

**3000 Maingate Lane, Kissimmee LLC v Meridian  
Palms Commercial Condominium Assoc., Inc.**

2016 NY Slip Op 30232(U)

February 10, 2016

Supreme Court, New York County

Docket Number: 652704/2015

Judge: Eileen A. Rakower

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

-----X  
3000 MAINGATE LANE, KISSIMMEE LLC,

Plaintiff(s),

Index No.  
652704/2015

Decision and  
Order

- against -

Mot. Seq. 001

MERIDIAN PALMS COMMERCIAL  
CONDOMINIUM ASSOCIATION, INC.,

Defendant(s).

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

Plaintiff 3000 Maingate Lane, Kissimmee LLC, a New York based Delaware corporation that owns units in a Florida condominium, brings this action against the condominium association, defendant Meridian Palms Commercial Condominium Association, Inc., a Florida corporation. Plaintiff alleges that defendant issued inaccurate certificates of estoppel containing association dues and elevator maintenance fees dating back six years, and that plaintiff's contract to sell its units to a buyer fell through when plaintiff refused to pay the purported fees. Plaintiff seeks damages against defendant for breach of fiduciary duty and prima facie tort, and a declaratory judgment stating that plaintiff does not owe the alleged fees and directing defendant to issue accurate certificates of estoppel.

Defendant moves for an order dismissing plaintiff's complaint, pursuant to CPLR §§ 3211(a)(2), (8), CPLR § 302(a), and CPLR § 327 on the basis of *forum non conveniens* by contractual agreement, and awarding costs and attorney's fees to defendant. Defendant argues that the court lacks long-arm jurisdiction over the defendant, that the action would be better adjudicated in Florida under CPLR § 327, and that the court lacks jurisdiction over the defendant on the grounds of improper service.

In support of its motion, defendant submits the attorney affirmation of Douglas Moyal, Esq., which annexes, *inter alia*, the “Declaration of Condominium of Meridian Palms Commercial Condominium” and the “Declaration of Shared Facilities Easement,” both filed on December 1, 2006 in the Public Records of Osceola County, Florida; the “Special Warranty Deed” executed by the condominium developer, SF Development, LLC, to plaintiff, 3000 Maingate Lane, Kissimmee, LLC, on July 15, 2009; and plaintiff’s affidavit of service through the secretary of state, pursuant to BCL § 307, dated August 5, 2015.

In opposition to the motion, plaintiff argues that defendant is subject to personal jurisdiction under CPLR § 302(a)(1) and (3), that dismissal under CPLR § 327(a) is not warranted, and that defendant was properly served in accordance with BCL § 307. Plaintiff submits, among other documents, the attorney affirmation of Jeffrey A. Miller, Esq.; the affidavit of Brian Schatz, the manager of plaintiff 3000 Maingate Lane, Kissimmee LLC; the certificates of estoppel issued by defendant on July 23, 2015; and defendant’s letters to plaintiff, dated June 18, 2015 and June 22, 2015, concerning the purported fees and defendant’s offer to acquire plaintiff’s units.

CPLR § 302(a)(1) provides that a court may exercise personal jurisdiction over a non-domiciliary that “transacts any business within the state” so long as the cause of action arises out of such transactions. (*Lebel v. Tello*, 272 A.D.2d 103, 103–4 [1st Dep’t 2000]). The test is “whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy.” (*Otterbourg, Steindler, Houston & Rosen, P.C. v. Shreve City Apartments*, 147 A.D.2d 327, 331 [1st Dep’t 1989]). “Purposeful activities are those with which a defendant, through volitional acts, ‘avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.’” (*Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 [2007]). Cumulative minor activities may provide sufficient grounds for “transaction of business” jurisdiction pursuant to CPLR §302(a)(1), so long as the cumulative effect creates a “significant presence” in the State. (*O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199, 200 [1st Dep’t 2003]; CPLR § 302 [a][1]). In either event, “it is the quality of the defendant[’]s[] New York contacts that is the primary consideration.” (*Fischbarg*, 9 N.Y.3d at 380).

