SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN
J.S.C.

PRESENT: _____ PART 3
Justice

Index Number : 652931/2012
ARC CAPITAL, LLC
vs
KALRA, AASHISH
Sequence Number : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. 652931/2012
MOTION DATE 4/2/13
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, 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: 6-18-13

J.S.C.
HON. EILEEN BRANSTEN
J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
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
COUNTY OF NEW YORK: PART 3

----------X

ARC CAPITAL, LLC, in the Right of and for the Benefit of TRIKONA ADVISERS LIMITED,

Plaintiff,

-against-

AASHISH KALRA, ASIA PACIFIC INVESTMENTS LTD, SAURABH KILLA, CAMBRIDGE ENERGY RESOURCES, DURANTACO HOLDINGS, LTD., INDIA INFRASTRUCTURE AND URBAN DEVELOPMENT COMPANY, PVT. LTD., and ZUNA ADVISERS, LLC

Defendants,

and

TRIKONA ADVISERS LIMITED,

Nominal Defendant.

----------X

Index No. 652931/2012
Motion Date: 4/2/2013
Motion Seq. No. 001

EILEEN BRANSTEN, J.:

In this shareholder derivative action, Defendants Aashish Kalra ("Kalra"), Saurabh Killa ("Killa"), and Trikona Advisors Limited ("TAL") (collectively "Defendants") move, pursuant to CPLR 3211, to dismiss the complaint on the grounds that Plaintiff ARC Capital, LLC ("ARC Capital"), which is suing derivatively on behalf of TAL, lacks standing to bring this action and that this court does not have personal jurisdiction over the Defendants.

I. Background

The origins of this matter lie in a 2002 meeting between Rakshitt Chugh ("Chugh") and Defendant Kalra. (Compl. ¶ 2.) At this 2002 meeting and thereafter, Chugh and Kalra began to develop a network of companies which provided investment advice and management services for the then-burgeoning market in real estate development in India. *Id.*

Nominal Defendant TAL[1] is one of those companies. *Id.* ¶ 32. TAL was formed as a "quasi-partnership" between Asia Pacific Investments, Ltd. and two companies owned by the Chugh family – ARC Capital and non-party Haida Investments, Ltd. *Id.* ¶¶ 32-34. TAL's Board of Directors had four members – Chugh and Kalra were the managing directors, while Killa and one other board member were "independent directors." *Id.* ¶ 32.Until January 2012, Killa and the other independent director were not involved in the management or control of TAL. *Id.* ¶ *59.* It is undisputed that, from 2006 through January 2012, Chugh and Kalra treated TAL as a partnership in which all management decisions were made jointly. *Id.* ¶¶ 32-34.

TAL managed Trinity Capital, an investment company that suffered serious financial difficulties in 2008. As a result of this, the relationship between Chugh and Kalra began to deteriorate. *Id.* ¶¶ 38, 39. Chugh and Kalra's disagreements led to an

---

[1] TAL was incorporated in the Cayman Islands in 2006.

arbitration proceeding between TAL and Trinity Capital and litigation with SachsenFonds GmbH ("SachsenFonds"), a German investorin Trinity Capital. Chugh and Kalra disagreed about how to manage the arbitration and litigation. In order to resolve some of these problems, Chugh and Kalra created a Collegium of Advisors ("COA") to manage TAL's defense in both matters. The memorandum of understanding establishing the COA gave it the power to determine which litigation strategies would be in TAL's best interest. Compl. ¶¶ 39-45.

Ultimately, the TAL/Trinity Capital arbitration settled, and as a condition of settlement, Chugh, Kalra and the rest of the parties agreed that they would not commence or prosecute an action against any other party to the proceeding concerning the settled claims. *Id.* ¶¶ 46-48.

In 2008 and 2009, Kalra established two independent companies – Defendants Durantaco Holdings, Ltd. ("Duranta") and Zuna Advisers, LLC ("Zuna"). *Id.* ¶ 50. Chugh likwise established Peak XV and related companies. *Id.* ¶ 55. These real estate development and investment companies were separately owned and distinct from TAL.

By October 2009, TAL had ceased operation. Plaintiff alleges that, by spring 2010, it became clear that Kalra wanted control of what remained of TAL in order to usurp its remaining assets and opportunities. *Id.* ¶ 57. In January 2012, one of TAL's independent directors resigned and, thereafter, Kalra and Killa voted to remove Chugh

from the TAL board of directors. (Compl. ¶ 59.) Chugh contends that Kalra thereafter used TAL's funds to pay his personal expenses, finance his personal travel, and pay legal bills for both his family's lawyers and for two lawsuits that Kalra commenced against Chugh (the "Connecticut actions"), purportedly in violation of the 2011 ancillary settlement agreement in the arbitration proceeding. *Id.* ¶¶ 67, 68, 73-75.

The Complaint asserts claims against Kalra and Killa for breach of fiduciary duty, waste of corporate assets, gross mismanagement, abuse of control, unfair competition and unjust enrichment. Plaintiff premises its claims on allegations that, among other things, Defendants started companies that compete directly with TAL, misappropriated TAL's resources for personal use, prolonged and exacerbated the SachsenFonds' litigation, and misappropriated TAL's assets to conduct the litigation in the Connecticut actions which are essentially a partnership dispute between Kalra and Chugh.

Plaintiff filed this derivative Complaint in August 2012, and, on September 4, 2012, TAL informed Plaintiff of its intent to defend itself from the derivative complaint.

II. Analysis

Defendants now seek dismissal of the Complaint, arguing that Plaintiff lacks standing to bring this derivative action. First, Defendants contend that under New York choice of law rules, Grand Court of the Cayman Islands Order 15, Rule 12A ("Grand

Court Rule") is a substantive rule, which not only governs this action but requires its dismissal due to Plaintiff's failure to seek leave to continue the litigation from the Grand Cayman Island courts.

In opposition to dismissal, Plaintiff argues that the Grand Court Rule is procedural and therefore under New York choice of law analysis, does not control in this court and does not prevent the New York action from proceeding. ARC Capital also contends that *Foss v. Harbottle*, 2 Hare 461 (1843) – an English decision holding that derivative claims are held by a company and not its shareholders – does not require dismissal because two of the exceptions articulated in that decision, fraud on the shareholders and ultra vires acts, apply to this case.

A. *Standing*

The threshold issue for the Court is whether Plaintiff has standing to bring this action. This standing inquiry turns on the applicability of Order 15, Rule 12A of the Grand Court Rules ("Grand Court Rules").[2]

---

[2] Order 15, Rule 12A, which applies to every shareholders' derivative action, provides in pertinent part:

> "(2) Where a Defendant in a derivative action has given notice of intention to defend, the Plaintiff must apply to the Court for leave to continue the action.

In conflict of laws matters, the law of the forum state must determine for itself whether a "given question is one of substance or procedure." *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 54 (1999). The classification of the rule as substantive or procedural is key because, "under common-law rules matters of procedure are governed by the law of the forum", while "matters of substantive law fall within the course charted by choice of law analysis." *Id.* at 53 (internal quotation marks and citations omitted).

Under New York choice of law rules, this state is not bound to adopt the choice of law classification that the Cayman Islands may have selected for the Grand Court Rule. Rather, in making the determination, New York courts "analyze substance and procedure in terms of the common law distinction between 'right' and 'remedy.'" *RLS Assoc., LLC v. United Bank of Kuwait PLC*, 464 F. Supp. 2d 206, 217 (S.D.N.Y. 2006). Under the common law, a procedural issue does not extinguish an underlying right, it merely deals with a remedy or the means by which a remedy is enforced whereas a substantive issue is closely related "to the nature and existence of an underlying right." *Id.* at 218. For

---

(3) The application must be supported by an affidavit verifying the facts on which the claim and the entitlement to sue on behalf of the company are based

(4) Unless the Court otherwise orders, the application must be issued within 21 days after [the date when notice of intention to defend was given] . . . ."

example, in *Tanges*, the Court of Appeals reasoned that a statute of limitations is considered procedural because it "does not extinguish the underlying right, but merely bars the remedy" while a statute of repose is substantive because it can block a cause of action before it even accrues and "envelop[es] both the right and the remedy." *Tanges,* 93 N.Y.2d at 55-56.

Applying that analysis to the circumstances here, it appears that the Grand Court Rule is a substantive, rather than procedural, rule because the underlying remedy is extinguished if Plaintiff fails to file an application to continue – that is, it "envelopes both the right and the remedy." *Id.* In *Locals 302 & 612 of Int'l Union of Operating Eng'r – Employers Constr. Indus. Ret. Trust v. Blanchard*, 2005 WL 2063852 (S.D.N.Y. Aug. 25, 2005), a Southern District of New York court found that a Canadian statute which required Plaintiff, in a derivative action against a Canadian corporation, to seek leave of a Canadian court to maintain the action was substantive because "the issue is not just who may maintain the action or how it will be brought but if it will be brought." *Id.* at *6, *23 (internal quotation marks and citation omitted). The court held that the requirement was a statutory precondition which was meant "'to protect the corporation from undue interference.'" *Id.* at *6, **23-24 (quoting *Charas v. Sand Tech. Sys. Int'l, Inc.*, 1992 WL 296406 at *7 (S.D.N.Y. Oct. 7, 1992); *see also Dragon Inv. Co. II LLC v. Shanahan*,

2007 WL 4144251 (Sup. Ct. N.Y. Cnty. 2007) (citing *Locals 302 & 612* for the proposition that leave requirements, like New York's demand rules, are substantive).

