

Lilis Energy, Inc. v Blackwell
2019 NY Slip Op 31523(U)
May 29, 2019
Supreme Court, New York County
Docket Number: 653469/2018
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

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LILIS ENERGY, INC.	INDEX NO.	<u>653469/2018</u>
Plaintiff,	MOTION DATE	<u>08/10/2018</u>
- v -	MOTION SEQ. NO.	<u>002</u>
SETH BLACKWELL,		
Defendant.		

DECISION AND ORDER

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 39, 40, 41, 43, 44, 45, 46, 47, 48 were read on this motion to DISMISS.

In this action, Plaintiff Lilis Energy, Inc. (“Lilis”) seeks to claw back certain stock and stock options that were awarded to former employee Seth Blackwell (“Blackwell”), claiming that Blackwell was not entitled to retain those awards because he was fired “for Cause.” Based on the same underlying facts, Blackwell sued Lilis in Texas state court, asserting that Lilis’s actions breached an employment agreement requiring that “any dispute that arises directly or indirectly from the relationship of the Parties evidenced by [the] Agreement” be litigated exclusively in Texas. For its part, Lilis asserts that a nearly identical forum selection clause in the contracts governing Blackwell’s stock and stock option awards requires that the dispute be heard in New York. This case thus raises the question of how to apply forum selection provisions that seem to point in different directions.

Blackwell moves to dismiss this action on the ground that (1) Lilis's claims arise under the employment agreement, not the "award" agreements, and therefore this dispute must be litigated in Texas; (2) the Texas action was filed first; and (3) the balance of interests under the doctrine of forum non conveniens weighs in favor of litigating in Texas. For the reasons set forth below, Blackwell's motion is granted and Lilis's complaint is dismissed.

Factual Background

The Agreements

Lilis, an independent oil and gas company headquartered in Houston, Texas, hired Blackwell as its Executive Vice President of Land and Business Development on December 1, 2016. (Complaint ("Compl.") ¶¶1, 11) (NYSCEF Dkt. No. 2). That same day, Blackwell entered into an Executive Employment Agreement (the "Employment Agreement") (NYSCEF Dkt. No. 6), which outlined Lilis's policies on compensation, bonuses, severance payments, and more. Under the Employment Agreement, Blackwell was eligible to receive, among other incentives and benefits, bonuses and awards of equity and non-equity compensation from the company. (Compl. ¶12, citing Employment Agreement §5.3). The Employment Agreement also included detailed definitions of key terms related to Blackwell's employment, including termination for "Cause." (See Employment Agreement §7.1). In addition, the Employment Agreement contained a broadly worded forum selection clause which directs Lilis and Blackwell to litigate any disputes arising from the employment relationship in the State of Texas:

For purposes of resolving any dispute that arises directly or indirectly from the relationship of the Parties evidenced by this Agreement, the Parties hereby submit to and consent to the exclusive jurisdiction of the State of Texas and agree that any related litigation shall be conducted solely in the courts of Harris County, Texas or the federal courts for the United States for the Southern District of Texas, where this Agreement is made and/or to be performed, and no other courts.

(*Id.* §21) (emphasis added).

In accordance with §5.3 of the Employment Agreement, Lilis granted Blackwell a series of equity awards, documented in certain stock and stock option agreements (collectively, the “Award Agreements”) (NYSCEF Dkt. Nos. 20-22). These agreements spelled out the mechanics of Blackwell’s stock and stock option awards. The December 2016 Incentive Stock Option Agreement (ISOA), for example, lists the “Number of Shares Purchasable,” the “Option Price per Share,” and the “Exercisability Schedule.” (See NYSCEF Dkt. No. 20). A subsequent ISOA issued in May 2017, as well as a restricted stock award (RSA) issued in October 2017, covered similar ground.

The Award Agreements stipulated that if Blackwell were terminated by the company “for Cause,” his stock options under the ISOAs would immediately expire and his unvested stock under the RSA would immediately be forfeited. (Compl. ¶¶16, 23, 26; *see, e.g.*, NYSCEF Dkt. No. 20 (“The entire Option, including any exercisable and non-exercisable portion, expires immediately upon . . . the Grantee’s Separation from Service for Cause.”)). If Blackwell left the company for other reasons, he could be entitled to keep some, if not all, of his stock options and unvested stock.

“Cause” is not defined separately in the Award Agreements. Instead, the Award Agreements refer to the terms and conditions of another agreement called the Omnibus Incentive Plan, which in turn defines “Cause” “as that term is defined in [Blackwell’s] offer letter or other applicable employment agreement.” (See Omnibus Incentive Plan §2.6) (NYSCEF Dkt. No. 26). By contrast, the Employment Agreement features a nine-paragraph exegesis on the meaning of “Cause,” which enumerates the standards Lilis must meet and the procedures it must follow when terminating an employee for Cause. (Employment Agreement §7.1).

The Award Agreements, like the Employment Agreement, contain a forum selection clause. This clause identifies New York, not Texas, as the forum for any disputes related to the “relationship of the parties evidenced by the Award Agreement”:

For purposes of resolving any dispute that arises directly or indirectly from the relationship of the parties evidenced by the Award Agreement, the Grantee hereby submits to and consents to the exclusive jurisdiction of the State of New York and agrees that any related litigation shall be conducted solely in the courts of New York County, New York or the federal courts for the United States for the Southern District of New York, where the Award Agreement is made and/or to be performed, and no other courts.

(See NYSCEF Dkt. Nos. 20-22).

The Instant Action

According to the allegations of the Complaint, Blackwell was fired from his post at Lilis on April 3, 2018, following allegations of impropriety. (Compl. ¶36). The company’s Board of Directors “unanimously voted to terminate Blackwell’s employment for Cause, as defined in Section 7.1(a) and (d) of the Employment Agreement” upon determining that Blackwell had falsified data and conducted himself inappropriately. (*Id.* ¶35). Lilis asserts that Blackwell was duly fired for Cause; Blackwell disagrees. Hanging in the balance is Blackwell’s entitlement to potentially millions of dollars in severance payments, stock options, and unvested stock.

As relevant to the instant motion, the parties vigorously dispute the proper forum to hear this case. According to Blackwell, the case “rightly belongs” in Texas under the forum selection clause found in the Employment Agreement. (*See* Def.’s Mem. of Law at 2) (NYSCEF Dkt. No. 17). In that vein, Blackwell filed a lawsuit in Texas state court, Harris County, on June 21, 2018, “alleg[ing] that Lilis breached the contract because he was not terminated for Cause under his Employment Agreement.” (*Id.* at 6-7, 12). A few weeks later, on July 10, 2018, Lilis filed the

instant action, relying on the forum selection clause in the Award Agreements to bring suit in New York.

Lilis alleges here that Blackwell breached his fiduciary duty to the company, (Compl. ¶¶65-71), and seeks a series of seven declaratory judgments, which would cumulatively amount to a ruling that Blackwell was terminated for Cause and thereby surrendered his rights to certain awards, bonuses, and severance payments. (*See* Compl. ¶¶51, 57, 63, 77, 83, 88, 95).

Blackwell moves to dismiss Lilis's claims on the ground that the Employment Agreement's forum selection clause controls, and thus Texas is the appropriate forum for this dispute. Alternatively, Blackwell argues, this case should be dismissed under the doctrine of forum non conveniens (CPLR § 327(a)(4)), or in light of the first-filed Texas action (CPLR § 3211(a)(4)).¹

Legal Analysis

“[A] contractual forum selection clause is documentary evidence that may provide a proper basis for dismissal pursuant to CPLR 3211(a)(1).” *Landmark Ventures, Inc. v. Birger*, 147 A.D.3d 497, 497 (1st Dep't 2017); *see Lifetime Brands, Inc. v. Garden Ridge, L.P.*, 105 A.D.3d 1011, 1012 (2d Dep't 2013) (affirming dismissal “pursuant to CPLR 3211 (a) (1) on the ground that the forum selection clause precluded commencement of the action in New York”).

“The first order of business is to decide which forum selection clause applies to Plaintiff's claims.” *Encompass Aviation, LLC v. Surf Air Inc.*, No. 18 CIV. 5530 (CM), 2018 WL 6713138, at *7 (S.D.N.Y. Nov. 30, 2018); *see DeSola Grp., Inc. v. Coors Brewing Co.*, 199 A.D.2d 141, 141 (1st Dep't 1993) (“[F]orum selection clause is inapplicable since plaintiff's complaint does not

¹ On September 28, 2018, Judge Kirkland of the 334th Judicial District of Harris County, Texas, denied Lilis's motion to dismiss, which was based on the same forum selection provisions in dispute here. (*See* Def.'s Reply Mem. of Law at 1) (NYSCEF Dkt. No. 43).

pertain to the Agreement.”); *see also Schmelkin v. Garfield*, 85 A.D.3d 755, 755–56 (2d Dep’t 2011) (holding that defendant “failed to sustain his burden of establishing that the forum selection clause applies here, since the allegations in the complaint are not based on” the relevant agreement) (internal citations omitted).

