

Kennedy Lewis Inv. Mgt., LLC v StimQ Med. LLC

2023 NY Slip Op 31534(U)

May 4, 2023

Supreme Court, New York County

Docket Number: Index No. 653767/2022

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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KENNEDY LEWIS INVESTMENT MANAGEMENT, LLC,

Plaintiff,

- v -

STIMQ MEDICAL LLC, LAURA TYLER PERRYMAN, LTP
LIMITED LLC

Defendant.

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INDEX NO. 653767/2022

MOTION DATE 05/02/2023

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, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for DISMISSAL.

Defendants Perryman and LTP Limited LLC (collectively, “Movants”)’s motion to dismiss is granted in part and denied in part.

Background

Plaintiff is an investment advisory firm that provides investment services to pension plans and other entities. It claims that this case relates to the alleged conduct of defendant Perryman. Plaintiff argues that Perryman fraudulently induced it into extending \$20 million in financing (via a loan) and to invest \$10 million to purchase shares in an entity called Stimwave Technologies Inc. (“Stimwave”); Perryman was, at the time, CEO of Stimwave. Defendant LTP Limited LLC (“LTP”) is purportedly an entity controlled by Perryman. Defendant StimQ Medical LLC (“StimQ”) is a subsidiary of Stimwave.

Plaintiff insists that Perryman was placed on a leave of absence from Stimwave due to alleged accounting irregularities. It insists that she misrepresented Stimwave’s financial

condition during the loan negotiations and that these alleged misrepresentations became the focus of a U.S. Department of Justice investigation. Plaintiff maintains that Perryman later resigned from her role with Stimwave. Plaintiff brings three causes of action: for fraud and civil conspiracy against all defendants, for malicious prosecution against defendant Perryman and for declaratory relief.

Movants claim that Perryman was CEO of Stimwave, a medical device company, from 2010 through 2019 before that entity declared bankruptcy. Plaintiff (and its successors) later acquired a 100% ownership interest in the assets of Stimwave before, according to Movants, plaintiff ousted Perryman from her executive role and commenced lawsuits in Delaware, Florida, California and now in New York.

In this motion Movants seek to dismiss on numerous grounds. They contend that this action should be dismissed because there is no personal jurisdiction over Perryman or LTP. Movants insist that Perryman lives in Florida while LTP is a Bahamian company, and both parties lack minimum contacts with New York. Movants also claim that dismissal is appropriate because there is another action pending between the same parties arising out of the same issues in Delaware. That lawsuit, according to Movants, is now three years old, although they admit that StimQ is not a party. Movants argue, nevertheless, that StimQ is the subject matter of that lawsuit because the parties are disputing (along with many other issues) minority stock ownership rights in StimQ. They also argue that the complaint fails to state a cause of action and that plaintiff lacks the capacity to bring this case as it is an unregistered foreign LLC without the proper certificate of authority.

Personal Jurisdiction

Movants argue that the Court lacks jurisdiction over them because Perryman is from Florida and LTP is an LLC organized under the laws of the Bahamas. They point out that the basis for jurisdiction in the complaint merely alleges that jurisdiction flows from CPLR 301 and 302 without any complementary allegations.

In opposition to this point, plaintiff contends that Movants consented to jurisdiction in New York via a forum selection clause in the loan agreement. It argues that this provision binds Perryman, since she was the CEO of Stimwave at the time. Plaintiff argues that the forum selection clause should be interpreted to encompass claims beyond those seeking contractual interpretation and should reach plaintiff's claims for fraud and malicious prosecution.

In reply, Movants argue that another agreement that forms the basis of this claim—a stock purchase agreement—contains a Delaware forum selection clause. However, that agreement was not included with Movants' papers.

“A ‘closely related’ analysis requires that the relation of the parties be such as to make application of the clause foreseeable, rendering a separate minimum-contacts analysis unnecessary. It is a general principle that only the parties to a contract are bound by its terms. . . . A non-signatory may also be bound by a forum selection clause where the non-signatory and a party to the agreement have such a ‘close relationship’ that it is foreseeable that the forum selection clause will be enforced against the non-signatory. The rationale for binding non-signatories is based on the notion that forum selection clauses ‘promote stable and dependable trade relations,’ and thus, that it would be contrary to public policy to allow non-signatory entities through which a party acts to evade the forum selection clause” (*Highland Crusader*

Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd., 184 AD3d 116, 121-22, 124 NYS3d 346 [1st Dept 2020]).

With respect to defendant Perryman, the Court finds that it has jurisdiction over her under the closely-related doctrine cited above. Plaintiff claims that Perryman perpetrated a fraud, while she was the CEO of Stimwave, to induce plaintiff to sign the loan agreement and so it was reasonably foreseeable that a lawsuit about that loan agreement might cause Perryman to be sued in New York because of the New York forum selection clause.

The Court observes that although Movants argue in reply that there is another agreement that has a Delaware forum selection clause, it appears that Movants failed to submit it. Movants merely cite to an allegation in the complaint that references this purchase agreement but did not cite or attach the actual agreement. The complaint itself does not mention a Delaware forum selection clause. Unfortunately, the Court cannot make any findings about that agreement if it is not included in this record.

To the extent that Movants argue that Stimwave has been released from the loan agreement, that does not, in this Court's view, render the forum selection clause as a nullity. Plaintiff's argument is that its financial interest in Stimwave was, in part, due to the loan agreement and so a dispute about that loan agreement (the alleged fraudulent inducement) directly implicates the forum selection clause. Movants did not point to any binding case law that a forum selection clause terminates if that agreement is extinguished due to bankruptcy or some other subsequent action.

However, the Court grants this branch of the motion to the extent that Movant seeks to dismiss LTP. There is no basis to find that the closely-related doctrine applies to LTP, a non-signatory to the loan agreement. In contrast to Perryman, the CEO of Stimwave, the Court is

unable to find that LTP could reasonably expect to be bound to a forum selection clause that it did not sign.

And, under a traditional personal jurisdiction analysis, the Court finds that it lacks jurisdiction over LTP. “[A] New York court may not exercise personal jurisdiction over a non-domiciliary unless two requirements are satisfied: the action is permissible under the long-arm statute (CPLR 302) and the exercise of jurisdiction comports with due process. If either the statutory or constitutional prerequisite is lacking, the action may not proceed. Due process requires that a nondomiciliary have ‘certain minimum contacts’ with the forum and that the maintenance of the suit does not offend traditional notions of fair play and substantial justice” (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019] [internal quotations and citations omitted]).

Here, plaintiff did not meet its burden to show that LTP had minimum contacts with New York. Instead, plaintiff contends that LTP had such contacts because Perryman, as its agent or co-conspirator, committed wrongful acts directed towards New York. But the Court finds that the complaint did not sufficiently establish a connection between LTP and New York to satisfy the due process requirement.

The Court views the complaint to detail the misdeeds of Perryman (in her capacity as CEO of Stimwave and in her individual capacity), but the allegations do not adequately explain LTP’s involvement. The Court observes that LTP is not included in the loan agreement at issue in this action (NYSCEF Doc. No. 31). LTP does not have an office in New York and is a Bahamian-based holding company. As Movants point out, it mainly consists of shares in other Bahamian companies. In other words, the Court finds that LTP is not an appropriate defendant

simply because it is an entity controlled by Perryman or that she was appointed acting manager of LTP for this action. More is required to exercise jurisdiction over LTP.

Prior Action Pending

Movants claim that the Delaware action involves the same causes of action and therefore insist that this case should be dismissed under CPLR 3211(a)(4). They insist that although defendant StimQ is not a party to that action, this entity's inclusion here makes little sense because plaintiff owns a majority interest in this entity and control its operations as well as its management. Movants stress that plaintiff did not include a fraud claim in the Delaware action but plaintiff's breach of contract claim involves the same exact loan agreement at issue here. They emphasize that a proposed amended pleading in Delaware includes the same malicious prosecution cause of action.

In opposition, plaintiff contends that the parties are not substantially the same. Its successor in interest is involved in the Delaware action, not plaintiff. That certain of the agreements may be involved in both actions does not, according to plaintiff, compel dismissal of this action.

In reply, Movants argue that this action is, essentially, a duplicative second case that repackages the derivative claims of plaintiff's now wholly owned subsidiary Stimwave (and apparently, the plaintiff in the Delaware case will soon be another subsidiary of plaintiff).

“[I]n deciding a motion to dismiss based on the pendency of another action, the analysis is similar to that employed in entertaining a motion predicated on forum non conveniens” (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 93, 660 NYS2d 568 [1st Dept 1997]). “In order to reach this issue, it is necessary that there be sufficient identity as to

both the parties and the causes of action asserted in the respective actions. With respect to the parties, the requirement is that there be substantial identity” (*id.* at 93-94). “[A] complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4)” (*JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1342, 102 NYS3d 238 [2d Dept 2019]).

A review of the Delaware action reveals that Movants did not meet their burden to establish that there is a substantial identity of the parties. Although Movants emphasize that the initial plaintiff in Delaware (Stimwave) is a wholly owned subsidiary of plaintiff and the new proposed plaintiff there (Curonix) is one as well, that does not mean that the plaintiff here waived its right to seek its own relief related to the loan. In fact, that Delaware case seems, on its face, to involve claims brought by Perryman’s former company against her (and many other defendants). Moreover, the issues are not the same. The alleged fraud at issue here is not alleged as a cause of action in Delaware.

To be sure, there are some overlapping issues but the Court, in its discretion, declines to view the different entities (plaintiff and its subsidiaries), even if the subsidiaries are controlled by plaintiff, as one and the same. Each of these entities can pursue its own claims as they are independent and separate entities. And there is no basis for a stay pursuant to CPLR 2201, as requested by Movants, as they did not meet their burden for that relief. An indefinite stay conditioned on, potentially, the outcome of the Delaware action is not efficient and will only needlessly delay this case.

Failure to State a Cause of Action

The Court denies this branch of Movant’s motion. The complaint contains clear and specific details for the three causes of action for fraud, malicious prosecution and for declaratory

relief. Movants' insistence that these allegations, while certainly verbose, are too conclusory is without merit. Plaintiff included more than enough detail for each claim and enough particularity to make out a fraud claim. At the motion to dismiss stage, this Court must consider the allegation as true. The allegations satisfy plaintiff's burden to state cognizable causes of action.

The Court observes that with respect to the malicious prosecution claims—based upon Perryman's assertions of claims against plaintiff in the Delaware action—the fact that these claims were abandoned by Perryman does not compel the Court to dismiss this claim (*McGuire v Epstein*, 167 AD2d 453, 453, 561 NYS2d 921 [2d Dept 1990] [finding that the abandonment of certain claims at the insistence of the opposing party states a cognizable claim for malicious prosecution]). Plaintiff argues that Perryman dropped these claims when faced with a motion to dismiss. That is enough, at this stage of the case, to state a malicious prosecution claim.

Lack of Capacity to Sue


As plaintiff points out, the fact that it lacks the requisite certificate in order to sue is not a fatal defect (*Basile v Mulholland*, 73 AD3d 587, 899 NYS2d 851 (Mem) [1st Dept 2010]). Plaintiff shall have until June 15, 2023 to cure this defect.

Accordingly, it is hereby

ORDERED that defendants Perryman and LTP Limited LLC's motion to dismiss is granted only to the extent that the claims against LTP Limited LLC are severed and dismissed, and defendant Perryman shall answer pursuant to the CPLR; and it is further

ORDERED that plaintiff shall remedy its apparent lack of capacity to sue on or before June 15, 2023.

Conference: August 1, 2023 at 10:30 a.m. By July 25, 2023, the parties are directed to upload 1) a discovery stipulation signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute regarding discovery or 3) letters explaining why no agreement about discovery could be reached. Based on these submissions, the Court will assess whether an in-person appearance is necessary. The failure to upload anything by July 25, 2023 will result in an adjournment of the conference.

5/4/2023		
DATE		ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE