Ripplewood Advisors, LLC v Callidus Capital SIA
2016 NY Slip Op 32685(U)
February 28, 2016
Supreme Court, New York County
Docket Number: 653517/2015
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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RIPPLEWOOD ADVISORS, LLC,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 653517/2015
Mot. Seq. No.: 001

CALLIDUS CAPITAL SIA AND VALDIS SIKSNIS,

Defendants.

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O. PETER SHERWOOD, J.:

In motion sequence number 001, defendants Callidus Capital SIA ("Callidus") and Valdis Siksnis ("Siksnis") move, pursuant to CPLR 327 (a) and 3211 (a) (8), for dismissal of plaintiff's complaint on *forum non conveniens* grounds and for lack of personal jurisdiction.

BACKGROUND

Plaintiff Ripplewood Advisors, LLC ("Ripplewood") is an investment firm incorporated in Delaware with its principal office in New York. Callidus is an investment and advisory company organized as an LLC under the laws of the Republic of Latvia with principal place of business in Riga, Latvia. Defendant Siksnis is a resident and citizen of Latvia who serves as Callidus' Chairman.

Citadele Banka ("Citadele") is a Latvian bank that was created in 2010 when the Latvian government split Parex Bank into viable and distressed banking assets. During the restructuring process, Parex received support from the European Union that required Latvia to privatize its interest in Citadele. The Latvian Privatization Agency ("LPA") was tasked with privatizing Citadele along with the assistance of its financial advisor, Société Générale ("SocGen"). The LPA referred to the sales process as "Project Centurion."

In 2014, Ripplewood and Callidus were both interested in acquiring Citadele. Defendants retained the services of Blue Star Strategies, LLC ("Blue Star"), as well as other firms, to assist them in finding a co-investor. Through Blue Star's assistance, plaintiff and defendants were introduced to one another and began discussing a joint investment strategy.

In April 2014, both parties reached an agreement ("April Agreement"), the terms of which are now disputed. Plaintiff states that the agreement was merely an "indicative term sheet," that

described "some characteristics of a potential transaction, and stat[ed] that the parties would participate in further evaluation of the Proposed Transaction" (plaintiff's mem in opposition at 5). Defendants refer to the agreement as a formalized partnership agreement. After receiving SocGen's permission to submit a joint bid, Ripplewood and Callidus submitted a binding conditional offer to the LPA on June 10, 2014.

Plaintiff claims that a few weeks later, SocGen requested a call with plaintiff, and asked that Siksnis not be invited. Plaintiff states that on the call, Stanislas Lecat, the Managing Director of SocGen, gave his "very strong recommendation" that Ripplewood not continue to bid with any Latvian investors since Latvian officials had concerns about local Latvian investors (plaintiff's mem in opposition at 7; affirmation of Elizabety Critchley ¶ 16). Plaintiff states that it informed defendants of what it learned and independently confirmed this information through multiple sources at the LPA. On July 3, 2014, Ripplewood wrote to the LPA to express its willingness to proceed in the bidding process without Callidus. Later that month, Ripplewood was "invite[d,] taking into account the absence of a local Latvian investor base," to the next phase of the bidding process (affirmation of Robert H. Baron, exhibit 8 at 1).

According to plaintiff, defendants expressed concern that they would not be compensated for their work. The parties proceeded to negotiate the terms of a new arrangement, and in October 2014, executed a new agreement that plaintiff contends replaced the April Agreement ("October Agreement").

On March 29, 2015, shortly before the Citadele acquisition was to close, defendants sent an email to Ripplewood in New York demanding compensation not provided for in the October 2014 Agreement. Ripplewood rejected the demand. In June 2015, Callidus filed an action in Latvia seeking to recover certain amounts allegedly due under the April Agreement. On August 25, 2015, Ripplewood moved to dismiss on the ground that, under Latvian law, the Latvian court lacks jurisdiction over the dispute. Ripplewood then brought suit in this court on October 22, 2015, seeking a declaratory judgement that the October Agreement is the sole agreement governing the parties' relations in connection with Project Centurion and that Ripplewood has no obligation to compensate defendants except as provided for in that agreement.

The Latvian Court entered an order on June 21, 2016 dismissing all of Callidus' claims and on July 5, 2016, released a full decision dismissing the case for lacked jurisdiction. On October 12, 2016, the appellate court reversed and remanded the case for a new examination.

In this court, defendants now seek dismissal on the grounds of *forum non conveniens* and lack of personal jurisdiction. For the reasons discussed below, the motion is denied.

DISCUSSION

A. Forum Non Conveniens

On a motion to dismiss on the ground of *forum non conveniens*, the movant bears the burden of demonstrating the relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]; *Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479). Among the factors to be considered are "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville*, 39 AD3d at 736).

