

HH Trinity Apex Invs. LLC v Hendrickson Props. LLC
2019 NY Slip Op 32623(U)
September 5, 2019
Supreme Court, New York County
Docket Number: 152409/2018
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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HH TRINITY APEX INVESTMENTS LLC, VERIDEA HOLDINGS LLC, VERIDEA APEX PARCEL 10 LLC,

INDEX NO. 152409/2018

Plaintiff,

MOTION DATE 09/27/2018

- v -

MOTION SEQ. NO. 001

HENDRICKSON PROPERTIES LLC, C. HENDRICKSON, LOOKOUT VENTURES, INC., JILL HENDRICKSON, HENDRICKSON PROPERTIES APEX LLC, HENDRICKSON PROPERTIES IV LLC, HENDRICKSON PROPERTIES V LLC, CAPITAL CLUB PROPERTIES, LLC

DECISION + ORDER ON MOTION

Defendant.

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 73, 74, 75, 76, 77, 78, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 107

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (9/4/19), the motion to dismiss pursuant to CPLR § 327 and, in the alternative, to stay or dismiss pursuant to CPLR § 2201 is denied.

RELEVANT FACTUAL BACKGROUND

Starting in 2007, HH Trinity Apex Investments LLC, Veridea Holdings LLC, Veridea Apex Parcel 10 LLC (collectively, the **Plaintiffs**), together with their various affiliates, began acquiring land to develop a “mixed-use sustainable development known as Veridea” in and around the town of Apex, North Carolina (the **Town**) (Compl., ¶¶ 2, 26, 28, 31). Each of the plaintiff entities was formed to acquire certain parcels of real property within the Town in

furtherance of this project. According to the complaint, the Plaintiffs “invested over \$85 million into the acquisition and development of Veridea” and “now own approximately 860 acres within the bounds of the planned project” with options on hundreds more acres (*id.*, ¶¶ 2, 30). The success of the Veridea project depended on obtaining certain entitlements from the Town such as appropriate zoning and land use rights in furtherance of development (*id.*, ¶ 33). The Plaintiffs approached C. Thomas Hendrickson to assist them with their efforts due to his reputation and certain contacts with the Town (*id.*, ¶¶ 34-37). Pursuant to a pair of identical Asset Management Agreements (the **AMA**), dated November 9, 2007, HH Trinity Apex Investments, LLC (**HH Trinity**) and Veridea Holdings LLC (**Veridea Holdings**), each as owner, contracted with an entity controlled by Mr. Hendrickson, Hendrickson Properties LLC (**Hendrickson Properties**) as agent to manage and develop the Veridea project (*id.*, ¶¶ 38, 40; *id.*, Exs. 1 & 2; NYSCEF Doc. Nos. 2-3).

The Veridea project required certain legislative and quasi-judicial decisions by the Town, which Mr. Hendrickson and Hendrickson Properties helped facilitate (Hendrickson Aff., ¶ 16; Compl., ¶ 56). First, the project required an amendment to the Town’s Unified Development Ordinance (**UDO**) to allow for the type of “next generation sustainable mixed-use community” envisioned by the Plaintiffs for Veridea (Hendrickson Aff., ¶ 14). To that end, the Town created a new form-based zoning district called a Sustainable Development Conditional Zoning District (**SD-CZ**). Second, the Town rezoned the property as SD-CZ (*id.*). Finally, on May 10, 2011, the Town approved a specific Sustainable Development Plan for Veridea (the **Veridea SD Plan**) (Compl., ¶¶ 44-48, 56, 67, 72).

As part of the rezoning process, the Town's UDO required that an applicant designate a "Responsible Person" with the "authority to make all the developer land use planning decisions for all land that is part of a Sustainable Conditional Zoning District SD -CZ" (Compl., ¶¶ 49-50, Ex. 5). Under the Veridea SD Plan, the designated Responsible Person for the Veridea project was Lookout Ventures, Inc. (**Lookout Ventures**), an entity wholly owned and controlled by Mr. Hendrickson (*id.*, ¶¶ 59, 72). As the Responsible Person, Lookout Ventures has:

all the responsibility and authority to make all the developer land use planning decisions for all land that is part of [the] Sustainable Conditional Zoning District SD-CZ. . . . This one person . . . will be the sole person from whom the Town will accept decisions regarding the Sustainable Development (SD) Plan and Sustainable Development Conditional Zoning District SD-CZ, including amendments, modifications or supplements thereof or the addition of lands thereto.

(Compl., Ex. 5, § 2.3.16[D]).

In February of 2016, the Plaintiffs terminated Hendrickson Properties' duties as asset manager for the Property (Compl., ¶ 100). Since that time, the Plaintiffs have attempted to "work[]" with the Town staff and members of [the] Town Council in an attempt to develop and adopt proposed amendments to the Town's UDO which would permit . . . Plaintiffs[] to appoint a new Responsible Person" (*id.*, ¶ 91). However, the Plaintiffs have been unsuccessful in their efforts to do so and, as further discussed below, they have since brought a legal claim (the **NC Action**) against the Town that, among other things, challenges the constitutionality of the Town's zoning ordinance, as further discussed below (*id.*).

The Plaintiffs have also repeatedly requested that Lookout Ventures step down as the Responsible Person, which request has been refused. The Plaintiffs allege that by naming

Lookout Ventures as the Responsible Person for the project, Mr. Hendrickson inserted a “poison pill” into the Veridea SD Plan as (i) Lookout Ventures does not have an ownership interest in Veridea, (ii) the Plaintiffs have no agreement with Lookout Ventures granting it any authority or responsibility to act on their behalf, and (iii) the Veridea SD Plan allows Lookout Ventures to control the selection of the Responsible Person for the project “in perpetuity, with no ability for Plaintiffs (or any other landowner) to remove Lookout Ventures from its position without Hendrickson’s consent” (Compl., ¶¶ 61, 59). Specifically, the Veridea SD Plan:

provides for three succession/replacement scenarios, all of which – as a practical matter – are controlled by Lookout Ventures:

- Lookout Ventures can be replaced at any time by any successor corporation to Lookout Ventures by way of merger or other reorganization;
- Lookout Ventures can be replaced by another person appointed by Lookout Ventures (or its successor corporation); and,
- Lookout Ventures can be replaced if it is dissolved without the appointment of a new Responsible Person, by the owners of fifty-one percent (51%) of the land comprising Veridea at the time of the appointment.

(Compl., ¶ 62).

The Plaintiffs contend that the “practical effect of these provisions is to make it impossible for Lookout Ventures to be replaced as the Responsible Person for Veridea unless Lookout Ventures consents” (*id.*, ¶ 65). The complaint alleges that these provisions were added to the SD Plan “at the last minute,” without their review, and that had the Plaintiffs been aware of said provisions, the Plaintiffs never would have agreed to this language (*id.*, ¶¶ 66-68). In sum, the Plaintiffs allege that Mr. Hendrickson sought to “create a situation whereby [he] could leverage his position of control to extract undeserved and improper benefits from Plaintiffs (such as selling the Property to Hendrickson below market value or causing Plaintiffs to pay Hendrickson a

substantial amount of money to relinquish control over the development of the Property)” (*id.*, ¶ 71). The Plaintiffs also allege that Mr. Hendrickson used his position to “extort” a \$500,000 loan from the Plaintiffs by saying that if they did not help him, he would have to declare bankruptcy and that the Veridea project would be “destroy[ed]” (*id.*, ¶¶ 108-110). The Plaintiffs claim that, as a result, they loaned Mr. Hendrickson \$500,000, which he has yet to repay in full (*id.*, ¶ 112). To evidence the loan, Hendrickson Properties Apex (**HPA**) entered into a Secured Promissory Note (the **Note**) with HH Trinity and Veridea Holdings, dated October 28, 2009, pursuant to which HH Trinity and Veridea Holdings agreed to loan HPA up to \$500,000 (the **Debt**) and HPA agreed to repay the Debt pursuant to the terms set forth in the Note (*id.*, ¶ 122; Compl., Ex. 10, NYSCEF Doc. No. 11). Simultaneously with the Note, Mr. Hendrickson, HPA, Jill D. Hendrickson, Hendrickson Properties IV LLC, Hendrickson Properties V LLC, and Lookout Ventures (together, the **Pledgors**) entered into a Pledge and Security Agreement (the **Security Agreement**), of even date, with HH Trinity and Veridea Holdings, pursuant to which the Pledgors agreed to pledge and create a security interest in certain collateral that they either owned or controlled as security for repayment of the Note (*id.*, Ex. 11, NYSCEF Doc. No. 12). The collateral included the beneficial interest of the Pledgors in defendant Capital Club Properties, LLC (**CCP**) (Compl., ¶ 126). Additionally, HPA, Lookout Ventures, Hendrickson IV and Hendrickson V executed a UCC Financing Statement in favor of Trinity Apex and Veridea Holdings giving them a security interest in certain collateral that they either owned or controlled, which UCC Financing Statement was duly recorded with the office of the North Carolina Secretary of State (*id.*, ¶ 124, *id.*, Ex. 12, NYSCEF Doc. No. 13). The Note and the Security Agreement both contain New York choice of law provisions (NYSCEF Doc. No. 11, ¶ 13; NYSCEF Doc. No. 12, ¶ 16[b]).

The Security Agreement also provides the following New York forum selection clause, in bold, all-caps font:

12. PLEDGOR HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY STATE OR FEDERAL COURT SITTING IN THE COUNTY OF NEW YORK, STATE OF NEW YORK, OVER ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT. LENDER MAY, AT ITS SOLE DISCRETION, ELECT SUCH COUNTY, OR THE UNITED STATES OF AMERICA, FEDERAL DISTRICT COURT HAVING JURISDICTION OVER SUCH COUNTY, AS THE VENUE OF SUCH SUIT, ACTION OR PROCEEDING. PLEDGOR HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION IT MAY NOW OR HEREAFTER HAVE TO SUCH VENUE AS BEING AN INCONVENIENT FORUM.

(Compl., Ex. 11, ¶ 12; NYSCEF Doc. No. 12, ¶ 12) (the **Forum Selection Clause**).

As contemplated by the Note, Veridea Holdings and Trinity Apex loaned HPA a total of \$500,000 (Compl., ¶ 129). The interest rate on this debt, prior to the maturity date of November 1, 2011, was 10 % per annum (*id.*, ¶ 130). The Plaintiffs allege that HPA failed to repay the principal and interest due on November 1, 2011 (*id.*, ¶ 131). This constituted a default under the terms of the loan, at which time the default rate of 15% per annum went into effect. As of the date of the Complaint, HPA allegedly owes \$1,309,832.81 pursuant to the Note to Veridea Holdings and Trinity Apex, which amount continues to increase.

The complaint asserts the following nine causes of action:

1. Breach of fiduciary duty (against Lookout Ventures and Hendrickson)
2. Breach of fiduciary duty (against Hendrickson Properties and Hendrickson)
3. Constructive Fraud (against Hendrickson)
4. Constructive Fraud (against Lookout Ventures)
5. Unfair and Deceptive Trade Practices (against Hendrickson and Lookout Ventures)

6. Declaratory Judgment that Hendrickson Properties is not entitled to a Developer Fee under the AMA upon the sale of Veridea (against Hendrickson Properties)
7. Breach of contract (against HPA)
8. Breach of contract (against the Pledgors)
9. Declaratory Judgment that the Pledgors are required to produce certain financial records and that Trinity Apex and Veridea are entitled to the proceeds from the sale of any pledged collateral on a going forward basis.

In the NC Action, which was filed shortly after the instant action, the Plaintiffs challenge the constitutionality of the Town's zoning ordinance and allege, *inter alia*, that the Town wrongfully required the "Responsible Person" component of the UDO amendment (NC Compl., ¶ 29).

Specifically, the Plaintiffs' claims in the NC Action, all asserted against the Town, are as follows:

1. Declaratory Judgment that Plaintiffs Have the Right to Designate a New Responsible Person
2. Declaratory Judgment that the Town's Adoption of Section 2.3.16(D) of the UDO Was Beyond its Authority
3. Declaratory Judgment that the Town Lacks Authority to Allow Lookout Ventures to Control Veridea
4. Declaratory Judgment that the Town's UDO Imposes an Unlawful Restraint on Alienation
5. Declaratory Judgment that the Town's Actions Deprived Plaintiffs of their Constitutional Rights to Substantive Due Process
6. Declaratory Judgment that the Town's Actions Deprived Plaintiffs of their Constitutional Rights to Procedural Due Process
7. Declaratory Judgment that the Town's Actions Deprived Plaintiffs of their Constitutional Right to Petition the Government
8. Declaratory Judgment that the Town Has Violated Art. I, Section 32 of the NC Constitution (Prohibition on Exclusive Privileges)

9. Regulatory Taking in Violation of the United States and North Carolina Constitutions
10. Inverse Condemnation - N.C. Gen. Stat. § 40A-51
11. Violation of 42 U.S.C. § 1983
12. Attorneys' Fees Pursuant to N.C. Gen. Stat. § 621.7.

Essentially, the NC Action challenges the Town's very authority to impose and enforce the Responsible Person designation. In contrast, the instant action concerns Mr. Hendrickson's actions under the AMAs and the Security Agreement.

The NC Action was initially removed to the United States District Court for the Eastern District of North Carolina, but was subsequently remanded back to Wake County Superior Court pursuant to a joint Consent Motion to Remand on the grounds that "it would be mutually beneficial to seek prompt judicial declaration regarding the legal enforceability of the subject UDO provisions and the proper designation of a 'Responsible Person' under the subject UDO provisions" (Joshi Aff., Ex. D, ¶¶ 5-7, NYSCEF Doc. No. 57).

After the filing of the moving brief on this motion, the parties to the NC Action, including the Plaintiffs here, agreed that the addition of the eight parties—including Lookout Ventures—was necessary in order for the court in North Carolina to afford complete relief (Joshi 2nd Aff., Ex. B). After the North Carolina court granted the parties' consent motion, on November 26, 2018, the Town filed a third-party complaint (the **NC Third Party Complaint**) against eight additional "necessary parties," including Lookout Ventures (*id.*).

The NC Third Party Complaint seeks declaratory relief, and asks the court to determine:

- (a) Whether Plaintiffs are entitled to replace Lookout Ventures as the Responsible Person under the [Sustainable Development Plan for Veridea (the “SD Plan”)] on the grounds of incapacity or otherwise;
- (b) Whether UDO § 2.3.16(D) is valid and enforceable;
- (c) Whether Plaintiffs are entitled to submit a rezoning application on behalf of Plaintiffs, alone, as owners of property, so as to rezone Plaintiffs’ property such that it is controlled by a new SD Plan that is approved as part of the (rezoned) SD-CZ, with such SD Plan naming as Responsible Person such person that Plaintiffs designate on behalf of themselves and their property;
- (d) Whether Plaintiffs have a valid claim for inverse condemnation under North Carolina law;
- (e) Whether Plaintiffs have any valid constitutional claim against Defendant under the United States Constitution or the North Carolina Constitution; (f) Whether Plaintiffs have any valid statutory claim against Defendant, including any right to damages or attorneys’ fees.

(NC Third-Party Compl., ¶ 29).

Other than Lookout Ventures, the seven additional third-party defendants in the NC Action are independent “owners of land in Veridea who would be affected by any judicial determination” in the NC Action, particularly as it relates to issues of Lookout Ventures’ capacity to serve as Responsible Person and the Town’s authority to recognize someone other than Lookout Ventures as Responsible Person as Plaintiffs’ request (*id.*, ¶¶ 13-20). Most recently, in a decision dated August 1, 2019, the court in the NC action denied the NC plaintiffs motion for partial summary judgment (NYSCEF Doc. No. 111). To date, no discovery has taken place in the NC action.

DISCUSSION

Pursuant to CPLR § 327(a):

When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

The question of whether to grant a motion brought pursuant to CPLR § 327 is left to the sound discretion of the trial court (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-79 [1984] [*cert denied* 469 US 1108 (1985)]). A defendant challenging a forum on this basis bears the burden “to demonstrate relevant private or public interest factors which militate against accepting the litigation” (*id.* at 479). Importantly, a plaintiff’s choice of forum is generally entitled to deference and should not be disturbed “unless the balance is strongly in favor of the defendant” (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]). Among the factors that a court must consider on *forum non conveniens* motion are: “the residency of the parties, the potential hardship to proposed witnesses including, especially, nonparty witnesses, the availability of an alternative forum, the situs of the underlying actionable events, the location of evidence, and the burden that retention of the case will impose upon the New York courts” (*Turay v Beam Bros. Trucking, Inc.*, 61 AD3d 964 [2d Dept 2009]). No one single factor is controlling (*id.*).

Under CPLR § 327(b), however:

Notwithstanding the provisions of [CPLR 327(a)], the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law [GOL] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

As relevant, GOL § 5-1402 provides that a party may maintain an action in New York against a foreign defendant if the parties have entered into an agreement that: (i) contains a New York forum selection clause, (ii) contains a New York choice of law provision, and (iii) involves a transaction that in the aggregate is over \$1 million.

Here, it is undisputed that the Note and Security Agreement contain New York choice of law provisions. The AMAs do as well (NYSCEF Doc. Nos. 2, ¶ 14; 3, ¶ 14). The Security Agreement also contains a clear and unequivocal New York forum selection clause, which not only submits to New York's jurisdiction but specifically waives the argument the defendants are now making: *i.e.*, **“PLEDGOR HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION IT MAY NOW OR HEREAFTER HAVE TO SUCH VENUE AS BEING AN INCONVENIENT FORUM** [emphasis in original]” (NYSCEF Doc. No. 12, ¶ 12). Although the loan was initially only \$500,000, at present, the amount outstanding is alleged to be in excess of \$1.3 million, and the parties' business dealings, *in the aggregate*, totaled approximately \$87 million. As such, “New York is an appropriate and convenient forum for the determination of this dispute as a matter of law, because the loan agreement, of which the aggregate value is more than \$1 million, contains a provision whereby defendants agreed that New York law would govern their rights and duties under the agreement and agreed to submitted to the jurisdiction of the New York courts” (*GE Oil & Gas, Inc. v Turbine Generation Servs., LLC*, 140 AD3d 582, 583 [citing GOL §5-1402 and *Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446 [1st Dept 2010]]).

In addition, and putting aside CPLR 327(b), which dictates the result here, the relevant *forum non conveniens* factors do not bode in favor of a North Carolina forum. The residency of the parties and the location of parties and witnesses are hardly dispositive factors here, particularly considering technological advances *vis a vis* video depositions and electronically stored/transmitted documents. In addition, to the extent that the location of documents and witnesses is a relevant factor, the court notes that, here, it is the evidentiary burden at trial *of the Plaintiffs*, not the defendants, of proving their case in this forum.

Significantly, all three of the Plaintiffs allege that they maintain their principal place of business in New York (*id.*, ¶¶ 12-14). “[A]lthough the residence of a plaintiff is not the sole determining factor on a motion to dismiss on grounds of *forum non conveniens*, it is generally *the most significant factor in the equation* [emphasis added]” (*Sweeney v Hertz Corp.*, 250 AD2d 385,386 [1st Dept 1998]). Moreover, while the defendants are not New York residents, they executed a Note and Security Agreement with a New York-based company, containing New York choice of law and forum selection provisions (*see Income Fund of Boston v Vahlsing*, 49 AD2d 724 [1st Dept 1975]). This case involves an integrated transaction. Among other things, the Plaintiffs allege that the loan would not have been made but for Mr. Hendrickson’s alleged “extortion.” Inasmuch as pursuant to the Security Agreement, the defendant Pledgors consented to the jurisdiction of the courts of the state of New York “over any suit, action or proceeding arising out of **or relating to this Agreement...and irrevocably waive[d], to the fullest extent permissible by law, any objection it may now or hereafter have to such venue as being an inconvenient forum** [emphasis added],” it was not only entirely foreseeable for the defendant

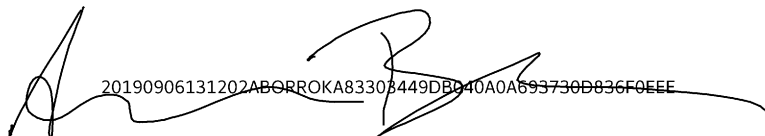
Pledgors to have to defend a lawsuit in New York concerning the transaction, but they should have anticipated defending such lawsuit in New York.

Finally, there is no particular burden placed upon this court by the maintenance of this action in New York as New York courts routinely adjudicate commercial disputes of this nature (*Hudson Ins. Co. v Oppenheim*, 35 AD3d 168, 169 [1st Dept 2006]). Certainly, the burden on this court is no greater than the burden would be on a North Carolina court to apply New York law in accordance with the choice of law provisions in the parties' various agreements if this action were to be brought in North Carolina.

Turning to the branch of the defendants' motion requesting a stay, CPLR 2201 permits "the court in which an action is pending" to "grant a stay of proceedings in a proper case, upon such terms as may be just." Here, a stay or dismissal pursuant to CPLR 2201 is unwarranted. There is no danger of an inconsistent result with the NC action and the key issues surrounding the claims here will not turn on any threshold questions of law before the NC court. As discussed at oral argument, in the NC Action, the North Carolina court may well decide that the Responsible Person designation is valid and otherwise constitutional, and this court may still find that there was a breach of fiduciary duty in permitting Lookout Ventures to continue as the Responsible Person. Finally, to the extent that the defendants argue that there are other stakeholders in North Carolina to whom the defendants owed fiduciary duties as well, the argument is without merit. The fiduciary duties that are at issue in this case are the fiduciary duties owed to the Plaintiffs pursuant to the specific agreements between the Plaintiffs and the defendants.

Accordingly, it is

ORDERED that the defendants' motion to dismiss, brought pursuant to CPLR 327 and CPLR 2201, is denied.



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9/5/2019

DATE

ANDREW BORROK, J.S.C.

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