

Funding Metrics, LLC v Letha's Pies, LLC

2019 NY Slip Op 35080(U)

November 6, 2019

Supreme Court, New York County

Docket Number: Index No. 655798/2019

Judge: O. Peter Sherwood

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This opinion is uncorrected and not selected for official publication.

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

-----X
FUNDING METRICS, LLC d/b/a QUICK FIX CAPITAL,

Plaintiff,

-against-

**LETHA'S PIES, LLC, RHONDA GLENN,
AND TIMOTHY GLENN,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

**DECISION AND ORDER
Index No.: 655798/2019**

Mot. Seq. Nos.: 001 and 006

In this motion for a preliminary injunction (Motion Sequence Number 001), plaintiff, a Delaware corporation, seeks to enjoin defendants, a small Arkansas Limited Liability Company ("LLC") and its two individual principals from further prosecuting a claim under Arkansas securities laws in an Arkansas court. In Motion Sequence Number 006, defendants seek to dismiss the complaint. In Motion Sequence Number 001, plaintiff relies on the forum selection provision of a completed \$22,000 agreement between the parties which provides in relevant part:

ALL TRANSACTION DOCUMENTS INCLUDING, WITHOUT LIMITATION, THE APPLICATION, THIS AGREEMENT AND THE PAYMENT AUTHORIZATION SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES THEREOF. MERCHANT AND GUARANTOR CONSENT TO THE JURISDICTION OF THE FEDERAL AND STATE COURTS LOCATED IN ANY COUNTY IN THE STATE OF NEW YORK AND AGREE THAT SUCH COURTS SHALL BE THE EXCLUSIVE FORUM FOR ALL ACTIONS, PROCEEDINGS OR LITIGATION ARISING OUT OF OR RELATING TO THIS AGREEMENT OR SUBJECT MATTER THEREOF; NOTWITHSTANDING THAT OTHER COURTS MAY HAVE JURISDICTION OVER THE PARTIES AND THE SUBJECT MATTER THEREOF.

For purposes of this motion, the court assumes this provision of the parties' contract applies. Regardless, the motion must be denied and the action dismissed because this court lacks subject matter jurisdiction and such jurisdiction may not be conferred by consent of the parties (see *Techno TM, LLC v Fireaway, Inc.*, 123 AD3d 610 [1st Dept 2014]). The parties to the agreement on which plaintiff, Funding Metrics, LLC, relies involves a transaction that has no

connection with New York between foreign entities. Although New York courts have jurisdiction over disputes between foreign corporations in certain limited circumstances, none of those circumstances are present here as the dispute is not between sophisticated parties arising out of a transaction covering not less than \$1 million (*see* GOL § 5-1402) and none of the criteria specified in BCL § 1314(b) that would allow this court to assert jurisdiction has been satisfied¹ (*see DDR Real Estate Servs., Inc. v Burnham Pac. Props, Inc.*, 1 Misc 3d 802 [Sup Ct Monroe Cty 2003] *aff'd* 12 AD3d 1182 [4th Dept 2003] [holding forum selection clause cannot create subject matter jurisdiction under BCL § 1314[b]]; and *Farrelle v Piedmont Aviation, Inc.*, 411 F2d 812, 815, n 4 [2d Cir 1969] [same]).

For the reasons discussed above defendants' motion to dismiss (Motion Sequence Number 006) must be granted.

Accordingly, it is hereby

ORDERED that plaintiff's motion for a preliminary injunction (Motion Sequence Number 001) is DENIED and the motion of defendants to dismiss the complaint (Motion Sequence Number 006) is GRANTED as this court lacks subject matter jurisdiction over the case; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against plaintiff Funding Metrics, LLC and in favor of defendants Letha's Pies, LLC, Rhonda Glenn, and Timothy Glenn together with costs to be taxed against said plaintiff upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

DATED: November 6, 2019

ENTER,



O. PETER SHERWOOD J.S.C.

¹ BCL § 1314(b) provides:

(b) Except as otherwise provided in this article, an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:

- (1) Where it is brought to recover damages for the breach of a contract or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.
- (2) Where the subject matter of the litigation is situated within this state.
- (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.
- (4) Where, in any case not included in the preceding subparagraphs, a nondomiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.
- (5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.