

Delgado v Willat

2015 NY Slip Op 31050(U)

June 18, 2015

Supreme Court, New York County

Docket Number: 652469/2014

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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GARY D. DELGADO,

Plaintiff,

Index No.
652469/2014

**DECISION and
ORDER**

- against -

Mot. Seq. 002

BOYD I. WILLAT, AN INDIVIDUAL, WILLAT, A
CALIFORNIA CORPORATION, WILLAT
ERGONOMICTECHNOLOGIES, LLC and DOES 1-5.

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Gary D. Delgado (“Delgado”), brings this action for specific performance, breach of contract, breach of fiduciary duty, accounting and constructive trust against defendants, Willat, a California Corporation (“WCC”), Willat Ergonomic Technologies, LLC (“WET”), and Boyd I. Willat (“Willat”) (and together with WCC and WET, collectively, “Defendants”). This action is based on, *inter alia*, an alleged agreement (the “MOU”) to convey a twenty percent equity interest in entity defendants WCC and WET to Plaintiff, as equity compensation for Plaintiff’s services as president and chief operating officer of defendant companies. Plaintiff claims that Defendants terminated Plaintiff’s employment with WCC and WET, but failed to timely exercise their option, under the MOU, to buy back Plaintiff’s equity interest in the WCC and WET.

Defendants now move for an Order, pursuant to CPLR § 327, dismissing Plaintiff’s complaint on the basis of *forum non conveniens*, in favor of a new action to be commenced in California.

The common-law doctrine of *forum non conveniens*, now codified in CPLR § 327, permits a court to dismiss an action when, “in the interest of substantial justice the action should be heard in another forum.” (CPLR § 327[a]). The doctrine, “is based upon ‘justice, fairness and convenience.’ . . . Among the factors to be considered are 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, and the availability of an alternative forum.” (*Grizzle v. Hertz*, 305 AD2d 311[1st Dept. 2003]) (citations omitted). CPLR § 327 further provides that, “[t]he domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.” (CPLR § 327[a]).

The burden rests upon the defendant challenging the forum to demonstrate “relevant private or public interest factors which militate against accepting the litigation. . . . No one factor is controlling.” (*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 [1984]). Unless the balance weighs strongly in favor of the defendant, a plaintiff’s choice of forum should not be disturbed. (*Id.*). Additionally, the burden of demonstrating that New York is not a proper forum to litigate the action “becomes even more onerous where the plaintiff is a New York resident.” (*Highgate Pictures, Inc. v. De Paul*, 153 A.D.2d 126, 129 [1st Dep’t 1990]).

Defendants argue that this action should be dismissed in the interests of substantial justice, in favor of a new action to be commenced in California, because Defendants are California residents. Defendants also argue that Defendants do not reside or hold assets in New York, and that California law governs certain causes of action asserted in Plaintiff’s complaint. (Willat Aff. ¶¶ 11, 12, 29, 5, 8). In the affidavit of Willat, Willat avers: “[e]xcept for plaintiff Delgado himself, all of the key witnesses, documents, corporate books and records as well as necessary non-party witnesses are located in California.” (Willat Aff. ¶ 6). Willat further avers:

Further, there are a number of non-parties that have important documents and testimony. None of these non-parties reside in New York, with the exception of a consultant named Barbara Heizer (“Heizer”) who performed some work for the Willat Companies. All the non-party witnesses (except for Heizer) are residents of California (with one Texas resident). As such, defendants

cannot compel any of these key non-party witnesses to testify live before a jury at a trial in New York. Accordingly, the ability of defendants to defend this action and to prosecute our counterclaims against Delgado will be substantially prejudiced if this trial is held in New York, instead of California, where these important non-party witnesses reside and can be subpoenaed as trial witnesses.

Plaintiff, in turn, argues that New York is a proper forum because Plaintiff resides in New York. (Delgado Aff. ¶ 8). Plaintiff argues that Plaintiff's ownership claims are established by tax returns and contracts, and that, as a result, the testimony of witnesses located in California is not material to determining Plaintiff's ownership claims. Additionally, Plaintiff argues that New York law governs the MOU. To this end, Plaintiff points out that the MOU, which does not contain a choice of law or choice of venue provision, is addressed to Plaintiff in New York. Plaintiff claims to have executed the MOU in New York and to have performed services as defendant companies' president and chief operating officer from his home in New York. (Delgado Aff. ¶¶ 34-35). Indeed, Plaintiff avers that, "[Plaintiff's] New York apartment served as the New York office for [defendant entities]" and that "press releases for the companies repeatedly referred to their New York presence." (Delgado Aff. ¶ 45).

Plaintiff further avers that, "on several occasions, we rented temporary office space in Manhattan to conduct meetings with significant prospective clients, including for a meeting for which Mr. Willat . . . flew to New York to participate in person", and that, "[d]ue to the extensive activity occurring in New York, . . . Mr. Willat also regularly traveled to New York to meet with Ms. Heizer and [Plaintiff], along with the important business partners for the Willat entities located in New York." (Delgado Aff. ¶¶ 55-56). Finally, Plaintiff argues that Defendants' motion is not based on convenience, and that Defendants are forum shopping in order to take advantage of California's narrower statute of limitations.

Here, Defendants fail to meet their heavy burden of demonstrating that New York is not a convenient forum for the instant litigation. Plaintiff is a New York resident, and Defendants do not dispute that Plaintiff executed or performed the MOU in New York. While Defendants seek to demonstrate that this dispute has "scant" connection to New York, Defendants fail to establish that any other forum

is more convenient to the parties or witnesses. (*Highgate Pictures, Inc.*, 153 A.D.2d at 129; *see also Aon Risk Servs. v. Cusack*, 102 A.D.3d 461, 463 [1st Dep't 2013] [observing that, "the defendant] has demonstrated his availability to this forum by his prior business activities here."]).

Wherefore, it is hereby,

ORDERED that Defendants' motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: June 18, 2015

JUN 18 2015



EILEEN A. RAKOWER, J.S.C.