

Naqvi v Computer Assoc. Intl., Inc.

2012 NY Slip Op 33387(U)

March 23, 2012

Supreme Court, New York County

Docket Number: 100875/06

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich
Justice

PART 54

Lafe Nagvis

INDEX NO. 1008 75/06

MOTION DATE _____

MOTION SEQ. NO. 002

Computer Assoc.

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

10, 11, 12, 13, 14, 15,
23, 24, 25
29
16, 17,
18

Cross-Motion: Yes No

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

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

Dated: 3/23/12

[Signature]
JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
LAEEQ NAQVI,

Index No. 100875/06

Plaintiff,

DECISION, ORDER
& JUDGMENT

-against-

COMPUTER ASSOCIATES INTERNATIONAL,
INC.,

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.:

The threshold and controlling issue before the court is whether defendant Computer Associates International, Inc. (CA-I), a Delaware corporation headquartered in New York State, is the wrong party named as defendant. Plaintiff Laeeq Naqvi’s Third Amended Complaint (Complaint) arises from his employment by non-party Computer Associates Middle East (CA-ME) in Saudi, Arabia in 2004. CA-ME ceased operations in September 2004. The Complaint includes Causes of Action for Breach of Contract and for Rescission and seeks both damages and equitable relief. CA-I moves for summary judgment and dismissal of the Complaint under CPLR 3212 (Mot. Seq. No. 002). Naqvi opposes.

For the sole reason that CA-I is not the real party in interest (discussed below), the court grants summary judgment and dismisses the Complaint. In making this decision, the court has not considered or reached any of the substantive claims or the parties’ additional arguments, including: choice of law; statute of limitations; *forum non conveniens*; release and ratification; and payment in full.

I. *Background*

A. Prior Rulings

Certain of the issues raised in the motion were resolved by the court (Hon. Herman Cahn, Ret.) in a December 31, 2008 decision and order (12/31/08 decision) partially granting CA-I's motion to dismiss. In light of the extensive briefing on that motion and the lengthy history of this case, the court assumes the parties' knowledge of the allegations in the pleadings.

In the 12/31/08 decision, the court ruled that the factual allegations in the complaint were legally sufficient to establish that: (1) CA-I is a properly named defendant because, as a member of the joint venture that established Computer Associates Middle East (CA-ME), it is liable in its individual capacity for CA-ME's obligations; (2) Although Naqvi signed the release under duress, because he was threatened with suit in Saudi Arabia and the withholding of his passport, exit visa, working papers and any money due him, whether he ratified the release by failing to repudiate it within a reasonable time was a question of fact; and (3) Under the "grouping of contacts test," New York law applies to plaintiff's claims. Exh. D, Romero Affirm. The court also denied dismissal on the basis of preclusion by the Saudi one-year statute of limitations, because the argument was improperly raised for the first time in CA-I's reply brief.¹

B. Undisputed Facts

In support of the motion for summary judgment, CA-I submits the following documents: Affirmations of counsel John P. McEntee and of Hussam Al-Hejailan, a Saudi lawyer, and the Saudi Labour and Workmen Law; Affidavit of Abdulazziz Al-Salloum, the Managing Director of CA-ME; Transcript of Naqvi's examination before trial (EBT); Employment contracts; Joint

¹Therefore, the court's discussion of whether Saudi or New York law applied to determine the statute of limitations is dicta.

Venture Agreement; E-mails and other documents. In opposition, Naqvi submits: Affidavit of Laeeq Naqvi; Affirmation of Peter A. Romero, Esq.; Correspondence; EBT excerpts; Unsigned Memorandum of Understanding; Tax, marriage and mortgage documents; E-mails and financial records.

The parties submitted a Joint Statement of Material Facts providing that:

1. [CA-I] is a business computer software company headquartered in Islandia, New York.
2. Plaintiff, who was born in Pakistan and became a naturalized United States citizen in 2003, began working for [CA-I] as a Technical Support Analyst in [CA-I]'s Lake Success, New York offices in or around September, 1997.
3. Sometime thereafter, Plaintiff transferred to [CA-I]'s Islandia, New York headquarters.
4. At the time, Plaintiff was paid a guaranteed annual salary of \$42,000, and he was not eligible to earn incentive compensation or sales commissions.

Based on the admissible evidence submitted by CA-I, the following additional material facts are undisputed:

Relationship of CA-I and CA-ME

CA-I is a leading provider of solutions and services for the management of IT infrastructure, business information and application development. It operates worldwide in more than 100 countries. Exh. O (12/31/08 Decision noting allegations.)². Through a Comprehensive Joint Venture and Shareholders Agreement dated November 3, 1997 (JV Agreement), CA-I sold

²Undisputed factual allegations.

and transferred 120 shares of the 199 shares it held in CA-ME, a Bahrain corporation, to United Computer Arabia WLL (UCA), a Saudi corporation. UCA and CA-I were parties to a 1996 Software Distribution Agreement (Software Agr.) “With respect to the distribution, licensing and servicing by UCA of the computer software programs of CA within certain countries.” Exh. F, pg. 1.

CA-I and UCA were also parties to an April 15, 1997 Memorandum of Understanding contemplating the establishment of a new company to be “jointly owned” by CA-I (40%) and UCA (60%), who agreed to work together to form a successor corporate entity to CA-ME.³ Exh. F, pgs. 1-2, ¶¶1.1-6, 5.7. Paragraph 6.10 of the JV Agreement provided that, “The relationship of all of the parties is that of independent contractors and nothing contained in this Agreement or the Existing [Software] Agreement shall constitute the parties as partners, joint venture [sic] or co-owners . . . or empower any party to act for, bind or otherwise create or assume any obligation on behalf of another.” Exh. F, ¶6.10.

CA-I’s subsidiary Computer Associates Management, Inc. (CAMI) held one share of CA-ME. Under the JV Agreement, UCA was to transfer and assign the Software Agr. to CA-ME. The Board of Directors for CA-ME was comprised of three individuals designated by UCA and two designated by CA-I. Directors could be removed with or without cause at CA’s or UCA’s request. UCA and CA were to alternate in choosing a Chairman of CA-ME. Exh. F. Unanimous consent of the shareholders was required to make “[a]ny change in the employment terms, including salaries, commissions, bonuses, stock options, and fringe benefits, applicable to

³This Memorandum of Understanding is referred to in the third “WHEREAS” paragraph of the JV agreement.

its employees.” Exh. F, ¶5.4..

The parties also agreed that: New York law would “exclusively govern the construction, interpretation and enforceability of this Agreement”; “[A]ny action or claim arising under or relating in any way to this Agreement, the relationship of any of the parties or the subject matter shall lie within the exclusive jurisdiction of the State and Federal Courts located in New York, New York”; and they would not “commence any action arising under or relating to this Agreement in any jurisdiction other than New York.” Exh. F, ¶6.12. The JV Agreement was executed by a single officer on behalf of CA-I, CUA and CA-ME, identified as Peter Schwartz SVP.

Naqvi Employment by CA-I then CA-ME

Naqvi lived in New York State, with a home in Levittown and a bank account with JP Morgan Chase in Ridgewood, New York. He also maintained a savings account with the National Bank of Pakistan in Islamabad Exh. J. CA-I is incorporated in Delaware and its headquarters are in Islandia, New York. Naqvi accepted a May 25, 2000 offer, made on letterhead of “Computer Associates”, to work as a Project Manager in Bahrain for CA-ME. The offer promised a guaranteed salary and the possibility of additional compensation as commission or bonus based on the company’s performance. Exhs. C, E.⁴ The offer was sent to him by CA-ME employee Jorge Sebastian, with whom he had spoken about working in a CA-I office in the Middle East. Naqvi worked for CA-ME, not CA-I, while he was in the Middle East. CA-I was not involved in the operation of CA-ME and was not Naqvi’s employer. Al-Salloum Affid.

⁴Exh. E, a poor copy of the May 25, 2000 Employment Offer, does not reflect a name or signature of a company representative. Naqvi’s signature accepting the offer appears on the document. Exh. C at 43.

Naqvi received his salary from CA-ME during the time he was in the Middle East, but he believed that CA-ME was the same as CA-I. Exh. C at 38.

Naqvi went to Bahrain in July 2000. As a condition of employment, he was required to surrender his visa and passport to CA-ME. His wife and son remained in New York because Naqvi wanted to “settle down” first and get a “suitable apartment.” They joined him in late 2002 or early 2003, after he accepted a new position with CA-ME and was transferred to Riyadh in Saudi, Arabia. Exh. C at 45-46. This new position was memorialized in a memo on CA-ME letterhead and dated May 26, 2002. Exh. G. The subject of the memo was “Amendment to Employment Package” and it was signed by AbdulAziz H. Al-Salloum, Managing Director. It stated that Naqvi would be reporting to Al-Salloum and that a formal employment agreement would be prepared for his signature.⁵ Exh. G. Al-Salloum reported to someone from CA South Africa. Exh. C at 59.

The “amendment” described in the memo includes: a guaranteed annual salary of \$60,000 with: 1% commission “equivalent to US\$15,000” on \$1,500,000 “Quota Target on New Sales” per year; 1.5% commission “equivalent to US\$45,000” on “all Quota Target (New Sales, Indirect Sales [“US\$750,000” per year] and Training + Maintenance [“US\$750,000” per year]); \$20,000 lump sum bonus if all quota targets achieved; and additional \$20,000 bonus if 150% of all quota targets achieved. Exh. G.

Final Settlement

A letter dated August 31, 2004, on the letterhead of United Computer Arabia Co., sent to Naqvi and other employees, informed them that: CA-ME and UCA would cease operating by

⁵No formal agreement was submitted by either party.

September 30, 2004, on which date the employees' 30-day notice period would begin to run; a wholly owned subsidiary of CA-I named CA Arabia had commenced operations in the Middle East and Gulf Regions; and the Finance Department would finalize their final settlements. Exh. H. The accountant for Computer Associates Arabia, Surriya Yousef, informed Naqvi of the final settlement amount at a meeting. Naqvi objected, claiming that the amount did not fully reflect sales that had been made. There were a series of meetings, during which Naqvi presented documents with calculations supporting his claims. At one point, he said he might sue CA-ME. Surriya responded that the company would countersue and under Saudi law, Naqvi would not get back his passport and given an exit visa if the company sued him. Surriya also told Naqvi that he would not be given back his passport and an exit visa unless he signed the final settlement document. Exh. C at 140-177.

Naqvi's Final Settlement reflected as due the total amount of 236,448 in Saudi Riyals. The company had increased the amount from 126,000 after Naqvi's objections. Naqvi signed it on October 17, 2004. Exh. I. Just above his signature is a "DECLARATION" stating that Naqvi had received all the amounts due him from "Computer Associates Middle East(UCA)" and that he had no other claims with the company, "except sales commission due on the new collections made on [his] deals from Oct 1, 2004 until March 31, 2005." Exh. I. Ultimately, he was paid 244,301 Riyals, or \$65,147. The following amounts were transferred into Naqvi's bank account in New York: \$48,000 and \$15,000 in December 2004; \$2,127.50 in January 2005. Exhs. C, I-K.

Statute of Limitations

Naqvi filed the original Summons and Complaint with the New York State Supreme Court on January 20, 2006. Article 13 of the Saudi Labour and Workmen Law that was

applicable until 2006 provided that,

No committee shall hear any complaint regarding any of the violations hereto, to the implementing regulations, orders and instructions made hereunder, after the lapse of twelve months from the date of the infraction, no suit or claim, pertaining to any of the rights provided for herein, shall be heard after the expiry of twelve months from the expiry date of the contract.

Exh. P. According to Saudi lawyer Hussam Al-Hejailan, the reformed Saudi Labour Law in effect contains similar language and “[i]n any case no claim shall be heard by the commissions for settlement of labour disputes later than twelve (12) months from the end of termination of the work relation.” Al-Hejailan Affid.

II. Discussion

Summary judgment is the procedural equivalent of a trial. *See S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 (1974). Because summary judgment is a drastic remedy, it should be used with caution and should be granted only if there exist no triable issues of fact and the movant is entitled to judgment as a matter of law. *See CPLR 3212 (b); Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986); *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). Once a prima facie showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” *Giuffrida v Citibank Corp.*, 100 NY2d 72, (2003); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

In deciding whether there is a material issue of fact, the court must view the evidence in the light most favorable to the nonmoving party. *See Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 (1985); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated’.”

Gervasio v Di Napoli, 134 AD2d 235, 236 (2d Dept 1987), quoting *Assing v United Rubber Supply Co.*, 126 AD2d 590 (2d Dept 1987).

A. *Proper Party*

CA-I, the movant here, claims that it is not a proper party to the lawsuit because CA-ME was Naqvi's employer during all relevant times and CA-1 is not derivatively liable for CA-ME's acts or omissions. Before addressing whether CA-I has made a *prima facie* showing as to this claim, the court will address Naqvi's claim that the prior ruling by Justice Cahn (retired), that CA-I is liable as a member of the joint venture that created CA-ME (12/31/08 Decision), is *law of the case* and binding.

The prior ruling was made in deciding a motion to dismiss and is not binding on the court in deciding the summary judgment motion. "The doctrine of law of the case is inapplicable 'where . . . a summary judgment motion follows a motion to dismiss'." *Friedman v General Connecticut Life Ins. Co.*, 30 AD3d 349, 349 (1st Dept 2006), quoting *Riddick v City of New York*, 4 AD3d 242, 245 (2004). The First Department explained that "the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings." *Id.*, citing *Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 (1st Dept 1987), *affd as mod* 9 NY3d 105 (2007). Consequently, Justice Cahn's ruling is not law of the case.

Therefore, the court will examine the sufficiency of the evidence underlying the pleadings. CA-I has made out a *prima facie* case that it is not the proper party by submitting admissible evidence of the following undisputed material facts: the parties to the JV Agreement

did not create a joint venture; Naqvi was employed by CA-ME, not CA-I, pursuant to the May 25, 2002 agreement that he claims was breached; CA-ME was a separate company from CA-I; and CA-I was a 39.5% shareholder of CA-ME pursuant to the JV Agreement.

Corporations “are legal entities distinct from their managers and shareholders and have an independent legal existence. Ordinarily, their separate personalities cannot be disregarded.” *Port Chester Electrical Constr. Corp v Atlas*, 40 NY2d 652, 657 (1976). Although courts do have the authority to look beyond the corporate form “to prevent fraud or to achieve equity” [*Id.*, quoting *International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 292 (1948)], neither circumstance is supported by the evidence. “Allowing a court -- through joint and several liability -- to in effect pierce the corporate veils, without the proper inquiry and proof according to established guidelines, undermines bedrock principles of corporate law.” *In re Seagroat Floral Co.*, 78 NY2d 439, 450 (1991) (modifying lower court order to reverse imposition of joint and several liability as to two distinct legal entities).

Here, the undisputed facts establish that the external indicia of separate corporate identities were at all times maintained. CA-ME was a corporation legally constituted under the laws of Saudi, Arabia. CA-I was a separate entity incorporated under the laws of Delaware, a minority shareholder of CA-ME; without more, it was not liable for CA-ME’s debts and obligations. *See East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 (2011), citing *Morris v New York State Department of Taxation and Finance*, 82 NY2d 135 (1993) (affirming dismissal of complaint against individual owner/shareholder of corporation where not establish domination and control and damage resulting from abuse of corporate form). There is no evidence that corporate formalities were not followed by CA-ME.

Nor is there any evidence that the parties intended to form and be members of a joint venture, thereby rendering them individually liable for the venture's debts and obligations.⁶ A joint venture or a partnership is created by agreement of the participants and determined by construing the parties' intent, which can be express or implied. *Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 298 (1st Dept 2003); *See Shaw v Irby*, 2008 NY Misc LEXIS 8598, 2008 NY Slip Op 31248U (Sup Ct, New York County 2008) ("A party seeking to establish a joint venture must point to language in the agreement or extrinsic evidence establishing intent to form something other than a contractual relationship to operate a company," citing *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 453 FSupp2d 633, 683-685 (SDNY 2006). A critical element of a joint venture or partnership is "a mutual promise or undertaking of the parties to share in the profits of the business and to submit to the burden of making good the losses." *Matter of Steinbach v Serosa*, 4 NY2d 302, 317 (1958), *appeal dismissed* 358 US 39 (1958) (emphasis added); *accord Larger v Dadabhoy*, 44 AD3d 425 (1st Dept 2007), *appeal denied* 10 NY3d 712 (2008).

Here, paragraph 6.10 of the JV Agreement provides that, "[t]he relationship of all of the parties is that of independent contractors and nothing contained in this Agreement or the Existing [software] Agreement shall constitute the parties as partners, joint ventures [sic] or co-owners." Exh. F. The parties also disclaim joint liability and agency authority. ¶1.4. Under New York law, "the fundamental, neutral precept of contract interpretation is that agreements are construed

⁶Partnership Law, which courts look to in determining the duties and obligations of joint venture members, explicitly holds partners jointly and severally liable for the partnerships debts and obligations (Partnership Law 26). *See Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 (1988) (finding joint and several liability where acting in ordinary course of partnership [or joint venture] business).

in accordance with the parties' intent, and that the best evidence of what parties to a written agreement intend is what they say in their writing." *Innophos, Inc. v Rhodia, S.A.*, 10 NY3d 25, 29 (2008) (internal citations omitted). Where, as here, a contract is negotiated by sophisticated parties at arm's length, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Hence, courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Vt. Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 (2004) (internal citations omitted).

The JV Agreement is clear and unambiguous. The parties to it did not intend to create a joint venture, regardless of their use of the words "joint venture." *Cf. Shine & Co. LLP v Natoli*, 89 AD3d 523, 523 (1st Dept 2011) (finding reference to defendant as "equity partner" not determinative).

Naqvi has not met his burden to dispute any of the material facts establishing, as a material law, that CA-I is not liable for the debts and obligations of CA-ME. He relies entirely on the *law of the case* doctrine, arguing that the prior ruling of Judge Cahn on the motion to dismiss is binding on this court in deciding a summary judgment motion. For the reasons discussed above, Naqvi is wrong.

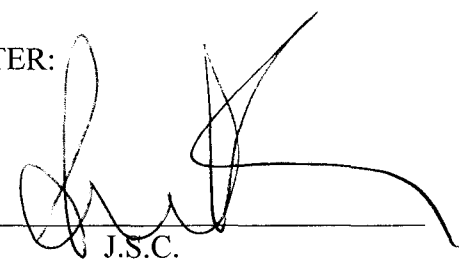
The court finds that CA-I would not be liable for any of Naqvi's claims even if he succeeded in proving them. The action against it should be dismissed. Since CA-I is not the real party in interest, the parties' additional arguments are moot. Accordingly, it is hereby

ORDERED that the motion by defendant Computer Associates International, Inc. for

summary judgment and dismissal of the Third Amended Complaint is granted in favor of plaintiff and against defendant Laeeq Naqvi, and the Third Amended Complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly, with costs to defendant upon presentation of a bill of costs.

ENTER:



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line. Below the line, the initials "J.S.C." are printed.

Dated: March 23, 2012