SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

----------X

PEGASUS STRATEGIC PARTNERS, LLC and ELF INVESTMENT, LLC, individually and derivatively as Members and in the right of BeOn Holdings, Inc.,

Plaintiffs,

-against-

KIPP L. STRODEN, MICHAEL BESANCON, HUGO VAN SEENUS, SEAN HECHT and BEON HOLDINGS, INC.,

Defendants.

----------X

Index No. : 653523/2015

DECISION AND ORDER

Mot. Seq. 001-002

HON. ANIL SIGNH:

In this action for, *inter alia,* breach of fiduciary duty and minority shareholder oppression, Pegasus Strategic Partners, LLC and Elf Investment, LLC (collectively, "plaintiff") moves by order to show cause for a preliminary injunction (i) enjoining and restraining defendant BeOn Holdings, a Nevada corporation (the "Company") from depriving plaintiffs of their bargained for information rights as minority owners and (ii) compelling production by the Company of required information under the Investor Rights Agreement. (Mot. Seq. 002). Kipp L. Stroden, Michael Besancon, Hugo Van Seenus and Sean Hecht (collectively, the "Individual Defendants") and the Company oppose and moves by separate motion for an order dismissing

plaintiffs' complaint pursuant to CPLR 3211(a)(8) for lack of jurisdiction. Both motions are consolidated for disposition.

Defendant Company is a Nevada corporation based in California and Individual Defendants are members of the Company's Board of Directors. Plaintiffs are Delaware limited liability companies with New York addresses but are passive investment vehicles which do not transact business in New York. Plaintiff Pegasus Strategic Partners, LLC is the parent company of plaintiff Elf Investment, LLC. Pursuant to a Stock Purchase Agreement, dated July 23, 2013 (the "SPA"), plaintiffs purchased 3,181,805 shares of the Company's Class B Common Stock and became 13.64% owners. Simultaneously to the execution of the SPA, plaintiff and Company entered into an Investors' Rights Agreement (the "IRA").

At the time plaintiff and Company signed the SPA, the Board of Directors consisted of Anthony Zolezzi, defendant Stroden, defendant Besancon and defendant Van Seenus. Soon after, Anthony Zolezzi resigned and defendant Hecht was appointed as a director. The SPA and IRA were both signed by defendant Stroden. Plaintiffs and Company also adopted and filed the Amended and Restated Articles of Incorporation (the "Articles"), which, pursuant to Section B, 3.3, prohibited the Company, without plaintiffs' consent, to amend, alter or repeal any provision of the Articles in a manner that "adversely affects the powers, preferences or rights of the Class B Common Stock" held by plaintiffs'. See Articles § 3.3.2.

On May 1, 2014, the Company and plaintiffs consented to a Term Sheet for a $1,250,000 private placement investment of secured second lien debt which created a new class of Series A Preferred Stock which was senior to plaintiffs' Class B Common Stock. Under the Term Sheet, current shareholders of the Company had a right to convert shares of Common Stock to Series A Preferred Stock. Plaintiffs elected not to participate in the debt offering. On February 6, 2015, the Board proposed a Second Amended and Restated Articles of Incorporation (the "Amended Articles"), which allegedly materially differed from the Term Sheet. Importantly, the Amended Articles did not require shareholders' participation in the debt offering be based upon their pro rata equity ownership in the Company and allowed shareholders' to convert their Common Stock to Series A Preferred Stock for a nominal sum. See Amended Articles § A.2. The Amended Articles also provided for a one-to-one conversion ratio of Preferred to Common Stock.

Plaintiffs' objected to the Amended Articles and were subsequently precluded from participating in the debt offering. It is further alleged by plainitffs' that at the February 6, 2015 Board meeting, in which the Amended Articles were approved, both defendant Hecht and defendant van Seenus approved the Amended Articles and refused to allow plaintiffs to participate in the offering.

Plaintiffs commenced this action on October 25, 2015 seeking equitable relief and money damages. Immediately after the filing of this action, the Company ceased

providing plaintiffs with required monthly financial information. Plaintiffs' have moved for a preliminary injunction compelling production of the required monthly financial information.

Analysis

Defendants' Motion to Dismiss

Defendant's motion to dismiss based upon lack of jurisdiction under CPLR 3211(a)(8) is denied as to the Company, defendant Stroden, defendant van Seenus and defendant Besancon and granted as to defendant Hecht.

