

<b>MProsiemo Ltd. v Vaygensberg</b>
2019 NY Slip Op 32955(U)
October 7, 2019
Supreme Court, New York County
Docket Number: 654565/2017
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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MPROSIEMO LIMITED,  
  
Plaintiff,

INDEX NO. 654565/2017

MOTION DATE N/A

- v -

MOTION SEQ. NO. 005

ARKADIY VAYGENSBERG, LEONID TATARCHUCK,  
STEFAN STEFANOV, ARKENSBERG, LLC, NIS,  
INC., ROMANIROV, LLC, ELMWOOD VENTURES,  
LLC, NICHOLAS BARTHELEMY, GEORGE V.  
EATERTAINMENT, S.A., JOHN DOES 1 THROUGH 10,  
BB NY OPERATIONS 357TH ST., LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

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ARKADIY VAYGENSBERG  
  
Plaintiff,

Third-Party  
Index No. 595502/2018

-against-

ALEXANDR NEFYODOV

Defendant.

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this action for, *inter alia*, breach of contract, Plaintiff/Counterclaim Defendant MProsiemo Limited (“MProsiemo”) and Third-Party Defendant, Alexandr Nefyodov (“Nefyodov”), move to dismiss Defendant/Counterclaim Plaintiff/Third-Party Plaintiff Arkady Vaygensberg’s (“Vaygensberg”) Amended Third Party Complaint (“ATPC”).

## **Background**

Vaygensberg is a resident of Florida. Nefyodov is a resident of Kazakhstan. Vaygensberg alleges that MProsiemo, a corporation registered in Cyprus, is a shell company that is owned and controlled by Nefyodov.

In or around 2007, Vaygensberg allegedly became aware of a new Ukrainian law that allowed landowners to rezone agricultural property for commercial use. Vaygensberg allegedly met with Nefyodov in Odessa, Ukraine, New York, and Moscow to discuss a potential joint venture centered on acquiring Ukrainian agricultural land, obtaining changes in zoning to permit commercial use of the land, and selling the rezoned lots.

Eventually, Nefyodov and Vaygensberg allegedly agreed to enter into an oral joint venture (the “Ukrainian Agreement”), whereby Vaygensberg would identify land to acquire, rezone it, and locate buyers for the rezoned lots, and Nefyodov would provide the funding for the land acquisitions and control the accounts, which held the profits. The parties allegedly agreed that Nefyodov would receive eighty percent of the profits from the land sales, and Vaygensberg would receive twenty percent of the profits.

Allegedly, by 2013, Vaygensberg’s share of the profits from the Ukrainian Agreement was approximately \$2.4 million, which Nefyodov held in “various shell companies” registered in Cyprus. Vaygensberg alleges that, after refusing to pay Vaygensberg his share of the profits, Nefyodov agreed to transfer the \$2.4 million he owed Vaygensberg into a new venture to open a Buddha Bar restaurant in New York (“BBNY”).

In or around December 2014, Nefyodov allegedly “caused MProsiemo to wire \$1,040,000 (rather than the promised \$2.4 million) to a bank account in New York established to fund the [BBNY].” ATPC ¶13.<sup>1</sup> In or around November 2015, Nefyodov began demanding that Vaygensberg return the \$1,040,000 to him.

MProsiemo commenced the underlying action on June 29, 2017, asserting causes of action for, *inter alia*, breach of contract and the dissolution of BBNY. Vaygensberg answered the complaint; commenced a third-party action against Nefyodov for breach of the Ukrainian Agreement; and asserted a counterclaim against MProsiemo and Nefyodov for breach of the Ukrainian Agreement based on alter ego liability and a second counterclaim against MProsiemo for a set off. Nefyodov and MProsiemo now move to dismiss the ATPC for, *inter alia*, lack of personal jurisdiction over Nefyodov and for failure to state a cause of action for breach of the Ukrainian Agreement.

### **Discussion**

On a motion to dismiss, “the pleading is to be afforded a liberal construction” – the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted

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<sup>1</sup> The term “ATPC” refers to the third-party complaint and the counterclaims.

by documentary evidence are not entitled to such consideration.” *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003) (citation omitted).

MProsiemo and Nefyodov move to dismiss the ATPC for lack of personal jurisdiction over Nefyodov. Because the question of personal jurisdiction is a threshold issue, it must be addressed first. *Matter of National Union Fire Ins. Co. of Pittsburgh, PA v St. Barnabas Community Enters., Inc.*, 48 AD3d 248, 249 (1st Dept 2008).

Vaygensberg relies on an October 29, 2018 stipulation (“Stipulation”) between Fox Rothschild LLP, counsel for MProsiemo and Nefyodov, and Clayman & Rosenberg LLP, counsel for Vaygensberg, and argues that New York may exercise personal jurisdiction over Nefyodov because Nefyodov’s designated agent was personally served with a third-party summons and ATPC in New York, pursuant to CPLR 308(1) and (3). Nefyodov argues that the Court does not have personal jurisdiction over him because he did not waive any personal jurisdiction challenge by executing the Stipulation, which extended his time to respond to the ATPC.

“Personal service upon a natural person shall be made . . . by delivering the summons within the state to the agent for service of the person to be served as designated under [CPLR] 318 . . . .” CPLR 308(3). However, a party is not precluded from appointing an agent for service of process by informal means, independent of CPLR 318. *See Weston Banking Corp. v. Turkiye Garati Bankasi, A.S.*, 57 NY2d 315, 327 (1982) (finding agent for service of process informally appointed where language of note allowed for a reasonable interpretation of the parties’ intention); *Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265, 271 (1980).

Here, the Stipulation provides, in part, “that Fox Rothschild LLP[] represents that it is authorized to accept service of process in this action for [Nefyodov] and that it has received and accepted service on behalf of Nefyodov of the Third Party Summons and Complaint filed by Defendant/ Third Party Plaintiff, [Vaygensberg] . . . .” Hugel Aff., Ex. B (NYSCEF 105). Although the formal requirements of CPLR 318 were not expressly satisfied, the plain language of the Stipulation establishes that Nefyodov intended to appoint his attorney as an agent authorized to accept service of process on his behalf.<sup>2</sup> Therefore, service of process upon Nefyodov was proper, and the portion of the motion to dismiss for lack of personal jurisdiction is denied.

Next, Nefyodov and MProsiemo argue that the third-party claim and first counterclaim for breach of the Ukrainian Agreement must be dismissed because Vaygensberg failed to state a cause of action for breach of a joint venture and because it is barred by the statute of frauds.

As an initial matter, Vaygensberg failed to plead the substance of the foreign law under which the Ukrainian Agreement should be interpreted. Vaygensberg contends that the law of Ukraine, Florida, or Kazakhstan could arguably govern the Ukrainian Agreement but does not plead the substance of those forums’ laws.

“Where a cause of action or defense is based upon the law of a foreign country or its political subdivision, the substance of the foreign law relied upon shall be stated.”

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<sup>2</sup> Compare *Rich v. Lefkovits*, 56 N.Y.2d 276, 279 (1982) (finding that a defense to personal jurisdiction was not waived where the plaintiff challenged service of process “by affirmative defense asserted in the answer, after a stipulation extending defendant’s time ‘to appear and answer.’”).

CPLR 3016(e). “Where . . . the record reveals a total failure to prove foreign law, the parties have consented that the forum law be applied to the controversy.” *Bank of New York v Nickel*, 14 AD3d 140, 149 (1st Dept 2004) (citations and quotation marks omitted); see *MediaXposure Ltd. (Cayman) v. Omnireliant Holdings, Inc.*, 29 Misc.3d 1215(A) (Sup Ct, NY County 2010). Here, because Vaygensberg has failed to plead or prove the substance of the foreign law to be applied, the parties are presumed to have consented to this forum’s law. See *Nickel*, 14 A.D.3d at 149; CPLR §3016(e).

Under New York law, “to properly plead the existence of a joint venture agreement,” the pleading must contain allegations of “acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses.” *Slabakis v Schik*, 164 AD3d 454, 455 (1st Dept 2018), *lv to appeal denied*, 32 NY3d 912 (2018) (“An indispensable [element] of a contract of . . . joint venture . . . is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses.*”) (citations and quotation marks omitted).

The ATPC is devoid of any allegation that Vaygensberg and Nefyodov intended to share in the potential losses of the Ukrainian Agreement. *Id.*; see *Andrews v. Cerberus Partners*, 271 A.D.2d 348 (1st Dept 2000) (“Plaintiff’s attempt to establish an oral agreement to enter into a joint venture must fail because of the absence of any allegation

that the parties were to share losses.”) (citation omitted). Vaygensberg’s argument – that the Ukrainian Agreement constitutes a joint venture, even though there was no specific agreement to share in the losses because the parties did not have any reasonable expectations of loss – is unavailing. *See Slabakis v Schik*, 164 AD3d at 455; *Lerch v Ark Restoration & Design Ltd.*, 137 A.D.3d 637, 638 (1st Dept 2016); *Andrews*, 271 A.D.2d 348.<sup>3</sup> Therefore, Vaygensberg has failed sufficiently to plead that the Ukrainian Agreement constitutes a joint venture.

Vaygensberg argues that, even if the Ukrainian Agreement does not constitute a joint venture under New York law, it constitutes an oral agreement that is not barred by the statute of frauds. Nefyodov and MProsiemo argue that the statute of frauds bars the Ukrainian Agreement because it relates to the purchase and sale of real estate.

Pursuant to General Obligations Law (“GOL”) § 5–701(a)(10), to be enforceable, an agreement “to pay compensation for services rendered in . . . negotiating the purchase, sale, [or] exchange . . . of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or interest therein” must be contained in a writing subscribed by the party to be charged. The statute expressly defines “[n]egotiating” to include “procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction.” *Id.* Further, GOL § 5–701(a)(10) “applies to various kinds of intermediaries who perform limited services in the

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<sup>3</sup> *But see Don v Singer*, 92 AD3d 576, 577 (1st Dept 2012); *Cobblah v Katende*, 275 A.D.2d 637, 639 (1st Dept 2000) (no reasonable expectation of losses for a venture involving a group of anesthesiologists servicing a hospital).



consummation of certain kinds of commercial transactions.” *Freedman v. Chemical Contr. Corp.*, 43 NY2d 260, 266 (1977).

Here, Vaygensberg allegedly learned of a “business opportunity in Ukraine,” which included the purchase and sale of real estate. Vaygensberg’s alleged role in the Ukrainian Agreement included identifying land to acquire, rezoning the land, and locating buyers for the rezoned lots. These alleged services rendered pursuant to the Ukrainian Agreement were performed in order to assist in the “negotiation or consummation of the transaction.” See *Nemelka v. Questor Management Co., LLC*, 40 AD3d 505 (1st Dept 2007) (oral to procure a business opportunity in exchange for compensation in the form of a limited right to co-invest in the opportunity was barred by the statute of frauds); *Andrews*, 271 AD2d at 348. Therefore, the alleged Ukrainian Agreement falls within GOL § 5-701(a)(10) and is barred by the statute of frauds.


For the foregoing reasons, MProsiemo’s and Nefyodov’s motion to dismiss the ATPC for breach of the Ukrainian Agreement is granted and Vaygensberg’s third-party claim against Nefyodov and first counterclaim against MProsiemo and Nefyodov are dismissed. The second counterclaim against MProsiemo, which seeks a setoff of an amount Vaygensberg may ultimately owe to MProsiemo in the underlying action, is based on the nonviable Ukrainian Agreement claim and is also dismissed.

In accordance with the foregoing, it is hereby

ORDERED that Plaintiff/Counterclaim Defendant MProsiemo Limited and Third-Party Defendant, Alexandr Nefyodov's motion to dismiss Defendant/Counterclaim Plaintiff/Third Party Plaintiff Arkady Vaygensberg's amended third-party complaint and first and second counterclaims is granted in its entirety; the counterclaims are dismissed, the amended third-party complaint is dismissed in its entirety as against Third-Party Defendant Alexandr Nefyodov; and the Clerk of the Court is directed to sever and enter judgment on the dismissed counterclaims and third-party complaint.

This constitutes the decision and order of the Court.

10/7/2019  
DATE

  
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART		
		<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE