

Atria Retirement Props., L.P. v Bradford

2012 NY Slip Op 33460(U)

August 22, 2012

Supreme Court, New York County

Docket Number: 651823/11

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 651823/2011
ATRIA RETIREMENT PROPERTIES,
vs.
BRADFORD, STEPHEN W.
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 651823/11
MOTION DATE 3/23/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8-22-12

[Signature]
HON. EILEEN BRANSTEN
J.S.C.

- 1. CHECK ONE: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [X] 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 THREE

-----X
ATRIA RETIREMENT PROPERTIES, L.P.,

Plaintiff,

-against-

STEPHEN W. BRADFORD and LEI ANN BRADFORD,

Defendants.

-----X

Index No.: 651823/11
Motion Date: 03/23/12
Motion Seq. No.: 001

BRANSTEN, J.

In motion sequence number 1, defendants Stephen W. Bradford and Lei Ann Bradford (together the “Bradfords”), move pursuant to CPLR 3211(a) and CPLR §§ 301 and 203 to dismiss the complaint (“Complaint”) brought by plaintiff Atria Retirement Properties, L.P. (“Atria”). Plaintiff opposes the motion.

Background

I. Relationship and Agreements Between the Parties

Atria is a New York limited Partnership with its principal place of business in Palm Beach Gardens, Florida. Affirmation of David S. Pegno in Opposition to Motion to Dismiss (“Pegno Affirm.”), Ex. A (the “Complaint”), ¶ 7. Atria is organized and governed according to an Agreement of Limited Partnership dated December 1, 1997, as thereafter amended (the “Partnership Agreement”). Complaint, ¶ 9.

On or about September 23, 2008, the Bradfords became limited partners in Atria by purchasing 0.6302% of the units that comprise the ownership of Atria. *Id.*, ¶ 8. They later

purchased additional units. *Id.* The Bradfords signed an agreement, the Subscription Agreement, Atria Retirement Properties, L.P. (the “Subscription Agreement”), contemporaneously with their initial unit purchase. *See* Reply Affidavit of Stephen W. Bradford (“Bradford Reply Aff.”), Ex. B (“Subscription Agreement”). The Bradfords agreed in the Subscription Agreement to be bound by the terms of the Partnership Agreement. Bradford Reply Aff., ¶ 3; *see* Subscription Agreement, § 6.8.

The parties disagree as to whether this action should be pursued in this court or in Florida state court. The Subscription Agreement provides that the agreement shall be construed in accordance with and governed by New York law. Subscription Agreement, § 11. Section 11 of the Subscription Agreement provides exclusive jurisdiction to Florida courts for any disputes arising under or in connection with the agreement. *Id.*

The Partnership Agreement also provides that “[a]ll questions with respect to the construction of this [a]greement, and the rights and liabilities of the parties, shall be determined in accordance with the provisions of the laws of the State of New York.” Partnership Agreement, § 15.08. However, unlike the Subscription Agreement, the Partnership Agreement does not select a forum for disputes arising thereunder.

II. Facts Underlying the Complaint

On or about April 19, 2011, the Bradfords telephoned Brent Brunne, Atria’s general partner, and his brother Bradley C. Brunne, a limited partner in Atria. Complaint, ¶ 17. The Bradfords sought to withdraw \$650,000 of their funds invested in Atria within two months.

Id. Brent Brunne informed the Bradfords that while the Partnership Agreement did not allow limited partners the right to withdraw their capital contribution, he would do his best to accommodate their request. *Id.*

Thereafter, the Bradfords allegedly made a series of demands for the immediate redemption of their capital contribution to Atria. *Id.* The Bradfords also requested financial documents from Atria. *Id.* ¶ 18. Brent Brunne mailed the documents to the Bradfords. He alleges that he was not required to do so under the Partnership Agreement. *Id.*

After receiving the financial documents, the Bradfords continued to demand further information about Atria's finances from Brent Brunne and continued to demand the immediate redemption of the Bradfords' capital contribution to Atria. *Id.*, ¶¶ 19-25.

In light of the ongoing disputes between the parties relating to the parties' rights under the Partnership Agreement, on July 1, 2011, Atria filed the instant declaratory action. Complaint, ¶ 28.

Atria's Complaint seeks a declaratory judgment that: a) Atria has fulfilled all of its contractual obligations to the Bradfords; b) Atria is not required to liquidate the Bradfords' limited partnership interest; and c) Atria is not required to permit the Bradfords to inspect any further records of Atria. *Id.*, ¶ 29.

Stephen Bradford contends that, prior to Atria's filing of the instant action, he had notified Atria that the Bradfords would be filing an action in Florida state court (the "Florida Action") in order to resolve the disputes between the parties. Reply Affidavit of Stephen W.

