SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 651987/2015
SRT CAPITAL SPC LTD.
vs
SOLEIL CAPITAL LIMITED
Sequence Number : 001
DISMISS

PART 54

INDEX NO. _____
MOTION DATE 2/23/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 10-13
Answering Affidavits — Exhibits _____ | No(s). 16, 23-28
Replying Affidavits _____ | No(s). 18, 29-47

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 3/25/16

_____, J.S.C.
SHIRLEY WERNER KORNREICH

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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SRT CAPITAL LTD.,

Index No.: 651987/2015

Plaintiff,

DECISION & ORDER

-against-

SOLEIL CAPITAL LIMITED, GRANDALE ENTERPRISES LIMITED, TEO KIAN HUAT, and PAY CHER WEE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants Teo Kian Huat (Teo) and Pay Cher Wee (Pay) (collectively, the Individual Defendants) move, pursuant to CPLR 3211(a)(8), to dismiss the complaint for lack of personal jurisdiction. Plaintiff SRT Capital Ltd. (SRT) opposes the motion. The motion is denied for the reasons that follow.

I. Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.

This action concerns an alleged default by defendants Soleil Capital Limited (Soleil) and Grandale Enterprises Limited (Grandale) (collectively, the Corporate Defendants) on non-recourse margin loans secured by shares of non-party Chiwayland International Ltd. (CIL). SRT, the lender and plaintiff in this action, also seeks to enforce the loans against the principals of the Corporate Defendants, Teo and Pay, on an alter ego theory of liability, and to hold them accountable for their alleged fraud in a Singapore court.[1]

[1] There is a related action before this court, styled *Soleil Capital Ltd. v Emerging Markets Intrinsic, Ltd.*, Index No. 653451/2015, the details of which are irrelevant to this motion.

SRT is a segregated portfolio company incorporated in the Cayman Islands. The Corporate Defendants are incorporated in the British Virgin Islands. The Individual Defendants are citizens of Singapore. Teo solely owns and controls Soleil, and Pay solely owns and controls Grandale. None of the underlying events occurred in New York, and it is undisputed that the parties are not generally subject to jurisdiction in New York.

The terms of the margins loans are memorialized and governed by USD Loan Agreement Term Sheets (referred to by the parties and herein as NRLAs) and Margin Lending Agreements (the MLAs) executed by SRT and each of the Corporate Defendants in March and April of 2015. *See* Dkt. 31-34.[2] Since the instant motion only pertains to jurisdiction over the Individual Defendants, and not the merits of the claims against the Corporate Defendants, the court will not discuss the terms of the NRLAs and MLAs in detail.[3] For the purposes of this motion, simply put, they provide that the loans made by SRT to the the Corporate Defendants are non-recourse obligations secured only by shares of CIL (the Shares), a Chinese company, which would be held in a collateral account. If the Shares declined in value, SRT could make a margin call which, if refused, would constitute an event of default on the loans.[4]

The MLAs are governed by New York law and provide that the contracting parties (SRT and the Corporate Defendants) consent to jurisdiction in this court "[w]ith respect to any suit,

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[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

[3] The relationship between the MLAs and the NRLAs, respectively, are somewhat similar to the contracts governing swaps (the ISDA Master Agreement and confirmations) in the sense that the MLAs, like the Master Agreement, set forth the general contractual terms while the NRLAs contain transaction specific information.

[4] At oral argument, SRT's counsel represented that its liquidation of the Shares sufficed to pay off the amount allegedly owed under the tranche of the loan that was funded. *See* Dkt. 48 (1/28/16 Tr. at 22).

action or proceeding **relating to this Agreement**." *See* Dkt. 32 at 7 (emphasis added). The parties agree that the Corporate Defendants are subject to jurisdiction in this court on the claims asserted by SRT in this action.

SRT alleges, and defendants do not dispute, that before the Shares were transferred to their respective collateral accounts, the parties executed Sale and Purchase Agreements (the SPAs) that falsely represented the ownership of the Shares to the bank custodian in order for the transaction to occur. *See* Dkt. 36 & 37. The parties agreed that the SPAs would not constitute a binding agreement between them, but rather make the transfer of Shares to SRT appear to be part of a sale, as opposed to collateral for the loans. *See* Complaint ¶¶ 32-33 (parties' communications stating SPAs were "for show" and NRLAs and MLAs govern). That said, the SPAs contain merger clauses, purport to be governed by Singapore law, and provide for *permissive* venue in a Singapore court. *See* Dkt. 36 at 4.[5]

In mid-April 2015, the price of the Shares declined significantly.[6] SRT issued margin calls, which were not met by the Corporate Defendants. Instead, on April 27, 2015, the Corporate Defendants commenced an action in the High Court of the Republic of Singapore in which they asserted claims to enforce and collect on the false SPAs. They also sought and obtained an *ex parte Mareva* injunction[7] dated April 28, 2015, which froze SRT's assets worldwide. *See* Dkt. 44. The *Mareva* injunction was obtained based upon affidavits submitted

[5] The court takes no position on the legality of the SPAs under U.S., Chinese, or any other applicable law. The SPAs were not originally submitted with the instant motion, but were filed after oral argument at the court's insistence.

