SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
----------X
DR. LAWRENCE LABORATORIES, LLC,

Plaintiff,

against-

DECISION & ORDER
Index No. 657241/2019

Mot. Seq. No.: 001

BOCANA, INC.,

Defendant.
----------X

O. PETER SHERWOOD, J.:

In motion sequence 001, defendant Bocana, Inc. ("Bocana") moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(8) on grounds of a defense founded on documentary evidence and lack of personal jurisdiction over Bocana. In the alternative, defendant requests dismissal on the basis of *forum non conveniens* pursuant to CPLR 327(a). For the following reasons, defendant's motion shall be denied in part and the action stayed.

As this is a motion to dismiss, the following background is taken from the complaint [NYSCEF Doc. No. 2]. Plaintiff Dr. Lawrence Laboratories, Inc. ("Dr. Lawrence") is a limited liability company organized under California law with its principal place of business in Torrance, California. The company formulates and sells "CBD oils and other related products" (Compl. ¶¶ 1, 3). Bocana, is a multi-level marketing corporation with its principal place of business in Torrance, California (*id.* ¶¶ 2, 4). On August 18, 2019, plaintiff and defendant "fully negotiated and agreed to all the terms of [a] Licensing Agreement both orally and, upon information and belief, in writing" (*id.* ¶ 6) whereby defendant acquired rights to market plaintiff's products and use its intellectual property in exchange for a 33.3% royalty fee on all commercial sales, both wholesale and retail (*id.* ¶¶ 5-6, 8, 12). Pursuant to the Licensing Agreement, plaintiff sold $750,000 worth of its products to defendant which defendant has yet to pay for (*id.* ¶ 12-14). Further, plaintiff alleges defendant made commercial sales of at least $400,000 worth of plaintiff's products since August 18, 2019 but defendant has yet to pay royalties due in the amount of $133,333 (*id.* ¶¶ 15-16). Prior to November 15, 2019, defendant became insolvent and, per a provision allowing the parties to terminate the Agreement in the event of defendant's insolvency, plaintiff terminated the Licensing Agreement by letter on November 15, 2019 (*id.* ¶¶

25-27). Plaintiff alleges three causes of action for breach of contract, accounting, and declaratory judgment.

On this motion defendant provides an unsigned document purporting to be a "Licensing Agreement" which designates California courts as the exclusive forum for disputes related to the Agreement (Def. Br. at 4, Doc. No. 4). In relevant part, the document states "[t]his Agreement shall be governed by the internal law of the State of California" and "[t]he parties hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of the State of California, County of Los Angeles and to the jurisdiction of the United States District Court for the Central District of the State of California for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement . . ." (Def. Br. at 4-5; Lammons Aff. Ex. 3, at 14, ¶ 11.13 [Doc. No. 8]). Defendant argues that, although it disputes the validity and enforceability of the Licensing Agreement, the court must take plaintiff's allegations as true on motion to dismiss and honor the forum selection clause (Def. Br. at 5-6; *Direct Mail Prod. Servs. V MBNA Corp.*, 2000 WL 1277597 at *5 [SD NY 2000]; *see also Boss v Am. Express Fin. Advisors, Inc.*, 15 AD3d 306, 307 [1st Dept 2005]; *Milmar Food Group II, LLC v Applied Underwriters, Inc.*, 61 Misc3d 812, 817-818 [NY Sup Ct Orange County 2018]).

Defendant also argues that in any event, the court should dismiss the complaint because it lacks personal jurisdiction over defendant (Def. Br. at 6-10; *see Penguin Group (USA) Inc. v Am. Buddha*, 609 F3d 30, 35 [2d Cir 2010]; *Best Van Lines, Inc. v Walker*, 490 F3d 239, 242 [2d Cir 2007]). As a corporate entity, defendant's place of incorporation and principal place of business, here Delaware and California respectively, provide the bases for general jurisdiction (Def. Br. at 7; Lammons Aff. ¶ 14, Ex. 4 [Doc. No. 9]; *Daimler AG v Bauman*, 571 US 117, 137 [2014]). Defendant is neither located nor incorporated in New York and it is not subject to general jurisdiction in New York.

Plaintiff responds that the motion to dismiss must be denied as there are disputed facts with regard to jurisdiction that must be resolved through discovery (Pl. Br. 2-3 [Doc. No. 21]; *Royalty Network, Inc.*, 638 F. Supp. 2d at 425; *Goel v Ramachandran*, 111 AD3d 783 [2d Dept 2013]; *see also Stardust Dance Prod. V Cruise Gr. Int'l*, 63 AD3d 1262, 1265 [3d Dept 2009]; *Shea v Hambro Am. Inc.*, 200 AD2d 371 [1st Dept 1944]). Plaintiff provides another version of the purported Licensing Agreement that contains a different choice of law provision. This version which bears the signature of Dr. Lawrence only, provides for jurisdiction in New York

(Lawrence Aff., Ex. A ¶ 10.13(a)-(b) [Doc. No. 20]). Plaintiff asserts it does not know the origin of defendant's version of the Licensing Agreement and, consequently, discovery will be necessary to investigate the discrepancy (Pl. Br. at 3-4; Lawrence Aff., ¶ 8 [Doc. No. 19]). It adds that the lack of a fully executed contract does not prevent jurisdiction from being determined as New York. Courts have previously held that unsigned agreements may be enforceable where evidence establishes the parties' intent to be bound, and there is evidence here that the parties intended to operate under the Licensing Agreement (though plaintiff does not specify which Agreement or cite documentary evidence) (Def. Br. at 4-5; *Flores v Lower E. Side Serv.*, 4 NY3d 363, 369 [2005]; *Brown Bros. v Beam Constr.*, 41 NY2d 397, 398 [1977]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). 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" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]).

The alleged Licensing Agreement which is the documentary evidence presented here does not resolve the jurisdiction issue. It does not represent evidence that is "(i) unambiguous and of undisputed authority, and (ii) [does not] resolve all factual issues, definitively disposing of plaintiff's claims" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]; *see also* Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Defendant's version of the Licensing Agreement is unsigned. Plaintiff's variant is similarly unexecuted and sets forth a different choice of law provision, New York. Consequently, defendant's motion pursuant to CPLR § 3211(a)(1) is denied.

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." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to

dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

Defendant's CPLR § 3211(a)(8) claim fails. Plaintiff has the burden to prove that the court has personal jurisdiction over defendant (*Marist Coll.*, 84 AD3d at 1322). Although plaintiff need not state all facts necessary to establish jurisdiction, it must show a "sufficient start" to demonstrate such facts "may exist" (*see HBK Master Fund L.P.*, 85 AD3d at 665. Here, plaintiff relies on a version of the Licensing Agreement which contains a different choice of law provision than the version presented by defendant [Doc. No. 20]. Although this evidence does not establish all facts necessary to establish jurisdiction, it is a sufficient start. Defendant's argument that plaintiff's reliance on this evidence is insufficient as it fails to meet documentary evidence standard is unavailing as the case defendant relies upon, *Karpovich v City of New York*, does not concern a plaintiff's burden under CPLR 3211(a)(8) but rather a defendant's burden on a motion to dismiss pursuant to CPLR 3211(a)(1) (*see* 162 AD3d 996, 997-998 [2d Dept 2018]). Defendant's argument that the court may properly grant dismissal in light of conflicting affidavits is similarly erroneous as defendant's case law, *In re Loukoumi, Inc.*, does not concern plaintiff's CPLR 3211(a)(8) burdens but, instead, a plaintiff's CPLR 3211(a)(7) assertion of failure to state a claim (*see* 285 AD2d 595, 596 [2d Dept 2001]). Consequently, defendant's motion pursuant to CPLR § 3211(a)(8) is denied.

Defendant argues that, should the court not apply the Licensing Agreement's forum selection clause and determine that it has personal jurisdiction over defendant, substantial justice requires the court to dismiss the action so it may be litigated in California, a "more convenient" forum (Def. Br. at 10; CPLR § 327(a); *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]; *see also Fred Simcha Wang v UBS AG*, 139 AD3d 448, 448 [1st Dept 2016]; *Sambee Corp. v Moustafa*, 216 AD2d 196, 198 [1st Dept 1995]). Defendant argues the dispute is between two California parties and litigating the matter in New York would require travel across the country that would place a substantial and unnecessary burden on defendant and its witness, especially considering the Agreement's forum clause (Def. Br at 10-11; Compl. ¶¶ 1-2; Lammons Aff, ¶ 14; Lammons Aff. Ex. 4, at 14 ¶ 11.13).

Plaintiff responds simply that the requested alternative must be denied because the Licensing Agreement provides for jurisdiction and venue and is binding on the parties (Def. Br. at 5; *Norvergence v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]).

As the party seeking dismissal on the ground of *forum non conveniens*, the defendant bears the burden of demonstrating relevant private or public interest factors which militate against accepting the litigation (*see Islamic Republic of Iran*, 62 NY2d at 479. The doctrine rests upon principles of justice, fairness, and convenience (*see id.*). Among the factors to be considered are "the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon New York courts, with no one factor controlling" (*Straville v Land Cargo, Inc.*, 39 AD3d 735, 736 [2d Dept. 2007] [internal quotation marks omitted]).

Defendant's CPLR § 327(a) claim may not be granted at this time. While the factors presented in this matter weigh generally in favor of California, they are not overwhelming: (i) the residency of both parties is California; (ii) defendant did not identify how specific witnesses would be burdened by traveling to New York or the materiality of their anticipated testimony (*see Economos v Zizikas*, 18 AD3d 392, 393 [1st Dept 2005]); (iii) depending on resolution of the conflicting agreements, California may be an adequate alternative forum; (iv) the parties do not dispute that the underlying actions appear to have taken place in California; and (v) this case does not appear to present a burden to New York courts. Although this case may be properly dismissed for *forum non conveniens*, the court declines to do so at this time as the possibility exists that this matter may ultimately be subject to a choice of law provision which would render *forum non conveniens* considerations moot (CPLR § 327(b); GBOL § 5-1402). Consequently, the court will authorize discovery limited to that issue (*see Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

It is hereby

ORDERED that defendant's motion to dismiss is denied in part and held in abeyance pursuant to discovery regarding the jurisdiction issue.

Dated: September 2, 2020

ENTER:

O. PETER SHERWOOD, J.S.C.