

<b>Process Equip. Co. of Tipp City v Weil</b>
2012 NY Slip Op 33643(U)
April 2, 2012
Supreme Court, New York County
Docket Number: 652390/2011
Judge: Anil C. Singh
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

PRESENT:

PART 61

Justice

Index Number : 652390/2011  
PROCESS EQUIPMENT CO.  
vs.  
WEIL, ROBERT  
SEQUENCE NUMBER : 002  
DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is denied in accordance  
with the annexed memoranda decision

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 4/2/12

ACS, J.S.C.  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61

-----X  
PROCESS EQUIPMENT CO. OF TIPP CITY, PECO  
HOLDINGS CORP. and VANDEMARK CHEMICAL  
INC.,

Plaintiffs,

Index No.

-against-

652390/11

ROBERT WEIL,

Defendant.

-----X  
ANIL C. SINGH, J. :

Defendant moves for dismissal of the first, second and third causes of action in the complaint. Plaintiffs oppose the motion.

Defendant was the chief executive officer of plaintiff Process Equipment Co. of Tipp City (Process), and a consultant for plaintiff Vandemark Chemical Inc. (Vandemark). Plaintiff Peco Holdings Corp. (Peco) is a holding company formed to acquire the outstanding shares of Process. Process is suing defendant for breach of contract and breach of fiduciary duty, the first and second causes of action. In the third cause of action, Process and Peco are seeking a declaratory judgment as to defendant's legal right to obtain compensation for his performance as a chief executive officer. In the fourth cause of action, Vandemark is seeking a declaratory judgment with respect to a bonus payment to which defendant claims he is entitled.

Defendant makes three arguments in favor of dismissing the causes of action. First, defendant claims that Peco lacks standing to sue him because Peco is not involved in any controversy with him. Second, defendant contends that Peco is currently not authorized to do business in this state and cannot sue him. Third, defendant alleges forum non conveniens is

involved in this action, arguing that most of the claims of this action should not be allowed to continue in this state.

Defendant argues that the first two causes of action only involve him and Process, his former employer. The causes of action concern defendant's entitlement to compensation as a chief executive officer of Process, allegedly the sole plaintiff involved. Process is seeking repayment of "excess" compensation allegedly paid to defendant. Peco's only involvement in this action relates to the third cause of action, in which it and Process are seeking a declaratory judgment that defendant is not entitled to additional compensation. Defendant asserts that, because there is no evidence that Peco has a stake with respect to defendant's compensation, Peco should be dismissed from this suit.

Defendant also argues that Peco should be dismissed on the ground that it currently lacks the authority to do business in this state. Peco claims to be a Delaware corporation with offices in New York. While the complaint states that Peco's principal place of business is in New York, defendant declares that its principal office is in Ohio. Defendant contends that, due to its current lack of authority, Peco is not legally permitted to bring any action against him.

Defendant seeks dismissal of the first three causes of action on the ground of forum non conveniens. According to defendant, Process is an Ohio corporation and not authorized to do business in New York. Defendant alleges that there are no connections to New York with respect to the transactions alleged in these causes of action. Defendant states that the only relationship alleged in the complaint between New York and defendant and Process involved an updated compensation plan signed by defendant in New York, setting forth defendant's compensation terms.

Defendant states that he is not a resident of New York and that Process is not a New York corporation; that all the work performed by him occurred primarily in Ohio; that Process's lawyers and accountants, whose testimony would be necessary, reside in Ohio; and that the relevant documents would be located in Ohio. Defendant claims that Ohio would be a better forum for determining the three causes of action. In fact, he submits evidence of a pending action brought by him against Process and Peco in the Common Pleas Court of Miami County, Ohio, Case No. 11-6971 (the Ohio Action).

In opposing this motion, plaintiffs contend that defendant has failed to establish that Peco was doing business in New York at a level sufficient to trigger New York's registration requirements. In any event, if this court finds that Peco violated this state's registration requirements, plaintiffs argue that Peco is entitled to a chance to satisfy any deficiencies under the statutes.

Plaintiffs state that Peco, due to its holding interest in Process, has a stake in this suit, which involves defendant's compensation from Process. In the declaratory judgment claim, Peco seeks a declaration as to what rights defendant has either to force Peco to repurchase his shares, or to recognize any 9% ownership interest defendant claims to possess in Peco.

As for forum non conveniens, plaintiffs assert that defendant has failed to show that the factors involved favor a dismissal of this case or the superiority of the Ohio forum. Plaintiffs dispute the significance of Ohio in this particular action, since many of the issues in this case allegedly center in New York, or in California, where defendant primarily resides. Plaintiffs aver distinctions between this case and the Ohio Action. And plaintiffs emphasize the alleged relevance of the compensation plan executed by defendant in New York to the first three causes

of action.

In reply, defendant repeats his argument that Peco lacks the legal authority to sue him in New York due to a lack of authority to do business here. He states that no significant nexus exists between the first three causes of action and New York. Defendant acknowledges that the last cause of action, involving Vandemark, is appropriate for this jurisdiction, but is allegedly based on transactions separate from the rest of the complaint.

“[C]apacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing.” *Silver v Pataki*, 96 NY2d 532, 537 (2001). “[C]apacity concerns a litigant’s power to appear and bring its grievance before the court (internal quotation marks and citations omitted),” and “may depend on a litigant’s status or ... authority to sue or be sued.” *Id.* By contrast, “[s]tanding involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast [ ] the dispute in a form traditionally capable of judicial resolution.” *Matter of Graziano v County of Albany*, 3 NY3d 475, 479 (2004) (internal quotation marks and citation omitted). Moreover, “[w]ithout both capacity and standing, a party lacks authority to sue.” *Id.*

With respect to standing, the court finds that Peco has a stake in this action. As a holding company, Peco owns the majority stock of Process, as alleged in the complaint, and the compensation paid to defendant would financially affect this plaintiff. With respect to the capacity to sue, defendant’s main argument concerns the authority to bring this action. Defendant cites section 1312 of the Business Corporation Law, which defines the relationship between this state and non-New York corporations.

“The purpose of this statute (and its predecessors) is to regulate foreign corporations which are

conducting business in New York so that they will not be on a more advantageous footing than domestic corporations. Specifically, the statute is designed to encourage foreign corporations to qualify to conduct intrastate business and to pay the State taxes levied on that intrastate business. The statute was not enacted to deny foreign corporations access to the courts of New York (internal citations omitted).”

*Reese v Harper Surface Finishing Systems*, 129 AD2d 159, 162 (2d Dept 1987).

The party relying upon this statutory barrier bears the burden of proving that a corporation’s business activities in New York “were not just casual or occasional,” but “so systematic and regular as to manifest continuity of activity in the jurisdiction.” *Peter Matthews, Ltd. v Robert Mabey, Inc.*, 117 AD2d 943, 944 (3d Dept 1986), quoting *Construction Specialties v Hartford Ins. Co.*, 97 AD2d 808 (2d Dept 1983). Defendant submits evidence that shows that Peco has not had the authority to do business here since last April. However, he has failed to show Peco’s present level of business activities here. There is no evidence as to whether Peco is currently conducting continuous activity in New York. The presumption that Peco is not doing business in New York has not been overcome, and Peco is not statutorily barred from maintaining an action here.

“The common-law doctrine of forum non conveniens ... permits a court to stay or dismiss such actions where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere.” *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-9 (1984), *cert denied* 469 US 1108 (1985).

“[t]he court, after considering and balancing the various competing factors, must determine in the exercise of its sound discretion whether to retain jurisdiction or not. Among the factors to be considered are the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit.” *id.* at 479.

Here, plaintiffs claim that this action derives from defendant's demands for compensation, and the basis is the compensation agreement that was executed in New York. Plaintiffs contend that most of defendant's relevant activities occurred in New York. They state that, except for the fact that Process is an Ohio corporation, Ohio is not a significant forum. Plaintiffs' papers indicate that defendant commenced the Ohio Action after plaintiffs commenced this action. In the Ohio action, Peco and Process are moving to dismiss the complaint on convenience grounds.

The court shall deny the motion to dismiss. This action is based in large part upon a New York contract, and the connection between Ohio and this case is not very substantial.

Accordingly, it is

ORDERED that defendant Robert Weil's motion to dismiss plaintiff Peco Holdings Corp. from this action is denied; and it is further

ORDERED that defendant Robert Weil's motion to dismiss the first, second and third causes of action in the complaint is denied.

DATED: Apr 27, 2012

ENTER:

*ACC*  
HON. ANIL C. SINGH  
SUPREME COURT JUSTICE  
J.S.C.