LibertyView Special v Jerusalem High Tech Ltd.
2017 NY Slip Op 30132(U)
January 23, 2017
Supreme Court, New York County
Docket Number: 650766/2015
Judge: Saliann Scarpulla

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

LIBERTYVIEW SPECIAL

- v -

JERUSALEM HIGH TECH LIMITED and SAMUEL HACOHEN

DECISION AND ORDER

INDEX NO. 650766/2015

MOTION DATE

MOTION SEQ. NO.

Plaintiff LibertyView Special Opportunities Fund, LP ("LibertyView" or "plaintiff") commenced this action against Jerusalem High Tech Limited ("JHT") and Samuel HaCohen ("HaCohen") (collectively, "defendants") to collect on a secured promissory note, asserting causes of action for (1) breach of contract on the Promissory Note against JHT, (2) breach of contract on the Pledge Agreement against JHT, (3) alter ego liability against HaCohen, (4) fraudulent conveyance pursuant to DCL § 273 against defendants, (5) fraudulent conveyance pursuant to DCL § 275 against defendants, (6) fraudulent conveyance pursuant to DCL § 276 against defendants, and (7) unjust enrichment against HaCohen. Plaintiff seeks an excess of $1.9 million in damages, as well as interest, costs, and attorneys' fees. HaCohen moves to dismiss the complaint against him individually pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction.

Background

LibertyView is an investment fund registered in the Cayman Islands. JHT is an Israeli limited liability company that is in the business of investing in and managing various technology companies. In early 2008, LibertyView and JHT entered into three relevant agreements – a Stock

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Purchase Agreement ("SPA"), a Promissory Note ("note") and a Pledge Agreement ("pledge agreement") (collectively, "relevant agreements").

As chair of JHT, HaCohen negotiated and executed the SPA, in which JHT agreed to purchase shares of non-party ViryaNet, Ltd. ("ViryaNet shares") from LibertyView.[1] The SPA and note provided that JHT would pay 10% of the agreed upon purchase price in cash and enter into the note in favor of LibertyView for the remaining amount. The note matured on January 7, 2013, and carried an annual interim interest rate of 5 per cent. The SPA also provided that LibertyView and JHT would enter into the pledge agreement to secure JHT's obligation under the note. Pursuant to the pledge agreement JHT granted LibertyView a security interest in the purchased ViryaNet shares.

The SPA's and the note's forum selection provisions designate New York as the exclusive jurisdiction for resolving disputes under those agreements. The pledge agreement, however, designates Tel-Aviv-Jaffa, Israel as the exclusive jurisdiction for resolution of disputes thereunder.

JHT never made interest or principal payments on the note. HaCohen claims that LibertyView never demanded annual interim interest or principal payment on the note until August 27, 2014, approximately six and half years after entering the note and approximately a year and half after the maturity date. Today, JHT remains in existence, but it is no longer active or operating. LibertyView claims that JHT is currently an empty shell, after selling its assets to Jerusalem Technology Investment (J.T.I.), Ltd. ("JTI") and the secured ViryaNet shares to an unrelated third party.

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[1] At the time, JHT's ownership was equally split among five shareholders, including HaCohen, who claims that all shareholders participated in the company's major decisions and approval process. However, shortly after JHT and LibertyView entered into the relevant agreements, HaCohen became a controlling shareholder, and the others remained minority shareholders to varying degrees at different times.

HaCohen now moves to dismiss the complaint, arguing that LibertyView failed sufficiently to allege personal jurisdiction over him. In an October 23, 2015 decision on LibertyView's previous order to show cause for a prejudgment attachment, I found that, pursuant to the forum selection provision contained in the note, LibertyView and JHT have agreed to submit to the exclusive jurisdiction of this Court in connection with the order of attachment.[2] Accordingly, personal jurisdiction over the defendant HaCohen remains at issue.

In his motion HaCohen argues that he has no contacts with New York – either in his personal capacity or in his capacity as chair of JHT – and that HaCohen is not a party to the note and therefore not bound by the note's forum selection clause. It is undisputed that HaCohen is a dual citizen of Israel and the United States. When he is in the United States, HaCohen resides in Massachusetts and has no personal contacts with New York.

