

Wilson v Dantas

2013 NY Slip Op 32026(U)

August 22, 2013

Supreme Court, New York County

Docket Number: 650915/12

Judge: Charles E. Ramos

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

PRESENT: CHARLES E. RAMOS Justice

PART 53

ROBERT R. WILSON III

INDEX NO. 650915/12

MOTION DATE

- v -

DANTAS

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s)

Answering Affidavits - Exhibits No(s)

Replying Affidavits No(s)

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

decided in accordance with accompanying memorandum decision.

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

DATED: 8/23/2013

CHARLES E. RAMOS 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: COMMERCIAL DIVISION

-----X
 ROBERT R. WILSON III,

Plaintiff,

-against-

Index No.
 650915/12

DANIEL VALENTE DANTAS, OPPORTUNITY EQUITY
 PARTNER, LTD., OPPORTUNITY EQUITY PARTNERS, L.P.,
 OPPORTUNITY INVEST II, INC., CITIBANK, N.A.,
 INTERNATIONAL EQUITY INVESTMENTS, INC., CITIGROUP
 VENTURE CAPITAL INTERNATIONAL BRASIL, L.L.C.,
 CITIGROUP VENTURE CAPITAL INTERNATIONAL
 BRASIL, L.P.,

Defendants.

-----X

Hon. Charles E. Ramos, J.S.C.:

In motion sequence 010, the defendants Daniel Valente Dantas ("Dantas"), Opportunity Equity Partners, Ltd. ("OEP LTD"), and Opportunity Invest II, Inc. ("OI-II", collectively, the "Opportunity Defendants") move pursuant to CPLR 3211 to dismiss the plaintiff Robert R. Wilson III's ("Wilson") complaint.

The Parties

Wilson is a former employee of Citibank, N.A. ("Citibank") and owns one share of OEP LTD.

Dantas is a citizen of Brazil and was a promoter, director and/or officer of OEP LTD, and is a beneficial owner of OI-II.

OI-II is a British Virgin Islands corporation.

OEP LTD is a Cayman Islands corporation and was the general partner entity for Opportunity Equity Partners, L.P. ("OEP LP").

Both OEP LP and OI-II are allegedly controlled and dominated

by Dantas.

Citibank, OEP LP, International Equity Investments, Inc., Citigroup Venture Capital International Brasil, L.L.C., Citigroup Venture Capital International Brasil, L.P. (collectively, the "Citibank Defendants") are no longer parties to this action.

Procedural History

In March 2011, Wilson commenced an action in the Southern District of New York (the "SDNY") against the Citibank Defendants and the Opportunity Defendants. On November 9, 2011, the District Court dismissed the action for lack of subject matter jurisdiction (*Wilson v Dantas*, 2013 WL 92999, *1 [SD NY 2013]).

In March 2013, Wilson commenced this action against the Opportunity Defendants and the Citibank Defendants in this Court. The Citibank Defendants removed the action to the SDNY, wherein the District Court dismissed the causes of action against the Citibank Defendants, and remanded the action to this Court after declining to exercise supplemental jurisdiction (*id.* at *9).

Background

This action arises out of a dispute over Wilson's compensation for his employment at OEP LTD.

The subject of the motion is whether this Court has personal jurisdiction over the Opportunity Defendants and if so, whether New York is a convenient forum to adjudicate the action. To this extent, only the facts relevant to the jurisdictional issues

shall be addressed in this decision.

As alleged in the complaint, in the 1990s, during his employment at Citibank, Wilson designed and proposed an investment program focused on investing in Brazil. After receiving authority from Citibank to launch the program on its behalf, Wilson relocated to Brazil. Citibank substantially participated in the creation of the fund, OEP LP, and the general partner entity that would manage the fund, OEP LTD. Wilson was an employee and shareholder of OEP LTD.

The formation of the investment program was memorialized in three separate agreements, an operating agreement (Operating Agreement), a limited partnership agreement (LP Agreement), and a Shareholder Agreement (SH Agreement, collectively the Agreements). All of the Agreements were executed on December 30, 1997.

The Operating Agreement contemplated that OEP LP would make co-investments in Brazil on a side-by-side basis with two other funds.

Pursuant to the SH Agreement and an alleged oral agreement with Dantas, Wilson alleges that his compensation was 1 Point of 20 Points or 5% of the profits of the investments (the Carried Interest).

In 2005, the Citibank Defendants commenced litigation in the SDNY against the Opportunity Defendants alleging that they had

breached certain fiduciary obligations under the Operating Agreement (the SDNY Litigation).

In 2008, the Citibank Defendants and the Opportunity Defendants executed a confidential settlement agreement to resolve the SDNY Litigation (the Settlement Agreement). In April 2008, prior to the execution of the Settlement Agreement, Dantas allegedly represented to Wilson that "as part of the settlement negotiations, he would be receiving his 5% stake in the [Carried Interest] and all other compensation" (Complaint, ¶¶ 46, 47).

To date, Wilson has not received the Carried Interest and has not been provided a copy of the Settlement Agreement. Wilson commenced this action seeking the production of the Settlement Agreement or payment of his compensation, the Carried Interest.

Discussion

The Opportunity Defendants move to dismiss on the grounds that this Court lacks personal jurisdiction over the Opportunity Defendants or in the alternative, that New York is an inconvenient forum to adjudicate this dispute.

Wilson argues that this Court has personal jurisdiction over the Opportunity Defendants pursuant to the terms of the Operating Agreement and CPLR 302.

The Operating Agreement

Wilson argues that the payment of the Carried Interest is a transaction contemplated by the Operating Agreement. Thus, this

Court has personal jurisdiction over the Opportunity Defendants pursuant to the terms of the Operating Agreement. The relevant portions of the Operating Agreement provide that the Opportunity Defendants, Citi, and Wilson, amongst others agreed:

that any legal suit, action or proceeding against it brought by another party to this Agreement, arising out of or based upon this Agreement or the transactions contemplated hereby maybe instituted in any state or federal court in the Borough of Manhattan, The City of New York, New York and...waives any objection to which it may now or hereafter have to laying of venue of any such proceeding (Battles Aff., Ex. C, § 7.06).

In opposition, the Opportunity Defendants counter that the payment of Wilson's compensation is not a transaction contemplated by the Operating Agreement. Instead, his causes of action arise relating to his compensation arise from the SH Agreement, which contains a Cayman Islands choice of law provision (*id.*, Ex. C, § 19 [10]).

The terms of the Operating Agreement clearly do not contemplate Wilson's entitlement to Carried Interest. To establish that this was a transaction contemplated by the Operating Agreement, Wilson references § 6.8.1 of the LP Agreement, which provides for the payment or reimbursement of "Other Expenses," which includes his compensation.¹ He further

¹ The relevant definition of "Other Expenses" is "(d) compensation, fees and expenses of the Principals and all directors, officers, or employees of the General Partner or agents and representatives of the General Partner that provide

argues that his compensation is a transaction that is contemplated by the Operating Agreement because the Operating Agreement incorporates the terms of the LP Agreement and the SH Agreement.

This Court disagrees.

The provisions cited by Wilson in the LP Agreement wholly fail to identify what Wilson's compensation is or how it would be paid (Battles Aff., Ex. B, §§ 6.8.1, 13.4).

The first provision of the LP Agreement cited by Wilson relates to reimbursement of "Other Expenses" between the General Partner, a Significant Investor, and the Portfolio Company, as defined by the LP Agreement. It does not pertain at all to Wilson's entitlement to the Carried Interest and makes no reference to the SH Agreement (*id.* at § 6.8.1).

