

<b>Borden LP v TPG Sixth St. Partners</b>
2019 NY Slip Op 30056(U)
January 2, 2019
Supreme Court, New York County
Docket Number: 657398/2017
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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**BORDEN LP,**

**Plaintiff,**  
**-against-**

**TPG SIXTH STREET PARTNERS, et al.,**  
**Defendants.**

**DECISION AND ORDER**  
**Index No.: 657398/2017**

**Motion Sequence Nos.: 002-004**

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**O. PETER SHERWOOD, J.:**

**I. BACKGROUND**

As these are motions to dismiss the third-party complaint, the facts are taken from the third-party complaint (NYSCEF Doc. No. 10) and are assumed to be true.

The original complaint alleges that plaintiff Borden, LP (Borden), entered into a \$14 million term loan agreement (the Credit Agreement) with various Credit Suisse entities (Credit Suisse). Collateral for the loan was common units of Switch, Ltd (the Switch Units), which had been acquired by Borden in a private, unrelated, transaction. The terms of the Credit Agreement were amended over time to extend the maturity date and to adjust the number of Switch Units serving as collateral, to reflect a three for one unit split. Credit Suisse then assigned its rights to either defendant TPG Sixth Street Partners (TSSP) or PBB Investments II LLC (PBB). On these motions, Borden assumes the assignment was proper and the credit agreement remains enforceable.

Switch then incorporated and issued common stock to Borden in exchange for its common units, subject to a lock-up agreement. Plaintiff claims that, under the terms of the Credit Agreement, it may sell any portion of the Switch Units at any time, at which point TSSP would receive a share of the proceeds or participate in the shares. Borden sold the Switch Units and provided notice to TSSP on September 29, 2017. The parties dispute whether the notice was proper. Under the Credit Agreement, the notice triggered the administrative agent (PBB)'s right to offer to purchase the Switch Units. On October 13, 2017, TSSP, through PBB, offered to purchase the Switch Units at a value to be calculated based on a formula (Complaint, ¶ 32). Borden claims the PBB offer was at a significant discount to the trading price and was not enforceable because it was not made for a specific price (*id.*, ¶ 33). On October 25, 2017, PBB made a revised

offer which Borden rejected as invalid (*id.*, ¶34). PBB made a third offer on November 24, 2017. Borden argues that, regardless, PBB did not have an unconditional right to buy, and Borden could decline. The parties also dispute the value of the Switch Sharing Percentage.

Since the end of the lockup period for the Switch Units fell after the Maturity Date of the loan, Borden transferred the Switch Units to PRS1000, LLC (PRS1000) in exchange for a promissory note (*id.* ¶ 48). Pursuant to the Credit Agreement, section 5.06(b), as there have not yet been any proceeds from the transfer, no proceeds are due to TSSP. Borden promised to make the payments to TSSP when PRS1000 makes its annual interest payments (*id.*, ¶ 52).

Borden brought this suit seeking a declaratory judgment as to Borden's rights and obligations under the Credit Agreement. Defendants TSSP and PBB assert counterclaims, alleging Borden and its owner, Michael Borden (M. Borden), plotted to execute a fraudulent sale of the Switch Units to PRS1000, an entity created by M. Borden in 2017 under Nevada law (*id.*, ¶ 50), in order to frustrate defendants' rights in breach of the Credit Agreement. It is further alleged that this also breached the Credit Agreement by not taking the highest per unit price offered. The counterclaims are:

- 1) Breach of Contract against Borden for sale of the Switch Units;
- 2) Breach of Contract against Borden for failure to pay the Switch Sharing Percentage to PBB;
- 3) Actual Fraudulent Conveyance in violation of New York Debtor & Creditor Law §276 or Nev. Rev. Stat. § 112.180 for conducting a sham sale of the Switch Units;
- 4) Constructive Fraudulent Conveyance in violation of New York Debtor & Creditor Law §273 or Nev. Rev. Stat. § 112.190 for conducting a sham sale of the Switch Units;
- 5) Declaratory Judgment that events of default of the Credit Agreement have occurred; and
- 6) Indemnification under the Credit Agreement and Collateral Agreement.

Defendants also filed a third-party complaint against M. Borden, PRS1000 and Smudge Monster, LLC (Smudge)<sup>1</sup> for:

- 1) Tortious Interference with Contract by conspiring to arrange a sham sale of the Switch Units;
- 2) Actual Fraudulent Conveyance in violation of New York Debtor & Creditor law §276 or Nev. Rev. Stat. § 112.180; and
- 3) Constructive Fraudulent Conveyance in violation of New York Debtor & Creditor law §273 or Nev. Rev. Stat. § 112.190.

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<sup>1</sup> Smudge is alleged to be an LLC founded by R. Christopher Reade, an attorney who was convicted and imprisoned for abetting a similar scheme to hide financial fraud with shell entities. Smudge and PRS1000 were controlled by M. Borden.

In this Decision and Order, motion sequence numbers 002, 003 and 004 are consolidated for disposition. The motions are brought separately by Third-Party defendants PRS1000, M. Borden and Smudge Monster but seek essentially the same relief, *i.e.* dismissal of the third-party complaint for lack of personal jurisdiction (CPLR 3211 [a] [8]) and failure to state a cause of action (CPLR 3211 [a] [7]) (*see* NYSCEF Docs. No. 28, 36 and 44). Because the third-party complaint must be dismissed for lack of personal jurisdiction, the court need not address the second ground for dismissal.

## II. ARGUMENTS

### A. Contentions of Third-Party Defendants

#### 1. Jurisdiction

PRS1000, M. Borden, and Smudge make essentially the same arguments to dismiss the third-party claims for lack of personal jurisdiction. They allege there is not general jurisdiction over PRS1000 or Smudge, as both are Nevada entities with their principal places of business in Nevada. Even the “doing business in New York” which is (incorrectly) alleged by defendants is insufficient to support jurisdiction. And the filing of the Borden Complaint which started this action does not qualify as a “tortious act” within New York because “the filing of litigation falls within the protection of the *Noerr–Pennington* doctrine, which has been applied to bar claims of tortious interference predicated on the commencement of litigation” (*I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]). Further, neither PRS1000 nor Smudge has minimum contacts with New York State. They are Nevada entities with no connections to New York.

For similar reasons, the court lacks jurisdiction over M. Borden, a Nevada resident without minimum contacts with New York State. Further, none of the actions alleged in the third-party complaint against him are alleged to have happened in New York State. While the allegations of jurisdiction center on M. Borden having caused Borden to file this action, allegations which he denies, the filing of an action is not an actionable tort (Memo at 4-5, citing *I.G. Second Generation Partners, L.P.*, 17 AD3d at 208 [“The filing of litigation falls within the protection of the *Noerr–Pennington* doctrine, which has been applied to bar claims of tortious interference predicated on the commencement of litigation”]).

Even if M. Borden had committed a tort in New York, CPLR 302(a)(2) requires a tortfeasor to be physically present when the tortious act was performed. M. Borden is not alleged to have

been present in New York when Borden filed the complaint in this action. Additionally, M. Borden signed the Credit Agreement on behalf of Borden in his capacity as Borden's manager. He did not sign in his personal capacity. Therefore, is not personally subject to the jurisdiction clause of the Credit Agreement.

## 2. Failure to State a Cause of Action

The Third-Party Complaint also fails to state a cause of action against either PRS1000 or Smudge because it does not plead, with the required particularity, that the transfer rendered Borden insolvent. Under CPLR 3016(b), there is a heightened pleading standard requiring particularity. Defendants allege Borden received a promissory note for the Switch Units, but do not allege the promissory note was worth less than Borden's liabilities.

Similarly, the third-party complaint fails to state a claim against M. Borden. The fraudulent conveyance claims are insufficient because there is no allegation M. Borden received a conveyance. He was neither a transferee nor a beneficiary of the transfer. Also, the complaint fails to allege (other than a conclusory statement, made upon information and belief) that Borden was insolvent at the time of a conveyance. No facts supporting this conclusion are alleged. Finally, M. Borden is not alleged to have acted outside the scope of his authority as a member of Borden, as would be required to show tortious interference with contract.

## **B. Contentions of Defendants/Third-Party Plaintiffs**

### 1. Jurisdiction

Defendants respond to all three motions to dismiss with a single brief. They argue this court has jurisdiction over M. Borden and PRS1000 because he and the company are so closely related to Borden and the transaction at issue that it was foreseeable both would be bound by the jurisdiction clause in the Credit Agreement. Further, all three movants conspired with Borden in its scheme to abrogate TSSP's rights under the Credit Agreement, including by filing the complaint in this action in furtherance of their scam (Opp, NYSCEF Doc. No. 48, at 11, quoting *Universal Inv. Advisory SA v Bakrie Telecom PTE, Ltd.*, 154 AD3d 171, 179 [1st Dept 2017] ["a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is 'closely related' to one of the signatories such that 'enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound'"]). Here, M. Borden has an ownership interest (Opp at 11, quoting *Universal Inv. Advisory.*, 154 AD3d at 179 ["If the nonsignatory party has an ownership interest or a direct or

indirect controlling interest in the signing party, or, the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process, then, a finding of personal jurisdiction based on a forum selection clause may be proper” (internal quotations omitted)) and a controlling interest in Borden, was intimately involved in the decision making, and signed the Credit Agreement himself.

PRS1000 is subject to jurisdiction for the same reasons. M. Borden is PRS1000’s president and member. PRS1000’s sole place of business is the offices of Smudge. It was incorporated just two weeks before it bought the Switch Units. PRS1000 is also closely related to the Credit Agreement and the instant dispute.

Defendants also argue that all three third-party defendants are subject to this court’s jurisdiction because they commenced this action and because they conspired to tortuously interfere with a contract that has a New York jurisdiction clause (Opp at 13-14, citing *Emerald Asset Advisors, LLC v Schaffer*, 895 F Supp 2d 418, 434 [EDNY 2012] [“By joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York, [the Defendant] purposely [availed himself] of the privilege of conducting activities within the forum state. [These connections] are such that he should reasonably anticipate being haled into court” in New York]). Regarding the filing of the action, third-party defendants are not protected by the *Noerr-Pennington* doctrine (which “provides First Amendment protections for persons petitioning the government for redress” [20 N.Y. Jur. 2d Constitutional Law § 287]). That doctrine does not protect baseless proceedings intended to inconvenience or harass (Opp at 14, citing *Primetime 24 Joint Venture v Natl. Broadcasting, Co., Inc.*, 219 F3d 92, 101 [2d Cir 2000]). This is a baseless action filed in New York by third-party defendants’ counsel, their agent, and itself is evidence they acted in New York (Opp at 15). Accordingly, as jurisdiction is permitted under CPLR 302 (a) (2), Constitutional due process is not offended (*id.*).

Finally, the argument about minimum contacts is irrelevant because M. Borden and PRS1000 are subject to the venue clause of the Credit Agreement (Opp at 13).

## 2. Whether Third-Party Complaint States a Cause of Action

As to the merits, M. Borden is personally liable for tortious interference. He personally directed the scheme to effectively transfer Borden’s assets to himself (by way of PRS1000, which he owns and controls), leaving Borden insolvent. TSSP alleges M. Borden acted on his own behalf and to benefit himself (Opp at 16). A claim for tortious interference may stand against an officer

of a party to the contract when the officer personally gained from the breach (*id.* at 17, *Courageous Syndicate, Inc. v People-to-People Sports Comm., Inc.*, 141 AD2d 599, 600 [2d Dept 1988] “[A] corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith ... [and did not commit] independent torts or predatory acts directed at another”). The complaint must allege that the officers' or directors' “acts were taken outside the scope of their employment or that they personally profited from their acts”). M. Borden acted in his own self-interest by directing Borden to breach the Credit Agreement and transferring the Switch Units to an entity he controlled (Opp at 18).

