

Telewizja Polska, S.A. v Spanski Enters., Inc.

2019 NY Slip Op 32336(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 650908/2019

Judge: O. Peter Sherwood

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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TELEWIZJA POLSKA, S.A.,

Plaintiff,

-against-

SPANSKI ENTERPRISES, INC.,

Defendant.

-----X

**DECISION AND ORDER
Index No.: 650908/2019**

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

Plaintiff Telewizja Polska, S.A. (TVP) is Poland’s national public television broadcasting company. Defendant Spanski Enterprises, Inc. (Spanski or SEI) is a Canadian corporation which distributes Polish-language television and radio in North and South America. On December 14, 1994, the parties entered into an agreement (which has been amended) by which TVP granted Spanski rights to use some TVP content (from a TVP television channel called TVP Polonia) in the Americas (as amended, the Agreement [translations attached as Exhibits 1-3 to Complaint, Dkt. #s 3-5]). The Agreement runs for 25 years, ending December 14, 2019. Plaintiff claims the Agreement provided the parties must mutually agree to extend the term of the Agreement past 2019. Spanski, however, sent TVP a letter purporting to exercise a unilateral right to extend the Agreement for ten years.

TVP asserts a single cause of action, for a declaratory judgment that the Agreement will end on December 14, 2019, and that Spanski’s unilateral attempt to extend it is ineffective.

II. ARGUMENT

A. Spanski’s Motion to Dismiss

Spanski moves to dismiss pursuant to CPLR 3211(a)(1) and (7), based on documentary evidence and failure to state a claim, because this action breaches an exclusive venue provision in the Agreement, and CPLR 3211(a)(8), for lack of jurisdiction, as Spanski has no operations, employees, or other contacts with NY.

The second amendment of the Agreement (dated November 4, 1999) provides “This Agreement shall be governed by the Laws of the State of New York, USA, and all disputes shall

be submitted for settlement by federal courts in the city of New York” (§8). The parties have litigated previous disputes before the federal courts in New York State, which have repeatedly ruled against TVP, and this case is impermissible forum shopping. In 2007, there was a case between the parties, initiated by Spanski, in the Southern District of New York (SDNY). The SDNY held that the Agreement (as amended) included an “express agreement to submit disputes to the federal courts in New York” (Memo at 4). Additionally, Spanski has already begun an action in the SDNY seeking a declaratory judgment on the same issues as are raised here, although TVP has not agreed to accept service in that action or to authorize its counsel to do so (*id.* at 6).

Separately, this court lacks jurisdiction over Spanski. Spanski did not consent to this court’s jurisdiction in the Agreement. It is a Canadian corporation with its principal place of business in Ontario, Canada. It has no offices in New York, is not registered to do business here, has no employees, bank accounts, or assets in NY, and does not transact business here (*id.* at 8 [admitting it has subcontracted with other entities to provide television content in the US and over the internet]). Even if Spanski transacted business in NY, which it did not, the claim asserted here does not arise from such a transaction (*id.* at 9).

B. TVP’s Opposition

TVP argues it could not sue Spanski in federal court because the federal courts have no jurisdiction (Opp at 3-6). There is no diversity of citizenship, as neither party is a citizen of the United States, and there is no federal question. The First Department has noted that, under these circumstances, a forum selection clause is ineffective (*id.* at 2).

TVP asserts Spanski is subject to this court’s jurisdiction because it transacts business in New York relating to the Agreement because it has a subsidiary which is Spanski’s licensee and agent (*id.* at 2). Additionally, Spanski has previously litigated in New York to enforce the Agreement, so has submitted to New York jurisdiction (*id.* at 2).

TVP also argues Spanski is subject to New York jurisdiction because distributing television programming in New York constitutes transacting business here (*id.* at 6). While Spanski claims it does not distribute the programming here, either for television or over the internet, the entity to which it sub-licenses TVP’s content for use in the US television market, EuroVu SA, is an affiliated company controlled by Spanski (*id.*). This constitutes Spanski transacting business in New York, as EuroVu is Spanski’s de facto agent (*id.* at 7). Further, in another action, Spanski’s

principal swore that Spanski “and EuroVu have expended extraordinary efforts to promote and market [the licensed content] throughout the United States” (*id.*, quoting Declaration of Boguslaw Spanski in Support of Plaintiff’s Preliminary Injunction Motion, attached to Samowitz aff, Dkt. # 24, at 3, ¶ 11). Spanski distributed the content in New York through EuroVu.

