (1985).

Stevenson avers that his allegations that the Agreement was negotiated in New York and that he attended meetings in New York are sufficient to confer jurisdiction under CPLR 302(a)(1). Stevenson is wrong. If Stevenson was asserting a claim arising under the Agreement, jurisdiction may well exist (although such a claim would be subject to mandatory arbitration). Stevenson's claims, however, have nothing to do with the Agreement itself or its effectuation. Rather, Stevenson is claiming that his alleged co-shareholders, through the actions of Ezekiel and Rogers, breached their fiduciary duties to Yallingup by failing to transfer certain profits from AMP Inc. to Yallingup.

Such a claim has nothing to do with New York. The facts underlying this claim are unrelated to the parties' activities that allegedly occurred in New York. The profits, if any, would have come from business that took place exclusively within Canada and the allegations concern the proper distribution of profits between Canadian companies. The events that took place in New York only relate to (1) the circumstances of the agreement governing Stevenson's consulting services; and (2) the work Stevenson allegedly performed to earn his Yallingup equity. Claims arising from either of these sets of events might give rise to jurisdiction under CPLR 302(a)(1) because there is a nexus between the events in New York and the alleged wrongdoing. Here, however, the wrongdoing, if any occurred, merely implicates violations of *Canadian* fiduciary duty law between parties outside of New York.

Yallingup is a Canadian company, and its internal affairs are governed by Canadian, not New York, law. *See Am. Int'l Group, Inc. v Greenberg*, 23 Misc3d 278, 285 (Sup Ct, NY County 2008) ("Generally, issues concerning the internal affairs of a corporation and the conduct of its directors are governed by the laws of the state of incorporation."), citing *Hart v Gen. Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987); *see also Culligan Soft Water Co. v Clayton*

Dubilier & Rice LLC, 118 AD3d 422 (1st Dept 2014) (the internal affairs "doctrine 'recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."), quoting *Edgar v MITE Corp.*, 457 US 624, 645 (1982). New York, moreover, has no nexus to the subject disputes nor an interest in the outcome. Stevenson, after all, is not even a New York resident. Though the complaint contains factual allegations concerning events in New York, none of the events giving rise to the claims actually pleaded took place in New York. Jurisdiction under CPLR 302(a)(1), therefore, does not exist.

Nor is there jurisdiction under CPLR 302(a)(2), which applies when an out-of-state defendant commits a tortious act in New York. *See Front, Inc. v Khalil*, 103 AD3d 481, 482 (1st Dept 2013). Again, the actual alleged wrongdoing – failure to transfer profits from AMP, Inc. to Yallingup – took place in Canada. Though Stevenson baldy claims wrongdoing occurred in New York, he does not identify any such wrongdoing. He, again, relies on the contract negotiations and his consulting work in New York, but neither of those form the basis of his derivative claims. Personal jurisdiction, consequently, does not exist. "Discovery on the jurisdictional issue is not warranted, as plaintiff has failed to make a 'sufficient start' in demonstrating the existence of long-arm jurisdiction over defendant." *Minella v Restifo*, 124 AD3d 486, 487 (1st Dept 2015), accord *Peterson v Spartan Indus.*, 33 NY2d 463, 467 (1974).

C. Claims Against Ezekiel

As a result, all that remains are the claims against Ezekiel. All seven causes of action are asserted against him. Three of them are dismissed for failure to state a claim.[5]

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[5] While defendants recognize that Canadian law likely applies (and they are almost certainly correct, since the alleged wrongdoing occurred in Canada and no harm befell any New York resident), they rely on New York law. In opposition, Stevenson assumes that New York law

First, the derivative cause of action for civil conspiracy is dismissed because "New York does not recognize civil conspiracy to commit a tort as an independent cause of action." *Steier v Schreiber*, 25 AD3d 519, 522 (1st Dept 2006). *Second*, the direct cause of action for tortious interference with prospective business relations fails because Stevenson does not allege which of his *own* business relations were harmed. *See Jacobs v Continuum Health Partners*, 7 AD3d 312, 313 (1st Dept 2004) (plaintiff must plead nonconclusory instances of lost business); *see also Steiner Sports Marketing, Inc. v Weinreb*, 88 AD3d 482, 48-83 (1st Dept 2011) (same). Additionally, to the extent this claim seeks redress due to Stevenson's equity in Yallingup being less valuable because profits from AMP, Inc. were not transferred to it, a claim to recover such loss must be asserted as a derivative claim. *See Serino v Lipper*, 123 AD3d 34, 41 (1st Dept 2014), citing *O'Neill v Warburg, Pincus & Co.*, 39 Ad3d 281, 282 (1st Dept 2007) ("A claim for diminution of the value of stock holdings is a derivative cause of action belonging to that corporation and not to plaintiffs individually").

Third, the direct cause of action for unjust enrichment fails because Stevenson's right to be compensated for his consulting work is governed by the Agreement. *See MG West 100 LLC v St. Michael's Protestant Episcopal Church*, 2015 WL 1897072, at *1 (1st Dept Apr. 28, 2015) ("The motion court properly dismissed plaintiffs' claims for unjust enrichment … since the

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applies. Therefore, as no conflict of law was raised, for the purposes of this motion, the court applies New York law. Yet, it bears mentioning that in Stevenson's supplemental brief, he avers that his "rights as a shareholder are governed by New York law (because that is what the parties agreed)." *See* Dkt. 55 at 11, citing Agreement § 4.7. The court will defer adjudication of a choice of law analysis to the Canadian court that will ultimately decide Stevenson's claims. *See* Dkt. 50 (Affidavit of Eliot N. Kolers, Esq., dated March 30, 2015) (Canadian attorney assessing how this action would proceed in the Canadian court system). Nonetheless, it should be noted that the Agreement does not purport to govern the substantive rights of Yallingup's shareholders. The parties do not believe that a shareholders' agreement exists, which, if true, would cause the applicable statutory default laws to apply (Nova Scotia law, or whatever other applicable Canadian law).

existence of the [] valid and enforceable written agreement governing the parties[']dispute[] precludes recovery in quasi contract for events arising out of the same subject matter"), citing *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 (1987).

The remaining four causes of action asserted against Ezekiel (the derivative causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with prospective business relations, and unjust enrichment) are dismissed on *forum non conveniens* grounds. 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. "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*

Hanwha Life Ins. v UBS AG, 2015 WL 1897164, at *1 (1st Dept Apr. 28, 2015) (affirming Supreme Court's dismissal of CDS fraud claim where the parties were located in Korea, the transaction occurred in Korea, and the alleged injury was suffered by a Korean corporation), *aff'g* 43 Misc3d 1224(A) (Sup Ct, NY County 2014) (Ramos, J.).

Hanwha is highly instructive. Even though, as in this case, some of the documents and witnesses were in New York, the Appellate Division held that dismissal on *forum non conveniens* grounds is appropriate where (1) a foreign country's law applies; (2) the harm was suffered exclusively by a foreign company; (3) the foreign country has an interest in adjudicating matters affecting its domestic companies that arise from wrongdoing that allegedly occurred within its borders; and (4) the foreign country is an adequate alternative forum, particularly where defendants have submitted to its jurisdiction (as defendants have done in this case).[6] *See Hanwha*, 2015 WL 1897164, at *1; *see also Farahmand v Dalhousie Univ.*, 96 AD3d 618, 619 (1st Dept 2012) ("The court properly found that, even if a basis for personal jurisdiction existed, dismissal would be warranted on the alternative ground of forum non conveniens. Plaintiff's [claims] lack a substantial nexus with New York, since the incidents giving rise to the claims occurred in Nova Scotia, Nova Scotia law governs the claims, and the documentary evidence and witnesses are located in Nova Scotia.").

The instant case concerns the claims a Connecticut citizen is asserting on behalf of a Canadian company arising from events that took place in Canada. This case belongs in Canada. The only allegations concerning events that took place in New York relate to the Agreement. There is no claim for breach of the Agreement. While the Agreement is governed by New York

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[6] *See* Dkt. 51-53 (defendants' affidavits, in which they expressly consent to jurisdiction in Ontario and Nova Scotia in the event this court dismisses the case on *forum non conveniens* grounds).

law, the Agreement has a mandatory arbitration clause, precluding all claims arising thereunder from being litigated. That is likely why Stevenson does not assert a claim for breach of the Agreement. Stevenson, nonetheless, seeks to frame this case as being about the Agreement. However, as discussed herein, his actual claims do not arise out of the Agreement. His claims merely implicate the rights of Yallingup. No case stands for the proposition that the state in which a shareholder acquires his shares is automatically considered to be a proper venue for derivative claims, regardless of where the company is incorporated or where the events relevant to the claims occurred.

That Stevenson allegedly earned his equity in New York does not make this derivative lawsuit properly venued here. Nor do his allegations that he was unfairly compensated for his consulting work justify a New York venue on his unjust enrichment claims since the Agreement governs this claim and he has not asserted a claim under the Agreement. Simply put, Stevenson does not allege any viable claim arising from a wrong that occurred in New York. Accordingly, it is

ORDERED that the motion by defendants AMP Solar Group, Inc., AMP Solar Limited Partnership, Potentia Solar, Inc., Paul Ezekiel, and Dave Rogers to dismiss the complaint is granted, and the Clerk is directed to enter judgment dismissing the complaint without prejudice to plaintiff Andrew Stevenson's right to commence a new action in an appropriate court in Canada.

Dated: May 11, 2015

ENTER:

J.S.C.