Melrose Assoc. L.P. v Floral Assoc. L.P.
2021 NY Slip Op 31827(U)
May 28, 2021
Supreme Court, New York County
Docket Number: 651323/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MELROSE ASSOCIATES LIMITED PARTNERSHIP,

Plaintiff,

- v -

FLORAL ASSOCIATES LIMITED PARTNERSHIP, JOSEPH CEFALO, FREDERICK CEFALO, STEPHEN CEFALO

Defendant.

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INDEX NO. 651323/2020

MOTION DATE 07/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Floral Associates Limited Partnership (**Floral**), Joseph T. Cefalo, Frederick W. Cefalo, and Stephen R. Cefalo's (collectively, the **Cefalos**, together with Floral, the **Defendants**) motion to dismiss is denied. There is long-arm jurisdiction over the Defendants pursuant to CPLR § 302 (a)(1) because this dispute arises out of the failure to make distributions in accordance with the 2018 Agreement (hereinafter defined) which 2018 Agreement was obtained by the Defendants who purposefully availed themselves of the New York forum by obtaining Melrose Associates Limited Partnership (the **Plaintiff**) execution of the same and consent to the transaction. Dismissal is also denied under the forum selection clause designating the federal court of Massachusetts because the Federal Court (hereinafter defined) has already held that diversity jurisdiction does not exist and no federal question is implicated. Finally, forum non conveniens does not support dismissal because the Plaintiff is a New York

limited partnership, there is little burden on this court, no hardship to the Defendants, and there exists a substantial nexus between this state and the action.

The Relevant Facts and Circumstances

This action concerns the Defendants' alleged failure to make certain distributions to the Plaintiff after the sale of an apartment complex located at 245 West Wyoming Avenue, Melrose, Massachusetts (the **Property**). Floral is a limited partnership formed in Massachusetts for the purpose of acquiring the Property (NYSCEF Doc. No. 2, ¶ 3). The Cefalos are general partners of Floral that reside in Massachusetts. The Plaintiff is a New York limited partnership with its principal place of business in New York, New York. The Plaintiff's general partner is Melrose Corp., a New York corporation.

Reference is made to an Amended and Restated Agreement of Limited Partnership of Floral Associates Limited Partnership (the **LP Agreement**; NYSCEF Doc. No. 13), dated March 8, 1983, pursuant to which the Plaintiff has a 96% interest in Floral as a limited partner and the Cefalos have a 4% interest in Floral as limited and general partners (NYSCEF Doc. No. 9, ¶¶ 9-10). The LP Agreement provided that distributions of net cash receipts would be allocated among the partners in accordance with their respective partnership interests (*id.*, § 6[c][ii]). The Plaintiff and Cefalos were also each entitled to 50% of the balance of any funds from the sale proceeds of the Property (*id.*, § 6[d][3][c]). The Cefalos, as general partners, required the consent of the Plaintiff, the limited partner, to sell the Property (*id.*, § 12[e]). The parties agreed that the LP Agreement would be interpreted by Massachusetts law (*id.*, § 36). The LP Agreement did not contain a forum selection clause.

On July 19, 2018, Joseph Cefalo emailed Ephraim Fruchthandler, Secretary of Melrose Corp., in New York advising of an offer to purchase the Property (NYSCEF Doc. No. 22, ¶ 5). By letter dated August 7, 2018, Joseph Cefalo wrote to Melrose Corp. at its New York address to formally solicit its consent to the sale and the parties discussed the same by telephone and e-mail between New York and Massachusetts (NYSCEF Doc. No. 24; NYSCEF Doc. No. 22, ¶¶ 8-9). On September 14, 2018, Floral entered into an agreement to sell the Property to non-party, BC Melrose LLC (the **Sale**) (NYSCEF Doc. No. 9, ¶¶ 23-25). The Defendants obtained the Plaintiff's formal consent for the sale pursuant to an agreement (the **2018 Agreement**; NYSCEF Doc. No. 14), dated October 30, 2018, by and between the Plaintiff and Floral, whereby Floral agreed to distribute 50% of net sale cash proceeds to the Plaintiff in accordance with the LP Agreement (*id.*, § 1[a]). The 2018 Agreement provided that Massachusetts law governed and that enforcement was to be brought in "the Federal Court District of Massachusetts, Boston" (*id.* at 2).

The Sale closed on April 5, 2019 for $32,240,000 (NYSCEF Doc. No. 9, ¶ 27). The Defendants calculated the Plaintiff's share of distributions to be $8,088,763 which was disbursed (*id.*, ¶ 29). Upon review of the final calculations from the Sale and an audited financial statement, the Plaintiff claims that it is entitled to over $1,300,000 of additional payment because the Defendants incorrectly charged and deducted certain items to their benefit (*id.*, ¶¶ 29-36).

On February 27, 2020, the Plaintiff commenced this action alleging claims including breach of the LP Agreement. On April 9, 2020, the Defendants filed a notice of removal that removed the

action to the United States District Court for the Southern District of New York (the **Federal Court**; NYSCEF Doc. No. 27). Pursuant to an opinion and order, dated May 21, 2020, the Federal Court remanded the case to state court because there was neither diversity of citizenship nor a federal question to ground subject matter jurisdiction (the **2020 Decision**; NYSCEF Doc. No. 33). On June 22, 2020, the Plaintiff filed an amended complaint and the Defendants responded with the instant motion to dismiss for lack of jurisdiction.

Discussion

A. There is Personal Jurisdiction Under CPLR § 302 Because the Defendants Conducted Purposeful Activity with the Plaintiff in New York During the Execution of the 2018 Agreement

Pursuant to CPLR § 302 (a)(1), a court may exercise 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]). In other words, 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, id.*). Electronic communications are sufficient to establish jurisdiction if used by the defendant to deliberately project itself into a business transaction occurring in New York (*Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 21 AD3d 90, 94 [1st Dept 2005]).

The Defendants' electronic communications to the Plaintiff concerning the 2018 Agreement are sufficient to ground jurisdiction under CPLR § 302 (a)(1). Inasmuch as the Defendants argue that there was no transaction of business in this state because the Sale occurred in Massachusetts,

the gravamen of this action is not the Sale itself, but the Defendants' alleged failure to make appropriate distributions to a New York limited partnership with a 96% interest in Floral. The Defendants here engaged in purposeful activity with the Plaintiff to obtain its necessary consent for the Sale. In particular, the Defendants confirmed its obligation to make distributions to the Plaintiff in exchange for the Plaintiff's consent to the Sale in the 2018 Agreement. There also exists a substantial relationship between the Defendants' 2018 communications with Plaintiff in New York and the alleged breach of the very obligations that were discussed and confirmed pursuant to the 2018 Agreement. Accordingly, the branch of the Defendants' motion to dismiss for lack of personal jurisdiction under CPLR § 302 (a)(1) is denied.

B. The Forum Selection Clause Does Not Mandate Dismissal Because It Cannot Be Enforced

It is the policy of the courts to enforce forum selection and choice of law clauses (*Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]). However, a forum selection clause may be invalidated where a plaintiff shows that its enforcement is "unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching" (*Boss v Am. Express Fin. Advisors, Inc.*, 15 AD3d 306, 307-308 [1st Dept 2005]).

The parties do not dispute that the choice of law provision regarding Massachusetts law should prevail as set forth in the LP Agreement and the 2018 Agreement. Thus, Massachusetts law applies to govern substantive issues in the case. To the extent that the Defendants argue that the Massachusetts choice of law provision should determine the interpretation and enforceability of

the forum selection clause, this is a procedural issue to which the law of the forum applies – i.e., New York law (*Intercontinental Planning, Ltd. v Daystrom, Inc.*, 24 NY2d 372, 381 [1969]).[1]

The forum selection clause in the 2018 Agreement provides that enforcement will occur "in the Federal Court District of Massachusetts, Boston" (NYSCEF Doc. No. 14 at 2). The Defendants argument that the clause encompasses both federal and state courts within the geographical area of the Massachusetts fails. The plain language of the agreement contemplates only litigation in federal court. However, as discussed above, the Federal Court has held that the federal courts lack subject matter jurisdiction to hear this dispute (NYSCEF Doc. No. 33). Accordingly, the branch of the Defendants' motion to dismiss pursuant to the forum selection clause is denied.

C. Forum Non Conveniens Also Does Not Favor Dismissal Because the Balance of Factors Favor Litigation in New York

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, the unavailability of an alternative forum in which the plaintiff may bring suit, the residency of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction (id.). 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

[1] In any event, the parties do not identify any conflict of laws between New York and Massachusetts concerning the interpretation and enforcement of a forum selection clause.

York and the action is lacking (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]).

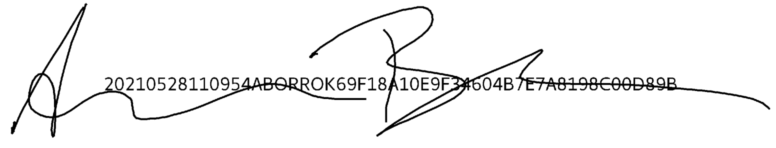
Although the fact that the Plaintiff is a New York limited partnership is not a dispositive, it is a significant factor in the analysis (*see Bacon v Nygard*, 160 AD3d 565, 566 [1st Dept 2018]). This litigation also poses little burden on the court, which is accustomed to applying the laws of foreign jurisdictions (*see Anagnostou v Stifel*, 204 AD2d 61, 62 [1st Dept 1994]). Inasmuch as the Defendants claim that a New York forum would be inconvenient for its non-party witnesses that reside in Massachusetts, the record does not indicate that any of these witnesses are not within the Defendants' control or would be unwilling to testify absent a court-ordered subpoena (*see Kronengold v Hilton Hotels Corp.*, 166 AD2d 325, 326 [1st Dept 1990] [defendant's list of non-party witnesses located outside of New York did not compel conclusion that New York would be an inconvenient forum]). Otherwise, the convenience to the parties is a neutral factor because the Plaintiff and Defendants' witnesses are located in New York and Massachusetts respectively. Finally, there exists a substantial nexus between New York and the action because the Defendants reached into New York and confirmed the its obligation to make distributions to the Plaintiff under the 2018 Agreement, which obligation is presently in dispute. Accordingly, the branch of the Defendants' motion to dismiss pursuant to the doctrine of forum non conveniens is denied.

Accordingly, it is

ORDERED that the Defendants' motion to dismiss is denied; and it is further

ORDERED that Defendants shall file an answer within 20 days from this decision and order; and it is further

ORDERED that the parties shall appear for a remote preliminary conference on June 25, 2021 at 12:30pm.



5/28/2021		ANDREW BORROK, J.S.C.	
DATE			
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE