BHRE Group LLC v Boger
2020 NY Slip Op 33167(U)
August 12, 2020
Supreme Court, Queens County
Docket Number: 702627/20
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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BHRE Group LLC, BHRE I LLC and 404 GRAND INVESTORS LLC,

Plaintiffs

-against-

YITZHAK BOGER, YONATAN IDO YEHUDA ZVI KARL, and SHALOM MORDECHAI KARL,

Defendants.

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Index No.: 702627/20
Mot. Date: 7/21/20
Mot. Seq. 1

The following papers were read on this motion by defendants to dismiss the complaint pursuant to CPLR 3211 (a)(1) and (a)(8).

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	EF2 - EF8
Answering Affidavits - Exhibits.....	EF11-EF13
Reply Affidavits.....	EF14-EF18

Upon the foregoing papers it is ordered that the motion by defendants to dismiss the complaint, pursuant to CPLR 3211 (a)(1) and (a)(8)., is determined as follows:

Plaintiffs in this breach of contract action seek damages based on the defendants' alleged improper attempt to force the plaintiffs to distribute monies from 404 Grand Investors LLC (404 Investors or LLC) to defendants. Plaintiffs submit that such distribution would violate the terms of the LLC's Operating Agreement and be done to the detriment of the other investors in the LLC. Defendants move to dismiss the complaint based upon documentary evidence in the form of a forum selection clause in a Subscription Agreement, that directs that

any disputes concerning the contract be resolved in a court, in Tel Aviv, Israel and on the ground that the Court lacks jurisdiction over the defendants, pursuant to CPLR 3211(a)(8).

The motion is opposed by plaintiffs.

Facts

BHRE LLC, the manager of BHRE I LLC (BHRE I), syndicates investments in real estate by raising money to invest in real estate properties in and around New York City, that are managed by someone else. One such property is located at 404 Grand Street, Brooklyn, New York (the Property). As part of its process of syndicating money to purchase the Property, BHRE I raised money from a number of individual investors, which money was invested into the project through 404 Investors. In total, BHRE I raised approximately $2,251,500 for the 404 Grand Street project, from a total of approximately 34 investors. 404 Investors is run pursuant to an operating agreement (the Operating Agreement), and is bound by provisions in a Subscription Agreement, that incorporates by reference, the terms of the Operating Agreement. Defendants Yitzhak Boger (Boger), Yonatan Ido (Ido), Yehuda Zvi Karl (Yehuda) and Shalom Mordechai Karl (Shalom), comprise only four of the LLC's 34 investors and approximately 17% of the total money invested in the LLC.

In 2014, defendants Boger, Ido, Yehuda and Shalom, among others, were solicited by Ben-David and Harow, in Israel. Based on their representations, the defendants each invested substantial amounts of money in one of Ben David and Harow's numerous New York real estate investments. Each of the defendants signed a Subscription Agreement with 404 Investors.

The Subscription Agreement signed by the defendants is the primary contract governing the relationship between the Parties. Paragraph 11.9 of the Subscription Agreement provides that:

> **Governing Law.** This Subscription Agreement shall be governed by and construed in accordance with the laws of the State of Israel, without regard to conflicts of law's provisions. **Any disputes with respect hereto shall be subject to the exclusive jurisdiction of competent courts located in Tel-Aviv, Israel** (emphasis added).

Thus, the Subscription Agreement provides the court of Tel-Aviv as having exclusive jurisdiction of disputes arising between the parties. The Complaint does not mention the Subscription Agreement, rather the Complaint rests on the Operating Agreement. However the undisputed record indicates that the terms of Operating Agreement are incorporated by reference into the Subscription Agreement. Nonetheless, the Subscription Agreement clearly states that any disputes related to the subscriber's investment are the exclusive jurisdiction of the Israeli court in Tel-Aviv.

Plaintiff BHRE I is a New York limited liability company, with its principal place of business located in Rockville Centre, New York. BHR is the Manager of 404 Investors. Plaintiffs (404 Investors, BHRE Group and BHRE I) is a Delaware limited liability company with its principal place of business located in Queens, New York. Defendants all reside in Israel.

404 Investors is run pursuant to an Operating Agreement (the Operating Agreement). Pursuant to the Operating Agreement, 404 Investors is a manager-managed limited liability company and its manager is BHRE I. Also, pursuant to the Operating Agreement, each of the defendants is, except in very limited circumstances not applicable here, intentionally a passive investor in 404 Investors with no ability to control 404 Investors' operations or management. In furtherance of its role syndicating the investment to purchase the Property, BHRE I, through 404 Investors, entered into an agreement with M1 Development LLC (M1) by which 404 Investors and M1 created 404 Grand Villa LLC (404 Villa), a New York limited liability company. 404 Investors owns the overwhelming majority of membership interests in 404 Villa. 404 Villa owns the Property and is managed by Rafael Manor (Manor), the principal of M1. As the manager of 404 Villa, and consistent with BHRE I and BHRE's roles as syndicators, Manor is solely

responsible for the development of the Property and has undertaken that responsibility since the late summer/early fall of 2014. The Property itself was an existing condominium property that was re-developed and expanded by 404 Villa. Although the Operating Agreement provides for distributions to be made, the plaintiffs submit that the Operating Agreement is clear that such distributions will only be made not only after payments are received from 404 Villa, after the development of the Property, but also after various other payments that take priority over distributions, are made. The Operating Agreement also provides that certain construction fees and project management fees must be paid prior to any distribution to the members of 404 Investors.

Finally, the Operating Agreement does not require that monies be distributed to its members and leaves such a determination to 404 Investors' manager, BHRE I. Plaintiffs submit that the defendants were well aware when they invested in 404 Investors that they would not receive any distributions until such time as the Property was developed and generating cash flow. The Operating Agreement also provides 404 Investors' manager with extensive control over the operations of 404 Investors.

As an aside, it is noted that in 2019, the defendants brought suit in Israel against Harow and Ben-David, who opposed the action on grounds of improper venue, and sought to have the case removed to the United States. The Israeli Court, Judge Varda Palut, held that venue was proper in Tel Aviv. Harow and Ben-David appealed Judge Palut's ruling and the appeal was denied.

In any event, in its first cause of action in the instant case, the plaintiffs allege that defendants breached their obligations under the Operating Agreement by, among other things, improperly filing a lawsuit in Israel and liens against Mr. Harow and Mr. Ben-David, individually, and their property in attempt to interfere with BHRE I's management of 404 Investors and to the detriment of the other members of 404 Investors. The second cause of action alleges that the defendants breached their duty of good faith and fair dealing with respect to the Operating Agreement by filing the Israeli lawsuit against Mr. Harow and Mr. Ben-David in an attempt to improperly influence the control and management of 404 Investors,

to interfere with BHRE I's management of 404 Investors in order to improperly obtain preferable treatment over other members of 404 Investors. The complaint fails to mention the Subscription Agreement altogether.

Defendants move to dismiss the complaint on the grounds that the Subscription Agreement directs that adjudication of disputes concerning the contract be made in Israel, and that the court lacks jurisdiction over the defendants pursuant to CPLR 3211 (a) (8). The motion is opposed by plaintiffs.

Discussion

CPLR 3211 (a) (1) provides: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence[.]" Where, as here, a complaint's allegations are flatly contradicted by documentary evidence, such allegations are no longer entitled to the presumption to be true or accorded every favorable inference on a motion to dismiss. "Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is warranted where 'the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004] (citation omitted). Dismissal is appropriate where, as here, the parties' agreement rejects plaintiffs' allegations (*see 150 Broadway N.Y. Assocs.. L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004] ("where a written agreement unambiguously contradicts the allegations ... for breach of contract, the contract itself constitutes documentary evidence warranting dismissal.") (citations omitted); *Trataros Const., Inc. v New York City Housing Auth*., 34 AD3d 451, 452 [2d Dept 2006] ("A motion to dismiss a cause of action on the ground that it is barred by documentary evidence pursuant to CPLR 3211(a)(1) may be appropriately granted where the documentary evidence utterly refutes plaintiff's factual allegations, and conclusively establishes a defense to the asserted claim as a matter of law.") (internal citations and quotation marks omitted).

"Although once disfavored by the courts, it is now recognized that parties to

a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*Creative Mobile Tech., LLC v Smart Modular Tech., Inc.*, 97 AD3d 626, 626 [2d Dept 2012] [citation omitted]).

