Noris Med., Inc. v Hagbi
2024 NY Slip Op 30426(U)
February 7, 2024
Supreme Court, New York County
Docket Number: Index No. 654964/2022
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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NORIS MEDICAL, INC.

Plaintiff,

- v -

NETA HAGBI, AS ADMINISTRATOR OF THE ESTATE OF LIRAN HAGBI,

Defendant.

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INDEX NO. 654964/2022

MOTION DATE 02/06/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM.

Defendant's motion to dismiss pursuant to a forum selection clause is granted.

Background

This action arises out of the alleged misappropriation of corporate funds by plaintiff Noris Medical Inc. ("Noris")'s former CEO, Liran Hagbi. Plaintiff insists it is a Rhode Island corporation with a principal place of business in Las Vegas, Nevada but that it had an office in New York County where Mr. Hagbi principally worked. Defendant Neta Hagbi is Mr. Hagbi's widow-- Mr. Hagbi unfortunately passed away in April 2022.

Noris claims that after Mr. Hagbi's death, it conducted a review of payments made to Mr. Hagbi and claims it found that he directed payments to himself in excess of $700,000 for which he was not entitled to receive. Noris argues that Mr. Hagbi misrepresented his health condition (apparently, he was battling cancer) and so it was unprepared for his death. It claims that employees left and vendors took their business elsewhere. It brings causes of action for breach of contract, unjust enrichment, and breach of fiduciary duty against his estate.

Ms. Hagbi contends that her husband was largely responsible for the success of Noris and that his estate is owed substantial compensation and bonuses. She insists that her husband owned a ten percent stake in Noris and even owned a minority ownership share in Noris' parent company. Ms. Hagbi argues that her husband developed customer relations and managed sales for Noris. She brings counterclaims for breach of contract, for declaratory relief that she is the owner of her husband's company shares and is entitled to the benefits of a shareholder in Noris, and an accounting.

In this motion, defendant contends that both parties agree that this action relates to an employment agreement that Liran Hagbi had with Noris. She insists that the agreement contains a New York choice of law clause but that it also contains an Israeli forum selection clause. Defendant contends that as this case has progressed, she discovered that many of the documents are in Hebrew and held by Noris' parent company, which is located in Israel and will require speaking with witnesses in Israel. Defendant contends that it recently commenced an action in Israel against Noris on the basis of this forum selection clause and that Noris has refused to voluntarily withdraw this action in favor of the Israeli one. Defendant emphasizes that New York has little nexus to this dispute and that she raised the affirmative defense of improper forum in her answer.

In opposition, plaintiff emphasizes that Noris has an executive office in New York and that defendant resides in New York. It complains that defendant asserted counterclaims in this case and so she should not be permitted to seek dismissal now. Plaintiff argues that defendant has engaged in substantial litigation activity since this case was commenced on December 22, 2022, including a previous motion about dismissing defendant's counterclaims. Plaintiff points

out that the parties have engaged in paper discovery and that defendant only raised the forum selection clause issue for the first time on November 13, 2023.

In reply, defendant emphasizes that there has been virtually no discovery exchanged—only defendant has turned over documents to plaintiff. She insists that plaintiff has not turned over anything and there has not yet been a ruling on the merits regarding any of the parties' claims.

Discussion

"It is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation. . . . In order to invalidate the clause, plaintiffs must show that its enforcement "would be 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, 307-08 [1st Dept 2005], *affd sub nom. Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242 [2006] [internal quotations and citations omitted]).

The Court grants the motion. There is no dispute that the employment agreement, which forms a substantial basis of the disputes between the parties, has a forum selection clause that requires disputes to be brought in Israel:

> "Any action or proceeding by either of the parties to enforce this Agreement, or related to this Agreement, shall be brought only in an Israeli court of competent jurisdiction in Tel-Aviv. The parties hereby irrevocably submit to the exclusive jurisdiction of such courts and waive the defense of inconvenient forum to the maintenance of any such action or proceeding in such venue. **THE EMPLOYEE UNDERSTANDS THIS PROVISION AND UNDERSTANDS THAT IF HE SO WISHES TO ENFORCE OR OTHERWISE BRING A LAWSUIT IN CONNECTION WITH THIS AGREEMENT, HE MUST DO SO IN AN ISRAELI COURT OF COMPETENT JURISDICTION IN TEL-AVIV**" (NYSCEF Doc. No. 33, ¶ 7[B] [emphasis in original]).

That defendant waited about a year to make the instant motion is of no moment. "Having raised the defense in its answer, [defendant] was entitled to rely on it later in the litigation and was not under any obligation to move on it more quickly than it did" (*Lischinskaya v Carnival Corp.*, 56 AD3d 116, 119, 865 NYS2d 334 [2d Dept 2008] [finding that a defendant did not waive a defense based on a forum selection clause where it waited about nine months to make a motion to dismiss]). Critically, just like in *Lischinskaya*, the parties have not yet taken any depositions (*see id.* at 118).

In fact, the record on this motion makes clear that only limited discovery has taken place; defendant has turned over some documents to plaintiff while plaintiff has not yet turned over anything (although plaintiff insists it is waiting for defendant to execute a confidentiality order). This is not a situation where defendant waited until the parties finished discovery and made dispositive motions (*c.f. Anagnostou v Stifel*, 204 AD2d 61, 61, 611 NYS2d 525 [1st Dept 1994] [denying a motion to dismiss on forum non conveniens grounds where the defendants had already made a summary judgment motion]).

Plaintiff did not cite any binding caselaw for the proposition that a defendant waives the right to assert that there is an improper forum simply by asserting counterclaims. To be sure, there was motion practice about those counterclaims. But other than that motion and turning over a few documents, not much has happened in this case. And defendant cited a rational reason for why she brought the instant motion now—the purported prevalence of Hebrew language documents and witnesses in Israel. And this Court's analysis is not a traditional forum non conveniens framework that involves consideration of the convenience of the witnesses and

the parties. Instead, the Court must assess whether it can overlook a clear forum selection clause in the underlying agreement.

Here, an employment agreement contained a mandatory forum selection clause that required (the verb "shall" is utilized) that disputes arising out of the employment agreement are to be brought in an Israeli court in Tel Aviv. Plaintiff agreed on, or insisted upon, that language and then, for whatever reason, decided to bring a case in New York. That means that plaintiff took a chance that defendant would raise this issue, which she did in both her answer and amended answer. Plaintiff cannot complain now that defendant is simply seeking to enforce the agreement. If plaintiff really wanted to ensure the case remained in New York, it "could have moved to strike the defense" (*Lischinskaya*, 56 AD3d at 119).

Summary

This is not a case where the parties participated in litigation for years and years and held depositions, only for a defendant to suddenly claim that the forum is improper. The parties here are barely past the pleading stage. Defendant insists that she increasingly found that there were more and more Hebrew language documents and decided to make a motion based on an affirmative defense in her answer. Certainly, plaintiff is correct to emphasize that defendant raised counterclaims. But plaintiff did not show that it would suffer any prejudice by being forced to pursue a case in accordance with its own agreement. Plaintiff has not yet turned over any discovery and no depositions have occurred or even been scheduled.

In other words, while this Court questions why defendant waited to make the instant motion, the length of time that has passed is not so long that it outweighs a clear forum selection

clause signed by sophisticated parties. The Court declines to ignore the strong preference in favor of enforcing those types of clauses under these circumstances.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss based on a forum selection clause is granted and the Clerk is directed to enter judgment accordingly WITHOUT costs or disbursements upon presentation of proper papers therefor.

2/7/2024
DATE

ARLENE P. BLUTH, 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