As a preliminary matter, since none of the parties reside in New York and none of the alleged conduct took place in New York, the parties agree that the sole basis of jurisdiction in this matter is through one of more of the forum selection clauses. Forum selection clauses are prima facie valid, provide certainty and predictability in the resolution of disputes and should be enforced absent a showing that they result from fraud or overreaching, that they are unreasonable or unfair, or that their enforcement would contravene some strong public policy of the forum. Sterling National Bank as Assignee of Norvergence, Inc. v. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222 (1st Dept 2006); National Union Fire Insurance Company of Pittsburgh, Pa. v. Williams, 223 A.D.2d 395, 398 (1st Dept 1996).

Section 5-1402 of the New York General Obligations Law provides for enforcement of forum selection clauses found in contracts worth not less than $1 million, even among foreign parties, but only if the parties submit to jurisdiction in New York. See Freeford Ltd. v. Pendleton, 53 A.D.3d 32 (1st Dept 2008). Section 5-1402(1) provides:

> [A]ny person may maintain an action or proceeding against a ...non-resident...where the action or proceeding arises out of or relates to any contract...covering in the aggregate, not less than one million dollars, and...which contains a provision or provisions whereby such...non-resident agrees to submit to the jurisdiction of the courts of this state."

§ 5-1402(1).

Generally, only parties in privity of contract may enforce terms of the contract such as a forum selection clause found within the agreement. 53 A.D. 3d 32, 38; see also ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 A.D.2d 272 (1st Dept 2003). General Obligations Law § 5-1402 also precludes this court from declining jurisdiction even where the only nexus is the contractual agreement. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 223 A.D.2d 395, 399 (1st Dept 1996). By agreeing to the forum selection clause, a party consents to personal jurisdiction and waives any basis to dispute New York's jurisdiction. Id. Finally, where a party to a contract has agreed in advance of litigation to submit to the jurisdiction of a court, she is later precluded from attacking that court's jurisdiction on grounds of forum

non conveniens[1]. Id.; see also Arthur Young & Co. v. Leong, 53 A.D.2d 515, 516 (1st Dept 1976); Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 41 (1st Dept 2008).

Here, defendant Stroden and the Company signed the SPA and the IRA. The forum selection clause in each document provides,

> The parties (a) hereby irrevocably and unconditionally submit to the jurisdiction of the state courts of the State of New York and to the jurisdiction of the United States District Court for the Southern District of New York for the purpose of any suit, action or other proceeding arising out of or based upon this Agreement, (b) agree not to commence any suit, action or other proceeding arising out of or based upon this Agreement except in the state courts of the State of New York or the United States District Court for the Southern District of New York, and (c) hereby waive, and agree not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that it is not subject personally to the jurisdiction of the above-named courts, that its property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Agreement or the subject matter hereof may not be enforced in or by such court.

SPA § 6.14; IRA § 6.11. As defendant Stroden and the Company each signed the SPA and the IRA, they are each bound by the forum selection clause and their motion to dismiss for lack of jurisdiction is denied.

Defendants also claim that the motion to dismiss should be granted to those Individual Defendants who are not parties to the SPA and the IRA because they are

[1] As discussed, *infra*, this court finds that the forum selection clause is valid as to the Company, defendant Stroden, defendant Besancon, and defendant van Seenus. As a result, Company and defendant Stroden are precluded from attacking this court's jurisdiction on grounds of forum non conveniens.

not subject to the forum selection clauses. The court grants Defendants motion to dismiss as it pertains to defendant Hecht but denies Defendants motion as to defendant Besancon and van Seenus.

There are three circumstances in which a non-signatory may invoke a forum selection clause. First, an entity or individual that is a third-party beneficiary of the agreement may enforce a forum selection clause found within the agreement. Freeford Ltd. v. Pendleton, 53 A.D.3d 32, 39 (1st Dept 2008); ComJet Aviation Mgt. v. Aviation Invs. Holdings, 303 A.D.2d 272 (1st Dept 2003). Second, parties to a global transaction who are not "signatories to a specific agreement within that transaction may nonetheless benefit from a forum selection clause contained in such agreement if the agreements are executed at the same time, by the same parties or for the same purpose." Freeford, 53 A.D.3d 32, 39. Third, a non-signatory that is closely related to one of the signatories can enforce a forum selection clause. Id. A non-signatory is considered closely related to one of the signatories and can enforce a forum selection clause when the enforcement of the clause is "foreseeable by virtue of the relationship between them." Id. The non-signatory defendant must have a "sufficiently close relationship with the signatory and the dispute to which the forum selection clause applied." Tate & Lyle Ingredients Americas, Inc. v. Whitefox Tech. USA, Inc., 98 A.D.3d 401, 402 (1st Dept 2012); Dogmoch Intl. Corp. v. Dresdner Bank, 304 A.D.2d 396, 397 (1st Dept 2003).