Finally, Spanski has filed suit in New York against TVP at least five times pursuant to the Agreement previously. Accordingly, Spanski has subjected itself to jurisdiction here in subsequent disputes about the same contract. In one of those litigations, Spanski “claimed that venue in New York was proper under 28 USC 1391(f)(1), which allows venue ‘in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred’ (Opp at 9, quoting Complaint in 14 CV 2570, attached as Exhibit 4 to Samowitz aff, Dkt. 27, at ¶ 8).

C. Spanski’s Reply

Spanski argues this case should be dismissed because there is no question this dispute may be brought in federal court, as there is currently a case pending in the SDNY on this very dispute. It is brought pursuant to the Federal Sovereign Immunities Act, which provides federal courts with jurisdiction to resolve disputes against foreign states and their agencies, such as TVP. That case (*Spanski Enterprises, Inc. v Telewizja Polska SA*, 19cv1619) is currently pending. If TVP chose to accept service, instead of requiring Spanski to serve via the Hague Convention, that action could proceed immediately. Further, if TVP had wanted to bring this action in federal court, it could have asserted a related claim under the Copyright Act or Lanham Act, which would provide subject matter jurisdiction. Alternatively, TVP could have brought claims related to the reversion of copyright, over which the federal courts have exclusive jurisdiction (Reply at 4-5).

Nor does this court have jurisdiction over Spanski. Even if Spanski did have some jurisdictional contacts with NY, the claim about whether Spanski could unilaterally extend the term of the Agreement did not arise from those contacts (*id.* at 6). The claim arises from the contract negotiations, none of which are alleged to have occurred in New York. Further, EuroVu is a separate company, not an agent of Spanski, and its acts cannot be attributed to Spanski for jurisdictional purposes unless the parent’s control is so complete the subsidiary is effectively just a department of the parent (*id.* at 7 citing *Delagi v Volkswagenwerk A.G. of Wolfsburg, Germany*, 29 NY2d 426, 432 [1972]). Spanski does not control EuroVu. Nor do the companies have common ownership or management, and EuroVu has separate bank accounts (Reply at 8-9).

Additionally, TVP is incorrect that Spanski's prior initiation of suits in the SDNY subjects it to NY jurisdiction (*id.* at 9). The cases cited by TVP are irrelevant (*id.*).

III. DISCUSSION

Standard on Motion to Dismiss for Failure to State a Claim

Section 8 of the Second Amendment to the Agreement provides that "[t]his Agreement shall be governed by the Laws of the State of New York, USA, and all disputes shall be submitted for settlement by federal courts in the city of New York" (§8). Plaintiff argues that court lacks jurisdiction. However, there is a case pending in the SDNY regarding this dispute, for which defendant Spanski (plaintiff in that case) contends there is federal jurisdiction pursuant to the Agreement and to the "Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1603(a)-(b), and 1605(a) (1), (2), as TVP is an agency and instrumentality of the Polish Government engaging in commercial activity within the United States, such commercial activity including its contractual relationship with SEI at issue in this action" (Federal Complaint, attached as Exhibit I to Piskora aff, Dkt. # 17, ¶ 25). Plaintiff's only reason for not obeying the terms of the Agreement and bringing this claim in federal court is because it contends that cannot be done (Opp at 2). As it apparently can, this dispute is properly brought in federal court, pursuant to the Agreement. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is GRANTED, as this court lacks jurisdiction and the parties' Agreement requires that the case be heard in the Southern District of New York; and it is further

ORDERED that the case is hereby DISMISSED without prejudice to refiling in the Southern District of New York.

This constitutes the decision and order of the court.

DATED: July 31, 2019

ENTER,


O. PETER SHERWOOD J.S.C.