Fast Software Solutions, LLC v Lichtman
2017 NY Slip Op 31221(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 656068/2016
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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FAST SOFTWARE SOLUTIONS, LLC,

Plaintiff,

-against-

STEVEN K. LICHTMAN, RENAISSANCE VENTURES, LLC d/b/a PRESTIGE ENTERTAINMENT, RENAISSANCE VENTURES MIAMI INC. d/b/a PRESTIGE ENTERTAINMENT, and JOHN DOE CORPORATIONS,

Defendants.

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Index No.: 656068/2016

Mtn Seq. Nos. 001 & 002

DECISION AND ORDER

JEFFREY K. OING, J.:

In mtn seq. no. 001, defendant, Renaissance Ventures Miami Inc. ("Renaissance Miami") moves, pursuant to CPLR 3211(a)(1) and (3), for dismissal of the complaint. Plaintiff, Fast Software Solutions, LLC, cross-moves to disqualify the Law Offices of Mark Sherman, LLC, as defendants' counsel.

In mtn seq. no. 002, defendants, Renaissance Miami, Renaissance Ventures, LLC ("Renaissance Ventures"), and Steven K. Lichtman ("Lichtman") (collectively, "defendants") move, pursuant to CPLR 327, for an order dismissing this action with prejudice on the ground of forum non conveniens.

These motion are consolidated for disposition.

FACTUAL BACKGROUND

Plaintiff commenced this action for breach of contract against defendants. Lichtman is a ticket broker operating both individually and under the names of the two defendant entities.

Lichtman's business objective is to obtain tickets at a low price, and then resell them at a high price through secondary markets.

Plaintiff is a Nevada limited liability company with its principal place of business in Las Vegas, Nevada (Complaint, ¶ 5). Lichtman is a resident of Greenwich, Connecticut (Id., ¶ 6). Renaissance Ventures is a limited liability company, organized in Connecticut, with its principal place of business in Greenwich, Connecticut (Id., ¶ 7). Renaissance Miami is a Florida corporation, with it principal place of business in Florida (Id., ¶ 8).

Plaintiff alleges that it entered into a contract with defendants, pursuant to which plaintiff was to obtain tickets to theater, sporting and other entertainment events throughout the United States, defendants were to resell them, and plaintiff and defendants were to evenly split the profits (the "Agreement") (Id., ¶ 2). The crux of plaintiff's allegations is that defendants breached the Agreement, and failed to properly compensate plaintiff.

Plaintiff alleges that Renaissance Miami is authorized to do business in New York, and that defendants "have all transacted business within the State of New York" (Id., ¶¶ 8, 16). Despite these allegations, no New York residents are alleged to have been harmed as a result of defendants' actions, no injury is alleged

to have been sustained in New York, and the alleged Agreement was not entered into in the State of New York.

On January 9, 2017, Renaissance Ventures commenced an action against plaintiff and Christopher Walsh ("Walsh"), plaintiff's principal, in Connecticut Superior Court, in the Judicial District of Stamford/Norwalk (the "Connecticut action" [Mark Sherman Aff., Ex. B]). In the Connecticut action, Renaissance Ventures asserts causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment against plaintiff and Walsh, which causes of action arise out of the same facts alleged in the instant action.

DISCUSSION

The threshold question is whether this action should be maintained in this State. The principle is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin v Mieth, 35 NY2d 414, 418 [1974]). The doctrine of forum non conveniens, codified in CPLR 327(a), "permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere" (Islamic Republic of Iran v Pahlavi, 62 NY2d 474, 478-479 [1984], cert denied 469 US 1108 [1985]). The central focus of the forum non conveniens inquiry is to ensure that trial will be convenient, and will best serve the ends of justice (see Piper Aircraft Co. v Reyno, 454 US

235, 236 [1981]; Capitol Currency Exch., N.V. v National Westminster Bank PLC, 155 F3d 603, 609 [2d Cir 1998], cert denied 526 US 1067 [1999]). If the balance of conveniences indicates that trial in the plaintiff's chosen forum would be unnecessarily burdensome for the defendant or the court, then dismissal is proper (Id.).

New York courts consider the availability of an adequate alternative forum and certain other private and public interest factors when evaluating New York's nexus to a particular action, and deciding whether to dismiss an action on the ground of forum non conveniens (Islamic Pahlavi, 62 NY2d at 479). The burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation (Id.; Highgate Pictures v De Paul, 153 AD2d 126 [1st Dept 1990]). Although not every factor is necessarily articulated in every case, collectively, courts consider and balance the following factors in determining an application for dismissal based on forum non conveniens: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on New York courts (see Pahlavi, 62 NY2d at 479; World Point Trading PTE. v Credito Italiano, 225 AD2d 153, 158-159 [1st Dept 1996]; Evdokias v

Oppenheimer, 123 AD2d 598, 599 [2d Dept 1986]). A motion to dismiss on the ground of forum non conveniens is subject to the discretion of the trial court, and no one factor is controlling (Pahlavi, 62 NY2d at 479; see also Matter of New York City Asbestos Litig., 239 AD2d 303, 304 [1st Dept 1997]).

Residency of the Parties

The fact that none of the parties are residents of New York weighs heavily in favor of dismissal. Plaintiff is not a New York resident, and does not allege any connection to New York in its complaint. None of the defendants are residents of New York. Although a court might generally give some deference to a plaintiff's choice of forum, such deference is significantly diminished where, as here, the plaintiff is a foreign corporation (see e.g. Dragon Capital Partners L.P. v Merrill Lynch Capital Servs., 949 F Supp 1123, 1131 [SD NY 1997]).

Situs of the Underlying Allegations

The allegations of the complaint center on a purported breach of contract between two non-residents of New York. The complaint is devoid of any allegations of an action that took place in the State of New York, and that allegedly caused plaintiff damage sustained in New York. In fact, the situs of all transactions, including the parties' formation of the alleged contract, correspondence between the parties and payments to plaintiff, all occurred outside of New York, which weighs greatly

in favor of dismissal pursuant to CPLR 327 (Pahlavi, 62 NY2d at 479 [the fact that the "transaction[s] out of which the cause of action arose occurred primarily in a foreign jurisdiction" weighs strongly in favor of dismissal on ground of forum non conveniens]; see also World Point Trading PTE, 225 AD2d at 159]; Bewers v Am. Home Prods. Corp., 99 AD2d 949, 950 [1st Dept 1982], affd 64 NY2d 630 [1984]).

Availability of an Adequate Alternative Forum

Although the availability of an alternative forum is not a "prerequisite" to a forum non conveniens dismissal, New York courts consider it a "most important factor" (Pahlavi, 62 NY2d at 481; Datwani v Datwani, 121 AD3d 449, 449 [1st Dept 2014] ["[t]he most important factor is that India presents an alternate forum where this dispute could, and should, be adjudicated"]). The Connecticut action which is already pending is a suitable forum for this litigation as two of the defendants are residents of Connecticut, and Renaissance Ventures has already availed itself of the Connecticut courts in a matter related to the instant dispute.

Although plaintiff argues that, "Connecticut is an inappropriate forum for this dispute," plaintiff, nonetheless, admits that the claims in the Connecticut action "stem from a breach of the very same contract at issue in the instant litigation" (Opposition Memo. at 7). Indeed, plaintiff offers no

actual reasons as to why Connecticut is an inappropriate forum, particularly given the fact that plaintiff may assert the claims brought here as counterclaims in the Connecticut action.

Importantly, on April 4, 2017, the Stamford Superior Court denied plaintiff's motion to stay the Connecticut action in favor of this action (4/4/17 decision [Sherman Reply Aff., Ex. B]). As such, this decision lends additional support that Connecticut is clearly an available and more appropriate alternative forum.