The determination as to whether defendant Besancon and defendant van Seenus are closely related to BeOn holdings and the dispute is a factually intensive analysis. See Out Publishing, Inc. v. Lipo Liquidating Corp., 2013 WL 3661886 *3 (Sup. Ct. N.Y. Cnty. Jul. 1, 2013); L-3 Commc'n Corp. v. Channel Tech., Inc., 291 A.D.2d 276 (1st Dept 2002) ("we note the absence of any factual predicate for plaintiff's contention that [defendants] bear so close a relation [that they would] have been foreseeably bound by [the forum selection clause]"). The closely related analysis is not bound solely to corporations or corporate officers. Directors can also be found to be closely related. See Thibodeau v. Pinnacle FX Inv., 2008 WL 4849957 at *5 n. 4 (E.D.N.Y. Nov. 6, 2008).

Here, plaintiffs correctly assert that defendant Besancon and defendant van Seenus are closely related for purposes of the forum selection clause. Although both defendants are non-signatories to the SPA, they are both listed as directors of the Company. See SPA § 4.6 ("the authorized size of the Board shall be four (4), and the Board shall be comprised of Anthony Zolezzi, Kipp Stroden, Michael Besancon and Hugo Van Seenus.") Additionally, both defendants have a nexus to the dispute as they sought to benefit from this debt offering allegedly at plaintiffs' expense. Defendant Besancon and defendant van Seenus, acting as directors of the Board of the Company, approved the Amended Articles, which allegedly diluted plaintiff's

minority interest. Additionally, both defendants allegedly refused to allow plaintiffs to participate in the debt offering.

Finally, defendant van Seenus' company was permitted to convert all of its common shares to preferred while only contributing $25,000, which was well below its pro rata ownership interest. Therefore, it was reasonably foreseeable to defendant Besancon and van Seenus that the forum selection clause would be applicable to any lawsuit against these closely related individuals in connection with their role as directors of the Company[2].

Defendants' argument that this court is required to engage in a forum non conveniens discussion as to defendant Besancon and defendant van Seenus is misguided. The "very point of a selection of forum clause is to avoid litigation over personal jurisdiction and disputes over the application of the long-arm statute." National Union Fire Ins. Co. of Pittsburgh, Pa v. Williams, 223 A.D.2d 395, 397-98 (1st Dept 1996). A forum selection clause affords a sound basis for the exercise of personal jurisdiction over a foreign party and renders the designated forum convenient as a matter of law. See National Union Fire Ins. Co. v. Weir, 131 A.D.2d 380, 381 (1st Dept 1987); VOR Assocs. v. Ontario Aircraft Sales & Leasing, 198

[2] Defendant argues that this result would subject every director of a corporation to the forum selection clause simply by their agreement to be a director. However, here, defendant Besancon and van Seenus took additional steps which subjected them to the forum selection clause, namely their ratification of the Amended Articles, and their alleged actions taken to prevent plaintiffs from participating in the debt offering.

A.D.2d 638, 639 (3d Dept 1993). As this court has decided *supra* that defendant Besancon and defendant van Seenus are subject to the forum selection clause contained in the SPA, their motion to dismiss based on forum non conveniens is denied as a matter of law.

Finally, defendants' reliance on Navitas Group Inc. v. Cermed Corp., Inc., 2013 WL 5879073 (Sup. Ct. N.Y. Cnty. Oct. 31, 2013) is without merit. In Navitas, the parties agreed to a provision in which New York *law* is controlling. The court then analyzed based on the personal jurisdiction of the parties. Here, plaintiffs and defendants have agreed that the New York courts are the appropriate *venue*. By agreeing to the forum selection clause, a party consents to personal jurisdiction and waives any basis to dispute New York's jurisdiction. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley, 223 A.D.2d 395, 399 (1st Dept 1996).

Defendant Hecht is not 'closely related' to the transaction or to the Company and therefore defendant's motion to dismiss is granted only as it pertains to defendant Hecht. At the time the SPA was signed, defendant Hecht was not a director of the Board. When a non-signatory has no relationship to the underlying transaction, they cannot be held to be 'closely related' nor subjected to the forum selection clause. See Out Publishing, Inc. v. Lipo Liquidating Corp., 2013 WL 3661886 *3 (Sup. Ct. N.Y. Cnty. Jul. 1, 2013) (finding that where the defendant had no personal

involvement in the transaction, they are not 'closely related' for purposes of the forum selection clause.)

