Satterfield v Vstock Transfer, LLC
2019 NY Slip Op 33279(U)
October 30, 2019
Supreme Court, New York County
Docket Number: 650311/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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BRENT SATTERFIELD,

Plaintiff,

- v -

VSTOCK TRANSFER, LLC, AMERICA 2030 CAPITAL, LLC (A/K/A BENTLEY ROTHSCHILD CAPITAL LTD CORP.), BENTLEY ROTHSCHILD CAPITAL LTD CORP., AMERICA 2030 CAPITAL, LIMITED, BENTLEY ROTHSCHILD FINANCIAL, LLC, BENTLEY ROTHSCHILD INVESTMENTS, XYZ CORPORATION 1 - 10, VAL SKLAROV

Defendant.

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INDEX NO. 650311/2019

MOTION DATE

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 201, 265 were read on this motion to/for DISMISSAL.

In motion sequence number 008, defendants America 2030 Capital LLC (Capital LLC), America 2030 Capital Limited (Capital Limited), Bentley Rothschild Capital Limited Corp (BR) and Val Sklarov move to dismiss plaintiff Brent Satterfield's amended complaint pursuant to CPLR 3211 (a) (1), (7), (8), and CPLR 327. Alternatively, they move to compel arbitration pursuant to CPLR 7503.

Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, accepted as true. On July 12, 2017, nonparty Co-Diagnostics, Inc. became a publicly traded company. (NYSCEF Doc. No. [NYSCEF] 130 at ¶ 21.) As part of the initial public offering, Satterfield received approximately 2 million restricted shares. (*Id.*) These shares were restricted from being traded, and bore legends to that

effect. (*see* 17 CFR § 230.144.) Accordingly, Satterfield could not sell the shares, but he became aware of the possibility of using the shares as collateral to obtain a loan. (NYSCEF 130, at ¶ 22.) Through nonparty Leib Schaeffer, a finder in New York City, Satterfield met Sklarov. (*Id.* at ¶ 23.) Sklarov informed Satterfield that he was the head of Capital LLC, a limited liability company organized under the laws of Colorado with offices in Kennesaw, Georgia. (*Id.* at ¶ 23, 7.) Capital LLC "represents itself on LinkedIn.com as maintaining an office on 48th Street, New York, NY." (*Id.* at 7.) In the Spring of 2018, Sklarov proposed that Capital LLC loan Satterfield up to $1.5 million to be repaid over the course of a five-year period. (*Id.* at ¶ 26.) Sklarov further proposed that Satterfield's shares, valued at the time in excess of $7 million, would serve as security for the loan. (*Id.*) At this time, the shares were held by defendant VStock Transfer LLC (VStock), a limited liability company organized under the laws of Delaware with principal offices operating in New York. (*Id.* at ¶¶ 26, 11.) On March 30, 2018, Satterfield and Capital LLC entered into a "Master Loan Agreement" (MLA). (*Id.* at ¶ 28.) Sklarov provided Satterfield with the MLA, and signed in his capacity as managing member of Capital LLC. (*Id.*; NYSCEF 178, MLA at 18.)

The MLA contains a provision in which the parties agreed that Capital LLC has the right to cease funding the loan if the shares experienced a material "Valuation Event" or material change in average daily trading volume. (NYSCEF 178 at § 6.2.) The MLA defines "Valuation Event" as when the fair market price of the shares falls to less than seventy five percent (75%) of the fair market price used to calculate the loan principal amount. (*Id.* at § 1.1.) In the event of a material "Valuation Event", the MLA further provides that Capital LLC shall provide written notice to Satterfield, who then has 3 business days to "top-up" the shares twenty-five percent (25%) more than the fair market

value, and cure the deficiency in value by tendering cash or a stock equivalent. (*Id.* at § 7.1 [g].) Another provision of the MLA indicates that either Satterfield or Capital LLC may require any dispute arising out of the MLA to be resolved by arbitration, the place of which was New York. (*Id.* at § 8.1.)

Sklarov subsequently provided Satterfield with several addenda that modified the MLA. (NYSCEF 130 at ¶ 32.) The first of which changed the form of the transaction from a transfer of shares, to a pledge, allegedly as required by the restrictive legend on the shares. (*Id.*) This first addendum also increased the amount of the loan to $3.5 million. (NYSCEF 179 at exhibit B, § I.) Again, Satterfield entered into this agreement with Sklarov in his capacity as managing member of Capital LLC. (*Id.* at 2.)

Under the MLA, approximately half of the shares became freely tradeable on December 11, 2018, and the other half on January 17, 2019. (NYSCEF 130 at ¶ 34.) In late 2018, Sklarov began to threaten to sell half of Satterfield's shares if Satterfield did not sign an additional addendum to the MLA. Sklarov also threatened Satterfield, with claims that he was in default under the MLA because the shares were not free trading. (*Id.* at ¶ 37.)

Satterfield executed the additional addendum, dated November 30, 2018 (November 2018 Addendum). (*Id.*) The November 2018 Addendum assigned the loan to Capital Limited together with all rights, warranties, obligations, covenants and representations. (NYSCEF 179 at exhibit B, § I.) It further modified the arbitration provision in the MLA, providing that disputes are to be governed by The Arbitrator Conflict Resolution Services in St. Kitts & Nevis, administered by the Arbitrator Conflict Resolution Service in St. Kitts & Nevis. (*Id.*) Additionally, the November 2018 Addendum transferred the shares to Capital Limited as one assignee, and to BR, a second assignee. (*Id.* at § II.

[h].) The November 2018 Addendum was entered into by Satterfield, and Sklarov, in his capacity as managing member of Capital LLC, and "operations manager" of BR. (*Id.* at 5; NYSCEF 179 at 6.)

Prior to the closing, Satterfield "arranged to have the [s]hares transferred to what he assumed to be an escrow account." (NYSCEF 130 at ¶ 38.) On December 13, 2018, Sklarov informed Satterfield by email that the legend restricting the shares had been removed meaning the shares became freely tradeable. (*Id.* at ¶ 39.) Subsequently, the price of Co-Diagnostics shares dropped from $2.18 to $1.15, an unprecedented plummet. (*Id.* at ¶ 40.) On December 17, 2018, Capital LLC countersigned the "Closing Statement and Addendum" form. (*Id.* at ¶ 41.) Satterfield signed as well. (*Id.*)

On December 26, 2018, Satterfield received a disbursement amount of $100,000 in connection with the MLA, but after deductions, the disbursement was approximately $66,709. (*Id.* at ¶ 42.) The next day, Capital LLC sent Satterfield a notice demanding a "top-up" of the shares allegedly because the share price had fallen below $1.50. (*Id.* at ¶ 42.)

Satterfield alleges that Capital LLC, Capital Limited, BR, Sklarov, and defendant Bentley Rothschild Investments (BRI) caused the price of the shares to drop by dumping the shares and manipulating the stock price. (*Id.* at ¶¶ 43, 2.) Satterfield alleges that the defendants dumped the shares even before the closing took place, and before a "single cent was loaned" to Satterfield. (*Id.* at ¶ 45.) Allegedly, days before the closing, defendants sold 10,760 shares on December 13, 2018, and 28,900 shares on December 14, 2017. (*Id.* at ¶ 47.) Whereas Satterfield only received $66,709 as a loan, $1,152,000 worth of the shares have been disposed. (*Id.* at ¶ 50.) Of the 2 million shares that were held by VStock, only about 1,134,897 shares are currently held. (*Id.* at ¶¶ 51, 26,18.)

Accordingly, Satterfield commenced this action for fraud, aiding and abetting fraud, conversion, civil conspiracy to commit fraud and conversion, unjust enrichment, and injunctive relief. He maintains that the defendants engaged in a stock loan fraud scheme, a scheme in which an individual owning shares in a corporation is induced to pledge those shares as collateral for a loan only to find that the "lender" has sold the collateral without paying the loan. (NYSCEF 130 at ¶¶ 1, 2.) Satterfield claims that Capital LLC, Capital Limited, BR, Sklarov, and BRI each participated in this scheme with the goal of obtaining his shares and selling them as soon as possible. (*Id.* at ¶ 3.) He alleges that they never intended to make the loan to him.

Discussion

CPLR 3211(a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant." "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 AD3d 485, 486 [1st Dept 2017][citation omitted].) Additionally, the court must accept as true the allegations set forth in the complaint and accord the plaintiff the benefit of every favorable inference. (*Wilson v Dantas*, 128 AD3d 176, 182 [1st Dept 2015].)

A. Waiver of Jurisdiction

Preliminarily, Capital LLC did not waive its right to assert lack of personal jurisdiction as a defense. CPLR 320 (b) provides that "an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction ... is asserted by motion or in the answer as provided in rule 3211." Accordingly, a defendant

waives lack of personal jurisdiction as a defense by failing to assert it in the answer or on a motion to dismiss. (*Deutsche Bank Natl. Trust Co. v Ned*, 114 AD3d 524, 524 [1st Dept 2014].) Once Satterfield filed the complaint in this action,[1] Capital LLC moved to dismiss for lack of personal jurisdiction, and therefore did not waive the defense.[2] (NYSCEF Doc. No. 130; NYSCEF Doc. No. 176, Motion 08 filed on May 20, 2019.) Although Satterfield argues that Capital LLC waived the defense by demanding a complaint and moving to dismiss for failure to file a complaint, "a demand or [such motion] does not of itself constitute an appearance in the action." (CPLR 3012 [b].) Capital LLC has raised jurisdiction as a defense from the inception of this litigation, and consistently maintained that position in subsequent motion practice. (NYSCEF Doc. No. 112, tr at 3:7-8.) Satterfield's remaining arguments do not yield an alternative result, and therefore, the court will consider whether a basis for personal jurisdiction exists with respect to Capital LLC and the other moving defendants.

B. General Jurisdiction

Satterfield fails to allege or otherwise present sufficient evidence to demonstrate general jurisdiction over the defendants. CPLR 301 states that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." When there is a basis for general jurisdiction under CPLR 301, personal jurisdiction over a defendant exists. (*Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014].) A basis for general jurisdiction exists when a limited liability company's affiliations with New York are so continuous and systematic as to render it at home in New York.

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[1] This case began on January 16, 2019 with a Summns and Notice and OSC to stop Vstock from transferring shares. (NYSCEF 1; 11).

[2] Capital LLC has not yet filed an answer.

(*Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018].) In the corporate context, corporations are considered at home in New York, and thus subject to general jurisdiction, when they are incorporated in New York, or have a principal place of business in New York. (*Magdalena,* 123 AD3d 601.)

The parties agree that Capital Limited was not served with process of service, and therefore Capital Limited is dismissed. (NYSCEF Doc. No. 265, Transcript, august 26, 2019, at 3:6-20.)

Satterfield fails to allege or show that BR is incorporated in New York or has a principal place of business in New York. Plaintiff alleges only that BR is a corporation organized under the laws of St. Kitts & Nevis. (NYSCEF 130 at ¶ 9.) Accordingly, a basis for general jurisdiction does not exist with respect to BR.

Satterfield also fails to allege or show that Capital LLC, a Colorado LLC with offices in Georgia, has a principal place of business in New York. (NYSCEF 130 at ¶ 7.) Plaintiff alleges in the complaint only that Capital LLC "represents itself on LinkedIN.com as maintaining an office on 48th Street, New York, NY", however, Satterfield never alleges, argues, or shows that this office is Capital LLC's principal place of business.[3] Indeed, an entity that operates in many places "can scarcely be deemed at home in all of them." (*Daimler AG v Bauman*, 571 US 117, 189 n 20 [2014].) Therefore, a basis for general jurisdiction does not exist with respect to Capital LLC. Because a basis for general

[3] Satterfield submits copies of Capital LLC's alleged webpage on www.glassdoor.com apparently to show that anonymous persons have identified themselves as employees of Capital LLC in New York. (NYSCEF Doc. Nos. 195 and 196.) However, these submissions do not demonstrate that Capital LLC's principal place of business is in New York. Such "website information . . . is, by itself, insufficient to meet [the] ultimate burden of establishing jurisdiction." (*Venegas v Capric Clinic*, 147 AD3d 457, 458 [1st Dept 2017].)

jurisdiction does not exist with respect to these defendants, the court considers whether a basis for long-arm jurisdiction exists.

C. Long-Arm Jurisdiction

When there is a basis for long-arm jurisdiction under CPLR 302, personal jurisdiction over a defendant exists, and here, Satterfield alleges or presents sufficient evidence to demonstrate jurisdiction over Capital LLC, Sklarov and BR.

1. Transacting Business Within New York

CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state ... ." "It is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction ... ." (*Kreutter v McFadden Oil Corp*, 71 NY2d 460, 467 [1988][citations omitted].) To determine if jurisdiction exists, a two-prong test is used. (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016].) "[U]nder the first prong[,] the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions." (*Id.*)

"Whether a non-domiciliary is transacting business within the meaning of CPLR 302 (a) (1) is a fact based determination, and requires a finding that the non-domiciliary's activities were purposeful and established 'a substantial relationship between the transaction and the claim asserted.'" (*Paterno v Laser Spine Inst*, 24 NY3d 370, 376 [2014][citations omitted].) "Purposeful activities are volitional acts by which the non-domiciliary avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." (*Id.* [internal quotation marks and citations omitted].) "[A] non domiciliary transacts business when on his [or her] own initiative ... [the non-domiciliary] project[s] himself [or herself] into this state to engage in a

sustained and substantial transaction of business." (*Id.* at 377 [internal quotation marks and citations omitted].) "The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York." (*Id.* at 376.) Indeed, CPLR 302 (a) (1) long-arm jurisdiction may exist "over commercial actors ... using electronical and telephonic means to project themselves into New York to conduct business transactions." (*Id.*)

"To satisfy the second prong of CPLR 302 (a) (1) that the cause of action arise[s] from the contacts with New York, there must be an 'articulable nexus' ... or 'substantial relationship' between the business transaction and the claim asserted." (*Rushaid*, 28 NY3d at 329.) The inquiry merely requires "a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former." (*Id.*) "The claim need only be 'in some way arguably connected to the transaction.'" (*Id*, [citation omitted].)

Here, Satterfield has established CPLR 302 (a) (1) long-arm jurisdiction over Capital LLC. The complaint alleges that Satterfield received approximately 2 million restricted shares that remained with defendant VStock in New York, the transfer agent operating out of New York. (NYSCEF 130 at ¶¶ 11, 16, 26.) Satterfield also submits the sworn testimony of VStock's compliance officer, Shay Galam, who stated that these shares were initially transferred to VStock from CODX in early 2018. (NYSCEF 190, tr. at 135: 1-2.) Galam swore under oath that Capital LLC engaged in at least two transactions with VStock. (*Id.* at 89:3-9.) One transaction entailed the transfer of shares from Capital LLC to BR. (*Id.*) The second transaction entailed the transfer of shares from Capital LLC to its broker. (*Id.*) Galam also discussed an email from Capital LLC to a VStock employee inquiring about lifting the restrictions on the shares. (*Id.* at 127:2-7.) The email "reiterate[s]

as previous emails" that Capital LLC is prohibited from transferring the shares. (*Id.*) The email is authored by Sklarov. (*Id.* at 127:17-20.) Galam further provided sworn testimony that it was possible to lift the restrictions on the shares but still hold the shares at the transfer agent's office. (*Id.* at 139:7-10.) Based on these allegations, Capital LLC engaged in purposeful activities or volitional acts by which it availed itself of the privilege of conducting activities within New York, thus invoking the benefits and protections of New York's laws. By initiating multiple transactions with New York based VStock to transfer scores of the 2 million shares, while also routinely corresponding with VStock about the shares' restrictions, Capital LLC projected itself into New York to engage in a sustained and substantial transaction of business. To say these transactions are "in some way arguably connected" to Satterfield's claims is a gross understatement. Indeed, these transactions are the very foundation of Satterfield's fraud claims insofar as he alleges that Capital LLC entered into a sham loan agreement simply to gain control of the shares and sell them off. Accordingly, the two prongs of CPLR 302 (a) (1) have been satisfied at to Capital LLC.

2. Agency

Because Sklarov represented Capital LLC "during [its] participation in purposeful acts in this State ... the fact that he acted for [Capital LLC] should not necessarily relieve him from responding to [Satterfield's] claims against him" in the event that Sklarov "acted improperly" in his capacity as managing member. (*Kreutter*, 71 NY2d at 470.) Here, Sklarov was the "primary actor in the transaction[s] with [VStock] in New York", not merely some employee of Capital LLC. (*Id.*) Accordingly, Capital LLC was acting as the agent of Sklarov such "that its actions are attributable to him." (*Id.* at 467.) To demonstrate this sort of agency, the plaintiff "need not establish a formal agency relationship" between the

individual officer and the entity. (*Id.*) The plaintiff "need only convince the court that the [entity] engaged in purposeful activities in this State in relation to his transaction for the benefit of and with the knowledge and consent of the [individual officer], and that [the individual officer] exercise[d] some control over [the entity] in the matter." (*Id.*) Here, the complaint contains various allegations that Sklarov "exercises dominion and control" over Capital LLC. (NYSCEF 130 at ¶ 12.) Every agreement here, including the MLA and subsequent addenda, were signed by Sklarov in his capacity as managing member of Capital LLC. The record indicates either explicitly or implicitly that Sklarov controls Capital LLC because he is the only individual directing the LLC's activities. Further, Satterfield's sworn testimony establishes that Sklarov was the prime mover of these transactions in spite of his use of Capital LLC to complete them. (*See generally* NYSCEF 190.) For instance, when asked under oath, "[d]id you ever come to learn who was trading shares in your stock from December 11th 2018 to ... December 27th, 2018", Satterfield answered, "[y]es ... [t]hey came from Val Sklarov, America 2030." (NYSCEF 190 at 59:4-8.) Satterfield added, "as our counsel reached out to The Bank of New York, we acquired additional records that showed that Val Sklarov had been selling on a near daily basis from the day the shares hit his account." (*Id.* at 60:3-6.) Accordingly, there is ample evidence in the record indicating that Capital LLC transacted business in New York for the benefit of, and with the knowledge and consent of Sklarov. Therefore, a basis for CPLR 302 (a) (1) long-arm jurisdiction exists with respect to Sklarov under an agency theory[4].

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[4] An additional basis for CPLR 302 (a) (1) long-arm jurisdiction exists with respect to Sklarov insofar as his agent, Leib Schaeffer, operated out of New York. For instance, when asked under oath, "[d]id you ever become aware as to whether or not [Schaeffer] was acting in this transaction as Mr. Sklarov's agent", Satterfield answered, "yes." (NYSCEF 190 at 56:7-9.) Satterfield clarified that "[Schaeffer] routinely sent e-mails, texts, that were clear that he was helping negotiation proceeding[s] ... on [Sklarov's] behalf." (*Id.* at 56:11-14.) When asked, "[d]id you ever ascertain where Mr. Schaeffer was located",

3. Tortious Act Within New York

The transactions noted above also provide a basis for long-arm jurisdiction under CPLR 302 (a) (2). CPLR 302 (a) (2) provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... commits a tortious act within the state ... ." The non-domiciliary must have committed tortious conduct in New York (*Seevers v Tang*, 268 AD2d 249, [1st Dept 2000]) meaning the alleged tortious act occurs in New York. (*Keane v Kamin*, 94 NY2d 263, 266 [1999].) Although "our courts have traditionally required the defendant's presence here at the time of the tort" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 97 [1st Dept 2010]), the First Department has affirmed that "[a] defendant with access to computers, fax machines etc., no longer has to physically enter New York to perform a financial transaction which may be criminal or tortious." (*Banco Nacional Ultramarino v Chan*, 169 Misc. 2d 182, [Sup Ct, NY County 1996], affd 240 AD2d 253.) For instance, "[u]sing a New York bank account for a fraudulent scheme constitutes a tort within New York." (*FIA Leveraged Fund Ltd. V Grant Thornton LLP* (150 AD3d 492, 495 [1st Dept 2017].)

Here, it is undisputed that the shares were held by VStock which operates out of New York. Accordingly, Capital LLC and Sklarov's use of New York-based VStock for this alleged fraudulent scheme also constitutes a tort within New York.

4. Conspiracy Jurisdiction

Satterfield alleges and presents sufficient evidence to demonstrate jurisdiction over BR insofar as there are allegations and evidence indicating that BR "was a party of a

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Satterfield responded, "[h]e was in New York." (NYSCEF 190 at 57:1-5.) The court notes that Satterfield submitted the transcript of Schaeffer's deposition in addition to hearing transcript. (NYSCEF 198.) However, the court declined to consider the transcript of Schaeffer's deposition because it was not certified by the court reporter. (*Id.* at 130.)

conspiracy involving the commission of several overt tortious acts in New York." (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013].)

"For purposes of [CPLR 392 (a) (2)], a coconspirator can be an agent" (*Small v Lorillard Tobacco Co*, 252 AD2d 1, 17 [1st Dept 1998]) especially when the "complaint contains allegations of a conspiracy with tortious acts committed within this jurisdiction by some of the conspirators." (*Reeves v Phillips*, 54 AD2d 854, 845 [1st Dept 1976].) The requirements for this conspiracy jurisdiction are set out in *FIA Leveraged Fund Ltd. v Grant Thornton LLP* (150 AD3d 492, 495 [1st Dept 2017].) Specifically, plaintiff must allege in the complaint (1) a corrupt agreement between two or more parties, (2) an overt act in furtherance of the agreement, which constitutes an independent tort or wrongful act, (3) the defendant's intentional participation in the furtherance of the plan or purpose, and (4) resulting damages or injury. (*Weinberg v Mendelow*, 113 AD3d 485, 487 [1st Dept 2014].) The "mere conclusory claim that an activity is a conspiracy does not make it so especially when the complaint fails to establish that the alleged coconspirators knew their act would have an effect in New York." (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 97 [1st Dept 2010][citations omitted].) Additionally, the plaintiff must establish the requisite relationship between the defendant and its New York co-conspirators by showing that the defendant had an awareness of the effects in New York of its activity, the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators, and the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant. (*Lawati v Montague Morgan Slade Ltd.*, 102 AD3d at 428 citing *Best Cellars Inc. v Grape Finds at Dupont, Inc.*, 90 F Supp 2d 431, 446 [SD NY 2000].)

Here, the first factor is satisfied because the complaint alleges a corrupt agreement among Capital LLC, Sklarov, and BR insofar as these defendants allegedly engaged in a stock loan fraud scheme. (NYSCEF 130 at ¶ 82.) The scheme centered around Capital LLC and BR's promise to provide a loan to Satterfield as a means of gaining control of his shares only to sell the shares without paying the loan. The second factor is satisfied because BR made an overt act in furtherance of the agreement when it entered into the November 2018 Addendum through its agent and "operations manager", Sklarov, and stated its intention to "fulfill all the obligations of the MLA" upon "the release of restriction by VStock Transfer." (NYSCEF 179 at exhibit B, 5 and § I.[e]-[f].) In accordance, with the November 2018 Addendum signed by Satterfield, and Sklarov in his capacity as managing member of Capital LLC, and operations manager of BR, BR was assigned the shares. The third factor is satisfied because BR's intentional participation in the furtherance of the plan or purpose is inferred by Sklarov's signature on the assignment in his capacity as operations manager. The fourth factor is satisfied because Satterfield has been damaged by this fraudulent scheme insofar as he was promised $3.5 million, of which he only received approximately $66,709, and he is now bereft of his shares. The fifth factor is satisfied because BR had an awareness of the effects in New York of its activities insofar as the assignment notes VStock's participation in these transactions and Sklarov signed the assignment on behalf of BR. The sixth factor is satisfied because the activity of Capital LLC and Sklarov in New York was to the benefit of BR, the entity that ultimately was assigned more than a million of the shares. Finally, the seventh factor is satisfied because there is ample evidence that Capital LLC and Sklarov acted in New York at the request of or on behalf of BR. Accordingly, a basis for CPLR 302 (a) (2) long-arm jurisdiction exists with respect to BR.

D. Federal Due Process

"Exercise of personal jurisdiction under the long-arm statute must comport with federal constitutional due process requirements. (*Rushaid*, 28 NY3d 316 at 330.) "[A] nondomiciliary must have 'certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" (*Id.* at 331 [citations omitted].) "The 'minimum contacts' test 'has come to rest on whether a defendant's conduct and connection with the forum State are such that it should reasonably anticipate being hailed into court there.'" (*Id.* at 331 [citations omitted].) These "minimum contacts exist where a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State.'" (*Id.* [citation omitted].) Here, Capital LLC and Sklarov's numerous transfers, transactions, and communications with VStock "to achieve the wrong complained of in this suit satisfies the minimum contacts components of the due process inquiry."[5] (*Id.* [internal quotation marks and citation omitted].) Additionally, personal jurisdiction here does not offend notions of fair play and substantial justice.

> "Whether personal jurisdiction offends 'notions of fair play and substantial justice' depends on a consideration of 'the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies."

(*Rushaid*, 28 NY3d 316 at 331.) Although Capital LLC is a Colorado LLC with offices in Kennesaw, Georgia, and Sklarov resides in Chicago, "the burden of litigation in New York

[5] Both the Court of Appeals and the Supreme Court of the United States have acknowledged "that it is constitutionally permissible to subject an individual participating in a transaction in a foreign State to long-arm jurisdiction even though his contacts with the forum were made in a corporate capacity." (*Kreutter*, 71 NY2d 460, 470, 470-471 [1988].)

is reduced by 'modern communication and transportation.'" (*Id.* [citations omitted]; NYSCEF 130 at ¶¶ 6, 7.) Indeed, the parties memorialized in the MLA that their disputes shall be arbitrated in New York begging the question whether litigating in New York is any burden at all. Additionally, the complaint implicates the fraudulent use of a New York limited liability company, an issue of great importance to the State. (*Rushaid*, 28 NY3d 316 at 331.) Satterfield also has an interest in obtaining convenient and effective relief as indicated by his commencement of this action here in the Commercial Division where complex commercial matters are routinely adjudicated. "On balance, and considering all the remaining factors, the maintenance of suit here does not 'offend traditional notions of fair play and substantial justice.'" (*Rushaid*, 28 NY3d 316 at 331.)

With respect to BR, "by joining the conspiracy with the knowledge that overt acts in furtherance of the conspiracy had taken place in New York ... purposely [availed itself] of the privilege of conducting activities within [New York]." (*Lawati*, 103 Ad3d at 429.) In any event, the minimum contacts requirement is also satisfied "as a result of [BR's] acceptance of transfer of shares to it" from VStock. (*see* NYSCEF 179 at exhibit B.) Accordingly, asserting jurisdiction over BR comports with due process considerations.

E. Forum Non Conveniens

CPLR 327 provides "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court ... may stay or dismiss the action in whole or in part on any conditions that may be just ... ." "In general, a decision to grant or deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion ... ." (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137–138 [2014].) "Forum non conveniens is a defense based upon the inconvenience of

the New York court as a forum of choice." (*National Union Fire Ins. Co. of Pittsburg, Pa. v Jordache Enters.*, 205 AD2d 341, 343 [1st Dept 1994].) It is a "nexus-oriented defense" that requires the court to balance certain factors. (*Id; see also Nasser v Nasser*, 52 AD3d 306, 306 [1st Dept 2008].)