Defendants contend the following factors weigh in favor of dismissal: (i) the availability of another forum, (ii) the relationship of the competing forum to the underlying transaction, (iii) the burden on the New York court when foreign law applies or a pending foreign action exists, and (iv) the location of witnesses and documents. Plaintiff disputes each of these factors and argues that defendants are unable to meet their burden in arguing *forum non conveniens*, particularly in light of the fact that plaintiff is a New York resident.

1. Effect of Plaintiff's Residence

As plaintiff correctly notes, the plaintiff's residence is an important factor to the *forum non conveniens* analysis (*see e.g. Thor Gallery at S. DeKalb, LLC v Reliance Mediaworks (USA) Inc.*, 131 AD3d 431, 432 [1st Dept 2015]; *Sweeney v Hertz Corp.*, 250 AD2d 385, 386 [1st Dept 1998]; *Kastendieck v Kastendieck,* 191 AD2d, 328 [1st Dept 1993]; *Cadet v Short Line Terminal Agency, Inc.*, 173 AD2d, 270 [1st Dept 1991]). Nonetheless, the fact that plaintiff is a New York resident is

not enough to save the case from dismissal (*see Holness.*, 251 AD2d at 224 ["Plaintiff's New York residence is an important but not dispositive factor favoring trial in New York"]). Thus while plaintiff's residency is an important factor, other factors -- such as the location where the underlying transaction occurred -- may prove to be dispositive.

2. The Availability of Another Forum

In this case, the Latvian courts are available to resolve the dispute. It appears that the Civil Case Board of Riga overturned the lower court's dismissal on the ground that the lower court had failed to determine, first, whether Ripplewood and Callidus' partnership constituted a legal entity under the applicable law, and second, whether Ripplewood caused losses to Callidus' property in Latvia (Commercial Division Rule 18 Letter from Charles Dorkey, Oct. 21, 2016 at 16-17). Accordingly, the appellate court's decision instructed the lower court to examine on the merits whether the two parties established a legal entity (*id.*). For the time being, it seems defendants are correct that the Latvian courts are available as an alternative forum, although it may come to be that the Latvian action is later dismissed without addressing the merits of the claims.

3. The Situs of the Underlying Transaction

Defendants argue that "[t]his is a Latvian dispute concerning an investment in Latvia" (defendants' mem in support at 10). Although this case involves parties who were at one time interested in an investment in Latvia, the investment itself is not the underlying transaction of this dispute. The transaction in question is the partnership agreement between Ripplewood and Callidus, not the acquisition of a Latvian bank. Accordingly, the cases defendants cite concerning disputes over foreign investments are inapposite. For example, *Adriana Dev Corp. N.V. v Gaspar* (81 AD2d 235 [1st Dept 1981]) involved a dispute over an ownership interest of a foreign entity in which "no agreements between the parties were made in New York (*id.* at 239). *Globalvest Mgt. Co. L.P. v Citibank, N.A.* (7 Misc. 3d 1023[A] [Sup Ct, New York County 2005]) involved a claim based on the commencement of an allegedly frivolous lawsuit in Brazil. Similarly, in *Brooke Group v JCH Syndicate 488* (214 AD2d 486) the underlying transaction was an insurance policy that was "was issued in London, and by its terms is governed by English law".

Citing to *Brooke Group* and *Globalvest*, defendants also argue for dismissal on the grounds that the facts of this case involve actions allegedly taken by a foreign government. Neither *Brooke Group* nor *Globalvest* predicated dismissal on the fact that the claims there involved actions taken by foreign governments. Rather, that fact was but a minor consideration in the context of the *forum non conveniens* analysis (*see Globalvest*, 2005 WL 1148687, at *4-10; *Brooke Group*, 214 AD2d at 487).

Plaintiff provides considerable support for their claim that the underlying transaction of this case arose substantially in New York (aff of Lawrence Lavine ["Lavine Aff."] ¶ 14 [Ripplewood's primary negotiator of the term sheet was in New York]; aff of Christopher Minnetian ¶ 2 [term sheet was signed in New York]). Thus, this factor does not weigh in favor of dismissal.

4. The Burden Imposed on New York Courts

Regarding the potential burdens to this court, the parties' dispute whether Latvian law governs the dispute and, if it applies, the extent to which any potential burden affects the *forum non conveniens* analysis.

a. *Whether Latvian Law Applies*

Both parties agree that the relevant standard for determining which law applies is the grouping-of-contracts choice of law analysis employed in *Zurich Ins. Co. v Shearson Lehman Hutton* (84 NY2d 309, 317 [1994]). The factors to be considered are: (i) the place of contracting; (ii) the places of negotiation and performance; (iii) the location of the subject matter; and (iv) the domicile or place of business of the contracting parties (*id.*). There is no dispute that the place of contracting is New York and that the place of business of plaintiff and defendants are New York and Latvia respectively. Both parties, however, dispute the location of negotiation and performance, and the location of the subject matter.

