

Cernich v Athene Holding Ltd.
2019 NY Slip Op 32874(U)
September 21, 2019
Supreme Court, New York County
Docket Number: 654688/2018
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

----- X
STEPHEN CERNICH,

Plaintiff,

Index No. 654688/2018
Decision/Order

- against -

ATHENE HOLDING LTD.,

Athene.

----- X

HON. ANDREA MASLEY, J.S.C.:

Plaintiff Stephen Cernich is a former officer and employee of defendant Athene Holding Ltd. (Athene), a Bermuda holding company “in the business of owning insurance companies” and publicly traded on the New York Stock Exchange (NYSCEF Doc No. 46, amended complaint, ¶¶ 2-4). Plaintiff brought this action against Athene to permanently enjoin litigation commenced by Athene against plaintiff in Bermuda and to declare that Athene breached the parties’ agreement and that any litigation must proceed in New York, as set forth in that agreement (*id.*, ¶¶ 39, 43, 55-58).¹

Athene moves to dismiss the amended complaint, pre-answer, pursuant to CPLR 3211 (a) 1 and (a) 7, with prejudice.² Athene’s motion is granted for the reasons set forth below.

¹ Plaintiff is a resident of Kentucky (see NYSCEF Doc No. 37, Athene memorandum of law in support at 1).

² Athene contends that by filing this motion, it does not intend “and shall not be deemed to have waived its rights to assert any jurisdictional, venue-related or other defenses, all of which are specifically reserved” (NYSCEF Doc No. 38, Adler aff at ¶ 17).

Background

According to the amended complaint, on October 20, 2016, plaintiff and Athene entered into a “global transaction,” the purpose of which was to resolve various issues connected with plaintiff’s departure from Athene’s employment (NYSCEF Doc No. 46, amended complaint ¶ 9).³ The “global transaction” consists of a Separation Agreement and General Release (Separation Agreement) and a Repurchase Agreement, both dated October 20, 2016, as well as “certain protective covenant provisions set forth by share contracts that granted the shares subject to repurchase” (together, the Agreement) (*id.*, ¶¶ 8, 9). These documents “represent the full and complete agreement concerning [plaintiff’s] termination of employment with the Company” (*id.*, ¶ 10 [internal quotation marks omitted]). The Agreement’s terms are to be “construed and interpreted in accordance with the internal laws of the State of New York,” and “disputes arising out of or related to the Agreement shall be brought in ... any federal court or state court within the State of New York, and submitted to the jurisdiction of New York State for this purpose” (*id.*, ¶¶ 11, 12 [internal quotation marks and emphasis omitted]).

On May 3, 2018, Athene commenced an action by writ in Bermuda against plaintiff and two nonparties, Imran Siddiqui and Caldera Holdings Ltd. (Caldera) (Bermuda Action) (NYSCEF Doc No. 41, specially indorsed writ of summons).⁴ It filed an amended writ on October 16, 2018 (NYSCEF Doc No. 40, amended specially indorsed writ of summons [the amended writ]). In the amended writ Athene alleges that plaintiff and Siddiqui, as former

³ Plaintiff alleged that Athene had refused to pay amounts owed to him pursuant to various share agreements (*see Cernich v Athene Holding Ltd.*, Index No. 655326/2016 [Sup Ct, New York County 2016]).

⁴ The Bermuda matter is entitled *Athene Holding Ltd. v Imran Siddiqui, Stephen Cernich, & Caldera Holdings Ltd.* [Civil Jurisdiction 2018] SC [Bermuda]: No. 149.

officers of Athene, learned of confidential and proprietary information about a separate company that Athene was strategizing to take over, and “formed an intention” to remove the information from Athene by incorporating Caldera to hold the confidential information (*id.*, ¶¶ 1-3, 8, 9). It further alleges that, since leaving Athene, plaintiff and Siddiqui, through Caldera, have used the confidential information to compete with Athene to acquire the other company (*id.*, ¶¶ 4, 5). These acts allegedly violate section 97 of the Companies Act of 1981 which defines the duty of care of officers in a Bermuda-organized company (*id.*, ¶ 22).

