

SRL v Khaledi Oriental Rugs, Inc.

2012 NY Slip Op 33462(U)

August 22, 2012

Supreme Court, New York County

Docket Number: 651928/2011

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN
Justice

PART 3

Index Number : 651928/2011
TABIBNIA, SRL
vs.
KHALEDI ORIENTAL RUGS, INC.
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 651928/2011
MOTION DATE 3/25/12
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

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

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8-22-12

Eileen Bransten
EILEEN BRANSTEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED [] NON-FINAL DISPOSITION [X]
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 – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

-----X
TABIBNIA SRL,

Plaintiff,

-against-

Index No.: 651928/2011
Motion Date: 3/25/2012
Motion Seq. No.: 001

KHALEDI ORIENTAL RUGS, INC. and
MEDHI KHALEDI,

Defendants.

-----X
The following papers, numbered 1 to 3, were read on this motion to dismiss.

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon review of the motion dismiss and complaint in the above-captioned action, it is clear that the matter does not meet the standards for assignment to the Commercial Division. See Uniform Rules for Trial Courts [22 NYCRR] § 202.70. The matter, including Plaintiff's fully submitted motion to compel disclosure, Mot. Seq. No. 003, is directed to the Trial Support office for random re-assignment to a non-Commercial Division judge.

Motion Sequence Number 001 is decided pursuant to the accompanying memorandum decision.

Dated: August 22, 2012


Hon. Eileen Bransten, J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; IAS PART THREE

-----X
TABIBNIA SRL,

Plaintiff,

-against-

Index No. 651928/2011
Motion Date: 3/25/12
Motion Seq. No.: 001

KHALEDI ORIENTAL RUGS, INC. and
MEDHI KHALEDI,

Defendants.

-----X
BRANSTEN, J.

Defendants Khaledi Oriental Rugs, Inc. (“KOR”) and Medhi Khaledi (“Khaledi”) (collectively, “Defendants”) move to dismiss the complaint. Plaintiff Tabibnia SRL (“Plaintiff”) opposes.

I. Background

This case arises from a dispute concerning the purchase of an antique carpet. Plaintiff is an Italian company that specializes in antique textiles.¹ Complaint (“Compl”), ¶ 2. Moshe Tabibnia (“Tabibnia”) is the owner of Plaintiff company. *Id.* Defendant KOR is a New York corporation that is also in the antique carpet business. *Id.* at ¶ 3. Khaledi owns KOR. *Id.*

In early April, 2011, Tabibnia became aware of an antique carpet (the “Carpet”) that the Pennsylvania auction company Pook & Pook, Inc. (the “Auction House”) was to auction off on April 16, 2011 (the “Auction”).

¹ Unless otherwise noted, all facts are drawn from the Complaint and are accepted as true for the purposes of this motion to dismiss. *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994).

On April 14, 2011, Khaledi e-mailed Tabibnia to ask him to look at a picture of the carpet and see if Tabibnia liked it. *Id.* at ¶ 17. Tabibnia responded that he was already aware of the Carpet and the Auction. *Id.* at ¶ 17.

Prior to the Auction, Tabibnia, who lives in Milan, Italy, attempted to secure one of a limited number of telephone bid lines for the Auction. *Id.* at ¶ 18. A telephone bid line would have enabled him to remotely place live bids for the Carpet. *Id.* Unable to secure a telephone bid line, Tabibnia unsuccessfully attempted to contact several carpet dealers to inquire if they had access to a telephone bid line and would they be willing to partner with Plaintiff to bid for the Carpet. *Id.* at ¶ 19.

On the morning of the Auction, Tabibnia called Khaledi to ask if Khaledi would purchase the Carpet with Plaintiff. *Id.* at ¶ 20. Khaledi agreed to partner with Plaintiff to purchase the Carpet using a telephone bid line that Khaledi had secured. *Id.* Khaledi and Tabibnia agreed that, if they were successful in obtaining the Carpet, KOR and Plaintiff would share the cost of the Carpet and would each have a fifty percent ownership interest therein. *Id.*

Throughout the Auction, Tabibnia and Khaledi consulted with one another regarding their bidding strategy. *Id.* at ¶ 24. Khaledi acquired the Carpet at the Auction for \$63,990. *Id.* at ¶ 25. Plaintiff claims that the parties planned for Tabibnia to travel to New York

following the Auction to view the Carpet and to reimburse Khaledi for half of the Carpet's purchase price. *Id.* at ¶ 31.

On April 25, 2011, before Tabibnia arrived in New York, Khaledi unilaterally sold the Carpet for \$73,900 to an unidentified purchaser. Affidavit of Hassan Khaledi, Improperly Pled as Medhi Khaledi, in Support of Defendants' Motion to Dismiss ("Khaledi Aff."), Ex. H.

Plaintiff then brought the instant action to enforce the alleged oral partnership agreement between the parties. Plaintiff brings causes of action for breach of contract, breach of fiduciary duty, unjust enrichment. Plaintiff also seeks a permanent injunction, a declaratory judgment² and a constructive trust. Khaledi denies that the parties entered into an oral partnership agreement.

II. Standard of Law

"On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party's pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.*

² Although Plaintiff labels the claim as one for "equitable estoppel," the relief it seeks therein is a permanent injunction and a declaratory judgment. Compl., ¶¶ 52-57.

III. Discussion

Defendants raise three principal arguments in support of their motion to dismiss. First, Defendants contend that Plaintiff may not bring the instant action in New York court because it is not registered to do business in New York. Second, Defendants maintain that the action should be brought in Pennsylvania, not New York. Third, Defendants claim that the alleged oral partnership agreement Plaintiff seeks to enforce is an illegal pooling agreement that violates U.S. anti-trust law. Fourth, Defendants argue that Plaintiff failed to adequately allege the elements of an oral partnership. Finally, Defendants assert that Plaintiff's claim for an injunction prohibiting Defendants from selling the Carpet is moot because the Carpet has already been sold.

The court addresses each argument in turn.

A. Authorization to Do Business in New York

Defendants claim that, under Business Corporations Law ("BCL") § 1312, Plaintiff, a foreign corporation, may not bring an action in New York courts unless it is registered to do business in New York. BCL § 1312 provides that "[a] foreign corporation doing business in the state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state."

Since Business Corporation Law § 1312 constitutes a statutory barrier to [a] foreign corporation's right to bring suit, the party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that

the foreign corporation's activity in New York is systematic and regular. . . . The burden of showing 'doing business' is therefore a heavy one since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce.

Airtran N.Y., LLC v. Midwest Air Group, Inc., 46 A.D.3d 208, 214 (1st Dep't 2007) (internal citations omitted).

Khaledi asserts in his affidavit that he has "had professional dealings with [Tabibnia] and [Plaintiff] on numerous occasions over the years and know[s] that [Tabibnia] personally comes to New York to engage in business on a regular basis." Khaledi Aff., p. 2. Khaledi does not claim that the business he conducted with Plaintiff or Tabibnia took place in New York. Neither does Khaledi assert that Tabibnia was conducting business on Plaintiff's behalf when he "personally . . . engage[d] in business" in New York. *Id.*

Defendants put forth only pictures from the internet in support of their contention that Plaintiff systematically and regularly does business in New York. The pictures purportedly depict Tabibnia and his wife attending an oriental rug symposium at the New York Historical Society. Khaledi Aff., Ex. B. Defendants do not explain how attending such an event could possibly constitute systematic and regular business activity in New York.

Defendants fail to meet their "heavy burden" of establishing that Plaintiff regularly does business in New York. *Airtran N.Y., LLC*, 46 A.D.3d at 214. As a foreign corporation, Plaintiff, therefore, need not obtain authorization to do business in New York prior to

bringing suit in the New York courts. BCL § 1312. Defendants' motion to dismiss on the grounds of Plaintiff's alleged failure to comply with BCL § 1312 is thus denied.

B. Bid Pooling and Antitrust Law

Defendants claim that the alleged oral partnership agreement between the parties is a "pooling activity" that is illegal under U.S. antitrust law. Memorandum of Law in Support of Defendants' Kaledi Oriental Rugs, Inc. and Mehdi Khaledi's Motion to Dismiss, pp. 6-7. Defendants assert that the alleged oral partnership had a "chilling effect" on competitive bidding at the Auction.

Section 1.2 of the Federal Antitrust Guidelines for Collaborations Among Competitors (the "Antitrust Guidelines") provides that agreements between competitors:

are analyzed under the rule of reason to determine their overall competitive effect. . . . The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.

Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors § 1.2 (2000).

Defendants present only their conclusory allegations and no evidence that the alleged oral partnership agreement was formed with an intent to "chill bidding" or that it produced such an effect. The alleged agreement did not reduce the number of bidders participating in

the auction, but instead permitted a bidder, Plaintiff, to participate in an auction in which it would otherwise have not been able to place live bids.

Defendant argues that Plaintiff could have independently participated in the Auction without Defendants' assistance by bidding online. Whether or not this is the case is a factual issue that is not appropriate for determination on a motion to dismiss. Furthermore, Defendants do not explain how the alleged oral partnership had the effect of stifling competition, even if Plaintiff could have independently bid in the Auction.

Defendants fail to establish that the alleged oral partnership between Plaintiff and Defendants was illegal. Construing all facts in favor of the Plaintiff, as the court must on a motion to dismiss, the alleged oral partnership between the parties did not violate antitrust laws. *Leon*, 84 N.Y.2d at 88. Defendants' motion to dismiss on the grounds that the alleged oral partnership is unenforceable due to illegality is denied.

C. Venue

Defendants argue that Plaintiffs should have brought the instant action in Pennsylvania rather than in New York. In doing so, Defendants attempt to enforce a forum selection clause contained in the Auction House's "Conditions of Sale" requiring that all actions be brought in Pennsylvania. *Khaledi Aff.*, Ex. F, p. 2.

The forum selection clause governs disputes between a purchaser and the Auction House, not between two purchasers who are unrelated to the Auction House. *Id.* Defendants

provide no basis upon which the court may enforce the Auction House's forum selection clause in an action in which the Auction House is not a party. Defendants' motion to dismiss for improper venue is denied.

D. Failure to Adequately Allege an Oral Partnership

Defendants next argue that Plaintiff failed to adequately allege the elements of an oral partnership. Defendants claim that Plaintiff alleged only that the oral partnership agreement provided for the equal sharing profits, but not losses.

"It is axiomatic that the essential elements of a partnership must include an agreement between the principals to share losses as well as profits." *Chanler v. Roberts*, 200 A.D.2d 489, 491 (1st Dep't 1994).

Plaintiff sufficiently alleged that the parties would share both profits and losses. First, Plaintiff claims that the parties agreed to share the cost of the Carpet. Although Plaintiff admits that it never paid its share of the Carpet's purchase price, Plaintiff claims that it was unable to do so because Defendants renounced the alleged oral partnership before Plaintiff had an opportunity to reimburse Defendants.

Second, Plaintiff claims that the parties agreed that Plaintiff and KOR would equally share ownership of the Carpet. Under the alleged oral partnership agreement, if the Carpet had been sold at a loss, then Plaintiff and KOR would have borne the loss equally, as they each held a fifty percent ownership interest in the Carpet.

Reading the complaint liberally in the light most favorable to Plaintiff, *Leon*, 84 N.Y.2d at 88. , Plaintiff sufficiently alleges the elements of an oral partnership. *Chanler*, 200 A.D.2d at 491. Defendants' motion to dismiss for failure to state a claim is denied.

E. Injunctive Relief

Defendants assert that Plaintiff's demand for injunctive relief preventing Defendants from selling the carpet is moot because Defendants sold the Carpet well before Plaintiff filed the instant action. In support of its contention, Defendants provide Khaledi's sworn affidavit and an invoice showing that the Carpet was sold to an unidentified purchaser on April 25, 2011 for \$73,900. Khaledi Aff., Ex. H.

In its brief, Plaintiff alleges that Defendants may not have actually sold the Carpet, and accuses Defendants of altering or fabricating the invoice. Memorandum of Law of Plaintiff Tabibnia SRL in Opposition to Defendants' Motion to Dismiss, p. 15. Plaintiffs provide no evidence rebutting Khaledi's sworn affidavit or disproving the authenticity or accuracy of the invoice proffered by Defendants. Nor does Plaintiff cite any case law in support of its position that the court should ignore Defendants' documentary evidence and sworn affidavit.

In light of Defendants' evidence that the Carpet was sold over a year ago, Plaintiff's claims for injunctive relief and a constructive trust preventing Defendants from selling the carpet are dismissed as moot.

IV. Conclusion

For the reasons set forth above, it is hereby

ORDERED that Defendants Khaledi Oreintal Rugs, Inc. and Mehdi Khaledi's motion to dismiss is granted to the extent that Plaintiff's causes of action for a permanent injunction and a constructive trust preventing Defendants from selling the Carpet are dismissed as moot. Defendants' motion to dismiss is otherwise denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, upon review of the motion dismiss and complaint in the above-captioned action, it is clear that the matter does not meet the standards for assignment to the Commercial Division. *See* Uniform Rules for Trial Courts [22 NYCRR] § 202.70. The matter, including Plaintiff's fully submitted motion to compel disclosure, Mot. Seq. No. 003, is directed to the Trial Support office for random re-assignment to a non-Commercial Division judge.

Dated: New York, New York
August 22, 2012

ENTER:



Hon. Eileen Bransten, J.S.C.