Tratado de Libre Comercio, LLC v Splitcast Tech. LLC
2018 NY Slip Op 30116(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 652650/2016
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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TRATADO DE LIBRE COMERCIO, LLC and
PEDRO CHAVEZ,

Plaintiffs,

Index No.: 652650/2016

-against-

Mot. Seq. No. 002

SPLITCAST TECHNOLOGY LLC, SPLITCAST INC., SPLITCAST TECHNOLOGY, SPA, AURUS S.A. ADMINISTRADORA GENERAL DE FONDOS, RAIMUNDO CERDA, CAMERON WENDT, HUGO NEIRA, FELIPE ARREDONDO, JOSE FLORES, JAVIER SALCEDO, IGNACIO LEON s/h/a IGNACIO LEON NAVARRO, and DOES 1-10,
inclusive,

Defendants.

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GERALD LEBOVITS, J.S.C.:

Defendants Raimundo Cerda , Ignacio Leon s/h/a Ignacio Leon Navarro , Splitcast Technology LLC (Splitcast LLC), Splitcast Inc. (Splitcast), and Splitcast Technology, SpA (Splitcast SpA) move, pursuant to CPLR 3211 (a) (2) and (a) (8), to dismiss plaintiffs Tratado de Libre Comercio, LLC (Tratado) and Pedro Chavez's securities law claim for lack of subject matter jurisdiction, and to dismiss the claims against Splitcast LLC and Splitcast SpA for lack of personal jurisdiction. These defendants further move, pursuant to CPLR 7503 (a), to compel arbitration of the remainder of plaintiffs' claims, and to stay this action and any subsequent litigation on those claims.

Background

Splitcast SpA, a Chilean corporation, developed a video streaming application (complaint, ¶ 20). Plaintiffs allege that defendant Cameron Wendt made a sales presentation to them regarding the software, and represented that Aurus had invested $600,000 into developing the application (*id.*, ¶¶ 18, 24-26). Cerda allegedly served as Aurus's representative with Splitcast SpA (*id.*, ¶ 25). Based on Wendt's alleged representation, plaintiffs decided to invest in Splitcast SpA (*id.*, ¶ 26).

On June 6, 2012, Chavez signed an advisory agreement with Splitcast (*id.*, ¶ 27). In broad terms, the agreement provided that Chavez and nonparty Scott de Rozic would serve as "Special Advisors to the CEO . . . of Splitcast" to assist with obtaining funding for development and expansion of the video streaming application (Ananda affirmation dated 3/22/17, exhibit B, Advisory Agreement dated 6/6/12 at 1-2). The agreement was made retroactive to May 18, 2012,

and ran until July 24, 2012 (*id.* at 1). Chavez was to be compensated with stock in Splitcast or Splitcast SpA (*id.* at 3).

Plaintiffs allege that, due to Cerda, Wendt, and defendant Hugo Neira's unwillingness to disclose details of the software and of Splitcast SpA's financials, Chavez was unable to come up with a business plan to obtain funding within the time set forth in the Advisory Agreement (complaint, ¶¶ 28, 30). Chavez and Splitcast then amended the Advisory Agreement, extending the term of the agreement to 30 days after funding was obtained (Ananda affirmation, exhibit C, Amendment to Advisory Agreement dated 7/22/12). Plaintiffs and Aurus, along with other Chilean investors, made a $150,000 bridge loan to Splitcast SpA in order to keep it running (complaint, ¶ 35).

In October 2012, unspecified defendants formed Splitcast LLC, with Chavez, Neira, Cerda, and defendant Felipe Arredando serving as officers (*id.*, ¶ 38). Splitcast LLC also allegedly became the owner of Splitcast and Splitcast SpA, though plaintiffs do not allege how this was accomplished (*id.*). On December 10, 2012, Chavez and Splitcast LLC entered into a consulting agreement (Consulting Agreement), under which Chavez would be appointed to the board of Splitcast LLC, be appointed as the Interim Chief Operating Officer (COO), have the right to certain reports and information about the company, and have the right to approve certain decisions (Ananda affirmation, exhibit E, Consulting Agreement dated 12/10/12). In conjunction with the Consulting Agreement, Tratado and Splitcast LLC entered into a note purchase agreement (Note Purchase Agreement), under which Tratado loaned Splitcast LLC $200,000 in exchange for a convertible promissory note (Promissory Note) (Ananda affirmation, exhibit D, Note Purchase Agreement dated 12/10/12, ¶ 2.1). Splitcast LLC and Chavez's signing of the Consulting Agreement was a condition precedent for Tratado's entering into the Note Purchase Agreement (*id.*, ¶ 3.1). Splitcast LLC warranted that it would apply for patents on its intellectual property, and that all notes governed by the Note Purchase Agreement would be secured by the intellectual property (*id.*, ¶ 4.1). These parties also agreed to arbitrate "any controversy or claim arising out of or relating to this agreement, or the breach thereof . . . provided however, that each party will have a right to seek injunctive relief in a court of law" (*id.*, ¶ 10.16). The Promissory Note provided that any disputes thereunder would be resolved "pursuant to the terms of the Note Purchase Agreement" (Ananda affirmation, exhibit F, Promissory Note dated 12/10/12, ¶ 2).

Plaintiffs allege that the relationship among the parties then broke down in several ways. They claim that Splitcast LLC never applied for patents on the video streaming application (complaint, ¶ 50). Further, that Neira and Cerda took unspecified actions and made unspecified personnel decisions without Chavez's knowledge or consent, and denied his requests for a demonstration of the software (*id.*, ¶¶ 51-52). Additionally, Chavez claims he lost access to a discretionary budget set forth in the Consulting Agreement (*id.*, ¶ 53; Consulting Agreement, ¶ 2 [d] [6]). Finally, plaintiffs claim that, in 2014, they learned Splitcast LLC was bankrupt, and that Neira, Cerda, and other investors had "negotiated amongst themselves without consulting plaintiffs to protect their own interests," though plaintiffs do not allege how these parties did so or what harm plaintiffs suffered as a result (complaint, ¶¶ 55, 59). Tratado claims it is still entitled to Splitcast LLC's intellectual property as security for the loan, and that defendants have failed to turn it over (*id.*, ¶¶ 56-57).

On May 16, 2016, plaintiffs commenced this action. The complaint alleges five causes of action: conversion (first cause of action); violations of Section 10 (b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5 (second cause of action); fraud and deceit (third cause of action); breach of contract (fourth cause of action); and, money had and received (fifth cause of action).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Lack of Personal Jurisdiction over Splitcast LLC and Splitcast SpA (Mot. Seq. No. 002)

Splitcast LLC and Splitcast SpA argue, pursuant to CPLR 3211 (a) (8), that the court lacks personal jurisdiction over them. Specifically, they argue that Splitcast LLC is a dissolved Delaware LLC that cannot be sued absent an order authorizing suit from the Delaware Chancery Court. Moreover, they argue that Splitcast SpA lacks sufficient minimum contacts with New York to justify the court's exercise of jurisdiction over it.

In opposition, plaintiffs argue that Business Corporation Law (BCL) § 1006 allows them to sue Splitcast LLC, as the Note Purchase Agreement provides that it is governed by New York law. Further, plaintiffs claim that Splitcast SpA has sufficient minimum contacts with New York because it is repeatedly mentioned within the Note Purchase Agreement, because it was owned by Splitcast LLC, because the owners of all three Splitcast entities overlapped, and because the Advisor Agreement entitled Chavez to stock in either Splitcast SpA or Splitcast.

"Where a defendant moves to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction, a plaintiff need only make a prima facie showing that such jurisdiction exists" (*Lang v Wycoff Hgts. Med. Ctr.*, 55 AD3d 793, 794 [2d Dept 2008] [internal quotation marks and citations omitted]). If a plaintiff cannot make a prima facie showing of personal jurisdiction, he or she may still obtain limited discovery as to jurisdiction by making a "sufficient start" and showing his or her position "not to be frivolous" (*Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]).

