

**Eagle Phillips NY, LLC v Currie**

2023 NY Slip Op 32755(U)

August 3, 2023

Supreme Court, New York County

Docket Number: Index No. 654299/2021

Judge: Verna L. Saunders

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. VERNA L. SAUNDERS, JSC PART 36**

*Justice*

-----X

**INDEX NO. 654299/2021**

EAGLE PHILLIPS NY, LLC dba UPLYFT CAPITAL,  
Plaintiff,

**MOTION SEQ. NO. 001**

- v -

ANDREW K CURRIE II dba K/C LIVESTOCK and ANDREW  
CURRIE aka ANDREW KELSO II CURRIE,  
Defendants.

**DECISION + ORDER ON  
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for

**DISMISS**

In July 2021, plaintiff commenced this action by summons and complaint against defendants Andrew K. Currie II d/b/a K/C Livestock (“business defendant”) and Andrew Currie (“Currie”), a freight carrier company and its owner, alleging that on or about December 30, 2020, plaintiff and the business defendant executed a Purchase and Sale of Future Receivables Agreement (“agreement”) whereby plaintiff agreed to purchase all rights to business defendants’ future account receivables having a face value of \$58,800.00 with an agreed upon purchase price of \$40,000.00. Currie executed a guaranty, wherein it guaranteed the business defendant’s obligations under said agreement. Plaintiff claims defendants breached the agreement, and it now seeks to recover the amount of \$42,670.00, plus interest, costs, disbursements, and attorney’s fees. (NYSCEF Doc. No. 1, *summons and complaint*).

Defendants move, pursuant to CPLR 3211(a)(1), (a)(2), (a)(8) and 327; Business Corporation Law § 1314; and General Obligations Law § 5-1402, for dismissal of plaintiff’s verified complaint, dated July 12, 2021, in its entirety and with prejudice (NYSCEF Doc. No. 4, *notice of motion*). Defendants argue that this court lacks personal jurisdiction over them because both defendants reside in Texas and have no accounts, property, officers, or other presence in New York. Defendants maintain that the forum selection clause in the agreement, wherein the parties allegedly agreed that the agreement would be governed by Connecticut law and that the courts of New York or Connecticut would be the exclusive forums for the adjudication of any disputes, does not mandate a different result because enforcement of the forum selection clause would be unjust and unreasonable.

Defendants also argue that dismissal of the verified complaint is warranted for lack of subject matter jurisdiction. Since plaintiff is a corporate entity based in Florida and defendants are a corporate entity and an individual based in Texas, subject matter jurisdiction must be assessed under Business Corporation Law § 1314(b). Since none of the factors required under Business Corporation Law § 1314 are satisfied, subject matter jurisdiction is not met. Moreover, defendants contend that language in the forum selection clause reflecting that the parties consent

to the jurisdiction of New York does not alter this conclusion. Neither the agreement, nor the guaranty, contain an express waiver of defenses based on lack of personal jurisdiction or *forum non conveniens*. Thus, assuming the action is not dismissed on jurisdictional deficiencies, the action must, at the very least, be dismissed, pursuant to CPLR 327, on *forum non conveniens* grounds.

Defendants also claim that unbeknownst to Currie or the business defendant, throughout the fall and winter of 2020, Currie's assistant Celina Schultz, without defendants' consent or knowledge, obtained loans in Currie's and/or the business defendant's name. (NYSCEF Doc. No. 9, *memorandum of law*).

In opposition to the motion, plaintiff argues that the forum selection clause, setting forth the governing law, venue, and jurisdiction, is enforceable insofar as the parties voluntarily consented to the jurisdiction and venue of the state of New York. Plaintiff also argues that defendants fail to present evidence sufficient to invalidate the authenticity of the Currie's signature on the purchase and sale agreement. Plaintiff also asserts that it is organized and existing under the laws of both New York and Florida, and it submits proof purporting to establish said status (NYSCEF Doc. No. 18, *memorandum of law in opposition*).

In reply, defendants argue that plaintiff's alleged organization under both Florida and New York does not grant the court subject matter jurisdiction, nor does it preclude this court from setting aside the forum selection clause and dismissing the action on *forum non conveniens* grounds. They maintain that enforcement of the forum selection clause would be unjust and unreasonable and that the forum selection clauses are the product of fraud or overreaching (NYSCEF Doc. No. 20, *memorandum in reply*).

A party seeking to prevent the enforcement of a forum selection clause must demonstrate that enforcement of the same would be "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 challenging party would, for all practical purposes, be deprived of its day in court" (*Grant v United Odd Fellow*, 187 AD3d 440, 441 [1st Dept 2020], citing *Puleo v Shore View Ctr. for Rehabilitation & Health Care*, 132 AD3d 651, 652 [2d Dept 2015] [internal quotation marks and citations omitted]). Absent such a showing, "the forum selection clause is prima facie valid and enforceable." (See *Grant v United Odd Fellow*, 187 AD3d at 441).

