Kal Tire v Vitale
2020 NY Slip Op 32405(U)
July 22, 2020
Supreme Court, New York County
Docket Number: 657644/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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KAL TIRE,

Plaintiff,

- v -

ALESSANDRO VITALE, MATTEO DENINNO

Defendant.

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INDEX NO. 657644/2019

MOTION DATE 03/18/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Alessandro Vitale's motion to dismiss pursuant to CPLR §§ 3211 (a)(5) and (a)(8) for expiry of the statute of limitations, lack of personal jurisdiction, and forum non conveniens is denied.

The Relevant Facts and Circumstances

This action arises from an alleged scheme to defraud Kal Tire where Mr. Vitale, a former Kal Tire employee, allegedly hired Matteo Deninno's companies to perform services for Kal Tire at inflated prices in return for which Mr. Deninno paid kickbacks to Mr. Vitale. Kal Tire is a Canadian partnership and the country's largest independent tile retailer (NYSCEF Doc. No. 1, ¶ 6).

Mr. Vitale was Kal Tire's Vice President for Sales and Marketing from August 2010 to March 2016 (NYSCEF Doc. No. 35, ¶¶ 8-11). Mr. Deninno is the President and Chief Executive Officer of various entities that secured contracts with Kal Tire: (i) KeyWord Group International, Corp/UbiquiTeam, Corp. (**UbiquiTeam**), a New York corporation headquartered in New York City, (ii) Input Group North America (**Input Group**), a New York corporation headquartered in New York City and (iii) CircleTech Ltd. (**CircleTech**), a company formed under United Kingdom law and headquartered in New York, and ComLab Corp. (**ComLab**), a New York corporation headquartered in New York (UbiquiTeam, Input Group, CircleTech, and ComLab, collectively, the **Dennino Companies**) (NYSCEF Doc. No 1, ¶¶ 8-10; NYSCEF Doc. No. 55).

Kal Tire alleges that Mr. Deninno hired Mr. Vitale to work for UbiquiTeam from 2008 to 2010 (NYSCEF Doc. No 1, ¶¶ 18-19). After Mr. Vitale left UbiquiTeam and began working for Kal Tire, Mr. Vitale allegedly hired the Deninno Companies pursuant to seven contracts between May 2013 to March 2015 where Kal Tire was charged inflated prices (*id.*, ¶¶ 28-105). In particular, Kal Tire alleges that Mr. Vitale met Mr. Deninno at his New York offices in March 2015 to incorporate four specific contracts with a collective value of approximately $3,500,000 in the fraudulent kickback scheme (*id.*).

To facilitate the alleged scheme, Mr. Deninno invoiced Kal Tire from his New York office, Kal Tire wired funds to the Deninno Companies at their New York bank accounts, and Mr. Deninno transmitted kickback payments to the bank account of Mr. Vitale's wife at the Bank of Montreal (*id.*). Altogether, Kal Tire alleges that it wired over $3,800,000 to the Deninno Companies and that Mr. Deninno passed on $606,300 in kickback payments to Mr. Vitale between July 2013 to

late 2016 (*id.*, ¶¶ 106-108). In 2016, Kal Tire fired Mr. Vitale for performance reasons (NYSCEF Doc. No. 64, ¶ 8). Mr. Vitale now works for Magna Tyre Group and resides in Vaughn, Ontario (NYSCEF Doc. No. 35, ¶ 13).

In March 2017, ComLab filed an action against Kal Tire in the United States District Court for the Southern District of New York captioned *ComLab Corp. v Kal Tire, et al.* (No. 17-1907; the **ComLab Action**), in which ComLab alleged that Kal Tire breached a contract for the "MyMTG project" (NYSCEF Doc. No. 1, ¶ 132). Pursuant to an opinion and order (NYSCEF Doc. No. 17), dated September 11, 2018, the court (Forrest J.) granted Kal Tire's motion for sanctions and dismissed the ComLab Action because ComLab intentionally fabricated evidence in support of the action and spoliated evidence critical to Kal Tire's defense in the action.

Kal Tire commenced this action on December 23, 2019 alleging (i) fraud, (ii) aiding and abetting fraud, (iii) breach of duty of loyalty against Mr. Vitale, (iv) aiding and abetting breach of duty of loyalty against Mr. Deninno, (v) conversion, and (vi) unjust enrichment. Mr. Vitale filed the instant motion to dismiss pursuant to CPLR §§ 3211 (a)(5) and (a)(8) for expiry of the statute of limitations, lack of personal jurisdiction, and forum non conveniens.

Discussion

A. Dismissal under CPLR § 3211 (a)(5)

Mr. Vitale argues that the Complaint should be dismissed pursuant to New York's borrowing statute because the applicable two-year limitation period under the laws of British Columbia and

Ontario has expired. In its opposition papers, Kal Tire argues that this action was timely filed in 2019 as it did not have a basis to suspect Mr. Vitale of fraud until April 26, 2018.

CPLR § 3211 (a)(5) provides for dismissal of an action if the relevant statute of limitations has expired. Pursuant to CPLR § 202, a non-resident that brings a lawsuit in New York based on events that give rise to a cause of action accruing outside of New York must commence the action within the shorter of either the New York limitation period and the limitation period of the place where the cause of action accrued (*Norex Petroleum Ltd. v Blavatnik,* 23 NY3d 665, 668 [2014]; *2138747 Ontario, Inc. v Samsung C & T Corp.*, 144 AD3d 122, 123 [1st Dept 2016]). As the Court of Appeals explained in *Norex Petroleum*, the purpose of the CPLR § 202, otherwise known as the borrowing statute, is to prevent forum shopping (*id.* at 979) [reversing both lower courts' finding that claim was untimely under CPLR § 202 because CPLR § 205, i.e., the savings clause, does not apply by operation of CPLR § 202]).

The time and place of injury generally determines where a tort action accrues (*Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]). When the alleged injury is purely economic, the place of injury is where the plaintiff resides and sustains the economic impact of the loss *(Norex Petroleum,* 23 NY3d at 673). Here, Kal Tire is a foreign partnership and its alleged injury is purely economic such that Kal Tire's legal residence determines where the action accrues (*id.*).

A partnership's legal residence is determined by its principal place of business (*Proforma Partners, L.P. v Skadden, Arps, Slate Meagher, & Flom, L.L.P.*, 1999 NY Misc. LEXIS 626, at *12 [Sup Ct, NY County 1999] [citations omitted]). As Kal Tire's principal place of business is in Vernon, British Columbia, the borrowing statute requires that Kal Tire's claims must be

timely filed under the laws of British Columbia (*Norex Petroleum, supra*; *2138747 Ontario, supra*; *All Children's Hosp., Inc. v Citigroup Global Markets, Inc.*, 151 AD3d 583 [1st Dept 2017]).

In British Columbia, a proceeding must be commenced within two years from the date that the claim is discovered (Limitations Act, SBC 2012, c 24, § 4). Mr. Vitale argues that Kal Tire should have known about its potential claim as early as November 3, 2015 when Kal Tire placed a litigation hold on Mr. Vitale's emails, and no later than April 9, 2017 when Kal Tire was served with the ComLab Action. Both arguments are unavailing.

Iain Butler, Vice President of Finance for Kal Tire attests that the litigation hold feature was activated on over 400 employee email accounts in 2015 for non-litigation purposes, including retaining communications with suppliers and customers (NYSCEF Doc. No. 64, ¶¶ 2-4). In other words, Kal Tire's activation of the litigation hold in 2015 was wholly unrelated to any contemplated litigation against Mr. Vitale. Mr. Butler also clarifies that Kal Tire first suspected that Mr. Vitale was involved in a fraudulent kickback scheme only after April 26, 2018, the date on which Mr. Vitale testified that he had received wire payments from Mr. Deninno in the ComLabAction (*id.*, ¶ 6).

To the extent that Mr. Vitale argues that Kal Tire knew of the alleged fraud at an earlier date because its answer in the ComLab Action contained two affirmative defenses of fraud, there is simply no evidence that these defenses were anything more than two of at least eight boilerplate defenses contained in a standard response pleading. Further, Mr. Vitale does not offer any

explanation of how Kal Tire would have acquired any evidence of wire payments or wrongdoing between Mr. Deninno and Mr. Vitale absent discovery in the Com Lab Action.

As a result, the record indicates that Kal Tire first discovered a potential fraud claim against Mr. Vitale only after April 26, 2018 and this action was timely commenced within two years of that date, i.e., on December 23, 2019, under the British Columbia Limitations Act.

For the avoidance of doubt, Mr. Vitale did not argue that this action was untimely under New York law. However, this action would also be timely commenced in New York because the relevant New York limitation periods for the claims asserted in this action are all longer than the two-year period in British Columbia. By way of example, a fraud claim is subject to a six-year limitation period (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Accordingly, the branch of Mr. Vitale's motion to dismiss for expiry of the statute of limitations pursuant to CPLR § 3211 (a)(5) is denied.

B. Dismissal for Lack of Personal Jurisdiction

Pursuant to CPLR § 3211 (a)(8), a court may also dismiss a case for lack of jurisdiction over the defendant. A court in New York may exercise personal jurisdiction over a non-domiciliary defendant where (i) the court has long-arm jurisdiction over the defendant under CPLR § 302, and (ii) the exercise of such jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]).

Under CPLR § 302 (a)(1), a court may exercise specific personal jurisdiction over a party where its activities are purposeful and there is a substantial relationship between the transaction and the claim asserted, even if only one transaction takes place in New York (*Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]; *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]). Put another way, the defendant must avail "itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" *(Fischbarg, supra*).

In addition, the court's exercise of personal jurisdiction under CPLR § 302 (a)(1) must comport with federal constitutional due process requirements, namely that 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" (*Al Rushaid v Pictet & Cie*, 28 NY3d 316, 330-31 [2016]).

Mr. Vitale argues that he did not transact business or commit any tort in New York to establish a basis for personal jurisdiction. Further, Mr. Vitale asserts that a single meeting with Mr. Deninno in New York does not provide a basis for personal jurisdiction. In its opposition papers, Kal Tire argues that the court has personal jurisdiction over Mr. Vitale under CPLR § 302 (a)(1) because he traveled to New York to transact business and committed a tort as a result. Kal Tire also argues that personal jurisdiction is established under CPLR § 302 (a)(2) because the allegedly wrongful acts of a co-conspirator, namely Mr. Deninno, should be imputed to Mr. Vitale.

Contrary to Mr. Vitale's general denial that he not is subject to jurisdiction in New York, Kal Tire alleges that Mr. Vitale visited New York for the purpose of meeting with Mr. Deninno to further their alleged fraudulent scheme (NYSCEF Doc. No. 1). Significantly, Mr. Vitale concedes that he travelled to Manhattan in March 2015 for a business meeting and does not contradict or deny Mr. Deninno's account that the "[March 2015] meeting specifically included, among other things, negotiations and discussions regarding the terms of the MyMTG contract, ComLab's scope of work for the MyMTG project, other projects for which Kal Tire hired ComLab to work on, and to negotiate the terms of potential future projects between the same parties" (NYSCEF Doc. No. 52, ¶ 5).

Mr. Deninno explains the meeting in further detail by asserting that, "all negotiations related to the My MTG contract were completed in New York … during the March 3, 2015 meeting" (NYSCEF Doc. No. 35, ¶ 9; NYSCEF Doc. No. 53, ¶ 5). After the March 2015 meeting, Mr. Dennino states that he "received regular phone calls and emails from Mr. Vitale at my home and office, both located in New York City, wherein KalTire-ComLab business was discussed, including the MyMTG project and contract" (NYSCEF Doc. No. 52, ¶ 5).

Based on the foregoing, the March 2015 meeting was not merely exploratory and, instead, reveals that Mr. Vitale was physically present in New York to establish a continuing relationship between Kal Tire and the New York based Dennino Companies and to negotiate projects between the parties, and that he followed up on that meeting by multiple calls into New York to perpetuate the alleged kickback scheme. Moreover, there is a substantial relationship between the March 2015 meeting and the claims asserted as Mr. Vitale negotiated the very contracts out

of which Kal Tire's claims arise. Under these circumstances, Mr. Vitale purposefully availed himself of the privilege of conducting activities in New York, which invokes the benefits and protections of New York (*see George Reiner & Co. v Schwartz*, 41 NY2d 648, 653 [1977] [determining that personal jurisdiction established over non-resident defendant for breach of employment contract that was entered during a single meeting in New York]). The court has specific personal jurisdiction over Mr. Vitale pursuant to CPLR § 302 (a)(1) and the court declines to address whether there is also personal jurisdiction over Mr. Vitale pursuant to CPLR § 302 (a)(2). Accordingly, the branch of Mr. Vitale's motion to dismiss pursuant to CPLR § 3211 (a)(8) is denied.

C. Dismissal for *Forum Non Conveniens*

CPLR § 327 codifies the common law doctrine of *forum non conveniens*. Pursuant to CPLR § 327, a court may dismiss an action if it "finds that in the interest of substantial justice the action should be heard in another forum." The resolution of a motion to dismiss on *forum non conveniens* grounds is left to the sound discretion of the trial court (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]).

Courts consider the burden on New York courts, potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring suit, the residence of the parties and whether the transaction at issue arose primarily in a foreign jurisdiction (*id.*). No one factor is controlling and the defendant bears a heavy burden in challenging the plaintiff's choice of forum regardless of the plaintiff's status as a nonresident (*id.*; *Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.P.A.*, 26 AD3d 286, 287 [1st Dept 2006]).

Significantly, the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant and a substantial nexus between New York and the action is lacking (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]).

Mr. Vitale argues that every factor in a *forum non conveniens* analysis favors dismissal. To wit, Mr. Vitale asserts that (i) none of the parties to this action reside in New York, (ii) the parties do not do business in New York, (iii) the transactions at issue did not occur in New York, (iv) witnesses are not located in New York, (v) British Columbia is a suitable alternate forum to adjudicate this dispute, and (vi) prosecution of the action will pose a hardship for parties located outside of New York.

In opposition, Kal Tire argues that the action should not be dismissed for *forum non conveniens* because (i) the crux of the alleged fraud was perpetrated when Mr. Vitale traveled to New York and met with Mr. Deninno to discuss certain contracts with Kal Tire, (ii) the alleged scheme was carried out while Mr. Deninno was a New York resident and involved three Deninno Companies located in New York, (iii) critical evidence from the bank accounts of the Deninno Companies is located in New York, (iv) New York is the most convenient location for non-resident parties and witnesses to travel to, (v) there is no hardship to litigating in New York, and (vi) the present action would not impose a burden on this court.

Inasmuch as the parties are nonresidents of New York, the Deninno Companies, which were used to carry out the alleged fraudulent scheme, remain headquartered in New York. Further, there would be little hardship in requiring Mr. Vitale to litigate in New York because he resides in Ontario, which is closer to New York than British Columbia. In addition, notwithstanding the unique limitation of cross-border travel between Canada and the United States at this time, the court may consider reasonable accommodations for nonresident parties as the case progresses if necessary.

The record also indicates that the location of the events giving rise to this action strongly supports the continuation of this action in New York. Although Mr. Vitale claims that the transactions in issue occurred elsewhere, Kal Tire sufficiently alleges that Mr. Vitale traveled to New York in March 2015 to meet Mr. Deninno at his New York office to expand their fraudulent scheme and there is sworn evidence from Mr. Deninno that this meeting involved the negotiation of several contracts with Kal Tire (NYSCEF Doc. No. 1, ¶¶ 55-131; NYSCEF Doc. No. 52, ¶ 5; NYSCEF Doc. No. 53, ¶¶ 3-4). In particular, Kal Tire alleges that four out of seven contracts at issue in this action were negotiated by the defendants in New York, which contracts gave rise to the vast majority of the kickbacks that Mr. Deninno allegedly sent to Mr. Vitale (*id.*). Kal Tire also alleges that it received invoices from the New York office of the Deninno Companies and that Kal Tire paid these invoices to the respective bank accounts of the Deninno Companies at JP Morgan in New York (NYSCEF Doc. No. 1, ¶¶ 106-131). These allegations establish a substantial nexus between the parties and New York and the location of events giving rise to the instant action weighs heavily in favor of keeping this litigation in New York.

In regards to non-party witnesses, the record indicates that they are located in New York, Italy, British Columbia, the United Kingdom, and Australia such that the location of witnesses is a neutral factor because there is no single convenient forum for all witnesses. Moreover, key evidence is located in New York as Kal Tire alleges that Mr. Deninno's New York bank accounts were used to receive payment from Kal Tire and send kickback payments to Mr. Vitale (NYSCEF Doc. No. 1, ¶¶ 106-131).

Overall, the present action does not present a burden for New York courts, which are accustomed to applying the law of foreign jurisdictions (*Anagnostou v Stifel*, 204 AD2d 61, 62 [1st Dept 1994] [reversing the trial court's dismissal of action on *forum non conveniens* grounds and explaining that a New York court was fully capable of applying Greek law if necessary]; *cf. Norex Petroleum Ltd v Blavatnik*, 151 AD3d 647 [1st Dept 2017] [dismissing on *forum non conveniens* grounds explaining, on remand, that "our courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York" where key events took place in and bulk of witnesses and documents were all located in Russia]).

To the extent that Mr. Vitale argues that British Columbia law should apply to resolve Kal Tire's claims, Mr. Vitale does not adduce a sufficient record to conduct a proper choice of law analysis particularly given that the claim appears to be timely. In any event, the first step in any choice of law analysis is to determine whether an actual conflict exists between the laws of the jurisdictions involved and Mr. Vitale also fails to identify any inconsistency between British Columbia and New York law (*Atsco Ltd. v Swanson*, 29 AD3d 465, 465 [1st Dept 2006] [the

court first found a conflict between New York and Malaysian law for a claim of fraudulent conveyance and then considered which law applied]).

Although British Columbia unquestionably presents a suitable alternate forum, it is not in the interest of substantial justice to have this action heard elsewhere when Mr. Vitale travelled to New York for the express purpose of negotiating the relevant contracts, he maintained an ongoing relationship with Mr. Deninno, who was located in New York, the funds that made up the alleged kickback payments were sent from New York bank accounts, and there is key evidence in New York that Kal Tire has already sought to secure by filing a petition for pre-suit discovery in this very court (*see Kal Tire v J.P. Morgan Chase Bank, N.A. and Bank of Montreal*, Index No. 150472/2019). Under these circumstances, Mr. Vitale fails to meet his heavy burden in disturbing Kal Tire's choice of a New York forum and dismissal based on *forum non conveniens* is denied.

Accordingly, it is

ORDERED that Mr. Vitale's motion to dismiss pursuant to CPLR §§ 3211 (a)(5) and (a)(8) is denied; and it is further

ORDERED that Mr. Vitale is directed to file an answer to the complaint within 20 days of this decision and order.

7/22/2020
DATE

ANDREW BORROK, J.S.C.

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