Regarding the location of negotiation, both parties present evidence indicating that negotiations occurred in either Latvia (Siksnis Decl., exhibits 2, 3, 5, 6) or New York (Lavine Aff. ¶ 14; Baron Affirm., exhibit 3 at 1, exhibit 4 at 1; Critchley Affirm. ¶ 11). Neither conclusively establishes either location as the definitive place of negotiation. Defendants contend that performance occurred in Latvia, but in doing so, they misconstrue what performance was to be under the contract. Performance under the agreement was not, as defendants allege, Callidus' efforts to

secure ownership in Citadele; rather, performance would have been how the parties were going to act vis-à-vis each other in the event that the joint bid was accepted. Thus, this factor does not weigh heavily in favor of either New York or Latvia. Similarly, while defendants contend that the location of the subject matter was "clearly in Latvia," (defendants' mem in reply at 5), defendants misconstrue what is the subject matter of the contract. As noted above, the subject matter is not the acquisition of a Latvian bank, but rather the parties' obligation to each other in the event that their bid is accepted. This too, weighs in favor of neither New York nor Latvia.

In sum, while neither forum's law is the obvious choice, the grouping-of-contracts analysis leans in favor of applying New York law to this dispute.

b. *The Burden of Applying Foreign Law*

Even if this court were required to apply Latvian law, the possible burden of applying foreign law is a minor consideration. Defendants cite to a number of cases that purportedly illustrate the importance of this consideration, but in each of these cases, the fact that New York courts would have to apply foreign law was a secondary consideration next to the fact that there was no substantial nexus between the underlying action and New York (*see Flame S.A. v Worldlink Int'l (Holding) Ltd.*, 107 AD3d 436, 438 [1st Dept 2013] ["[o]ther than the fact that plaintiff is trying to enforce a judgment of the Southern District of New York, which merely recognized a London judgment against Shipping, this case has no tie to New York"]; *Globalvest*, 2005 WL 1148687, *5 ["there is absolutely no nexus between Globalvest's cause of action and this forum"]; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176-178 [1st Dept 2004] ["[t]he present dispute has no substantial nexus to New York"]; *Tilleke & Gibbins Intl. v Baker & McKenzie*, 302 AD2d 328, 329 [1st Dept 2003] [noting, among other factors, the "lack of any discernible connection between this action and New York"]; *Davidson Extrusions v Touche Ross & Co.*, 131 AD2d 421 [2d Dept 1987] [noting, among other factors, that the transaction occurred "almost entirely" in the competing jurisdiction].) As plaintiff correctly notes, at least where other *forum non conveniens* factors do not weigh heavily in favor of dismissal, New York courts do not find it especially burdensome to apply foreign law (*see Thor Gallery*, 131 AD3d at 432–433 ["New York courts are more than capable of applying the laws of other jurisdictions, and often do. This does not create any undue burden on New

York courts."]; *Lerner*, 126 AD3d at 432 [denying defendants' request for dismissal where, among other factors, defendants "failed to show that New York courts will be unable to apply Israeli law, should the necessity arise"]).

5. The Location of Witnesses and Documents

Defendants argue that the majority of witnesses in this case live outside the United States. In so arguing, defendants presume the underlying dispute of this case to be the purchase of Citadele. As discussed above, however, the primary question in this case revolves around formation of the April Agreement which involves a number of witnesses who are available here. Accordingly, this factor does not urge dismissal either.

6. Conclusion

None of the *forum non conveniens* factors presents a compelling case in favor of dismissal. As such the plaintiff's choice of forum should not be disturbed.

B. Personal Jurisdiction

Because Callidus is not incorporated in New York and does not maintain its principal place of business here, it is not amenable to general personal jurisdiction in this court under CPLR 301. To determine whether it is subject to long-arm jurisdiction as a foreign corporation under CPLR 302 (a) (1), the court must decide: "(1) whether the defendant transacts any business in New York, and, if so, (2) whether the cause of action arises from such a business transaction" (*Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 334 [2012]).

As for the first prong of the test outlined in CPLR 302 (a) (1), the activity in New York must be "purposeful" (*id.* at 338). Purposeful activities are defined as "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" (*C. Mahendra (N.Y.) LLC v Natl Gold & Diamond Ctr Inc*, 125 AD3d 454, 457 [1st Dept 2015]). "Not all purposeful activity . . . constitutes a 'transaction of business' within the meaning of CPLR 302 (a) (1)" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). The activity must be essential to the formulation of a business relationship (*see Greco v Ulmer & Burne LLP*, 23 Misc 3d 875, 889 [Sup Ct Kings County 2009]).

