SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice

PART 45

ELI GUTSTADT et al

INDEX NO. 158257/2012

-v-

MOTION DATE

NATIONAL FINANCIAL PARTNERS CORP.

MOTION SEQ. NO. 001

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~~ by defendants to dismiss the complaint on grounds of forum non conveniens is GRANTED.

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

Dated: October 22, 2013

MELVIN L. SCHWEITZER

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 45

ELI GUTSTADT and JANICE GUTSTADT, on behalf of 1244584 ONTARIO INC. and 1263699 ONTARIO LIMITED,	:	
Plaintiffs,	:	Index No. 158257/2012
-against-	:	DECISION AND ORDER
NATIONAL FINANCIAL PARTNERS CORP., 2171817 ONTARIO INC., MARTIN SHAW, DAVID BURSTEIN, JEFFREY DOWNEY, 1244584 ONTARIO INC. and 1263699 ONTARIO LIMITED,	:	Motion Sequence No. 001
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

National Financial Partners Corp., 2171817 Ontario Inc., Martin Shaw, David Burstein, Jeffrey Downey, 1244584 Ontario Inc. and 1263699 Ontario Limited move to dismiss the complaint pursuant to CPLR 202, 327 (a), 2201, and 3211 (a) (2) and (8).

Background

Eli and Janice Gutstadt (Mr. & Mrs. Gutstadt) are minority shareholders of 1244584 Ontario Inc. (584 Inc.), a subsidiary of 1263699 Ontario Limited (Old DOT). Old DOT was an insurance brokerage firm conducting business in Canada. Martin Shaw (Mr. Shaw) is one of two directors of 584 Inc. and its majority shareholder. David Burstein (Mr. Burstein) was the accountant for Old DOT. National Financial Partners Corp. (NFP) is a New York-based corporation, with its principal place of business in New York City. Jeffrey Downey (Mr. Downey) was, at all relevant times, NFP's Chief Financial Officer, and a Senior Vice President working in New York City.

Plaintiffs allege that NFP and its wholly-owned subsidiary 2171817 Ontario Inc. (217 Inc.), acting through Mr. Downey, conspired with Mr. Burstein and Mr. Shaw in New York to engage in a fraudulent scheme to transfer the assets and business of Old DOT to NFP, greatly benefitting Mr. Burstein and Mr. Shaw, but to the detriment of Old DOT and the minority shareholders of 584 Inc. Plaintiffs assert defendants accomplished the scheme through a series of fraudulent acts, including tortious conduct.

Plaintiffs allege that Mr. Shaw misappropriated funds of Old DOT for his personal use in breach of his contractual and fiduciary obligations to 584 Inc. and Old DOT. Plaintiffs further claim that Mr. Shaw caused Old DOT to execute CAD$1,312,000 promissory notes in favor of insurance companies, representing the funds he allegedly misappropriated. Subsequently, Mr. Shaw and Mr. Burstein allegedly began to loot Old DOT's business by transferring it to DOT Benefits Consulting Corp. (New DOT), a company they owned and controlled. Plaintiffs specifically allege that, in connection with this transfer, the "holders of the Preference Shares [of 584 Inc.] were not consulted, nor was a shareholder or directors' meeting called, in violation of the Articles of Incorporation of 584 Inc., as amended, and the Ontario Business Corporations Act, which requires formal shareholders' and directors' meetings and approval in order to sell or otherwise dispose of all or substantially all of the property of a corporation." Using the assets of Old DOT, New DOT was able to discharge the promissory notes executed in favor of the insurance companies.

Mr. Shaw and Mr. Burstein sold all of the shares of New DOT to NFP pursuant to a Share Purchase Agreement dated May 6, 2008 (SPA). Mr. Shaw, Mr. Burstein and NFP, through, among others, Mr. Downey, negotiated the SPA in New York City. Plaintiffs allege NFP and 217 Inc. knew that New DOT was merely a continuation of Old DOT and that the

assets of Old DOT had been converted by Mr. Shaw and Mr. Burstein for the benefit of New DOT and its shareholders. Plaintiffs allege NFP and 217 Inc. were aware that Mr. Shaw and Mr. Burstein had breached their fiduciary duties to 584 Inc. and Old DOT and fraudulently concealed this from 584 Inc.'s minority shareholders. NFP and 217 Inc. nevertheless entered into the transaction, ultimately paying Mr. Shaw and Mr. Burstein and another New DOT shareholder (Henry Toby) CAD$8,048,708 to acquire the outstanding common shares of New DOT.