Moreover, the second provision of the LP Agreement cited by Wilson is fatal to his argument. It provides that the LP Agreement "together with the Subscription Agreement[,], the Private Placement Memorandum, the Citibank Investor Letter and the Operating Agreement, constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and fully supersedes any and all prior or contemporaneous agreements or understandings between the parties hereto pertaining to the subject matter hereof" (*id.* at § 13.4).

services to the General Partner" (Battles Aff., Ex. B, p. I-17).

Conversely, the SH Agreement provides that it "constitutes the entire agreement between the parties hereto with respect to the matters dealt with therein and supersedes any previous agreement between the parties hereto in relation to such matters" without incorporating by reference any other agreement.

(Ex. A, § 20 [9]).

The parties obviously had the wherewithal to incorporate the terms of the SH Agreement into the Operating Agreement, if they so desired. This Court can only conclude that the omission was intentional and that the parties did not intend for the Operating Agreement to incorporate the terms of the SH Agreement.

Wilson has failed to establish that his causes of action arise out of or relate to a transaction contemplated by the Operating Agreement. Rather, the provisions that provide for Wilson's entitlement to the Carried Interest are solely contained in the SH Agreement (Battles Aff., Ex. A, § 13; Annex A). Wilson fails to cite to any provisions in the Agreements that would support his argument.

In support, Wilson cites *Intl. Equity Investments, Inc. v Opportunity Equity Partners Ltd.*, but the court therein determined that the Operating Agreement contemplated the making of side-by-side investments and Dantas' control over such investments (*Intl. Equity Investments, Inc. v Opportunity Equity Partners Ltd.*, 475 F Supp 2d 450, 453 [SD NY 2007]).

Furthermore, *Intl. Equity* is completely distinguishable because the subject of the action concerned breaches of the Operating Agreement and tort causes of action related to obligations under the Operating Agreement (*id.*).

However, the causes of action asserted by Wilson relate to his entitlement to the Carried Interest as part of his compensation. His causes of action do not relate to the obligations set forth in the Operating Agreement, but instead rely entirely on the obligations set forth in the SH Agreement.

CPLR 302

In assessing if personal jurisdiction exists pursuant to CPLR 302(a)(1), this Court must determine if the Opportunity Defendants transacted any business in New York and if so, whether Wilson's causes of action arise from such transactions (*Licci v Lebanese Can. Bank*, 20 NY3d 327, 334 [2012]).

It is well settled that a defendant's physical presence in New York is not required to subject that party to the jurisdiction of our courts under CPLR 302 (*Fischbarg v Doucet*, 9 NY3d 375, 382 [2007]).

CPLR 302(a)(1) provides that "jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction" and alleged causes of action (*Fischbarg* at 380 [internal quotations

omitted)). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.* [internal quotations omitted]).

Wilson alleges numerous contacts in his complaint, that purportedly demonstrate that New York has jurisdiction over the Opportunity Defendants (Gusy Aff., ¶¶ 26-33; Complaint, Exhibit A).

However, those contacts are related to the SDNY Litigation pertaining to the side-by-side investments contemplated by the Operating Agreement and the resulting Settlement Agreement. Wilson was not a party to either and as a result fails to establish a substantial relationship between his causes of action and the alleged contacts. His causes of action pertain to the Opportunity Defendants' failure to pay his compensation.

By broadly interpreting the Operating Agreement's forum selection clause, Wilson attempts to have the dispute over his compensation considered as a "transaction contemplated by" the Operating Agreement, but as stated above, that interpretation is clearly contradicted by the plain language of the SH Agreement, the LP Agreement, and the Operating Agreement itself.

This Court finds that the purported contacts are not substantially related to Wilson's causes of action and do not


form a basis for invoking CPLR 302(a) to impose personal jurisdiction on the Opportunity Defendants. As a result, this Court will not address Wilson's remaining arguments.

Accordingly it is,

ORDERED that the defendant's motion to dismiss is granted and the complaint is dismissed without prejudice to an action to be commenced in a proper forum..

This constitutes the decision and order of this Court.

Dated: August 22, 2013



J.S.C.
CHARLES E. RAMOS