Hardship to Defendants and Potential Witnesses

Also among the factors to be considered by the New York courts in assessing a motion to dismiss for forum non conveniens is the potential hardship to defendants in terms of travel to New York or the provision of necessary evidence (Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd., 9 AD3d 171, 177 [1st Dept 2004] [identifying the location of witnesses and documents as an "important factor" in deciding a motion to dismiss for forum non conveniens]). This factor also weighs in favor of dismissal.

Even when a defendant files a forum non conveniens motion seeking to litigate the claim in a neighboring state -- such as Connecticut -- dismissal is warranted if the relevant witnesses, parties, evidence and injury occurred in that neighboring state (Lombardi v Moran Towing Corp., 199 AD2d 10 [1st Dept 1993] ["In view of the fact that plaintiff lives, worked, was injured, and treated in New Jersey, and that almost all of the witnesses

reside in New Jersey, it cannot be said that dismissal on the ground of forum non conveniens was an abuse of discretion"]).

Here, Lichtman and Renaissance Ventures are residents of Connecticut, while Renaissance Miami is incorporated in Florida. All documents and records associated with the allegations are located outside of New York. Additionally, any witnesses needed to testify regarding such documents or other evidence will be outside of New York. None of the defendants, or the plaintiff, maintains a New York office, and no documents are located within the state. Indeed, plaintiff concedes that "[p]otential witnesses of importance are likely located in Greenwich, Connecticut" (Opposition Memo. at 7).

Applicability of Foreign Law

"[O]ne factor which weighs in favor of dismissal on forum non conveniens grounds is the applicability of foreign law" (Phat Tan Nguyen v Banque Indosuez, 19 AD3d 292, 294 [1st Dept 2005]; accord Shin-Etsu Chem. Co., Ltd., 9 AD3d at 178 ["[t]he applicability of foreign law is an important consideration in determining a forum non conveniens motion" and weighs against retention of the action]). For this reason, New York courts commonly dismiss actions that may require interpretation of foreign law (e.g., Pahlavi, 62 NY2d at 480; PT. Bank Mizuho Indonesia v PT. Indah Kiat Pulp & Paper Corp., 25 AD3d 470, 471

[1st Dept 2006]; Tilleke & Gibbins Intl. v Baker & McKenzie, 302 AD2d 328, 329 [1st Dept 2003]).

While plaintiff's claims are not complicated, New York would be required to apply Connecticut law to the extent that it is relevant in this action (CPLR 4511 [a]). As such, this factor weighs in favor of dismissal.

Potential Burden on New York Courts

The principle is well settled that New York courts "need not entertain causes of action lacking a substantial nexus with New York" (Martin, 35 NY2d at 418; see also Pahlavi, 62 NY2d at 478 ["our courts are not required to add to their financial and administrative burdens by entertaining litigation which does not have any connection with this State"]; Silver v Great Am. Ins. Co., 29 NY2d 356, 361 [1972] ["our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York"]).

Here, the dispute presented in this case has virtually no connection with New York. No allegations of liability or damages to any resident of New York are alleged. Any alleged breach of contract affects only the parties to this action, none of whom are New York residents. Finally, the conduct alleged took place in Connecticut, not in New York. The fact that plaintiff's claims have little, if any, connection to New York, weigh in

favor of CPLR 327 dismissal (Phat Tan Nguyen, 19 AD3d at 294 [CPLR 327 favored dismissal where "New York's nexus to this matter not only fail[ed] to rise to the level of 'substantial,' but [was], in fact, barely discernable"]; Serano Ltd. v Canadian Imperial Bank of Commerce, 287 AD2d 309, 309 [1st Dept 2001] [forum non conveniens dismissal appropriate where "the action [was] virtually devoid of New York connections"]).

Nonetheless, in opposition, plaintiff contends that there is a "substantial nexus between this action and New York" (Opposition Memo. at 4). Plaintiff claims that the basis for the "substantial nexus" is that between 2011 and 2015 it allocated significant funds to "sourcing tickets to events located in New York," and that approximately 20% of all tickets sourced during that time period were to theater, sporting and other entertainment events in New York (Id.). Plaintiff's contention is undermined by its own statements in opposition to Renaissance Miami's dismissal motion (mtn seq. no. 001).

In its motion to dismiss, Renaissance Miami contended that plaintiff lacked legal capacity to sue because it is a foreign limited liability company that is not authorized to transact business or file suit in the State of New York. In support of that contention, Renaissance Miami argued that New York Liability Company Law § 802 mandates that a limited liability company doing business within New York State must obtain a certificate of

authority from the New York Department of State by complying with filing requirements and publication requirements. According to Renaissance Miami, plaintiff never obtained such certificate of authority.

In response to that motion, plaintiff argued that it "has never engaged in systematic and regular" business in New York, and was therefore not required to obtain a certificate of authority prior to bringing this action (Plaintiff's Memo. at 1 [emphasis added]). In support of that argument, on January 13, 2017, plaintiff submitted an affidavit from Walsh, plaintiff's sole managing member, in which Walsh completely disavows plaintiff's business activities within the State of New York (see Sherman Reply Aff., Ex. A). Specifically, Walsh swears under oath that plaintiff "was an entity formed under the laws of Nevada," plaintiff "had no employees or office space in the State of New York," plaintiff "maintained no infrastructure or bank accounts in New York," plaintiff "never sold tickets to any events located in New York," and plaintiff "maintained no business ties to New York whatsoever" (Walsh Aff., ¶¶ 14-19).

Plaintiff cannot possibly reconcile its two versions of its relationship to New York. In the instant motion, where it seeks to maintain this action in New York, plaintiff claims substantial ties to New York. In the other motion, when plaintiff tried to avoid compliance with the law requiring it to obtain a

certificate of authority before bringing this action, it submitted a sworn statement specifically claiming that it "maintained no business to New York whatsoever," and "never sold tickets to any events located in New York" (Walsh Aff., ¶¶ 18-19). Plaintiff cannot have it both ways. It cannot allege that a motion to dismiss on the ground of forum non conveniens must be denied because of the "high percentage" of New York tickets it sourced, while simultaneously claiming that it did not transact business in New York in opposition to Renaissance Miami's motion to dismiss.

Morever, even if this Court were to accept plaintiff's current version of events, the issue being litigated here does not involve the sale of tickets from defendants to consumers. Instead, the dispute centers on the alleged contract between plaintiff and defendants, and the alleged breach thereof. A review of plaintiff's complaint reveals that there is no allegation that defendants' action in selling tickets for any New York events is the basis of alleged wrongdoing. To the contrary, the allegations are centered only on defendants' alleged nonpayment or underpayment to plaintiff, which breach is not alleged to have taken place in New York. Indeed, there is no allegation that any New York resident was injured, or that the actual sale of any tickets to New York events is a source of defendants' liability to plaintiff. In fact, the causes of

action plaintiff asserts allege only the breach of a ticket provision contract between two entities, neither of which is domiciled in New York.

Lastly, plaintiff claims that because Renaissance Miami currently maintains a New York certificate of authority, which lists Lichtman as president, defendants' motion must be denied. This argument completely lacks merit. The relevant time period alleged by plaintiff is 2008 through 2015 (Opposition Memo. at 1). Renaissance Miami did not obtain a certificate of authority until January 29, 2016, well after the alleged time period set forth in the complaint (Id. at 4).

Based on the foregoing, there is no nexus between plaintiff's claims in this action and the State of New York. The allegations are simply insufficient to create the requisite factual connection between New York and this dispute, and defendants' motion for dismissal on the ground of forum non conveniens is granted. In light of this determination, Renaissance Miami's motion to dismiss the complaint, and plaintiff's cross motion for disqualification, are denied as moot.

Accordingly, it is

ORDERED that defendants' motion to dismiss on the ground of forum non conveniens (mtn seq. no. 002) is granted, and the

complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the motion of defendant Renaissance Miami to dismiss the complaint (mtn seq. no. 001) is denied as moot; and it is further

ORDERED that plaintiff's cross motion for disqualification (mtn seq. no. 002) is denied as moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.