The claim against M. Borden for fraudulent conveyance should also stand because, despite the alleged failure of defendants to allege he was a beneficiary of the transfer, third-party plaintiffs have alleged M. Borden arranged for the Switch Units to be transferred to an entity he owned and controlled, which is sufficient (*id.* at 19). Alternatively, the corporate veil should be pierced between PRS1000, which did not specifically move against the fraudulent conveyance claim, and M. Borden, as he created PRS1000, a shell company to act as his alter ego to transfer the Switch Units on blatantly uncommercial terms in direct violation of TSSP's rights. (*id.* at 20).

As for the constructive fraudulent conveyance claim, Section 273 of New York Debtor & Creditor Law provides that an entity is deemed insolvent “when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute” (NY DEBT & CRED § 271[1]). Defendants have pled this much (Opp at 21). Borden has admitted it did not have available assets to repay TSSP other than from sale of the Switch Units (*id.* at 22, citing Complaint, ¶ 49). Accordingly, the transfer to PRS1000 for a promissory note, rather than a transfer to TSSP for cash, was fraudulent (Opp at 22).<sup>2</sup>

### C. Replies

#### 1. PRS1000

In its reply, PRS 1000 observes that defendant/third-party plaintiff's admit that the *Noerr-Pennington* doctrine bars any claim that by filing the Borden Complaint, Borden as the agent of PRS1000, committed a tort in New York thereby conferring jurisdiction on New York courts over PRS1000. PRS1000 disputes that there is any exception to the doctrine in cases where the

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<sup>2</sup>Defendants do not assert claims against Smudge. In a footnote they state that “TSSP is prepared to dismiss, without prejudice, the fraudulent conveyance claim against Smudge” (*id.*, note 7).

complaint is objectively baseless (*id.*). However, acknowledging that the *Noerr-Pennington* doctrine recognizes a “sham” exception, PRS1000 asserts that to plead such an exception, defendants would have to allege the conduct was objectively baseless with no reasonable expectation of success and that the third-party defendant was acting with the intent to interfere with the third-party plaintiff’s business (*id.* at 5). PRS1000 adds that this situation is also distinguishable from the case relied upon by defendants, *Primetime 24 Joint Venture v Natl. Broadcasting, Co., Inc.*, because that case involved thousands of successive filings made to harass. Also, notably, defendants here did not move to dismiss Borden’s Complaint, suggesting that the Borden complaint would survive such a motion.

PRS1000 cannot be bound by the jurisdiction clause in the Credit Agreement, as that agreement also includes section 9.10, which states that the agreement is not intended to bind non-signatories (*id.* at 7-10). The Credit Agreement states it intends to confer rights and obligations only on parties and their successors or assigns. PRS1000 is none of these.

PRS1000 is not closely related to Borden, such that it could be bound by the terms of the Credit Agreement, which was signed years before PRS1000 was created (*id.* at 1, 10). Nor is PRS1000 an owner, successor, officer, or director of Borden, such as could be considered “closely related” (PRS1000 Reply at 4). PRS1000’s close relation to M. Borden is not transitive so as to make it a close relation to Borden.

Further, defendants fail to sufficiently plead that transfer of the Switch Units made Borden insolvent. The cited paragraph of the Complaint actually states that the transfer of the Switch Units kept Borden solvent (*id.* at 14).

## 2. M. Borden

In his reply, M. Borden argues defendants have failed to allege facts to support their argument he and Borden were “closely related,” as defendants have not alleged his domination over Borden, or his involvement in the negotiation or preparation of the Credit Agreement (M. Borden Reply at 5-6). M. Borden had an indirect ownership interest in Borden and signed the Credit Agreement on its behalf, which is insufficient (*id.* at 7).

Nor can defendants establish jurisdiction based on their conspiracy theory (*id.*). Filing an action is protected by *Noerr-Pennington*, and the exception mentioned by the defendants applies only if the litigation is a sham. Here, it is not. There is no legal authority supporting defendants’ position that M. Borden’s attorney’s presence in New York creates jurisdiction (*id.* at 8-9, citing

*CK's Supermarket Ltd. v Peak Entertainment Holdings, Inc.*, 37 AD3d 348, 348 [1st Dept 2007] [“the only purposeful activity alleged is that defendant's New York-based counsel assisted in negotiating the guaranty. That is not enough”]).

Further, the fraudulent conveyance claims should fail because M. Borden did not receive the transfer, and there is no claim for aiding and abetting a transfer (M. Borden Reply at 9-11). Defendants allege no personal benefit to M. Borden. Nor can he be liable under a veil piercing theory, as he never received the property (*id.* at 11, citing *Springut Law PC v Rates Tech. Inc.*, 157 AD3d 645, 646 [1st Dept 2018] [conclusory, nonspecific allegations insufficient to support veil piercing]). An ownership interest in an entity that receives an allegedly fraudulent transfer does not qualify as such a benefit (M. Borden Reply at 12-13, citing *BBCN Bank v 12th Ave. Rest. Group Inc.*, 150 AD3d 623, 623-24 [1st Dept 2017] [“there is no cause of action for aiding and abetting a fraudulent conveyance against a person . . . who is alleged merely to have assisted in effecting the transfer, in a professional capacity, and who is not alleged to have been a transferee of the assets or to have benefited from the transaction”]).

Defendants also fail to allege facts supporting their conclusion that Borden was insolvent. They state it was so only on information and belief (M. Borden Reply at 13). This is not sufficient, which is why defendants point to the complaint in this action, but they misinterpret it, as discussed above by PRS1000. Notably, even if it did support defendants' conclusion, defendants have denied the allegation in their answer.

The tortious interference claim also fails because defendants fail to allege M. Borden acted outside the scope of his authority or personally benefitted from the breach (*id.* at 14). The allegation that M. Borden directed Borden to sell the Switch Units is not enough.

### 3. Smudge Monster

Smudge is in the business of facilitating corporate filings and registrations (Smudge Reply at 1). It performed the ministerial act of registering PRS1000 as a Nevada LLC and received a small fee. It was not involved in the transaction and was neither a beneficiary nor a transferee (*id.*).

Defendants' arguments for jurisdiction over Smudge are based on a claimed conspiracy surrounding the filing of the Borden Complaint. Smudge had nothing to do with the filing, and if it had, its actions would be protected by the *Noerr-Pennington* doctrine (*id.* at 2-3).

Alternatively, the defendants' second and third causes of action should be dismissed for failure to state a claim, as there are no allegations or evidence to support the fraudulent conveyance claim against Smudge (*id.* at 3, citing Opp at 20 n. 7).

### III. DISCUSSION

CPLR 3211 [a] [8] provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant.” When presented with a motion under CPLR 3211 [a] [8], “the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue” (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only requires a “sufficient start,” demonstrating that such facts “may exist” (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

It is undisputed that none of the movants are subject to general jurisdiction. CPLR 302(a) sets forth four different scenarios in which the New York courts can exercise specific or long arm jurisdiction over non-domiciliary defendants as follows:

“[A] court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (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; or
4. owns, uses or possesses any real property situated within the state.

(CPLR 302[a]). Defendants rely on the forum selection clause of the Credit Agreement as grounds to bind M. Borden and PRS1000 and to argue that all three third-party defendants committed tortious acts in New York, thereby subjecting them to jurisdiction.

Defendants argue M. Borden and PRS1000 are subject to New York jurisdiction as they are “closely related” to Borden, so that the Credit Agreement, signed by Borden, can be enforced against them (Opp at 10). The relevant provision of the Credit Agreement states:

“The Borrower hereby irrevocably and unconditionally submits, for itself and its property, to the exclusive jurisdiction of any New York State court . . . , in any action or proceeding arising out of or relating to this Agreement or the other Loan Documents, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State”

(Credit Agreement, § 9.15, NYSCEF Doc. No. 002).

As M. Borden and PRS1000 observe, the Credit Agreement actually excludes them. It contains the following language:

“Nothing in this Agreement or in the other Loan Documents, expressed or implied, is intended to confer upon any Person (other than the parties hereto and thereto, their respective successors and assigns permitted hereunder and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent, the Collateral Agent, and the Lenders) any rights, remedies, obligations or liabilities under or by reason of this Agreement or the other Loan Documents.”