As for the second prong, "in light of all the circumstances, there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted" (*Licci*, 20 NY3d at 339. However, the "inquiry under the statute is relatively permissive" and "causation is not required" (*id.*). As the party seeking to assert jurisdiction, Ripplewood has the burden to present sufficient facts to demonstrate that the court has jurisdiction over Callidus (*see Cotia (USA) Ltd. v Lynn Steel Corp.*, 134 AD3d 483, 484 [1st Dept 2015]; *CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471 [1st Dept 2011]).

The assertion of personal jurisdiction must also be based on a defendant's minimal contacts with New York sufficient to comport with due process (*see Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept], *motion to dismiss appeal denied* 26 NY3d 1077 [2015], *rearg denied* 27 NY3d 951 [2016]). "This requires an examination of the quality and the nature of the defendant's activity and a finding of some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protection of its laws" (*id.*).

Plaintiff has met its burden with respect to the first prong. Defendants sought out a business relationship with plaintiff in New York, negotiated a contract with plaintiff's employees located in New York, and executed that contract in New York. When it seemed that the parties might not be able to fulfill the aims of that contract, defendants communicated with plaintiff's employees in New York regarding how they would move forward. In short, defendants' contacts "comprised 'the purposeful creation of a continuing relationship with a New York corporation' " (*Fischbarg*, 9 NY3d at 381, quoting *George Reiner & Co. v Schwartz*, 41 NY2d 648, 653 [1977]). Defendants' contacts also satisfy the due process requirement of minimal contacts because under these circumstances, defendants "should have reasonably expected to defend against a suit based on their relationship with plaintiff in New York" (*id.* at 385). Since plaintiff's request for declaratory relief arises directly out of these contacts, defendant has met its burden under the second prong of CPLR 302 (a) (1) as well.

Defendants contend that they should not be subject to personal jurisdiction because their only contacts with New York in this case were made through electronic communications. However, it is not the form of defendants' contacts, but "the quality of the defendants' New York contacts that is the primary consideration" (*id.* at 380). The quality of defendants' contacts in this case is sufficient to

grant jurisdiction. In *Fischbarg*, for example, the New York Court of Appeals found that the defendants' purposeful attempt to establish an attorney-client relationship in addition to their direct participation in that relationship through calls, faxes, and emails over a period of several months was sufficient to constitute a "transaction of business" (*id.*). In *Deutsche Bank*, the Court of Appeals found sufficient availment where the defendant, a "sophisticated institutional trader," pursued a negotiation with one of the plaintiff's employees in New York that resulted in the sale of $15 million in bonds (7 NY3d at 72). Defendants are likewise sophisticated parties who established a relationship with plaintiff in New York to engage in a large transaction. This relationship involved negotiations that took place over a period of several months. Under both *Fischbarg* and *Deutsche Bank*, these acts are sufficient to establish jurisdiction under CPLR 302. While defendants are correct in noting that telephone calls are generally insufficient to establish personal jurisdiction (*see, e.g., Intl. Customs Assocs., Inc.*, 893 F Supp at 1261–62), both *Fischbarg* and *Deutsche Bank*, specifically found that electronic correspondence was sufficient where the quality of the defendants' contacts were otherwise sufficient (*Fischbarg*, 9 NY3d at 381-382; *Deutsche Bank*, 7 NY3d at 71-72).

Finally, defendants argue that this court should dismiss plaintiff's claim against Siksnis since he has not transacted with Ripplewood in his individual capacity. New York has rejected this type of argument, as well as the "fiduciary shield doctrine," on which the argument is based (*see Kreutter v McFadden Oil Corp.,* 71 NY2d 460, 470–471 [1988]). A court may exercise jurisdiction over a corporation's fiduciary for acts performed in a corporate capacity (*see id.*). Defendants' argument must be rejected.

As discussed above, the *forum non conveniens* factors do not show a compelling case sufficient to disturb plaintiffs' choice of forum. Defendants are subject to long-arm jurisdiction under CPLR 302 (a) (i).

Accordingly, it is

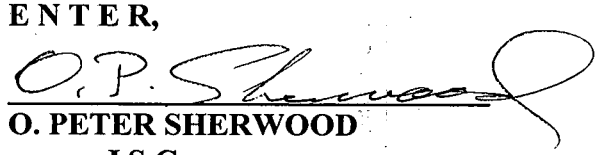
ORDERED that the motion by Callidus Capital SIA and Valdis Siksnis to dismiss the complaint is DENIED; and it is further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, April 18th, 2016 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: February 28, 2016

E N T E R,



O. PETER SHERWOOD
J.S.C.