In opposition, LibertyView argues that at all relevant times HaCohen was the alter ego of JHT; therefore, HaCohen is equally a party to the note as JHT, subjecting him to its forum selection provision. To support this argument, LibertyView alleges the following: (1) that in 2008, HaCohen entered into the note to purchase the ViryaNet shares on behalf of JHT to protect his position as chairperson at ViryaNet; (2) that shortly after JHT purchased the ViryaNet shares, HaCohen restructured JHT's ownership in his favor as a result of repeatedly telling JHT's shareholders that he personally financed and guaranteed the SPA and note; (3) that in 2013, JHT transferred virtually all of its assets, except the secured ViryaNet shares, to JTI with no consideration paid directly to JHT; (4) that in 2014, JHT sold the secured ViryaNet shares to an unrelated third party with the proceeds paid out personally to HaCohen; and (5) that HaCohen made false statements about JHT

[2] Plaintiff misconstrued this jurisdictional finding as the Court's conclusive determination of jurisdiction for all claims against JHT. In turn, the parties fail to argue in this motion whether the relevant agreements are one contract with conflicting forum selection provisions or separate. I address the issue *sua sponte* in the analysis below in order to decide this motion.

and his position there when LibertyView contacted HaCohen regarding the note in August 2014 – all of which HaCohen orchestrated to thwart LibertyView from collecting on the note.

Discussion

Upon a motion to dismiss pursuant to CPLR § 3211(a)(8), the plaintiff, "[a]s the party seeking to assert personal jurisdiction . . . bears the ultimate burden of proof on this issue." *Doe v. McCormack,* 100 A.D.3d 684, 684 (2d Dep't 2012); *see also Copp v. Ramirez*, 62 A.D.3d 23, 28 (1st Dep't 2009). "[I]n deciding whether the plaintiff[] ha[s] met [its] burden, the court must construe the pleadings and affidavits in the light most favorable to [it] and resolve all doubts in [its] favor." *Brandt v. Toraby*, 273 A.D.2d 429, 430 (2d Dep't 2000); *Wilson v. Dantas*, 128 A.D.3d 176, 182 (1st Dep't 2015).

In opposing the motion, the plaintiff is not required to make a *prima facie* showing of jurisdiction, but only a "sufficient start" in demonstrating a basis for personal jurisdiction over the defendant "to warrant further discovery." *HBK Master Fund L.P. v. Troika Dialog USA, Inc.*, 85 A.D.3d 665, 666 (1st Dep't 2011).

I. Forum Selection Provision

As to this motion, neither party raises the issue of conflicting forum selection provisions in the note and the pledge agreement, specifically whether the relevant agreements should be read together with one forum provision given effect over the other, or whether the relevant agreements should remain separate. I resolve this issue *sua sponte* and then address the issue of personal jurisdiction over HaCohen raised on this motion to dismiss. *See CooperVision, Inc. v Intek Integration Tech., Inc.,* 7 Misc. 3d 592, 596 (Sup. Ct. 2005) (stating that the court must "first [] determine[] whether the disputed clause was a part of the parties' contract" before addressing whether the forum selection provision was enforceable).

"As a general rule, contracts remain 'separate unless the history and subject matter shows them to be unified' " *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Williams*, 223 A.D.2d 395, 396 (1st Dep't 1996) (citation omitted). " 'In determining whether contracts are separable or entire, the primary standard is the intent manifested, viewing the surrounding circumstances." *Id.* (citation omitted). However, even when multiple agreements are read and interpreted together, that " 'does not require that the two separate instruments must be deemed consolidated and one for all purposes or that a separate and independent provision of one, *such as a jurisdictional paragraph* . . . is to [be] incorporated in the other' " *CooperVision, Inc. v Intek Integration Tech., Inc.,* 7 Misc. 3d 592, 598 (Sup. Ct. 2005) (quoting *Kent v. Universal Film Mfg. Co.,* 193 N.Y.S. 838, (1st Dep't 1922)) (emphasis added) (changes in original).

Here, there are three separate agreements that each form a part of the same overall transaction. In reference to the pledge agreement, the SPA provides in Section 2.3 that JHT "has granted a security interest to [LibertyView] in all of the [ViryaNet shares], *subject to the terms and conditions of such Pledge Agreement*" (emphasis added). Accordingly, "the designation of a different forum for the litigation of disputes arising out of [the pledge agreement's] performance indicate that the respective agreements are intended to be separate [for jurisdictional purposes] . . . [otherwise,] the contradictory provisions . . . would be rendered mere surplusage, a result that offends a fundamental principle of contract interpretation" *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Williams*, 223 A.D.2d 395, 396 – 97 (1st Dep't 1996) (citation omitted).

