

Simshabs Capital Partners, Ltd. v Ellis
2016 NY Slip Op 32609(U)
December 21, 2016
Supreme Court, Kings County
Docket Number: 503445/2016
Judge: Sylvia G. Ash
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At an IAS Term, Comm-11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of December, 2016.

P R E S E N T:

HON. SYLVIA G. ASH,

Justice.

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SIMSHABS CAPITAL PARTNERS, LTD.,

Plaintiff(s),

DECISION AND ORDER

- against -

Index # 503445/2016

HERBERT ELLIS,

Defendant(s).

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The following papers numbered 1 to 11 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-6
Opposing Affidavits (Affirmations) _____	7-9
Reply Affidavits (Affirmations) _____	10
Other (Prospectus) _____	11

Plaintiff, SIMSHABS CAPITAL PARTNERS, LTD. ("Simshabs"), brings this action for breach of contract, misrepresentation, tortious interference with business relations against Defendant, HERBERT ELLIS ("Ellis"). Both parties are in the business of real estate development. According to the affidavit of Rafi Weiss ("Weiss"), President of Simshabs, in or around the end of January 2016, the parties were engaged in discussions about a potential joint venture. During those discussions, Ellis allegedly requested that Simshabs provide documentation confirming its involvement in substantial real estate projects. However, to provide such information, Simshabs required Ellis to sign a confidentiality agreement. It is undisputed that Ellis signed the subject Confidentiality Agreement dated January 29, 2016, which, in relevant part, states the following:

- 2. Information sent by SCP is not for dissemination to others.
Submission is for the sole purpose of Ellis making a determination as to whether he wishes to proceed further with SCP. Ellis will not contact any party mentioned within any information submitted.

3. Regardless of...Ellis agrees not to utilize, distribute or disclose to any party any aspect of information within the BFHJ book. Such involves any principal and/or any property mentioned within such information.....

5. Ellis will not contact anyone, be it lenders, principals or others related to or doing business with SCP for any reason.....

8. By execution of this document, Ellis represents that he has the authority to execute on behalf of their partners and affiliated entities and that all such individuals are bound by this agreement.....

10. This Agreement sets forth the entire agreement of the parties hereto with respect to the subject matter hereof, and no change or modification of this Agreement shall be valid unless made in writing and signed by all of the parties hereto. This Agreement is personal to Ellis.

In its complaint, Simshabs alleges that it forwarded the BFHJ book¹ to Ellis; that such book contained confidential information; and that on February 19, 2016, Simshabs met with Greg Senkevitch (“Senkevitch”), President and CEO of Beneficial Holdings (“Beneficial” or “BFHJ”) who is featured on page one of the BFHJ book, who informed Simshabs that “Ellis contacted him and disclosed various details of the transaction” that were the subject of the Confidentiality Agreement. Simshabs further alleges that upon learning of the “Agreement with Ellis, Senkevitch withdrew from his dealings with Simshabs.” Based on the foregoing, Simshabs seeks a preliminary injunction enjoining Ellis and his agents from further disclosing or distributing “confidential information” and from contacting any individual or entity mentioned in the “confidential materials.”

Ellis opposes Simshabs’ motion for a preliminary injunction and cross-moves to dismiss the complaint in its entirety. According to Ellis, Simshabs forwarded a “marketing pitch-book” containing details of what appeared to be its divisions, principals and prior projects to Michael McGovern (“McGovern”), a listing broker for one of Ellis’s companies. Ellis contends the pitch-book contains false information. Specifically, that the “division” featured on page one of the pitch-book, Beneficial, is not a division of Simshabs or affiliated with it. It is Ellis’s position that

¹ According to Simshabs, the BFHJ book outlines its relationship with various entities and strategic partners and contains confidential information on projects that Simshabs was involved in. The BFHJ book is also referred to by Simshabs as the “prospectus.”

Simshabs inserted Beneficial's marketing materials into its pitch-book to pass off Beneficial's experience as its own. In support, Ellis proffers McGovern's affidavit stating that the brochure he received from Simshabs is a spiral-bound "glossy" containing information on BFHJ which the accompanying cover letter states is a "division" of Simshabs. McGovern states that he conducted an internet search of BFHJ which revealed that BFHJ is a public company traded on NASDAQ but that he could not confirm an affiliation between Simshabs and BFHJ. That, as a result, on February 1, 2016, he inquired further by calling the BFHJ offices and speaking to Senkevitch, asking him whether BFHJ was a division of Simshabs. According to McGovern, Senkevitch answered in the negative and terminated the call. McGovern states that, at that point, he concluded the brochure was fraudulent and did not pursue any further communications with Simshabs. He further states that he never forwarded or disclosed the brochure to Ellis until Ellis asked about it when he received an email from Simshabs threatening him with liability. Ellis has submitted the original brochure/pitch-book/prospectus to the Court as part of his motion.

Ellis moves to dismiss the cause of action for breach of contract on primarily two grounds. First, Ellis argues that the information contained in the pitch-book cannot be considered "confidential" because such information was false and, in any case, everything contained in the brochure is publicly available on Beneficial's own website. Secondly, Ellis argues that there can be no breach of the Confidentiality Agreement because said agreement is "personal to Ellis" and does not bind Ellis's agent, McGovern, and it was McGovern who received the BFHJ book and who contacted Senkevitch as part of his due diligence.

In addition, Ellis argues that Simshabs cannot maintain a cause of action for negligent misrepresentation because it has failed to allege even one misrepresentation, let alone one with any particularity or one that was relied upon by Simshabs in any way. Further, that Simshabs failed to state a cause of action for tortious interference with business relations because Simshabs' allegations with regards to malice and bad-faith, necessary elements for tortious interference, are conclusory.

In a separate motion, Ellis moves to change venue to Albany County on the basis that Simshabs, at the time of this action's commencement, was an unauthorized foreign corporation and, therefore, venue should be based on Ellis's residence which is in Albany County.

In opposition, Simshabs states that it is a New Jersey Corporation with its principal office located in Kings County, New York. Simshabs further states that it filed its application to conduct business in New York in December 2015 but that the Certificate of Authority was not issued by the Secretary of State until April 2016. Simshabs also argues that Ellis and his company are engaged in

a multi-million construction project in Manhattan and the extent of his business ventures is such that there would be no prejudice to Ellis to litigate in Kings County.

In opposition to Ellis’s motion to dismiss, Simshabs submits that the confidential information that was “leaked” was the very fact that Simshabs is communicating with Ellis with respect to a potential joint venture. Simshabs also maintains that it has stated causes of action for breach of contract, negligent misrepresentation and tortious interference.

Discussion

Turning first to Ellis’s motion to dismiss, the Court finds that Ellis is not entitled to dismissal of Simshabs’ breach of contract cause of action under CPLR 3211. It is well established that on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, the facts as alleged in the complaint to be accepted as true, and the plaintiff accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [Ct App 1994]). In addition, 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 (*Id. citing Heaney v Purdy*; 29 NY2d 157 [1971]).

Here, the complaint alleges that Ellis received confidential information, the BFHJ book, and that Ellis contacted Senkevitch regarding information contained in that book. The Confidentiality Agreement clearly prohibits Ellis from contacting anyone “doing business” with Simshabs. The argument that Beneficial is not a division of Simshabs as allegedly represented in the BFHJ book and the contention that the book was, in fact, forwarded to McGovern who thereafter contacted Senkevitch, and therefore there was no breach by Ellis are issues that cannot be resolved by this Court on a CPLR 3211 motion to dismiss. The Court is limited to determining whether the four corners of the complaint has plead a cause of action and the Court finds that an action for breach of contract has been sufficiently plead. In addition, the Court finds that the documentary evidence referred to by Ellis is not dispositive of Simshabs’ claims.

However, the Court dismisses Simshabs’ second cause of action for misrepresentation on the basis that it is duplicative of its breach of contract claim. The Court also dismisses the third cause of action for tortious interference because Simshabs’ allegation regarding harm/malice are conclusory (*see Hersh v Cohen*, 131 AD3d 1117, 1119 [2d Dept 2015]; *McHenry v Lawrence*, 66 AD3d 650, 652 [2d Dept 2009]) and unsupported based on Simshabs’ own recitation of the facts.

Turning to Simshabs' motion for a preliminary injunction, the Court finds that Simshabs has not established its entitlement to an injunction. Simshabs cannot show irreparable harm as the harm is purely financial and has already allegedly occurred with respect to Beneficial. Simshabs does not indicate that any other entity, besides Beneficial, is identified in the prospectus/pitch-book. Moreover, the Court is in possession of said book and will be turning it over to Simshabs at its convenience.

With respect to Ellis's motion to change venue to Albany County, the motion is denied. "[A] foreign corporation's designation of the location of its office in its statement filed with the Secretary of State constitutes a designation of its residence for venue purposes under CPLR 503[c] (*Johanson v J.B. Hunt Transp., Inc.*, 15 AD3d 268, 269 [1st Dept 2005]). Here, Ellis does not dispute that Simshabs filed its application to conduct business in New York with the Secretary of State in December 2015, prior to this action's commencement, and that the address listed in its application was its Kings County address.

In accordance with the foregoing, it is hereby

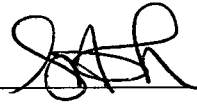
ORDERED that Simshabs' motion for a preliminary injunction is DENIED (motion sequence 1); it is further

ORDERED that Ellis's motion to change venue is DENIED (motion sequence 2); and it is further

ORDERED that Ellis's motion to dismiss the complaint is DENIED as to the first cause of action and GRANTED as to the second and third causes of action (motion sequence 3).

This constitutes the Decision and Order of the Court.

E N T E R,



Sylvia G. Ash, J.S.C.