As noted above, the action involves the use of a New York LLC to commit fraud in New York, and therefore, there is a substantial nexus between this jurisdiction, the subject matter of the action, and the parties. (*National Union Fire Ins. Co. of Pittsburg, Pa. v Jordache Enters.*, 205 AD2d 341, [1st Dept 1994]; *compare Gibson Greetings Card, Div. of C.I.T. Fin. Corp. v Gateway Transp. Co.*, 41 AD2d 918, 919 [1st Dept 1973].) Although "residency here ... is but one factor to be considered," the court notes the defendant VStock has its principal place of business in New York. (*Nasser*, 52 AD3d at 306.) Capital LLC and Skarlov are not residents of New York, but as previously noted, there is little if any potential hardship to them in litigating in New York. (*Id.*) There is little if any burden on the New York courts to hear this matter insofar as the New York courts have a great deal of expertise in adjudicating complex commercial matters. (*Id.* at 308 ["the court properly considered the burden of the New York courts"].) Moreover, the causes of action arose in New York, and would not "involve the applicability of foreign law." (*Id.* at 307.) There are certainly other forums available to the parties. (*Id.* at 306.) In considering these factors, among others, dismissal pursuant to CPLR 327 is denied.

F. Arbitration

"Arbitration is a creature of contract. Where parties have agreed upon a forum for resolution of controversy, courts should not rewrite their agreement." (*Matter of Intercontinental Packaging Co. v China Natl. Cereals, Oils & Foodstuffs Import & Export Corp., Shaghai Foodstuffs,* 159 Ad2d 190, 195 [1st Dept 1990].) "Under both Federal and

New York law, it is settled that unless it can be established that there was a 'grand scheme' to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions and the agreement to arbitrate may be valid despite the underlying allegation of fraud."[6] In the complaint, Satterfield, quite literally, alleges that Capital LLC and Sklarov "participated in a scheme to defraud" him. (NYSCEF 130 at ¶ 2.) Moreover, Satterfield produced sufficient evidence to indicate that the subsequent modifications to the MLA including the St. Kitts and Nevis arbitration provision were permeated with fraud. For instance, when asked, why he signed the November 2018 Addendum that provided for arbitration in St. Kitts & Nevis, Satterfield answered, "Mr. Sklarov informed me that if I did not he would take all of my shares." (NYSCEF 190, tr. at 62:8-13.) Satterfield added, "whenever [Sklarov and Schaeffer] wanted me to sign a new document or new amendment, I would get a whole lot of sales rhetoric right at that moment; oh, this is going to be wonderful ... [v]ersus in November the tone had changed completely to we are going to take all your stock." (*Id.* at 120:8-14.) When asked, "[d]o you believe that Mr. Sklarov intentionally drove down the price of your shares", Satterfield answered, "[a]bsolutely." (*Id.* at 110:23-25.) Indeed, Satterfield was asked, "[s]o before you recovered the executed agreement for Mr. Sklarov, how many shares had Mr. Sklarov sold to your knowledge based upon this composit", and Satterfield responded "a little more than 45,000 shares." (*Id.* at 95:17-20.) Satterfield additionally described the "several lines of evidence"

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[6] The court discussed this issue at length in its prior decision (NYSCEF 200) granting plaintiff's motion for a preliminary injunction enjoining defendants America 2030 Capital, LLC, Bentley Rothschild Ltd. Corp. and Sklarov from participating in the Nevis arbitration. After an emergency hearing on whether the amendments are permeated with fraud, the court found plaintiff established likelihood of success. The court declines to reiterate that analysis here although it is incorporated by reference.

indicating that the shares were sold by Sklarov ranging from Sklarov's emails to the shares turning up in the Bank of New York. (NYSCEF Doc. No. 190 at 59-60.) Accordingly, the court finds that the second addendum signed by Satterfield containing the St. Kitts & Nevis arbitration provision was permeated with fraud.

Accordingly, it is

ORDERED that motion sequence number 008 is granted to the extent that the complaint is dismissed against America 2030 Capital Limited; and it is further

ORDERED that America 2030 Capital LLC, Val Sklarov, Brent Satterfield, and Bentley Rothschild Capital Limited Corp. are compelled to arbitrate in New York.

Motion Seq. No. 008

10/30/19
DATE

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

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