(*id.*, § 9.10).

“The fundamental rule of contract interpretation is that agreements are construed in accord with the parties’ intent . . . and ‘[t]he best evidence of what parties to a written agreement intend is what they say in their writing’ . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous [internal citations omitted]” (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1<sup>st</sup> Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67).

In accordance with these principles, a court should interpret a contract “so as to give full meaning and effect to the material provisions” (*Beal Savings Bank v Sommer*, 8 NY 3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). “A reading of a contract should not render any portion meaningless . . . . Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be

so interpreted as to give effect to its general purpose” (*id.* at 324-325, quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]). Accordingly, as the Credit Agreement expressly excludes conferring any “rights, remedies, obligations or liabilities” upon non-parties to that agreement (other than successors or assigns) the contractual obligation to submit to New York jurisdiction cannot extend to non-parties M. Borden and PRS1000.

Defendants also argue all three third-party defendants are subject to jurisdiction of the New York Courts because they conspired to tortuously interfere with the Credit Agreement and filed the Borden Complaint in New York. They cite CPLR 302(a)(2), which requires commission of a tortious act within the state. “To find that a defendant has committed a tortious act in New York, courts have traditionally required the defendant's presence in the state at the time of the tort. However, a foreign corporation need not have been physically present in New York in order to have committed “a tortious act within the state,” since a tortious act in New York by the corporation's agent will be imputed to the corporation so as to render it amenable to suit in New York” (15 N.Y. Jur. 2d Business Relationships § 1135). Further, “[t]he acts of a co-conspirator may, in an appropriate case, be attributed to a defendant for the purpose of obtaining personal jurisdiction over that defendant” (*Reeves v Phillips*, 54 AD2d 854, 854 [1st Dept 1976]).

The only specific action alleged by the defendants to have occurred in New York is the filing of the Borden Complaint. The *Noerr-Pennington* doctrine “was first established in the context of concerted petitions for anti-competitive legislation” (*Primetime 24 Joint Venture*, 219 F3d at 99-100). “Courts have extended *Noerr-Pennington* to encompass concerted efforts incident to litigation, such as prelitigation ‘threat letters’” and litigation, itself (*id.* citing *Columbia Pictures Indus., Inc. v Redd Horne, Inc.*, 749 F2d 154, 161 [3d Cir 1984]). However, if the “resort to the courts is in bad faith and a ‘mere sham,’” *Noerr-Pennington*’s protections do not apply (*id.*). Defendants allege the Borden Complaint was made, not to determine the validity of Borden’s actions, but to “force TSSP to accept the grossly depressed value using the threat of prolonged litigation” (Opp at 14). However, there is a real dispute among the parties as to the amount due the defendants, and whether Borden’s actions were proper. Defendants filed an answer with six counterclaims for breach of contract, fraudulent conveyance, indemnification, and a declaratory judgment. This strongly suggests the existence of an actual controversy among the parties. The allegation that Borden’s intention was to achieve a settlement is hardly ground for a claim of bad faith.

The Borden Complaint was no mere sham and *Noerr-Pennington* protections apply. The filing of that complaint does not satisfy the jurisdictional requirement that the third-party defendants have committed a tortious act in this state. Defendants have failed to satisfy their burden of showing third-party defendants are subject to the jurisdiction of the New York courts.

Because the third-party complaint must be dismissed for lack of jurisdiction, the court may not address that branch of the motions alleging failure to state a claim. The entire complaint must be dismissed.

It is hereby

**ORDERED** that the motions to dismiss the third-party complaint (Motion sequence numbers 002, 003 and 004) are GRANTED for lack of personal jurisdiction over the third-party defendants and the third-party complaint is hereby dismissed in its entirety.

This constitutes the decision and order of the court.

**DATED: January 2, 2019**

**ENTER,**

  
**O. PETER SHERWOOD J.S.C.**