Plaintiffs argue that by entering into the SPA, defendants expressly agreed that New York law applied to any such dispute, regardless of any choice-of-law rules. The SPA provides in relevant part that:

> 8.9 *Governing Law; Resolution of Disputes.* This Agreement shall be governed and construed in accordance with the laws of the State of New York without regard to principles of conflicts of law. Any dispute or controversy between the parties relating to or arising out of this Agreement or any amendment or modification hereof shall be determined by arbitration in New York, New York by and pursuant to the rules then prevailing of the American Arbitration Association, other than claims for injunctive relief. The arbitration award shall be final and binding upon the parties and judgment may be entered thereon by any court of competent jurisdiction.

Plaintiffs commenced an action in Canada more than two years ago against all of the individuals and entities named as defendants in the instant matter premised upon the transfer of assets from Old DOT to New DOT and the subsequent sale of New DOT to NFP. On November 26, 2012, less than two months after plaintiffs learned that the SPA was negotiated in New York, they commenced this derivative action on behalf of the minority shareholders of 584 Inc. and Old DOT, asserting numerous claims against defendants, including claims for breach of fiduciary duty, fraud, conversion, and unjust enrichment. Plaintiffs seek imposition of

a constructive trust on the converted assets of Old DOT, currently in the possession of NFP and 217 Inc. through their ownership of New DOT's shares.

Discussion

Subject matter jurisdiction

Defendants move to dismiss the complaint on the grounds that this court lacks subject matter jurisdiction pursuant to CPLR 3211 (a) (2).

Defendants argue that under New York law claims relating to the corporate affairs of a foreign corporation are impacted by the internal affairs doctrine. The internal affairs doctrine provides that the law of the place where the company is incorporated determines the rights of a shareholder in such company, including the right to sue derivatively. *Hart v General Motors Corp.*, 129 AD2d 179 (1st Dept 1987). Citing the internal affairs doctrine, defendants argue that whether this court has subject matter jurisdiction over this derivative action must be determined by reference to the law of Ontario.

Section 246 (1) of the OBCA provides as follows:

> [A] complainant may apply to the court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

In *Locals 302 and 612 v Blanchard*, 2005 US Dist LEXIS 17679 (SDNY 2005), the identical requirement was interpreted as such:

> "In sum, [the court] finds that the internal affairs doctrine mandates that the law of the forum of incorporation governs plaintiff' claims . . . Section 239 of the CBCA requires that a plaintiff seek leave of a specifically enumerated Canadian court before proceeding with a derivative action. Plaintiffs did not seek such leave here, and consequently, this court has no jurisdiction over plaintiff's claim."

Here, defendants claim plaintiffs have not made application to and have not obtained leave from the Ontario Superior Court of Justice to bring a derivative action on behalf of 584 Inc. or Old DOT.

Plaintiffs argue that *Blanchard* is inapplicable because it did not involve interpretation of a choice-of-law provision such as Section 8.9 of the SPA. Plaintiffs state that the choice-of-law provision in the SPA supplants a traditional choice-of-law analysis, including the internal affairs doctrine. "It is a well-settled policy of the courts of New York to enforce contractual provisions for choice-of-law and selection of a forum for litigation." *Imaging Holdings I, L.P. v Israel Aerospace Industries Ltd.*, 26 Misc 3d 1226 (2009). Defendants respond by arguing tort claims are outside the scope of contractual choice-of-law provisions that specify what law governs construction of the terms of the contract. *Twinlab Corp. v Paulson*, 283 AD2d 570, 571 (2d Dept 2001). The court finds that the provision relied on by the plaintiffs is limited, as it requires application of New York law only to the governance and construction of the agreement. The plaintiff's claims for breach of fiduciary duty, fraud, conversion, and unjust enrichment are acknowledged as claims relating to the obligations of directors and controlling shareholders to minority shareholders which are without the scope of the SPA or tort claims which also fall outside the scope of Section 8.9 of the SPA.

Plaintiffs also assert that the choice-of-law provision in the SPA is applicable to their claims as they were intended third-party beneficiaries to the contract. Plaintiffs allege that the defendants led the plaintiffs to believe they were intended to benefit from the transactions contemplated by the SPA. In response, defendants point to Section 8.8 of the SPA, which states, "Nothing in this Agreement, express or implied, is intended or shall be construed to create any third party beneficiaries." Plaintiffs cite *ART Capital Partners, LP v Tyco Acquisiton Corp.*

XVIII, 71 AD3d 1404, 1406 (4th Dept 2010) to argue that New York courts hold that former shareholders of a corporation party to a merger agreement are third-party beneficiaries to the agreement despite the fact that they are non-signatories to the agreement. The facts are distinguishable from this case, as the court in *ART* ruled it was clear from the context and purpose of the transactions that the former shareholders were intended beneficiaries of the agreement. Here, neither Old DOT, 584 Inc., nor their shareholders were parties to the SPA and each fails to identify any provision of the SPA that specifically extends any rights to them. Accordingly, the court lacks subject matter jurisdiction and the complaint is dismissed on this basis.

Statute of Limitations

Defendants move to dismiss the complaint on the grounds that the plaintiffs' claims are time barred pursuant to CPLR 202, which provides:

> "An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply."

In order to rule on the applicability of CPLR 202, the court must determine whether the cause of action accrued outside the state. Defendants cite *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525 (1999), in which the Court of Appeals held that when injury is economic, the place of injury is where the plaintiff resides and sustains the economic impact of the loss. In response, plaintiffs cite *Lang v Paine, et al.*, 582 F Supp 1421, 1425-26 (SDNY 1984), stating "the plaintiff's residence need not necessarily be the situs of the economic impact of the fraud, and the court can properly consider all relevant factors in determining where the loss is felt."

Plaintiffs assert that New York has a great concern with, and interest in, the issues raised in this litigation, and the claims should be heard in New York.

There is no dispute that the plaintiffs are residents of Ontario and the actions constitute a derivative action brought on behalf of two Ontario corporations. If any economic impact has occurred, it did so in Ontario and pursuant to CPLR 202 plaintiffs' claims must be within the statute of limitations of Ontario law. Pursuant to the Ontario Limitations Act of 2002, a two-year statute of limitations applies to all torts actions not otherwise subject to a special limitations period. The court has determined that the causes of action are tort claims. Plaintiffs filed suit in the Ontario Superior Court of Justice on July 28, 2010, and had not commenced action in New York until November 26, 2012, more than two years after discovering the alleged fraudulent transfer. The court finds that CPLR 202 applies and the action is time barred by Ontario law.

As to the breach of fiduciary duty claim, plaintiffs argue that defendants should be estopped from raising a statute of limitations defense because they fraudulently concealed material facts from plaintiffs. Citing *Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688 (2d Dept 2012), plaintiffs claim that when a fiduciary fails to disclose facts he is duty bound to disclose, he is estopped from asserting the statute of limitations as a defense to claims based upon such facts. Defendants cite *Knobel v Shaw*, 90 AD3d 493 (1st Dept 2011), in which the First Department explained that, "equitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the basis for plaintiff's underlying substantive cause of action." Here, the court finds the same wrongful acts underlie both plaintiffs' estoppel argument and their underlying substantive claim. Those acts are the transfer of assets without informing shareholders, and reselling those assets for a

significant multiple of the price paid to the original owner of the assets. Accordingly, equitable estoppel does not apply.

Forum Selection

CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." The burden is squarely on the defendants, and it is a "heavy burden [to] demonstrate[e] that the forum chosen by [the plaintiff] is an inappropriate one." *Banco Ambrosiano, S.P.A. v Artoc Bank & Trust Ltd.*, 62 NY2d 65, 74 (1984). At the same time, New York "should not be under compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York." *Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 (1972).

Although the decision to dismiss on *forum non conveniens* grounds is discretionary, New York courts consistently dismiss cases lacking a "substantial nexus" to New York. *See e.g. Id.; Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 (1984) (dismissing case lacking substantial nexus to New York); *Shin-Etsu Chem. Co. v 3033 ICICI Bank Ltd.*, 9 AD3d 171 (1st Dept 2004) (same). To determine said "substantial nexus", New York courts look to the following factors: the residency of the parties; whether "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction"; the location of relevant witnesses and documents; the applicability of foreign law; and the availability of an alternative forum. *See Pahlavi*, 62 NY2d at 479.

Residency of the Parties

As defendants point out, Mr. Shaw and Mr. Burstein are Canadian residents, as are all plaintiffs. The action is a derivate action brought on behalf of a Canadian corporation that was

allegedly looted by a second Canadian corporation. NFP and Mr. Downey, whom are both parties to the prior pending Canadian action, are the only parties connected to New York regarding residency.

Location of the Underlying Transaction

Defendants point to dismissals on *forum non conveniens* grounds featuring a "transaction out of which the cause of action arose occur[ing] primarily in a foreign jurisdiction." *Foster Wheeler Iberia S.A. v Mapfre Empresas S.A.S.*, 2007 NY Misc LEXIS 1205, at *2 (Sup Ct NY County March 29, 2007) (quoting *Pahlavi*, 62 NY2d at 479). The defendants stress that the entire matter is premised upon an allegation that all assets of Old DOT were transferred fraudulently to New DOT, which are both corporations doing business in Canada. These assets were then acquired by 217 Inc., also a Canadian corporation. Defendants argue that the only connection the underlying transaction had with New York is that 217 Inc.'s parent company, NFP, a Delaware corporation, maintains offices in New York and that the SPA was negotiated and signed in NFP's offices. Plaintiffs argue that the SPA was the final transaction which completed defendants' fraudulent scheme to strip the assets of Old DOT and the court must consider the negotiation and approval of the SPA the ultimate transaction, which occurred in New York.

The court finds that even an investment transaction with deal documents drafted, negotiated, and closed in New York can be considered an underlying transaction in a foreign jurisdiction for *forum non conveniens* analysis. *See e.g. Imaging Holdings I, LP v Israel Aerospace Indus. Ltd*, 2009 NY Misc LEXIS 3630, at *2-3 (NY Sup County Dec. 11, 2009) ("[P]erhaps most telling of all, the alleged misconduct which plaintiffs claim led to the purported diminution in value of ImageSat and, in turn, their investment, was carried out in Israel by Israeli

residents.") Similarly to the defendants in *Imaging Holdings*, Mr. Shaw and Mr. Burstein, Canadian residents, carried out the alleged fraudulent scheme in Canada. The primary location of the fraudulent scheme is what helps determine if the case has a "substantial nexus" to New York; the site of negotiation on its own fails to rise to a substantial level. *Compare Fin & Trading Ltd.*, 28 AD3d at 346-47 ("Given that Tirouflet's representations are false only in light of the allegedly fraudulent scheme to boost Rhodia's value, the purported meetings do not suffice to create a substantial nexus with New York in that the underlying transaction occurred primarily in a foreign jurisdiction . . ."), *with Ithaca Partners, L.P. v Skadden, Arps, Slate, Meagher & Flom*, 219 Ad2d 499 (1st Dept 1995) (denying a motion to dismiss on *forum non conveniens* grounds when "all of defendant's actions concerning such offering were performed in New York[.]"). The underlying transaction arose primarily in a foreign jurisdiction (Canada), which strongly suggests there is not the "substantial nexus" required to avoid *forum non conveniens* dismissal.

Location of Relevant Witness and Documents

It is "far more efficient, less expensive and involve[s] a greater probability of a complete record for both sides if the case is adjudicated [where] the principal documents and witnesses pertaining to the underlying commercial and corporate claims are located." *Imaging Holdings*, 2009 NY Misc LEXIS 3630, at *13. A vast majority of witnesses and documents likely important to this litigation are located in Canada. *Inter alia*, Mr. Shaw and Mr. Burstein reside in Canada, Old DOT, New DOT and 217 Inc. are corporations doing business in Canada, and all documents regarding the transfer of assets from Old DOT to New DOT are located in Canada. Plaintiffs argue that it is reasonable to infer that NFP principals involved in negotiating the SPA are key witnesses and conduct business in New York. Plaintiffs also assert that the key

documents relating to NFP's acquisition of the Old DOT's assets as part of the SPA are located in New York. Defendants point out that the only witnesses identified by plaintiffs that are located in New York are NFP principals and the only documents identified are documents relating to the SPA. It is important to note that NFP is a party to the pending Canadian action.

"In the age of cell phones, email, and fax machines," *Mpower Comme'ns Corp. v Voipld.com, Inc.*, 304 F Supp 2d 473, 476 (WDNY 2004) the location of documents will not create substantial inconvenience for potential litigation. The location of witnesses, and more specifically the compellability of witnesses, is another matter. Canadian witnesses cannot be compelled to appear in this court. Given the quantity of potential Canadian witnesses, this weighs heavily in favor of dismissal. *See Globalvest Mgmt. Co. L.P. v Citibank, N.A.*, 2005 NY Misc LEXIS 944, at *20-21 (Sup Ct NY County May 12, 2005 ("[T] here are numerous potential witnesses who are located in Brazil and whose testimony will be relevant to the matter [], yet who are not subject to the jurisdiction of this court . . . The likely inability of Citibank to compel these critical witnesses to testify in New York . . . strongly militat[es] in favor of having this case heard in Brazil.").

"[T]he unavailability of witnesses [is] not a sufficiently weighty concern to *require forum non conveniens* dismissal because any testimony [the defendant] needs from witnesses whose attendance cannot be compelled can be obtained, for example, through the use of letters rogatory." *Armco Inc. v North Atlantic Ins. Co. Ltd.*, 68 F Supp 2d 330, 342 (SDNY 1999) (internal quotations omitted) (emphasis added). Although not requiring *forum non conveniens* dismissal, the inability to compel live witnesses can create significant handicaps for defendants, weighing in favor of *forum non conveniens* dismissal. *See Schertenleib v Traum*, 589 F2d 1156,

1165 (2d Cir 1978). Given that majority of witnesses reside in Canada, a Canadian forum is particularly appropriate.

Applicability of Foreign Law

When "[i]t would, in the circumstances constitute an unnecessary burden on our courts to be compelled to apply foreign law," this burden weighs in favor of *forum non conveniens* dismissal. *Bewers v Am. Home Products Corp.*, 99 AD2d 949, 950 (1st Dept 1984) (internal citation omitted). In New York, the internal affairs doctrine provides that the law of the place where the company is incorporated determines the rights of a shareholder in a foreign company, including the right to sue derivatively. *Hart v General Motors Corp., et. al.*, 129 AD2d 179 (1st Dept 1987). Plaintiffs allege that Mr. Shaw and Mr. Burstein unlawfully transferred the assets belonging to Old DOT to New DOT without notification or authorization from the minority shareholders in violation of the Ontario Business Corporations Act (OBCA). By citing the OBCA, plaintiffs understand that their rights as shareholders are to be governed by Ontario law.

New York courts are commonly called upon to apply foreign law, and do not dismiss solely to avoid that burden. *Intertec Contracting A/S v Turner Steiner Int'l. S.A.*, 774 NYS2d 14, 18 (1st Dept 2004) ("Nor do I find any potential application by New York courts of the laws of Sri Lanka to be an unnecessary burden upon our judiciary since our courts are frequently called upon to apply the laws of foreign jurisdictions."). Courts do give the factor significant, but not dispositive weight, in deciding *forum non conveniens* motions. *See e.g. FIMBank P.L.C. v Woori Fin. Holdings Co.*, 2013 WL 1197093 (1st Dept Mar 26, 2013).

Availability of an Alternative Forum

"[T]he availability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss" *Pahlavi*, 62 NY2d at 481, although the absence of such a forum "does not require the court to retain jurisdiction." *Id.* at 483.

Defendants cite *Finance and Trading Ltd. V Rhodia S.A.*, 28 AD3d 346 (1st Dept 2006), where the court upheld a dismissal, reasoning that the "litigation pending in France, as well as the securities and criminal investigations there, which predate this action, will address the underlying facts, including the alleged fraudulent disclosures." Similar to the facts in *Rhodia*, there is a prior pending action in the Ontario Superior Court of Justice, which plaintiffs commenced on July 28, 2010. The parties in the two actions are identical and seek relief based on the same fraudulent transactions alleged.

"As a matter of New York policy, the rule has been stated that . . . Generally the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere." *White Light Prods. v On The Scene Prods.*, 231 AD2d 90 (1st Dept 1997).

Based on an analysis of the above factors, the court grants defendants' motion to dismiss on *forum non conveniens* grounds.

ORDERED that defendants' motion to dismiss the complaint is granted.

Dated: October 27, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER