SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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YACHT HAVEN USVI LLC,

Plaintiff,

- v -

THE WEST INDIAN COMPANY LIMITED,

Defendant.

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INDEX NO. 656409/2019

MOTION DATE 01/16/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, and 53 were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is ordered that the motion to dismiss the complaint is granted per the following memorandum.

In this action to recover damages for breach of contract and for injunctive relief, the defendant moves, pursuant to CPLR 3211 (a) (3) and (a) (8), to dismiss the complaint for lack of legal capacity and personal jurisdiction, or in the alternative, pursuant to CPLR 327 on the ground of *forum non conveniens*. Defendant opposes the motion. For the following reasons, the motion is granted, and the complaint is dismissed pursuant to CPLR 3211 (a) (8) and CPLR 327.

BACKGROUND

The Yacht Haven Grande is a luxury mixed-use waterfront development near the City of Charlotte Amalie, on the Island of St. Thomas, U.S. Virgin Islands (USVI). It consists of a mega-yacht marina, condominiums, restaurants, offices, and retail shopping malls. Plaintiff, a USVI limited liability company with its principal office in New York City, is the developer, owner, and operator of the Yacht Haven Grande.

In this action plaintiff alleges that defendant, a USVI company with its principal office in the USVI, has actively undermined the financial viability of the Yacht Haven Grande. Plaintiff contends that defendant breached its obligation under a lease agreement with plaintiff, pursuant to which defendant agreed to support the project and take no action detrimental to it.

By way of background, on February 1, 2002, plaintiff's predecessor in interest, PRM Caribbean LLC (PRM), entered into a Development and Lease Agreement (the "Original Lease") with defendant to lease certain parcels of hurricane-damaged property on which the Yacht Haven Grande was to be constructed (NYSCEF Doc. No. 28). Pursuant to the lease, plaintiff agreed, at its sole expense, to "construct buildings, a marina and common area improvements on" the leased property "and also to renovate or construct new buildings on" PRM's adjacent property, replacing an existing dilapidated hotel with a high-end resort and renovated marina (*id.* at 2).

PRM and defendant both agreed to "cooperate with respect to, and support, the Project" (*id.* at 13, ¶ 5 [10]). They further agreed to take no "action or make any statement detrimental to or against the Project" and that defendant's "support of the Project shall include its public support at, and with respect to, all hearings, press releases, presentations and other dealings with the Government and the general public" (*id.*).

On July 9, 2002, PRM and plaintiff entered into an Assignment, Assumption and Consent Agreement (the "Assignment"), whereby PRM assigned to plaintiff all of PRM's rights under the Original Lease and plaintiff assumed all of PRM's obligations under that agreement (NYSCEF Doc. No. 44). Defendant consented to the assignment in writing (*id.*). That same day, plaintiff and defendant executed a Landlord Consent and Amendment to Development and Lease Agreement (the "Landlord Consent"), pursuant to which defendant again consented to the

assignment and both parties agreed to amend certain provisions of the Original Lease (NYSCEF Doc. No. 45). The parties further amended the lease by agreements dated December 31, 2002, November 19, 2003, and October 20, 2004.

On August 1, 2012, the parties agreed to divide the Original Lease into two separate leases. To that end, they executed two Amended and Restated Development and Lease Agreements; one for the "Upland" and one for the "Marina" portions of the property (the "Bifurcated Leases") (NYSCEF Doc. Nos. 30, 31). Like the Original Lease, the Bifurcated Leases included a provision whereby the parties agreed to "cooperate with respect to, and support, the Project," to take no "action or make any statement detrimental to or against the Project," and that defendant's "support . . . shall include its public support at, and with respect to, all hearings, press releases, presentations and other dealings with the Government and the general public" (*id.* at 13, ¶ 5 [10]). The Bifurcated Leases state that they supersede and replace the Original Lease (*id.* at 3).

The Instant Action

On October 30, 2019, plaintiff commenced this action against defendant alleging, that while plaintiff invested in excess of $150 million in the Yacht Haven Grande project, defendant actively and intentionally undermined the financial viability of the project (*see*, Complaint [NYSCEF Doc. No. 4]). Specifically, plaintiff alleges that defendant erected a number of physical barriers blocking access to the Yacht Haven Grande (*id.*, ¶¶ 74-76); interfered with the development of reasonable transportation to the site (*id.*, ¶¶ 87-102); and prohibited signage and advertising for the Yacht Haven Grande (*id.*, ¶¶ 77-86).

Plaintiff further alleges that defendant has diverted cruise ships, taxis, and foot traffic away from the Yacht Haven Grande towards a competitor mall – the Havensight Mall – which is

owned by the Government Employee's Retirement System (GERS) and managed by defendant (*id.*, ¶ 9). Plaintiff alleges that defendant entered into an agreement with GERS that requires defendant to favor the Havensight Mall over the Yacht Haven Grande (*id.*, ¶¶ 118-122).

In addition, plaintiff alleges that defendant is a public entity operating on behalf of the USVI government and that members of that government have a "direct and personal interest in the success of GERS, as do [defendant] and its officers and employees" (*id.*, ¶ 12). Plaintiff asserts that it intends to prove that defendant and GERS, "at the express direction coming from the highest levels of the USVI Government, have engaged in actions that . . . are overtly hostile to private enterprise and investments from parties outside of the USVI generally, and, specifically, are and were in direct violation of and in breach of [defendant's] express contractual obligations to" plaintiff (*id.*, ¶ 11).

Additionally, plaintiff claims that in December 2014, defendant announced its intent to construct a new competing cruise ship pier and then filed a permit to build the pier on land that defendant already demised to plaintiff, as well as on land that plaintiff is currently leasing from the USVI Department of Planning and Natural Resources (*id.*, ¶¶ 105-108). Plaintiff claims that if constructed, the new pier – known as the Long Bay Landing Pier Project – would impede access to, and navigation in and around, the Yacht Haven Grande marina and have a material impact on the view available from the property (*id.*, ¶ 109). Plaintiff alleges that by placing the additional cruise ship pier on land demised to plaintiff, defendant would be denying plaintiff its right to develop that land as part of its next phase of development of the Yacht Haven Grande project.

In the complaint, plaintiff asserts the following causes of action: breach of contract; breach of the covenant of good faith and fair dealing; tortious interference with prospective

business relations; and violation of section 1503 (2) of the Virgin Islands Antimonopoly Law, which prohibits any "contract, combination or conspiracy" that "unreasonably restrain[s] trade or commerce" (V.I. Code Ann. tit. 11, § 1503 [2]). Plaintiff also seeks to permanently enjoin defendant from entering into management agreements with GERS or otherwise continuing a commercial relationship with GERS and the Havensight Mall.

In lieu of answering, defendant now moves pursuant to CPLR 3211 (a) (3) (a) (8) to dismiss the complaint for lack of legal capacity and personal jurisdiction, or in the alternative, pursuant to CPLR 327 on the ground of *forum non conveniens*.

DISCUSSION

Personal Jurisdiction

When opposing a motion to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction, the plaintiff "has the burden of demonstrating satisfaction of statutory and due process prerequisites" (*Matter of James v iFinex Inc*., 185 AD3d 22, 28-29 [1st Dept 2020] [internal quotation marks and citation omitted]). "The facts alleged in the complaint and affidavits in opposition to such a motion to dismiss are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff" (*Nick v Schneider*, 150 AD3d 1250, 1251 [2d Dept 2017]).

Here, in opposing defendant's motion, plaintiff contends that personal jurisdiction can be exercised under New York's long-arm statute, CPLR 302.[1] As relevant here, CPLR 302 (a) (1) provides that "a court may exercise personal jurisdiction over any non-domiciliary . . . who . . . transacts any business within the state" (CPLR 302 [a] [1]). The inquiry in this regard "is twofold: under the first prong the defendant must have conducted sufficient activities to have

[1] Plaintiff does not argue that there is a basis for general jurisdiction under CPLR 301 (*see*, Plaintiff's Opp. Mem. [NYSCEF Doc. No. 47] at 13 n 6).

transacted business in the state, and under the second prong, the claims must arise from the transactions" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016], *rearg denied* 28 NY3d 1161 [2017]). "As to the 'sufficient activities' requirement, jurisdiction is proper . . . so long as the defendant's activities here were purposeful[,]" meaning, those activities "with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Nick v Schneider*, 150 AD3d at 1252 [internal quotation marks and citations omitted]). "Determining purposeful availment is an objective inquiry, [which] always requires a court to closely examine the defendant's contacts for their quality" (*Rushaid v Pictet & Cie*, 28 NY3d at 323 [internal quotation marks and citations omitted]).