Bradford (“Bradford Reply Aff.”), ¶ 6. The Bradfords filed the Florida Action in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida on or about July 6, 2011. *Id.*, ¶ 5. The Florida action is presently stayed pending the court’s determination on the instant motion to dismiss. *See* Transcript of Oral Argument of February 16, 2012 (Delores Hilliard, Official Court Reporter).

III. The Instant Motion to Dismiss

The Bradfords move to dismiss on the grounds that: 1) the parties selected Florida as the exclusive forum for disputes under the Subscription Agreement; 2) the court lacks personal jurisdiction over the Bradfords, even through the extension of New York long-arm jurisdiction; 3) the court should not invoke subject matter jurisdiction for the instant declaratory judgment action; and 4) New York is a forum non conveniens for this action. The court herein analyzes the applicability of the forum selection clause in the Subscription Agreement which is dispositive.

Analysis

I. Standard of Law

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.

Leon v. Martinez, 84 N.Y.2d 83 (1994) (internal quotations and citations omitted).

II. *Forum Selection Provision*

The Bradfords move to dismiss Atria's Complaint on the ground that the forum selection provision in the Subscription Agreement provides exclusive jurisdiction for the instant action to the courts of the State of Florida.

Parties to a contract may freely select a forum which will resolve any disputes arising under the contract. *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (1996). "Such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes[.]" *Id.* (internal citations omitted).

Atria argues that the forum selection clause in the Subscription Agreement is inapplicable. Atria contends that it seeks a declaration of Atria's rights and obligations under the Partnership Agreement, which does not have a forum selection clause, not under the Subscription Agreement, which does have such a clause.

The court disagrees. The Bradfords agreed to be bound to the Partnership Agreement through the Subscription Agreement. Subscription Agreement, § 6.8 (providing that the Bradfords "agree[] to be bound by all of the terms and conditions of the offering made by the Partnership Agreement[.]"). The Subscription Agreement's forum selection clause provides that:

[t]his Subscription Agreement shall be construed in accordance with and governed in all respects by, the laws of the State of New York. For any dispute arising under this Subscription

Agreement or in connection herewith, the parties irrevocably submit to, consent to, and waive any objection to, the exclusive jurisdiction of the courts of the State of Florida.

Subscription Agreement, § 11. Though Atria seeks a declaration regarding the parties' rights and obligations under the Partnership Agreement, the Subscription Agreement is not without effect. The Subscription Agreement was the vehicle by which the Bradfords became limited partners in Atria. They did not separately execute the Partnership Agreement.

Furthermore, under New York law, "where two or more written instruments between the same parties concerning the same subject matter are contemporaneously executed, they will be read and interpreted together." *Greene's Ready Mixed Concrete Co. v. Fillmore Pac. Assocs. Ltd. Partnership*, 808 F. Supp. 307, 311 (S.D.N.Y. 1992) (applying a forum selection clause in an action to enforce guaranty agreements where, even though the guaranty agreements were silent as to forum selection, promissory notes, subscription agreements and security agreements executed contemporaneously with the guaranties contained provisions selecting New York as the exclusive forum for disputes); *see also BWA Corp. v. Alltrans Express U.S.A., Inc.*, 112 A.D.2d 850, 852 (1st Dep't 1985) (holding that "in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together") (internal citation omitted).

In the instant action, the Bradfords agreed to be bound by the Partnership Agreement contemporaneously with and as a part of the execution of the Subscription Agreement. The

Partnership Agreement and Subscription Agreement both concern the Bradfords' investment in Atria. "Where two or more written instruments between the same parties concerning the same subject matter are contemporaneously executed, they will be read and interpreted together." *Greene's Ready Mixed Concrete Co.*, 808 F. Supp. at 311.

Accordingly, the forum selection provision in the Subscription Agreement is interpreted as also applying to the Partnership Agreement. The selection of Florida as the forum for disputes arising under the Partnership Agreement is prima facie valid unless Atria makes a showing that the forum selection provision is unreasonable. *Brooke Group*, 87 N.Y.2d at 534. Atria has made no such showing.

Atria must thus pursue this declaratory action against the Bradfords in Florida. The Bradfords' motion to dismiss the Complaint as barred by the forum selection clause in the Subscription Agreement is granted.

Order

Accordingly it is hereby

ORDERED that the motion of defendants Stephen W. Bradford and Lei Ann Bradford to dismiss the complaint herein is granted and the complaint is dismissed in its

entirety, with costs and disbursements to the defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

This constitutes the decision and order of the court.

Dated: New York, New York
August 22, 2012

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line.

Hon. Eileen Bransten, J.S.C.