Because plaintiff has advanced no arguments upon which this Court might disregard the forum designation contained in the pledge agreement, I find that the appropriate forum in which to commence an action related to the pledge agreement is the one designated in the pledge agreement, i.e., Tel-Aviv-Jaffa, Israel, and not the note. *See CooperVision, Inc. v Intek Integration Tech., Inc.,* 7 Misc. 3d 592, 596 - 97 (Sup. Ct. 2005) ("Forum selection clauses are '*prima facie* valid and

should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.") (italics added). In accordance with this finding, I will now address whether this Court has personal jurisdiction over HaCohen as to each claim against him.

II. Personal Jurisdiction

HaCohen has no personal contacts with New York sufficient to establish personal jurisdiction over him pursuant to either CPLR §§ 301 or CPLR 302. Thus, LibertyView alleges personal jurisdiction over HaCohen solely on the basis that he is the alter ego of the corporate defendant JHT. "Where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well." *Transasia Commodities Ltd. v. Newlead JMEG, LLC*, 45 Misc.3d 1217 (Sup. Ct. N.Y. County 2014) (citation omitted). "It is also well established that the exercise of personal jurisdiction over an alter ego corporation does not offend due process." *See id.* (citing *Transfield ER Cap Ltd. v. Indus. Carriers. Inc.*, 571 F.3d 221, 224 (2d Cir. 2009)).

"In order to state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation . . . in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against plaintiff which resulted in plaintiff's injury.'" *Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014) (quoting *Morris v. New York State Dep't. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993)). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no definitive rules governing the varying circumstances when this power may be exercised." *Id.* (citation omitted). To show an alter ego relationship, LibertyView makes three primary allegations, discussed in more detail below.

A. HaCohen's Alleged Ulterior Motive

LibertyView alleges that HaCohen exercised complete dominion over JHT when it entered into the note to purchase ViryaNet shares because HaCohen simultaneously needed to protect his position as chairperson at ViryaNet. Yet, JHT's execution of the note has the objective earmarks of a properly taken corporate transaction. HaCohen submits an affidavit and corporate minutes that show relevant materials were presented to the board and shareholders, the board and shareholders then met to discuss the transaction, and finally the board unanimously resolved to approve the transaction at the meeting.[3]

To support liability based upon an alter ego theory, New York courts require "a corporation [to] ha[ve] been so dominated by an individual . . . and its separate entity so ignored that it primarily transacts the dominator's business instead of its own . . ." *Is. Seafood Co., Inc. v Golub Corp.*, 303 A.D.2d 892, 893 (3d Dep't 2003) (citation omitted). Here, the documentary evidence submitted by HaCohen shows that JHT's separate corporate structure was respected in connection with execution of the note, thus HaCohen has sufficiently disproven LibertyView's bare allegation that HaCohen exercised complete dominion over JHT in respect to the note. That HaCohen may have individually benefited from the transaction does not alone show that he exercised a sufficient degree of control over JHT's decision to proceed to warrant piercing the corporate veil. *See In re Lyondell Chem. Co.*, 543 B.R. 127, 146 (Bankr. S.D.N.Y. 2016) (finding insufficient allegations where "it [was] alleged that [the transaction] was '*initiated by* [the individual shareholder],' " because "it is not alleged that [Corporation] ever failed to exercise its business discretion in connection with the December Distribution, the Merger or otherwise.") (emphasis added).

[3] At the time JHT entered into the note, HaCohen only owned 20% of JHT shares and was one of two directors. *See Is. Seafood Co., Inc. v Golub Corp.*, 303 A.D.2d 892, 895 (3d Dep't 2003) (finding that "[w]hile [defendant] may be the sole stockholder, director and officer of both corporations and seems to exhibit disregard of corporate formalities, this, in and of itself, constitutes insufficient proof of complete domination and control . . .")

B. HaCohen's Alleged Misrepresentations to Restructure JHT

LibertyView further alleges that after JHT executed the relevant agreements, HaCohen misrepresented his personal contribution and guarantee to JHT shareholders to induce them to restructure JHT in his favor, evincing HaCohen's actual control over JHT. This allegation of alleged misconduct relates to different, subsequent transactions, *i.e.*, the various agreements between JHT's shareholders and JHT that restructured the respective shareholders' JHT ownership ("JHT Restructuring Agreements).[4] While this allegation may indicate HaCohen's misconduct after JHT executed the note, it does not indicate HaCohen's " 'complete domination of the corporation *in respect to the transaction attacked* [here, execution of the note].' " *Baby Phat Holding Co., LLC v Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dep't 2014) (citation omitted) (emphasis added).

C. JHT's Alleged Fraudulent Transfers

Finally, LibertyView alleges that, in 2013-2014, HaCohen caused JHT to fraudulently transfer virtually all of its assets to JTI and sell its secured ViryaNet asset to an unrelated third party as part of a scheme to thwart LibertyView from collecting on the note. LibertyView alleges that HaCohen first fraudulently transferred virtually all of JHT's assets to JTI, a new corporation HaCohen formed, and the consideration exchanged in that transaction was allocated directly to JHT shareholders, not JHT itself. HaCohen does not deny that JHT received no consideration from that transaction, and even proffers corporate minutes whereby the sole director, HaCohen, and the remaining three shareholders discuss selling JHT's assets in exchange for JTI shares distributed directly to them.

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[4] The JHT Restructuring Agreements' forum selection provisions designate Tel-Aviv, Israel as the exclusive jurisdiction. Zalayet Aff. Ex. 1-4.

The alleged fraudulent transfer of JHT's assets to JTI, years after the execution of the relevant agreements, does not support an alter ego relationship between HaCohen and JHT in connection with JHT's execution of the note sufficient to hold HaCohen to the note's forum selection clause. Instead, these allegations may support a claim against JHT for fraudulent transfer. Whether HaCohen later caused JHT to fraudulently transfer assets to avoid payment of the note is a different issue from whether HaCohen sufficiently controlled and abused JHT to perpetuate fraud in connection with execution and performance under the note.

LibertyView's second fraudulent transfer allegation also fails to support an alter ego relationship between HaCohen and JHT in connection with the note, even when considering HaCohen's alleged misrepresentations to LibertyView regarding this transaction. LibertyView alleges that HaCohen fraudulently transferred the secured ViryaNet shares to an unrelated third party and that HaCohen personally received the sale proceeds. The secured interest LibertyView has in the sale proceeds, however, relates to the pledge agreement, not the note. Therefore, even if this fraudulent transfer allegation were to support an alter ego relationship between defendants, it ties HaCohen to the wrong agreement, i.e., the pledge agreement, which requires resolution of disputes thereunder in Israel, not New York, as discussed above.

LibertyView argues that the alleged fraudulent transfers alone provide a sufficient basis for personal jurisdiction over HaCohen and cites *Corpuel v. Galasso*, 268 A.D.2d 202 (1st Dep't 2000) as support. *Corpuel*, however, is distinguishable because the fraudulent transfers in that case themselves established long-arm jurisdiction over the out-of-state defendants, and it is undisputed that the alleged fraudulent transfers here did not occur in New York, have no connection to New York, and do not in and of themselves give rise to long-arm jurisdiction over HaCohen.

Because the allegations, even when collectively taken, fail to make a sufficient start to support an alter ego theory tying HaCohen to the note, this Court does not have personal

jurisdiction over HaCohen. Accordingly, defendant's motion to dismiss is granted, and the Court dismisses the following causes of action with leave to commence in the appropriate forum: (1) plaintiff's third cause of action for alter ego liability against HaCohen; (2) plaintiff's fourth cause of action for fraudulent conveyance pursuant to DCL § 273 against HaCohen only, (3) plaintiff's fifth cause of action for fraudulent conveyance pursuant to DCL § 275 against HaCohen only, (4) plaintiff's sixth cause of action for fraudulent conveyance pursuant to DCL § 276 against HaCohen only, and (5) plaintiff's seventh cause of action for unjust enrichment against HaCohen.

In accordance with the foregoing, it is hereby

ORDERED that Samuel HaCohen's motion to dismiss the complaint is granted as to all causes of action asserted against him.

This constitutes the decision and order of the Court.

DATE : 1/23/17

SCARPULLA, SALIANN, JSC