Generally, “interstate negotiations by telephone, facsimile or mail are insufficient to impose personal jurisdiction in New York upon a non-resident defendant.” (*Professional Personnel Mgt. Corp. v. Southwest Med. Assoc., Inc.*, 216 A.D.2d 958 [4th Dept 1995]). Defendant’s use of a website to send invoices, schedule payments and send condominium information to unit owners, and its letters

to plaintiff in New York regarding the certificates of estoppel, purported fees, and offer to acquire the units, taken together, fall short of establishing that the defendant “intended to project [itself] into ongoing New York commerce” or that defendant “purposefully availed” itself of the New York forum. (*Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 21 A.D.3d 90, 96 [1st Dep’t 2005]; *Larsen v. Virtual Tech., Inc.*, 42 Misc 3d 1210(A) [Sup Ct 2014]). Thus, defendant’s contacts with New York are not sufficient to constitute the purposeful activity required for long-arm personal jurisdiction pursuant to CPLR § 302(a)(1).

Alternatively, plaintiff argues that defendant is subject to personal jurisdiction under CPLR § 302(a)(3), which provides that jurisdiction exists over a non-domiciliary who “commits a tortious act without the state causing injury to person or property within the state” if the non-domiciliary:

- (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state; or
- (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The determination of whether a tortious act committed outside New York causes injury inside the state is governed by the “situs-of-injury” test, requiring determination of the location of the original event that caused the injury. (*Magwitch, L.L.C. v. Pusser’s Inc.*, 84 A.D.3d 529, 923 N.Y.S.2d 455 [1st Dep’t 2011]).

Although plaintiff’s causes of action for breach of fiduciary duty and prima facie tort allege tortious conduct, the plaintiff’s injury claim stems from a dispute over defendant’s assessment of fees plaintiff allegedly owes the condominium association under the governing condominium documents. The mere fact that plaintiff maintains its corporate offices in New York is insufficient to establish the kind of direct injury within New York that the statute requires. (*See Fantis Foods, Inc. v. Std. Importing Co., Inc.*, 49 N.Y.2d 317, 326 [1980] [“[T]he residence or domicile of the injured party within a State is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there ...”]). Moreover, the second part of the test is not satisfied because plaintiff cannot show that defendant “regularly” does or solicits business in New York, has engaged in a persistent course of conduct here, or derives substantial revenue from services

defendant renders in the state of New York. Defendant's maintenance of a website for the convenience of all condominium unit owners, meetings in New York with potential contractors for renovation of the condominium, and letters to plaintiff claiming back dues and offering to acquire plaintiff's units, provide insufficient contacts with New York for the exercise of jurisdiction under CPLR § 302(a)(3).

Even assuming that long-arm jurisdiction exists, a court may dismiss an action under CPLR § 327 where the parties have agreed to a forum in a state other than New York. (*See Boss v. American Express Fin. Advisors, Inc.*, 6 N.Y.3d 242 [2006]). It is well-settled policy of the courts in this State to enforce contractual provisions for choice of law and selection of a forum for litigation. (*Koob v. IDS Fin. Servs.*, 213 A.D.2d 26, 33, 629 N.Y.S.2d 426 [1995]). Forum selection clauses, which are prima facie valid, are enforced "because they provide certainty and predictability in the resolution of disputes." (*Brooke Group, Ltd. v. JCH Syndicate* 488, 87 N.Y.2d 530, 534, 640 N.Y.S.2d 479, 663 N.E.2d 635 [1996]; *see also Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 247 [2006]). The "very point" of forum selection clauses "is to avoid litigation over personal jurisdiction, as well as disputes arising over the application of the long-arm statute." (*Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 222 [1st Dep't 2006]).

In order to set aside a forum selection clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court." (*British West Indies Guaranty Trust Co. v. Banque Internationale A Luxembourg*, 172 A.D.2d 234 [1st Dep't 1991]). "Absent a strong showing that it should be set aside, a forum selection agreement will control." (*Horton v. Concerns of Police Survivors, Inc.*, 62 A.D.3d 836, 836, 878 N.Y.S.2d 793 [2009] [quoting *DiRuocco v. Flamingo Beach Hotel & Casino*, 163 A.D.2d 270, 272, 557 N.Y.S.2d 140 [2d Dep't 1990]).

The forum selection clause in the Declaration of Condominium provides, in pertinent part:

Except for the matters subject to mandatory nonbinding arbitration pursuant to § 718.1255, *Florida Statutes*, the Osceola Courts will be the exclusive forum for any dispute, proceedings, suit or legal action concerning the interpretation, construction, validity, enforcement of, performance under, or related in any way to, this Declaration or any other agreement or instrument executed in connection with this Declaration. In the event any such suit or legal action is commenced by

any party, the other parties agree, consent, and submit to the personal jurisdiction of the Osceola Courts with respect to such suit or legal action.

The Shared Facilities Easement contains similar provisions concerning “Applicable Laws” and “Jurisdiction”:

This Easement shall be governed by, and construed in accordance with, the laws of the State of Florida, including the statutory and governing conflicts of law.

The Circuit and County Courts of the 9<sup>th</sup> Judicial Circuit, in and of Orange County, Florida (“Orange Courts”) will be the exclusive venue for any dispute, proceeding, suit or legal action concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, this Easement or any other agreement or instrument executed in connection with this Easement.

Plaintiff fails to make the requisite “strong showing” that the relevant forum selection clauses should be set aside. Plaintiff does not offer evidence that the forum selection clauses are unjust or unreasonable, or that commencing an action in Florida would be so gravely difficult that plaintiff would be deprived of its day in court. Accordingly, the forum selection clauses in the Declaration of Condominium and Shared Facilities Easement are valid and enforceable.

Plaintiff suggests that the forum selection clauses are not controlling because plaintiff does not assert breach of contract claims, but instead seeks damages arising from defendant’s tortious conduct—the alleged fabrication of fees and issuance of the inaccurate certificates of estoppel. The applicability of the forum selection clause, however, “does not turn on the type or nature of the dispute between the parties.” (*Bernstein v. Wysoki*, 77 A.D.3d 241, 250 [2d Dep’t 2010]). Rather, “it is the language of the forum selection clause itself that determines which claims fall within its scope.” (*Couvertier v Concourse Rehabilitation and Nursing, Inc.*, 117 A.D.3d 772, 773 [2d Dep’t 2014]; see also *Buhler v. French Woods Festival of Performing Arts*, 154 A.D.2d 303, 304, 546 N.Y.S.2d 591 [1st Dep’t 1989]). The forum selection clauses here, by their express language, grant “exclusive” jurisdiction to Florida, and apply to “any ... action,” “related in any way to” the Declaration of Condominium and Shared Facilities Easement. The plaintiff’s action thus falls within the scope of the forum selection clauses.

That neither party is a signatory to the Declaration of Condominium or Shared Facilities Easement does not alter the enforceability of the forum selection clauses. Both the Declaration of Condominium and Shared Facilities Easement were formed under Florida law. Florida's Condominium Act "establishes a detailed scheme for the creation, sale, and operation of condominiums." (*Woodside Vill. Condo. Ass'n v. Jahren*, 806 So.2d 452, 455 [Fla. 2002]). "The declaration of condominium, which is the condominium's 'constitution,' creates the condominium and strictly governs the relationships among the condominium unit owners and the condominium association." (*Neuman v. Grandview At Emerald Hills, Inc.*, 861 So.2d 494, 496-97 [Fla. Dist. Ct. App. 2003]). The Condominium Act specifically provides that "[a]ll provisions of the declaration are enforceable equitable servitudes, run with the land, and are effective until the condominium is terminated." Fla. Stat. § 718.104(7). Plaintiff, having acquired ownership of the condominium units by "Special Warranty Deed" dated July 15, 2009, is therefore bound by the forum selection clauses contained in the Declaration of Condominium and the Shared Facilities Easement.

Wherefore it is hereby,

ORDERED that defendant's motion to dismiss, pursuant to CPLR 3211(a)(8), is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: February 10, 2016

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Eileen A. Rakower, J.S.C.