On June 22, 2018, plaintiff and Siddiqui moved to set aside or stay the writ on jurisdictional and forum-related grounds, and void Athene’s attempt to serve process on them in the United States (NYSCEF Doc No. 38, Adler aff, ¶ 12). Caldera previously moved on similar grounds, and its motion was denied in a ruling issued by the Supreme Court of Bermuda (J. Hellman) on June 28, 2018 (NYSCEF Doc No. 44, Bermuda Action June 28 Ruling, ¶¶ 5, 69). In sum, the Bermuda Supreme Court was “not persuaded that New York is clearly and distinctly the appropriate forum” (*id.*, ¶ 67).

In August 2018, the Bermuda court thereafter scheduled a hearing for November 26-28, 2018, to address plaintiff and Siddiqui’s motion as well as two applications by Caldera seeking dismissal of the writ and for leave to appeal the June 28, 2018 ruling (NYSCEF Doc No. 38, Adler aff, ¶ 13).

Plaintiff commenced this action on September 20, 2018, alleging breach of contract and seeking declaratory and injunctive relief based on Athene’s breach of the parties’ Agreement by bringing its action in Bermuda rather than in New York (NYSCEF Doc No. 1, summons and complaint).⁵ Plaintiff filed an amended complaint on October 23, 2018

⁵ Siddiqui commenced a separate action in state court which was removed upon Athene’s motion, to the United States District Court for the Southern District of New York (NYSCEF

(NYSCEF Doc No. 46, amended complaint). The amended complaint consists of four causes of action: (1) that Athene be permanently enjoined from pursuing the Bermuda Action and that any action must proceed in the venue to which the parties agreed; (2) that Athene breached the parties' Agreement by commencing the Bermuda Action; (3) that Athene breached the implied covenant of good faith and fair dealing by failing to inform the Bermuda Supreme Court that the parties' Agreement mandates that any claim relating to plaintiff's employment and termination must be brought and determined in New York; and (4) that plaintiff is entitled to a declaratory judgment that Athene breached the "plain language" of the parties' Agreement (*id.*, ¶¶ 35-58).

Plaintiff simultaneously moved by order to show cause to preliminarily enjoin Athene from continuing the Bermuda Action as against him (NYSCEF Doc No. 38, Adler aff, ¶ 14; NYSCEF Doc No. 24, order to show cause). Plaintiff's motion was denied (NYSCEF Doc No. 51, *Cernich v Athene Holding Ltd.*, Sup Ct, NY County, Nov. 28, 2018 [Masley, J.S.C.]). This court found, inter alia, that plaintiff was unable to demonstrate a likelihood of success on the merits because the forum selection clause contained in the Repurchase Agreement, which he relied upon to argue that New York has exclusive jurisdiction, contains "plainly ambiguous and contradictory" language (NYSCEF Doc No. 51 at 1-2).

Athene filed this motion to dismiss the amended complaint (NYSCEF Doc No. 36, notice of motion). In the interim, the Supreme Court of Bermuda held the three-day hearing in the Bermuda Action, and issued a judgment on January 14, 2019, which, in relevant part,

Doc No. 45, Angelillo aff, ¶ 9). By letter dated June 28, 2019 (NYSCEF Doc No. 89, Adler letter), defendant's counsel advised this court, pursuant to Supreme Court New York County Commercial Division Rule 18, that Athene's motion to dismiss Siddiqui's complaint was granted with prejudice (*see Siddiqui v Athene Holding Ltd.*, US Dist Ct, SD NY, 18 Civ 12125, Koeltl, J., 2019).

dismissed the application by plaintiff and Siddiqui to set aside the writ, and granted Athene leave to serve plaintiff and Siddiqui outside of Bermuda to bring them under the jurisdiction of the Bermuda courts (NYSCEF Doc No. 60, *Athene Holding Ltd v Siddiqui, et al*, Supreme Court of Bermuda, January 14, 2019 [Hargun, CJ], ¶ 132) (hereinafter Bermuda Judgment).

The Agreements

Both parties base their arguments on the Separation Agreement and Repurchase Agreement which resolved issues pertaining to plaintiff's termination by Athene. These two agreements, along with certain protective covenants contained in separate documents, are argued by plaintiff to form a fully integrated agreement with a forum selection clause, contained in the Repurchase Agreement, requiring any litigation involving his employment with and termination by Athene to be conducted in New York, under New York law. The Separation Agreement and the Repurchase Agreement are "sealed," and only hard copies were provided to this court.⁶

The Separation Agreement

The Separation Agreement is drafted on Athene letterhead as a letter to plaintiff setting forth the terms of his separation of employment from Athene Annuity and Life Company and its affiliates, including Athene Holding Ltd. and Athene Asset Management, L.P. - collectively referred to as "the 'Company'" (Separation Agreement at 1). It was signed on October 20, 2016, by James Belardi, Chief Executive Officer of Athene Holding Ltd. and Athene Asset Management, L.P., and by plaintiff. Its opening paragraph states:

⁶ To date, there is no order directing the sealing of these documents, and therefore, within 20 days of the court's entry of this decision on NYSCEF, the documents must either be filed on NYSCEF in their entirety or an OSC requesting to redact or seal must be brought in accordance with the Part 48 Rules. Otherwise, the court will upload the unredacted documents to NYSCEF that were considered in deciding this motion. The court will not refer to the NYSCEF Doc. Nos. for these documents, because they are mere placeholders and do not contain the actual documents.

"[T]his letter agreement (this "Agreement"), together with the Repurchase Agreement dated October [20], 2016 ("Repurchase Agreement") and the protective covenant provisions (together, the "Protective Covenants") of your Share Agreements ..., represents the full and complete agreement concerning your termination of employment with the Company"

(Separation Agreement at 1).

"By signing this Agreement, [plaintiff] and the Company acknowledge and agree that, upon full execution of this Agreement and the Repurchase Agreement, the June 21, 2016 Letter [containing the disputed agreement] shall be null and void and of no further force or effect"

(Separation Agreement, § 22)).

The Separation Agreement identifies the classes of shares owned by plaintiff as of his June 30, 2016 separation date from Athene (Separation Agreement, § 3). It also indicates that plaintiff agreed to (1) forfeit the unvested shares, and that the Company would pay him a "forfeited shares payment"; (2) enter the Repurchase Agreement, "attached hereto," in order to effectuate the transfer of his vested shares to the Company effective on the separation date, and (3) receive an agreed-upon amount, the "repurchase price," paid by the Company at the time of closing (Separation Agreement, § 3, 21).

"[W]ithin two business days of the wiring by the Company of (i) the Repurchase Payment in accordance with the terms of the Repurchase Agreement, (ii) the Bonus Payment in accordance with Section 2 of this Agreement, and (iii) the Forfeited Shares Payment in accordance with Section 3 of this Agreement, [plaintiff] will cause the Lawsuit [brought in New York Supreme Court in 2016] to be dismissed with prejudice"⁷

(Separation Agreement, § 9).

Section 8 states that upon the Company's satisfying its responsibilities under the Agreement, plaintiff agrees to discharge the Company and all "Released Parties" from all claims, known or unknown, relating to his employment and termination. In consideration of plaintiff's release:

⁷ In 2016, plaintiff commenced an action in New York County, Supreme Court, seeking monies allegedly owed by Athene (*see Cernich v Athene Holding Ltd.*, Index No. 655326/2016 [Sup Ct, New York County 2016]) which resulted in the Agreement.

"[T]he Company hereby releases [plaintiff] from any and all claims which it has or ever had against [plaintiff] arising from or related to any act ... occurring or existing at any time prior to the date that the Company signs this Agreement including, ... all claims that in any way result from, or relate to ... [plaintiff's] employment [and] compensation ... or termination from employment with the Company ... provided, however, that the Company is not releasing [plaintiff] from or with respect to, and the foregoing release by the Company does not include, any claims arising out of any criminal, fraudulent, intentionally wrongful or reckless conduct by [plaintiff]"

(Separation Agreement, § 8).

Section 18 provides that the terms of the agreement "shall be construed and interpreted in accordance with the internal laws of the State of New York, without regard to its choice of law rules" (Separation Agreement, § 8).

The Repurchase Agreement

The Repurchase Agreement was also signed on October 20, 2016, by Belardi as CEO of Athene Holding Ltd., described as "the Company," and plaintiff as "Shareholder". It sets forth the agreements between the Company and plaintiff made between 2009 and 2016 concerning the allotment of certain shares, the agreement that plaintiff would sell certain shares and Athene would buy those shares at an agreed-upon figure (termed the "Repurchase Payment"), and the acknowledgement by plaintiff that he was entitled solely to the Repurchase Payment (Repurchase Agreement at §§ A-H; ¶¶ 1-4).

"This Agreement contains the entire understanding of the parties hereto with respect to the subject matter hereof and, other than as set forth herein and in the Separation Agreement between [plaintiff] and Athene Annuity and Life Company dated as of October 20, 2016, supersedes all other agreements between or among any of the parties with respect to the subject matter hereof"

(Repurchase Agreement, ¶ 8 [h]).

The forum selection clause is contained in the subsection entitled "Governing Law":

"This Agreement, and all claims or causes of action (whether in contract or tort) that may be based upon, arise out of or relate to this Agreement or the negotiation, execution or performance of this Agreement ..., shall be governed by and construed in accordance with the internal laws of the State of New York. Any action against any party relating to the foregoing shall be brought in, and the parties hereto hereby

irrevocably submit to the non-exclusive jurisdiction of any federal or state court located within the State of New York over any such action. The parties hereby waive, to the fullest extent permitted by applicable law, any objection that they may now or hereafter have to the laying of venue of any such action brought in such court or any defense of inconvenient forum for the maintenance of such action”

(Repurchase Agreement, ¶ 8 [i]).

Parties' Arguments

Athene argues that the forum selection clause in the Repurchase Agreement is limited to the subject matter of the Repurchase Agreement, namely issues concerning certain of plaintiffs' shares, Athene's repurchase of those shares, and subsequent payment to plaintiff. The Bermuda litigation, on the other hand, alleges breach of plaintiff's fiduciary duty and duty of confidence owed to Athene under Bermuda law and has nothing to do with the terms of the Repurchase Agreement.

Thus, Athene argues that: (1) the amended complaint's first cause of action seeking specific performance and injunctive relief is baseless because the forum selection clause in the Repurchase Agreement is limited to the contents of that agreement (2) the second cause of action for breach of contract is similarly baseless because it has not breached any terms pertaining to the terms of the Repurchase Agreement; (3) the third cause of action for breach of the implied covenant of good faith and fair dealing is based on plaintiff's erroneous claim that the parties agreed that all claims, including Athene's claim of breach of fiduciary duty, should be filed in New York; and (4) the fourth cause of action for a declaratory judgment is also based on the erroneous claim that Athene breached the parties' agreement by ignoring the Repurchase Agreement's forum selection clause.

Central to Athene's argument is that plaintiff errs in claiming that the Repurchase Agreement, the Separation Agreement, and parts of nine other agreements known as the Protective Covenants, are a single integrated agreement, which taken together have a

broad enough aggregated scope to include Athene's Bermuda claim. Athene argues that the rule in New York is that "in the absence of some clear indication that the parties had a contrary intention, contracts manifesting separate assents to be bound are generally presumed to be separable" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Clairmont*, 231 AD2d 239, 241-242 [1st Dept 1997]), and that here, the forum selection clause in the Repurchase Agreement designating New York state and federal courts with "nonexclusive jurisdiction," states explicitly that it applies to "this Agreement" – meaning the Repurchase Agreement – and is therefore limited to claims relating to "the negotiation, execution or performance of this Agreement" (Repurchase Agreement, ¶ 8 [i]).

In opposition, plaintiff argues that the Separation Agreement and the Repurchase Agreement, were executed by the same parties on the same day as part of a single closing and a global transaction settling plaintiff's 2016 New York lawsuit, and clearly represent the entire agreement concerning his employment termination with Athene. Plaintiff denominates the two documents together as the "Settlement Agreement."

Plaintiff argues that the Repurchase Agreement's forum selection clause applies to the entire "Settlement Agreement," and is exceptionally broad, applicable to "all claims and causes of action ... that may be based on, arise out of or relate to this Agreement or the negotiation, execution or performance of this Agreement" (Repurchase Agreement ¶ 8 [i] [emphasis omitted]). Accordingly, plaintiff argues that because Athene's Bermuda claims arise out of and relate to plaintiff's departure from the Company and his "obligations to the Company subsequent to his termination," the New York-exclusive jurisdiction provision is triggered.

Discussion

When considering a motion to dismiss brought pursuant to CPLR 3211 (a) (1) and (a) (7), the court must accept as true the facts alleged in the complaint as well as any reasonable inferences that may be gleaned from those facts (see *Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009], citing *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court's sole role is to determine whether the complaint states a legally cognizable claim (see *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Although the defendant and the court presume the truth of the allegations of the complaint, there is no obligation to accept the truth of factual allegations by the plaintiff that are conclusory, speculative or inherently incredible (see, e.g. *Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003] [factual allegations in complaint plainly contradicted by documentary evidence need not be accepted as true on motion to dismiss]).

A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 [2002]; see *Sonkin v Sonkin*, 157 AD3d 414, 415 [1st Dept 2018] [complaint dismissed where the documents proffered served "as a complete defense to the plaintiff's claims]).

The question of whether a writing is ambiguous is a question of law to be resolved by the court (see *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Additionally, contract interpretation is a legal matter for the court to decide (see *Thomas Crimmins Contr. Co. v City of New York*, 138 AD2d 138, 143 [1st Dept 1988], affd 74 NY2d 166 [1989]). "Words in a contract are to be construed to achieve the apparent purpose of the parties,"

the Court of Appeals has held, and “[a]lthough the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989] [internal quotation marks and citation omitted]).

The Separation Agreement and Repurchase Agreement are independent documents that, along with the Protective Covenants, define the terms of the parties’ agreement relative to only plaintiff’s termination from Athene. There is no ambiguity on this issue and the intent of the parties is clear.

The Bermuda Judgment found, at paragraph 86, that plaintiff is subject to the exclusive Bermuda forum selection provision contained in Bye-Law 84 of Athene’s amended Bye-Laws.⁸ The Bermuda Supreme Court noted that certain Bye-Laws are “clearly intended to benefit” Athene’s officers, and made the presumption that Athene’s officers, including plaintiff, “assumed their office on the basis that they could rely upon these Bye Laws as contractual terms.” It follows, the Court reasoned, that if an officer could enforce the Bye-Laws against Athene, then the Bye-Laws, including Bye-Law 84, are enforceable by Athene against an officer, including plaintiff.

Bye-Law 84 is captioned “Exclusive Jurisdiction” and states:

“In the event that any dispute arises concerning the [Bermuda Companies Act of 1981 (the “Bermuda Act”)] ... including any question regarding ... whether there has been any **breach of the Act or these Bye-laws by an Officer** or Director ..., any such dispute shall be subject to the exclusive jurisdiction of the Supreme Court of Bermuda” (emphasis added)

The Bermuda Court, in paragraph 90 of its Judgment, found that the terms of Bye-Law 84 were a part of plaintiff’s engagement as an officer of Athene, making him subject to the jurisdiction of Bermuda relative to disputes coming within the terms of Bye Law 84,

⁸ A copy of the Eleventh Amended and Restated Bye-Laws of Athene Holding Ltd., adopted on June 6, 2018 (Bye-Laws), is found at NYSCEF Doc No. 61.

“unless [he] can point to exceptional circumstances which could not have been foreseen.”

Needless to say, plaintiff has not shown exceptional circumstances which he could not have foreseen at the time he became an officer of Athene.

In New York, the “parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the[ir] contract” (*Brooke Grp. v JCH Syndicate* 488, 87 NY2d 530, 534 [1996]). Forum selection clauses are “prima facie valid and enforceable unless shown by the resisting party to be unreasonable (*id.*). Nonetheless, plaintiff’s argument that the court is bound by the parties’ agreement to New York as a forum, at least as stated in the Repurchase Agreement, carries no weight, because (1) Athene’s claim against plaintiff does not concern the subject matter of the Repurchase Agreement and does not fall under that forum selection clause, and (2) the findings by the Bermuda Supreme Court addressed and resolved internal issues pertaining to a Bermuda-organized company which maintains a registered office in Bermuda. Athene’s claims do not concern plaintiff’s departure from Athene or the repurchase of his shares, and even if that were not so, Bye-Law 84, which requires plaintiff to litigate in Bermuda any dispute concerning whether he breached the Bermuda Act while an officer of Athene, far more critically concerns Bermuda law than New York.

It is clear that in comparison with New York, Bermuda has a “paramount interest” in these issues (*see Carroll v Weill*, 2 AD3d 152, 153 [1st Dept 2003] [finding Delaware, the state of incorporation, had a “paramount interest” in claims involving the corporation’s internal affairs, and derivative actions were already being litigated]; *Sturman v Singer*, 213 AD2d 324, 325 [1st Dept 1995] [similar; the claim involved an alleged breach of a fiduciary duty and the plaintiff could intervene in the other Delaware actions]). Moreover, Bermuda’s

law provides that actions claiming breach of fiduciary duty against a Bermuda company must be litigated in Bermuda.

As stated by the Court of Appeals, "New York courts have historically recognized foreign country judgments under the doctrine of comity ... [which] refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states" (*Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 247 [2008] [internal quotation marks and citation omitted]; see *AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.*, 160 AD3d 93, 99 [1st Dept 2018]). The "general rule," is that a judgment recovered in a foreign country "is conclusive" unless the judgment "is tainted with fraud, or with an offense against the public policy of this state, or the foreign court had not jurisdiction" (*Cowans v Ticonderoga Pulp & Paper Co.*, 219 App Div 120, 121-122 [3d Dept 1927], *affd*, 246 NY 603 [1927]; see generally, CPLR 5304).

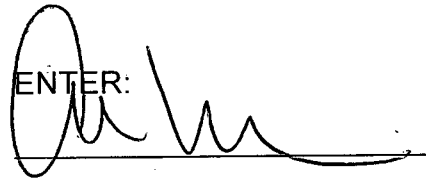
The findings of the Supreme Court of Bermuda in its January 14, 2019 Judgment are that because plaintiff was an officer of Athene, he is subject to the Bye-Laws of Athene. This leads to the conclusion that plaintiff can only defend himself in Bermuda and may not seek to transfer the forum to New York or elsewhere. Here, comity dictates that this Court should defer to the holdings in the Bermuda Judgment that plaintiff is subject to Bye-Law 84, under which the Bermuda Court has exclusive jurisdiction over Athene's claim. This court finds that Athene has submitted persuasive evidence that the amended complaint should be dismissed with prejudice.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted with prejudice and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/21/19

ENTER: 

J.S.C.

HON. ANDREA MASLEY