

<b>Pre-Settlement Fin., LLC v Ellis</b>
2017 NY Slip Op 31553(U)
June 23, 2017
Supreme Court, Richmond County
Docket Number: 150251/16
Judge: Charles M. Troia
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
PRE-SETTLEMENT FINANCE, LLC

Plaintiff, DCM 1M  
Present:  
HON. CHARLES M. TROIA

-against-

DECISION AND ORDER

THERESA A. ELLIS, and SCOTT ZUKOWSKI,

Index No. 150251/16  
Motion Nos. 2498-001  
483-002

Defendants.  
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The following papers numbered 1 to 6 were fully submitted on the 7th day April, 2017:

	Papers Numbered
Notice of Motion for Default Judgment with Exhibits (dated June 16, 2016).....	1
Opposition of Pro-Se Defendant Ellis (dated August 4, 2016).....	2
Supplemental Opposition of Pro-Se Defendant Ellis, with Supporting Papers and Exhibits (dated January 26, 2017).....	3
Cross-Motion of Pro-Se Defendant Ellis to Vacate the Default Judgment, with Exhibits.....	4
Plaintiff's Opposition to Cross-Motion (dated February 23, 2017).....	5
Reply by Defendant Ellis (dated April 5, 2017).....	6

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Upon the foregoing papers, plaintiff's motion seeking a default judgment is denied.  
Defendants' cross-motion, *inter alia*, to vacate the default and to dismiss the complaint as against  
them is granted.

In this action the Court must decide whether a forum selection clause and choice of law

provision are applicable and enforceable, and whether in the interest of substantial justice the action should be heard in another forum.

On or about March 3, 2016, Pre-Settlement Finance (hereinafter "PSF") commenced this action for monetary damages arising from claims of breach of contract against defendant Theresa Ellis and her husband, Scott Zukowski. Ellis commenced an action for wrongful termination of her employment on or about October 22, 2001, alleging her then employer Ethicon, Inc., failed to accommodate her cognitive disabilities and traumatic brain injuries resulting from an automobile accident. According to the complaint, plaintiff obtained an assignment of rights from defendant Ellis to her proceeds in the underlying action in the United States District Court of New Jersey action titled *Ellis v. Ethicon, Inc*, Index Number 05-726.

On September 23, 2010 plaintiff and defendant Ellis entered an agreement wherein Ellis assigned to plaintiff a portion of her potential proceeds from the New Jersey action and plaintiff advanced to Ellis the sum of \$29,000.00. The assignment agreement was executed by defendant Ellis and acknowledged by her attorney in Pennsylvania. Defendant Zukowski was not a party to the agreement. Pursuant to the agreement defendant Ellis authorized her attorney to pay directly to plaintiff its sum due for the purchase of defendants proceeds.

On March 7, 2014 the wrongful termination matter was settled. On June 12, 2014, a motion for attorneys fees was filed by the attorney for defendant Ellis. On June 24, 2014, Ellis filed a motion to supplement the motion for attorneys fees and asserted that plaintiff PSF should be paid proceeds in the amount of \$100,057.52. On July 10, 2014, by order of the District Court of New Jersey (hereinafter "NJDC") the Clerk of the Court was directed to deposit with the court the sum equal to the settlement amount. Thereafter, on September 9, 2015, the Honorable Peter G. Sheridan, U.S.D.J, directed the parties to submit an order regarding the distribution of funds

that were deposited into Court. Pursuant to the September 9, 2015 NJDC order, the attorney for defendant Ellis was to receive attorneys fees and costs in the amount of \$14,894.14 and defendant Ellis was to receive the remainder of the settlement. According to plaintiff, the order failed to address plaintiff's claim to the a portion of the proceeds which was received by Ellis. Plaintiff contends it has not received payment and moves for a default judgment against defendants for the sum of \$272,374.72 purportedly owed to plaintiff, in addition to attorneys fees in the amount of \$10,000.00.

Defendants oppose plaintiff's motion and cross move to vacate their default and dismiss the complaint. Defendants contend that this court lacks personal jurisdiction over defendants who are residents of Pennsylvania. According to defendants, Ellis is cognitively incapacitated as a result of a traumatic brain injury and lacks capacity to proceed on her own behalf. Defendants also contend that plaintiff is attempting to secure a lien on a NJDC judgment, affirmed by the Third Circuit Court of Appeals, and that the New Jersey court should interpret its own judgment. In addition, defendant Ellis contends that defendant Zukowski was not a party to the assignment and was removed as a plaintiff prior to trial in the NJDC proceeding and is an improperly named defendant in the instant proceeding. Defendant Ellis contends that she did not receive funds which are purportedly owed to plaintiff. Defendant Ellis also contends that she was represented by counsel in the NJDC proceeding and plaintiff communicated with her counsel. Further, defendants contend that they would face a substantial hardship litigating in this forum.

A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its

day in court (*Chiantella v Lucy Chiantella Revocable Trust of 2002*, 105 AD3d 955 [2<sup>nd</sup> Dept. 2013]). Here, the parties agreed in a written contract that any disputes would be determined in a Court of competent jurisdiction in New York. However, here in light of the circumstances the selected forum would be so gravely difficult that defendants would, for all practical purposes, be deprived of their day in court.

The common-law doctrine of forum non conveniens, articulated in CPLR 327(a), permits a court to stay or dismiss an action where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere (CPLR 327[a]; *see Koskar v. Ford Motor Co.*, 84 AD3d 1317, 1317–1318 [2<sup>nd</sup> Dept. 2011]). On a motion to dismiss on the ground of forum non conveniens, the burden is on a defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation here (*see Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 479 [1984], cert. denied 469 U.S. 1108 [1985]). Here, New Jersey is an available alternate forum, plaintiff's action has no real connection to New York and defendants would face a substantial hardship litigating in this court.

Moreover, the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no one single factor controlling (*see Smolik v. Turner Constr. Co.*, 48 AD3d 452 [2<sup>nd</sup> Dept. 2008]).


Even assuming that this Court has jurisdiction in this matter, as the issues to be decided in this action regard the parties prior New Jersey judgment in the New Jersey District Court action that court is better suited to interpret its own determinations. In addition, based upon the principles of justice, fairness and convenience, this Court is persuaded that New Jersey is a more appropriate forum.

Accordingly, plaintiff's motion is denied. Defendants' motion to dismiss is granted conditioned on leave to commence the action in New Jersey.

This constitutes the decision and order of the court.

Dated: June 23, 2017

ENTER,



J. S. C.

Hon. Charles M. Troia  
Justice of the Supreme Court