Pursuant to Delaware law, once an LLC has been dissolved, it may not be sued unless its certificate of cancellation is nullified by the Delaware Chancery Court (*Metro Communication Corp. BVI v Advanced Mobilecomm Tech. Inc.*, 854 A2d 121, 138 [Del Ch 2004]; 6 Del Code Ann §§ 18-803 [b], 18-805). Any claims against a dissolved Delaware LLC may not proceed in the absence of such nullification (*Capone v Castleton Commodities Intl. LLC*, 2016 NY Slip Op 30521 [U], *5-6 [Sup Ct, NY County 2016], *affd* 148 AD3d 506 [1st Dept 2017]). Plaintiffs do

not deny that Splitcast LLC is dissolved, nor do they allege that they have commenced the requisite proceeding to nullify Splitcast LLC's certificate of cancellation in the Delaware Chancery Court. Plaintiffs' arguments that, because the Note Purchase Agreement is governed by New York law, the BCL allows them to sue Splitcast LLC, are unavailing. New York applies the law of the state of incorporation pursuant to the corporate "internal affairs" doctrine when analyzing a choice of law question in cases involving corporate law (*see Venturetek, L.P. v Rand Publ. Co., Inc.*, 39 AD3d 317, 317 [1st Dept 2007]). Thus, Delaware Law governs whether Splitcast LLC, a dissolved Delaware LLC, can be sued.

Because, here, the court lacks personal jurisdiction over Splitcast LLC, its motion to dismiss the complaint against it is granted.

With respect to Splitcast SpA,

> "[t]o determine whether a non-domiciliary may be sued in New York, [a court must] first determine whether [the] long-arm statute (CPLR 302) confers jurisdiction over it in light of its contacts with this State. If the defendant's relationship with New York falls within the terms of CPLR 302, [the court must] determine whether the exercise of jurisdiction comports with due process"

(*LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214 [2000]). Though plaintiffs do not specifically state this, from their arguments it is clear that they believe jurisdiction exists pursuant to CPLR 302 (a) (1). CPLR 302 (a) (1) provides that a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state" may be subject to the court's personal jurisdiction. "CPLR 302 (a) (1) jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007] [internal quotation marks and citation omitted]). A defendant must "avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal quotation marks and citation omitted]). "[E]ven when physical presence is lacking, jurisdiction may still be proper if the defendant on his [or her] own initiative . . . project[s] himself [or herself] into this state to engage in a sustained and substantial transaction of business" (*id.* at 382 [internal quotation marks and citation omitted]). "[I]t is not the quantity but the quality of the contacts that matters . . . ." (*Paterno v Laser Spine Inst.*, 24 NY3d 370, 378 [2014]).

Here, plaintiffs' allegations regarding Splitcast SpA are insufficient to support the court's exercise of jurisdiction over it. Splitcast SpA is not a party to any of the agreements at issue in this action, and the fact that it is identified as a subsidiary in the Note Purchase Agreement, is not equivalent to a transaction of business. Although it is a subsidiary of Splitcast LLC, all of the actions of the defendants alleged in the complaint were by, or on behalf of, Splitcast LLC or Splitcast, the US entities involved in these transactions. While plaintiffs allege that Splitcast SpA dominated and controlled Splitcast LLC, the complaint does not allege anything specific about how this dominion was exercised. The fact that the entities had overlapping rosters of members, standing on its own, is insufficient absent any allegations that Splitcast SpA itself did anything in New York. The transacting business test requires allegations that Splitcast SpA projected itself

into New York for a "sustained and substantial transaction of business," and such allegations are plainly lacking here (*Fischbarg*, 9 NY3d at 382).