Section 5.8 of the agreement states:

"This Agreement shall be governed by and construed in accordance with the laws of the state of Connecticut. In the event a lawsuit is brought by [Plaintiff] arising out of this Agreement or any Guaranty related hereto, [KCL] consents to the jurisdiction of the federal and state courts located in the State of New York or Connecticut and agrees that such courts shall be the exclusive forums for all actions, proceedings or litigation arising out of or relating to this Agreement or subject matter thereof."

Here, this court rejects defendants' conclusory assertion that enforcement would prove unreasonable and unjust. Although Currie submits an affidavit wherein, he asserts that, upon

information and belief, Schultz took out the loan memorialized by the agreement, the affidavit, executed in Texas, lacks a certificate of conformity in accordance with CPLR 2309, and, this vague and unsubstantiated claim nevertheless fails to invalidate the forum selection clause here.

The doctrine of forum non conveniens is codified in CPLR 327(a), which provides in relevant part:

“When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, *on the motion of any party*, may stay or dismiss the action in whole or in part on any conditions that may be just” (emphasis added).

It is well-settled that, “where a party to a contract has agreed to submit to the jurisdiction of a court, that party is precluded from attacking the court’s jurisdiction on forum non conveniens grounds.” (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222 [1st Dept 2006], citing *National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228, 232 [1999]; *Concord Assets Fin. Corp. v Radebaugh*, 172 AD2d 446, 448 [1991].) Inasmuch as defendants have failed to persuade this court that the forum selection clause is invalid, such that it is unenforceable, that branch of the motion seeking dismissal of the complaint based on the doctrine of forum non conveniens is denied. (See *Creative Res., Inc. v Rumbellow*, 244 AD2d 383 [2d Dept 1997].)

Business Corporation Law § 1314 provides that “an action or special proceeding against a foreign corporation may be maintained by another foreign corporation of any type or kind or by a non-resident in the following cases only:

- (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract.
- (2) Where the subject matter of the litigation is situated within this state.
- (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state.
- (4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the civil practice law and rules.”
- (5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.”

“Supreme Court has subject-matter jurisdiction over actions brought by foreign corporations or non-residents against other foreign corporations only if (i) they fall into one of five specified categories (*see* BCL § 1314[b]); or (ii) they fall within an exception to § 1314’s limits that itself has been created by statute (*see e.g.*, General Obligations Law (GOL) § 5-1402 [1].) (*Mobile Programming LLC v Tallapureddy*, 2021 NY Slip Op 50411(U), \*\*2-3 [Sup Ct, NY County 2021], citing *Techo-TM, LLC v Fireaway, Inc.*, 123 AD3d at 610.) As relevant here, “while New York recognizes consent as a basis for personal jurisdiction, it does not recognize consent as a basis for long-arm jurisdiction.” (*Techo-TM, LLC v Fireaway, Inc.*, 123 AD3d 610, 610 [1st Dept 2014].)

This court agrees with defendants that, as alleged in the complaint, this court lacks subject matter jurisdiction over this action, insofar as plaintiff alleges to be "a limited liability company organized and existing under the laws of the State of Florida"; Currie is a resident of Texas; and the business defendant is organized and existing under the laws of Texas. That said, plaintiff argues, in opposition, that it also organized and existing under the laws of both New York and Florida. In support of this, plaintiff submits a printout from a website entitled "opencorporates", which identifies plaintiff as having a registered address in Brooklyn, New York (NYSCEF Doc. No. 13). Since that branch of the motion seeking dismissal of the complaint pursuant to Business Corporation Law §1314 appears to be based on a pleading error, defendants' motion is denied, and plaintiff is granted leave to amend the complaint to reflect that it is also duly organized and existing under the laws of New York, upon penalty of dismissal if it fails to so amend. Accordingly, it is hereby

**ORDERED** that defendants' motion is denied in its entirety; and it is further

**ORDERED** that plaintiff is granted leave to amend the complaint within twenty (20) days from the date of this order, in accordance with the foregoing, upon penalty of dismissal if it fails to amend the complaint; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants; and it is further

**ORDERED** that defendants shall interpose an answer in this action within twenty (20) days after the filing of the amended complaint; and it is further

**ORDERED** that the parties are hereby directed to appear for a preliminary conference on October 11, 2023, details which shall be provided by the court no later than October 10, 2023.

This constitutes the decision and order of this court.

August 3, 2023

HON. VERNA L. SAUNDERS, JSC

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