Poms v Dominion Diamond Corp.
2019 NY Slip Op 31364(U)
May 15, 2019
Supreme Court, New York County
Docket Number: 655733/2017
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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NADAV POMS,

Plaintiff,

- v -

DOMINION DIAMOND CORPORATION, JAMES GOWANS, THOMAS ANDRUSKEVICH, GRAHAM CLOW, TRUDY CURRAN, TIM DABSON, DAVID SMITH, CHUCK STRAHL, JOSEF VEJVODA

Defendant.

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INDEX NO. 655733/2017

MOTION DATE 03/04/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 58
were read on this motion to/for DISMISS.

Defendants Dominion Diamond Corporation ("Dominion" or the "Company"), James Gowans, Graham Clow, Trudy Curran, Tim Dabson, David Smith, Chuck Strahl, and Josef Vejvoda1 (collectively the "Director Defendants," and together with Dominion, the "Defendants"), move to dismiss the amended complaint of plaintiff Nadav Poms ("Poms") pursuant to CPLR 327(a) and 3211(a)(1), (2), (5), (7), and (8).

Background

Poms, on his own behalf and on behalf of the holders of common stock of Dominion, initiated this proposed class action lawsuit alleging claims for negligent misrepresentation, breach of fiduciary duty and quasi-appraisal in connection with the proposed acquisition of Dominion by the Washington Companies (the "Proposed

Transaction"). In the amended complaint Poms seeks money damages and legal fees. Poms owns 22,000 shares, less than one percent, of Dominion's issued and outstanding shares.

Dominion is a Canadian corporation with its principal place of business in Calgary, Alberta, Canada. Its registered office is located in Toronto, Ontario, Canada. It is listed on the New York Stock Exchange and Toronto Stock Exchange. All the Directors Defendants reside in Canada and/or the United Kingdom. None of the Defendants reside in New York.

On July 15, 2017, Dominion's Board of Directors approved a definitive arrangement agreement (the "Arrangement Agreement") with Northwest Acquisitions ULC, an affiliate of the Washington Companies, pursuant to which each share of Dominion's common stock would be converted into the right to receive $14.25 per share in cash. To enable Dominion's stockholders to vote in favor of the Proposed Transaction, Dominion's Board authorized the filing of an Information Circular (the "Circular") with the Securities and Exchange Commission on or about August 23, 2017. The Circular was also mailed to Dominion's shareholders.

Poms alleges that the Circular violates New York and Canadian law as it contains incomplete and materially misleading information regarding (i) the process leading to the Proposed Transaction; (ii) the financial analyses conducted by Dominion's financial advisors, TD Securities Inc. ("TD Securities") and Morgan Stanley Canada Limited

("Morgan Stanley"), in connection with the Proposed Transaction; and (iii) the projections relied upon by TD Securities and Morgan Stanley in performing their valuation analyses.

Defendants argue that Dominion is a "foreign private issuer" under the U.S. Securities laws[1] and was therefore exempt from Section 14(a) of the Securities Exchange Act of 1934, which concerns an issuer's obligations to file a proxy statement in connection with a proposed merger or acquisition and the contents thereof. Dominion was required to follow the specific proxy rules applicable under the Canada Business Corporations Act ("CBCA") and the applicable Canadian Securities law. According to Defendants, Dominion provided all required information required by the applicable Canadian law about the Proposed Transaction.

As mandated under the CBCA, a hearing was held before the Ontario Court regarding the merger. Poms did not raise any objection or oppose the merger in Canada, but instead commenced this action and sought a preliminary injunction. I denied the preliminary injunction by decision and order dated September 19, 2017. The Dominion shareholders voted in favor of the transaction and the Ontario Superior Court of Justice (the "Ontario Court"), entered a final order approving the transaction as "fair and reasonable".[2]

At the final hearing on September 22, 2017, the Ontario Court noted that "no Dominion shareholders have delivered responding materials to indicate an intention to

[1] *See* 17 C.F.R. 240.3b-4(c).
[2] Decision by the Honourable Mr. Justice P. Cavanagh dated 9/22/2017.

oppose court approval of the arrangement, as permitted by paragraphs 26 and 27 of the interim order" and that "Mr. Poms has, through counsel advised that he does not oppose the order sought, but he intends to pursue the litigation that he commenced in the State of New York for damages, and if the State of New York is later found to be forum non-convenien[s], that he intends to pursue his claim for damages in Ontario. Mr. Poms has not exercised rights as a dissenting shareholder."

After the Ontario Court issued its final order, Poms amended his complaint in this action, and Defendants now move to dismiss on the grounds that (i) this Court lacks either general or specific personal jurisdiction over either Dominion or the Director Defendants; (ii) Plaintiff's claims concerning the Circular describes a wholly Canadian transaction with no connection to New York and should be dismissed on the grounds of forum non-conveniens; (iii) international comity, res judicata or collateral estoppel apply because the Ontario Court has already ruled that the transaction is "fair and reasonable"; (iv) the Securities Litigation Uniform Standards Act of 1998 precludes state law claims seeking damages on behalf of a class that allege misrepresentations or omissions of material facts in connection with the purchase or sale of securities listed on a national exchange; (v) Plaintiff's claim for negligent misrepresentation fails to state a claim; and (vi) Plaintiff's claim for 'quasi appraisal' fails because quasi- appraisal is a remedy rather than a cause of action and Poms fails to advance any underlying cause of action that provides a basis for a quasi-appraisal remedy.

Discussion

"On a motion to dismiss pursuant to CPLR 3211 (a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 485 (1st Dept 2017) (citations omitted).

Poms asserts that the New York courts have personal jurisdiction over Defendants pursuant to CPLR 302(a)(1) because Dominion's common stock is traded on the New York Stock Exchange and each of the Director Defendants have sufficient contacts with New York as a director/officer of a company whose common stock is traded on the New York Stock Exchange. Poms also asserts that the Defendants have purposefully availed themselves of the resources of New York by (i) retaining Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), a law firm headquartered in New York, NY as their legal counsel in connection with the Proposed Transaction; (ii) designating New York as the proper forum to bring claims relating to the Arrangement Agreement and submitting to the exclusive jurisdiction of the courts of this State; and (iii) retaining Kingsdale Advisors, which maintains offices in New York, NY as Dominion's proxy solicitation agent.[3]

[3] Here, Poms does not assert any basis for New York to exercise general jurisdiction over Defendants, nor does any exist under CPLR 301. Dominion is a Canadian corporation with its head and principal place of business in Calgary, Canada. Its registered office is located in Toronto, Canada and it does not conduct any business in New York. The Directors Defendants reside in Canada and/or the United Kingdom and have no connection to New York.

Under CPLR 302 (a)(1), jurisdiction may only be exercised over an out-of-state defendant if that defendant "has purposefully transacted business within the state and there is a substantial relationship between the transaction and the claim asserted." *Coast to Coast Energy*., 149 AD3d at 486 (internal citation and quotation marks omitted).

Poms first argues that New York courts may exercise specific jurisdiction over Defendants because Dominion is traded on the New York Stock Exchange.[4] However, it has been long held that a corporation is not doing business in New York for the purposes of conferring jurisdiction merely because its shares are listed on a New York Stock Exchange. *See Deer Consumer Products, Inc. v. Little*, 35 Misc.3d 374 (Sup. Ct. 2012), citing *Gilson v. Pittsburgh Forgings Co*., 284 F.Supp. 569 (SDNY 1968), *Robbins v. Ring,* 9 Misc.2d 44 (Sup. Ct. 1957). Therefore, this is an insufficient basis to confer jurisdiction over Defendants.

Poms next argues that the Defendants voluntarily submitted to the jurisdiction of New York courts by selecting New York as the forum in which to litigate any action related to the debt financing of the Proposed Transaction and agreeing that New York law would govern all claims against any debt-financing source. However, review of the Arrangement Agreement demonstrates that Defendants agreed to litigate in New York *only* as to issues related to debt-financing source and nothing more. Because debt financing is not at all related to the causes of action alleged by Poms -- which concerns the sufficiency and accuracy of disclosures made in connection with the Proposed

[4] Dominion shares are traded on both the Toronto and New York stock exchanges.

Transaction, Poms has not shown a substantial relationship between the debt financing and the cause of action pled to confer jurisdiction over the Defendants pursuant to the forum selection clause.

Poms next argues that New York courts may exercise specific jurisdiction over Defendants because they retained Kingsdale Advisors, a Canadian proxy solicitation agent which also maintains an office in New York, as the Company's proxy solicitation agent. The fact that Defendants retained a Canadian proxy solicitation agent, which has an office in New York is not sufficient, in and of itself, to show that Defendants have subjected themselves to jurisdiction here. Poms fails to plead facts sufficient to demonstrate that simply by appointing Kingsdale Advisors as the proxy solicitation agents, Defendants transacted business in New York. In addition, Poms has failed to plead facts to show that his claims arose out of the appointment of a proxy solicitation agent. Accordingly, there is an insufficient basis to exert CPLR 302 (a)(1) jurisdiction over the Defendants on this ground.

Finally, Poms argues that New York courts may exercise specific jurisdiction here because the Defendants purposefully availed themselves of the resources of New York by retaining Paul Weiss, a law firm headquartered in New York, as their legal counsel in connection with the Proposed Transaction.

As support, Poms relies on *Fischbarg v. Doucet*, 9 N.Y.3d 375 (2007). However, in *Fischbarg*, the plaintiff was a New York attorney who performed substantial and ongoing work for the defendants in New York. The defendants projected themselves into

New York by establishing an attorney-client relationship with the plaintiff over a course of nine months through telephone calls, faxes, mail contacts and e-mails, and the plaintiff did extensive work for the defendants, records indicating over 238.4 hours, all in New York. The plaintiff sought to recover fees for his representation of the defendants. There was clearly an articulable nexus between the business transacted and the cause of action sued upon. *Fischbarg* is distinguishable not only because of the nature and quality of the contacts involving New York but also because here, Poms' cause of action is about the sufficiency and accuracy of disclosures made in connection with the Proposed Transaction, not about Paul Weiss being retained.

Similarly, Poms' reliance on *Rational Strategies Fund v. Hill*, 40 Misc.3d 1214(A) (Sup. Ct. 2013) is also misplaced. In *Rational Strategies*, the plaintiff was a resident of New York and owned shares of common stock in defendant, SCBT. SCBT and First Financial Holding entered into a merger agreement, which included a clause designating New York City as the location of the merger closing. A New York law firm was retained to represent SMBC on the merger and a New York investment banker was retained. The plaintiff sued alleging that the Registration Statement filed with the SEC regarding the merger did not disclose all material facts. The Court determined that the issue of whether defendants' New York contacts gave rise to plaintiff's cause of action required jurisdictional discovery.

Unlike *Rational Strategies*, the Defendants here concluded the Arrangement Agreement in Canada with no connection to New York. Although the Defendants

consulted Paul Weiss's Toronto and New York offices, including some New York based attorneys, the center of gravity for the Proposed Transaction was in Canada with a very remote, if any, contact in New York. *See Berkshire Capital Group, LLC v Palmet Ventures, LLC*, 307 Fed. Appx. 479, 481 (2d Cir. 2008) ("The mere fact that [Defendants] engaged in *some* contact with [] New York [] does not mean that [Defendants] transacted business in New York.").

Moreover, a foreign entity hiring a law firm, which has a presence in New York, but without a substantial connection between the law firm's engagement and the subject matter of the litigation, has been held an insufficient basis to confer New York jurisdiction over the foreign entity. *See e.g., Hastings v. Piper Aircraft Corp.,* 274 AD 435 (1st Dep't 1948)("[F]inally, we fail to see how consultation with its attorneys in New York can fairly be said to bring the business of the defendant corporation into the State"); *c.f. Kaczorowski v Black and Adams*, 293 AD2d 358 (1st Dep't 2002) (where the "action was brought to obtain payment for services rendered by plaintiff in the very matter in connection with which plaintiff was solicited and retained by defendant, plaintiff has sufficiently established that defendant is subject to the jurisdiction of New York courts in this action pursuant to CPLR 302 (a)(1)").

In *Bristol-Meyers Squibb Co. v. Supreior Court of California,* 137 S.Ct. 1773 (2017), the United States Supreme Court confirmed that "[i]n order for a court to exercise specific jurisdiction over a claim, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the

forum State." *Id.* at 1781 (internal quotation marks and brackets in original omitted), citing *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S.Ct. 2846 (2011). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781.

At bottom, the fact that Defendants consulted attorneys who have an office in New York about a Canadian Proposed Transaction (and some New York based attorneys may have even been consulted about the Canadian Proposed Transaction) without more, does not supply the required link between Defendants New York presence and the subject matter of the litigation. Instead Poms lists a few, detached connections between Defendants and New York in an attempt to manufacture specific jurisdiction. These connections, however, are not substantially related to his claim – that disclosures concerning the proposed acquisition in Canada of a Canadian company by an affiliate of a Montana company were inadequate and/or misleading. Poms list of unconnected relationships between New York and his claims concerning the Proposed Transaction in Canada are at best tangential and insufficient to show the required "affiliation between the forum and the underlying controversy" for New York to exert specific jurisdiction over this proposed class action litigation.[5] *Id.* at 1781.

For the foregoing reasons, it is

[5] Even if not specifically addressed, I have considered all of the parties' arguments concerning jurisdiction. Because I dismiss for lack of jurisdiction, I do not address the parties' other arguments on the dismissal motion.

ORDERED the motion of defendants Dominion Diamond Corporation, James Gowans, Graham Clow, Trudy Curran, Tim Dabson, David Smith, Chuck Strahl, and Josef Vejvoda to dismiss the amended complaint of plaintiff Nadav Poms is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

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5/15/2019
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE