

<b>Pirs Capital, LLC v Mentour Corp.</b>
2022 NY Slip Op 30286(U)
January 27, 2022
Supreme Court, New York County
Docket Number: Index No. 655661/2020
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK NERVO PART 04**

*Justice*

-----X

PIRS CAPITAL, LLC,

Plaintiff,

- v -

MENTOUR CORPORATION, VIJAY RAJU, SUMANTH  
NEELAM

Defendant.

-----X

INDEX NO. 655661/2020

MOTION DATE 12/29/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISSAL.

This matter was transferred to Part IV.

Defendants move to dismiss the complaint, alleging that the Court lacks general and personal jurisdiction, and that New York is an inconvenient forum and venue.

It is inarguable that the parties consented to the jurisdiction of New York courts. Section 4.5 of the parties' agreement, entitled "Binding Effect: Governing Law, Venue, and Jurisdiction," states, in pertinent part:

This Agreement shall be covered by and construed in accordance with the laws of the State of New York ...

Any suit, action or proceeding arising hereunder, or the interpretation, performance or breach hereof, shall, if Purchaser so elects, be instituted in any court sitting in New York, (the “Acceptable Forums”). ***Merchant agrees that the Acceptable Forums are convenient to it, and submits to the jurisdiction of the Acceptable Forums and waives any and all objections to jurisdiction or venue.***

(NYSCEF Doc. No. 11 at § 4.5 [emphasis supplied])

It is well established that jurisdiction over a defendant may be acquired by the defendant’s consent, “this consent may be given either before or after action has been brought” (*Gilbert v. Burnstine*, 255 NY 348, 354 [1931]; see e.g. *Banco do Commercio e Industria de Sao Paolo v. Esusa Engenharia e Construcoes*, 173 AD2d 340 [1st Dept 1991]). Accordingly, to the extent that defendants now contend New York courts are inconvenient or otherwise lack general jurisdiction to hear this matter, such claims are entirely baseless upon even a cursory reading of the parties’ contract agreeing and consenting to the jurisdiction and venue of New York courts.

Defendants seek attorney’s fees and costs, contending that plaintiff improperly brought this action in New York. Likewise, plaintiff, in opposing this motion, has sought attorney’s fees and costs for same. Given that the

parties have each requested attorney's fees on the basis of frivolous motion practice, the Court finds that the parties have adequately briefed the issue of frivolity, under 22 NYCRR § 130. The Court finds that defendants' motion is entirely devoid of merit, defendants failed to disclose the parties' agreement consenting to jurisdiction, defendants failed to withdraw this motion upon plaintiff's evidence conclusively establishing defendants consented to jurisdiction, and defendants have not opposed plaintiff's request for fees. Consequently, the Court finds defendants' instant motion frivolous and a waste of resources, in violation of 22 NYCRR § 130. As a sanction for such frivolous conduct, the Court awards plaintiff attorney's fees.

To the extent that defendants contend they are afforded 10 days following the instant decision and order to answer the complaint, pursuant to CPLR § 3211(f), they are mistaken. CPLR § 3211(f) is applicable only where the time to serve a responsive pleading has not yet run; here, defendants' § 3211 motion is untimely.

Notwithstanding, the Court deems defendants' § 3211(f) request a motion to compel the acceptance of an untimely answer pursuant to CPLR § 3012(d). CPLR § 3012(d) provides the Court discretion to compel the acceptance of an

untimely answer “upon such terms as may be just and upon a showing of reasonable excuse for delay.” Where a defaulting party moves to compel acceptance of the answer, it is within the discretion of the Court to “assess the sufficiency of the ... submission” (*Castillo v. Garzon-Ruiz*, 290 AD2d 288, 290 [1st Dept 2002]). As the parties have not had an opportunity to be heard on § 3012(d), and given the strong preference for adjudicating matters on the merits, it is hereby

ORDERED that to the extent the motion seeks to file an untimely answer, defendants shall serve, via NYSCEF, their proposed answer(s) to the complaint on or before February 11, 2022; and it is further

ORDERED that should plaintiff oppose the late answer(s), it shall show cause why an order should not be entered compelling acceptance of defendants’ untimely answer(s) pursuant to CPLR § 3012(d) on March 7, 2022, or as soon thereafter as the parties may be heard, *via paper submissions only*, as below; and it is further

ORDERED that plaintiff’s papers in opposition, if any, shall be served upon defendants via NYSCEF no later than February 25, 2022; and it is further

ORDERED that defendants' papers in support, if any, shall be served via NYSCEF no later than March 4, 2022; and it is further

ORDERED there shall be no reply or further submissions on the order to show cause; and it is further

ORDERED that plaintiff's counsel shall file, via NYSCEF with courtesy copy to chambers, a detailed recitation of the work performed in opposing the instant dismissal motion no later than February 11, 2022, or the award of such fees shall be deemed waived; and it is further

ORDERED that defendant shall submit opposition as to the amount of plaintiff's counsel's fees only, and not as to the award of fees in principle, via NYSCEF with courtesy copy to chambers on or before February 18, 2022; and it is further

ORDERED that should plaintiff consent to the late service of the defendants' proposed answer(s), or should defendants consent to the attorney's

fees submitted by plaintiff, as above, the parties shall file, via NYSCEF, a stipulation so stating on or before February 18, 2022; and it is further

ORDERED that to the extent the motion seeks dismissal it is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

01/27/2022

DATE

  
FRANK NERVO J.S.C.

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