Accordingly, the court lacks personal jurisdiction over Splitcast SpA, and its motion to dismiss the complaint against it is granted. Based on the foregoing, there is no need for the court to determine whether the exercise of jurisdiction over Splitcast SpA would comport with due process.

The Securities Claims

For their second cause of action, plaintiffs allege that defendants fraudulently induced them to invest money with the Splitcast entities in violation of section 10 (b) of the Securities Exchange Act of 1934, and of SEC Rule 10b-5 (complaint, ¶ 67). Specifically, plaintiffs allege that, in the Advisory Agreement, defendants offered securities in Splitcast, a company that did not then exist, and undercapitalized Splitcast LLC, skewing its valuation upward in a false report (complaint, ¶ 70). The moving defendants argue that the federal courts have exclusive jurisdiction over securities violations and, thus, that this court lacks subject matter jurisdiction pursuant to CPLR 3211 (a) (2). In opposition, plaintiffs argue that concurrent jurisdiction is presumed in the absence of legislation, and if defendants thought that this claim should be in federal court, they should have moved to remove it. Moreover, they claim, relying on *Merrill Lynch, Pierce, Fenner & Smith Inc. v Manning* (__ US __, 136 S Ct 1562 [2016]), that this court may exercise jurisdiction, because an action alleging state common-law claims, that merely mentions a duty under the Exchange Act, does not give rise to exclusive federal jurisdiction.

The Securities Exchange Act of 1934 provides that "[t]he district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder (15 USC § 78aa). As the *Merrill Lynch* court held, "[i]f a complaint asserts a right of action deriving from the Exchange Act (or an associated regulation), the suit must proceed in federal court" (*Merrill Lynch*, 136 S Ct at 1569).[1] It is settled law that New York Courts will dismiss causes of action brought under the Securities Exchange Act (*e.g. Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008]). Here, plaintiffs have explicitly alleged violations of the Securities Exchange Act of 1934 and the SEC Rules. In this context, plaintiffs' claim that the court may exercise jurisdiction is unavailing, as 15 USC § 78aa and *Merrill Lynch* expressly foreclose that possibility. Plaintiffs' remaining arguments are meritless.

Accordingly, those branches of the moving defendants motions to dismiss the second cause of action for lack of subject matter jurisdiction are granted.

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[1] The parties make various allegations of sanctionable conduct throughout their opposition and reply papers. One of these allegations relates to Plaintiffs' repeated misapplication, at best, of the holding of *Merrill Lynch*, which the moving defendants argue is without a basis in law or fact and, therefore, is frivolous. Plaintiffs' apparently willful and repeated misapplication of the holding of *Merrill Lynch*, particularly after defendants had pointed out plaintiffs' error in their reply papers, borders on frivolous (22 NYCRR 130-1.1 [c]). However, a motion for sanctions is not currently before the court.

Arbitration

Splitcast, Cerda, and Leon move, pursuant to CPLR 7503 (a), to compel arbitration of the remaining four causes of action asserted against them. They argue that the Note Purchase Agreement contains a broad and enforceable arbitration clause that covers the remaining cause of action, as all of them arise out of, or directly concern, the Note Purchase Agreement. Because plaintiffs violated the arbitration clause by filing this suit, Cerda and Leon argue that the court should compel arbitration and stay this action and any subsequent litigation on these facts.

In opposition, plaintiffs argue that Splitcast, Cerda, and Leon are not signatories to the Note Purchase Agreement and, therefore, may not seek to compel arbitration under it. Moreover, plaintiffs allege, for the first time, that they are seeking the equitable remedy of a constructive trust, and that the arbitration clause allows litigation seeking equitable relief. Further, plaintiffs claim that none of the other agreements, the Advisory Agreement, Promissory Note, and Consulting Agreement, require arbitration. Finally, plaintiffs assert that the moving defendants waived their right to compel arbitration by moving to dismiss.

