Bugsby Prop. LLC v Alexandria Real Estate Equities, Inc.
2019 NY Slip Op 32359(U)
August 5, 2019
Supreme Court, New York County
Docket Number: 650795/2019
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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BUGSBY PROPERTY LLC and STEVEN MARCUS,

Plaintiffs,

-against-

ALEXANDRIA REAL ESTATE EQUITIES, INC., and JOEL S. MARCUS,

Defendants.

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DECISION AND ORDER
Index No.: 650795/2019

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

This is a dispute between father and son where the son and his company seek to be paid for services provided to the father and his company. Under motion sequence 001, defendants move to dismiss the complaint pursuant to CPLR 327(a) for *forum non conveniens*, or alternatively pursuant to CPLR 3211(a)(1), (4), (7), or (8). For the reasons discussed below the motion shall be granted under CPLR 327 (a) which is the focus of this decision and order.

I. BACKGROUND

Unless otherwise specified the following facts are taken from the amended complaint. Plaintiff Steven Marcus ("Steven") controls plaintiff entity Bugsby Properties LLC ("Bugsby")[1], and is the son of defendant Joel Marcus ("Joel"), who is the CEO and Executive Chairman of defendant Alexandria Real Estate Equities, Inc. ("Alexandria" or "ARE").

Alexandria's stock had been underperforming from 2010 to 2013 when Joel Marcus approached his son at a family gathering in California about how to improve the company's stock price and save his position (Steven Marcus aff. ¶ 6). At his father's request, Steven Marcus on behalf of Bugsby spent four weeks from November 2013 to December 2013 analyzing Alexandria's stock performance and developing a plan for improvement. Steven conducted independent research and worked with Wall Street analysists Michel Bilerman ("Bilerman") of

[1] The complaint alleges that Bugsby performed the services alleged. There is no writing in the record that reflects any agreement to this effect but in an affidavit submitted on this motion, Steven Marcus asserts he did the work "on behalf of Bugsby" (NYSCEF Doc. No. 26, Steven Marcus Aff. ¶ 7). Steven Marcus individually is party to a Confidential Information and Nondisclosure Agreement relating to "Project Affirmed," the matter which both Bugsby and Steven Marcus assert Bugsby provided services (NYSCEF Doc. No. 17).

Citigroup and Ross Smotrich ("Smotrich") of Barclays Capital. Bugsby determined that Alexandria's focus on issuance of common stock to fund growth, rather than using debt or strategic joint ventures and private capital, was the cause of the stagnation. Bugsby ultimately advised creating large, programmatic, strategic joint ventures with private institutional investors as a way forward.

On December 4, 2013, Joel and Steven attended ARE's Investor Day in New York, during which Joel presented the same growth strategy focusing on common stock. Later that day, Bugsby sent to Joel an outline of the proposal by email. The next day, Joel met with Steve Mastrovich ("Mastrovich") of JP Morgan to discuss the proposal. On December 7, 2013, Bugsby sent a full recommendation deck to Joel, other members of Alexandria's management, Steve Mastrovich, and Todd Eagle of Goldman Sachs. The final deck was slightly modified again on December 11, 2013. Joel decided to make implementation of the proposal a priority for Alexandria, and on December 21, 2013, Steven set up and attended a series of meetings in New York to that end. On December 26, 2013, Brett Perry of JP Morgan circulated "Joint Venture follow-up Discussion Materials" that included a list of potential investors based on a list originally compiled by Bugsby. The project became known as "Project Affirmed".

In early 2014, Joel announced the plan to shareholders and it was immediately well received. Alexandria's share price started to show improvement by the second quarter of 2014. From 2015 to 2017, Alexandria and TIAA partnered on a number of real estate projects. Mastrovich, who was involved in Project Affirmed from its early stages, became the exclusive financial advisor for the TIAA deals. Execution of these joint ventures led to significant growth in share price, public market perception, and $7 billion in market value.

Steven and Bugsby were never compensated for their work. Instead Joel attempted to pass Bugsby's ideas off as his own by representing to people such as Mastrovich that he had the idea to implement a joint venture strategy. Joel also asked Steven to remove anything related to Bugsby from the recommendation deck because "I cannot compensate you as you well know" (amended complaint ¶ 49).

On December 27, 2013, Alexandria's Vice President for Real Estate Legal Affairs, Gary Dean, asked Steven and Bugsby to sign confidentiality agreements regarding continuation of work, but the plaintiffs refused at that time. On December 27, 2013, Joel asked Steven to sign a non-

disclosure agreement during a breakfast meeting in Aspen, Colorado. Joel cited a company policy prohibiting hiring or remunerating family. Dean sent another request on December 28, 2013, citing the same policy against nepotism. Not knowing that the nepotism policy was not as broad as Alexandria represented, Steven ultimately signed a confidence information and non-disclosure agreement (the "NDA") regarding future advice only, which he now contends is in any event void for lack of consideration. The NDA expired by its terms five years from the effective date, and so expired as of December 27, 2018 (Mastro aff, exhibit C at 3).

Plaintiffs assert four counts of quantum meruit and a fraud. The same day that this action was filed, defendants filed an action for declaratory judgment in California that "the [NDA] agreement between the parties is valid"; that the parties' "agreement is contained entirely in the [NDA]"; "the only compensation owed to Steven was the right to promote his work" and "no monetary compensation is or was owed to Steven or Bugsby" (mem exhibit 3 ¶ 53). Under the NDA, the parties consented to California's jurisdiction (NDA ¶ 12; Mastro aff ¶ 3).

II. ARGUMENT

As to *the forum non conveniens* defense, defendants argue that, where none of the parties resided in New York, including plaintiffs, plaintiffs "must demonstrate special circumstances which warrant the retention of the action in New York or risk dismissal of the action pursuant to the doctrine of *forum non conveniens*" (*Economos v Zizikas*, 18 AD3d 392, 393 [1st Dept 2005]). 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 complaint in this action mentions only two purported connections to New York – the Marcuses' presence at a December 4, 2013 Investor Day and a series of meetings later in December 2013 that Steven set up for Joel to meet with investment bankers from JP Morgan and Goldman Sachs (amended complaint ¶¶ 29, 35). This is insufficient to establish a substantial nexus, especially when there exists an "overwhelming nexus" with California (*Forward Foods LLC v Next Proteins, Inc.*, 21 Misc3d 1113[A], 2008 WL 4602345 at *6 [Sup Ct NY County Oct. 15, 2008]; *Wyser-Pratte Mgmt. Co. v Babcock Borsig AG*, 7 Misc.3d 1012[A], at *4-5 [Sup Ct NY County 2004]).

Defendants argue that the case would be better adjudicated in California because it would be a burden on the New York courts to apply California law (*Marochnik v Pfizer, Inc.*, 29 Misc3d

1232[A], at *5-6 [Sup Ct NY County 2008]). The NDA is by its terms governed by California law. Since Alexandria's principal place of business is in California, its records are likely stored there, and much of the relevant documentation and many key witnesses to this litigation are located in California. For example, Joel Marcus and Gary Dean, who supervised preparation of the NDA, are domiciled in California (Dean aff ¶¶ 4-5; Marcus aff ¶ 4). California is an adequate alternative forum, the availability of which is the most important factor in a *forum non conveniens* analysis. The defendants, as well as Steven, have consented to California's jurisdiction (NDA ¶ 12). Moreover, pending related litigation in California may completely resolve the claims pending in New York, and courts routinely grant relief on *forum non conveniens* grounds for this reason (*Datwani v Datwani*, 121 AD3d 449, 449 [1st Dept 2014]; *World Point Trading PTE Ltd. v Credito Italiano*, 225 AD2d 153, 161 [1st Dept 1996]; *Forward Foods*, 21 Misc3d 1113[A], at *5-6).

In opposition, plaintiffs note that the "plaintiff's selection of a forum is entitled to heavy deference; defendants bear the burden of persuasion" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). Defendants have extensive contacts with New York that overwhelm any claim of inconvenience. Alexandria has a major regional office in New York, and Joel Marcus stays for months at time in New York at the Four Seasons Hotel (Steven Marcus aff ¶¶ 31[g], 33). Defendants have failed to explain the relevance of any documents that may be in California or how bringing those documents to New York would be burdensome. Nor do defendants indicate that they plan on calling any witnesses that may be inconvenienced. The conduct at issue was targeted at New York in order to raise the price of the stock on the New York stock exchange; it was not transitory or a mere link in the chain of events. While defendants identify no third-party witnesses in California, plaintiffs have identified several in New York who would otherwise be outside plaintiffs' subpoena power. This is a critical consideration in the *forum non conveniens* analysis (*see Turay v Beam Bros. Trucking, Inc.*, 61 AD2d 324, 328 [2d Dept 2009]; *Sambee Corp. v Moustafa*, 216 AD2d 196, 198 [1st Dept 1995]; *Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 328 [1st Dept 1991]).

While defendants suggest that their later-filed action for declaratory relief in California should have priority, both California and New York give priority to first-filed complaints involving similar issues and the same parties (*White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 96-100 [1997]). Rush-filed actions are also disfavored (*id.*, at 100). The existence of a potential

choice of law issue does not militate in favor dismissal for *forum non conveniens* as courts regularly apply the law of other states.

In reply, defendants argue that any contacts plaintiffs point to with respect to Alexandria's capital markets strategy aimed at New York to increase stock price on the NYSE would have occurred well after the advising work that plaintiffs seek remuneration for in the amended complaint. Plaintiffs conflate advisory work and the results of that work. To accept plaintiff's argument would mean that any corporation entering into a transaction involving a New York bank could be sued in New York for pre-transaction conduct, no matter how tenuous the connection with New York (reply at 3). Litigating in this venue would unnecessarily burden this court.

The California venue and choice of law provisions in the NDA remain binding even after the contract has expired (*Weingard v Telepathy, Inc.*, 2005 WL 2990645, at *3 [SD NY Nov. 7, 2005]; *Young Women's Christian Association of the U.S. Nat'l Bd. V HMC Entertainment, Inc.*, 1992 WL 279361, at *4 [SD NY Sept. 25, 1992]). Plaintiffs' argument that they would be burdened by litigating in a forum lacking subpoena power over third party witnesses involved with the joint venture transactions that occurred years after plaintiffs provided the advisory services at issue is a red herring. These witnesses are not relevant to the issues here. Finally, plaintiff mischaracterizes the "first-in-time" rule – this only applies where "competing actions have been commenced 'reasonably close in time' to one another" (*Nat'l Union Fire Ins. Co. of Pittsburgh v Jordache Enters., Inc.*, 205 Ad2d 341, 343 [1st Dept 1994]). Priority is not a factor in *forum non conveniens* analysis.

III. DISCUSSION

On a motion to dismiss on the ground of *forum non conveniens*, the defendant challenging the forum selected bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran*, 62 NY2d at 479; *Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept 2007]). The doctrine rests upon principles of justice, fairness, and convenience (*see Islamic Republic of Iran*, 62 NY2d at 479). Among the factors to be considered are "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville*, 39 AD3d at 736 [internal quotation marks omitted]).

Here, the court could grant the motion based on *forum non conveniens*, but it is not obligated to do so. The factors weigh in favor of California, but not overwhelmingly so. First, as to the residency of the parties, both defendants are domiciled in California and neither plaintiff is domiciled in New York. Second, as to hardship to witnesses, defendants do not identify any witnesses that would be burdened either way; the witnesses that plaintiff identifies in New York were not involved in the conduct at issue and plaintiff has failed to demonstrate the materiality of their testimony (*see Economos*, 18 AD3d at 393). Third, there is no dispute that California is an adequate alternative forum. Fourth, as to the situs of the underlying action, the request for Steven Marcus's help is alleged to have happened in California, the NDA (the only written contract here) is governed by California law, the misrepresentations made about the nepotism policy happened in Colorado, and two meetings occurred in New York. Finally, while the case presents choice of law questions with California law appearing to apply, the case does not present an overwhelming burden on the New York court.

However, this court "need not entertain causes of action lacking a substantial nexus with New York" and the facts alleged here fail to establish such a nexus (*Martin*, 35 NY2d at 418). Steven and Joel attended an ARE Investor Day event in New York prior to adoption of the proposal. Steven then consulted various investment bankers and set up two meetings in New York for Joel to attend with investment bankers in connection with the proposal. The complaint does not allege that there was anything intentional about those meetings with respect to New York. Although the meetings concern Project Affirmed, Project Affirmed is not the subject of this litigation. This case relates to the alleged failure of Joel and/or ARE to pay Steven and/or Bugsy for services rendered. Said services were about Project Affirmed but that fact is mere background. Thus, the meetings do not establish a substantial nexus (*see Martin,* 35 NY2d at 418). The court may therefore properly dismiss the case for *forum non conveniens*. Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss this action on the ground that New York is an inconvenient forum is granted on condition that defendant consent to amendment of the complaint for declaratory relief which is pending in the California Superior Court in Los Angeles; and it is further

ORDERED that, within 30 days from service of a copy of this decision and order with notice of entry, defendants shall file proof of compliance with the above condition with the Clerk

of the Part and with the Clerk of the Court (60 Centre Street, Room 141B), together with a copy of this order with notice of entry and proof of service of the foregoing on counsel for plaintiff; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the Part shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, upon the timely filing of the foregoing, the Clerk of the Court shall enter judgment dismissing the action; and it is further

ORDERED that in the event of non-compliance, counsel are directed to appear for a status conference in Room 252, 60 Centre Street, New York, New York, on October 14, 2019, at 9:30 AM.

This constitutes the decision and order of the court.

DATED: August 5, 2019

ENTER,

O. PETER SHERWOOD J.S.C.