Indeed, although not controlling, Defendants' expert opines that, while the steps outlined in the Grand Court Rule provide a procedural framework, the requirement to seek leave of court is substantive under Cayman Islands law because once the "application to continue" is filed, the court will hold a substantive hearing to determine if the case is bona fide. *See* Affirmation of Maryellen Connor, Ex. H ¶¶ 9, 10, 11 (Declaration of Richard Thomas William Annette). In *Renova Resources Private Equity Limited v. Gilbertson*, CILR 268 at 35 (2009), a Cayman Islands court explained that in order for a Plaintiff to obtain leave to continue a derivative action, the Cayman court must be:

> satisfied . . . that its case is not spurious or unfounded, that it is a serious as opposed to a speculative case, that it is a case brought bona fide on reasonable grounds on behalf of and in the interests of the company and that it is sufficiently strong to justify granting leave for the action to continue rather than dismissing it at this preliminary stage.

See also Declaration of Richard Thomas William Annette ¶ 12.

Since the rule is substantive, the internal affairs doctrine[3] mandates that the law of the forum of incorporation governs Plaintiff's claims. TAL is a Cayman Islands corporation, and, therefore, the Grand Court Rule, which requires Plaintiff to seek leave of the Cayman Islands court before proceeding with a derivative action, controls. Plaintiff did not timely seek such leave and, consequently, this court has no jurisdiction over Plaintiff's claims.

However, the Grand Court Rule also provides that "[i]f Plaintiff does not apply for leave to continue the action as required by paragraph (2) within the time laid down by paragraph (4), any Defendant who has given notice of intention to defend may apply for an order to dismiss the action . . ." (Order 15, Rule 12A[9]). Upon hearing any application for dismissal under Paragraph (9), Cayman Islands Grand Court may "if the Plaintiff so requests, grant the Plaintiff . . . an extension of time to apply for leave to continue the action . . ." (Order 15, Rule 12A[10][b]). Accordingly, the Complaint is dismissed. However, Plaintiff may refile this action if the Cayman Islands Grand Court

---

[3] Under the internal affairs doctrine, the right of a shareholder to object to conduct in the operation of the corporation is determined by the law of the state of incorporation. Court have so held based on the premise that only one jurisdiction should have authority to regulate a corporation's internal affairs, on matters peculiar to the relationships among or between the corporation and its officers, directors and shareholders, because, otherwise a corporation could be faced with competing demands. *Locals 302& 612 of Int'l Union of Operating Eng'r – Employers Constr. Indus. Ret. v. Blanchard*, 2005 WL 2063852 *3, 6-7 (S.D.N.Y. Aug 25, 2005); *Hart v. General Motors Corp.*, 129 A.D.2d 179, 184 (1st Dep't 1987) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 645-646 (1982)).

finds that the complaint has merit and falls within one or more exceptions to the *Foss v. Harbottle*[4] rule.

Because this Court lacks jurisdiction over this action under the Grand Court Rule, the Court need not address Defendants' remaining dismissal arguments.

(*Order follows on next page.*)

[4] Under English law, which has been expressly adopted by the Cayman Islands Court of Appeals, a derivative claim belongs to the corporation and a shareholder may ordinarily bring a derivative claim on behalf of a corporation only if a simple majority of shareholders could not ratify the conduct upon which the suit is based. But where such a technicality would lead to manifest injustice, the courts recognize four exceptions to the general rule, "permitting a shareholder to bring a derivative suit when the conduct at issue: (1) infringes on the shareholder's personal rights; (2) requires a special majority to ratify; (3) qualifies as a fraud on the minority; or (4) is ultra vires." *CMIA Partners Equity Ltd. v. O'Neill*, 29 Misc. 3d 1228[A] (Sup. Ct. N.Y. Cnty. 2010).

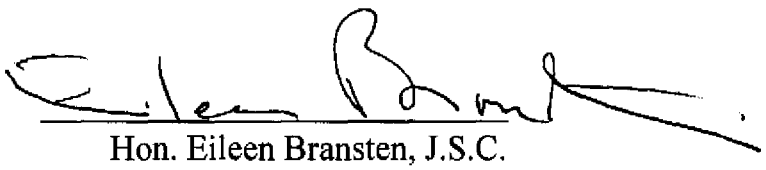
III. Conclusion

Accordingly, it is

ORDERED that Defendants Aashish Kalra, Saurabh Killa and Trikona Advisors Limited's motion to dismiss the complaint is granted and the Clerk is directed to enter judgment in favor of Defendants, dismissing this action, together with costs and disbursements to Defendant, as taxed by the Clerk upon presentation of a bill of costs.

Dated: New York, New York
June 18, 2013

ENTER:



Hon. Eileen Bransten, J.S.C.