Preliminary Injunction

Plaintiffs' order to show cause for a preliminary injunction enjoining and restraining the Company from depriving plaintiffs' of their bargained for information rights as minority owners is denied.

A court may not enter a preliminary injunction unless the moving party "demonstrates a likelihood of ultimate success on the merits, irreparable harm absent the granting of the preliminary injunction and a balancing of the equities in its favor." Four Times Square Associates, L.L.C. v. Cigna Investments, Inc., 306 A.D.2d 4, 5 (1st Dept 2003). "The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits" Icy Splash Food & Beverage, Inc. v. Henckel, 14 A.D. 3d 595, 596 (2d Dept 2005). The granting of a preliminary injunction is a drastic remedy. See e.g., 1234 Broadway LLC v. W. Side SRO Law Project, 86 A.D.3d 18, 23 (1st Dept 2011).

A mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in "unusual" situations, "where the granting of the relief

is essential to maintain the status quo pending trial of the action." Second on Second Cafe, Inc. v. Hing Sing Trading, Inc., 66 A.D.3d 255, 264 (1st Dept 2009).

A permanent injunction is a drastic remedy which may be granted only where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction. 67 A N.Y. Jur. 2d Injunctions § 169. A permanent injunction should be granted only in a clear case, reasonably free from doubt. Standard Realty Associates, Inc. v. Chelsea Gardens Corp., 105 A.D.3d 510 (1st Dept 2013). To be entitled to a permanent injunction, plaintiff is required to establish not only irreparable harm, but also the absence of an adequate legal remedy. McDermott v. City of Albany, 309 A.D.2d 1004, 1005 (3d Dept 2003).

Here, plaintiff does not seek to maintain the status quo pending a trial. Instead, plaintiffs seek a permanent injunction at this preliminary stage requiring defendants to provide Monthly Financial Information without giving defendants a full and fair opportunity to contest the application on the merits after discovery.

Irreparable harm is the lynchpin to the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is *likely* to suffer irreparable harm if equitable relief is denied." Natsource LLC v. Paribello, 151 F.Supp 2d 465, 469 (S.D.N.Y. 2001) (internal citations and quotation marks omitted). Moreover, "the irreparable harm must be shown by the moving party to be imminent, not remote or speculative." Golden v.

Steam Heat, Inc., 216 A.D.2d 440, 442 (2d Dept 1995). New York law is clear that "irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." In re Walsh v. Design Concepts, Ltd, 221 A.D.2d 454 (1995). The courts have held that "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm." Family-Friendly Media, Inc. v. Recorder Television Network, 74 A.D.3d 738, 739 (2d Dept 2010).

This court is not persuaded that plaintiffs will suffer irreparable harm. In Matter of Brenner v. Goldsmith, 114 A.D.2d 363 (2d Dept 1985), the Second Department held that irreparable harm results when a director would be voted out of office by the other shareholders and as a result, lose his absolute right to inspect the corporate books. Plaintiffs admitted during oral arguments that there was no threat that they would be voted out of office as they are not a director of the Company. See SPA §4.6. Plaintiff's reliance on Street v. Vitti, 685 F.Supp. 379 (S.D.N.Y. 1988), is similarly misplaced as the irreparable harm was the loss of the position as a director, with the result of the loss to inspect the corporate books. Id. at 384. Again, plaintiffs do not contend that they will be voted out of office as a director. Finally, in Alcatel Space, S.A. v. Loral Space & Communs., Ltd., 154 F. Supp.2d 570 (S.D.N.Y. 2001), the plaintiff sought a preliminary injunction to prevent the

disclosure of confidential trade secrets. Here, plaintiffs are seeking the production of confidential documents, a distinction, which does not amount to irreparable harm.

This court is unaware of any precedent that irreparable harm exists, for the purposes of a preliminary injunction, where a shareholder is denied access to Monthly Financial Information that is a part of the contract between the parties. Plaintiffs' motion for a preliminary injunction is denied.

Accordingly it is,

ORDERED that defendants motion to dismiss based on lack of jurisdiction under CPLR 3211(a)(8) is denied as to the Company, defendant Stroden, defendant van Seenus and defendant Besancon; and it is further

ORDERED that defendants motion to dismiss based on lack of jurisdiction under CPLR 3211(a)(8) is granted as to defendant Hecht; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is denied.

Date: June 20, 2016
New York, New York

Anil C. Singh