Based on the allegations set forth in the Complaint, this dispute hinges on the Employment Agreement, not the Award Agreements. As a starting point, Blackwell’s eligibility to receive *any* of the compensation at issue originates in the Employment Agreement. (Compl. ¶12) (“Under the Employment Agreement Blackwell was eligible to receive, among other incentives and benefits, bonuses and awards of equity and non-equity compensation that the Board could award him from time to time.”).

And Lilis’s specific causes of action all implicate the Employment Agreement. Lilis’s first three causes of action seek a series of declaratory judgments that “because Blackwell was terminated for Cause,” his incentive stock options expired immediately upon his termination, and his entitlement to unvested restricted stock options were similarly forfeited. (*See* Compl. ¶¶51, 57, 63). Deciding that issue depends largely on whether Blackwell was validly fired “for Cause”—a term defined in the Employment Agreement. (*See, e.g., id.* ¶¶18-19, 23, 35, 37). Likewise, Lilis’s fifth, sixth, seventh, and eight causes of action all seek declaratory judgments about provisions in the Employment Agreement, including the “for Cause” provision. (*Id.* ¶¶77, 83, 88, 95). Lilis’s fourth cause of action, which alleges that Blackwell breached his fiduciary duties to the company, also stems directly from the Employment Agreement. As Lilis acknowledges, Blackwell only owed those duties “by virtue of his role as an executive officer and employee of Lilis,” (Pl.’s Mem. of Law at 12-13, citing Compl. ¶65), a role defined by the Employment Agreement. And the Employment Agreement specifically mentions “breach of a fiduciary duty to

the Company” as one possible basis for termination for Cause. *See* Employment Agreement §7.1(d).

Lilis hardly disputes the importance of the Employment Agreement to deciding the issues at hand. The company admits, for instance, that “whether Blackwell’s incentive stock options . . . accelerated and became immediately exercisable or expired as of the date of Blackwell’s termination is entirely dependent on whether or not he was terminated for ‘Cause,’ as solely defined in his Employment Agreement.” (Pl.’s Mem. of Law at 9), and “there can be no dispute that Blackwell received the equity awards at issue solely as a result of his employment relationship with Lilis.” (*Id.* at 7). Nor does Lilis point to any provisions unique to the Award Agreements that would help resolve the underlying dispute. All this would seem to lead ineluctably to the conclusion that the Employment Agreement’s forum selection clause governs.

Instead, Lilis argues that the Award Agreements’ forum selection clause envelops all disputes relating to the Award Agreements *as well as* all disputes relating to an awardee’s Employment Agreement. Lilis summarizes this interpretation with the following rule: “[I]f the Employment Agreement is evidenced by the Award Agreements . . . then any dispute related to the Employment Agreement must be litigated in New York (as well as any claims under the Award Agreement themselves).” (Pl.’s Mem. of Law at 7). Lilis’s counsel confirmed at oral argument that under the company’s reading of the contracts, employment-related disputes having nothing to do with the substance of the Award Agreements would nonetheless be subject to the forum selection clause in those agreements. This is a remarkable rewriting of the agreements, and as a matter of contract interpretation it is untenable.

For one thing, Lilis’s interpretation would read the forum selection clause out of the Employment Agreement altogether. This result runs afoul of the general rule that “[w]here

interrelated agreements contain competing forum selection clauses, a Court must avoid [an] interpretation[] that render[s] a provision of either agreement superfluous.” *Adar Bays, LLC v. Aim Expl., Inc.*, 251 F. Supp. 3d 704, 708 (S.D.N.Y. 2017) (internal quotation marks omitted); *see also MPEG LA, LLC v. Samsung Elecs. Co.*, 166 A.D.3d 13, 17 (1st Dep’t 2018) (noting that when “agreements are interrelated, they must be read together”). In fact, Lilis itself advises that the Court “should not adopt an interpretation which will operate to leave a provision of a contract . . . without force and effect.” (Pl.s’ Mem. of Law at 7, citing *Acme Supply Co. v. City of New York*, 834 N.Y.S.2d 142, 143 (1st Dep’t 2007)). Yet Lilis’s reading does exactly that.