"To satisfy the second prong of CPLR 302 (a) (1) . . . , there must be an articulable nexus . . . or substantial relationship . . . between the business transaction and the claim asserted" (*id.* at 329 [internal quotation marks and citations omitted]). This is a "relatively permissive" inquiry, inasmuch as "[t]he claim need only be in some way arguably connected to the transaction" (*id.* [internal quotation marks and citations omitted]).

"Exercise of personal jurisdiction under CPLR 302 (a) (1) must also comport with federal due process" (*D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 299 [2017]). In order to do so, the assertion of personal jurisdiction must be predicated on "minimum contacts with the forum state such that the defendant should reasonably anticipate being haled into court there, and second, that the prospect of having to defend a suit in New York comports with traditional notions of fair play and substantial justice" (*id.* at 300 [internal quotation marks and citations omitted]).

Here, in asserting jurisdiction, plaintiff relies on the fact that the Assignment and the Landlord Consent were both executed in New York. Plaintiff further relies on the fact that New York was the location for several meetings between the parties held "in furtherance of" their "contractual relationship." In addition, plaintiff contends that defendant has retained a financial advisor based in New York. Plaintiff asserts that this is enough to satisfy New York's long-arm statute and due process.

In moving to dismiss the complaint, defendant contends that plaintiff cannot establish the quality of contacts with New York necessary to sustain jurisdiction under New York's long-arm statute. Defendant points out that it is a USVI entity with its sole principal place of business in the USVI. It only does business in the USVI and is not registered to do business in New York. It does not employ anyone who resides in New York; does not advertise in New York; does not own, use, or possess any assets in New York; holds no bank accounts in New York; does not provide services or derive substantial revenue in New York; and does not maintain any operations in New York.

Defendant further asserts that the Original Lease and the Bifurcated Leases were negotiated by the parties' respective USVI attorneys in the USVI and executed in the USVI. Defendant contends that while the complaint also alleges that plaintiff was present in New York for at least six meetings that occurred between February 4, 2013, and May 12, 2015, these meetings involved discussion about the unrealized Long Bay Landing Pier Project or were incidental to the parties' already existing contractual relationship. Defendant maintains, therefore, that those New York meetings do not amount to the type of continuous and systematic activity that would make it reasonable to require defendant to defend itself in New York, especially where there is no alleged relationship between New York and the claims in this action.

In addition, defendant highlights that in 2012 and 2013, the parties entered into a series of related contracts for, *inter alia*, reciprocal easements for pedestrian access between their respective properties, and for the enhancement of the shuttle service, taxi services, and visitor welcome services to promote their respective USVI business activities (NYSCEF Doc. Nos. 32, 33). Defendant points out that one of these agreements is expressly governed by USVI law, with St. Thomas as the parties' selected venue for litigation (NYSCEF Doc. No. 33).

The court finds that it does not have personal jurisdiction over the defendant under CPLR 302 (a) (1). Defendant does not dispute that the Assignment and the Landlord Consent were both *executed* in New York. However, merely executing a contract in New York is not sufficient to satisfy the transaction-of-business prong of the statute (*see Presidential Realty Corp. v Michael Sq. W., Ltd*., 44 NY2d 672, 673-674 [1978]; *Standard Wine & Liq. Co. v Bombay Spirits Co*., 20 NY2d 13, 17 [1967]; *Abbate v Abbate*, 82 AD2d 368, 384 [2d Dept 1981]). Plaintiff's reliance on *Wilson v Dantas*[2] in this regard is misplaced. In that case, the Appellate Division, First Department, held that New York courts could exercise long-arm jurisdiction over defendants based on the establishment of a foreign investment program where the *operative* contracts establishing the program were not only executed in New York, *but also negotiated* in New York (*Wilson v Dantas*, 128 AD3d 176, 179 [1st Dept 2015], *affd* 29 NY3d 1051 [2017]). In that case, the court distinguished the "'purely ministerial' act of merely executing a contract in New York that had been negotiated elsewhere," and noted that merely executing a contract in New York "would likely be insufficient to confer personal jurisdiction" (*id*. at 183). Here, defendant asserts that these documents were negotiated in the USVI and plaintiff fails to allege specific facts from which it may be inferred that they were negotiated in New York. Therefore,

[2] 128 AD3d 176 (1st Dept 2015), *affd* 29 NY3d 1051 (2017).

Wilson v Dantas (*supra*) does not support plaintiff's position. Moreover, it is undisputed that the Bifurcated Leases – which are the operative agreements alleged to have been breached in this case – were negotiated by the parties' respective USVI attorneys in the USVI and executed in the USVI.

Plaintiff alleges, and defendant acknowledges, that at least six meetings between the parties were held in New York between February 4, 2013, and May 12, 2015, and that those meetings "were to discuss the parties' contractual issues and the unrealized cruise ship pier project in the U.S. Virgin Islands" (Defendant's Mem. [NYSCEF Doc. No. 23] at 12; Counsel's Moving Affirm. [NYSCEF Doc. No. 24] ¶ 22). However, it is the quality, not the quantity, of a defendant's New York contacts that is the primary consideration (*see Paterno v Laser Spine Inst.*, 24 NY3d 370, 378 [2014]; *Fischbarg v Doucet*, 9 NY3d 375, 380 [2007]). "[T]o establish jurisdiction in New York based on a meeting or meetings in that state, the meeting or meetings must be essential to the formulation of a business relationship" (*Serface Care, Inc. v Berry Good Labs, LLC*, 2021 WL 2287107 at *7, 2021 NY Slip Op 31900 [U] at **14 [Sup Ct NY County 2021], quoting *Kforce Inc. v Foote*, 33 Misc 3d 1201 [A] [Sup Ct, NY County 2011], quoting *United Computer Capital Corp. v Secure Prods., L.P.*, 218 F Supp 2d 273, 278 [ND NY 2002]). Where a New York meeting is not held "'for the purpose of initiating or forming a relationship, but is to alleviate problems under a pre-existing relationship, New York courts have declined to assert jurisdiction'" (*id.*, quoting *United States Theatre Corp. v Gunwyn/Lansburgh Ltd. Partnership*, 825 F Supp 594, 596 [SD NY 1993], citing *McKee Electric Co. v Rauland-Borg Corp.*, 20 NY2d 377 [1967]; *see Greco v Ulmer & Berne L.L.P.*, 23 Misc 3d 875, 889 [Sup Ct NY County 2009] ["In addition, meetings in the forum state that are exploratory, unproductive, or insubstantial are insufficient to establish requisite contacts with the state"). Here, plaintiff

does not allege that these meetings were held for the purpose of forming or initiating a relationship and, as defendant points out, the meetings were held after the agreements at issue were signed. Nor are there any alleged facts indicating that these discussions involved negotiations that "advanced the business relationship to a more solid level" (*ICC Primex Plastics Corp. v LA/ES Laminati Estrusi Termoplastici S.P.A.*, 775 F Supp 650, 655 [SD NY 1991]).

In addition, "the Court of Appeals has long held that meetings within New York related to transactions outside of New York are not alone sufficient to confer jurisdiction" (*Dizengoff v Hine Bldrs., LLC*, 2017 WL 2210113 at *3, 2017 NY Slip Op 31090 [U] at ** 7 [Sup Ct NY County 2017], citing *Presidential Realty Corp. v Michael Sq. W. Ltd*, 44 NY2d 672, 673 [1978]). These meetings related to transactions outside of New York.

As to the allegation that defendant conferred with a New York based financial advisor, there are no facts alleged from which it may be inferred that those meetings had an "articulable nexus" to the plaintiff's claims against defendant in this action (*D&R Global Selections, S.L.*, 29 NY3d at 298-299 [2017]).

Finally, contrary to the plaintiff's contention, it fails to demonstrate that facts may exist requiring discovery on the issue of personal jurisdiction so as to postpone resolution of the issue. Thus, defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (8) on the ground of lack of personal jurisdiction is granted.[3]

CONCLUSION

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted, and the complaint is, therefore, dismissed; and it is further

[3] Because this court dismisses the action for lack of personal jurisdiction over the defendant, it proceeds no further to address defendant's additional arguments regarding *forum non conveniens* and lack of capacity to sue.

ORDERED that the clerk is directed to enter judgment dismissing the complaint and to mark the case disposed.

This constitutes the decision and order of the court.

ENTER:

5/16/2022
DATE

LOUIS L. NOCK, J.S.C.

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