Parties to an agreement "may freely select a forum which will resolve any disputes over the interpretation or performance of the contract" (*Brooke Group v JCH Syndicate 488,* 87 NY2d 530, 534 [1996]). Here, the forum selection clause in the Subscription Agreement expressly mandates that Tel-Aviv, Israel, has exclusive jurisdiction over disputes arising out of the parties' contractual relationships. Such a forum selection clause is *prima facie* valid and enforceable "unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court" (*LSPA Enter., Inc. v Jani-King of N.Y., Inc.,* 31 AD3d 394, 395 [2d Dept 2006]; *see Harry Casper, Inc. v Pines Assoc., L.P.,* 53 AD3d 764, 765 [3d Dept 2008]; *Stravalle v Land Cargo, Inc.,* 39 AD3d 735 [2d Dept 2007]; *Fleet Capital Leasing/Global Vendor Fin. v Angiuli Motors, Inc.,* 15 AD3d 535 [2d Dept 2005]). "Absent a strong showing that it should be set aside, a forum selection agreement will control" (*Di Ruocco v Flamingo Beach Hotel & Casino,* 163 AD2d 270, 272 [2d Dept 1990]).

Here, the plaintiffs failed to make the requisite "strong showing" that the forum selection clause in the Subscription Agreement, which requires disputes to be decided in the courts of Tel Aviv, Israel, should be set aside (*see Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836-37 [2d Dept 2009]). Plaintiffs made no showing that the forum selection clause was "unreasonable,

unjust, in contravention of public policy, invalid due to fraud or overreaching," or "that a trial in the selected forum would be so gravely difficult that the [appellants] would, for all practical purposes, be deprived of [their] day in court" (Lifetime Brands, Inc. v Garden Ridge, L.P., 105 AD3d 1011, 1012 [2d Dept 2013]; *Best Cheese Corp. v All-Ways Forwarding Int'l. Inc.*, 24 AD3d 580, 581 [2d Dept 2005]; *see Lawrence v Graubard Miller,* 11 NY3d 588 [2008]). Thus, the branch of the defendants' motion which is to dismiss the complaint pursuant to CPLR 3211 (a) (1) on the ground that the forum selection clause in the Subscription Agreement precludes commencement of the action in New York is granted (*see Creative Mobile Tech., LLC v Smart Modular Tech., Inc.*, 97 AD3d 626, 626-627 [2d Dept 2012]).

In light of the court's determination to grant the motion to dismiss, pursuant to CPLR 3211(a) (1), it need not decide whether dismissal is also warranted, pursuant to CPLR 3211 (a) (8). In any event, the Court notes that there is insufficient information on the record for such a finding, and that limited discovery on the issue of personal jurisdiction discovery on that issue would otherwise be necessary (*see Ying Jun Chen v Lei Shi,* 19 AD3d 407, 407–408 [2d Dept 2005], quoting CPLR 3211[d] (When opposing a motion to dismiss a complaint pursuant to CPLR 3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a prima facie showing of jurisdiction, but instead "need only demonstrate that facts 'may exist' to exercise personal jurisdiction over the defendant"); *see Peterson v Spartan Indus.,* 33 NY2d 463, 467 [1974]). If "it appear[s] from affidavits submitted in opposition to [the] motion ... that facts essential to justify opposition may exist but cannot then be stated," a court may, in the exercise of its discretion, postpone resolution of the issue of personal jurisdiction (CPLR 3211[d]; *see Peterson v Spartan Indus.,* 33 NY2d at 467; *Ying Jun Chen v Lei Shi,* 19 AD3d at 407–408).

It is further noted for plaintiffs' edification, however, that "[a]n individual cannot be subject to jurisdiction under CPLR 301 unless he is doing business in New York as an individual rather than on behalf of a corporation" (*Brinkmann v*

Adrian Carriers, Inc., 29 AD3d 615, 617 [2d Dept 2006]; *see Laufer v Ostrow,* 55 NY2d 305, 313 [1982]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the branch of the defendants' motion, which is to dismiss the complaint pursuant to CPLR 3211 (a) (1), on the ground that the forum selection clause in the Subscription Agreement precludes commencement of the action in New York, is granted; and it is further

ORDERED, that the branch of the defendants' motion, which is to dismiss the complaint, pursuant to CPLR 3211(a) (8), is denied, as academic, in light of the Court's finding that the forum selection clause mandates adjudication of the contract dispute in Israel.

Dated: August 12, 2020

TIMOTHY J. DUFFICY, J.S.C.

FILED
8/14/2020
05:11 PM
COUNTY CLERK
QUEENS COUNTY