[6] The court takes judicial notice of the fact that the Chinese stock markets have been volatile.

[7] *Mareva Compania Naviera S.A. v International Bulkcarriers S.A.*, 2 Lloyd's Rep 509 (C.A. 1975); *see generally Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund, Inc.*, 527 US 308, 327-31 (1999).

by the Individual Defendants, which contain myriad misrepresentations, most prominently that the SPAs, as opposed to the NRLAs and MLAs, govern the subject transactions. *See* Dkt. 40 & 41. After the *Mareva* injunction was issued, SRT moved to vacate it on the ground that the SPAs do not govern. On May 8, 2015, the Corporate Defendants consented to the Singapore court issuing an order discharging the *Mareva* injunction, and the Singapore court granted damages and costs against the Corporate Defendants. *See* Dkt. 47. Indeed, in paragraph 52 of the Corporate Defendants' amended answer in this action, they admit that their former counsel in Singapore improperly based their request for a *Mareva* Injunction on the SPAs. *See* Dkt. 19 at 23.

SRT commenced this action on June 5, 2015. The complaint asserts seven causes of action: (1) a declaratory judgment against Soleil regarding the validity of the NRLA and MLA executed by Soleil; (2) breach of the NRLA and MLA executed by Soleil; (3) a declaratory judgment against Grandale regarding the validity of the NRLA and MLA executed by Grandale; (4) breach of the NRLA and MLA executed by Grandale; (5) fraud against all defendants; (6) aiding and abetting fraud against the Individual Defendants; and (7) alter ego/conspiracy against all defendants.[8]

The Corporate Defendants answered the complaint and asserted counterclaims against SRT. *See* Dkt. 14 (original answer) & Dkt. 19 (amended answer). However, on July 15, 2015, the Individual Defendants filed the instant motion to dismiss for lack of personal jurisdiction. The court reserved on the motion after oral argument and directed supplemental briefing [*see* Dkt. 48 (1/28/16 Tr.)], which the parties filed on February 5, 2016.

[8] There are only seven causes of action, but the last cause of action is mislabeled as "Count 8"; there is no "Count 7". *See* Dkt. 1 at 18-19.

II. Discussion

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 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).

Moreover, it is well settled that the party asserting jurisdiction over a non-domiciliary has the burden of establishing personal jurisdiction. *Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009). It is equally well settled that a forum selection clause is a valid means to establish jurisdiction. *See Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 (2006); *Sterling Nat'l Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 (1st Dept 2006).

The Individual Defendants assert two arguments regarding why they should not be subject to personal jurisdiction in this action: (1) the MLAs' forum selection clause does not apply to the Individual Defendants because the Individual Defendants only signed the MLAs on behalf of the Corporate Defendants; and (2) SRT has not sufficiently pleaded the elements necessary to establish jurisdiction based on an alter ego theory. While defendants are correct with respect to the latter argument,[9] their motion is denied because the forum selection clause applies to the Individual Defendants based on the closely related doctrine.[10]

As noted, defendants concede that the MLAs' forum selection clause applies to the Corporate Defendants. The Individual Defendants, however, contend that they only signed the MLAs in their corporate capacity on behalf of the Corporate Defendants. That, however, is of no moment. The First Department has held that "a nonparty that is 'closely related' to one of the

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[9] Simply put, the alter ego allegations are conclusorily pleaded since they merely parrot the requisite alter ego elements. *See 2406-12 Amsterdam Assocs. LLC v Alianza LLC*, 136 AD3d 512 (1st Dept 2016) (alter ego claims must be "plead in a non-conclusory manner"). The only facts pleaded relate to the Individual Defendants' uncontroverted domination and control of the Corporate Defendants, but that is neither remarkable (wholly owning and controlling investment SPVs is ordinary) and insufficient to plead an alter ego claim. *See Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 41 (1st Dept 2012) (pleading element of domination is insufficient); *see also Hantman & Assocs. v Florida Family Office LLC*, 2015 WL 1938756, at *3 (Sup Ct, NY County 2015), quoting *Damianos Realty Group, LLC v Fracchia*, 35 AD3d 344 (2d Dept 2006) ("The mere claim that the corporation was completely dominated by the defendant[], or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil."). It also should be noted that the seventh cause of action (as noted, erroneously labeled as "Count 8") is not necessary because, while alter ego liability exists under New York law, it is not an independent cause of action. *See Robinson v Day*, 103 AD3d 584, 588 (1st Dept 2013). Also, civil conspiracy is not recognized as an independent tort in New York. *Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 (1st Dept 2016).

[10] The court should not have directed supplemental briefing on the fiduciary shield doctrine. As discussed herein, the closely related doctrine is the jurisdictional doctrine applicable to the subject forum selection clause. The fiduciary shield doctrine, which has been rejected by the Court of Appeals, applies to long-arm jurisdiction, which is not present here. *See Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 469 (1988).

signatories can enforce a forum selection clause" where "[t]he relationship between the nonparty and the signatory [is] sufficiently close so that enforcement of the clause is foreseeable by virtue of the relationship between them." *Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 (1st Dept 2008). More recently, in expounding on this rule, the First Department expressly adopted the approach of the federal and Delaware courts that have long held that a forum selection clause can "bind a nonsignatory defendant that has a sufficiently close relationship with the signatory *and* the dispute to which the forum selection clause applies." *Tate & Lyle Ingredients Americas, Inc. v Whitefox Techs. USA, Inc.*, 98 AD3d 401, 402 (1st Dept 2012) (emphasis in original) (collecting cases); *see Indosuez Int'l Fin., B.V. v Nat'l Reserve Bank*, 304 AD2d 429, 431 (1st Dept 2003) (recognizing closely related doctrine); *L-3 Commc'ns Corp. v Channel Techs., Inc.*, 291 AD2d 276, 277 (1st Dept 2002) (same); *see also Taberna Preferred Funding II, Ltd. v Advance Realty Group LLC*, 45 Misc3d 1204(A), at *5 (Sup Ct, NY County 2014) (rejecting argument that closely related doctrine only applies to corporate subsidiaries and not individuals).

The Individual Defendants are closely related to the Corporate Defendants. The closely related doctrine applies where, as here, the non-signatory is a principal of the signatory company and played an active role in the transaction. *See Bent v Zounds Hearing Franchising, LLC*, 2016 WL 153092, at *4 (SDNY 2016); *Dragon State Int'l Ltd. v Keyuan Petrochemicals, Inc.*, 2016 WL 439022, at *3 (SDNY 2016), citing *Recurrent Capital Bridge Fund I, LLC v ISR Sys. & Sensors Corp.*, 875 FSupp2d 297, 307-08 (SDNY 2012); *see also Firefly Equities, LLC v Ultimate Combustion Co.*, 736 FSupp2d 797, 799 (SDNY 2010) (collecting analogous New York federal district court cases); *Aguas Lenders Recovery Group v Suez, S.A.*, 585 F3d 696, 701 (2d Cir 2009) (collecting cases from other Circuit Courts of Appeals). The Individual Defendants wholly own and control the Corporate Defendants and signed the MLAs on their

behalf. Indeed, the underlying margin loans were sought by the Individual Defendants on behalf of their own companies. The Individual Defendants, therefore, are bound by the MLAs' forum selection clause and subject to jurisdiction in this court.

The Individual Defendants argue, in the alternative, that even if they are generally bound by the MLAs' forum selection clause, the claims arising from the *Mareva* injunction do not fall within the scope of the forum selection clause. Again, they are wrong. The forum selection clause does not provide that its applicability is limited to claims arising under the MLAs (i.e., breach of contract). Rather, the clause states that it applies to all claims *relating* to the MLAs. *See* Dkt. 32 at 7; *Phillips v Audio Active Ltd.*, 494 F3d 378, 389 (2d Cir 2007) (claims that "relate to" contract are broader than those that "arise out of" contract). While the *Mareva* injunction was nominally procured on the basis of an alleged breach of the SPAs, the parties agree that the SPAs themselves – while not actual binding contracts – were used by the parties to effectuate the collateral transfers required by the MLAs. Hence, disputes implicating the SPAs relate to the MLAs.

Importantly, the purpose of defendants' frivolous lawsuit in Singapore should not be overlooked. Defendants tried to eschew their obligations under the MLAs by falsely representing to the Singapore court that SRT owed money to defendants for the Shares when, in reality, it was the Corporate Defendants that allegedly owed money to SRT. To be sure, even if there is merit to the Corporate Defendants' contention that it was SRT, and not the Corporate Defendants, that breached the MLAs, the recourse sought in Singapore, nonetheless, was inappropriate. Simply put, the Singapore lawsuit was an attempt to prevail on the parties' controversy over the margin loans by frivolously claiming the SPAs, instead of the MLAs, governed. It is undisputed that the parties' disputes, both in Singapore and in this action, only

relate to the subject margin loans. Hence, regardless of the merits of the parties' claims, it is clear that whatever occurred in the Singapore lawsuit necessarily related to the MLAs, which govern the margin loans, and thus liability arising from defendants' conduct in the Singapore action also relates to the MLAs. Accordingly, it is

ORDERED that the motion by defendants Teo Kian Huat and Pay Cher Wee to dismiss the complaint for lack of personal jurisdiction is denied.

Dated: March 25, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C