Applying well-worn canons of construction here, the forum selection clauses in the Employment Agreement and the Award Agreements can be read to govern separate, albeit related, areas of potential discord. Cases arising from the particulars of an employee’s incentive award agreements—the number of share options, for example, or their redemption value at a point in time—may turn on the language of the Award Agreements in a way that triggers the forum selection clauses found therein. But this dispute is about the Employment Agreement. Either Blackwell was fired for Cause under the Employment Agreement, or he was not. Once that fundamental determination is made, the consequences will then inexorably ripple out to the Award Agreements. It is the Employment Agreement, in other words, which will work its effect on the Award Agreements, not vice versa. Reading the Award Agreements as Lilis does, to trump the Employment Agreement, inverts this contractual cause and effect.

Lilis’s interpretation also produces impractical, if not absurd, results. *See MPEG LA, LLC*, 166 A.D.3d at 17 (“[W]e must examine the parties’ obligations and intentions as manifested in the entire agreement and seek to afford the language an interpretation that is sensible, practical, fair, and reasonable.”). Lilis’s Texas-based employees seeking to litigate disputes with the company

about disability benefits, vacation days, or the non-compete policy—found in the Employment Agreement at Sections 5.4, 5.8, and 12.1., respectively—would be forced to do so in New York simply because they signed a separate agreement concerning an entirely different aspect of employment. Nothing in the text of the Award Agreements’ forum selection clause suggests such all-encompassing breadth.

Nor does the Award Agreements’ forum selection clause supersede the Employment Agreement’s forum selection clause. In arguing that it does, Lilis focuses primarily if not entirely on the sequence of the two agreements (the Award Agreements being executed after the Employment Agreement), while ignoring their substance. Under New York law, “a subsequent contract *regarding the same matter* will supersede the prior contract.” *Hyuncheol Hwang v. Mirae Asset Sec. (USA) Inc.*, 165 A.D.3d 413, 413–14 (1st Dep’t 2018) (emphasis added); *Kramer v. Danalis*, 49 A.D.3d 263, 264 (1st Dep’t 2008) (holding that operating agreement did not supersede interest holders’ agreement because it “was neither the subject of negotiation between defendant and Irving nor pertained to precisely the same subject matter”). Here, the Award Agreements do not cover “precisely the same subject matter” as the Employment Agreement. As discussed, the Employment Agreement addresses an employee’s entitlement to compensation, including the award of stock options, while the Award Agreements address the specifics of those options. This dispute between Blackwell and Lilis is about Blackwell’s entitlement to the incentive awards and other compensation, not about the specifics of the options.

Moreover, Lilis’s argument conflicts with the text of the merger clause found in the Award Agreements. The clause is conspicuously narrow, providing only that the Award Agreements supersede “prior agreements . . . concerning the [Stock] Option.” (Award Agreement § 12(c)). And “Option” is a defined term meaning “an Incentive Stock Option to purchase the number of

Shares designated in the [Award Agreements].” (Award Agreement Preamble). Lilis’s interpretation would widen the merger clause to include all claims arising under the Employment Agreement, without any textual justification for doing so. The Employment Agreement does not get into the specifics of Blackwell’s “Option”—rather, it focuses on his entitlement to various kinds of cash and equity compensation, including the Option. As Blackwell rightly contends, “[n]othing in the language of the Award Agreements calls for an alteration of any of the terms set forth in the Employment Agreement.” (Def.’s Mem. of Law at 11). Had the drafters of the Award Agreements wished to write a broader merger clause, or to provide specifically that the forum selection clause overrides the forum selection clause in the Employment Agreement, they could have done so. But as written, the more natural reading of the Award Agreements is that they complement the Employment Agreement, but do not supersede it.²

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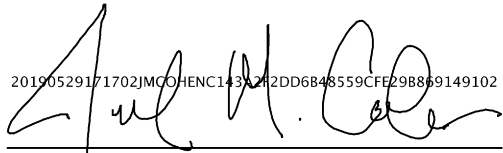
Accordingly, for the reasons described above, it is:

ORDERED that Blackwell’s motion to dismiss is **GRANTED** and Lilis’s Complaint is dismissed.

² Because the forum selection clause in the Employment Agreement mandates that Lilis’s claims be litigated in Texas, the Court need not rule on Lilis’s argument under N.Y. Gen. Oblig. Laws §§ 5-1401-1402, which permit, but do not mandate, litigation in New York courts “where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part.” Nor does the Court need to address Blackwell’s alternative arguments in support of dismissal based on the first-filed doctrine and the doctrine of forum non conveniens. *See, e.g., Landmark Ventures*, 147 A.D.3d at 498 (“Since dismissal was proper based on the forum selection clause, we need not reach plaintiff’s arguments regarding forum non conveniens.”).

This constitutes the Decision and Order of the Court.

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JOEL M. COHEN, J.S.C.

5/29/2019

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE