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

JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 601140/2010
DIRECTV LATIN AMERICA,
VS.
PRATOLA, CARLOS
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____
MOTION DATE 12/17/2010
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	11-13, 15
Answering Affidavits — Exhibits	16-20
Replying Affidavits	21-22, 24

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 4/8/11

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

DIRECTV LATIN AMERICA, LLC and
LATIN AMERICAN SPORTS, LLC,

Plaintiffs,

-against-

Index No. 601140/10

CARLOS PRATOLA,
ALEJANDRO ZUNDA CORNELL and
DIEGO CLEMENTE,

DECISION AND ORDER

Defendants.

----------X

SHIRLEY KORNREICH, J.:

Defendants move, pursuant to CPLR 3211 (a) (4) and (a) (8) to dismiss the complaint on the ground that the complaint is barred by the doctrines of res judicata and/or collateral estoppel as a result of a prior decision issued by the District Court of the Southern District of New York, finding lack of personal jurisdiction over the defendants and grounds for dismissal under the doctrine of forum non conveniens.

Plaintiff, DirecTV Latin America, LLC (DirecTV), brings this action against Carlos Pratola and Alejandro Zunda Cornell (Zunda), two former senior officers of its subsidiary, DirecTV Argentina, S.A. (DirecTV Argentina) and a third party, Diego Clemente. Defendants are alleged to have defrauded DirecTV into entering a joint venture, while they secretly obtained kickbacks and an equity interest in the venture from the other party to that joint venture.

DirecTV provides pay television services in Latin America and, through its subsidiaries, including DirecTV Argentina, has approximately 5 million subscribers. Before his termination, defendant Pratola was the general manager and chief executive officer of DirecTV Argentina. Defendant Zunda was a senior officer at DirecTV Argentina.

DirecTV alleges that, in April 2006, Pratola and Zunda suggested to management that it would be beneficial for DirecTV to create a Spanish language television channel to broadcast golf programming in Latin America (the Channel). At Pratola's urging, DirecTV entered into discussion with Carlos Vincente Avila (Avila), a prominent figure in Argentine sports, with a view toward forming a joint venture to develop and distribute the Channel in Latin America. In July 2006, Pratola took a lead role in negotiating a Memorandum of Understanding between DirecTV and Avila, as well as negotiating the definitive transactional documents, including the joint venture agreement (the Agreement).

The result of the Agreement between DirecTV and Avila was the formation of Latin American Sports, LLC (LAS), a limited liability company owned by DirecTV, and by Park 610, LLC (Park 610), a limited liability company owned by Avila. DirecTV alleges that, among the issues that Pratola negotiated with Avila was the structure of the joint venture, including the amount and proportion of DirecTV's equity and debt funding for the Channel. According to DirecTV, Pratola convinced management that Avila would not accept less than a majority stake in the venture in exchange for his contribution to the venture, which consisted principally of procuring the desired golf programming rights. Thus, although DirecTV would supply all of the funding, it ultimately agreed to receive only 45% of the membership of the joint venture, whereas Park 610 would receive 55% of the equity. Pursuant to the Agreement, DirecTV had the obligation to provide up to $7 million of funding to LAS. During the calendar year 2006, DirecTV made a capital contribution of $1,500,000. In 2007, DirecTV contributed capital in the amount of $2,500,000.

In addition to its financial contribution, DirecTV had certain approval rights as a minority

investor. While Avila was the Chairman of LAS, DirecTV had the right to designate two members of the Board of Directors of LAS; Avila was able to designate three. From August 22, 2006, until the date of his termination, Pratola was one of the two directors of LAS designated by DirecTV.

DirecTV alleges that Avila had a long history of developing sports programming in Argentina, and his personal commitment to developing the Channel in the Latin American market was material to DirecTV's decision to invest in the joint venture. Consistent with this understanding, among the terms of the Agreement was a provision stating that a "Change of Control" of Park 610 would constitute an "Event of Default" under the Agreement.

Park 610, which was formed in August 2006 as a Delaware limited liability company, was owned in equal portions by two Uruguayan corporations, Tumely S.A. (Tumely) and Loraine S.A. (Loraine). In the summer of 2006, during due diligence meetings, Avila told DirecTV's counsel that he owned all of the equity of Tumely and Loraine. When questioned during those meetings as to why Park 610's ownership was split between Tumely and Loraine, rather than registered directly in the name of Avila himself, Avila informed DirecTV's counsel that the sole purpose of the dual holding company structure was to build enough flexibility to permit intra-family transfers in the future.

DirecTV alleges that, in fact, at the same time that Avila was preparing to close the joint venture with DirecTV, Pratola and Zunda were working with Avila to arrange a transfer of the ownership of Tumely to Leraman, S.A. (Leraman), an entity formed by and on behalf of Pratola and Zunda. This transfer of interest was accomplished in 2006.

DirecTV also alleges that Pratola and Zunda received cash kickbacks from Avila in the

form of management fees. As part of the joint venture transaction, LAS had entered into a "Management Services Agreement" with Park 610. The Management Services Agreement provided for the payment to Park 610 of a management fee equal to 25% of all advertising sales generated by LAS.

The Channel's advertising revenues did not materialize as planned, and sales were far below the amount that would generate a significant management fee. Avila, therefore, pressured DirecTV to pay him an advance on the management fees in the amount of $30,000 per month for six months and to reevaluate the arrangement thereafter. The payment of the management fees was carried out under highly irregular circumstances. LAS's chief executive officer, Roberto Timistit (Timistit), who was also Avila's brother-in-law, initially arranged for two transfers of $30,000 to a JPMorgan acount held in the name of Avila personally, rather than to Park 610, as would have been required under the Management Services Agreement. Another transfer in the amount of $30,000 was made to an account at UBS bank with the beneficiary information titled as "Clemente." DirecTV alleges that, upon information and belief, defendant Clemente opened the UBS acount in New York for the purpose of receiving funds that were to be diverted from DirecTV, DirecTV Argentina and/or LAS.

DirecTV alleges that Clemente was indispensable to the other defendants in their efforts to conceal the cash portion of the kickbacks to Pratola and Zunda because DirecTV had the right to examine the books and records of LAS. If the cash kickbacks from Park 610 had been wired from LAS accounts titled in the name of its own executives (Zunda and Pratola) as opposed to some third party whom DirecTV did not recognize, such as Clemente, DirecTV would have become aware of the kickbacks. DirecTV alleges that Timistit later arranged wire transfers on

three subsequent occasions, in each case in the amount of $20,000 to Avila's JPMorgan account and $10,000 to Clemente's UBS account.

In the fall of 2007, Direct TV received evidence indicating that Pratola and Zunda had engaged in a conspiracy with Avila with regard to the Leraman transaction. DirecTV confronted each of Pratola and Zunda about the transaction. When confronted with the evidence against them, neither Pratola nor Zunda offered a satisfactory explanation of their conduct. Ultimately, DirecTV Argentina fired Pratola and Zunda for their self-dealing.

By letter dated March 25, 2008, DirecTV notified Avila that it had discovered his illicit transfer of Tumely to Leraman and DirecTV exercised a Call Option contained in the Agreement. Avila denied that an event of default had taken place and refused to tender his membership interests in LAS.

The Federal Court Action

On April 29, 2008, DirecTV commenced an action in federal court on behalf of itself and as a derivative action on behalf of LAS against defendants Park 610, Avila, Timistit, Paratola and Zunda (*DirecTV Latin America, L.L.C., et al., v Park 610, L.L.C., et al.*, 08 Civ. 3987 [VM]) (The Federal Court Action). On June 12, 2008, DirecTV filed an amended complaint, which added Clemente as a defendant. The various defendants filed motions to dismiss on a number of different theories. The matter was referred to Magistrate Judge Gabriel Gorenstein for supervision of pretrial proceedings, who raised, sua sponte, the issue of whether there was complete diversity of citizenship and, therefore, subject matter jurisdiction. After receiving additional briefing from the parties on this issue and on the issue of forum non conveniens, the Court recommended dismissal of LAS and Zunda as parties due to lack of subject matter

jurisdiction. Further, the Court recommended the dismissal of the derivative, fiduciary duty and fraud claims because the Court found LAS was a necessary party to those claims as written. However, the Court recommended giving DirecTV leave to file an amended complaint consistent with the recommendation. This Report and Recommendation was adopted in its entirety (Decision and Order of United States District Judge Victor Marrero, dated April 30, 2009, *DirecTV Latin Am. V Park 610, LLC,* 614 F Supp 2d 446 [SD NY 2009]).

DirecTV's second amended complaint in the Federal Court Action omitted LAS and Zunda as parties and asserted five grounds for relief: (1) declaratory judgment against Park 610; (2) breach of contract against Park 610; (3) breach of fiduciary duties against Park 610 and Avila; (4) aiding and abetting a breach of fiduciary duty against Avila, Timistit, Pratola and Clemente; and (5) fraud against Avila, Pratola and Timistit, and aiding and abetting fraud, as against Clemente and Timistit. The remaining defendants then moved to dismiss the action on the grounds of lack of personal jurisdiction and the doctrine of forum non conveniens.