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, . . . the court shall direct the parties to arbitrate" (CPLR 7503 [a]). "If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration" (*id.*). The court need only determine that "a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement" (*Liberty Mgt. & Constr. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 80 [1st Dept 1995]). New York's public policy strongly favors arbitration (*Greater Miami Baseball Club Ltd. Partnership v National League of Professional Baseball Clubs*, 193 AD2d 513, 514 [1st Dept 1993]).

Here, plaintiffs do not dispute the validity of the arbitration clause within the Note Purchase Agreement. To the extent that plaintiffs claim that the other agreements between Chavez and Splitcast LLC are not covered by the clause, the Promissory Note expressly provides that any disputes thereunder shall be resolved under the arbitration clause of the Note Purchase Agreement (Ananda affirmation, exhibit F, Promissory Note, ¶ 2), and the Consulting Agreement is incorporated into the Note Purchase Agreement by reference (Ananda affirmation, exhibit D, Note Purchase Agreement, ¶ 3.1). The Note Purchase Agreement provides that it, the Promissory Note, the Consulting Agreement, and other documents delivered pursuant to the Note Purchase Agreement, "constitute the full and entire understanding between the parties with regard to the subjects hereof and thereof," thus superseding the Advisory Agreement and its Amendment, neither of which provide for arbitration (*id.*, ¶ 10.8). Plaintiffs' remaining claims, for conversion, fraud, breach of contract, and money had and received, expressly relate to money due under, Splitcast LLC's obligations under, or representations made within the Note Purchase Agreement and related documents. Plaintiffs do not dispute this.

Plaintiffs' remaining arguments concern whether Splitcast, Cerda, and Leon, who are not parties to the Note Purchase Agreement, can seek to enforce the arbitration clause. As signatories

to the agreements herein, plaintiffs cannot seek to hold Cerda and Leon liable, both individually and as agents of Splitcast LLC, as well as Splitcast, for claims under and arising out of these agreements, while simultaneously arguing that the valid arbitration clause governing those agreements does not apply (*Ranieri v Bell Atl. Mobile*, 304 AD2d 353, 354 [1st Dept 2003]). To the extent that plaintiffs claim they are seeking equitable relief, which is permissible under the arbitration clause, they have failed to allege the elements of a constructive trust. A constructive trust requires, among other elements, a fiduciary or confidential relationship between the parties, and no such relationship is alleged here (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). Finally, a defendant who, as Cerda and Leon have done here, moves both to dismiss a complaint and to compel arbitration in a timely manner has not waived their right to arbitration (*Singer v Jefferies & Co.*, 78 NY2d 76, 85–86 [1991]; *Fein v General Elec. Co.*, 40 AD3d 807, 808 [2d Dept 2007]).

Accordingly, that branch of Cerda and Leon's motion to compel arbitration of the remaining causes of action, and to stay this and any subsequent matter related to those claims is granted.

Accordingly, it is hereby

ORDERED that the branch of the motion of defendants Splitcast Technology LLC, Splitcast Inc., Splitcast Technology, SpA, Raimundo Cerda, and Ignacio Leon, to dismiss the complaint against Splitcast LLC and Splitcast Technology, SpA for lack of personal jurisdiction is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendants Splitcast Inc., Raimundo Cerda, and Ignacio Leon's motion to dismiss the second cause of action for violation of Section 10 (b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 is granted; and it is further

ORDERED that the branch of defendants Splitcast Inc., Raimundo Cerda, and Ignacio Leon's motion to compel arbitration and to stay this action against them is granted; and it is further

ORDERED that plaintiffs Tratado de Libre Comercio, LLC and Pedro Chavez shall arbitrate their claims against the said defendants in accordance with Paragraph 10.16 of the Note Purchase Agreement; and it is further

ORDERED that all proceedings in this action against defendants Splitcast Inc., Raimundo Cerda, and Ignacio Leon are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that any of the arbitrating parties may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the remainder of the action is severed and continued.

Dated: January 11, 2018

HON. GERALD LEBOVITS J.S.C.