In determining that part of defendants' motion to dismiss based upon lack of personal jurisdiction, Magistrate Gorenstein applied New York State law and found that, under both CPLR 302 (a) (1) and CPLR 302 (a) (2) and the facts as alleged by DirecTV, New York did not have personal jurisdiction over either Pratola or Clemente. Magistrate Gorenstein also noted that even if there were personal jurisdiction over Pratola and Clemente, the suit against them would be properly dismissed on forum non conveniens grounds.

As to that part of defendants' motion to dismiss for failure to state a cause of action, Magistrate Gorenstein determined that DirecTV had failed to state a claim for breach of contract, because it had not shown: first, that more than 50% of the shares in Park 610 had been

transferred to Leraman, thereby breaching the Joint Venture Agreement; second, that Park 610 had transferred its interest in LAS, thereby breaching the "transfer of interests" portion of the Joint Venture Agreement; and third, that the transaction involving Tumely, Lorraine, Avila and Leraman was attributable directly to Park 610 and, therefore, a breach of the ethics provision of the Joint Venture Agreement. Magistrate Gorenstein also dismissed DirecTV's claim for a declaratory judgment. In addition,

As to the claim for fraud, Magistrate Gorenstein found that DirecTV's allegations were sufficiently pled as to Avila but not as to Timistit. Magistrate Gorenstein nonetheless found that Timistit had aided and abetted Avila's fraudulent statements. In addition, the Court found that DirecTV had sufficiently alleged that Park 610 breached its fiduciary duties and that Avila breached his fiduciary owed to DirecTV as the manager of the LLC. As to Timistit, the Court stated: "Timistit's acts done to advance the indirect transfer of ownership of Park 610 to Pratola and Zunda are sufficient to show aiding and abetting liability" (Burger Aff., Ex. H, at 51).

The Report and Recommendation of Magistrate Gorenstein was adopted in its entirety by United States District Judge Victor Marrero (Decision and Order dated January 26, 2010).

DirecTV commenced this action against Pratola, Zunda and Clemente in May 2010. According to DirecTV, as a result of a settlement with Avila in the Federal Court action, DirecTV now owns LAS and LAS is, therefore, also named as a plaintiff. Plaintiffs allege the following causes of action: breach of fiduciary duty against Pratola regarding the diversion of management fees (first cause of action); aiding and abetting breach of fiduciary duty against Zunda and Clemente (second cause of action); breach of fiduciary duty against Pratola regarding the Leraman transaction (third cause of action); aiding and abetting breach of fiduciary duty

against Zunda (fourth cause of action); aiding and abetting Park 610 and Avila's breach of fiduciary duty as against all defendants (fifth cause of action); civil conspiracy against all defendants (sixth cause of action); fraudulent concealment against Pratola and Zunda (seventh cause of action); aiding and abetting fraud against all defendants; and conspiracy to commit fraud against all defendants (ninth cause of action). Relying on the federal decision, defendants move to dismiss the complaint, in its entirety, on the grounds that the complaint is barred by the doctrines of res judicata and/or collateral estoppel, by the lack of personal jurisdiction over the defendants and by the doctrine of forum non conveniens.

"The general doctrine of res judicata gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein" (*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008], quoting *Matter of Grainger (Shea Enters.)*, 309 NY 605, 616 [1956]). Under New York's transactional approach to the doctrine of res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). However, "[i]n properly seeking to deny a litigant two 'days in court,' courts must be careful not to deprive him of one" (*Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). "Where a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply" (*Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142 [2d Dept 2010] [internal quotation marks and citation omitted]). Thus, the First Department has held that:

> Dismissal of a prior action for failure to prosecute is not such

> dismissal as would bar the institution of a new action for the same relief [citation omitted]; nor is a dismissal for failure of plaintiffs to appear a dismissal on the merits [citation omitted]; *or a dismissal for lack of jurisdiction over the person* [citation omitted]

(*Mintzer v Loeb, Rhoades & Co.*, 10 AD2d 27, 31 [1st Dept 1960]) (emphasis added).

Similarly, the Court of Appeals has noted that:

> "Whereas a dismissal based on the statute of limitations or statute of frauds grounds is a determination that the matter is irremediably flawed as a matter of law, it is equivalent to a determination on the merits for res judicata purposes. At the opposite end of the spectrum, dismissal for prematurity, lack of standing, absence of ability of the court to proceed by reason of a defect in jurisdiction over subject matter or person or other forms of procedural inadequacy unique to the particular case in the particular forum are not intended to have any determinative effect "on the merits' of the action"

(*Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d at 13 n 3 [2008], quoting 10 Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.11, at 50-116 [2d ed]). Thus, a determination by a court as to lack of personal jurisdiction does not reach the merits of the controversy and, consequently, does not preclude a subsequent action based upon the same controversy. Here, for example, the ultimate merits of the plaintiffs' claims for breach of fiduciary duty, aiding and abetting the breach of fiduciary duty, fraudulent concealment, aiding and abetting fraud and conspiracy to commit fraud is not precluded by the Federal Court Action.

However, the related, narrower, doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Thus, where specific factual issues are determined by a prior court, those issues may not be relitigated

in a second proceeding (see *Cartesian Broadcasting Network, Inc. v Robeco USA*, 10 Misc 3d 1060 (A), 2005 NY Slip Op 52048 (u) [Sup Ct, NY County 2005], *affd* 43 AD3d 311 [1st Dept 2007]).

There are two necessary requirements for collateral estoppel: "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]).

Here, the issue as to whether New York has personal jurisdiction over Clemente and Pratola pursuant to CPLR 301 and 302, has been briefed and determined in the Federal Court Action. The issue may not be relitigated (*see e.g. Keeler v West Mtn. Corp.*, 105 AD2d 953 [3d Dept 1984]).

As to plaintiffs' suggestion that this determination is not binding upon LAS, since it was not a party to the prior action, LAS is a limited liability company which is now wholly owned by DirecTV. Its interests with respect to the claims against the defendants are identical to those of DirecTV.

> [A] nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation

(*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). As a result, LAS is collaterally estopped from relitigating personal jurisdiction over the defendants as well.

However, neither Magistrate Judge Gorenstein nor Judge Marrero made any determination as to personal jurisdiction over Zunda. The issue over New York State's

jurisdiction over this defendant remains to be determined.

In their complaint, plaintiffs allege that Zunda is a citizen of the United States, with a domicile at Calle Julian Alvarez 2860, Piso 3, Departamento 5°, C1425DHT, Barrio Palermo, Buenos Aires, Argentina (Complaint ¶ 9). It is uncontroverted that, until his termination, Zunda was employed as a senior officer at DirecTV Argentina.

In support of their position that New York has jurisdiction over Zunda, plaintiffs allege that the defendants used a UBS bank account in New York owned by defendant Clemente as an instrumentality of the conspiracy to funnel a part of the kickback to co-defendants Pratola and Zunda.(Compl., ¶¶ 53 - 59). Plaintiffs have not alleged that Zunda had any other business dealings or contact within this State.

CPLR 302 provides the basis for personal jurisdiction in New York against a non-domiciliary. CPLR 302 (a) (1) permits New York long-arm jurisdiction where a non-domiciliary defendant "transacts business" within the state and the claim arises out of that transaction. "This [section] has typically contemplated an ongoing business relationship between the parties, with some New York contacts. The focus is on the contacts between the nonresident defendant and the business centered in New York" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 95 [1st Dept 2010]). Where, as here, the business dealings between the plaintiffs and defendants involved services outside of New York, "the mere payment into a New York account does not alone provide a basis for New York jurisdiction" *(id.* at 96). Thus, the mere fact that funds were deposited into an account maintained by Clemente is not grounds for jurisdiction over Zunda.

Further, CPLR 302 (a) (2) provides that jurisdiction may be exercised over a non-domiciliary who in person or through an agent "commits a tortious act" within New York. "To

find that a defendant has committed a tortious act in New York, our courts have traditionally required the defendant's presence here at the time of the tort" (*id.* at 97, citing *Kramer v Vogl*, 17 NY2d 27 [1966]). Plaintiffs do not allege that Zunda was physically present in New York.

For these reasons, plaintiffs have failed to show facts sufficient to confer long-arm jurisdiction over Zunda.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by defendants Carlos Pratola, Alejandro Zunda Cornell and Diego Clemente to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of the defendants.

Dated: April 8, 2011

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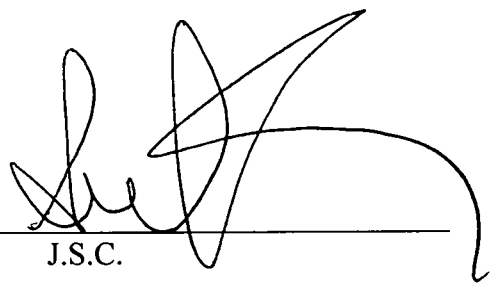

J.S.C.